

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

ERNEST HEFFNER, et al.,	:	No. 4: 08-CV-990
Plaintiff(s),	:	
v.	:	Judge Jones
	:	
DONALD MURPHY, et al.,	:	ELECTRONICALLY FILED
Defendant(s).	:	

***AMICUS CURIAE* BRIEF OF THE
NATIONAL FUNERAL DIRECTORS ASSOCIATION
RE: CROSS MOTIONS FOR SUMMARY JUDGMENT**

I. INTEREST OF AMICUS CURIAE.

The National Funeral Directors Association ("NFDA") is the largest and oldest national association of funeral professionals in the country. As the representative of approximately 20,000 funeral directors and 10,000 funeral homes, it advocates on behalf of the funeral profession and the families served by the profession. In addition to its funeral home and funeral director members, NFDA also represents constituent state funeral associations in nearly every state, including the Pennsylvania Funeral Directors Association.

NFDA is a strong advocate of laws and regulations that protect the funeral consumer. For example, in 2000, NFDA adopted its Model Guidelines for State Preneed Laws. Those Guidelines provide for comprehensive preneed contract disclosures for consumers, strict 100% trusting laws, licensing for all preneed funeral sellers, and protection against fraudulent and deceptive practices. The Guidelines have been used by several state legislatures to strengthen their preneed laws and regulations.

NFDA has also partnered with the Federal Trade Commission to institute the Funeral Rule Offenders Program. If a funeral home is a first time violator of the FTC's Funeral Rule, the funeral home may join this diversionary educational program run by NFDA in lieu of an FTC enforcement action. The Funeral Rule Offenders Program has been hailed by the FTC as a landmark example of an association helping to self regulate its own profession.

While NFDA is a national association, it often focuses on state funeral licensing laws and regulations. Funeral service is primarily regulated on the state level. NFDA assists its member state associations by compiling information on educational and licensing statutes and advocating for the adoption of state laws that protect the funeral consumer and hold the profession accountable. For this reason, NFDA is filing this Amicus brief in support of Pennsylvania's funeral licensing laws and regulations.

While every state licenses funeral professionals, no two do it in the same manner. Statutory licensing schemes, most of which have been developed over the past century, differ in many respects. A myriad of issues, such as educational and apprenticeship requirements; funeral home, cemetery and crematory licensing; preneed funeral sales and funding; regulations and restrictions on funeral practices; customs and religious exemptions; laws on who controls the funeral and disposition, and administrative and regulatory oversight are all in the mix for state legislatures to sort out. Add into this mixture the different ethnic, religious and cultural norms and customs found throughout regions and states, and it is clear why every state regulates funeral service in its own particular manner.

Pennsylvania is no different than any other state. Its funeral licensing laws are made up of hundreds of requirements, prohibitions and restrictions that the state legislature has enacted over the past decades. From these many provisions, the Plaintiffs have taken aim at about a dozen restrictions and challenged them as irrational or protectionist. Yet, every one of the provisions fits into a comprehensive scheme that serves the valid governmental purposes of protecting the funeral consumer and holding the funeral profession accountable.

By its very nature, licensing is restrictive and exclusionary. It prevents those who do not meet the licensing qualifications from competing against those who do.

As such, licensing strikes a balance between ensuring expertise and accountability versus promoting free and open competition.

There will often be two sides arguing where the licensing law should draw the line. Ultimately, that is a decision for the state legislature, which can lawfully draw the line anywhere within a broad range. As long as the legislature has a valid reason for the licensing restriction, judicial challenges, such as the one mounted by the Plaintiffs in this case, are misplaced. It is not up to the judiciary to decide the relative wisdom of whether Pennsylvania funeral licensing laws over-regulate or under-regulate. As long as the challenged provisions of the licensing laws are rationally related to a legitimate governmental interest, they are beyond judicial challenge. Plaintiffs should be making their case to the Pennsylvania legislature, not the courts.

While NFDA supports all of the challenged provisions of Pennsylvania's licensing laws that are under attack, NFDA will focus on only two particular provisions in its Amicus brief. Those two items – the right of a state to inspect licensed funeral homes and the requirement that a business be licensed as a funeral home in order to sell cremation services – goes straight to the two primary rationales for licensing laws – consumer protection and accountability.

II. INSPECTION OF FUNERAL HOMES.

In Count I of the Complaint, the Plaintiffs allege that Section 16 of Pennsylvania's Funeral Director Law (63 P.S. Sec. 479.16(b)) violates the Fourth Amendment's prohibition against warrantless searches by the government. According to the Complaint, the statute's authorization for the State Board of Funeral Directors to enter into funeral homes for the purpose of carrying out inspections constitutes unreasonable search and seizure.

