NEW MEXICO LAW REVIEW

Volume 15
Issue 3 *Summer 1985*

Summer 1985

Domestic Relations - Racial Factors in Change of Custody Determinations: Palmore v. Sidoti

Dixie Lynn Johnson

Recommended Citation
Dixie L. Johnson, *Domestic Relations - Racial Factors in Change of Custody Determinations: Palmore v. Sidoti*, 15 N.M. L. Rev. 511 (1985).
Available at: https://digitalrepository.unm.edu/nmlr/vol15/iss3/4

This Notes and Comments is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

المنارة للاستشارات

www.manaraa.com

DOMESTIC RELATIONS—Racial Factors in Change of Custody Determinations: *Palmore v. Sidoti*

I. INTRODUCTION

In *Palmore v. Sidoti,*[1] the United States Supreme Court unanimously invalidated a Florida circuit court's use of a racial classification as a basis for its decision to modify a child custody award.[2] The circuit court had removed a three-year-old Caucasian child from her mother's custody after the mother married a black man.[3] Applying strict scrutiny, the Supreme Court found that the lower court's action violated the equal protection clause of the fourteenth amendment.[4]

The Court held that while the state's duty to protect the best interests of children in its jurisdiction was a compelling state interest for purposes of the equal protection clause, the circuit court's use of a racial classification to achieve that state interest was unjustified in *Palmore*.[5] The circuit court had based its decision entirely on the supposition that, because racial prejudice exists in society, the child might be stigmatized by living in her mother's interracial household.[6] The Supreme Court ruled that mere speculation that a child might be harmed by society's racial prejudice did not justify the use of racial classification to modify a custody award.[7]

The language of *Palmore* gives rise to different interpretations of the significance of the decision. *Palmore* may be read narrowly to preclude consideration of race in custody modification disputes except in situations where a child has been injured or is actually threatened by racial factors in her environment. A broader interpretation would allow consideration of racial factors only if the factors resulted in proven injury to the child. The broadest interpretation of *Palmore* would preclude consideration of race entirely, even if injury has occurred. Regardless of the proper interpretation of *Palmore,* the case reduces the discretion formerly exercised by New Mexico judges in custody modification disputes. This Note examines the rationale of the *Palmore* decision, various interpretations of

1. 104 S. Ct. 1879 (1984).
2. *Id.*
3. *Id.* at 1880-81.
4. *Id.* at 1882. The Court used strict scrutiny because of the racial classification. *Id.*
5. *Id.*
6. *Id.* at 1881.
7. *Id.* at 1882.

the decision, and the probable impact of each interpretation on New Mexico law.[8]

II. STATEMENT OF THE CASE

When Linda and Anthony Sidoti, both Caucasions, were divorced in 1980, the Florida circuit court granted Ms. Sidoti custody of the couple's three-year-old daughter Melanie.[9] The following year, Anthony Sidoti filed a petition to modify that order on the basis of various changed conditions, including the fact that Linda Sidoti had married a black man.[10] When the circuit court considered the petition, both parties were remarried and the father was living in Texas.[11] Even though it found no reason to doubt the mother's devotion to the child, the adequacy of housing facil-

8. New Mexico and Florida have both adopted a "best interests of the child" standard for determination of child custody. *See* N.M. Stat. Ann. § 40-4-9(A) (Repl. Pamp. 1983); Fla. Stat. § 61.13(2)(b)(1) (Supp. 1984). *See also* Schuermann v. Schuermann, 94 N.M. 81, 82, 607 P.2d 619, 620 (1980). The standard allows a change of custody only when a substantial change in circumstances has occurred and when it would be in the child's best interests to be moved. Boone v. Boone, 90 N.M. 466, 467, 565 P.2d 337, 338 (1977); Culpepper v. Culpepper, 408 So.2d 782, 784 (Fla. Dist. Ct. App. 1982).

