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Niles v. Niles, 299 So. 2d 162 (Fla. 2d Dist. Ct. App. 1974)

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CASE COMMENTS

Child Custody—INTERRACIAL MARRIAGE MAY BE CONSIDERED IN FRAMING CUSTODY MODIFICATION ORDERS—*Niles v. Niles,* 299 So. 2d 162 (Fla. 2d Dist. Ct. App. 1974).

Gloria Marion Niles received custody of her two minor children in dissolution of marriage proceedings before the Circuit Court for Hillsborough County. By means of a post-dissolution order the trial court transferred custody of the children to Donald Milton Niles, the natural father and appellee.[1] The mother appealed the order, claiming she had been denied custody of her children on the grounds of her proposed interracial marriage to a black man.[2] In *Niles v. Niles* the Second District Court of Appeal found that the impending interracial marriage had not been the *sole* reason for transferring custody from appellant and affirmed.[3] The court, adopting what has come to be regarded as the general rule,[4] held that interracial marriage is one of many relevant factors to be considered in a custody proceeding.[5] The court then cited additional factors that rendered the mother an unsuitable guardian: men had spent the night in appellant's apartment when the children were present;[6] appellant had suffered from emotional instability reflected by a nervous breakdown requiring hospitalization;[7] and the conduct of the children had changed for the worse in recent months.[8]

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1. FLA. STAT. § 61.13(3) (1973) provides for orders concerning the care, custody and support of minor children after final judgment in a dissolution of marriage proceeding.

2. Niles v. Niles, 299 So. 2d 162 (Fla. 2d Dist. Ct. App. 1974).

3. *Id.*

4. *See* notes 26-29 and accompanying text *infra.*

5. 299 So. 2d at 162-63.

6. *Id.* at 162. Although appellant conceded two men had spent the night with her occasionally, a dispute existed as to whether the children had been present during those visits. *See* Brief for Appellant at 3, Brief for Appellee at 4, Niles v. Niles, 299 So. 2d 162 (Fla. 2d Dist. Ct. App. 1974). Such visits would not disqualify the mother from retaining custody unless they posed a threat to the children's welfare and upbringing. Therefore the children's presence during those visits was a critical issue. *See* Smothers v. Smothers, 281 So. 2d 359, 360 (Fla. 1973); note 50 *infra.*

7. 299 So. 2d at 162. Emotional or mental disorders of a parent that threaten the child's best interests are frequently at issue in custody decisions. *See generally* Annot., 74 A.L.R.2d 1073 (1960). Custody transfers may be based on parental conduct evidencing emotional instability. *See* Green v. Green, 254 So. 2d 860, 861 (Fla. 1st Dist. Ct. App. 1971) (mother's spending habits, relationships with other men, and suicide episodes evidenced emotional instability). The fact that a parent once suffered disorders requiring psychiatric care or hospitalization is not dispositive of custody issues, however; the central issue is whether the parent is currently suffering a disorder that threatens the child's welfare. Thus the Iowa Supreme Court has held:

Where the record does not bear out a finding that the mother of a small child

As the court of appeal noted, the welfare of the child is of paramount concern in change-of-custody cases.[9] At common law the father had the superior right to custody,[10] but later cases held that the welfare of young children was usually best served by awarding custody to the mother.[11] Today, although the Florida dissolution of marriage

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is presently suffering from a mental disease, but does show she has been discharged from treatment . . . with symptoms under remission for a reasonable length of time, and shows no probability of a recurrence, the mother should not be deprived of the care and custody of her child for that reason.

Vanden Heuvel v. Vanden Heuvel, 121 N.W.2d 216, 221 (Iowa 1963).

Florida courts have taken a similar view. In Butler v. Butler, 248 So. 2d 174 (Fla. 1st Dist. Ct. App. 1971), custody had been transferred from the mother, whose manic-depressive illness had resulted in incidents which threatened physical injury to the child. The appellate court affirmed the order, noting findings that such incidents were likely to recur. *Id.* at 175. But the court also noted that the mother would be privileged to seek a return of custody when her health was restored. *Id. See also* Dunlap v. Dunlap, 66 So. 2d 221 (Fla. 1953) (custody transferred to mother after psychiatric care resulted in recovery from mental disorder).

The one-sentence discussion in *Niles* of the mother's mental health was unenlightening as to whether the mother was currently suffering from the disorder. The court did not indicate the severity of the disorder, whether a recurrence was likely, or the probable effect on the children of the mother's condition.

