I. INTRODUCTION

“Custody battle.” Within popular culture, this phrase often evokes images of mud-slinging ex-spouses who are fighting over their children, often in highly contentious and potentially damaging public disputes. This, of course, is but one reality. Custody battles do not always involve extreme conflict, public spectacle, or even divorcing spouses. Frequently, custody battles involve disputes between biological parents and individuals who are euphemistically referred to as “third parties”—unrelated adoptive parents; stepparents; gay, lesbian, bisexual, or transgender (GLBT) coparents; foster parents; and relatives who have been rearing someone else’s children for extended periods of time. Importantly, these cases introduce a level of complexity into the decision-making process that is not present in custody disputes involving two divorcing, biological parents. When biological parents divorce, judges are typically charged with determining custody based on the child’s best interests. Existing case law
and divorce statutes for the state guide and constrain custody decisions despite judges’ wide discretion regarding what constitutes a child’s best interests.\(^4\) However, the legal landscape is more complex when nonbiological parents (e.g., third parties) are involved because judges must consider more than just the child’s best interests. Judges must also account for the biological parents’ rights and the nonbiological parents’ place within the child’s life and existing family structure.\(^5\) Judges are often faced with juggling the best interests doctrine, the parental rights doctrine, and social, as well as legal, conceptions of the family in the decision-making process.

Multiple relevant decision-making doctrines complicate the process in a number of important ways. First, judges must weigh competing doctrines against one another to determine which ones take precedence. Second, the introduction of multiple doctrines shifts the decision-making focus off children—whose custody is at stake—and onto adults and their rights as parents. As a consequence, many custody disputes that involve biological and nonbiological parents never discuss children’s interests at all.\(^6\) Instead, the cases focus on contested definitions of parenthood and the inherent rights of biological parents to the custody of their children.\(^7\)

This kind of doctrinal conflict is especially apparent in contested adoptions. As defined here, contested adoptions are those cases in which a nonbiological parent is either pursuing adoption of a child against the wishes of that child’s biological parent or, in the case of intact GLBT relationships, seeking a second-parent adoption for the nonbiological coparent, but facing judicial hurdles.

Contested adoptions come before the courts for a variety of reasons. It may be that the biological parent surrendered the child for adoption, but then changed his or her mind. It may be that the biological parent left the child in the long-term care of a relative who now seeks adoption. It may involve foster parents who wish to make permanent their relationship with the child for whom they are caring. It may involve stepparents who want to formalize their parental status with respect to the children they are rearing. Or it may occur when GLBT parents, who have used artificial reproductive technologies, seek second-parent adoptions for the nonbiological coparent. Regardless of the circumstances, contested

---

\(^4\) Id.

\(^5\) See Holtzman I, supra note 1, at 335–36.

\(^6\) See infra Part IV.B.

\(^7\) See infra Part V.A.
adoptions bring a number of doctrines to the fore, and judges must weigh these against one another in the decision-making process. This introduces substantial complexity into custody decision making, in part because these doctrines are often at odds with one another.

Nonetheless, much of my past research on nonbiological litigants suggests that, despite this complexity, patterned judicial responses do emerge.8 Judicial consideration of parents’ rights and definitions of the family, in the absence of arguments based on children’s best interests, generally result in custody outcomes that favor biological parents.9 However, if those same arguments are coupled with a judicial focus on the child’s best interests, the relationship between the child and the nonbiological parent is significantly more likely to be protected.10 Here, this Article will explore the impact of children’s best interests arguments within the specific context of contested adoptions.

To accomplish this, Part II begins with a discussion of the role of children’s attachment relationships.11 This is an important consideration because the existence of parent-child attachments, even in the absence of biological relationships, is one of the primary justifications for considering custody in a nonbiological parent.12 Part III elaborates on the sources of doctrinal conflict and its potential consequences for custody decision making.13 Part IV then offers some background information on the data collection and analysis methods involved with this research.14 In Part V, this Article illustrates how parents’ rights, family definitions, and children’s interests influence the outcomes of contested adoptions.15 Finally, in Part VI, this Article offers thoughts on the legal and policy implications of these findings.16

8 Holtzman I, supra note 1, at 336.
9 Mellisa Holtzman, Nonmarital Unions, Family Definitions, and Custody Decision Making, 60 FAM. REL. 617, 627 (2011) [hereinafter Holtzman II].
10 Id. at 627.
11 See infra Part II.
12 See infra Part II.
13 See infra Part III.
14 See infra Part IV.
15 See infra Part V.
16 See infra Part VI.
II. CHILDREN’S ATTACHMENT RELATIONSHIPS

It is a widely accepted tenet among many social scientists that children need security, continuity, and stability for healthy development. Social attachment theory suggests that it is through the development of strong emotional attachments to parental figures that children develop a sense of security and feelings of safety and belonging. These experiences provide children with a secure base from which to explore the world and develop self-confidence and eventually independence. Children who lack secure attachment relationships—or who lose them unexpectedly—experience grief; exhibit lower levels of self-esteem; experience more behavior problems, self-doubt, and aggression; and have greater difficulty in adulthood with relationship development and maintenance. Importantly, although initial studies of attachment focused on the relationship between children and their biological mothers, later research suggested that attachments to other individuals, including teachers, peers, and psychological parents, were also important for child development.


18 See 1 JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT passim (1969); 2 JOHN BOWLBY, ATTACHMENT AND LOSS: SEPARATION passim (1973); 3 JOHN BOWLBY, ATTACHMENT AND LOSS: LOSS passim (1980).

19 See Ainsworth, supra note 17, at 710.


21 Grazyna Kochanska & Sanghag Kim, Early Attachment Organization with Both Parents and Future Behavior Problems: From Infancy to Middle Childhood, 84 CHILD DEV. 283, 293 (2013).


23 Ainsworth, supra note 17, at 709; 1 BOWLBY, supra note 18, passim; 2 BOWLBY, supra note 18, passim; 3 BOWLBY, supra note 18, passim.

24 Christi Bergin & David Bergin, Attachment in the Classroom, 21 EDUC. PSYCHOL. REV. 141, 141 (2009).


Moreover, disruptions in these attachment relationships have been found to produce many of the negative outcomes for children that are associated with losing a primary attachment figure (e.g., a mother).27

Given the body of research on the importance of attachment relationships and the consequences involved with their disruption, this research begins from two assumptions. First, the maintenance and preservation of children’s attachment relationships are important for their overall well-being and development.28 Second, this assertion is no less true when the relationships are based on social and emotional connections, rather than biological connections.29 In short, the preservation of children’s parental relationships enhances children’s well-being irrespective of the presence or absence of genetic ties.

Efforts to protect children’s attachments are not uncommon among legal scholars. These scholars argue that enabling children to maintain parent-child relationships with adults to whom they have become emotionally attached promotes the welfare of children, regardless of whether those relationships are grounded in genetic connections.30 For instance, as early as 1984, Katharine Bartlett argued that “exclusive” parenthood—the practice of legally recognizing only one mother and one father for children—was severely limiting and detrimental to children.31 Bartlett asserted that “the child’s need for continuity in intimate relationships demands that the state provide the opportunity to maintain important familial relationships with more than one parent or set of parents.”32 In so doing, children’s relationships with nonbiological parents would be preserved.