Both states have statutory guidelines for such a determination. When determining custody modification for a child under the age of 14, a New Mexico court must consider all relevant factors including, but not limited to:

(1) the wishes of the child's parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parents, his siblings and any other person who may significantly affect the child's best interest;
(4) the child's adjustment to his home, school and community; and
(5) the mental and physical health of all individuals involved.

N.M. Stat. Ann. § 40-4-9(A) (Repl. Pamp. 1983).

Moreover, New Mexico courts have determined that additional factors may be relevant to such a decision. These factors include: (1) the effects on the child of the morality, character, or integrity of the custodial parent; (2) parental unfitness; and (3) material or economic factors. *See Schuermann,* 94 N.M. at 83, 607 P.2d at 621; Shorty v. Scott, 87 N.M. 490, 493, 535 P.2d 1341, 1344 (1975). All of these factors must be balanced against the possible negative impact a change of custody could have on the child. *Schuermann,* 94 N.M. at 83, 607 P.2d at 621. *See infra* notes 43-49 and accompanying text for the New Mexico position on race as a factor in custody modification prior to the *Palmore* decision.

See Fla. Stat. § 61.13(2)(b)(1) (Supp. 1984), the Florida statutory guideline for a change of custody determination. *See also* Sanders v. Sanders, 376 So.2d 880 (Fla. Dist. Ct. App. 1979), *cert. denied,* 388 So.2d 1117 (Fla. 1980) for application of the Florida statutory and common law guidelines in a change of custody determination.

9. *Palmore,* 104 S. Ct. at 1880.

10. *Id.* The father argued that: (1) the mother's extra-marital sexual activities with a black male created a detrimental moral environment for the child; (2) the mother was not caring for Melanie properly, as evidenced by head lice, mildewed clothing, and the necessity of Melanie spending at least eight hours per day at a day-care center; and (3) he had remarried, Melanie had "developed an affection" for his new wife, and it would be in the child's best interest for the court to award custody to him. Petition for Modification of Final Judgment at 11-13, Palmore v. Sidoti, 104 S. Ct. 1879 (1984) [hereinafter cited as "Modification Petition"].

11. Modification Petition at 5. Before the hearing, Linda Sidoti married Clarence Palmore, the black man with whom she was living when her former husband filed the Modification Petition. *Palmore,* 104 S. Ct. at 1880.

ities, or the respectability of her new spouse,[12] the circuit court ordered that Melanie should be transferred to her father's custody.[13] The sole basis for the change in custody was that Melanie would suffer from social stigma if she remained with her mother and her black stepfather.[14]

The mother appealed to the Florida District Court of Appeal,[15] which affirmed the circuit court judgment without an opinion.[16] The United States Supreme Court granted certiorari and reversed the judgment of the District Court of Appeal on equal protection grounds, with Chief Justice Burger delivering the opinion for a unanimous court.[17]

III. DISCUSSION AND ANALYSIS

In *Palmore v. Sidoti,* the United States Supreme Court held that consideration of racial factors in a custody modification decision was pre-

12. *Palmore,* 104 S. Ct. at 1881.

13. Petition for a Writ of Certiorari to District Court of Appeal of Florida, Second District at 4, Palmore v. Sidoti, 104 S. Ct. 1879 (1984) [hereinafter cited as "Florida Certiorari Petition"].

14. *Palmore,* 104 S. Ct. at 1881.

15. Florida Certiorari Petition at 7.

16. *Palmore,* 104 S. Ct. at 1881. The mother's Petition for Rehearing was denied. Florida Certiorari Petition at 7. Because the court of appeals issued no written opinion, the Florida Supreme Court was precluded from reviewing the case. *Id.; see* Fla. Const. art. V, § 3(b)(3) (West Supp. 1983). The only appellate relief, therefore, was to the United States Supreme Court. 28 U.S.C. § 1257(3) (1982).