8. 299 So. 2d at 162. *Cf.* Brust v. Brust, 266 So. 2d 400 (Fla. 1st Dist. Ct. App. 1972). Though the *Brust* court cited a number of factors in affirming an award of custody to the father, the Florida Supreme Court has indicated the crucial factor in *Brust* was the mother's difficulty in disciplining her children. Anderson v. Anderson, 309 So. 2d 1, 7 (Fla. 1975).

9. 299 So. 2d at 162, *citing* Jayne v. Dennison, 284 So. 2d 237 (Fla. 2d Dist. Ct. App. 1973); Bolton v. Gordon, 201 So. 2d 754 (Fla. 4th Dist. Ct. App. 1967). *Accord,* Belford v. Belford, 32 So. 2d 312 (Fla. 1947); Green v. Green, 188 So. 355 (Fla. 1939); Frazier v. Frazier, 147 So. 464 (Fla. 1933). *Cf.* Anderson v. Anderson, 309 So. 2d 1 (Fla. 1975); FLA. STAT. § 61.13(2) (1973).

10. McCann v. Proskauer, 112 So. 621 (Fla. 1927).

11. *See, e.g.,* Teel v. Sapp, 53 So. 2d 635 (Fla. 1951); Stewart v. Stewart, 24 So. 2d 529 (Fla. 1946); Jones v. Jones, 23 So. 2d 623 (Fla. 1945). The rationale of these cases is that "[o]ther things being equal, . . . the mother of infants of tender years [is] best fitted to bestow the motherly affection, care, companionship, and early training suited to their needs." Fields v. Fields, 197 So. 530, 531 (Fla. 1940), *citing* Gayle v. Gayle, 125 So. 638, 639 (Ala. 1930). *See also* Green v. Green, 188 So. 355, 356 (Fla. 1939) ("Nature has prepared a mother to bear and rear her young and to perform many services for them and to give them many attentions for which the father is not equipped."); Commonwealth *ex rel.* Edinger v. Edinger, 98 A.2d 172, 175-76 (Pa. 1953) (discussion of importance of mother's care).

Courts have tended to accept without question the assumptions underlying the presumption favoring the mother. *See, e.g.,* Potter v. Potter, 127 N.W.2d 320, 328 (Mich. 1964) (Smith, J., dissenting) (rule is based on "reason and common experience"); Commonwealth *ex rel.* Lucas v. Kreischer, 299 A.2d 243, 245 (Pa. 1973) (rule supported by "wisdom of the ages"). However, one commentator has found that the limited empirical data available supports the presumption. Bradbrook, *The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-Parental Child Custody Disputes,* 11 J. FAMILY L. 557, 586 (1971). One Florida court, in affirming a custody award to the father, has expressly refused to consider nonjudicial authority supporting the presumption. Brust v. Brust, 266 So. 2d 400, 402 (Fla. 1st Dist.

statute requires that the father receive "the same consideration as the mother in determining custody,"[12] Florida custody decisions continue to hold that if other factors are equal the mother will be preferred.[13]

To support a change of custody order it must be shown that there has been a significant change of circumstances since the original order, and that failure to transfer custody will be detrimental to the child.[14] Stressing the broad discretion allowed the trial judge in making custody determinations,[15] the *Niles* court found there was competent substantial evidence of changed conditions to support the order. By emphasizing non-racial factors and deferring to the discretion of the

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Ct. App. 1972). The *Brust* case exemplifies the current trend towards erosion of the presumption. *See* note 13 *infra.*

12. FLA. STAT. § 61.13(2) (1973).

13. *See, e.g.,* Anderson v. Anderson, 309 So. 2d 1 (Fla. 1975) (decided after *Niles);* Brandon v. Faulk, 287 So. 2d 714 (Fla. 1st Dist. Ct. App. 1974).

