

# A Parental Lament

## Dear State of Arizona:

I am writing this letter to thank you for the amendment to A.R.S. § 8-223, which grants a parent the right to a jury trial in a proceeding to terminate parental rights.

My husband and I are parents of three children who were removed from our home by the Arizona Department of Economic Security (Child Protective Services) when my last child was born drug-addicted. My husband is the father of one of my children and is in the Arizona State Prison serving a nine-year sentence for selling drugs and probation violations from other charges. The fathers of my other two children, ages 3 and 5, are unknown because, frankly, I had sex with so many men for drugs that I have no idea who the fathers are. I have relied on government programs for our support. I cannot rely on my family because it is totally dysfunctional, and they have a history of criminal behavior, alcoholism and domestic violence.

When the State removed my children, they were put in a foster home together. I have heard the children are doing fine and that they are healthy and happy in the foster home. I was also told the foster family wants to adopt my children and give them a permanent safe and stable life. I have been told that the 3- and 5-year-old were malnourished, had dental problems and showed symptoms of abuse and neglect when they were removed. I admit I have had some boyfriends who resented my children and might have been “too harsh” on them, but I do the best I can. I love my children. No one has the right to take them away from me. My husband and I will fight with every means we have available to us to see that our rights are not terminated. There will be no adoption of my children if I can help it. That’s why I want to thank you for the right to a jury trial.

Up until December 19, 2003, termination trials in Arizona were tried before judges experienced in juvenile matters. These judges had lived with the cases from the very beginning and reviewed the continuing reports that were required to be filed by the case manager. The judges were familiar with the psychological reports,

reports of drug treatment and testing. They knew exactly what services were being offered to parents and how well they were complying with them. Judges were monitoring the plans for family reunification and, when there was noncompliance, they were ordering the Attorney General to file motions to terminate parental rights after a year had passed so that the children could have an opportunity for permanency in their lives by being available for adoption, permanent guardianship or some other alternative living arrangement.

Naturally, I am not interested in any of these things happening with MY children. They are MINE. I will raise them as I want to.

After the Attorney General filed a motion to terminate my parental rights, those of my husband and unknown fathers, after a year of my not complying with services offered to address my parenting skills and drug abuse, I found out that I could ask for a jury trial.

Both my husband and I have asked for a jury trial. Our court-appointed attorneys have told us that even though grounds for termination would be relatively easy to prove in my case, we have a chance of convincing at least three jurors (which is all we need) that the efforts at family reunification were not “diligent” enough, and that, even if they were, it would not be in the children’s “best interests” to terminate the relationship so they could be adopted (A.R.S. § 8-533).

I didn’t know what an advantage this gave me—but I do now!

I learned that Rule 66 of the Juvenile Court requires the “adjudication termination hearing” to be held “no later than ninety days after the permanency hearing.” This rule, of course, never contemplated “jury trials” when drafted. Now the judges have to set the jury trials within the same periods. This was great because I didn’t even have to request a jury trial until the Initial Termination Hearing, which must be set within 30 days of the Permanency Hearing (Rule 65). This means I could force a jury trial within 60 days (except for the court’s authority to extend one time for

an additional 30 days under Rule 66).

I found that the office of the Attorney General is greatly understaffed and overworked, and that there is a lack of jury trial experience. Now that the trial will not be to a judge, they will have to prepare for a jury trial and clear their calendars of everything else for the week I estimate this trial will take. Of course, the same is true with my court-appointed attorney and my husband’s separate court-appointed attorney. There is also a guardian ad litem appointed for my children. (I understand that in some cases there are separate attorneys appointed for the children in addition to a GAL.) The Attorney General won’t be able to rely on reports from psychologists or psychiatrists in my case. They will have to appear and testify. In addition, I have asked my lawyer to object to the jury seeing anything that is “hearsay” in any of the reports and to ask the court that such information



The following is a fictitious letter written by Judge Stephen A. Gerst to demonstrate some of the issues that have arisen with the right to jury trial in parental termination cases in Arizona. Nothing in the following letter is based on any pending case or identified parties.



either be redacted or the people who made the statements be called to testify.

