



Shauna Prewitt. Photo by Michael R. Schmidt

## Protected from further assault

In 13 states, a man who fathers a child through rape can ask for custody rights.

Shauna Prewitt wants to bring that number down to zero.

By Jamie Loo

**I**t didn't seem right.

When Shauna Prewitt entered Georgetown University Law Center in 2006, she raised a point with professors and others over something personal to her.

"Does it seem consistent with what we're learning about legal principles and constitutional rights that a rapist could have parental rights?" she asked.

"And the response that I was hearing over and over again was 'No, no, no — that

doesn't seem right, that doesn't seem consistent, that doesn't seem right.'"

Prewitt was close to the end of a nearly two-year custody battle with the man who she alleges sexually assaulted her. She became pregnant as a result of the attack and had a daughter.

At the time, her home state of Missouri did not have any laws that specifically addressed parental termination rights in cases where a child was conceived through rape.

In her research, Prewitt found that only 16 states had laws on this issue. Over time, she has become one of the country's leading advocates for women who become pregnant by sexual assault — and for their children.

Today, 30 states have some form of parental rights restrictions on alleged and convicted rapists to protect sexual assault victims and their children, and Congress passed the Rape Survivor Child Custody Act in June to encourage more states to do the same.

Prewitt, an associate at Skadden Arps Slate Meagher & Flom, was honored by The Chicago Bar Foundation with its Maurice Weigle Exceptional Young Lawyer award this past summer for her advocacy work.

### **A parent's fundamental right**

During her senior year at the University of Chicago, Prewitt said she was raped by someone she knew and found out she was pregnant a few months before graduation. She felt weak, afraid and completely dead after the attack.

"It was a lot of darkness. I felt like the light had gone out," she said. "But there was something at that same time that was very wondrous to me. This idea that this dead body was fostering and nurturing life. It felt like something to look forward to."

Less than a year after giving birth, Prewitt said her daughter's biological father petitioned for custody rights. Citing a confidential agreement, she declined to share details about the father's case. But the end result was that his parental rights were terminated.

With laws designed to protect sexual assault victims and children, Prewitt said it didn't make sense that an alleged rapist could exercise parental rights.

At Georgetown Law, Prewitt started researching the issue and got an article published in the *Georgetown Law Journal* in 2010. She started receiving invitations to speak in front of law student groups and other organizations soon after, which eventually led her to do broader systemic advocacy on the issue around the country.

The right to be a parent stems from the 14th Amendment, Prewitt said, and since it's a fundamental right, there have to be extraordinary circumstances in order to take it away.

As part of their legislative authority, states determine those circumstances and have included conditions such as child neglect, abuse or abandonment in its laws as grounds to terminate parental rights.

Prewitt said without such explicit legislative authorization, judges are left to determine alleged rapists' parental rights in a variety of areas such as custody, adoption, visitation, child support and inheritance.

The levels of restrictions in the 30 states that have these laws vary and a few are gender neutral. In some states, the law only applies to adoptive rights so that a woman

who conceives a child through rape doesn't have to notify and obtain consent from the biological father to do so.

Other states allow a complete termination of parental rights, which removes a father's name from the birth certificate.

Prewitt said she has also seen laws that terminate or restrict a father's visitation or physical custody rights but still include a father's name on the child's birth certificate and, in some states, allow a court to order the father to pay child support.

"He also might have other benefits of parenthood, such as perhaps grandparents' rights," she said. "Or if that child were to say pass away with an estate, he might have inheritance rights from that child, but that really varies among the states that have a restriction statute."

In 2014, Ohio passed a law that was partially inspired by the Ariel Castro case. The Cleveland man had kidnapped, imprisoned, raped and tortured three women in his home over a 10-year period and fathered a daughter with one of them, Amanda Berry. During Castro's trial in 2013, he asked the judge for visitation rights with the child. Ohio's law now allows for a termination of parental rights if the man was convicted or plead guilty to rape or sexual battery.