The *Anderson* case expressly held that FLA. STAT. § 61.13(2) (1973) does not alter the traditional preference for awarding custody to the mother. 309 So. 2d at 2, 3. But *Anderson* indicates the preference carries less weight than it has in the past. Florida courts once took the view that the presumption mandated an award of custody to the mother unless she were shown to be an unfit parent. *See, e.g.,* Teel v. Sapp, 53 So. 2d 635 (Fla. 1951); Stewart v. Stewart, 24 So. 2d 529 (Fla. 1946). In *Anderson,* however, the court affirmed an award of custody to the father despite a specific finding by the trial court that both parents were fit. 309 So. 2d at 1-2. *Cf.* Brust v. Brust, 266 So. 2d 400, 401 (Fla. 1st Dist. Ct. App. 1972). The *Anderson* court indicated that although the mother was to be afforded the benefit of "the traditional rule for prime consideration" the preference was not a conclusive presumption. 309 So. 2d at 3, *citing* Goodman v. Goodman, 291 So. 2d 106 (Fla. 3d Dist. Ct. App. 1974). The *Anderson* decision apparently regarded the "continuing preference" as but one factor to be weighed in determining the child's best interest. 309 So. 2d at 3. Thus the trial court, in exercise of its broad discretion, *see* note 15 *infra,* could award custody to the father despite the preference and the court's finding that the mother was a fit parent.

14. Hutchins v. Hutchins, 220 So. 2d 438 (Fla. 2d Dist. Ct. App.), *cert. denied,* 229 So. 2d 869 (Fla. 1969). *See also* THE FLORIDA BAR, FLORIDA FAMILY LAW § 24.55 (2d ed. 1972); 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTI-NUPTIAL CONTRACTS § 14, at 14-73 (1967). The *Hutchins* court noted that Florida law requires a greater showing in support of a modification petition than that necessary for a custody order at the time of the original divorce. The court indicated such a rule is necessary both to comply with res judicata principles and to provide a stable environment for the affected children. 220 So. 2d at 439. Similarly, a chancellor has less discretion to modify a custody decree than he has to enter it initially. *See, e.g.,* Belford v. Belford, 32 So. 2d 312 (Fla. 1947); Nixon v. Nixon, 209 So. 2d 878 (Fla. 3d Dist. Ct. App. 1968).

15. 299 So. 2d at 163, *citing* Johns v. Johns, 108 So. 2d 784 (Fla. 2d Dist. Ct. App. 1959). In his original decree, the chancellor is given broad discretion in determining what custody arrangement will best serve the child's welfare. An original custody order will not be modified unless a clear abuse of that discretion is shown. Anderson v. Anderson, 309 So. 2d 1, 4 (Fla. 1975); Pacheco v. Pacheco, 246 So. 2d 778 (Fla.), *appeal dismissed,* 404 U.S. 804 (1971); Evans v. Evans, 70 So. 2d 506 (Fla. 1954); Green v. Green, 188 So. 355 (Fla. 1939). The chancellor has less discretion, however, in change-of-custody proceedings. *See* note 14 *supra.*

trial judge, the appellate court avoided the issue of the weight to be given to racial factors.[16]

Although the *Niles* fact situation has not been considered in Florida before,[17] it has been ruled on in other jurisdictions. In *Murphy v. Murphy*,[18] custody of a nine-year-old child had been given to the natural mother after her divorce. Two years later she married a black dentist. The natural father then obtained an order transferring custody to him. Citing the fact that the mother had been excommunicated by the Catholic Church and had made no provision for the child's religious instruction,[19] the Supreme Court of Errors of Connecticut said it could find no clear abuse of the trial judge's broad discretion and affirmed.[20]

Similarly, the Michigan Supreme Court in *Potter v. Potter*[21] affirmed a modification order granting custody to the natural father in the home of the child's maternal grandparents after the mother married a black surgeon. The majority opinion stressed that the mother had removed the child from the state without court permission, that

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16. The court of appeal noted that the circuit court counselor had recommended that custody be transferred to the father because appellant had "chosen for herself, and therefore for herself *and* the children, a life style unacceptable to the father of the children and the society in which we live." 299 So. 2d at 162. The counselor's evaluation of lifestyle may have referred to appellant's alleged immoral conduct rather than her proposed marriage, although the natural father had lived with his second wife before his remarriage. Brief for Appellant at 3, Niles v. Niles, 299 So. 2d 162 (Fla. 2d Dist. Ct. App. 1974). In any case, a parent's sexual relationships are relevant to custody decisions only if they adversely affect the children's welfare. *See* note 59 *infra*. Whatever the significance of the counselor's evaluation of the mother's lifestyle, the closing comments of the trial judge suggest his evaluation of appellant's lifestyle—and the children's best interest—turned primarily on the mother's interracial marriage:

> Well, folks, it is not written in a case [how] to decide what . . . is best for the children. Certainly, under the laws of this country, as . . . now interpreted by the Court, inter-racial marriages are no longer against the law. I know of no law, [n]or even . . . of any social circle, that represents it as desirable . . . . Certainly, in our present way of thinking, inter-racial marriages are frowned upon by most people of both races and certainly, without question children of an inter-racial married family will be subjected to pressures and problems that they should not be called upon to do. I find that the best interests of the children will be determined by giving them to the custody of their father.