Wow! You should have seen what went on at the Pretrial Conference for the purpose of setting the trial. We asked for our jury trials at the Initial Severance Hearing, but the judge who has been in charge of our cases all along told us she would not be setting the trial or trying the case. The reason given was that the judge's calendars were full and there was no clear week within the time periods of the rules. (I was happy; I didn't want the same judge who knew my file, and who ordered the motion for termination to be filed, to be the judge who tried my case anyway.) In addition, the juvenile court facilities in Maricopa County are not set up for jury trials. There is no place in the courtrooms for juries and no jury rooms. Our cases were sent downtown to a new judge unfamiliar with our cases to set for trial and to try the case. By this time,

even more time had passed and the trial had not even been set yet.

I watched as all of the attorneys, including my own and the guardian ad litem, asked for a trial date far past the time periods mandated by the Rule. No one wanted to object to its violation because their calendars were busy, they needed time to prepare, and there were all kinds of scheduling problems with witnesses. I learned that these same problems did not exist with a bench trial because a judge could be flexible with time and more accommodating. Also, trials to the bench were much shorter than jury trials.

I was fine with the judge's violation of the strict time periods of Rule 66. I'm not interested in "permanency" for my children being established within any time periods. I am only interested in MY permanent desires. Besides, I just might use the "extra time" to start some services so my lawyer can argue that, even though a bit late, I am "trying" to be a good mother and demonstrate that I should not lose my kids.

Another interesting aspect is that my incarcerated husband may be appearing throughout the jury trial telephonically if he cannot be brought here. That should be fun—day after day he and a guard sitting next to a telephone. If he testifies, the jury's assessment of his credibility and demeanor will be telephonic (*see John C. v. Sargeant*, 90 P.3d 781 (Ariz. Ct. App. 2004)).

Now here is my secret. I really have no intention of taking my case to a jury trial in the first place. I don't want a jury to hear everything about me as a mother. But this jury trial "right" has given me great leverage for some kind of settlement or accommodation—even if it is for delay and more services. The longer the delay, the more likely something will happen that will make it more difficult to take my children. Maybe the foster parents who want to adopt will lose hope, or the kids will "act out" with frustration. More likely, though, the attorneys will leave their offices and more delays will occur. In the meantime, I will stay in the system and continue to

"visit" my children and pick and choose among services I want, not those somebody else claims I need.

I heard I am not far off from what has happened in almost every other case. From December 19, 2003, through December 19, 2004, many cases were set for trial; however, there have been only two jury trials in Maricopa County in the entire first year since the statute allowed the right to a jury trial. There were a handful more in Pima County, and none anywhere else in the state. Boy, this law is sure working well! I hope the legislature doesn't let this law sunset after the three-year period provided when it was enacted.

The jury trial cases that didn't go as scheduled were due to continuances, last-minute waivers of jury trial, parents not showing up and being defaulted, or the cases settling at the last moment. (There have even been several instances where the Attorney General has withdrawn the motion to terminate because a continuance would not be granted.) This has left the judges and attorneys with empty calendars for the week or more the cases would have been in trial.

This is why I want to thank you. My right to a jury trial, even though not constitutionally mandated, has really worked well for me because it has been bad for the system. I must admit as well that it has been injurious and harmful to children who are waiting for a chance for permanency after parents have had more than a year to change the circumstances that caused the removal in the first place. I don't care about all that. All I care about is me and my rights to my children.

Thank you, State of Arizona. 

**Hon. Stephen A. Gerst** recently retired from the Superior Court bench of Maricopa County after serving more than 21 years. His last assignment was as a juvenile judge handling parent termination jury trials. Judge Gerst has accepted a faculty position with Phoenix International School of Law, located in Scottsdale, Ariz.