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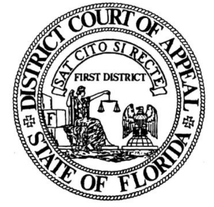

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
CASE NO. 1D12-4377

PAMELA SPIVEY, as Personal Representative
of the Estate of NICKLAUS ELLISON,
Deceased,

Appellant,

Lt. Case No.: 2012-CA-003018

v.

TEEN CHALLENGE OF FLORIDA, INC.,

Appellee.
_______________________________________/

ON APPEAL FROM THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This appeal arises from an order compelling arbitration under the Rules of Procedure for Christian Conciliation (Rules or Christian Conciliation Rules). Appellee, Teen Challenge of Florida, Inc., operates residential facilities that help young men overcome addiction through the application of biblical principles. (App. 2, 16.) Nicklaus Ellison died in August 2011, just one month after he allegedly entered Teen Challenge's Jacksonville program. (App. 3.) Appellant, Pamela Spivey (Plaintiff), the decedent's mother and the estate's personal representative, sued Teen Challenge (Defendant) for wrongful death. (App. 1-5.) On Defendant's motion, the trial court compelled Plaintiff to mediate and arbitrate this secular dispute under the Christian Conciliation Rules based on an agreement executed by the decedent in March 2011. (App. 35-42.)

In this appeal, we contend that: (i) the trial court improperly resolved disputed factual issues without an evidentiary hearing regarding whether a valid arbitration agreement existed when the decedent died; and (ii) the agreement was unenforceable under the Due Process and Religion Clauses of the federal and state constitutions and under public policy; *Infra*, Argument, at 23-47. We first discuss the course of proceedings below and set forth the factual disputes relevant to our first argument. *Infra*, Part A, at 2-10. Then, we set forth the language of the arbitration agreement and the Christian Conciliation Rules relevant to our second

argument. *Infra*, Part B, at 10-14.

A. Course of Proceedings in the Trial Court

1. Facts and Arguments Presented to the Trial Court Before and During the Non-Evidentiary Hearing

It was undisputed in the trial court that the decedent signed an arbitration agreement in March 2011. (App. 11, 79, 85.) What was disputed was whether or not the agreement was terminated in May 2011 or was still in effect when the decedent died in August 2011.

From Plaintiff's perspective, the arbitration agreement was terminated when the decedent was discharged from Teen Challenge's Pensacola program in May 2011. No new arbitration agreement or renewal of the previous arbitration agreement was signed by the decedent upon his re-entry to Teen Challenge later in the summer of 2011. (App. 82, 85, 91-94, 19, 30.) Therefore, Plaintiff contended, no arbitration agreement existed that governed the decedent's alleged wrongful death in August 2011. (App. 82, 62-64.) To support these inferences, Plaintiff filed her own affidavit. (App. 30.) She attested that the decedent was discharged from Teen Challenge Pensacola on May 28, 2011 and that he was given all his personal belongings and returned to Knoxville, Tennessee, via bus on May 30, 2011. (App. 30.) Plaintiff also filed a "Teen Challenge—Confidential—Discharge/Release Report" for the decedent. (App. 32-34.) The report indicated that the decedent entered Teen Challenge's Jacksonville program for the first time

on July 19, 2011 and was involuntarily discharged one month later on August 19, 2011. (App. 34.)

From Defendant's perspective, it could be inferred that the arbitration agreement continued to be in effect when the decedent died in August 2011. To support this inference, Defendant provided the affidavit of the pastor and executive director of the Teen Challenge Jacksonville, Johnathan Taylor. (App. 16-18.) He attested that, on July 18, 2011, he received a call from Teen Challenge Pensacola advising that the decedent had violated the rules in Pensacola and that his mother was requesting that he be transferred to Jacksonville rather than be expelled from Teen Challenge. (App. 17.) Mr. Taylor further attested that the decedent was not asked to re-complete the paperwork because of his status as a transfer. (App. 17.) Teen Challenge's file on the decedent, including the March 2011 arbitration agreements, was forwarded to the Jacksonville facility. (App. 17.)

The trial court held a half-hour non-evidentiary hearing on the motion to compel arbitration. (App. 72-106.) At that hearing, Plaintiff argued, among other things, that there was no valid arbitration agreement in existence at the time of decedent's death. (App. 82, 91-94.) Plaintiff admitted that the decedent signed the arbitration agreement in March 2011, but argued that the decedent was discharged from Teen Challenge Pensacola two months later as shown by

Plaintiff's affidavit. (App. 85-86.)[1] Plaintiff's counsel also represented to the trial judge that the decedent was incarcerated in Tennessee from June 2, 2011 to June 20, 2011, after being discharged from Teen Challenge Pensacola. (App. 86, 27.)

Plaintiff's counsel then explained that the decedent was re-admitted to Teen Challenge Pensacola in lieu of further jail time after his June 2011 incarceration, but no documentation was signed when he was re-admitted. (App. 87.)[2] The decedent transferred to Jacksonville on July 19, 2011 and no documentation was signed when he was transferred. (App. 88-89, 17.) Plaintiff's counsel argued that the arbitration agreement did not constitute a lifetime perpetual waiver of any claims against Defendant that might arise in the future, even after being discharged from the program. (App. 91-94.)

Defendant's counsel had said an evidentiary hearing was unnecessary. (App. 76.) However, in response to Plaintiff's argument, Defendant's counsel said that he could submit an affidavit that would show that the decedent was "suspended or discharged temporarily, at which point he apparently did go to jail." (App. 100.) Defendant's counsel represented that the decedent was never expelled or terminated from the program and was not required to pay his initiation fee again when he came back to the program. (App. 100.) Defendant's counsel further

[1] The transcript reflects that trial counsel referred to May 2012; however, it is clear that counsel meant to refer to May 2011.

[2] The transcript reflects that trial counsel referred to June 2012; however, it is clear that counsel meant to refer to June 2011.

represented that the decedent was about to be expelled again after he was readmitted in June 2011, but after his mother begged, he was transferred to Jacksonville. (App. 100-01.) Defendant's counsel also represented that the decedent was continually involved in Defendant's program even though he had some "bumps in the road along the way where he was temporarily suspended, he was then readmitted and then transferred, and the events that are the subject of this lawsuit occurred while he was in the program." (App. 101.)

Finally, at the hearing, Plaintiff's counsel argued that the arbitration agreement was unenforceable and violated due process, and in so arguing, she relied on the provision in the Rules stating that the Bible would be the "supreme authority" governing the arbitration process. (App. 97-99.) Plaintiff's counsel cited *Higher Ground Worship Center, Inc. v. Arks, Inc.* (App. 98); No. 1:11-cv-00077, 2011 WL 4738651 (D. Idaho 2011). In that case, a federal district court commented on this same provision in the Rules by stating: "the Court is troubled by such a provision's effect of requiring a now-unwilling participant to engage in an arbitration process which may deprive them of due process and access to secular law." *Id.* at *4 n.4; (App. 98-99.)

2. The Trial Court's Order Compelling Arbitration

The trial court granted the motion to compel arbitration. (App. 35-41.) With regard to whether a valid arbitration agreement existed when the decedent

died, the court found that the decedent's treatment program was "ongoing" and "under the same terms and conditions that the parties agreed to at the time of the signing of the [March 2011] agreement." (App. 39.) The court also found:

> The program maintained his enrollment even though he was on occasions suspended which is apparently not uncommon in that type of program. Furthermore, he apparently voluntarily consented to being transferred from Pensacola to Jacksonville as a part of the same ongoing program. The agreement contemplated that it would be at least a year long program . . . .
>
> From what the Court has to go on, it appears the intent of the parties was that this agreement would last throughout his enrollment into the Teen Challenge Program which continued by his acquiescence from Pensacola on through to Jacksonville.

(App. 39-40.)