Brief for Appellant at 5, Niles v. Niles, 299 So. 2d 162 (Fla. 2d Dist. Ct. App. 1974). Under the general rule followed in other jurisdictions and apparently adopted in *Niles*, a trial judge abuses his discretion if he regards the racial issue as the decisive factor. *See* notes 24-29 and accompanying text *infra*.

17. The *Niles* issue would have been foreclosed in Florida prior to Loving v. Virginia, 388 U.S. 1 (1967), by enforcement of an antimiscegenation statute. *See* FLA. STAT. § 741.11 (1965); notes 41-48 and accompanying text *infra*.

18. 124 A.2d 891 (Conn. 1956).

19. *Id.* at 893.

20. *Id.*

21. 127 N.W.2d 320 (Mich. 1964).

the mother was, in the eyes of the court, "a picture of a young woman who has been in serious rebellion," and that her behavior did not present "a picture of certainty and stability."[22]

In *Murphy* and *Potter,* the courts rejected claims that racial issues had been significant considerations in framing the orders.[23] Like the *Niles* court, the *Murphy* and *Potter* courts focused on nonracial factors and the broad discretion of the trial judge. The *Murphy* and *Potter* decisions thus left unresolved the propriety of considering racial issues in reaching child custody decisions.

The issue was confronted, however, by an Illinois appellate court in *Fountaine v. Fountaine.*[24] In *Fountaine,* the white mother petitioned the court to reverse an order giving custody of the children to the natural father, a black man, following her divorce. The mother claimed

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22. *Id.* at 325-26. The concurring opinion criticized the majority for applying a "hypercritical 'fitness' test." *Id.* at 327 (Black, J., concurring). The dissenting opinion vigorously objected to the majority's stress on the mother's failure to obey the trial court's order to keep the child within the jurisdiction. The dissent noted that the father had resorted to self-help to return the child to the jurisdiction, and that, in any case, contempt of court does not deprive an otherwise fit parent of custody. *Id.* at 327 (Smith, J., dissenting). *Cf.* Teel v. Sapp, 53 So. 2d 635 (Fla. 1951) (mother's false statement in affidavit for service that father's address was unknown does not indicate mother is unfit parent).

23. In *Murphy* the court said:

> The plaintiff in her brief claims that the decision of the trial court was based upon the fact that she had married a Negro. . . . [S]uch a consideration was not included in those which led the court to the conclusion reached.

124 A.2d at 893. The *Potter* court stated:

> [A]n attempt has been made by counsel for appellant to inject into the case questions of civil rights . . . . It is obvious from the opinion of the circuit judge that he did not consider such racial differences as of special significance at the present time.

127 N.W.2d at 326. Though racial considerations may not have swayed the *Murphy* trial judge, they seem to have permeated the case. The mother had retained custody for two years with no complaint from the father. Within 12 days of her remarriage the father filed for a modification order, alleging she had been excommunicated, had failed to provide the daughter with religious instruction, and had alienated her parents and thus deprived the child of loving grandparents. Both excommunication and parental alienation resulted from the mother's remarriage. 124 A.2d at 893.

In *Potter,* the trial judge heard evidence on the racial issue, including a statement from the psychiatrist-director of the Wayne County Children's Center that the mother's multiracial California neighborhood would be a better environment for the child than the grandparent's racially tense Detroit neighborhood. The expert witness also expressed concern about placing the child in the home of grandparents who were hostile to the child's mother. He recommended that the child be returned to the mother. MARRIAGE ACROSS THE COLOR LINE 70 (C. Larsson ed. 1965). The trial judge's opinion noted that "one must accept the thesis of the expert . . . that if there are stable inter-personal relations in the home of the mother and a favorable community climate, the fact of a bi-racial marriage alone should not defeat the mother's claim." *Quoted in* 127 N.W.2d at 328. *See also* note 35 and accompanying text *infra.*

24. 133 N.E.2d 532 (Ill. Ct. App. 1956).