Abandoning the doctrine of parental exclusivity in favor of a model that recognizes multiple parental relationships would give legal effect to the reality of children’s lives. Children frequently live within family structures that contain biological parents alongside stepparents, gay or lesbian coparents, or other unrelated parental figures. But, the emotional

References:


29 Id.


31 Id. at 881–82.

32 Id. at 882.
connections between these individuals and the nonbiological children they rear are often assumed to derive from the adult’s relationship with the child’s biological parent.33 That is, stepparents, GLBT coparents, and other parental figures are only entitled to function as parents so long as they maintain a relationship with the biological parent. Once that relationship ceases, the derivative rights that they enjoyed cease as well. Although this derivative perspective on nonbiological parenthood “ignores the various and complex relationships, expectations, and emotions” that are in operation within these family structures, it does, at least temporarily, recognize the possibility of nonexclusive parenthood.34 In instances in which the nonbiological parent has never been in a romantic relationship with the biological parent (e.g., in a traditional adoption, foster care situation, or arrangement involving long-term childrearing by a relative), legal institutions rarely embrace, even tacitly, ideas of shared parenthood.35 Instead, either/or models are employed, whereby either the nonbiological parent or the biological parent is entitled to custody and visitation.36

Thus, protecting children’s relationships with stepparents, GLBT coparents, and other psychological attachment figures is an increasing concern for legal scholars. Mason and Mauldon, as well as Malia, suggest that stepparents should not only be legally recognized for the role they play in their stepchildren’s lives, but they should also enjoy this recognition even while the biological parents retain their legal standing with respect to the child.37 Within the context of GLBT coparents, Hare and Skinner advocate for legal recognition of nonbiological gay and lesbian parents.38 Allen argues against the practice of treating nonbiological gay and lesbian parents as legal strangers to their children when the adult relationship ends.39 Wald and Jacobs suggest that parenthood should be based on the

34 Id. at 303.
36 See Malia, supra note 33, at 303–04 (discussing differences in custody and visitation between biological and nonbiological parents).
37 Id. at 306–07; Mason & Mauldon, supra note 35, at 23.
adult’s actual conduct toward the child rather than the adult’s gender or
genetic status.\textsuperscript{40} Furthermore, Yngvesson argues that adopted children are
tied to both their biological heritage and their adoptive heritage.\textsuperscript{41} Accordingly, adopted children should not be entirely cut off from their
biological roots.

In short, legal scholars have proposed a number of changes that extend
parental status to adults with whom children have developed parent-child
attachments. Whether advocating for broader legal definitions of the
family,\textsuperscript{42} more consistent judicial use of the best interests doctrine,\textsuperscript{43} or
legal recognition of “moral parenthood,”\textsuperscript{44} “functional parenthood,”\textsuperscript{45} “de
facto parenthood,”\textsuperscript{46} or “nonexclusive parenthood,”\textsuperscript{47} scholars have put
forth a variety of proposals aimed at protecting children’s attachment
relationships.

Importantly, a number of scholars have suggested that these proposals
must do more than merely shift legal rights from one adult to another. They must “also recognize children as persons in their own right.”\textsuperscript{48}


\textsuperscript{44} Hare & Skinner, supra note 38, at 371–72.

\textsuperscript{45} Jacobs, supra note 40, at 434–36.

\textsuperscript{46} Mason & Mauldon, supra note 35, at 23 (emphasis omitted).


\textsuperscript{48} Hare & Skinner, supra note 38, at 373.
Children, these scholars argue, have “relationship rights” that deserve legal protections on par with the rights of adults.\(^{49}\) Thus, it is not sufficient for proposals to focus on expanding the rights of nonbiological parents relative to biological parents. Proposals must also give primacy to children’s rights. It is only by doing so that proposals can move beyond the law’s tendency to “assume[] an adult-centric perspective that discounts children’s reality.”\(^{50}\)

### III. DOCTRINAL CONFLICT: PARENTS’ RIGHTS, CHILDREN’S INTERESTS, AND FAMILY DEFINITIONS

One might ask how a legal system that purports to hold children’s interests paramount could be criticized as adult-centric. This happens because, in custody disputes between biological and nonbiological parents, societal and legal commitments to children come into conflict with equally valid and strongly held societal and legal commitments to the rights of biological parents. As a consequence, in contested adoptions, there is more at stake than just the adjudication of which adult is best equipped to meet the child’s needs. Judges must consider the biological parent’s rights, the nonbiological parent’s role within the child’s life, the nonbiological parent’s standing to seek custody, and the child’s need for continuity and stability in his or her attachment relationships.\(^{51}\) Thus, in many ways, these disputes have the potential to pit children’s interests and adults’ rights against one another and, because both of these things are enshrined in law, the result is not just conflict between the needs of distinct individuals, but conflict between well-established legal doctrines as well.

Consider first the parental rights doctrine. This doctrine is grounded in several Supreme Court decisions that have established a fundamental, constitutional right in biological parents to the custody and control of their children.\(^{52}\) Importantly, this doctrine also holds that the rights of biological parents cannot be disturbed except for the most cogent reasons—unfitness,


\(^{51}\) See Quilloin v. Walcott, 434 U.S. 246, 251–56 (1978) (discussing the due process and equal protection rights of an unwed biological father, the rights of a stepfather, and the best interests of the child in a contested adoption).

abandonment, voluntary surrender of one’s parental rights, and so forth. Therefore, judges must consider this doctrine in order to give legal recognition to the rights of biological parents in contested adoptions.

Because contested adoptions, by definition, involve the custody of children, the children’s best interests doctrine is relevant to judicial decision making as well. This doctrine holds that custody decisions should be made with the child’s interests in mind, such that the person who is awarded custody is the person best able to meet the child’s emotional and physical needs. Of course, judicial notice of this doctrine does not necessarily mean conflict will arise with parental rights—after all, most children’s interests and their parents’ rights coincide. However, in instances in which children have developed strong emotional attachments and parent-child relationships with individuals other than their biological parents, their best interests may dictate custody to, or at the very least, continued contact with, these nonbiological parents. In this situation, the child’s interests may conflict with the biological parents’ rights.

Thus, the rights of biological parents and the needs of children set up the potential for doctrinal conflict in contested custody disputes. To the extent that the parental rights doctrine conceives of children as individuals to whom biological parents have rights, it is difficult for the doctrine to protect those rights while simultaneously recognizing children’s potentially competing interests. Likewise, to the extent that the best interests doctrine emphasizes children’s needs over parents’ rights, it may inappropriately diminish the constitutional rights of parents. Contested adoptions create a particularly challenging dilemma for judges: Whose rights take precedence in cases in which they are in conflict with one another and when safeguarding both is a fundamental tenet of the legal system?