On the issue of whether the arbitration agreement was void for public policy, the trial court held that the religious arbitration process in this case did not deprive a participant of due process or access to secular law and it did not implicate the personal representative's First Amendment rights. (App. 41.)

3. Plaintiff's Motion for Reconsideration and Defendant's Response

Plaintiff moved for reconsideration of the trial court's order compelling arbitration and requested an evidentiary hearing on whether there was a valid agreement to arbitrate in effect. (App. 59.) Plaintiff argued that the trial court erred in resolving, without an evidentiary hearing, the factual dispute regarding whether the arbitration agreement was in effect. (App. 62-64.)

Plaintiff's motion for reconsideration also argued that the trial court erred because: (1) the arbitration agreement's selection of the Bible as the supreme authority was an entanglement with religion that violated public policy; (2) the trial court's enforcement of the arbitration agreement violated the First Amendment by requiring that Plaintiff pray; and (3) by compelling Plaintiff to religious arbitration, the trial court limited Plaintiff's right to freely exercise her religion, including her right to change her religion. (App. 64-70.)

In response to the First Amendment and public policy arguments, Defendant conceded that "the core dispute" in this case was non-religious in nature (a wrongful death claim for negligence). (App. 245.) Defendant argued, however, that the arbitration agreement was enforceable because both Plaintiff and the decedent knew the Christian nature of the program and because decedent presumably agreed to arbitrate under the Christian Conciliation Rules. (App. 246 (citing *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101 (D. Colo. 1999)).)

Defendant also ridiculed Plaintiff's First Amendment and public policy arguments. Specifically, it argued: "It is astounding that Plaintiff—who was deeply involved in her son's participation in Defendant's Christian program, and even 'begged' the Defendant's Christian program to take him back when he had violated the rules—should now object to the arbitration agreement because it

supposedly requires her to pray." (App. 246.) Moreover, Defendant asserted: "The argument that Plaintiff's religious rights *might* be violated *at some point,* in the highly speculative and unlikely event of her conversion to some other religion between now and the date of arbitration, barely merits any response at all." (App. 246.) Defendant argued that, if the prayer requirements found in the Rules were unconstitutional, the trial court should hold those requirements to be non-essential to the agreement and sever them from the other Rules. (App. 246.)

Both parties submitted to the trial court additional documents relevant to whether a valid arbitration agreement existed when the decedent died. Defendant submitted additional affidavits from Scott Lipinsky, business director for Teen Challenge Pensacola, and Jonathan Deric Cain, a Teen Challenge intake coordinator. (App. 228-38, 239-42, 207-11.) Mr. Lipinsky attested that participants who violate the program rules are generally suspended or dismissed, meaning they are "temporarily precluded from participation." (App. 252.) The term "discharge," Mr. Lipinsky attested, does not mean the participant is permanently terminated or expelled from the program. (App. 252.) According to Mr. Lipinsky, the decedent violated the program rules, resulting in his suspension or dismissal from the program in May 2011; however, the decedent was allowed to return to the program when his suspension was lifted in June 2011. (App. 252.)

Mr. Cain attested that, when a participant is expelled or terminated from the program, the routine practice is that the participant must re-apply, pay another induction fee, and re-complete the paperwork which includes an arbitration agreement. (App. 222.) Because the decedent was not required to re-apply after his temporary suspension or dismissal, Mr. Cain attested that the decedent did not re-complete the arbitration agreement and other paperwork. (App. 222.)

Plaintiff submitted Defendant's student guidelines and the decedent's file with Defendant. (App. 112-205.) The decedent's file noted that he was legally mandated to enroll in Defendant's program. (App. 168.) The student entry agreement signed by the decedent stated that completion of the Teen Challenge program required a minimum enrollment of one year. (App. 194.) Similarly, the student guidelines estimated the period of time for each phase of the program, and collectively, these estimated periods lasted at least one year and could take more than eighteen months. (App. 125.) However, the student guidelines and other admission paperwork indicated that the decedent could be terminated, dismissed, or discharged from the program in less than a year for many reasons. (App. 127, 138-39, 181, 188, 194.) For example, the student guidelines provided that possession of narcotics of any kind was grounds for immediate dismissal. (App. 127, 181.) They also provided that a student terminated from the program needed to take with him all his personal possessions. (App. 138-39.) There was also a

one-month waiting period before a terminated student could be considered for re-admission. (App. 139, 188.) If a student was re-admitted, he "start[ed] the program over without credit for previous time spent at this, or any other Teen Challenge." (App. 139.)

4. The Trial Court's Order Denying the Motion for Reconsideration

The trial court denied Plaintiff's motion for reconsideration. It found that, "[b]ased upon the affidavits on file at the time of the hearing," no "substantial issue [was] raised" as to whether the March 2011 arbitration agreement was still in effect when the decedent died in August 2011. (App. 255-56.) The trial court concluded that Plaintiff's affidavit—which referred to the decedent's discharge from Teen Challenge in May—did not create a factual issue as to whether the decedent was bound by the arbitration agreement when he died because "at his request he later returned to the Teen Challenge Pensacola program before being transferred to the Jacksonville program." (App. 255-56.)

Plaintiff timely appealed the order compelling arbitration and the order denying reconsideration. (App. 262-63.)

B. The Provisions of the Arbitration Agreement and the Christian Conciliation Rules

The arbitration agreement was titled "Teen Challenge's Christian Conciliation and Arbitration Agreement." (App. 11, 51.) It provided that the parties accepted "the Bible as the Inspired Word of God" and that they agreed to

arbitrate under specified biblical verses and the Christian Conciliation Rules:

> THE UNDERSIGNED PARTIES (Teen Challenge and the enrolling student) enter into this Agreement as an essential condition of enrollment Into the Teen Challenge Program.
>
> The undersigned parties accept the Bible as the Inspired Word of God. They believe that God desires that they resolve their disputes with one another within the Church and that they be reconciled In their relationships In accordance with the principles stated in First Corinthians 6:1-8, Matthew 5:23-24, and Matthew 18:15-20.[[3]]
>
> Accordingly, the undersigned parties hereby agree that, if any dispute of controversy that arise out of, or is related to this agreement is not resolved in private meetings between the parties pursuant to Matthew 5:23-24 and 18:15, then the dispute or controversy will be settled by biblically based mediation and, if necessary, legally binding arbitration, in accordance with the Rule of Procedure for Christian Conciliation (rules) of the Association of Christian Conciliation Services (current rules available and incorporated by this reference). The undersigned parties agree that these methods shall be the sole remedy for any dispute of controversy between them and, to the full extent permitted by applicable law, expressly waive their right to file a lawsuit in any civil court against one another for such disputes, except to enforce an arbitration decision, or to enforce this dispute resolution agreement. Any mediated agreement or arbitrated decision hereunder shall be final and binding, and fully enforceable according to its terms in any court of competent jurisdiction.

(App. 11.)

The trial court attached the Christian Conciliation Rules to the order compelling arbitration. (App. 49-58.) According to the Rules, the purpose of the Christian conciliation process is to "glorify God" by resolving disputes according to principles of "Christian conciliation," which is a "biblically-based" method for

[3] Copies of these Bible verses are located in the appendix. (App. 275-78.)

dispute resolution. (App. 50, ¶¶ 1 & 3.B.) The "Application of Law" provision states, "Conciliators shall take into consideration any state, federal, or local laws that the parties bring to their attention, but the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process." (App. 51, ¶ 4.) The "conciliators" (mediators and arbitrators (App. 51, ¶ 3.C)) are required to "affirm" a Christian statement of faith. (App. 52, ¶ 10.) The administrator or mediator may biblically counsel a party, teach her "relevant biblical principles," and assign her "homework" to facilitate the mediation process. (App. 51, 55, ¶¶ 5.B, 22.) The Rules do not state that a party may decline this biblical counseling, teaching, or homework.