17. *Palmore,* 104 S.Ct. 1879. At the time of the reversal, Melanie still lived with her father in Bryan, Texas. N.Y. Times, Aug. 16, 1984, at A18, col. 6. Her father petitioned for an Order Preventing Immediate Retrieval to prevent the mother from taking Melanie to Florida. The Associated Press Wire Service, May 2, 1984. Judge Tom McDonald, Jr., West Texas State District Judge, issued a temporary restraining order along with a gag order. *Id.* Ms. Palmore requested that the United States Supreme Court waive the customary 25-day waiting period and bar the Texas court's efforts to prevent her from taking Melanie out of Texas. *Id.*

On May 2, 1984, Chief Justice Burger waived the waiting period and remanded the case to the Florida Court of Appeals for a second custody hearing to review the Supreme Court action. *Id.* The Chief Justice did not bar the Texas court's actions, but Ms. Palmore agreed to wait until the end of May 1984 to see her child, and Judge McDonald lifted both the Order Preventing Immediate Retrieval and the Gag Order. *Id.*, August 15, 1984.

The Florida Court of Appeals in turn remanded the case to the same circuit court which had decided the case originally. *Id.*, August 16, 1984. Judge Manuel Mendez of the Circuit Court, 13th Judicial Circuit, State of Florida, determined that the Texas court was a "more appropriate forum" for determining who should have custody of Melanie because Melanie had lived in Texas for almost two years at that point. United Press International Wire Service, October 17, 1984. Judge Mendez transferred jurisdiction to a court in Brazos County, Texas. *Id.* Ms. Palmore had argued that, because the Supreme Court remanded the case to Florida, the proceedings must continue there. The Associated Press Wire Service, August 27, 1984. Mr. Sidoti persuaded Judge Mendez that according to the guidelines of the Uniform Child Custody Act, Texas should have jurisdiction over the determination since Melanie was a resident of Texas. United Press International Wire Service, October 17, 1984.

Melanie, who remains living with her father in Texas, has visited her mother only once since the original custody modification in 1982. The Associated Press Wire Service, December 27, 1984. In December of 1984, Linda Palmore filed a Petition for Divorce, alleging incidents of abuse directed at her by her husband. *Id.* He was subsequently hospitalized for several days in late April, 1985, due to a stab wound to his chest received during a fight with Linda Palmore which occurred while their car was stopped at an intersection in Florida. The Associated Press Wire Service, April 23, 1985. At this writing, the Texas court has not yet ruled on the custody modification. *Id.*

cluded when the only evidence of harm to the child was speculation that the child might suffer social stigma as a result of her custodial parent's interracial marriage.[18] Under this narrow holding, *Palmore* allows a court to consider evidence regarding environmental conditions which threaten a child's physical or psychological health even if those conditions were created or inflamed by racial prejudice and even if the child has not yet been injured.

The language of the opinion in *Palmore* also gives rise to two broader interpretations which would further limit a state court's discretion in considering race as a factor in custody modification disputes. The Supreme Court stated in *Palmore* that "the effects of racial prejudice, however real," could not justify removing a child from her natural mother's custody.[19] It is unclear to what extent "effects" may encompass threatened or actual injury to the child. This ambiguous language indicates that *Palmore's* impact may reduce judicial discretion when there is evidence of actual or threatened injury to the child resulting from racial factors, as well as in situations where the only evidence of injury is based on speculation.

A. The Narrow Holding

It is apparent from the facts of *Palmore* that the circuit court based its change of custody order solely on speculation that Melanie Sidoti would suffer social stigmatization as a result of her mother's interracial marriage.[20] No evidence was presented to indicate that Melanie had been actually harmed by the effects of racial prejudice.[21] No psychological test results, doctor's reports or evidence regarding Melanie's adaptation to her mother's home, her school, or her neighborhood were presented to the circuit court.[22] There also was no indication that Melanie was likely to be harmed by racial prejudice present in her environment. The record discloses no evidence of neighborhood racial disputes, teasing, or any other form of discrimination which might have resulted in physical or psychological injury to Melanie.[23] When the circuit court ordered the

18. 104 S. Ct. at 1882.
19. *Id.*
20. 104 S. Ct. at 1881.
21. *Id.*
22. *Id.*
23. *Id.* A court counselor prepared an environmental study, but the circuit court did not use any evidence contained in the report to support its opinion. *Id.* The court merely quoted the counselor's prediction that Melanie was sure to experience "environmental pressures not of choice" because of her mother's "unacceptable" life-style. *Palmore*, 104 S. Ct. at 1881.

