

Farzad Family Law Scholarship 2015

At the age of 21, Shauna Prewitt became the victim of rape. One month later, Prewitt learned that she was pregnant as a result of the rape. She decided to give birth to, and raise, her rape-conceived child. Her attacker subsequently filed for sole custody of the child. While his parental rights were ultimately terminated, not all women share the same success as Prewitt. One woman, for example, shared

I was raped in [North Carolina] and the rapist won “[j]oint” custody. Torment does not come close to describe what I live . . . [The courts] have not only tied and bound me to a rapist, but also the innocent child that was conceived by VIOLENCE! [The rapist’s] violence has earned him even more control over my life.

These anecdotes are representative of the serious problem facing women who become pregnant as a result of rape. These women must make the difficult decision whether to terminate the pregnancy, carry the baby full term and place the child for adoption, or keep and raise the child conceived through rape. The subset of women who choose to keep and raise their children may be forced to endure a lifetime with their rapists if they seek to exercise their parental rights over the children they father through rape.

I. Should a female victim of rape whose child was conceived through rape have the right to forever terminate the perpetrator’s parental rights in every respect? Assume for this question the perpetrator was criminally convicted of the rape.

A female victim should be entitled to petition the court to terminate her rapist’s parental rights in every respect, regardless of the circumstances surrounding the attack. If the perpetrator was criminally convicted of the rape, it has been established in a court of law that he committed the rape beyond a reasonable doubt. Because this is the highest evidentiary standard in the legal system, a criminal rape conviction should serve as *per se* evidence that the child was conceived as a result of an illegal act.

The perpetrator's parental rights should be terminated for three principal reasons. First, allowing the rapist to retain his parental rights contravenes the best interest of the child. In family law, the primary consideration is, and should continue to be, the best interest of the child. While it is generally in a child's best interest to be raised by his or her biological parents, this presumption is certainly rebuttable in situations where the parent is a violent criminal. Because men who rape are typically aggressive, hold negative attitudes toward women, and lack empathy, they likely will not be suitable caretakers or positive influences on their children.

In addition to considering the best interest of the child, the Supreme Court also created a "biology-plus" standard in family law. In *Quilloin v. Walcott*, the Court held that in order to establish paternity, a man must be committed to the welfare of the child, in addition to having a biological relationship with him or her. In that case, the Court noted that the biological father had not taken any responsibility "with respect to the daily supervision, education, protection, or care of the child." *Quilloin* and its progeny created the framework that governs the establishment of paternity today. Based on this standard, men who father children through rape should not be entitled to exercise any parental rights solely based on their biological relationship with the child.

Second, allowing the rapist to retain his parental rights will adversely impact the victim mother. Many rape victims suffer from Post Traumatic Stress Disorder ("PTSD") or related symptoms following their attack. In order to co-parent the rape-conceived child, the mother will be forced to maintain contact with her rapist. Requiring the victim mother to engage in prolonged contact with the rapist may cause additional physical and psychological harm, thereby exacerbating the trauma she already faces. Additionally, preventing the victim mother from overcoming the traumatic incident may significantly impair her ability to successfully raise and care for her child.

Finally, permitting the rapist to retain parental rights over a child he fathered through rape rewards him for his vehement crime. These men often exercise, or threaten to exercise, parental rights over the children they father through rape. They do so in order to force their victims to drop criminal charges against them, abstain from testifying against them at their criminal trial, or to otherwise intimidate them. The legal system should not serve as a vehicle for rapists to further harass victims who made a courageous decision to keep and raise their child conceived through rape.

II. Should a condition precedent of such a termination of parental rights be the criminal conviction of the alleged perpetrator for rape?

A criminal rape conviction should not be a condition precedent of terminating the parental rights of a rapist. Many victims never report their rapes to law enforcement because they are ashamed, embarrassed, or feel threatened by their attacker. Of the brave victims who do report, only a small percentage of the perpetrators are ever caught or prosecuted. Ultimately, only a small fraction of the rapes committed each year result in conviction and incarceration. Because most perpetrators are never brought to justice, requiring a criminal conviction of the alleged perpetrator will not adequately protect the victim mothers or their children. Given the low rate of attrition for rape cases, it would be impossible for most women to ever terminate the parental rights of their rapist.

A civil finding that the rape occurred and resulted in pregnancy should be sufficient to terminate the rapist's parental rights. This finding should take place in a family court, like any other termination of parental rights case. The most common standard for terminating parental rights in the United States is "clear and convincing evidence." Requiring a criminal conviction of the alleged perpetrator for rape would elevate the evidentiary burden to "beyond a reasonable doubt," which is not required in any other area of family law, and should not be imposed here.

In *Santosky v. Kramer*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires “that the State support its allegations by at least clear and convincing evidence” before it may permanently terminate an individual’s parental rights. While “beyond a reasonable doubt” is an extraordinarily high threshold to overcome in a family law proceeding, “preponderance of the evidence” is equally inappropriate. Given the significant deprivation of an individual’s liberty that occurs when his or her parental rights are terminated, due process requires a showing of clear and convincing evidence.