To complicate matters even more, contested adoptions involve an additional layer of complexity because they introduce a nonbiological parent into the equation. As such, judges must consider the nonbiological

53 See Santosky, 455 U.S. at 749 (recognizing that thirty-five states and the District of Columbia have authority to terminate parental rights for permanent neglect if supported by clear and convincing evidence); Quilloin, 434 U.S. at 255 (breaking up a natural family on the grounds of unfitness would not violate the Due Process Clause if done in the child’s best interest); see also id. at 248 n.2 (recognizing that court order, abandonment, or voluntary surrender will terminate parental rights for adoption purposes under a Georgia statute).


parent’s role in the child’s life, the potential right the nonbiological parent
may or may not have with respect to the child’s custody, and how, if at all,
the nonbiological parent’s involvement shifts the balance between the
child’s interests and the biological parents’ rights.56 Weighing these issues
means societal conceptions of the family and definitions of parenthood are
often incorporated into the decision-making process as well.57

Many of the proposals for protecting children’s attachment
relationships are, in fact, predicated on the notion that judges will consider
definitions of the family in these kinds of disputes.58 Moreover, a number
of scholars have suggested that, if judges reject traditional conceptions of
the family whereby biological relatedness is the marker of parenthood and
embrace, instead, more expansive conceptions of the family that recognize
parenting as a social, emotional, and psychological relationship, the
balance between children’s interests and biological parents’ rights might
well be tipped toward children.59 Said another way, if judges recognize
nonbiological parents as legitimate parental figures who have established,
by virtue of their past behavior, important and meaningful attachment
relationships with the child, then decisions that protect that parent-child
relationship may be more likely.

Much of the scholarly work on nonexclusive parenthood is grounded
in the assumption that legal recognition of broad, nontraditional definitions
of the family will ensure the preservation of children’s attachment
relationships by enabling children to maintain connections to both their
biological and nonbiological parents.60 While this is a hopeful sentiment,
custody awards that maintain rights in both the biological and
nonbiological parent remain relatively rare.61 Instead, custody disputes,
like so many disputes in the United States legal system, are predicated on
an adversarial model that assumes only one winner—either the biological
or the nonbiological parent. While legal consideration of expansive,
nontraditional conceptions of the family may increase the likelihood that

56 See id.
57 Id. at 16.
58 See id. at 16–17.
59 Bartlett, supra note 30, at 961; Hare & Skinner, supra note 38, at 371; Jacobs, supra
note 40, at 447–48; Skinner & Kohler, supra note 42, at 298–99; Wald, supra note 40, at
410–11.
60 Bartlett, supra note 30, at 944–46; Kavanagh, supra note 47, at 141–43; Young,
supra note 47, at 554–55.
61 Holtzman I, supra note 1, at 341; Holtzman II, supra note 9, at 619; Holtzman IV,
supra note 43, at 603.
the child’s relationship with the nonbiological parent will be maintained, this does not guarantee that the child’s interests have been fully considered. For instance, a decision that maintains the nonbiological relationship at the expense of the biological relationship may be as detrimental over time as one that prefers the biological connection to the exclusion of the nonbiological connection. As I have argued elsewhere, “A win for one parent may, in fact, signal a loss for the child—loss of contact with the losing adult, loss of an attachment figure, loss of previously established routines and family patterns, and so forth.”

Thus, while judicial recognition of expansive definitions of the family is a meaningful policy goal and one potential way to protect the nonbiological parent-child relationship, it does not consistently ensure this outcome, nor does it ensure that the children’s ties to both their biological and nonbiological parents will be simultaneously preserved. By way of example, much of my prior research has examined the efficacy of legal arguments predicated on family definitions. This research suggests that, although the consideration of broad, nontraditional conceptions of the family are associated with the preservation of children’s nonbiological attachments, outcomes grounded in nonexclusive parenthood remain rare. Moreover, my research suggests that family definitions are only able to consistently protect children’s nonbiological attachments when they are considered alongside best interests arguments. Judicial consideration of children’s best interests appears to maintain a focus on the child more clearly than does judicial consideration of parental rights and family definitions, either together or in isolation. Therefore, research suggests that promoting judicial consideration of the best interests doctrine may be a more effective way to ensure, at the very least, the maintenance of

---

62 Holtzman I, supra note 1, at 336.
63 Holtzman V, supra note 43, at 31; Holtzman II, supra note 9, at 619.
64 Holtzman V, supra note 43, at 31.
children’s nonbiological attachment relationships. From there, courts can pursue the idea of nonexclusive parenthood.

This Article explores the relationship between parental rights, family definitions, and children’s best interests within the context of contested adoptions. It examines how judicial use of these doctrines, in tandem and in isolation, impacts the likelihood that custody outcomes will favor biological parents, nonbiological parents, or both sets of parents—and thus relationships—simultaneously.

IV. DATA AND METHODS

As a social scientist, I approach the study of case law somewhat differently than a lawyer. Rather than focusing on a select number of seminal cases, I examined many cases over time and across states in an effort to discern patterns in judicial decision making. Moreover, I utilize qualitative research techniques to uncover these patterns and develop in-depth understandings of judges’ decisions in custody disputes between biological and nonbiological parents.

A. Sample

This Article is based on published appellate court opinions that are part of a longitudinal study of judicial decision making. The complete data set contains nearly 1,000 cases that represent disputes between biological and nonbiological parents in eight states over a nearly forty-year period (1970–2006). These states are Colorado, Florida, Illinois, Indiana, Massachusetts, Mississippi, Oregon, and Tennessee. Because I have described the data collection decisions, rationales, and procedures elsewhere in detail, I will not recount those discussions here.

The data for this Article come from a smaller subset of cases involving contested adoptions. Across the entire dataset, there were 355 contested adoptions. They fell into five broad categories: those involving GLBT parents; relatives who were pursuing adoption; unrelated adoptive parents; stepparents who were seeking to adopt their spouse’s child with that

---

68 See infra Parts IV–V.
69 See infra Parts IV–V.
70 Holtzman II, supra note 9, at 620–23.
71 Space constraints make it difficult to provide a complete list of all the analyzed cases along with their rationale and outcome categorizations; however, this information can be obtained from the author upon request.
spouse’s consent, but without the consent of the nonresidential parent; and those involving other kinds of litigants—typically foster parents.

B. Analytic Procedures

Judicial opinions offer insight into the factors that judges feel compelled to consider and account for in the decision-making process. Therefore, published opinions represent narrative accounts of legal decisions. Narratives are a form of textual data and, as a researcher, I must use coding methods that will allow me to discern patterns within the data, while respecting the richness of meaning that is contained within the narratives as a whole. Qualitative research techniques are the most appropriate for this process. These techniques require that I remain attentive to the specific words and phrases within the data that serve as indicators of the issues and ideas that are of theoretical interest. This is an iterative, time-consuming process that requires multiple reads of each case, as well as the creation of tables, graphs, and detailed coding memoranda that chart the patterns emerging within the data.72

Two trained coders and I read each case and independently coded them for judicial discussions of children’s best interests, parental rights, and family definitions. Passages that made explicit reference to the best interests doctrine or to children’s welfare, needs, rights, well-being, and so forth were coded as indicators of judicial discussions of children’s best interests. Passages that explicitly referenced the parental rights doctrine or that discussed legal preferences for fit biological parents, constitutional limits on interference with intact families, or arguments regarding family autonomy were coded as indicators of judicial attention to parental rights. Finally, family definitions were indicated by discussions of marriage, unwed or single parenthood, domestic partnerships, expected gender roles, psychological or de facto parenthood, and so forth.

Multiple coders were used to ensure that the richness of meaning contained within the cases was captured effectively. As such, coding discrepancies were typically resolved by coding phrases in multiple ways so as to capture the various levels of nuance that all coders saw in the data. Together, the coders and I arrived at a collective understanding of the ways that judges discussed and used children’s best interests, parents’ rights, and family definitions during the decision-making process.

