

Judge Leaves Probe Decision To the Discretion of State AG

BY JOEL STASHENKO

ALBANY—A federal court cannot compel New York's attorney general to intervene in the contentious and long-standing legal dispute over the estate of Thomas and Agnes Carvel, the founders of the soft ice cream empire, a federal judge has ruled.

Thomas Carvel's niece sought to force Attorney General Andrew M. Cuomo to use his regulatory powers over charities to dissolve the Thomas and Agnes Carvel Foundation, revoke its tax-exempt status, transfer its assets to a court-appointed receiver for disbursement to charities and otherwise halt foundation operations.

Northern District Judge Lawrence E. Kahn held in *Carvel v. Cuomo*, 1:07-cv-1034, that the broad authority the attorney general and his Charities Bureau have to regulate charities is discretionary. Neither of the federal statutes cited by Pamela Carvel as she made her pro se arguments for compelling Mr. Cuomo to act, 42 U.S.C. §1983 or 28 U.S.C. §1361, give the federal court jurisdiction, Judge Kahn wrote.

"Plaintiff points to no statute that obligates the Attorney General to take the actions Plaintiff desires," the judge ruled. "Accordingly, Plaintiff has no such right. ... To the extent Plaintiff is dissatisfied with the actions the Office of the Attorney General has taken, they are not the proper subject matter of litigation in this Court."



Judge Kahn

Judge Kahn wrote that he also found no supportable allegations from Ms. Carvel that her constitutional rights were violated by the attorney general's failure to move against the foundation.

"The proposed amended complaint... fails to articulate a plausible nexus between any of Defendant's actions, or inactions, and a deprivation of Plaintiff's federal constitutional or statutory rights," the judge decided in granting the attorney general's motion to dismiss.

The attempt to inject Mr. Cuomo's office into the Carvel matter was the latest turn in a case that has been the subject of litigation since soon after

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the 1990 death of Thomas Carvel. He was the gravel-voiced entrepreneur whose ads for his chain of ice cream shops

became familiar in the Northeast.

He left his assets in trust to his wife with the proviso that the remainder of his estate would go to the Thomas and Agnes Carvel Foundation upon her death. Agnes Carvel died in 1998.

Pamela Carvel, formerly co-executor of Thomas Carvel's estate and executor of Agnes Carvel's estate, contends that control of the foundation was hijacked by people outside the family who were close to her uncle before his death. She contended before Judge Kahn that the foundation sold property and other Carvel assets without the approval of first Agnes and later Pamela. Ms. Carvel also claims the foundation has excluded her from participation.

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In an interview, Ms. Carvel claimed that Thomas Carvel placed the value of his estate as \$250 million near the time of his death. She estimated that the value of the foundation may have fallen to as low as \$50 million today.

Ms. Carvel also contended that Agnes Carvel never saw any money from the foundation in the eight years between her husband's death and her own.

The president of the Yonkers-based Thomas and Agnes Foundation, attorney and Hudson Valley Bank executive William Griffin, did not return calls seeking comment last week.

In her complaint, Ms. Carvel asked that the remaining assets of the foundation be distributed to charities that were benefiting from the foundation prior to Thomas Carvel's death.

Following Agnes Carvel's death, Ms. Carvel won a judgment from the High Court of Justice in London for more than 8 million British pounds (about \$16 million) to be paid to her from Agnes Carvel's estate under the terms of a 1995 will executed by Agnes Carvel.

Judge Upholds Discretion

Agnes Carvel was born in England and remained a British citizen throughout her life. Pamela Carvel said she is a resident of Florida and London.

In the United States, the Carvel estate remains in probate before Westchester County Surrogate Anthony A. Scarpino Jr. In 2002, he ruled that the foundation was the sole beneficiary of Agnes Carvel's estate under a will agreement signed by Thomas and Agnes Carvel in 1988.

Earlier Ruling

In 2006, Eastern District Judge Dora L. Irizarry denied Ms. Carvel's request to confirm the British judgment in her favor in *Carvel v. Carvel Foundation Inc.*, 06-MC-0005. Judge Irizarry wrote that her court lacked jurisdiction to hear the case because federal courts are precluded from disposing of property that is in the custody of a state probate court.

Ms. Carvel has brought other suits against the foundation in Florida and Delaware.

As did Judge Irizarry, Judge Kahn found the probate exception to federal jurisdiction to be a bar to Mr. Cuomo's office being ordered to dissolve the foundation, rescind transactions by the foundation and otherwise do as Ms. Carvel requested.

But Judge Kahn went further in rejecting the statutory or constitutional claims made by Ms. Carvel as well as her contention in an amended complaint that 18 U.S.C. §1962, the RICO statute, was also violated. He wrote that Ms. Carvel failed to demonstrate any injury to her business or property from any actions or non-actions by Mr. Cuomo.

Ms. Carvel called Judge Kahn's ruling "completely wrong" and said she would seek to appeal. In particular, she took exception to the argument by Mr. Cuomo's office, adopted by Judge Kahn, that the attorney general's enforcement powers of charities under the state's Not-for-Profit Corporations Law is discretionary.

Mr. Cuomo "has some nerve putting in papers that he can enforce

the law when he feels like it," Ms. Carvel said.

According to Ms. Carvel's complaint, investigations by former Attorneys General Robert Abrar and Eliot Spitzer resulted in convictions against several Carvel employees, foundation officers or lawyers involved in financial transactions with the foundation or the Carvel estate.

Ms. Carvel said she has been unable to get a response from Lawrence Werner, assistant attorney general in Mr. Cuomo's Charities Bureau about her complaints that problems at the foundation continue.

John Milgrim, a spokesman for Mr. Cuomo, declined to comment on the Carvel foundation and Ms. Carvel's attempts to have the attorney general wind up its affairs.

"The office is gratified that the court clearly recognized the attorney general's jurisdiction with regard to the office's ability to exercise discretion when regulating trusts," Mr. Milgrim said.

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