that the father had been given custody of the children solely because of their appearance. The appellate court agreed that the trial court's custody determination was based solely on the racial characteristics of the children, and that such a decision was an abuse of discretion.[25] The court held that, although relevant to a determination of the child's best interests, "the question of race alone [cannot] overweigh all other considerations and be decisive of the question."[26] This approach has come to be regarded as the general rule,[27] and was apparently adopted by the Florida court in *Niles*. The *Niles* decision seemed to assume that a resolution of custody based *solely* on the mother's interracial marriage would be an abuse of discretion,[28] but that racial issues could properly be considered with other relevant factors in determining the child's best interests.[29]

The *Fountaine* and *Niles* cases reflect a judicial assumption that an interracial environment is inherently detrimental to children; interracial marriage is intrinsically relevant to custody determinations only if it is thought that an interracial home will impede the child's best interests. This assumption, like that which supports the preferred position of the mother in custody determinations,[30] rests on judicial generalizations rather than on empirical data. Although courts once gave free rein to their own racial prejudices in discussing interracial homes,[31] courts now tend to reason that, because our society has not yet overcome racial prejudice, children raised in interracial homes will inevitably be exposed to detrimental pressures.[32]

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25. *Id.* at 534-35.

26. *Id.* at 535.

27. Comment, *Race as a Consideration in Adoption and Custody Proceedings*, 1969 U. ILL. L.F. 256, 257.

28. "From a study of the record we do not believe it can fairly be said that appellant lost her children solely because of her proposed interracial marriage." 299 So. 2d at 162.

29. "The effect of an interracial marriage upon a particular child is but one of many factors which may be considered in determining in whose custody the child's best interest would be served." *Id.* at 162-63.

30. *See* note 11 *supra*.

31. *See, e.g.*, Ward v. Ward, 216 P.2d 755, 756 (Wash. 1950) ("These unfortunate girls, through no fault of their own, are the victims of a mixed marriage . . . ."); *In re* Hunter, 193 P. 155, 156 (Cal. App. 1920) ("[M]arriage between a white girl and a Hindu . . . is abhorent and unthinkable to every enlightened and right thinking Caucasian.").

32. For instance, in Commonwealth *ex rel.* Lucas v. Kreischer, 289 A.2d 202 (Pa. Super. Ct. 1972), *rev'd*, 299 A.2d 243 (Pa. 1973), the trial judge had stated:

> [T]hough some in-roads are being made today, the almost universal prejudice and intolerance of interracial marriage is real and undeniable. This bias, however silly and unreasonable, is also exhibited toward the children [of interracial marriages]; and it must be admitted the plight of these children in the past has

Empirical data concerning such homes is limited, and most of that data involves adoption of black children by white parents rather than custody in an interracial home which includes a natural parent.[33] But the evidence available does not indicate interracial homelife is inherently harmful to children.[34] Thus, the trial judge in *Potter* stated:

> [There] is no legal authority that living in an interracial home which is otherwise favorable is injurious to a minor child. We have been exhibited no authoritative studies in the behavioral sciences that indicate hurt or injury to a child in an interracial home which is happy and stable.[35]

The lack of proof that interracial homes are detrimental to children was a central factor in *Commonwealth ex rel. Lucas v. Kreischer*.[36] There the Pennsylvania Supreme Court directed the trial court to award custody to the mother despite her interracial marriage. The supreme court noted that "sociological studies establish that children raised in [interracial homes] do not suffer from this circumstance," and that there had been no evidence of special circumstances indicating that the children whose custody was at issue were likely to suffer from

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not been a happy one and in our opinion, this ancient phobia merits consideration in this case.

Quoted in 289 A.2d at 203 (Hoffman, J., dissenting). This reasoning is similar to that of the *Niles* trial judge. *See* note 16 *supra*.

In Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972), a three-judge court ruled that a Louisiana statute prohibiting interracial adoptions violated the equal protection clause. The court stated:

> Cognizant of the realities of American society, this Court would agree that an interracial home in Louisiana presents difficulties for a child, including the possible refusal by a community to accept the child, and other community pressures, born of racial prejudice on the interracial family . . . . [W]e regard the difficulties inherent in interracial adoption as justifying consideration of race as a relevant factor in adoption, and not as justifying race as the determinative factor.

Id. at 266. *Cf.* Comment, *supra* note 27, at 256-57: "The states are in unanimous agreement that in adoption and custody proceedings, the welfare and best interest of the child are paramount. Race has long been a factor considered by courts and agencies in such proceedings; in light of the realities of American society it would seem to be a most relevant consideration."