72 NVivo, a qualitative software package, facilitates this process and allows key words and phrases to be categorized according to topics and interrelated themes.
After the data coding was complete, cases were categorized based on their judicial rationales and their custody outcomes. The categorization of judicial rationales was based on prior coding for discussions of children’s rights, parents’ rights, and family definitions. Importantly, the determination of a case’s dominant judicial rationale was based on more than passing reference to these concepts. Instead, we also accounted for judges’ explicit statements regarding whose rights were paramount, counts of phrases supporting each argument, and the opinion’s overall tone.

The categorization of case outcomes was based on whether the decision favored the biological parent (BIO), the nonbiological parent (NONBIO), or both simultaneously (JOINT). Decisions were said to favor the biological parent if they resulted in custody placement with the biological parent or if they resulted in judicial decisions, such as reversals or remands, that privileged the biological relationship. Outcomes were said to favor the nonbiological parent if they resulted in custody placement with the child’s nonbiological attachment figure or if they resulted in judicial decisions, such as reversals or remands, that privileged the nonbiological relationship. Finally, decisions were said to favor both sets of parents simultaneously if both the biological and nonbiological parent were awarded custody or visitation with the child.

Categorizing cases according to their rationale and outcome allowed me to systematically examine the relationship between the arguments that judges offered and the outcomes those arguments produced. Because contested adoptions bring parents’ rights, family definitions, and children’s interests to bear on the decision-making process, it was important to examine the degree to which these decision-making criteria were associated with the preservation of children’s attachment relationships.

Of the 355 cases under consideration here, in 97% of cases, judges considered the rights of the biological parent; in 34%, children’s best interests were given attention; and in 27%, definitions of the family were considered. Relatedly, 50% of all the cases (179) resulted in decisions that favored biological parents, 46% (163) favored nonbiological parents, and 4% (13) had joint custody awards. The question then becomes: How were judicial rationales related to the pattern of outcomes associated with these cases? At first glance, one might speculate that the ubiquitous use of the parental rights doctrine accounted for the cases that favored biological parents, while the introduction of best interests arguments and family definitions arguments shifted the remaining cases toward outcomes

73 See Holtzman II, supra note 9, at 620–23.
favoring nonbiological parents—this is, after all, what scholars who put forth proposals about children’s rights and family definitions expect to have happen. However, the story is much more complex.

The relatively low number of cases with best interests and family definitions analyses is actually quite striking given the long-standing commitment of the legal system to protect children’s interests. One might have expected greater reliance on best interests arguments, at the very least, but that did not happen. Moreover, as this Article illustrates, parental rights, family definitions, and children’s interests not only interacted with each other in ways that many scholars might not have predicted, but they interacted with particular litigant contexts in very important ways as well. Understanding the full impact of parental rights, family definitions, and children’s interests on custody decision making and the preservation of children’s attachments requires that we account for these unexpected, yet important, interrelationships.

V. PARENTAL RIGHTS, FAMILY DEFINITIONS, AND CHILDREN’S INTERESTS

A. The Ubiquitous Nature of Parental Rights Arguments

Because parents’ rights are considered fundamental and constitutionally protected,74 it is not surprising that they were given judicial notice in nearly every case. In many instances, parental rights were the only thing judges considered, and case outcomes often favored biological parents. For instance, in McCulley v. Bone,75 the court of appeals set aside an adoption decree because the biological mother validly withdrew her consent to the adoption.76 In so doing, the court noted:

[N]o one can doubt, on the facts of this case, that the disruption and emotional consequences of [the] child’s return to her biological mother would not have been occasioned had [the] mother’s significant parental interests been respected in the way the statutes—and perhaps constitutional principles, as well—require. . . . This case stands as a reminder that the primary purpose of an

76 Id. at 796.
adoption is to provide a home for a child, not a child for a home.77

In *Hinkle v. Lindsey*,78 the court overturned a stepparent adoption on the grounds that:

Natural law gives [the biological father] certain rights as a parent of the child, and these rights can be taken away only in strict compliance with the law. The record before [the court] does not support a conclusion, by clear and convincing proof, that [the biological father’s] conduct manifested a settled purpose to forego his parental rights.79

In *LaFollette v. Van Weelden*,80 the court noted:

A natural parent may submit to an adoption by giving consent. He may so conduct himself as to show a complete abandonment. But, absent the two criteria cited [previously in the opinion], it takes a mighty clear and convincing set of facts before the privileges and responsibilities of the father can be taken away from him.81

In addition, in *Swarthout v. Reeves*,82 the court upheld an adoption denial on the grounds that, even though the biological father’s support payments were “minimal” and visitation with the child “was not exemplary,” an adoption decree would permanently and irreversibly sever the biological parent-child relationship.83 Thus, the judges noted that they were “inclined to give [the] benefit of doubt toward maintaining the family bond.”84

The concern with the permanence of adoptions that was expressed in *Swarthout* was a commonly used rationale for the use of the parental rights doctrine. Many judges went so far as to say that it was precisely *because* adoption, as opposed to merely custody, was at stake that parents’ rights

---

77 *Id.* at 795–96.
79 *Id.* at 986.
81 *Id.* at 198.
83 *Id.* at 619–20.
84 *Id.* at 620.
had to take precedence over other decision-making criteria, including the child’s best interests.\textsuperscript{85} As the judges in \textit{Mahoney v. Linder} asserted:

\begin{quote}
In an adoption, a court is asked to terminate every right and interest of the natural parent. Adoption goes far beyond the child-centered question of custody during minority. . . . The petition to adopt concerns a different kind of right, the subjective tie between a parent and child, the right of a parent to be identified with his child for emotional, religious or other reasons. A father may hope his son will bear his name; a mother may anticipate that her daughter will inherit her property. . . . [T]here is ordinarily no vital interest of the child [that] requires the termination of his parents’ rights.\textsuperscript{86}
\end{quote}

Likewise, in \textit{In re Adoption of Burton}, the Illinois Appellate Court overturned an adoption by foster parents, holding that “[a]doption is a much more serious matter than a mere temporary change of custody.”\textsuperscript{87} Citing previous precedent, the court noted:

\begin{quote}
The welfare of the child is a much more appropriate yard stick in a custody case than in an adoption matter. Adoption affects the course of inheritance, deprives the child of a place in which it was placed by nature, and by force of law thrusts the child into another relationship, while severing forever and conclusively the legal rights and interests of the natural parent.\textsuperscript{88}
\end{quote}

Similarly, a Florida court overturned a stepparent adoption, holding that “[a]doption completely severs parental ties. Such permanent termination of parental rights and responsibilities must not be ordered without parental consent except upon clear and convincing proof that the natural parent has conducted himself in such a way as to show a complete abandonment of the child.”\textsuperscript{89} The court went on to find that, while a best


\textsuperscript{86} \textit{Mahoney}, 514 P.2d at 906 (quoting \textit{Simons}, 366 P.2d at 876–77).

\textsuperscript{87} \textit{Burton}, 356 N.E.2d at 1285.

\textsuperscript{88} \textit{id.} (quoting Jackson v. Russell, 97 N.E.2d 584, 585 (Ill. App. Ct. 1951)).

\textsuperscript{89} \textit{Serpe}, 395 So. 2d at 1241.
interests analysis was “sufficient to support an award of custody, [it was] not sufficient to justify a complete and permanent termination of the parental relationship.”