While parties have the right to be represented by independent legal counsel throughout the conciliation process, "the Administrator may disqualify an attorney from participating in conciliation, provided his or her client is given reasonable time to secure another attorney." (App. 53, ¶ 13 A., D.) "Attorneys will be expected to respect the conciliatory process and avoid unnecessary advocacy." (App. 53, ¶ 13 E.)

The Rules provide that all communications made in the conciliation process are strictly confidential and inadmissible in court, except that the administrator may divulge information under certain circumstances. (App. 54, ¶ 16.) One such

circumstance is when the administrator deems it appropriate to discuss a case with church leaders of parties who profess to be Christians. (App. 54, ¶ 16.)

The Rules explicitly provide for "Church Involvement" and authorize church leaders to take "whatever steps" they deem necessary to resolve the dispute:

> Unless agreed otherwise, the Administrator and the conciliators may discuss a case with the church leaders of parties who profess to be Christians. If a party who professes to be a Christian is unwilling to cooperate with the conciliation process or refuses to abide by an agreement reached during mediation, an advisory opinion, or an arbitration decision, the Administrator or the other parties may report the matter to the leaders of that person's church and request that they actively participate in resolving the dispute. If a church chooses to become actively involved, it may, at its discretion, review what has transpired during conciliation, obtain such additional information as it deems to be helpful, and take whatever steps it deems necessary to facilitate reconciliation and promote a biblical resolution of the dispute (see Matt. 18:15-20). The Administrator may disclose to the church any information that may have a bearing on its investigation or deliberations.

(App. 54, ¶ 17.) The Rules state the transition from mediation to arbitration "shall take place when either a majority of the mediators or all of the parties agree that neither mediation *nor church involvement* is likely to resolve the outstanding issues of the dispute." (App. 55, ¶ 24.B (emphasis added).)

Mediation and arbitration proceedings normally begin with an opening prayer and end with closing comments and prayer. (App. 55, 57, ¶¶ 22, 34.) The arbitrators may request or consider "Legal or Scriptural Briefs" that set forth the parties' understandings of the legal, factual, or scriptural issues. (App. 57, ¶ 38.)

The arbitrators may grant "scriptural" remedies and relief. (App. 57, ¶ 40.C.) The "Conflict of Rules" provision states, "Should these Rules vary from state or federal arbitration statutes, *these Rules shall control* except where the state or federal rules specifically indicate that they may not be superseded." (App. 58, ¶ 42) (emphasis added). "The arbitration decision is final and cannot be reconsidered or appealed except as provided by [a request for reconsideration under the Rules] and/or civil law." (App. 58, ¶ 40.G.)

SUMMARY OF ARGUMENT

This appeal presents two issues. The first issue concerns a settled principle of procedure: courts may not find facts without an evidentiary hearing. The second issue concerns a settled principle of constitutional law applied in a new context: a government (including its judicial branch) may not compel the exercise of religion in any forum, whether at a place of worship or in arbitration, and it cannot inhibit an individual's right to change her religious mind. If this Court agrees with Plaintiff on the first issue, then it need not decide (for now) the second issue; it can simply remand for an evidentiary hearing. If the Court disagrees with Plaintiff on the first issue, then it must decide the second issue.

On the first issue, a court may compel arbitration of a dispute only if a party proves an arbitration agreement existed. No one disputes that the decedent: (i) signed an arbitration agreement in March 2011; (ii) departed the program in late

May 2011; (iii) later returned to the program and transferred to Jacksonville; and (iv) did not sign a new arbitration agreement when he returned to the program. But the parties do dispute: (i) the nature of the decedent's departure in May 2011; (ii) the effect that the departure had on the parties' contractual relationship; and (iii) whether, by not entering into a new agreement upon the decedent's return to the program, an arbitration agreement still existed when the decedent died.

Plaintiff contends that the May 2011 departure was a discharge or dismissal, resulting in a termination of the parties' contract. Plaintiff further contends that she cannot be bound to arbitrate any disputes arising out of the decedent's second stint in the program because no new arbitration agreement was executed upon or after his return to the program. On the hand, Defendant quarrels with Plaintiff's characterization of the decedent's May 2011 departure. It contends that it merely "suspended" the decedent in May 2011. Therefore, Defendant contends, the March 2011 agreement remained in effect when the decedent's "suspension" was lifted and he later returned to the program, and no new agreement was required to bind the decedent or Plaintiff to arbitrate. These disputes center on factual issues— to wit, what occurred when the decedent left in May 2011, what occurred when the decedent later returned to the program, and what mutual understandings were manifested—that should have been determined at an evidentiary hearing.

On the second issue, the trial court violated the Due Process and Religion Clauses of our federal and statute constitutions, as well as public policy, when it compelled Plaintiff to participate in proceedings governed by the Christian Conciliation Rules. The Religion Clauses forbid the government (including the judicial branch) from coercing or compelling individuals to adhere to religious principles and practices like those contained in the Rules. The trial court unconstitutionally compelled Plaintiff to exercise religion because the Rules require, among other things, that: (i) God be glorified; (ii) the Bible be the "supreme authority"; (iii) the parties undergo, when directed, biblical counseling and teaching; and (iv) the parties' church leaders, if invited by someone other than the parties, take whatever steps they deem necessary to resolve the dispute.

The decedent's prior voluntary agreement to follow the Rules' religious principles and practices is inconsequential. Enforcement of a religious arbitration agreement to resolve a secular dispute violates public policy and the Religion Clauses. It violates one's freedom of conscience and one's right to change one's religious mind. These rights mean that courts cannot compel an individual to adhere to religious principles and practices even if the individual previously agreed to follow such principles and practices.

Finally, cases enforcing religious arbitration agreement are either distinguishable or not persuasive. Courts in those cases failed to recognize the

constitutional limitation on their own judicial power. That limitation prohibits courts from compelling the exercise of religion or the adherence to religious principles or practices. By compelling Plaintiff to comply with the Christian Conciliation Rules to resolve her secular dispute with Defendant, the trial court disregarded and violated this constitutional limitation on its power. Accordingly, its order compelling arbitration under the Rules must be reversed.

ARGUMENT

ISSUE #1: WHETHER THE TRIAL COURT IMPROPERLY RESOLVED A DISPUTED FACTUAL ISSUE WITHOUT AN EVIDENTIARY HEARING RELATING TO THE EXISTENCE OF AN ARBITRATION AGREEMENT AT THE TIME OF THE DECEDENT'S DEATH.

Standard of Review. When a trial court denies an evidentiary hearing on whether a valid arbitration agreement exists, its decision denying the hearing is reviewed *de novo*. *See Rowe Enters. LLC v. Int'l Sys. & Elecs. Corp.*, 932 So. 2d 537, 539-42 (Fla. 1st DCA 2006) (reviewing *de novo* trial court's decision not to hold evidentiary hearing on whether a valid arbitration agreement existed).

Merits. A factual dispute was presented to the trial court as to whether a valid arbitration agreement existed when the decedent died in August 2011. Plaintiff contended that the arbitration agreement ended when the decedent was discharged from the program in May 2011. Defendant contended that the agreement remained in effect when the decedent was re-admitted in June 2011. This factual dispute should have been resolved only after an evidentiary hearing.

The Florida Arbitration Code provides that "[i]f the court shall find that a substantial issue is raised as to the making of the [arbitration] agreement or provision, it shall summarily hear and determine the issue and, according to its determination, shall grant or deny the application."[4] § 682.03(1), Fla. Stat. "It is clear that, pursuant to section 682.03(1) of the Florida Arbitration Code, when a factual dispute . . . exists, upon request, the trial court must hold an expedited evidentiary hearing and determine whether a valid agreement to arbitrate exists." *Rowe Enters.*, 932 So. 2d at 541-42; *see also FL-Carrollwood Care Center, LLC v. Estate of Gordon ex. Rel.*, 34 So. 3d 804, 806 (Fla. 2d DCA 2010) (holding it was error for the trial court to make a finding that one party lacked capacity to contract based on documentary evidence without holding a full evidentiary hearing); *Tandem Health Care of St. Petersburg v. Whitney*, 897 So. 2d 531, 533 (Fla. 2d DCA 2005) (holding that, if the facts relating to a motion to compel arbitration are disputed, the trial court is required to hold an evidentiary hearing).

