

THE SUPREME COURT OF ARKANSAS HOLDS THAT
RELIGIOUSLY NEUTRAL REQUIREMENTS IMPLEMENTED BY
STATE AGENCIES ARE NOT IN VIOLATION OF THE FREE
EXERCISE CLAUSE.

In *Myers v. Arkansas Department of Human Services*¹, the Supreme Court of Arkansas held that a neutral requirement by the Department of Human Services was not in violation of the Free Exercise Clause, even when the requirement incidentally affected religious practices.² The court also held that out of court statements are not hearsay when they are not admitted for their truth,³ and that the circuit court did not err in terminating appellant's parental rights.⁴

Appellant Myers was a missionary living on the Tony Alamo Christian Ministry ("TACM") compound with her husband and six children.⁵ On October 20, 2008, the Federal Bureau of Investigation and the Arkansas State Police raided the compound, and six juveniles were taken into foster care with the Arkansas Department of Human Services ("DHS").⁶ Based on information about abuse at the compound, an emergency custody order and amended petition for dependency-neglect⁷ was filed on November 18-19, 2008, and appellant's children were removed from the compound to protect the health and physical well-being of the juveniles.⁸

On February 27, 2009, appellant was adjudicated to be dependent-negligent for failing to protect the juveniles from abuse, for endorsing marriages between underage girls and men, and for neglecting the juveniles' educational and health needs.⁹ The court found that parental custody went against the juveniles' well-being and ordered custody to DHS with an ultimate goal of reunification with the parents.¹⁰ In order to obtain reunification, the parents were to: "(1) submit to psychological evaluations; (2) attend and actively participate in counseling; (3) successfully complete parenting classes; (4) obtain safe and stable housing separate and apart from

1. 2011 Ark. 182, ___ S.W.3d ____.

2. *Id.* at 11, ___ S.W.3d at ____.

3. *Id.* at 14, ___ S.W.3d at ____.

4. *Id.* at 22, ___ S.W.3d at ____.

5. *Id.* at 2, ___ S.W.3d at ____.

6. *Id.*, ___ S.W.3d at ____.

7. *Myers*, 2011 Ark. 182, at 2, ___ S.W.3d at _____. Dependent-neglect is defined in ARK. CODE ANN. § 9-27-303(18). *Id.*, ___ S.W.3d at ____.

8. *Id.*, ___ S.W.3d at ____.

9. *Id.* at 2-3, ___ S.W.3d at ____.

10. *Id.* at 3, ___ S.W.3d at ____.

TACM; (5) obtain stable employment separate and apart from TACM.”¹¹ Myers was also to aid DHS in locating her three daughters.¹²

There was a review order for the appellant’s case on July 19, 2009.¹³ At the time of the order, the appellant had submitted to the psychological evaluation and completed the required parenting classes, but she had made no attempt to obtain housing or employment apart from TACM.¹⁴ The review order stated that while the appellant had not completed the permanency plan, the goal of the case was still reunification.¹⁵

When the appellant was at the same level of completion of the case plan at the permanency hearing on December 8, 2009, the court changed the goal of the case from one of reunification to one of termination of parental rights and adoption.¹⁶ Additionally,

[t]he court found that the appellant and her husband, Jim Myers, had exposed their children to an atmosphere with serious risk of child abuse; were totally dependent upon TACM, which was controlled by a convicted sex offender; and refused to believe that child abuse occurred within the organization at the direction of Tony Alamo.¹⁷

DHS filed a petition of termination of parental rights on December 17, 2009.¹⁸ Appellant responded on January 4, 2010 that circumstances had changed since Alamo’s imprisonment, and that a dependent-neglect hearing was no longer applicable.¹⁹ On January 14, 2010, appellant filed a motion to eliminate the requirements to obtain housing and employment away from TACM from the case plan, alleging that these requirements violated her right to practice religion and her substantive due process rights under the First and Fourteenth Amendments of the United States Constitution and article 2, section 24 of the Arkansas Constitution.²⁰ DHS answered that endangering one’s children was not protected under the right to religious freedom.²¹

A termination hearing on the case was held on January 27, 2010, and DHS introduced a tape of recorded phone calls between an imprisoned Tony Alamo and unidentified women at the TACM compound.²² Appellant objected to the introduction of the tape, asserting it was hearsay and more

11. *Id.*, ___ S.W.3d at ____.