33. E. HERZOG, C. SUDIA, J. HARWOOD & C. NEWCOMB, FAMILIES FOR BLACK CHILDREN—THE SEARCH FOR ADOPTIVE PARENTS 37, 41-42 (1971). Interracial adoption is usually justified on the ground that it is more desirable for the child than remaining in an institution, often the only alternative. *Id.* at 38. *See* Compos v. McKeithen, 341 F. Supp. 264 (1972). The availability of this justification may inhibit investigation into the effects on a child of interracial adoption.

34. MARRIAGE ACROSS THE COLOR LINE 68 (C. Larsson ed. 1965).

35. *Quoted in id.* at 71.

36. 299 A.2d 243 (Pa. 1973).

living in an interracial home.[37] Therefore, the court held, there was no compelling reason to depart from the strong presumption that a young child's welfare will best be served by being placed in the mother's custody.[38] The court concluded that if children are raised in a "happy and stable home" they will learn to cope with prejudice and will grow up unprejudiced themselves.[39]

Lucas seems to indicate that, at least in Pennsylvania, race is not relevant to custody determinations absent specific evidence that the particular children involved will suffer from life in an interracial home.[40] The *Lucas* decision seems correct. The *Fountaine* assumption that an interracial environment is harmful to a child is unjustified by the data available. While the evidence does not conclusively show there are no effects on a child in such circumstances, neither does it show in any certain way that a child will be harmed. Moreover, it is possible that being forcibly removed from his natural mother may cause more harm to a young child than any stress created by social prejudice as he grows older. Therefore any psychological pressures that are merely *assumed* to result from an interracial home would seem insufficient to overcome the favored position of the mother in custody proceedings.

Though the *Lucas* case was decided on the basis of Pennsylvania family law, the result in that case may be required by constitutional considerations. In 1967 the United States Supreme Court in *Loving v. Virginia*[41] declared Virginia's antimiscegenation statute invalid under the equal protection and due process clauses of the fourteenth amendment. The Commonwealth of Virginia, assuming that the applicable equal protection standard was the "rational basis" test,[42] had argued that the scientific evidence supporting the legislative classification was in doubt and therefore the Court should defer to the legislature's judgment.[43] But, because the statute drew a classification based on

37. *Id.* at 245.

38. *Id.* at 246.

39. *Id.*

40. This was the position of a dissenting opinion in the court below. 289 A.2d 202, 207 (Hoffman, J., dissenting). Note, however, that the supreme court stated the "basic reason" for the trial court's order was the interracial marriage. 299 A.2d at 245. The *Lucas* case may thus be read as simply an illustration of the *Fountaine* rule that race may not be a "decisive" factor in custody determinations.

41. 388 U.S. 1 (1967).

42. The commonwealth had asserted that because the statute applied equal penalties to blacks and whites, it did not constitute invidious racial discrimination, and hence was to be judged under the more lenient equal protection standard. 388 U.S. at 7-8. The Court rejected this argument on the authority of McLaughlin v. Florida, 379 U.S. 184 (1964). 388 U.S. at 10.

43. 388 U.S. at 8.

race, the Court held a more stringent equal protection test was applicable.[44] The commonwealth was required to meet the "very heavy burden"[45] of showing the distinction made between interracial marriages and other marriages was "necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[46] The Court concluded that the statute was invalid under the equal protection clause because there was no "legitimate overriding purpose" which justified the classification.[47] The Court further held that deprivation of the fundamental right of marriage on "so unsupportable a basis as the racial classification embodied in these statutes" was a denial of liberty without due process of law.[48]

The *Fountaine* rule, like antimiscegenation statutes, is based on a racial classification. Even though the *Fountaine* rule prohibits utilizing racial factors in a "determinative" fashion,[49] the rule operates to deprive parents of custody on the basis of their spouses' race. It thereby singles out interracial marriages for special treatment. If no "legitimate overriding purpose"—no compelling state interest[50]—exists to support this classification, the *Loving* case requires the conclusion that *any* consideration of race in custody proceedings violates the equal protection clause.

Although at least one court has found the equal protection clause flatly prohibits consideration of racial factors in custody decisions,[51]

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44. *Id.* at 11.
45. *Id.* at 9.
46. *Id.* at 11.
47. *Id.*
48. *Id.* at 12.
49. *See* notes 24-27 and accompanying text *supra.*
50. In *In re* Griffiths, 413 U.S. 717 (1973), the Court noted:

> The state interest has been characterized as "overriding," [McLaughlin v. Florida, 379 U.S. 184, 196 (1964)]; Loving v. Virginia, 388 U.S. 1, 11 (1967); "compelling," Graham v. Richardson, [403 U.S. 365, 375 (1971)]; "important," Dunn v. Blumstein, 405 U.S. 330, 343 (1972), or "substantial," *ibid.* We attribute no particular significance to these variations in diction.