In oral arguments, counsel for the father argued that the circuit court based its decision both on the mother's extramarital sexual activity and on her inability to help Melanie cope with the difficulties she would have to face as a result of being part of a racially mixed household. Record at 18-19, 21-22, Palmore v. Sidoti, 104 S. Ct. 1879 (1984) [hereinafter cited as "Record"]. The Supreme

custody modification, it did so based only upon its predictions of difficulties facing Melanie in future years resulting from her mother's marriage to a black man.[24] Had Linda Sidoti married a Caucasian, as the Supreme Court read the proceedings below, the circuit court would not have ordered the change of custody.[25] Because the circuit court based its decision solely on race, it applied a racial classification.[26] The Supreme Court held that the racial classification was constitutionally invalid under the equal protection clause of the fourteenth amendment.[27]

1. Equal Protection Analysis

The equal protection clause of the fourteenth amendment prohibits states from denying any person equal protection of the law.[28] In enforcing this provision, the United States Supreme Court strives to eliminate any governmentally imposed racial discrimination.[29] Governmental acts employing racial classifications are inherently suspect, in part because history demonstrates the likelihood that such classifications are motivated by prejudice rather than by legitimate governmental purpose.[30] Any state statute or act by a state judicial officer which applies a racial classification is strictly scrutinized.[31] To be constitutionally valid, a racial classification must pass two requirements: its use must further a compelling state interest and the classification must be necessary to accomplish that interest.[32] Application of strict scrutiny has rarely resulted in validation of a racial

Court rejected these arguments. Record at 22. Under Florida law, adulterous conduct by the custodial parent is not relevant to a custody modification unless the conduct adversely affects the child. *Palmore*, 104 S. Ct. at 1881; Culpepper v. Culpepper, 408 So.2d 728 (Fla. Dist. Ct. App. 1982); Dinkel v. Dinkel, 322 So.2d 22, 24 (Fla. 1975). The Court interpreted the circuit court's opinion as evidence that the decision was based solely upon the racial issue. Record at 22.

24. *Palmore*, 104 S. Ct. at 1881.

25. *Id.*

26. *Id.* at 1882. The Court stated that racial classifications are more likely to be motivated by racial prejudice than by legitimate public concern. *Id.* The focus should be on the individual, rather than on race. *Id.* This is especially true when the state is obligated to protect the best interests of a child, as in a custody modification dispute. *Id. Palmore* may be read as urging courts to focus on the child, rather than on the racial issues.

27. *Id.*

28. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

29. *Palmore*, 104 S. Ct. at 1881-82; Strauder v. West Virginia, 100 U.S. 303, 307-08, 310 (1880).

30. *Palmore*, 104 S. Ct. at 1882.

31. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Actions of state courts and judicial officers in their official capacities are considered state action within the meaning of the fourteenth amendment. Ex parte Virginia, 100 U.S. 339, 347, (1879); Shelley v. Kraemer, 334 U.S. 1, 18, (1948). State action imposing a racial classification is subject to the most rigid scrutiny. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Loving v. Virginia, 388 U.S. 1, 11 (1966).