NFDA is unaware of any state that requires an inspector from the board or agency that regulates funeral homes to obtain a search warrant as a pre-condition to inspection. It goes without saying that requiring a warrant under those circumstances would eliminate the ability of state funeral boards to carry out routine inspection of the funeral homes they regulate.

Most funeral licensing laws contain funeral home inspection provisions that are similar to Pennsylvania's Section 16 and provide the state funeral board with the unconditional right to enter the funeral home without prior notice for the purpose of conducting routine inspections. NFDA member funeral homes are well aware that routine inspections are part and parcel of being a regulated profession. While no one generally welcomes an inspection from the state funeral board, funeral home owners understand that public health considerations require that

inspectors have access to embalming rooms, refrigeration facilities, crematories, and other areas of the funeral home.

Thirty years ago, the U.S. Supreme Court addressed the issue of warrantless inspections of commercial businesses by government regulators. In *Donovan v. Dewey*, 452 U.S. 594 (1981), the Court held that warrantless inspections of mines authorized by the Federal Mine Safety and Health Act constituted reasonable searches within the meaning of the Fourth Amendment.

In addressing the issue of privacy, the Court in *Donovan* ruled that when a businessman engages in a persuasively regulated business and is aware that his property will be subject to periodic inspection undertaken for specific purposes, there is not the same expectation of privacy that a homeowner has. The Court found that the greater latitude to conduct warrantless inspections of commercial property reflects the lesser expectation of privacy that the owner of commercial property enjoys.

The Plaintiffs in this case do not argue that inspections of funeral homes are unrelated to the legitimate governmental purpose of public health and professional accountability. Nor do they claim that the inspections by Pennsylvania state funeral board regulators are too random or infrequent so that the owners have no real expectation that inspections will occur. Indeed, they complain in Paragraph 176 of the Complaint about the "multitude" of funeral home inspections.

Under the holding of *Donovan v. Dewey*, the Pennsylvania funeral home inspection provisions are reasonable and constitutional. They promote the public health and assure accountability for the profession. Without the state's ability to conduct periodic and unannounced inspections, there would be no assurance that Pennsylvania funeral homes are being maintained and operated in accordance with the standards set forth in the licensing laws and regulations.

III. SALES OF CREMATION SERVICES

In Count XI of the Complaint, the Plaintiffs claim that those portions of Pennsylvania's Funeral Director Law which preclude crematories that are not licensed by the State Board of Funeral Directors from selling cremation services directly to the public are unconstitutional. Plaintiffs maintain in Paragraphs 386-388 of the Complaint that the statutory requirement to have a funeral home license in order to sell cremation services to the public serves no legitimate governmental purpose.

This particular attack against the Funeral Directors Law is also waged by the International Cemetery, Cremation and Funeral Association (ICCFA) in its amicus brief. ICCFA, whose membership is primarily comprised of cemeteries and funeral homes that are owned by publicly-traded conglomerates, argues that funeral directors are not trained in the science of cremation, have no special knowledge thereof, and, in fact, have "no substantive involvement" in the

cremation process. Requiring a funeral home license to sell cremation services to the public is, in ICCFA's opinion, illogical, unduly expensive, and unconstitutional.

ICCFA's position is wrong both from a practical standpoint and a legal standpoint. ICCFA is trying to convince the Court that cremation simply involves placing the body in a cremation retort and then returning cremated remains back to the family. That simplistic argument ignores the fact that the Pennsylvania legislature has recognized: that the actual act of cremation is commonly just one step in an involved process that entails numerous decisions by family members who are looking to the funeral director for guidance and expertise. Rather than simply loading a body in a crematory retort and pushing a button, disposition of a decedent by cremation includes the following

- Determining who holds the right of disposition. Before a body can be cremated, the funeral home arranging the cremation must determine who has the right to authorize the cremation. In today's society, with extended families, dysfunctional and transient family members, couples living in non-traditional relationships, living wills and advance directives, this determination often requires a detailed knowledge of Pennsylvania law. 20 Pa. C.S. § 305 sets out the priority list of who holds the right of disposition. That statute also references 20 Pa. C.S. Chapter 21, governing intestate succession. Adding to the complexity is the need to know the legal concepts

of "enduring estrangement", "contrary intent", and waiver. The legislature fairly concluded that funeral directors, who are trained in funeral law as part of their mortuary science programs, have the expertise to make these determinations to insure that the person who provides permission to cremate is actually the one under law who holds the right of disposition. Cremation is disfavored in some religions and ethnic groups; an errant decision to cremate can have serious adverse effects.