There are four ways a party may demonstrate a disputed factual issue requires an evidentiary hearing: (1) counsel's arguments at a non-evidentiary hearing; (2) a written response in opposition to arbitration; (3) affidavits; and (4) documents furnished by counsel. *Linden v. Auto Trend, Inc.*, 923 So. 2d 1281,

[4] Though the parties have litigated this dispute under the Florida Arbitration Code, the result would be no different under the Federal Arbitration Act. *See Rowe Enters.*, 932 So. 2d at 539-42 (noting that the requirement for an evidentiary hearing is essentially the same under both state and federal law).

1283 (Fla. 4th DCA 2006) (citations omitted). In this case, a disputed factual issue regarding the existence of the agreement was raised in all four ways. First, Plaintiff argued at the hearing there was no arbitration agreement in existence that would govern the decedent's death. (App. 82, 85-86.) Second, Plaintiff filed a motion for reconsideration raising the disputed issue of fact and requesting an evidentiary hearing (App. 62-64); this was functionally the equivalent of a written response to the motion to compel arbitration.[5] Third, Plaintiff filed her own affidavit. (App. 30.) Fourth and finally, Plaintiff's counsel provided documents to the trial court, including Defendant's response to requests for production, Defendant's discharge report for the decedent, the decedent's file with Teen Challenge, and the Teen Challenge student guidelines. (App. 11, 19, 34, 49-58, 123-217.)

Here, the parties disputed whether the arbitration agreement, signed in March 2011, continued to be in effect after May 2011. Specifically, the parties disputed whether or not the decedent had been terminated from the program when he returned to Tennessee in May 2011. Plaintiff contended that, if this termination did occur, it also terminated the arbitration agreement. (App. 82, 91-94.)

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[5] This Court has held that a party may preserve an argument for consideration on appeal through a motion for reconsideration of a non-final order. *Altee v. Duval County School Board*, 990 So. 2d 1124, 1129 (Fla. 1st DCA 2008).

To support her contentions, Plaintiff attested in her affidavit that the decedent was discharged in May 2011 and returned to Tennessee. (App. 30.) To purportedly rebut Plaintiff's contentions, Mr. Taylor in his affidavit attested that the decedent was continuously enrolled in the program from July 18, 2011 until he was transferred to Jacksonville. (App. 17.) But he did not attest that the decedent was continuously enrolled in the program *after his discharge in May 2011*. (App. 17.) The trial court implicitly acknowledged the need for further evaluation of this evidence when it stated in its order: "*From what the Court has to go on*, it *appears* the intent of the parties was that this agreement would last throughout his enrollment into the Teen Challenge Program which continued by his acquiescence from Pensacola on through to Jacksonville." (App. 40) (emphasis added).

Plaintiff could have further developed the facts argued by her counsel if the trial court had granted Plaintiff the requested evidentiary hearing—such as the manifest intent of the parties at the time the contract was signed, decedent's departure from the program in May 2011, and his June 2011 incarceration in Tennessee—that would have demonstrated that the agreement ended before the decedent's death in August 2011. Consequently, the trial court erred by failing to hold an evidentiary hearing to resolve the factual dispute regarding whether the arbitration agreement was in effect when the decedent died. *See, e.g.*, *Rowe Enters*, 932 So. 2d at 541-42.

Stated another way, the parties disputed the duration of the arbitration agreement signed in March 2011. In this case, there was no express statement in the arbitration agreement regarding its duration. "When a contract does not contain an express statement as to duration, the court should determine the intent of the parties by examining the surrounding circumstances and by reasonably construing the agreement as a whole." *City of Homestead v. Beard*, 600 So. 2d 450, 453 (Fla. 1992) (citations omitted). A contract may be terminated at will if it lacks any express provision as to its duration or if it is to remain in effect for an indefinite period of time. *Perri v. Byrd*, 436 So. 2d 359, 361 (Fla. 1st DCA 1983). On the other hand, a contract may not be terminated at will if a certain period of duration can be inferred from the nature of the contract, the circumstances surrounding its execution, and the manifest intent of the parties. *City of Homestead*, 600 So. 2d at 453.

The student guidelines and the admission documents signed by decedent indicated that treatment in the Teen Challenge program would take last at least one year. (App. 125, 194.) However, the admission documents also contemplated that an individual could be dismissed, terminated, or discharged from the program in less than a year. (App. 138-39, 181, 188, 194.) A termination, dismissal, or discharge is what Plaintiff contends occurred in this case. (App. 30.)

From the affidavits available to the trial court, different inferences could be drawn about the contract's duration and whether it was terminated before decedent's death. The events in May 2011—which Plaintiff alleges constituted a discharge—could be construed as a termination of the contract. Alternatively, as Defendant contended in its post-hearing affidavits, those events could be construed as a mere suspension from the program. (App. 222, 252.) Thus, the trial court's finding—that the Plaintiff was in an "ongoing treatment program under the same terms and conditions that the parties agreed to at the time of signing the agreement" (App. 39)—was not conclusively established by the affidavits as a matter of law. Nor did the affidavits conclusively establish as a matter of law the trial court's finding that the "program maintained his enrollment even though he was on occasions suspended." (App. 39.) By making these findings, the trial court improperly determined, without an evidentiary hearing, a substantial factual issue as to whether the arbitration agreement existed when the decedent died.

<u>ISSUE #2</u>: WHETHER, UNDER THE DUE PROCESS AND RELIGION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS AND UNDER PUBLIC POLICY, A COURT MAY COMPEL A PARTY TO ARBITRATE A SECULAR DISPUTE UNDER RULES THAT REQUIRE ADHERENCE TO RELIGIOUS PRINCIPLES AND PRACTICES.

Standard of Review. The issue of whether an arbitration agreement violates public policy is subject to a *de novo* standard of review. *E.g., Gessa v. Manor Care of Fla., Inc.*, 86 So. 3d 484, 492 (Fla. 2011). Constitutional issues are also reviewed *de novo*. *E.g., Conner v. State*, 803 So. 2d 598, 605 (Fla. 2001).

Merits. The trial court violated the Due Process and Religion Clauses of our federal and statute constitutions, as well as public policy, when it compelled Plaintiff to participate in proceedings governed by the Christian Conciliation Rules. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). The trial court overlooked this fundamental principle of constitutional law when it compelled Plaintiff to arbitrate its dispute under the Christian Conciliation Rules. The trial court coerced Plaintiff to exercise a particular religion, Christianity, as a means to resolve a secular dispute. This coercion, as discussed in more detail below, included compelling Plaintiff to resolve her secular dispute with Defendant in accordance with biblical and Christian principles and practices.

The trial court's failure to abide by our federal and state constitutions and

public policy is established by the following points, which we discuss in more detail below. First, the Religion Clauses of our constitutions forbid the government from coercing individuals from complying with religious principles and practices. *Infra* Part A, at 25-27. Second, by ordering Plaintiff to comply with the Christian Conciliation Rules to resolve her secular dispute with Defendant, the trial court was unconstitutionally coercing Plaintiff to exercise a religion. *Infra* Part B, at 27-31. Third, the fact that Plaintiff's decedent may have voluntarily agreed to abide by the Rules is inconsequential; even when individuals voluntarily agree to adhere to a religion's principles and practices, our constitutions and public policy do not permit courts to compel enforcement of such agreements to resolve secular disputes. *Infra* Part C, at 31-41. Fourth, case law enforcing religious arbitration is distinguishable or not persuasive. *Infra* Part D, at 41-47.