32. *Palmore*, 104 S. Ct. at 1882. *See also* Korematsu v. United States, 323 U.S. 214, 216 (1944) (wherein Justice Black initiated the strict scrutiny analysis).

classification.[33] Indeed, one commentator has termed this approach "strict in theory and fatal in fact."[34] The Supreme Court maintains, however, that racial classifications are not per se invalid and that the analysis is not merely pretextual.[35]

In *Palmore,* the Supreme Court identified the state's duty to protect the best interests of children over whom it has jurisdiction as a compelling state interest for purposes of fourteenth amendment equal protection.[36] The Supreme Court also held, however, that it was unnecessary for the circuit court to apply a racial classification in order to protect Melanie's best interests and that the classification, therefore, was constitutionally invalid.[37]

Application of a racial criterion was unnecessary in *Palmore* because the criterion employed was founded on mere speculation.[38] No evidence indicated the necessity of court action to prevent injury to the child.[39] The Supreme Court compared the situation in *Palmore* with two cases in which the Court had refused to allow segregation in public parks.[40] In

33. L. Tribe, American Constitutional Law, § 16-6, p. 1000 (1978). Most cases which have sustained a racial classification are strongly criticized today. *Id.* at § 5-16, p. 277. For example, in the first case which applied strict scrutiny to a racial classification, the Supreme Court upheld a classification which temporarily excluded and detained persons of Japanese ancestry living in the United States. Korematsu v. United States, 323 U.S. 214 (1944). Scholars question whether the majority opinion would be upheld today. *See* L. Tribe, American Constitutional Law, § 5-16, p. 277 (1978); 2 C. Aniteau, Modern Constitutional Law, §§ 12:84, 12:85 (1969).

Among the few cases upholding racial classifications are those in which prison officials have segregated prisoners based on racial criteria. This "prison security and discipline" exception to the equal protection rights of inmates was first identifed in Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd,* 390 U.S. 333 (1968). In that case, the district court indicated in its decision to order desegregation of Alabama prisons that in some isolated instances, "prison security and discipline necessitates segregation of the races for a limited period." 263 F. Supp. at 331. The United States Supreme Court's one page per curiam approval of the district court decision included a concurrence by Justices Black, Harlan, and Stewart which stated: "[W]e wish to make explicit [that] prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." Lee v. Washington, 390 U.S. at 334.

Subsequent cases have indicated that this focus on racial factors is relevant only in extreme circumstances. Stewart v. Rhodes, 473 F. Supp. 1185, 1189 (S.D. Ohio 1979). A generalized expectation of racial violence is insufficient to justify racial segregation by prison officials. U.S. v. Wyandotte County, 480 F.2d 969, 971 (10th Cir. 1973), *cert. denied,* 414 U.S. 1068 (1973); *Stewart,* 473 F. Supp. at 1189; Mickens v. Winston, 462 F. Supp. 910, 912 (E.D. Va. 1978). This kind of constitutional analysis, allowing consideration of racial factors only when it is "necessary" in order to achieve the state's compelling interest, is consistent with the narrow holding of *Palmore.*

34. Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 8 (1972).

35. *See supra* note 33 for a discussion of the pertinent cases.

36. 104 S. Ct. at 1882.

37. *Id.*

38. *Id.* at 1881.

39. *Id. See supra* text accompanying notes 20-23.

40. 104 S. Ct. at 1882-83 n. 3 (citing Watson v. City of Memphis, 373 U.S. 526 (1963); Wright v. Georgia, 373 U.S. 284 (1963)).

each case, the city's interest in the health and safety of its citizens was a compelling state interest for purposes of equal protection, but segregation was held unnecessary to achieve that interest.[41] Accordingly, reliance on a generalized risk associated with racial tensions could not justify a racial classification.[42]

2. New Mexico Implications

As a result of *Palmore,* state courts may no longer consider possible stigmatization resulting from interracial marriages when determining whether to modify a custody order.[43] Until *Palmore,* this consideration was permitted in most jurisdictions, including New Mexico.[44]

The New Mexico Supreme Court held in the 1977 case of *Boone v. Boone*[45] that race could be a relevant factor in a custody modification dispute, but that racial considerations alone could not properly determine the child's best interests.[46] *Boone* involved facts strikingly similar to those in *Palmore.* In *Boone,* the New Mexico Supreme Court reversed a trial court's change of custody order on the ground that the order was based on "unsupported findings" regarding the effect on the children of a Caucasian mother's "immoral" relationship with a black man whom she had subsequently married.[47] Employing a different analysis than that in *Palmore,* the New Mexico court indicated that the lower court's decision

---

41. *Watson,* 373 U.S. at 535-36; *Wright,* 373 U.S. at 292.