- Making Funeral Arrangements. As noted above, cremation is simply one step in the disposition process. While some families know that they want cremation, they are oftentimes unaware that cremation can follow a funeral, be accompanied by a memorial service, involve a graveside ceremony when the urn is interred, or include numerous other options for the disposition of the cremated remains. Funeral directors are the only ones that can make these arrangements with families and explore all of the options. The Legislature fairly concluded that families should meet with a licensed person to make sure families are aware of these options.
- Removal of Medical Devices. Given the increasing number of implanted medical devices in today's population and the rising increase in the cremation rate, the removal of implanted medical devices by embalmers is an everyday event. Medical devices that are powered by lithium batteries,

like pacemakers and defibrillators, will explode in a crematory retort. Therefore, for the safety of crematory workers and to avoid destroying retorts, it is necessary for an embalmer to locate the device in the decedent's body, surgically remove and de-activate the device, and then repair the cuts with sutures. This requires the skills of a licensed embalmer.

- Accountability. The cremation process, just like any other disposition process, involves removing the body from the place of death, sheltering and preparing it for disposition, making arrangements with the individuals who hold the right of disposition, filling out and filing the death certificate and other disposition permits, arranging and carrying out the ultimate disposition of the cremated remains, and doing all of these activities in a professional, ethical, and lawful manner. Funeral homes that fail to do so are accountable to the State Board of Funeral Directors and subject to disciplinary action.

Whether the method of disposition involves burying the body, cremating the body, processing the body by alkaline hydrolysis, or donating the body to medical science, the Pennsylvania legislature has determined that it wants the entire process overseen and carried out by a licensed funeral director that has sufficient knowledge, expertise and accountability to protect the public. This is a legitimate governmental interest that fully justifies the legislature's choice that only licensed

funeral homes are authorized to sell disposition services, including cremation, to the public.

ICCFA and the Plaintiffs are arguing that the Court must view the simple act of cremating the body myopically and ignore that it is part of the disposition of the decedent, an area in which the legislature has established a detailed regulatory scheme. Courts routinely reject these attempts to isolate and attack as unconstitutional the regulation of just one aspect of a regulated trade or profession. For example, in *Guardian Plans Inc. v. Teague*, 870 F.2d 123 (4th Cir. 1989), a challenge very similar to the one brought in this case was made against a Virginia licensing statute which required a funeral director's license for those who made preneed funeral arrangements with consumers. The Appellants contended (as the Plaintiffs and ICCFA do in this case) that it is irrational to require an individual to undertake the training and education required of a funeral director in order to simply sell preneed funeral services.

In *Teague*, the Fourth Circuit rejected the Appellants' contention. In that regard, the Court held as follows:

"Appellants' due process/equal protection challenge is premised on their belief that it is ludicrous to require a salesperson, who does nothing more than make preneed arrangements, to have the same credentials as a full-fledged funeral director. They argue that the proof of the irrationality of this requirement lies in the fact that, although designed to protect consumers, its effect is plainly anti-consumer by restricting consumer choice in

this traditionally anti-competitive market. We are unpersuaded.

Appellants' position boils down to a disagreement with the Virginia General Assembly's judgment in refusing to establish different licensure requirements for persons who do nothing more than arrange funerals. In essence, they seek to isolate, and treat differently, this one aspect of the funeral service profession. This argument has been rejected by several courts in regard to several other professions. (Citations omitted.)

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The Virginia General Assembly could have rationally determined that keeping the arrangement of funerals in the hands of licensed funeral professionals would benefit the public by ensuring competence in funeral arrangement. Our inquiry ends here. The wisdom of this determination is simply irrelevant. Because these licensing requirements are rationally related to a legitimate interest, they survive due process/equal protection scrutiny.

870 F. 2d at 126.

The exercise that ICCFA and the Plaintiffs invite this Court to undertake with regard to the sale of cremation services is exactly the type of exercise that the Fourth Circuit in *Teague* found to be improper in reviewing due process/equal protection challenges to economic regulations. *See also Williamson v. Lee Optical*, 348 U.S. 483, (1955). The Pennsylvania legislature decided that the sale of cremation, like the sale of other forms of disposition, may only be carried out by a

licensed funeral director. That determination is supported by the legitimate governmental interests of protecting the public and promoting accountability. It is constitutional.

IV. CONCLUSION.

For the foregoing reasons, NFDA respectfully requests this Court to uphold all aspects of the Funeral Directors Law being attacked by Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document on October 21, 2011, and that counsel listed below will receive a copy via the Court's ECF system:

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