The Rape Abuse & Incest National Network (RAINN), an organization which works on education and policy issues to combat sexual violence, maintains a database of laws in each state. The 13 states that have not passed laws allowing a termination of parental rights of rapists are Alabama, Arizona, Georgia, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, New York, North Dakota, Rhode Island, Virginia and Wyoming. The District of Columbia also lacks a similar law.

Illinois passed a law that originally required a criminal sexual assault conviction in order to restrict a rapist's parental rights. It was amended in 2013 to include "clear and convincing evidence" of a rape conception to restrict these rights and includes provisions to allow women to decline child support obligations from the father.

The law — an amendment to the Illinois Parentage Act — also prohibits any family members of the father from petitioning for

custody or visitation rights without the consent of the child's mother. He is also not entitled to any inheritance from the child.

### **Evidentiary standards**

The legal distinction between a criminal sexual assault conviction and a clear and convincing evidence standard in these types of laws is significant to advocates.

RAINN senior policy attorney Patrick Fergusson said rape is the most underreported and underprosecuted serious crime in the U.S. In some cases, rapists try to cut deals in which they agree to abandon their custody petitions in exchange for a woman dropping her criminal case against him, Prewitt said.

"It's so essential because 98 percent of rapists are not convicted," Fergusson said. "To require conviction means that states are only helping 2 percent of survivors."

In a criminal case, prosecutors decide what types of charges to pursue, Prewitt said, and in the course of plea bargaining, a more serious charge of sexual assault could wind up being reduced.

She said some states have narrowly defined the required conviction standards, so even with a guilty verdict on a lesser sexual assault or abuse charge, women can't take their cases to court to terminate parental rights.

In a 2011 case, the 4th U.S. Circuit Court of Appeals overturned a North Carolina trial court decision and allowed a man who was convicted of attempted statutory rape to petition for visitation rights with the child born from that assault.

Timothy Scott Bobby, who is serving 10 years in prison for the crime, also asked for joint custody, a change of the baby's last name and visitation rights for his parents. The state law only prohibits those with first- or second-degree convictions from claiming parental rights.

Fergusson and Prewitt said the U.S. Supreme Court has used the clear and convincing evidence standard for termination of parental rights, which is another reason it should apply to state laws on this issue.

In *Santosky v. Kramer* (1982), the high court ruled that before a state can permanently revoke parental rights to a biological child, "due process requires that the state support its allegations by at least clear and convincing evidence."

But applying that standard in civil court alongside a criminal issue could be problematic. During its last legislative session, Maryland considered a bill to terminate parental rights of men who father children by rape using the clear and convincing standard.

The Maryland Office of the Public Defender testified in opposition to the bill. Ricardo Flores, government relations director for the office, said the office did not take a formal position on the clear and convincing standard but provided testimony on some technical and due process concerns in the bill.

The intersection between criminal court and family law tends to happen in abuse and neglect cases, he said, which involve conduct between a child and a mother or father. Flores said in a parental rights case for a man who has fathered a child through an alleged assault, the question of criminal conduct is between the mother and father.

The proposed Maryland bill would have allowed statements from a third party, such as a police officer or child protective services, Flores said, which would be hearsay since the assault would be presented as fact without an opportunity for cross-examination.

Notice of service for hearings is also different in civil law, he said, so if a father never receives the notice because of a change in address or other error, it's possible "that a person could be subject to termination of rights in absentia without that person ever stepping foot in court."

Flores said there's also no right to representation in a civil law proceeding. Maryland lawmakers proposed that a hearing take place within 30 days, which even with representation, Flores said, isn't much time to prepare for a parental rights termination case.

"Given the seriousness of this, we think it's important that someone have professional representation," he said.

By 2012, Prewitt had become somewhat accustomed to questions from state legislators that had little to do with parental rights.

Why would a raped woman want to raise a child conceived through this act? What kind of rapist would even want to exercise parental rights?

But when then-U.S. Rep. Todd Akin, a Republican from the St. Louis suburbs,

made his now infamous comments about "legitimate rape" in 2012, Prewitt was offended.

"If it's legitimate rape, the female body has ways to try to shut the whole thing down," Akin said during an interview on a St. Louis TV news show regarding his opposition to allowing abortion in cases of rape.