What we see from these and many similar cases is a tendency for many judges to rely almost exclusively on parental rights arguments. When that happened, cases were much more likely to be decided in favor of the biological parent. Of course, a parental rights analysis did, at times, produce custody outcomes that favored nonbiological relationships. This happened most often because the court determined that the biological parent had abandoned the child, had validly and irrevocably surrendered the child for adoption, or had otherwise engaged in behaviors that made the parent unfit for custody. The outcomes of these cases resulted in the preservation of children’s attachments to their nonbiological parents because of the focus on the fitness of the biological parent rather than the interests of the child in maintaining his or her nonbiological parental relationships. It also meant that, in nearly all of these cases, children lost one set of parental relationships in favor of another. Joint custody awards were quite rare in cases that relied almost exclusively on a parental rights analysis.

B. The Limited Impact of Family Definitions

Unlike the parental rights doctrine, which was present in nearly every case, family definitions arguments were used fairly infrequently and almost never entirely on their own. Of the 355 cases in this study, ninety-six used a family definitions argument, but only four were based exclusively on family definitions. Quite often, discussions of the meaning of family were paired with a parental rights argument. Rather than increase the likelihood of decisions that would preserve children’s nonbiological attachments, when family definitions and parental rights were used in conjunction, the parental rights doctrine typically trumped any potential influence of family definitions.

For instance, in Stokes v. Arnold, foster parents sought to adopt three siblings who had been in their care for six years. The foster parents relied, in part, on a family definitions argument when they asserted that

\*90 Id.


\*93 Id. at 518–19.
“they, as foster parents, along with the children, ha[d] a fundamental liberty interest in their existing familial relationship.”\textsuperscript{94} Although the trial court had ruled in favor of the foster parents, the Tennessee Court of Appeals reversed, finding that “any interest the [foster parents] or the children might have in their relationship as a foster family is outweighed by [the biological mother’s] fundamental liberty interest in the custody, companionship, and care of her children.”\textsuperscript{95}

Likewise, in an effort to justify overturning two foster parent adoptions, in \textit{Drinnon v. Brown},\textsuperscript{96} the court went to extensive lengths to define the foster parent role:

\begin{quote}
The primary goal of any foster care program is to maintain the family unit and re-establish (or create) familial relationships. In other words, the ultimate goal must be the return of the children to the parents. The ever-present danger in a foster care situation is the intense bond and affection that can be—and probably will be—created between the foster parents and child. . . . The foster parents must walk an exceedingly fine line. They must give love, but not so much that the bond cannot be broken without severe trauma to the child. If the foster parents allow themselves to become so attached to the child that they seek permanent custody or adoption, then the foster care program itself is in peril and an invaluable tool could be rendered useless.\textsuperscript{97}
\end{quote}

Relying on the idea that there is more at stake in adoption than in custody, the court proceeded to reverse the adoptions by noting that “custody [is not] the question. The issue is much more permanent: It[ is] whether you sever the blood relationship—the symbolic umbilical cord between mother and child. It[ is] whether [the biological mother] will ever suffer the pain and pleasure of being a mother again to these children.”\textsuperscript{98}

In \textit{S.G. v. C.S.G.},\textsuperscript{99} an eight-year-old child was the subject of a dispute between his grandmother, with whom he had lived his entire life, and his

\begin{footnotes}
\item[94] Id. at 523.
\item[95] Id.
\item[96] 776 S.W.2d 96 (Tenn. Ct. App. 1988).
\item[97] Id. at 99–100.
\item[98] Id. at 100.
\item[99] 726 So. 2d 806 (Fla. Dist. Ct. App. 1999).
\end{footnotes}
The court first acknowledged the grandmother’s parental relationship to the child: “There is no doubt that the person with whom a child lives, especially when the child is young, is a significant figure to [the] child.”

Unlike adults, children have no psychological conceptions of relationship by blood-tie until quite later in their development. . . . What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these [interchanges], become the parent figures to whom they are attached.

Despite giving credence to a definition of family that recognized the grandmother as a nonbiological parent, the court ultimately rejected her adoption petition by not only favoring the parental rights doctrine, but by explicitly rejecting a best interests argument as well:

[O]ur ruling [is not] based upon a lack of sensitivity or understanding of the role played by [the] grandmother in the life of this child. In the eyes of the law, the grandmother’s interest[s] in continuing the custody of her grandchild must give way to the constitutional right of privacy of the natural mother to raise her child . . . . Where, as here, the natural parent has not abandoned the child or been found an unfit parent . . . , a court is without the authority to impose its own view of the child’s best interest.

We can see that, in most cases, family definitions were not able to outweigh the influence of parental rights. Instead, parental rights arguments trumped any potential positive influence family definitions might have had on the preservation of children’s attachments. The consequence was that most of these cases favored biological parents, rather than nonbiological parents or both sets of parents simultaneously. Of course, judicial recognition of family definitions was, at times, associated with decisions that promoted the maintenance of children’s attachments. It became evident, however, that family definitions had the most impact when simultaneously considered alongside best interests arguments.

100 Id. at 807.
101 Id. at 808.
102 Id. at 808 n.1 (quoting GOLDSTEIN ET AL., supra note 26, at 12–13).
103 Id. at 812.
C. The Presence and Absence of Children’s Best Interests Arguments

Only 119 (34%) of the cases utilized the child’s best interests as a decision-making rationale. Given what is at stake in an adoption, it may seem reasonable to preference parental rights arguments over a best interests analysis. A Florida court emphatically asserted as much when it declared a best interests analysis to be dangerous because “to permit [children’s] interests to govern . . . an adoption could disrupt our society . . . .”104 Yet, such a complete emphasis on parental rights conflicts with the oft-stated legal goal of making children’s needs paramount. Most states statutorily require courts to consider the child’s best interests in custody decision making.105 Additionally, courts routinely note that “[t]he ultimate goal of every proceeding involving the care and custody of a child is to ascertain and promote the child’s best interests.”106 Why, then, would parents’ rights figure so prominently in contested adoptions, but children’s best interests receive considerably less attention?

Simply put, many state statutes explicitly forbid the simultaneous balancing of parental rights and children’s best interests.107 In many states, courts were required to weigh parental rights first and consider children’s best interests only upon a finding that the biological parent had forfeited his or her rights in some way.108 For instance, in In re Adoption of Female Child, the Tennessee Supreme Court held:

[I]n a contest between a parent and a non-parent, a parent cannot be deprived of the custody of a child unless there has been a finding . . . of substantial harm to the child. Only then may a court engage in a general “best interest of the child” evaluation in making a determination of custody.109

104 In re Adoption of Baby Girl C, 511 So. 2d 345, 357 (Fla. Dist. Ct. App. 1987).
105 See Determining the Best Interests of the Child, supra note 4, at 1.
109 Female Child, 896 S.W.2d at 548.
Likewise, according to the Mississippi Court of Appeals:

[T]he court does not reach the issue of what is to the best welfare of the child or children sought to be adopted until it shall first appear from the evidence that the parent so objecting has abandoned or deserted the child or children, or is mentally or morally unfit to rear and train it or them, when the contest is between a natural parent and third persons.\(^{110}\)

Ironically, judges may be statutorily bound to treat children’s interests as both primary in the decision-making process and secondary to the biological parent’s rights. The Illinois Appellate Court acknowledged this statutory conflict when it observed that, although “[t]he Adoption Act declares that the child’s best interests are the prime consideration . . . , before there can be a consideration of the best interests of the child, the legislative scheme contemplates that there must be a finding of parental unfitness.”\(^{111}\)

Interestingly, in In re Adoption of M.A.H., the Florida District Court of Appeals lamented the fact that a children’s best interests analysis was statutorily impermissible:

Prior to 1973, the Florida [s]tatute did not require the parent to have “abandoned” the offspring and indeed it spoke to “the best interests of the child.” However, our no doubt well intentioned legislature has orchestrated the new statute to specifically negate the child’s best interests and make the adoption, without consent, subject only to abandonment. Thus, the comforting words . . . “that the courts will always consider first and primarily the welfare of the minor,” have been superceded. This is hard to accept. In matters relating to children it appears that the best interests of a child are always at least considered in all facets of the law. Yet in that most sensitive of areas, adoption of minor children, the legislature has seen fit to jerk the rug out from under us.\(^{112}\)

\(^{110}\) N.E., 761 So. 2d at 961 (quoting Mayfield, 64 So. 2d at 716).