12. *Id.*, ___ S.W.3d at ____.

13. *Myers*, 2011 Ark. 182 at 3, ___ S.W.3d at ____.

14. *Id.*, ___ S.W.3d at ____.

15. *Id.*, ___ S.W.3d at ____.

16. *Id.*, ___ S.W.3d at ____.

17. *Id.* at 4, ___ S.W.3d at ____.

18. *Id.*, ___ S.W.3d at ____.

19. *Myers*, 2011 Ark. 182 at 4, ___ S.W.3d at ____.

20. *Id.* at 4-5, ___ S.W.3d at ____.

21. *Id.* at 5, ___ S.W.3d at ____.

22. *Id.*, ___ S.W.3d at ____.

prejudicial than probative.²³ DHS said the tape should be allowed under the business records exception.²⁴ The court agreed with DHS and found the probative value to outweigh any prejudice.²⁵

In regards to appellant's argument for elimination of the housing and employment change requirements, appellant reiterated her arguments from her January 14, 2010 motion about interference with her right to practice religion and changed circumstances since the imprisonment of Alamo.²⁶ DHS responded that even if appellant's religious freedom was affected by the case plan requirements, there was a compelling state interest in protecting the welfare of appellant's children.²⁷ DHS also contended that circumstances at the compound had not significantly changed even though Alamo had been imprisoned.²⁸ The court decided that appellant had a legitimate religious belief and that DHS had a compelling state interest, but declined to decide whether appellant's religious rights had been burdened by the state's action before hearing further testimony.²⁹

Testimony from Court-Appointed Special Advocate Malynda Cree indicated that Alamo was still effectively running the compound from prison and that the juveniles were in the same possible danger as before.³⁰ Cree also expressed her concerns that appellant was completely reliant on Alamo for housing and employment, which would make it difficult for appellant to go against Alamo's wishes.³¹

After hearing this testimony, the court ruled that protecting the children was a compelling state interest, and "that the parents had a right to exercise their freedom of religion, but that the burden placed upon the parents' religious freedom did not override the compelling state interest."³² The court found that DHS had a right to require housing and employment separate from TACM as part of the case plan to fulfill the compelling state interest.³³

Appellant's parental rights to her two younger sons were terminated with an order issued on April 16, 2010.³⁴ Appellant appealed the order on May 4, 2010³⁵ and raised three points on appeal:

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23. *Id.*, ___ S.W.3d at ___.
 24. *Id.*, ___ S.W.3d at ___.
 25. *Myers*, 2011 Ark. 182 at 5, ___ S.W.3d at ___.
 26. *Id.* at 5-6, ___ S.W.3d at ___.
 27. *Id.* at 6, ___ S.W.3d at ___.
 28. *Id.*, ___ S.W.3d at ___.
 29. *Id.*, ___ S.W.3d at ___.
 30. *Id.* at 6-7, ___ S.W.3d at ___.
 31. *Myers*, 2011 Ark. 182 at 7, ___ S.W.3d at ___.
 32. *Id.*, ___ S.W.3d at ___.
 33. *Id.*, ___ S.W.3d at ___.
 34. *Id.* at 8, ___ S.W.3d at ___.
 35. *Id.*, ___ S.W.3d at ___.

(1) that the case plan requirements unduly burdened her constitutional right to free exercise of religion; (2) that the circuit court erred by allowing the introduction of certain taped conversations between Tony Alamo and members of his ministry; and (3) that the circuit court erred by finding there was sufficient evidence to support the termination of her parental rights.³⁶

On her first point on appeal, appellant argued that a strict scrutiny standard should be applied because religious freedom rights and substantive due process rights are involved.³⁷ She also argued that her case was not given individual consideration, that her children were “lumped in” with the other juveniles on the compound,³⁸ and that her parental rights were terminated based on her belief system.³⁹

DHS responded that the requirements to obtain housing and employment separate from TACM were narrowly tailored solutions to the state’s compelling interest to protect the children in Arkansas.⁴⁰ DHS also asserted that appellant was never asked to “disassociate” from the religion but was only asked to provide safe housing for her children.⁴¹ DHS noted that this was a neutral requirement used to protect children, not to burden religious practices.⁴²