42. *Palmore,* 104 S. Ct. at 1882-83 n.3. *See supra* note 33 for a discussion of a similar analysis in a prison context.

43. *Palmore,* 104 S. Ct. at 1882.

44. Before *Palmore,* jurisdictions in the United States followed three schools of thought on this issue. Some allowed consideration of racial factors in custody modification disputes. *See In re* Jane B., 85 Misc.2d 515, 380 N.Y.S.2d 848 (1976); Langin v. Langin, 2 Ill. App. 3d 544, 276 N.E.2d 822 (1971); Fountaine v. Fountaine, 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956). Others allowed consideration of racial factors, but only if they were not the determinative factor in awarding custody. *See* Russell v. Russell, 80 Ill. App. 3d 41, 399 N.E.2d 212 (1979) (racial considerations cannot outweigh all other factors); Niles v. Niles, 299 So.2d 162 (Fla. Dist. Ct. App. 1974).

Pennsylvania, Iowa, and Michigan had determined that racial factors were not to be considered in custody disputes unless harm to the child resulting from racial factors was demonstrated. *See* Myers v. Myers, 468 Pa. 134, 360 A.2d 587 (1976) (parent's interracial, nonmarital relationship was not sufficient to justify a change of custody absent adverse consequences to children); Commonwealth *ex rel.* Lucas v. Kreischer, 450 Pa. 352, 299 A.2d 243 (1973) (parent's interracial marriage insufficient to justify a change of custody absent evidence that children would suffer from living in the household); *In re* Davis, 502 Pa. 110, 465 A.2d 614 (1983) (absent proven harm to the children, no change of custody was merited based on parent's interracial marriage). *See also In re* Marriage of Kramer, 297 N.W.2d 359 (1980) (racial tension should not affect custody decision unless it has some "demonstrated relevancy" to one or more established criteria for child custody adjudication; existence of prejudice and tension in the community is insufficient); Edel v. Edel, 97 Mich. App. 266, 270; 293 N.W.2d 792, 796 (1980) (consideration of a parent's association with a person of another race was inappropriate).

45. 90 N.M. 466, 565 P.2d 337 (1977).

46. *Id.*

47. *Id.* at 467-68, 565 P.2d at 338-39.

violated the equal protection clause of the fourteenth amendment because it impinged upon her fundamental right to marry a person of another race.[48] The court held that race could be considered in a custody modification dispute, but only as one of several factors.[49]

The New Mexico standard for custody determination will change only slightly if the narrow interpretation of *Palmore* prevails. If the only evidence related to race is an interracial marriage of the custodial parent, with only speculation as to the possible impact social attitudes toward that marriage might have on the child, *Palmore* precludes any consideration of those factors in the modification decision.[50] If the impact of *Palmore* is limited to this interpretation, New Mexico courts will retain discretion to consider racial factors if a child has been injured or is likely to be injured as a result of demonstrated prejudicial treatment which actually threatens her physical or psychological health.

B. Broader Interpretations of Palmore v. Sidoti

While the facts of *Palmore* and the cases cited by the United States Supreme Court in explaining its holding indicate that *Palmore* should be construed narrowly, language in the opinion and the traditional application of strict scrutiny to racial classifications support two broader interpretations of *Palmore*. The Court stated that "[t]he effects of racial prejudice, however real," could not justify removing a child from her natural parent's custody.[51] "Effects" is an ambiguous term. It could include prejudice directed toward the child herself which presents a threat to her physical or psychological well-being, or it could even extend to include actual injury resulting from such threats. If either is the case, the significance of *Palmore* will be very broad indeed.

