

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ERNEST F. HEFFNER, et al.,) Docket No. 4:08-CV-990
))
) Plaintiffs) (Judge John E. Jones III)
))
) v.))
))
DONALD J. MURPHY, et al.,))
))
) Defendants.))
_____)

**AMICUS CURIAE BRIEF OF THE INTERNATIONAL
CEMETERY, CREMATION, AND FUNERAL ASSOCIATION**

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I. INTEREST OF AMICUS CURIAE

Amicus is the International Cemetery, Cremation and Funeral Association (“ICCFA”). Founded in 1887, ICCFA is a voluntary trade association with over 7200 members, including non-profit, for-profit, religious and municipal cemeteries, funeral homes, crematories and memorial retailers. ICCFA’s activities include tracking federal and state legislation affecting the death care industry and promoting education. ICCFA also takes an active role in advancing the public interest on funeral industry issues. ICCFA promotes consumer choice, the pre-arrangement of funeral and burial decisions, and open competition among providers of death care services and has created more than two dozen model guidelines advocating state legislation on a variety of consumer-related issues.

Since at least 97% of ICCFA’s members are corporations, ICCFA is troubled by Pennsylvania’s unique statutory scheme which, but for certain protectionist exceptions, bans out-of-state corporations from entering the Pennsylvania funeral market. This anti-competitive statute, which has generally been known since at least 1952 as the “Funeral Director Law,” 63 P.S. § 479.1 *et seq.* (hereinafter the “Act” or “FDL”), gives Pennsylvania’s state-licensed funeral directors, along with their spouses, children and grandchildren, the virtually

exclusive right to provide funeral services in Pennsylvania – a market that generates revenues in the tens of millions on an annual basis.¹

ICCFA is also concerned with the recent attack upon duly-regulated crematories, which, for years, have provided direct cremation services to the public and have interacted with the public through the communication of truthful information and contracted to provide for cost-efficient direct cremation services without the necessity of the added cost of a funeral director. Despite no record of consumer harm from these activities, the Pennsylvania Funeral Board now applies the FDL to grant a monopoly over cremation to in-state funeral homes to the exclusion of all other cremation providers.

It is these two items – the discriminatory ownership scheme and the prohibition against crematories interacting with the public, that ICCFA wishes to focus upon in this *amicus* brief. At the same time, ICCFA wishes to go “on record” as supporting Plaintiffs in each of their claims advanced in support of their request for summary judgment. Importantly, there is nothing requested by the Plaintiffs in this case which will require any Pennsylvania licensed funeral director

¹ To the knowledge of ICCFA, the only other State in the United States which restricts ownership to in-state funeral directors is Maryland. However, the Maryland scheme is at least not so brazen as to create the type of ownership exceptions that exist for the unlicensed spouses, children and grandchildren of licensed Pennsylvania funeral directors – a patent protectionist exception to the general rule which eviscerates any legitimate argument that ownership be restricted to licensed funeral directors.

to operate differently than he or she currently operates. To the contrary, this litigation simply seeks to provide additional consumer choice and greater freedom of communication to the Pennsylvania consumer. In short, ICCFA urges this Honorable Court to hold as unconstitutional a statutory scheme which is anti-consumer, anti-competitive, and a quintessential blueprint of unlawful protectionism which stands as an affront to the dormant Commerce Clause.

II. THE PENNSYLVANIA OWNERSHIP SCHEME

The ownership scheme set forth in Pennsylvania law is unique on to itself. The Act purports to restrict ownership of funeral homes to licensed funeral directors, but carves out exceptions for the widow, estate, spouse, children and grandchildren of Pennsylvania funeral directors to own funeral homes – without regard for the knowledge, training, or qualifications of these individuals or even so much as consideration of their age, competence or character. The FDL does not promote qualified funeral director ownership of funeral homes in Pennsylvania. It promotes ownership of funeral homes in Pennsylvania by Pennsylvanians to the detriment of anyone not fortunate enough to have been born into or marry into a Pennsylvania funeral director's family. It is, respectfully, the most offensive scheme existing throughout the United States.

There are hundreds of ICCFA members that successfully own and operate funeral homes throughout the United States wherein the ownership resides in

entities other than licensed funeral directors. Much like the Plaintiffs, ICCFA is not advocating the elimination of regulation, nor does it advocate the elimination of licensed funeral establishments. Under the FDL, however, a five-year old grandchild of a Pennsylvania licensed funeral director would qualify to own stock in a restricted business corporation. See 63 P.S. § 479.8(b)(4). Additionally, even a spouse who is certified as legally incompetent would qualify to obtain a widow's license and own his or her spouse's funeral home upon the death of that spouse. This statutory scheme, which permits these forms of ownership, but precludes a plaintiff like Robert Lomison or Wellman Funeral Associates, Inc. (who operate cemeteries and funeral homes in multiple states) from owning a Pennsylvania licensed home, certainly cannot withstand constitutional scrutiny.