Before addressing these points, we note, as a preliminary matter, that the Religion Clauses of the First Amendment apply to state governments via the Fourteenth Amendment's Due Process Clause. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The trial court (like this Court) is part of the judicial branch of Florida's government. *See* Fla. Const., Art. II, § 3 & Art. V, § 1. As such, the trial court had to comply with the Fourteenth Amendment's Due Process Clause and the incorporated Religion Clauses just as Florida's executive and legislative branches must do so. *See Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984) ("The

actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment."). Where, as here, a state court enforces a private agreement, its enforcement constitutes state judicial action subject to the Fourteenth Amendment. *See Shelley v. Kraemer*, 334 U.S. 1, 13-14 (1948) (holding that judicial enforcement of a private agreement was state action subject to Fourteenth Amendment); *Franklin v. White Egret Condo., Inc.*, 358 So. 2d 1084, 1088-89 (Fla. 4th DCA 1977) (same).

A. The constitutions prohibit the government from coercing citizens to comply with religious principles and practices.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. Amend. I. "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof." Fla. Const. Art. I, § 3. The Religion Clauses of our constitutions have a "double aspect":

> On the one hand, [they] forestall[] compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, [they] safeguard[] the free exercise of the chosen form of religion.

Wallace v. Jaffree, 472 U.S. 38, 50 (1985) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

Under the Religion Clauses, the government (which includes the judicial

branch, *see supra* at 24-25) may not coerce a person to exercise religion. *See Lee v. Weisman*, 505 U.S. 577, 587(1992); *see also Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007) (noting government coercion to participate in religious activities "strikes at the core" of the First Amendment). The government "[n]either can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion," and no person "can be punished for . . . church attendance or non-attendance." *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 15-16 (1947). "[T]he preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000) (internal quotations omitted) (quoting *Lee*, 505 U.S. at 589). "[R]eligious beliefs and religious expression are too precious to be . . . prescribed by the State." *Lee*, 505 U.S. at 589.

The constitutional prohibition on government coercion of religion has been applied in a variety of circumstances, including: (i) school prayer; (ii) probationers, parolees, and prisoners ordered to participate in rehabilitative programs that include religious prayers and exercises;[6] and (iii) requirements that state employees attend conferences with religious presentations. *See* Rex Ahdar,

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[6] *See also Inouye v. Kemna*, 504 F.3d at 715 (discussing multiple cases that have prohibited compulsion of probationers, parolees, and prisoners to participate in programs that include religious prayers and exercises and holding that the law was well established that such compulsion was unconstitutional).

Regulating Religious Coercion, 8 Stan. J. Civ. Rts. & Civ. Liberties 215, 220-24 (2012) (listing examples). This prohibition on government coercion should apply also in this case. It should prohibit a court from compelling compliance with a private agreement that requires adherence to religious principles and practices to resolve a secular dispute. *See* Brian Sites, *Religious Documents and the Establishment Clause*, 42 U. Mem. L. Rev. 1, 10-12 (2011) (arguing that the anti-coercion principle should also apply when analyzing the enforceability of private agreements); *see also id.* at 12 n.46 (noting that "the prohibition [on coercion] will apply in the event that enforcing arbitration results in requiring performance of a religious act"); *id.* at 66 ("If the requested relief requires compelling a party to engage in a religious exercise, the relief simply cannot be granted."). The trial court's order in this case violates this constitutional principle that the government may not coerce religion, as we explain next.

B. The trial court's order compelling compliance with the Christian Conciliation Rules was an unconstitutional coercion.

By compelling Plaintiff to mediate and arbitrate under the Christian Conciliation Rules, the trial court was coercing Plaintiff to participate in and exercise a religion (Christianity) as the means to resolve her secular dispute with Defendant. Specifically, the trial court was coercing Plaintiff to exercise religion as follows:

- The court compelled Plaintiff to participate in a process in

which the express purpose is to "glorify God" by resolving disputes according to principles of "Christian conciliation," which is a "biblically-based" method for dispute resolution. (App. 50, ¶¶ 1 & 3.B.)

- The court compelled Plaintiff to participate in a process in which the Holy Scriptures (the Bible) are the "supreme authority governing every aspect" of the process. (App. 51, ¶ 4.) The particular Bible verses that govern this process, and by which Plaintiff must abide to resolve her secular dispute with Defendant, are Corinthians 6:1-8, Matthew 5:23-24, and Matthew 18:15-20. (App. 11, 51 ¶ 5.B; 275-78.)
- The court compelled Plaintiff to participate in a process that requires the "conciliators" (mediators and arbitrators (App. 51, ¶ 3.C)) to "affirm" a Christian statement of faith. (App. 52, ¶ 10.)
- The court compelled Plaintiff to submit to a process in which the administrator or mediator may biblically counsel her, teach her "relevant biblical principles," and assign her "homework" to facilitate the mediation process. (App. 51, 55, ¶¶ 5.B, 22.) The Rules do not state that Plaintiff may decline this biblical counseling, teaching, or homework.

- The court compelled Plaintiff to participate in a process to which Christian church leaders also may be invited by the conciliators. If they are invited, these church leaders may take "whatever steps [they] deem[] necessary to facilitate reconciliation and promote a biblical resolution of the dispute." (App. 54, ¶ 17.) Moreover, if further church involvement is likely to resolve the secular dispute, Plaintiff may be prevented from arbitrating the dispute.[7] (App. 55, ¶ 24.B.)
- If the Rules (including their underlying Christian and biblical principles) conflict with federal and state arbitration rules, Plaintiff must still abide by the Rules and their Christian and biblical principles unless the "state or federal rules *specifically* indicate that they may not be superseded." (App. 58, ¶ 42 (emphasis added).)
- The court compelled Plaintiff to participate in proceedings that normally open and close with a prayer and that normally include counseling on the "application of relevant biblical principles." (App. 57, ¶¶ 22, 34.)
- The court compelled Plaintiff to participate in an arbitration in which the arbitrators may consider "scriptural" briefs and may grant

[7] Specifically, the Rules state the transition from mediation to arbitration "shall take place when either a majority of the mediators or all of the parties agree that neither mediation nor church involvement is likely to resolve the outstanding issues of the dispute." (App. 55, ¶ 24.B.)

"scriptural" remedies and relief. (App. 57, ¶¶ 38, 40.C.)

Moreover, the religious principles and practices mandated by the Rules do not have an imprimatur of constitutionality simply because elsewhere the Rules refer to secular laws or have secular aspects. *See Warner v. Orange County Dept. of Prob.*, 115 F.3d 1068, 1076 (2d Cir. 1996) (rejecting argument that secular aspects of Alcoholics' Anonymous (AA) meetings allowed government to compel attendance at AA meetings given that the meetings "included at least one explicitly Christian prayer"). For example, Rule 42 (which Defendant emphasized to the trial court (App. 245)) does provide that the Rules "shall control except where the state or federal [arbitration] rules specifically indicate that they may not be superseded." (App. 58.) But Defendant did not name in the trial court—and cannot name now—a single religious rule or practice mandated by the Rules that is "superseded" (specifically or otherwise) by the federal or state arbitration rules or statutes. The rule requiring glorification of God is not superseded. (App. 50, Rule 1.) Nor is the rule making the Bible the supreme authority (App. 50, Rule 4),[8] or the rules authorizing biblical counseling, teaching, and church involvement (App. 54, Rules 17, 21.A).