\(^{111}\) Blakey, 391 N.E.2d at 223.

\(^{112}\) M.A.H., 411 So. 2d at 1382–83 (citations omitted).
Why would states insist on this kind of balancing between parental rights and children’s interests? Perhaps it is precisely because parents have rights while children have interests. The word rights connotes claims that are high priority and mandatory, whereas the word interests connotes something significantly less fundamental. Consequently, states may feel more strongly obligated to protect parents’ rights over children’s interests. Regardless of the reason, the outcome of this statutory conflict was that judges often explicitly refused to consider other decision-making criteria, including children’s best interests, until after the biological parent’s rights had been scrutinized.113

What, then, was the defining feature of those cases in which children’s interests were considered? Some only utilized a best interests analysis because it was triggered once the biological parents were deemed lacking in some way.114 However, others chose to elevate children’s interests above parents’ rights, despite the general legal tendency to the contrary.115 For instance, in Ross, the court of appeals reversed an adoption denial because the lower court had failed to consider the child’s best interests in its decision making.116 The judges argued that “[t]he best interest of the child is placed above that of all others in matters of custody and adoption.”117 Citing a number of precedents in support of this perspective, the court concluded by saying:

While it may be extremely hard for a court to terminate a loving father’s relationship with his daughter, the court must do so if that permanency and stability [that] every child needs and craves can only be obtained through adoption. This Court will not deprive the innocent child of the opportunity for a wholesome parental relationship in order to satisfy a claim of blood, alone.118

Here, the child’s best interests trumped the father’s parental rights, rather than the other way around.119

113 See N.E., 761 So. 2d at 961 (quoting Mayfield, 64 So. 2d at 716).
114 See id.; Female Child, 896 S.W.2d at 548.
117 Id. at *11.
118 Id. at *24 (citation omitted).
119 Id. at *23–24.
Similarly, in Hunter v. Doe, the court acknowledged the rights that inhere in putative fathers, but argued that, if such fathers do not register with the state’s putative father registry in a timely fashion, the court was not compelled to protect those rights. According to the court:

[P]romptness is measured in terms of the baby’s life not by the onset of the father’s awareness. The demand for prompt action by the father at the child’s birth is neither arbitrary nor punitive, but instead a logical and necessary outgrowth of the [s]tate’s legitimate interest in the child’s need for early permanence and stability.

The court proceeded to uphold the child’s adoption, finding that “a mere biological link between the putative father and the child does not require a [s]tate to listen to his opinion regarding the child’s best interests . . . .” This father lost his parental rights, not because he was unfit, but because he waited too long to register his status as a biological father with the state. This delay interfered with his child’s need for early stability and permanence—a need that the court felt outweighed the father’s rights to his child.

This tendency for some courts to balance children’s interests against parents’ rights was also reflected in a handful of cases where judges explicitly rejected the idea that adoptions required more stringent decision-making criteria than custody decisions. In In re J.D.K., the Colorado Court of Appeals upheld an adoption by a child’s paternal grandparents, holding that, “[i]n an adoption proceeding, ‘the primary consideration is the welfare of the child, secondly the rights of the parents.’” In addition, an Indiana court found that, within the adoption statutes:

[The] paramount concern shall be for the health, welfare and future of the child whose adoption is immediately contemplated or who in the future will hopefully be adopted. The purpose of this chapter in regard to the

\[121\] Id. at 749–50.
\[122\] Id. at 750 (quoting Robert O. v. Russell K., 604 N.E.2d 99, 103–04 (N.Y. 1992)).
\[123\] Id. at 749.
\[124\] Id. at 752.
\[125\] Id.
\[127\] Id. at 544 (quoting In re E.R.S., 779 P.2d 844, 850 (Colo. 1989)).
termination of parental rights is to give to unfortunate children who have been bereft of love and parental care the benefits of a home, and of such parental care, and the law should receive a liberal construction to effect this purpose.\textsuperscript{128}

Both an Indiana court and an Oregon court refused to allow biological mothers to withdraw their consents to adoption, finding that, in weighing the mothers’ rights against the adoptive families’ expectations and the children’s interests, the scales tipped in favor of the children and the adoptive parents.\textsuperscript{129} Specifically, the Indiana Court of Appeals held:

The trial judge must recognize there are three parties whose interests and feelings are involved in the adoption process and all must be treated fairly. That judge must balance the interest of the natural parents and their sacred relationship to their child against the hope, expectation, reliances, and desires of the adoptive parents—all against the best interest of the child[,] which, after all, rules supreme.\textsuperscript{130}

Further, the Oregon court held that an adoption revocation would not only have “adverse emotional effects upon the child,” but it would harm the adoptive parents as well because they would experience a loss similar to “the death of a child.”\textsuperscript{131}

The concern of the Indiana and Oregon courts with the impact of their decisions on the foster families and the children helps illustrate those instances in which judges accounted for family definitions and children’s best interests simultaneously. Recall that family definitions were consistently associated with the maintenance of children’s nonbiological attachments only in those cases in which family definitions were considered alongside best interests arguments.\textsuperscript{132} Thus, an Illinois court upheld a stepparent adoption because it served the child’s best interests and because to do otherwise would “unquestionably disrupt the tranquility of a

\textsuperscript{128} \textit{In re Adoption of Herman}, 406 N.E.2d 277, 279–80 (Ind. Ct. App. 1980) (quoting IND. CODE § 31-3-1-7 (1971) (repealed 1997)).


\textsuperscript{130} \textit{Hewitt}, 396 N.E.2d at 942.

\textsuperscript{131} \textit{Baby Girl J}, 583 P.2d at 25.

\textsuperscript{132} See supra text accompanying note 65.
family unit [that] now involves not an infant but an eight[-]year[-]old child and her adoptive parents with whom she has lived during her critically significant formative years.  Likewise, after an Indiana court denied a stepmother’s adoption petition, the court of appeals overturned the decision, finding:

Although we are sympathetic with Mother’s desire to establish a relationship with her daughter, we are constrained to view this situation from R.L.R.’s perspective, not Mother’s, and we must [remain] focused on the paramount consideration—R.L.R.’s best interests. However laudable Mother’s desire and intentions might be, they do not . . . change the fact that R.L.R. has established a strong, loving, healthy, mother-daughter relationship with [her stepmother]. To ignore these facts places R.L.R. at risk of significant emotional upheaval, confusion, and turmoil. This would certainly not be in R.L.R.’s best interests.