1. Injury Required Before Removal Is Justified

If the determining factor in the Supreme Court's decision was that the circuit court referred only to the possible injury that might result from racial prejudice in society, *Palmore* can be interpreted as precluding consideration of racial factors unless actual injury has occurred. Under this intermediate interpretation of *Palmore*, the Court's rejection of "effects of racial prejudice, however real," would mandate rejection of evidence regarding threats to the child's physical or psychological health which were rooted in racial prejudice, but would allow consideration of actual injury to the child.[52]

48. *Id.* at 468, 565 P.2d at 339. *See also* Loving v. Virginia, 388 U.S. 1 (1967).

49. *Boone*, 90 N.M. at 468, 565 P.2d at 339.

50. 104 S. Ct. at 1882.

51. *Id.*

52. This interpretation would have an effect similar to the restrictions imposed on consideration of racial factors in Pennsylvania, Iowa, and Michigan. *See supra* note 44. Racial considerations would only be relevant if there was demonstrated injury to the child. *Id.*

The *Palmore* Court repeatedly referred to the "possible injury" that could result from prejudice, and held that mere speculation concerning such possible injury was insufficient to justify a racial classification.[53] This language may imply that only actual, as opposed to possible, injury can support such a classification.[54] In *Palmore,* there was no showing that Melanie was frequently beaten by neighborhood children or that psychological tests demonstrated poor adaptation to adverse treatment by peers or siblings.[55] On this record, the decision can be read as saying that the mere possibility that injury might occur was insufficient justification for imposing a racial classification.

This intermediate interpretation of *Palmore* would alter the New Mexico standard in a different way than would the narrow holding discussed above.[56] A New Mexico court would be precluded from considering any effects of racial prejudice threatening the child's well-being unless the child had been demonstrably injured as a result of that prejudice. This is a reduction in judicial discretion previously allowed under *Boone.*[57]

For example, before *Palmore,* if a child was taunted by her classmates at school or rejected by neighborhood children, a New Mexico court could consider those factors if it deemed them relevant in determining the child's best interests, even if the factors were the result of racial prejudice.[58] The racial taint could be ignored as the court focused upon the child's reaction to her environment. Under this intermediate interpretation of *Palmore,* however, a New Mexico court would be precluded from even considering these factors because they were the result of racial prejudice.[59] Only when actual injury to the child is proven would it be constitutionally permissible to consider these "racial" factors in fulfilling the court's duty to protect the child's best interests.[60] Until that point, considering these factors would violate the equal protection clause of the fourteenth amendment.

2. Even Injury Is Not Enough

The broadest interpretation of *Palmore* would preclude any consideration of race or the results of racial prejudice, even actual injury, in a custody modification decision. Under this interpretation, "effects of racial

53. 104 S. Ct. at 1882.
54. *Id.*
55. *Id.*
56. *See supra* text accompanying notes 43-49 (discussion of New Mexico standard for consideration of racial factors in custody modification under *Palmore's* narrow holding).
57. 90 N.M. at 468, 565 P.2d at 339 (1977). *Boone* held that racial considerations could be relevant to custody modification decisions, but could not be the only factors considered. *Id. See supra* text accompanying notes 45-49.
58. *Boone,* 90 N.M. at 468; 565 P.2d at 339. *See* N.M. Stat. Ann. §40-4-9(A)(3), (4) (1978). *See also supra* note 8.
59. 104 S. Ct. at 1882.
60. *See supra* text accompanying notes 28-37 (equal protection analysis).

prejudice, however real,"[61] includes injury to the child, and state courts will be forced to ignore injury and contributing environmental factors if they are rooted in racial prejudice. If this interpretation prevails, *Palmore* will reduce state court discretion considerably in custody modification determinations.