Indeed, compelling compliance with the Rules results in religious coercion

[8] While Rule 4 does permit the conciliators to "take into consideration" secular laws, it unequivocally states that "the Holy Scriptures (the Bible) shall be the supreme authority" in the conciliation process. (App. 50.)

far more pervasive and extensive than the coercion found unconstitutional in other contexts. For example, in *Santa Fe*, the U.S. Supreme Court found student-led, student-initiated prayer at a high school football game—attendance at which was voluntary—to be unconstitutionally coercive. *See* 530 U.S. at 311-12. The coercion in *Santa Fe* was done indirectly by the government by using social pressure as the means for coercion. *See id.* at 312. In contrast, here, the government (i.e., the trial court) is *directly* coercing the exercise of religion by using its judicial power to compel Plaintiff to comply with the biblical and Christian Rules. The government may not do this. As we explain next, it may not do this even where, as here, a person previously voluntarily agreed to comply with such religious rules.

C. Even if a party previously agreed to adhere to a religion's principles and practices, the federal and state constitutions, as well as public policy, do not permit courts to compel a party to comply with such an agreement.

The trial court justified its decision to compel Plaintiff to abide by the Christian Conciliation Rules in part by noting that "the decedent and presumably his mother [, the Plaintiff,] knew he was entering into a treatment program that was based on Christian principles." (App. 41.) In a similar vein, Defendant argued for enforcement of the arbitration agreement because Plaintiff and the decedent knew the Christian nature of the program and because the decedent presumably agreed to

arbitrate under the Christian Conciliation Rules. (App. 246 (citing *Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101 (D. Colo. 1999)).

These justifications are misplaced. Not every private agreement into which a party knowingly and voluntarily enters may be enforced by a court. For example, our constitutions prohibit a court from enforcing a party's voluntary, private agreement to refrain from selling his property to buyers of a certain race. *See Shelley v. Kraemer*, 334 U.S. 1, 19-22 (1948). Similarly, courts decline to enforce many voluntary, private agreements that violate public policy.[9]

A court should not enforce the arbitration agreement in this case—even if it was voluntarily consented to—because to do so would violate public policy and the Religion Clauses of the federal and state constitutions. No branch of the government (including the judicial branch) should ever compel a person to exercise a religion or to follow religious principles and rules, even if that person voluntarily previously agreed to exercise that religion and abide by its principles and rules. The liberty interest protected by the Religion Clauses may not be bargained away,

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[9] *See, e.g.*, *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 474-75 (Fla. 2011) (holding that private agreement that substantially diminishes statutory remedies protecting nursing home residents was unenforceable due to public policy); *Loewe v. Seagate Homes, Inc.*, 987 So. 2d 758, 760 (Fla. 5th DCA 2008) (holding that private agreement with exculpatory clause relieving builder of liability for his negligent construction was void for public policy); *D&L Harrod, Inc. v. U. S. Precast Corp.*, 322 So. 2d 630, 631 (Fla. 3d DCA 1975) (declining to enforce private agreement on public policy grounds because one of the parties was not licensed to provide the services that were the subject of the agreement).

we contend, because it has special characteristics that arguably make it unique and distinguish it from all our other liberties protected by our constitutions.

The liberty protected by the Religion Clauses, at its core, is the individual's right to "freedom of conscience." *See Wallace v. Jaffree*, 472 U.S. 38, 50 (1985). This "freedom of conscience . . . embraces the right to select any religious faith or none at all." *Id.* at 53. "This conclusion derives support . . . from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . ." *Id.* As James Madison wrote, a person's right to religious freedom is inalienable because a person's conscience and religion must be the product of only his own thoughts and cannot be the product of what others dictate:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men. It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him.

James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785)) (located in *Constitutional Debates on Freedom of Religion: A Documentary History* 48, 50 (John J. Patrick & Gerald P. Long eds., 1999)).

As part of this freedom of conscience, our American and Western heritage has embraced the right to change one's religious beliefs and to exit from one's

religious faith as the "sine qua non of religious freedom." John Witte, Jr., *A Primer on the Rights and Wrongs of Proselytism*, 31 Cumb. L. Rev. 619, 624 & n.21 (2001). As Judge Farmer eloquently has written for the Fourth District in a different context, the freedom of religion includes "the right to change one's religious mind":

> The freedom to choose any religion necessarily comprehends the freedom to change religions. Great changes in religious beliefs by individuals are a feature of Western history; e.g., Saul of Tarsus on the road to Damascus; Constantine and the cross in the sky; Martin Luther and the cathedral door at Worms, to cite a few. We would reduce the right to the free exercise of religion by half if we did not recognize the right to change one's religious mind.

Abbo v. Briskin, 660 So. 2d 1157, 1159 (Fla. 4th DCA 1995); *see also In re Marriage of Weiss*, 49 Cal. Rptr. 2d 339, 347 (Cal. Ct. App. 1996) (noting that the "inalienable First Amendment right to the free exercise of religion . . . includes the right to change [one's] religious beliefs"), *Zummo v. Zummo*, 574 A.2d 1130, 1146-48 (Pa. Super. Ct. 1990) (recognizing the "fundamental [constitutional] right of individuals to question, to doubt, and to change their religious convictions" and that the "[r]eligious freedom . . . recognized by our founding fathers [was] to be *inalienable*" and thus could not be bargained way).

"This understanding of the right to choose and change religion . . . has now become an almost universal feature of Western understandings of religious rights." Witte, *supra*, 31 Cumb. L. Rev. at 624. This right has become enshrined as part of

international law, including treaties to which the United States is a signatory.[10] This American and Western heritage of the right to change one's religion stands in stark contrast to heritage of other non-Western nations that limit one's right to change religions.[11]

The *Weiss* case is instructive on the right to change one's religion. In *Weiss*, before marriage, a wife entered in a written agreement in which she voluntarily agreed to rear the children of her marriage in a particular religious faith. 49 Cal. Rptr. 2d at 341. When the wife divorced, her former husband asked the court to enforce the pre-nuptial agreement. *See id.* at 341-42. The court declined. *Id.* at 342-47. It reasoned that enforcing such an agreement would "encroach[] upon the

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[10] *See* Johan D. van der Vyver, *Limitations of Freedom of Religion or Belief: International Law Perspectives*, 19 Emory Int'l L. Rev. 499 (2005) (discussing Article 18 of the Universal Declaration of Human Rights of 1948 and the International Covenant on Civil and Political Rights of 1966); Moshe Hirsch, *The Freedom of Proselytism Under the Fundamental Agreement and International Law*, 47 Cath. U.L. Rev. 407, 415 & n.42 (1998) (same).

[11] *See* Natan Lerner, *Proselytism, Change of Religion, and International Human Rights*, 12 Emory Int'l L. Rev. 477, 503 (1998) (discussing that the law of Islam "inspired" several nation-states, where Islam served as positive law, to object to any "explicit recognition of the right to change one's religion or belief" in the 1948 Universal Declaration of Human Rights); Hirsch, *supra*, 47 Cath. U.L. Rev. at 411-13 (discussing the same history); David M. Smolin, *Exporting the First Amendment?: Evangelism, Proselytism, and the International Religious Freedom Act*, 31 Cumb. L. Rev. 685, 704 (2001) (discussing how, in India, changing one's religion can result in a change in one's legal rights and privileges); Perry S. Smith, *Speak No Evil: Apostasy, Blasphemy and Heresy in Malaysian Syariah Law*, 10 U.C. Davis J. Int'l L. & Pol'y 357, 371 (2004) (discussing how the Cairo Declaration on Human Rights adopted by the Organization of the Islamic Conference is "evasive" on the issue of one's right to change religions).

fundamental right of individuals to question, to doubt, and to change their religious convictions." *Id.* at 346-47 (internal quotations omitted). This right was so important that it could not be "bargained away":

> The constitutional freedom to question, to doubt, and to change one's convictions, protected by the Free Exercise and Establishment Clauses, is important for very pragmatic reasons. For most people religious development is a lifelong dynamic process even when they continue to adhere to the same religion, denomination, or sect. The First Amendment specifically preserves the essential religious freedom for individuals to grow, to shape, and to amend this important aspect of their lives, and the lives of their children. Religious freedom was recognized by our founding fathers to be inalienable. It remains so today. Thus, while we agree that a parent's religious freedom may yield to other compelling interests, we conclude that it may not be bargained away.