413 U.S. at 722 n.9.

51. In DeLander v. DeLander, 37 U.S.L.W. 2139 (Cal. Super. Ct. Aug. 14, 1968), the father claimed that because his former wife had " 'an obsessive preoccupation' with [black] associates," had taken a black husband and moved into a predominantly black neighborhood, the minor children would be disoriented and unable to relate to their own culture. Furthermore, he feared that in the event of race riots their lives would be endangered. *Id.* The court responded:

> The Fourteenth Amendment requires that a Court refuse to become a party to any discrimination based on race. Thus any consideration of the stepfather's race, or of the race of the mother's associations, or of the neighborhood racial mix, would result in a Court making its determination on the basis of factors which the Fourteenth Amendment prohibits from consideration. If the Court modifies

such a result is not necessarily required. If protecting the interest of children is considered a compelling state interest under *parens patriae*[52] the equal protection question remaining is whether the *Fountaine* rule is necessary to further that interest. Like the assumed perils of miscegenation at issue in *Loving*, the *Fountaine* assumption that interracial homes are detrimental to children rests on either equivocal scientific evidence or state officials' perceptions of social "realities."[53] Neither equivocal empirical data nor judicial notice of social conditions establishes the necessity of giving an interracial environment special weight in custody proceedings.[54] Thus the equal protection clause should bar courts from applying a rule which assumes, in all cases, that interracial marriage will impede children's best interests.

A different situation is presented, however, when it is clear from the record that a specific child, in a specific interracial home, has suffered racial abuse. Then the extent of the abuse, weighed against other relevant factors, may make it necessary for the court to remove the child from the interracial home to meet the compelling state interest. To satisfy equal protection requirements, then, the rule should be that an interracial environment is relevant to a change-of-custody determination only to the extent that it has produced specific racial abuse affecting the specific child.[55]

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its prior custody order because of racial factors such a modification would be a denial of the equality of all human beings.

. . . .

The very act of considering race as a factor, and then disregarding it as a controlling factor, requires that the State admit, contrary to the Constitution, that there are differences in human beings because of their color.

Id. Cf. Stingley v. Wesch, 222 N.E.2d 505 (Ill. Ct. App. 1966) (holding, on other than constitutional grounds, that stepfather's race has no significance in custody proceeding).

The *DeLander* court also noted that interracial marriages were not prohibited by state law. 37 U.S.L.W. at 2139. *Cf.* Goldman v. Hicks, 1 So. 2d 18 (Ala. 1941). In *Goldman*, the father contended the gentile mother's subsequent marriage to a Jew rendered her unfit to have custody of the child. The court held: "Marriages which are not forbidden by statute, or violative of social morality, can have no such effect in this State." *Id.* at 21.

52. *Parens patriae,* "parent of the country," refers to the guardianship power of the state, as sovereign, over children. BLACK'S LAW DICTIONARY 1269 (rev. 4th ed. 1968).

53. *See* notes 30-37 and accompanying text *supra.*

54. In *Loving,* the lack of scientific evidence militated against the *existence* of a compelling state interest. In the context of child custody decisions, the question is what judicial assumptions are *necessary* to further the state's compelling interest. In the latter situation, equivocal scientific evidence undercuts the necessity of assuming interracial homes are detrimental to children, rather than the existence of the state interest per se.

55. This is the rule suggested in a dissent to the superior court decision in Commonwealth *ex rel.* Lucas v. Kreischer, 289 A.2d 202, 207 (Pa. Super. Ct. 1972) (Hoffman, J., dissenting). The Pennsylvania Supreme Court cited the dissent with approval in reversing

Such a rule would also satisfy due process requirements. The *Fountaine* rule arguably interferes with fourteenth amendment liberty to "marry, establish a home and bring up children,"[56] since the rule may discourage parents with custody of their children from entering into interracial marriages, and may deprive parents who have already entered into such marriages of custody. The classification drawn by the *Fountaine* rule rests on considerations strikingly similar to *Loving,* and therefore seems "so unsupportable" that it constitutes a deprivation of liberty without due process of law. If the *Fountaine* rule were limited to situations in which actual racial abuse had been shown, the classification drawn between interracial homes and other homes would seem sufficiently supportable to withstand due process attack.