Prewitt wondered if other legislators would start speculating that women can't get pregnant from rape. Angry and upset that Akin's comments would hurt the cause, she immediately wrote a letter to dispel this myth quickly. The letter, "An Open Letter to Rep. Akin from a Woman Who Got Pregnant From Rape" was published on xoJane, an online magazine geared toward women's issues.

Initially, Prewitt thought that her comments would only reach fellow advocates. But within 20 minutes of its posting, the letter went viral, and she started receiving phone calls from rape survivors, national media outlets and state legislators from around the country.

Akin's comments turned out to be a catalyst. Prewitt estimates that 19 states had laws at that time.

That number would quickly increase to 30, and some of those prior states revisited and strengthened their laws over the past three years.

But that doesn't mean the road to getting these laws passed was easy.

The issue of children conceived through rape has usually been framed in the context of abortion rights, Prewitt said, and the political rhetoric around it can be problematic because it assumes that all women are forced to relive the trauma of their rape by giving birth.

While Prewitt said she understands some women may feel that way, she didn't personally experience this and has met many other women who also chose to raise their children. One study found that about a third of women who conceive through rape decide to give birth.

"I think that it's important to remember, just as a woman's response to the rape experience can vary widely, a woman's response to a pregnancy from a rape can also vary widely," she said. "It's important that we have a voice that can represent a different viewpoint or different kind of feeling than what is considered to be,

rightly or wrongly, considered to be the norm."

Prewitt said one societal stigma around rape that comes up frequently in opposition to these laws is this idea that a woman will falsely "cry rape in order to strip custody rights away from good men." But the laws require clear and convincing evidence of rape conception which is a heavy burden to meet, she said, and since parental rights are considered fundamental rights, judges don't take these decisions lightly. There's also an argument that a woman would falsely report the rape to terminate parental rights out of vengeance and still receive child support benefits. It's illogical, Prewitt said, because in most states once those rights are dissolved the child support obligations are also eliminated.

Although there is resistance in some states, Prewitt said the cause has received bipartisan support with unanimous or near-unanimous votes in many of the states that have passed such laws.

When she spoke with Republican and Democratic legislators, she said many of them were influenced by whether they felt it was a pro-life or a pro-choice issue, which also drew in advocates on both sides of that debate.

Prewitt has found herself testifying before state legislatures with groups like Planned Parenthood and Catholic organizations as allies.

"There's usually a comment made by one or the other of them that in the history of being in this state, we've never come together on an issue like this, but we're both in support of this because it's the right thing to do," she said.

In late 2012 or early 2013, the issue got the attention of U.S. Rep. Debbie Wasserman Schultz of Florida — the current chairwoman of the Democratic National Committee — who reached out to Prewitt and RAINN about creating a federal law to address this issue.

The Rape Survivor Child Custody Act was included as an amendment to the Justice for Victims of Trafficking Act passed in April.

The federal law provides a \$5 million funding pool annually through 2020 and is available to states with laws that allow for a termination of parental rights of alleged rapists based on the clear and convincing

evidence standard. The initial funding will last for one year, and states can apply for renewal each year.

With current laws, Fergusson said that 10 states would be eligible to receive this funding, which would go toward programs that help rape survivors and their children.

Prewitt said she hopes the federal law will incentivize states to address this issue and adopt the clear and convincing evidence standard.

The laws will only be effective if women

can access legal help, Prewitt said, and she wants to see more pro bono resources to help women who conceived from rape with parental rights termination cases.

Prewitt created a volunteer organization, Hope After Rape Conception, for women with this shared experience. This issue had been in the shadows for a long time, she said, partially because of closed court proceedings in family or juvenile courts and societal attitudes around rape and raising a rapist's child.

Many women Prewitt has met through her advocacy work said they felt alone and didn't realize other women had gone through this.

"I think that's been the best thing actually that's come out of this," she said. "It's that finally people can connect with one another and see that this has happened and can connect and discuss the struggles that they deal with because of what has happened." ■

**[jloo@lbpc.com](mailto:jloo@lbpc.com)**