Id. (internal quotations, alterations, and emphasis omitted); *see also Abbo*, 660 So. 2d at 1159-61) (declining to require divorcing spouse to rear children in a certain faith despite the fact that, as condition of the marriage, the spouse agreed to convert to the faith in question).

The arbitration agreement signed by the Decedent in this case is unenforceable because it bargained away the Decedent's and Plaintiff's inalienable religious freedoms, including their rights to change their religious minds. In the trial court, however, Defendant mischaracterized these rights and Plaintiff's argument relying on these rights. Specifically, Defendant mistakenly asserted: "The argument that Plaintiff's religious rights *might* be violated *at some point,* in

the highly speculative and unlikely event of her conversion to some other religion between now and the date of arbitration, barely merits any response at all." (App. 246.) This assertion is wrong on several levels.

Plaintiff's argument is not that her rights "might" be violated "at some point." They are being violated *now*. This is so because Plaintiff's adherence to the Christian Conciliation Rules is not the result of her own free will, volition, and conscience. Instead, she must adhere to the Christian Conciliation Rules because a court has *compelled* (or coerced) her to adhere to the Rules. Where, as here, one is *compelled* by the government to exercise a particular religion and to follow that religion's principles and practices, one has lost her freedom of conscience and religion and her freedom to change one's religious mind. Free will and freedom of conscience are at the core of the religious freedom envisioned by our Founding Fathers and inalienably endowed to all of us. *See supra* at 33-34. The governmental act of compelling one to adhere to a religion, by itself, results in the loss of one's religious freedom.

In addition, Plaintiff, who admittedly is a Christian, need not convert to some other religion in order to object to the government compelling her to follow the Christian Conciliation Rules and its practices. As the *Weiss* court aptly noted, "religious development is a lifelong dynamic process *even when [one] continue[s] to adhere to the same religion, denomination, or sect*." 49 Cal. Rptr. 2d at 347

(emphasis added). Though religious leaders may object, Americans are permitted to selectively adhere to their religious creed, and they may pick and choose their religious beliefs and practices in a "cafeteria" fashion.[12] One day, they may agree to follow a particular religious practice, and then the very next day, they are free to abandon this religious practice, all the while professing to be a member of the religious creed that follows that practice. The fact that Plaintiff may be Christian, even a devout Christian, does not constitutionally authorize the government to order her to follow Christian principles and practices, even if previously she or her predecessor-in-interest (her son, the decedent) agreed to comply with such principles and practices.[13]

A hypothetical illustrates why the fact that Plaintiff is a Christian (devout or otherwise) in no way lessens the constitutional injury she has suffered as a result of the trial court's order compelling her to follow the Christian Conciliation Rules. Suppose a Catholic priest and his parishioner enter into an otherwise written binding contract, supported by consideration, in which the parishioner agrees that

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[12] In popular parlance, the term "cafeteria Catholic" refers to one who professes to be Catholic but only selectively follows some (not all) of the teaching of the Catholic Church. Wikipedia, Cafeteria Catholicism, http://en.wikipedia.org/wiki/Cafeteria_Catholicism (last visited November 12, 2012).

[13] *See* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 Santa Clara L. Rev. 501, 551-52 (2012) (justifying why religious arbitration of secular disputes should be unenforceable even if no party desires to change religions and the objecting party previously consented to religious arbitration).

he will attend mass every Sunday and also on the holy days of obligation (Ash Wednesday, All Saints Day, etc.). Later, the parishioner decides that he no longer desires to attend mass on the holy days of obligation but instead he wants to attend mass only on Sundays and continue to follow the other doctrines of the Catholic faith.

If the priest asked a court to enforce this contract, would any court enforce such a contract? Would any court order the parishioner to attend mass on the holy days of obligations? Would the fact that the parishioner voluntarily had agreed in the past to do this make any difference in the constitutional and public policy analysis? Would it make any difference that the parishioner's refusal to attend mass on the holy days of obligation was at odds with the fact that, for all other purposes, he was a devout Catholic? The answers to these questions are, of course, "no." Any enforcement of such a contact would violate the parishioner's religious freedoms because his attendance at mass on the holy days of obligation, if compelled by the court, would be the result of an unconstitutional coercion and not the result of the parishioner's own free will and conscience. *See supra*, at 27-31; *Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 15-16 (1947) (noting that the First Amendment prohibits government compulsion of church attendance).

An unconstitutional coercion is occurring in this case similar to the foregoing hypothetical. By compelling Plaintiff to abide by the Christian

Conciliation Rules, the trial court is compelling Plaintiff to participate in a religious process that glorifies God, that follows the Bible as the supreme authority, that may require Plaintiff to undergo biblical counseling and teaching, and that allows Plaintiff's church leaders to take "whatever steps" they deem necessary to resolve her secular dispute with Defendant. *See supra*, at 25-27; *see also Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007) ("For the government to coerce someone to participate in religious activities strikes at the core of the Establishment Clause of the First Amendment . . . ."). By compelling compliance with the Rules, the order deprives Plaintiff of her freedom of conscience, her right to choose how she practices her faith, and her right to change her religious mind.

Finally, Defendant suggested to the trial court that the current religious faith of the person objecting to religious arbitration is relevant to determine the enforceability of a religious arbitration agreement.[14] This suggestion is fraught with constitutional danger. If implemented, would Defendant's suggestion mean that non-Christians or former Christians could object to arbitration under the Christian Conciliation Rules but current Christians could not? Could non-devout Christians object? Or only devout Christians? What would be the required depth

[14] Defendant suggested this to the trial court when it argued: "It is astounding that Plaintiff—who was deeply involved in her son's participation in Defendant's Christian program, and even 'begged' the Defendant's Christian program to take him back when he had violated the rules—should now object to the arbitration agreement because it supposedly requires her to pray." (App. 246.)

of the objecting party's religious devotion (or non-belief) and how would the trial court determine this? If a Christian converted to another faith after signing the agreement, would the trial court have to determine whether the conversion was sincere or merely an attempt to avoid enforcement of the agreement? Answering these questions will require a court to determine questions of religious faith and doctrine, as well as the sincerity of the religious beliefs held by objecting parties; this determination will foster excessive, unconstitutional government entanglement with religion. *See generally Lemon v. Kurtzman*, 403 U.S. 602 (1971) (prohibiting the excessive entanglement of government and religion).

D. Case law enforcing religious arbitration is distinguishable or not persuasive.

In the trial court, Defendant cited three cases from other jurisdictions compelling arbitration under the Christian Conciliation Rules. *See Encore Prods., Inc. v. Promise Keepers*, 53 F. Supp. 2d 1101 (D. Colo. 1993); *Easterly v. Heritage Christian Schools*, *Inc.,* No. 1:08-cv-1714-WTL-TAB, 2009 WL 2750099 (S.D. Ind. Aug. 26, 2009); *Woodlands Christian Academy v. Weibust*, No. 09-10-00010-CV, 2010 WL 3910366 (Tex. App. Oct. 7, 2010). These cases, even on questions of federal law, are not binding on this Court. *See, e.g.*, *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976) (noting decisions of lower federal courts on federal law are not binding on Florida courts); *Pignato v. Great W. Bank*, 664 So. 2d 1011, 1015

(Fla. 4th DCA 1995) (same). Nor are they persuasive.

The only one of the three cases that touches on the argument presented on this appeal is *Encore.* There, two corporations entered into an agreement requiring arbitration under the Christian Conciliation Rules. 53 F. Supp. 2d at 1106. In opposing arbitration, one corporation made several arguments, only one of which bears on this case. Specifically, the corporation argued compelling arbitration under the Rules would violate the free exercise rights of the corporation's agents and employees. *Id.* at 1112. In rejecting this argument, the court acknowledged that "it may not be proper for a district court to refer civil issues to a religious tribunal;" however, the court concluded with little analysis that referring civil issues to a religious tribunal was proper "when the parties agree to do so." *Id.* (citing *Elmora Hebrew Center, Inc. v. Fishman*, 593 A.2d 725, 731 (N.J. 1991)).