Overall, these cases illustrate two important things about children’s best interests. First, courts were willing to preference children’s interests over parents’ rights in some instances and, when that happened, the inclusion of a best interests analysis seems to have changed the way judges balanced parents’ rights and children’s interests. If parental rights arguments were considered alongside best interests arguments, biological parents were awarded custody only 11% of the time, compared to 43% of the time when parental rights were considered on their own. Second, these cases also illustrate that, when family definitions were considered in tandem with best interests arguments, children’s nonbiological attachments were more likely to be preserved. Judicial notice of family definitions without simultaneous consideration of children’s best interests resulted in custody outcomes that protected children’s nonbiological attachments only 19% of the time. That figure jumped to 35% when family definitions and children’s best interests were considered together. In short, definitions of the family, on their own, did not consistently have the effect that scholars often hope for, but when children’s best interests were brought to bear on the case as well, the impact of family definitions changed.

133 In re Adoption of Miller, 436 N.E.2d 611, 617 (Ill. App. Ct. 1982).

The findings regarding parental rights, family definitions, and children’s interests suggest that the introduction of a best interests analysis changes the way the parental rights doctrine and definitions of the family impact custody decision making. The question becomes: Under what conditions were courts likely to emphasize children’s interests, parents’ rights, and family definitions? A close look at the data suggests that, although this kind of balancing happened in all states, in all eras, and in all litigant contexts, there were some differences across states, time periods, and, most especially, litigants.

D. Contextual Factors and Best Interests, Family Definitions, and Parental Rights Arguments

Perhaps the most striking finding is that the litigant context was strongly associated with the types of decision-making criteria that judges utilize. The GLBT cases illustrate these effects most clearly. All seven of these cases contained significant discussions of definitions of the family, and six of them emphasized children’s interests. This is the only litigant context in which family definitions were considered in 100% of the cases and children’s interests were considered in well above 50% of the cases. In contrast, only three of the GLBT cases discussed parental rights. Given that, in all other types of cases, parental rights were considered more than 90% of the time, it is meaningful that, in GLBT cases, parental rights analyses were strikingly absent. Moreover, and perhaps most interestingly, five of the seven GLBT cases resulted in joint custody awards, whereby the child’s attachment to both the biological and nonbiological parent was given legal recognition. This stands in sharp contrast to the other types of cases, where no more than 8% of any given type of case resulted in joint custody outcomes.

For instance, in Adoption of Tammy, the Massachusetts Supreme Judicial Court upheld a second-parent adoption on the grounds that both women were “functioning, separately and together, as the custodial and psychological parents of [Tammy],” and “[i]t would be in the best interest of the child to permit [the nonbiological mother] to adopt [Tammy] and [the biological mother] to retain [postadoptive] parental rights.” Also, in In re Adoption of K.S.P., a lower court decision denying a second-parent

136 Id. at 316 & n.1 (internal quotation marks omitted).
adoption was reversed.\textsuperscript{138} The appellate court justified the reversal by saying:

\[\text{[O]ur paramount concern should be with the effect of our laws on the reality of children’s lives. It is not the courts that have engendered the diverse composition of today’s families. It is the advancement of reproductive technologies and society’s recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare[,] and protect the rights of children raised in these families . . . . At that point, courts are left to vindicate the public interest in the children’s financial support and emotional well-being by developing theories of parenthood, so that “legal strangers” who are de facto parents may be awarded custody or visitation or reached for support. Case law and commentary on the subject detail the years of litigation spent in settling these difficult issues while the children remain in limbo, sometimes denied the affection of a “parent” who has been with them from birth. It is surely in the best interests of children, and the state, to facilitate adoptions in these circumstances . . . .}\textsuperscript{139}

The five GLBT cases with joint custody awards differed in significant ways from the other eight cases in this data that had joint outcomes. The other cases focused heavily on the parental rights doctrine, rather than best interests and family definitions arguments, and they resulted in the denial of the adoption petition even while custody was determined to remain with the nonbiological parent. More specifically, in these eight cases, the courts denied the adoptions that were at issue because the biological parents could not clearly be shown to be unfit. Yet, the courts held that custody with the nonbiological parents best promoted the children’s interests. Perhaps not surprisingly, judges often arrived at this decision because “[a]doption completely severs parental ties”\textsuperscript{140} and reduces the biological parents “to

\textsuperscript{138} Id. at 1260.
\textsuperscript{139} Id. at 1259.
\textsuperscript{140} In re Adoption of Noble, 349 So. 2d 1215, 1216 (Fla. Dist. Ct. App. 1977).
the role of complete strangers.” In short, despite the questionable behavior of the biological parents, judges were hesitant to award adoptions given what was at stake. Yet, they were also unwilling to return full custody to the biological parents. In many ways, these cases approximated nonexclusive parenthood because the judges recognized that children’s relationships with their nonbiological parents promoted the children’s welfare. However, the judges were not willing to entirely sever the children’s biological connections by awarding an adoption. Therefore, children’s legal connections to their biological parents remained intact, even while judges maintained the children’s emotional connections to their nonbiological parents.

Approximating nonexclusive parenthood is not the same thing as embracing it. Only the GLBT cases did that, and this likely reflects a number of interrelated factors. First, nearly all of the cases involved lesbian second-parent adoptions in which the nonbiological coparent was attempting to adopt her partner’s biological child with that partner’s consent. Because the biological and nonbiological litigants were not at odds with one another in most of these cases, judges may have been more inclined to focus on the child’s interests rather than the parent’s rights and more inclined to embrace the tenets of nonexclusive parenthood. Had the GLBT cases not been confined to second-parent adoptions (a methodological artifact of the focus of this particular Article), it is quite likely that parental rights arguments would have been given more consideration. However, that does not necessarily mean that children’s interests and family definitions would have been given less attention. As I have demonstrated elsewhere, in custody disputes involving GLBT litigants (regardless of whether second-parent adoptions are at issue), courts are increasingly likely to weigh children’s interests and family definitions alongside parental rights arguments and, when they do that, children’s attachments to both parents are more likely to be protected.

Second, family definitions arguments were likely important to the decision-making process in the GLBT cases because of the nature of these kinds of relationships. GLBT custody disputes involve individuals from ongoing or former romantic partnerships. In this way, they mimic

---

143 Holtzman II, supra note 9, at 629.
heterosexual relationships, yet simultaneously fall outside the traditional bounds of those relationships. To the extent that GLBT couples differ from heterosexual couples, judges must wrestle with definitions of the family as they attempt to contextualize these romantic partnerships. But, to the extent that these romantic connections mimic heterosexual relationships, judges—especially in situations involving second-parent adoptions—may be more inclined to treat GLBT couples similarly to divorcing, heterosexual couples, such that children’s best interests arguments take center stage.\textsuperscript{144}

Finally, it may be the case that family definitions arguments were salient in the GLBT context because these cases almost always involved one biological parent and one person who was entirely unrelated to the child genetically.\textsuperscript{145} This was in contrast to disputes between biological parents and genetic relatives who reared the children—in these instances, family definitions were discussed only 18\% of the time. Relatedly, in stepparent adoptions, the child remained, at all times, in the custody of one of the biological parents. The nonresidential biological parent faced the loss of parental rights if the court granted the stepparent an adoption, but the residential biological parent retained parental rights. In these cases, family definitions were discussed only 17\% of the time. Therefore, the presence of a biological connection between the child and litigants on both sides of the dispute may have lessened the likelihood that family definitions would be considered in the decision-making process. This assertion is further supported by the fact that judicial notice of family definitions was not only a consistent feature of GLBT cases, but was significantly more likely in cases involving foster parents and unrelated adoptive parents—32\% and 40\% of cases, respectively. Further, when family definitions arguments were combined with best interests arguments in cases involving foster parents or unrelated adoptive parents, outcomes were significantly more likely to protect children’s attachments.