The dormant Commerce Clause “prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *W. Lynn Creamery v. Healy*, 512 U.S. 186, 192 (1994) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-284 (1988)). The Pennsylvania ownership restrictions patently discriminate against interstate commerce and unduly burden interstate commerce in violation of the dormant Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3. It is abundantly clear from the recent summary judgment filings by both sides that a more than adequate record has been developed which indisputably confirms the

protectionist nature of the Pennsylvania statutory scheme and the absence of any legitimate benefit flowing from that restrictive scheme (of course, but for the benefit flowing to the progeny of the “mom and pop” Pennsylvania licensed funeral directors). The record is clear – in-state interests are benefitted while out-of-state interests are burdened. There simply is no need for this complex statutory scheme of ownership, nor is there any legitimate need for the limitation on how many homes may be owned or operated by a particular entity. Indeed, the frivolity in arguing that there is a need for the limitation on funeral homes owned is belied by the very statute which allows spouses, children and grandchildren of Pennsylvania licensed funeral directors to own the stock in as many restricted business corporations as can be purchased and operated.

ICCFA has agreed not to supplement the existing summary judgment records as a condition to securing consent to the submission of this *amicus*. Accordingly, ICCFA will not detail census data, the volume of death care industry business within the United States, etc. At the same time, it is axiomatic and beyond cavil that an ownership scheme whose protectionist exceptions swallow “the rule” itself, and a scheme which benefits the family members of Pennsylvania licensed funeral directors to the detriment of all others, cannot withstand any challenge under our United States Constitution, whether that challenge is based upon Commerce Clause analysis, or even under the more deferential Due Process

Clause analysis. ICCFA submits that Pennsylvania's ownership scheme, given its facial preference for in-state interests, requires a "strict scrutiny" analysis, and no legitimate, let alone compelling, reason can be asserted to justify the barriers which have been erected to protect the Pennsylvania licensed funeral director and his extended family.

III. PROHIBITION AGAINST OFFERING CREMATION SERVICES

In Count XI of Plaintiffs' Amended Complaint, they raise, *inter alia*, Commerce Clause, First Amendment and Due Process challenges to the FDL's requirement that one must be a Pennsylvania licensed funeral director to offer cremation to the public or enter into contracts with customers for cremation. As Plaintiffs have pointed out, Pennsylvania law thus holds that, unless a Pennsylvania funeral director receives compensation, one cannot die expecting to have his remains disposed. ICCFA's members include numerous cemeteries and crematories, which, for years, have interacted with the public, communicated honestly with the public, and contracted with the public for direct cremations. These cemeteries and crematories, as well as any other out-of-state provider of cremation, are banned from communicating about or providing their services in Pennsylvania, unless a Pennsylvania funeral director is paid as a middleman. Pennsylvania's laws thus "deprive citizens of their right to have access to the

markets of other States on equal terms,” in violation of the dormant Commerce Clause. *Granholm v. Heald*, 544 U.S. 460, 473 (2005).

Moreover, there is no legitimate reason why a Pennsylvania licensed funeral director must have his hand in the pocket of every Pennsylvania consumer (or that consumer’s next-of-kin) in order for that individual to have his or her remains finally disposed. The state-endorsed monopoly over cremation granted to Pennsylvania funeral directors is all that more inappropriate because funeral directors do not necessarily possess any expertise in cremation. As the Record amply demonstrates, funeral directors are not trained in the science of cremation and possess no special knowledge therein. It is illogical and unduly expensive to require consumers to pay a Pennsylvania funeral director to direct one of his unlicensed employees to pick up a body, drop it off at a crematory, and return later for pick-up after the act of cremation is completed when that funeral director has no substantive involvement, let alone expertise, in the cremation process. There are many consumers throughout this country who very much want a funeral director involved at the time of their death, and such an option should remain available. Again, however, ICCFA understands that this litigation does not seek to alter that option in any regard. Rather, as is the theme throughout the lawsuit, Plaintiffs ask only that consumers be given alternatives and options, which, if

given, will reduce consumer costs, increase the flow of information to consumers, and provide opportunities for enhanced competition.

The suggestion that a crematory operator engages in the unlicensed practice of funeral directing if he or she discusses the benefits of cremation with the Pennsylvania consumer simply defies logic. Yet, that appears to be precisely the state of law, at least as applied by this current set of Funeral Board Members. Accordingly, ICCFA strongly urges that summary judgment of Count XI of Plaintiffs' Amended Complaint be granted. Granting that relief will eliminate an unreasonable restriction on commercial speech; it will eliminate a burden on commerce that is not necessary or reasonable; and it will greatly reduce a consumer's cost who seeks to be cremated without the fanfare of a funeral and the writing of a significant check to a funeral director who does nothing more than utilize unlicensed individuals to transport the body to and from the qualified crematory. Funeral directors continue to serve a valuable role in society for many consumers throughout the country. However, they should not possess a monopoly on the death care industry, especially when that monopoly provides no benefit to the party most deserving: the consumer.

IV. CONCLUSION

For the foregoing reasons, and for the many reasons set forth in Plaintiffs' Motion for Summary Judgment, it is respectfully requested that the Court order Pennsylvania to remove its long-standing barriers and prohibitions, thus allowing a freer flow of commerce, greater consumer access, and compliance with the dictates of our Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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