In reaching this conclusion, the *Encore* court did not analyze or consider the arguments presented *supra*, at 25-41. It did not consider that one has the right to change one's religious mind. *Supra*, at 33-36. Instead, the court supported its conclusion by simply citing to *Elmora*, a case which is materially distinguishable from the instant case and *Encore*.

In *Elmora*, the court referred a *religious* dispute to a religious tribunal.[15] *Elmora*, 593 A.2d at 727. Unlike secular disputes, civil courts may not constitutionally decide religious disputes. *See, e.g.*, *Presbyterian Church in United States v. Mary Elizabeth Hull Memorial Presbyterian Church*, 393 U.S. 440, 450-52 (1969). Accordingly, a civil court's decision to compel arbitration of a religious dispute arguably could be defensible because such a dispute may be decided only by religious authorities. *See* Nicholas Walter, *Religious Arbitration in the United States and Canada*, 52 Santa Clara L. Rev. 501, 553 (2012).

But the dispute here, like in *Encore*, is *secular*. (*See* App. 245 (Defendant conceding the instant dispute is "non-religious").) Secular disputes, of course, may be decided by civil courts, unlike religious disputes. Thus, the same justification for compelling religious arbitration of a religious dispute does not exist where, as here, the dispute is *secular*. As one commentator has noted, *Encore* was "wrongly decided" and is "troublesome." Walter, *supra* at 550. That commentator's reasoning is cogent and apropos:

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[15] Later, after the judicial referral of the religious dispute, the parties failed to object to the religious tribunal's expansion of its own jurisdiction to the parties' secular dispute, and the parties continued to participate in the religious arbitration. *Elmora*, 593 A.2d at 727. The courts concluded that the parties had consented to, and thus were bound by, the religious tribunal's decision on the secular disputes. *Id.* at 731. The important distinction between *Elmora* and the instant case is that, unlike the trial court here, the *Elmora* courts never compelled arbitration of the secular dispute. Here, the trial court's compulsion of a secular dispute to a religious arbitration—not the religious arbitration by itself—is what violates the Religion Clauses. *See supra* at 27-31.

> *Encore* is troublesome. There was no underlying religious issue that a court could not adjudicate—for example, an issue that would pose a "religious question." The dispute was a purely commercial one relating to the termination of a contract. Nevertheless, the court held, following established doctrine, that voluntary consent to take a dispute to arbitration was all that mattered. In effect, the court held that a party could alienate its rights to religious freedom, by having a religious procedural law imposed on it through arbitration.
>
> *Encore* was wrongly decided. Religious arbitration of non-religious issues should not be binding on parties through the civil courts, because it risks infringing their right to religious freedom. The problematic nature of this kind of issue can be brought out by another example. Suppose that an individual signing an employment contract with a Christian school agrees to Christian dispute resolution in the case of conflict. This contract may contain a clause obliging her, before moving to binding arbitration, to attempt a conciliation session according to Biblical principles. In order to take part in the conciliation, the party will need to act in a "Christian" fashion. Her religious rights have been alienated by the contract.

Id.; *see also Higher Ground Worship Center, Inc. v. Arks, Inc.*, No. 1:11-cv-00077, 2011 WL 4738651, at *4 n.4 (D. Idaho 2011) (questioning in dicta whether *Encore* was correctly decided).

Encore is also distinguishable. Unlike in this case, the underlying agreement in *Encore* had a choice-of-law provision selecting the secular law of a state (Colorado). Based on this choice-of-law provision, the *Encore* court ruled that the "arbitrator must fashion a result that is consistent with [state secular] law." *Encore*, 53 F. Supp. 2d at 1111. In contrast, here, there is no choice-of-law

provision selecting state secular law. Therefore, biblical principles, not state secular law, will unquestionably govern the arbitration in this case.[16]

In addition, *Encore* wrongly suggested that, if a court fails to enforce a religious arbitration agreement, such inaction could somehow infringe on religious freedoms of the party favoring religious arbitration—in this case, the Defendant. *Id.* at 1113. This reasoning is erroneous. The right to exercise one's religion does not allow one to employ the machinery of the government (here, the judicial branch) to compel others to follow one's religious beliefs, principles, and practices. *See generally Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (prohibiting majority of students from using public prayer at school football games to coerce other students to listen to the prayer selected by the majority's leader, even though the government (the school) did not select the leader or the prayer and did not compel student attendance at the game).

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[16] Any argument to the contrary is belied by the plain language of the Rules. Rule 4, titled "Application of Law," plainly states that "the Holy Scriptures (the Bible) shall be the supreme authority governing every aspect of the conciliation process." (*See* App. 51, ¶ 4.) It is irrelevant that Rule 4 also requires the conciliators "to take into consideration any state, federal, or local laws that the parties bring to their attention." (*Id.*) By way of analogy, Florida courts, when applying Florida law, may also consider the law of other jurisdictions. But in "considering" these foreign laws, Florida courts are still governed by and apply Florida law. Similarly, Rule 4's requirement that the conciliators "consider" secular law does not alter Rule 4's command that the Holy Scriptures is the "supreme authority governing every aspect of the conciliation process."

The other holdings from the three Christian Conciliation cases have no bearing on the instant dispute. These three cases hold that, in response to a motion to compel arbitration, it is premature to argue that the arbitrators appointed under the Rules will disregard secular law in favor of biblical principles given the fact that Rules requires the arbitrators to "take into consideration" secular law. These three cases justify this holding because, they reason, if the arbitrators fail to abide by secular law, then a party could later challenge in court the validity of any arbitral decision.[17] The reasoning of these cases, under the federal and Texas arbitration laws, is dubious in Florida where post-arbitral challenges to arbitral decisions are strictly limited to a handful of circumstances, none of which would appear to apply simply because the arbitrators followed religious law instead of secular law. *See Schnurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327, 1329

[17] *See, e.g.*, *Encore Prods.*, 53 F. Supp. 2d at 1111 (holding that arbitrators were required to "fashion a result" consistent with secular state law, rejecting argument that arbitration award was unenforceable as "premature," and noting authority of courts to later review the arbitration decision for "illegal results"); *Easterly*, 2009 WL 2750099, at *3 & n.3 (suggesting that, if the arbitrators were to follow biblical principles that conflict with secular law, then the party opposing arbitration could return to court and challenge the validity of arbitral decision on the ground it "manifestly disregards" the law); *Woodlands Christian*, 2010 WL 3910366, at *5 (examining Rules 4, 40, and 42; holding that these rules did not limit a party's remedies under secular law; and holding that an arbitrator's decision under the Rules would not "trump" secular law in part because the state arbitration code authorized a court to overturn an arbitral decision based on the "integrity of the process").

(Fla. 1989) (rejecting argument that departure from "accepted rule of law" was a valid basis to challenge arbitration decision); § 682.13(1), Fla. Stat. (2012).

Regardless, it is inconsequential to our argument whether or not Plaintiff could later challenge in court the validity of the arbitral decision. The trial court is violating the constitution—right now, at this very moment—by coercing Plaintiff to participate in and exercise a religion. As Defendant conceded, the trial court has compelled Plaintiff to participate in a process where "religious principles will control." (App. 245.) The fact that the arbitral decision's validity later may be challenged under secular law does not undo or cure the trial court's current, ongoing unconstitutional coercion of religion.

CONCLUSION

The order compelling arbitration should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2012, a true and correct copy of the foregoing was served by email upon: Joshua P. Welsh, jwelsh@bushross.com and Bejamin Jilek, BJilek@bushross.com, Bush Ross, P.A., Attorneys for Defendant/Appellee.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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