The Arkansas Supreme Court decided in favor of DHS on this issue, stating that the requirements to obtain housing and employment separate from TACM were neutral requirements that “only incidentally affected appellant’s exercise of her religion.”⁴³ The court states that because the requirements were neutral and not in place to regulate religious practices, the protections of the Free Exercise Clause are not applicable.⁴⁴

The second point on appeal is whether the trial court abused its discretion by allowing the introduction of the recorded telephone conversations between Alamo and women at the compound under Ark. R. Evid. 803(6).⁴⁵

Appellant argued Ark. R. Evid. 803(6) should not have applied because the correctional facility where the recordings were made was a “public facility” rather than a “business.”⁴⁶ She also argued that even if the correctional

36. *Id.* at 1-2, ___ S.W.3d at ____.

37. *Myers*, 2011 Ark. 182 at 8, ___ S.W.3d at ____.

38. *Id.*, ___ S.W.3d at ____.

39. *Id.* at 9, ___ S.W.3d at ____.

40. *Id.*, ___ S.W.3d at _____. In this analysis, DHS relied on the nearly identical court of appeals case *Thorne v. Arkansas Department of Human Services*, 2010 Ark. App. 443, ___ S.W.3d ___, *Id.*, ___ S.W.3d at ____.

41. *Myers*, 2011 Ark. 182 at 9, ___ S.W.3d at ____.

42. *Id.* at 10, ___ S.W.3d at ____.

43. *Id.* at 11, ___ S.W.3d at ____.

44. *Id.* at 12, ___ S.W.3d at _____. The court also explicitly overruled the strict-scrutiny analysis in *Thorne* for the same reason. *Id.* at 13, ___ S.W.3d at ____.

45. *Id.*, ___ S.W.3d at ____.

46. *Myers*, 2011 Ark. 182, at 13-14, ___ S.W.3d at ____.

facility was a “business,” the evidence did not meet the admissibility requirements.⁴⁷ Appellant also argued that admission of the recordings violated her right to confrontation and that Ark. R. Evid. 403 justified the exclusion of the tapes.⁴⁸

DHS responded by asserting that introduction of the tapes was proper because the statements were not offered for their truth, but were offered to illustrate Alamo’s continued control of the compound from prison.⁴⁹

The Supreme Court of Arkansas agreed with the appellant that the recordings were not business records but found that the tapes were admissible because it also agreed that the recordings were not hearsay.⁵⁰ Because hearsay is defined as an out-of-court statement offered for its truth and the statements on the tapes were not offered for their truth, the statements on the tape were not hearsay.⁵¹ The court stated that it would not address appellant’s arguments about the right to confrontation and justifying exclusion under Rule 403 because the former was not raised prior to this appeal and was not preserved, and the latter was not adequately developed.⁵²

The third issue raised on appeal was whether there was clear and convincing evidence to support the termination of parental rights.⁵³ Parental rights may be terminated when clear and convincing evidence shows there is a statutory ground for the termination⁵⁴ and (1) that it is likely the juvenile will be adopted if parental rights are terminated, and (2) that granting custody to the parent is potentially harmful to the child.⁵⁵

The trial court heard testimony from two of the DHS case workers involved with the case, the appellant, and appellant’s oldest son, R.M., who was sixteen years old at the time of testimony.⁵⁶

47. *Id.* at 14, ___ S.W.3d at ____.

48. *Id.*, ___ S.W.3d at ____.

49. *Id.*, ___ S.W.3d at ____.

50. *Id.*, ___ S.W.3d at ____.

51. *Id.* at 14-15, ___ S.W.3d at _____. The court notes that the statements on the tapes are typically about what was happening at the compound when the statements were offered to show Alamo’s continued control of the compound. *Myers*, 2011 Ark. 182, at 15, ___ S.W.3d at _____. While Alamo did make statements on the tapes that he was still in control of what happened at TACM, appellant did not object to those specific portions of the tapes, therefore, she waived her right to do so. *Id.*, ___ S.W.3d at ____.

52. *Id.* at 15, ___ S.W.3d at ____.

53. *Id.*, ___ S.W.3d at ____.