The *Palmore* Court acknowledged that racial prejudice exists and that children growing up in interracial households may face difficulties that other children do not encounter.[62] Nonetheless, it stated, "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[63] If acknowledging that a child has experienced harm as a result of racial prejudice is an indirect toleration of private biases, considering such harm when modifying custodial decisions may be unconstitutional. In that case, even the compelling state interest in the welfare of children may not overcome the presumption against racial criteria.

This reading, although it finds some support in the Court's language, seems unduly broad. The holding of *Palmore* surely does not extend this far. The opinion itself does not discuss situations in which a child has actually been injured by conduct flowing from racial prejudice. The Court speaks only generally to the possible effects of racial prejudice and the application of racial classifications when the environment has not been proven harmful and no injury has occurred.[64] Its refusal to allow consideration of "effects of racial prejudice, however real," must not be interpreted as requiring a court to ignore a child's actual injury.[65] Upon proven injury, a court should be allowed to consider in good faith all factors relevant to the child's best interests, including those resulting from racial prejudice. If a court is forced to ignore otherwise relevant factors simply because they are rooted in racial prejudice, the result will be to ignore the child and give effect to such racial prejudice rather than to ignore the prejudice itself.

Palmore has been read as precluding consideration of such factors,[66] however, and if this broad interpretation is applied to the New Mexico standard for custody modification, *Boone* will no longer be controlling law in New Mexico. Under this broad interpretation of *Palmore,* no factors

61. *Palmore,* 104 S. Ct. at 1882.
62. *Id.*
63. *Id.*
64. *Id.*
65. *See supra* note 26.
66. *Id. See* Silverberg, *Palmore v. Sidoti: Equal Protection and Child Custody Determinations,* 18 Fam. L.Q. 335, 350 (1984) wherein one commentator suggests that *Palmore* precludes any consideration of race in both custody modification disputes and initial custody awards and urges the same result in adoption proceedings.

tainted by racial prejudice, even actual injury, may be considered in good faith by a court determining whether to change a prior custodial award.

IV. CONCLUSION

Palmore v. Sidoti is one of the United States Supreme Court's most recent statements regarding racial classifications in violation of the equal protection clause of the fourteenth amendment. At its narrowest, *Palmore* will preclude use of a racial classification when modifying custody if there is no finding of actual harm to the child or of actual, potentially harmful effects of racial prejudice in her environment. The critical question left unanswered by the Supreme Court opinion is how broadly the decision will be applied. It is likely to preclude consideration of racial factors in situations where only potential harm but no actual injury to the child can be demonstrated. It remains to be seen whether, in change of custody disputes, *Palmore* will preclude every consideration of race or of otherwise compelling considerations which happen to be rooted in racial prejudice.

While it would be preferable if such considerations were moot, as the Supreme Court in *Palmore* acknowledged, racial bias remains a problem in our society.[67] The question left unanswered by *Palmore* is at what point the state's compelling interest in the welfare of an individual child might overcome the national purpose of eradicating governmental actions which are based on racial classifications. Further clarification by the Supreme Court may be in order as state courts struggle with this balancing of policy considerations.

DIXIE LYNN JOHNSON

67. 104 S. Ct. at 1882. One reason for encouraging a court not to remove a child from an interracial home is the special environment provided when a family joins together to cope with the pressures of the outside world. "[I]n a multiracial society such as ours racial prejudice and tension are inevitable. If . . . children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such." Commonwealth *ex rel.* Lucas v. Kreischer, 450 Pa. 352, 355, 299 A.2d 243, 246 (1973). The hope that, as a result of facing such difficulties, the child will grow stronger and more tolerant, is often coupled with the court's refusal to yield to prejudice merely because it cannot be prevented. *See In re* Custody of Temos, 304 Pa. Super. 82, 91, 450 A.2d 111, 120 (1982); Myers v. Myers, 468 Pa. 134, 138, 360 A.2d 587, 591 (1976); *Lucas*, 450 Pa. at 355, 299 A.2d at 246.