Procedurally, there should be an evidentiary hearing where the mother may be heard on her desire to have her rapist’s parental rights permanently terminated. At this hearing, the alleged attacker will have the opportunity to present evidence that no rape occurred and, thus, his parental rights should remain intact. This type of proceeding will guarantee that the alleged attacker will receive due process under the law, while protecting the interests of the victim mother in terminating her rapist’s parental rights.

III. Should a condition precedent of such a termination of parental rights be that a non-biological parent (male or female) will also adopt the child (resulting in the child having two parents)?

A non-biological parent adopting the child should not be a condition precedent of terminating the parental rights of a rapist. While it is generally in the child’s best interest to be raised by two parents, there are many situations in which the presence of the child’s parent would be more harmful than helpful to the child. Certainly when one of the child’s natural parents is a rapist, it is in the child’s best interest to sever all ties with that parent.

The termination of parental rights analysis does not, and should not, depend on whether another individual is willing and able to adopt the child. This requirement would be akin to requiring a petitioner in a dissolution of marriage action to identify another individual that he or she will marry prior to granting a final judgment of divorce. While being raised in a single-parent

household is not the ideal situation for a child, many children are successfully raised by single parents. Accordingly, this requirement should not be imposed by the legal system.

If the victim mother decides to marry or co-parent the child with another individual, albeit male or female, that is her prerogative. It does not make a difference whether the proposed adoptive parent is male or female. Based on the Supreme Court's recent decision in *Obergefell v. Hodges*, the law is now well-settled that

many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

While there is still certainly a social stigma surrounding same-sex marriage, the distinction between heterosexual and homosexual couples no longer exists in the eyes of the law.

IV. Should the perpetrator of rape still be obligated to pay the victim child support throughout the child's minority (which you can assume means under the age of 18) even if his parental rights are terminated?

In a majority of jurisdictions, terminating an individual's parental rights in every respect encompasses both parental rights *and* obligations. As such, the parent is stripped of the right to seek custody or visitation with the child and is relieved of the duty to support the child financially. As a matter of public policy, this majority view should continue to be applied uniformly in family law cases, without specific inquiry into the facts surrounding the termination of parental rights. Failure to do so would undermine a major policy objective of terminating parental rights—to remove the toxic parent from the child's life.

Although a perpetrator of rape should not be obligated to pay the victim child support upon termination of his parental rights, he should still be held responsible for all consequences that result from his violent crime. Failure to hold him financially accountable rewards him for his

wrongdoing, and punishes the victim mother for making the difficult decision to keep and raise her rape-conceived child. Furthermore, it potentially deprives the innocent child of a fair quality of life because he or she was conceived as a result of a criminal act.

Given the fact that most rapists are never charged, tried, and convicted of rape, requiring the perpetrator to pay retribution to the victim mother through the criminal system would be a futile remedy. Instead, the victim mother should be entitled to seek an equitable remedy in a civil court of law. Civil remedies have been applied in many other criminal contexts. This would enable women to obtain the additional financial support they would not have otherwise required, but for the perpetrator's commission of a violent crime that resulted in pregnancy. Ultimately, this solution weighs the competing interests of the state, the victim mother, and society at large, in order to reach a morally and practically sound result.

V. Conclusion

To conclude, a female victim of rape who decides to keep and raise her rape-conceived child should have the right to permanently terminate the perpetrator's parental rights in every respect. Allowing a man who fathered a child through rape to remain involved in the child's life contravenes the best interest of the child, re-victimizes the mother, and rewards the perpetrator for his violent crime. A criminal rape conviction should serve as *per se* evidence that the child was conceived as a result of rape.

Because of the low attrition rates in rape cases, however, a criminal conviction should not be a condition precedent of such termination of parental rights. In instances where the perpetrator is not charged, prosecuted, and convicted of the rape, the victim mother should nonetheless be entitled to sever ties with her rapist. The appropriate evidentiary standard for termination of a rapist's parental rights is "clear and convincing evidence," which is supported by the Supreme Court's jurisprudence and family law principles in general.

A non-biological parent adopting the child should not be a condition precedent for terminating a rapist's parental rights. In today's society, many children are successfully raised in single-parent households. If a non-biological parent does decide to adopt the child, resulting in the child having two parents, it should not make a difference whether that individual is a male or female. The law now recognizes that homosexual couples can create loving, supportive families, just as heterosexual couples do.

Finally, a perpetrator of rape should not be obligated to pay the victim child support upon termination of his parental rights. This does not, however, mean that the victim should be barred from obtaining the financial support she needs for her child through all legal mediums. Instead, the victim mother should be entitled to seek equitable remedies from the perpetrator in a civil court of law.