The Florida court's decision in *Niles* contains the seed of such a modified rule. The *Niles* court stated: "The effect of an interracial marriage upon a particular child is but one of many factors which may be considered in determining the person in whose custody the child's best interest would be served."[57] The *Niles* court did not apply this language stringently; it affirmed the findings of a trial judge who gave considerable weight to an assumption that children generally will be subjected to disruptive social pressures in an interracial home.[58]

But the *Niles* language, if strictly construed, could lead to the conclusion that interracial marriage is relevant in change-of-custody cases only to the extent it produces demonstrable, rather than conjectural, detriment to a particular child's well-being. Such a rule would comport with the changing Florida treatment of other factors relevant to change-of-custody decisions,[59] and would better serve the ultimate end of protecting the child's best interests.

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the superior court. 299 A.2d 243, 245-46. Although the supreme court apparently applied the rule proposed by the dissent below, *see* 299 A.2d at 245, it did not refer to or rely upon the dissent's careful analysis of the constitutional issues involved.

56. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

57. 299 So. 2d at 162-63.

58. *See* note 16 *supra.*

59. At least two aspects of Florida custody law indicate a growing tendency to downplay generalized presumptions and to focus instead on the specific factors affecting particular children. First, Florida courts have relaxed the rule that an otherwise fit mother is to receive preferential treatment in custody decisions. *See* note 13 *supra.* This relaxation reflects changing concepts of parental roles, and gives the trial judge additional flexibility, allowing him to evaluate the best interests of the child in light of parent-child relationships in individual families.

Second, Florida has taken a view towards parental morality that focuses squarely on the child rather than on the parent. Moral unfitness has long been a basis for depriving a parent of custody. *See* Teel v. Sapp, 53 So. 2d 635 (Fla. 1951). But in Smothers v. Smothers, 281 So. 2d 359 (Fla. 1973), the Florida Supreme Court stated that it would be error to transfer custody from a mother solely because of her illicit

Courts following the *Fountaine* rule, recognizing the prejudice that exists in American society, have treated race as a relevant factor in custody proceedings in order to spare children the harmful effects assumed a priori to result from such prejudice. But it has been clear since *Brown v. Board of Education*[60] that the existence of prejudice does not compel courts to allow discrimination to follow in its wake. "Is it good public policy . . . to require people who have no prejudices to conform to the standards of the prejudiced? . . . [I]s it wise to require the socially healthy to keep step with the socially ill?"[61] The answer must be no.

C. ANTHONY CLEVELAND

Constitutional Law—FOURTEENTH AMENDMENT—STUDENTS FACING SUSPENSION HAVE PROPERTY AND LIBERTY INTERESTS THAT QUALIFY FOR DUE PROCESS PROTECTION.—*Goss v. Lopez*, 95 S. Ct. 729 (1975).

During February and March of 1971 there was widespread student unrest in the Columbus, Ohio, public school system. Many students were summarily suspended for periods of up to 10 days pursuant to applicable Ohio law.[1] Dwight Lopez, a student at Central High School,

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sexual activity, since such activity "may have no bearing whatsoever on the welfare and upbringing of the children." *Id.* at 360. Although the *Smothers* court upheld the modification order, it did so because the mother's personal relationships had led to the continued presence in the home of a man to whom the children were unrelated by law or blood. The supreme court noted that the man's nearly permanent presence in the house, the fact that he physically disciplined the children, and his temperamental outbursts during the natural father's visits supported the trial court's conclusion that the mother's personal relationship with this man—rather than her sex life with him—was detrimental to the children. *Id.*

60. 347 U.S. 483 (1954).

61. MARRIAGE ACROSS THE COLOR LINE 73 (C. Larsson ed. 1965).

1. OHIO REV. CODE ANN. § 3313.66 (1972) provides in relevant part:

> The superintendent of schools . . . or the principal of a public school may suspend a pupil from school for not more than ten days. Such superintendent . . . or principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor. The pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board of education . . . and shall be permitted to be heard against the expulsion. At the request of the pupil, or his parent, guardian, custodian, or attorney, the board may hold the hearing in executive session but may act upon the expulsion only at a public meeting. The board may, by a majority vote of its full membership, reinstate such pupil. No pupil shall be suspended or expelled from any school beyond the current semester.