Thus, although the patterns associated with judicial recognition of family definitions and children’s interests were most pronounced in GLBT cases, they held up in other litigant contexts as well. Children’s interests and family definitions were most apt to receive judicial attention in situations that involved biological parents against genetically unrelated parental figures. However, beyond this, the litigant context did not give

\textsuperscript{144} Holtzman II, \textit{supra} note 9, at 630–31; Holtzman IV, \textit{supra} note 43, at 603–04.

\textsuperscript{145} See Holtzman II, \textit{supra} note 9, at 622.
rise to marked differences in judicial use of the decision-making criteria or the types of outcomes ultimately associated with the cases.

Contrary to what one might expect, state and timing effects also did not explain many differences in the judicial use of decision-making doctrines or in the case outcomes. Despite the fact that each state was free to regulate family law largely as it chose, there was a great deal of consistency across the states. Every state focused on parental rights, most incorporated best interests arguments less than half of the time, and family definitions arguments less than one-third of the time. Likewise, states were fairly similar in their distribution of the types of litigants involved in the cases. Most had fewer than 10% GLBT cases; the same was true for foster parent cases. Relatives seeking adoption generally encompassed about one-quarter of a state’s cases, while unrelated adoptions approached approximately one-third of a state’s cases. Stepparent adoptions accounted for about 40% of a state’s cases on average. Regarding custody outcomes, Colorado, Illinois, Indiana, and Massachusetts slightly favored nonbiological parents, while Florida, Mississippi, Oregon, and Tennessee slightly favored biological parents. These differences were not dramatic and no apparent patterned reason for these differences could be discerned. Therefore, it appears that state effects on the decision-making process and the custody outcomes were minimal.

The same was true when considering potential timing effects on the cases. Because the cases were decided over a forty-year period, it would be reasonable to assume that judicial rationales and case outcomes might differ over time. But, there were no large disparities in the number of cases favoring biological and nonbiological parents over time, and the number of cases utilizing a best interests analysis was fairly stable over time. During most decades, approximately 30% of cases relied on best interests arguments. The only exception to this was during the 1980s, when that figure was cut in half. It is not entirely clear why judicial reliance on the best interests doctrine declined in the 1980s—an investigation of the specific legal and cultural factors that may have been at play during this decade would need to be undertaken to determine the cause of that pattern. Nonetheless, trends in the 1990s and 2000s returned to rates that were on par with the 1970s. Over time, judicial consideration of best interests arguments remained relatively stable, at least within the eight states under consideration here.

146 See Holtzman III, supra note 43, at 388.
VI. DISCUSSION

What are we to take away from this analysis of contested adoptions? Most importantly, this research reveals that there is a clear and strong association between judicial use of the best interests doctrine and custody outcomes that promote the maintenance of children’s nonbiological attachment relationships. Relatedly, judicial reliance on expansive definitions of the family, although posited by many scholars as an effective means for protecting children’s attachments, consistently achieves that goal only when it is paired with a best interests analysis. Family definitions, by themselves or alongside the parental rights doctrine, do not consistently give rise to custody decisions that maintain children’s connections to their nonbiological parents.

This is important because it not only speaks directly to debates over the efficacy of children’s rights and family definitions in the preservation of children’s attachments, but it also suggests that criticisms lodged against judicial consideration of children’s interests and rights, although meaningful, may be overstated. Specifically, a number of scholars suggested that the best interests doctrine is an indeterminate standard.147 This standard may be inappropriate because it “enables judges, under the guise of law, to impose their values and beliefs about proper parenting upon litigants.”148 Despite these criticisms, however, this research suggests that the best interests doctrine is still the most effective means by which children’s attachment relationships are likely to be preserved. To that end, it substantiates Schneider’s assertion that the best interests doctrine is, despite its shortcomings, “as reasonable a framework for balancing the advantages of rules and discretion as we are likely to find.”149

Therefore, rather than debate the efficacy of children’s interests versus family definitions, legal scholars should focus their attention on promoting judicial use of the best interests doctrine in contested adoptions. Given that many states expressly prohibit consideration of the best interests doctrine until parental rights have been considered, legislative change may be a first step in this process. Amicus curiae briefs and efforts by lawyers to promote a children’s best interests analysis in contested adoptions would

---

147 See Martin Guggenheim, What’s Wrong with Children’s Rights passim (2005); Robert H. Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226 passim (1975).
be important steps as well. Regardless of the chosen tactic, the important point is that a focus on children’s interests is needed to protect their attachments with nonbiological parents.

This does not mean that judicial recognition of expansive definitions of the family is unwarranted. Family definitions, when paired with the best interests doctrine, were certainly effective at preserving children’s attachments. Children’s interests are best served when custody decisions fit the realities of their family situations. To that end, pairing the best interests doctrine with discussions of expansive family definitions can be a powerful means of preserving nonbiological attachments. Efforts to expand legal conceptions of the family should not be abandoned entirely by scholars, but they should be paired with an emphasis on children’s interests in maintaining parental relationships irrespective of genetics.

One might be inclined to ask if judicial reliance on the best interests doctrine would merely trade one situation that hinders children’s attachments for another—after all, most cases that were based on a best interests analysis preserved the nonbiological relationship to the exclusion of the biological one. Said another way, very few cases allowed children to maintain connections to both their biological and nonbiological parents. To some extent, a best interests analysis is no more likely to result in custody decisions that embrace nonexclusive parenthood than is a parental rights analysis. This is a fair critique and a valid concern. As a scholar who is focused on promoting children’s rights, I am not interested in trading one inadequate situation for another. However, a best interests analysis is the most probable avenue for achieving nonexclusive parenthood—a parental rights analysis certainly will not achieve that goal and a family definitions argument, at least in isolation, will not do so either. It is only by explicitly focusing on children’s interests and balancing them alongside family definitions and parental rights that we are likely to see a movement toward custody decisions that protect both biological and nonbiological parent-child relationships simultaneously.150

Moreover, the maintenance of both biological and nonbiological relationships should be our ultimate goal. Children benefit from stability and continuity within their relationships, especially with parental figures.151

150 Much of my past research bears out this assertion and it does so within a variety of litigant contexts, in both national and crosssectional examinations of cases, and across a variety of time configurations (from the early 1900s to cases as recent as 2012). See, e.g., Holtzman III, supra note 43, at 372, 384.

151 See Holtzman II, supra note 9, at 619, 622–23.
And they suffer when those relationships are lost. Thus, when legal decision making preferences either biological connections or nonbiological connections, but not both, children unnecessarily lose—they lose existing familial relationships, they lose potential future relationships, and they lose continuity, stability, and security in their connections with others. These losses are not just damaging; they are unnecessary—judicial consideration of the best interests doctrine is the best way to prevent these kinds of losses and to preserve children’s attachment relationships.

---

152 See supra notes 19–22 and accompanying text.