54. *Id.* at 16, ___ S.W.3d at _____. The trial court had found two separate statutory grounds for termination, neither of which was challenged by the appellant. *Id.* at 20-21, ___ S.W.3d at ____.

55. *Myers*, 2011 Ark. 182, at 16, ___ S.W.3d at ____ (citing ARK. CODE ANN. § 9-27-341(b)(3)(B)).

56. *Myers*, 2011 Ark. 182, at 16-18, ___ S.W.3d at ____.

Kimberly Thompson, a DHS caseworker assigned to the Myers case, testified that appellant had undergone the psychological evaluation, completed the parenting classes, and maintained contact with her children until appellant's incarceration for contempt of court.⁵⁷ However, Thompson also testified that appellant had made no attempt to obtain housing or employment separate from TACM, and that appellant seemed to lack independent decision-making skills when it came to her children's welfare.⁵⁸ Thompson said she was unsure that appellant would follow through with the court's orders if she regained custody.⁵⁹

Gayla Griffin, another DHS worker, testified that she was familiar with appellant's children and that she knew of families willing to adopt a set of siblings with their ages.⁶⁰ She also testified that it would take at least six months for the children to be adopted once an adoptive placement was found.⁶¹

Appellant testified that she and her children had been raised within TACM and that it was all she had ever known.⁶² She testified that her children had not been abused while at the ministry and that she did not know of any children being beaten at the ministry.⁶³ She testified that some girls at TACM had been married at a young age but did not know that girls as young as twelve years old had been married.⁶⁴ Appellant also testified to Alamo's control of the ministry. She testified that Alamo had maintained control of TACM while he was incarcerated in federal prison before and that he continued to run the ministry during this imprisonment.⁶⁵ Appellant also acknowledged that she was unwilling to seek housing or employment outside of TACM.⁶⁶

Appellant's oldest son, R.M., also testified.⁶⁷ R.M. testified that neither he nor his siblings had ever been abused, that he wanted to continue contact with his brothers but did not want to be adopted, and that when he turned 18, he wished to return to the compound with his mother.⁶⁸

After hearing all of this testimony, the trial court made a ruling that appellant's parental rights with her two younger sons were terminated and that

57. *Id.* at 16-17, ___ S.W.3d at ____.

58. *Id.* at 17, ___ S.W.3d at ____.

59. *Id.*, ___ S.W.3d at ____.

60. *Id.*, ___ S.W.3d at ____.

61. *Id.*, ___ S.W.3d at ____.

62. *Myers*, 2011 Ark. 182, at 18, ___ S.W.3d at ____.

63. *Id.*, ___ S.W.3d at ____.

64. *Id.*, ___ S.W.3d at ____.

65. *Id.*, ___ S.W.3d at ____.

66. *Id.*, ___ S.W.3d at ____.

67. *Id.* at 19, ___ S.W.3d at ____.

68. *Myers*, 2011 Ark. 182, at 19, ___ S.W.3d at ____.

an alternative solution be made in regard to R.M.⁶⁹ The court also found that TACM was still under the control of Alamo even though Alamo was not present at the compound.⁷⁰ The court reasoned that termination of appellant's parental rights to be the best course of action for the well-being of her younger children.⁷¹

On appeal, appellant argued that there had been no evidence of past abuse and that the only evidence of potential harm was Alamo's continued control over the ministry.⁷² DHS argues that the circuit court's findings were not clearly erroneous because the court's decision to terminate parental rights was based on evidence showing Alamo's continued control of TACM and appellant's indifference or incapacity to follow the steps necessary to protect her children's welfare.⁷³

The Supreme Court of Arkansas found that the circuit court had not erred in granting the termination because there was evidence that "appellant refused to remedy the conditions that caused her children's removal."⁷⁴ The circuit court's decision was affirmed.⁷⁵

* *Sidney Leasure*

69. *Id.*, ___ S.W.3d at ____.

70. *Id.*, ___ S.W.3d at ____.

71. *Id.*, ___ S.W.3d at ____.

72. *Id.* at 20-21, ___ S.W.3d at ____.

73. *Id.* at 21, ___ S.W.3d at ____.

74. *Myers*, 2011 Ark. 182, at 22, ___ S.W.3d at ____.

75. *Id.*, ___ S.W.3d at ____.