COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2007-P-1390

ERNEST ORTIZ
Plaintiff,*pro se*

v.

COMMISSIONER MASSACHSUETTS DEPARTMENT OF REVENUE
(In his official capacity),

CATHERINE J. ORTIZ
Defendants.

Appeal from Superior Court, County of Bristol,
No. BRCV 2006-01092-B

INITIAL BRIEF FOR APPELLANT

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Table of Contents

Table of Contents i

Table of Authorities iii

Statement of the Issues 1

Statement of the Case and the Facts 2

Summary of the Argument 4

A. Fundamental Rights-Strict Scrutiny Standard of Review 5

B. Right of Privacy 5

C. Basic Rights--Equal Protection 5

D. Separation of Powers 6

Introduction 7

Argument 9

I. Whether G. .L. c. 208, § 34 (Alimony) and its Enforcement Provisions Impermissibly Infringe art.10 Ma. Const. Declaration of Rights, Due Process, Right of Privacy. ... 9

A. Standard of Review—Strict Scrutiny 10

B. The Alimony Provision is Within the Zone of the Right of Privacy 11

C. Art 10 Ma. Const. Declaration of Rights 14

D. No Compelling State Interest 15

E. Exercising One Fundamental Right Cannot Deny Another 16

F. Right of Privacy: Autonomous Decision Making v. Disclosure of Personal Information 16

G. P. II c. 3 art. 5 Ma. Const. 17

II. Whether G. .L. c. 208, § 34 (Alimony) and its Enforcement Provisions Impermissibly Infringe art. 106, Ma. Const., Basic Rights and Equal Protection. 18

A. The Doctrine of Necessaries 19

B. Married Spouses and Divorced Spouses are Treated Unequally 20

C. Divorcing Parties in a Marriage are Treated Unequally .. 21

III. Whether G. L. c. 208, § 34 (Alimony) and its Enforcement Provisions Impermissibly Infringe art. 30 Ma. Const. Declaration of Rights, Separation of Powers. 22

A. art. 30 Ma. Const. 22

B. Standard of Review 23

C. G. L. c. 208, § 34, Alimony 24

D. Chelmsford Trailer Park Test 26

1. Statute delegates fundamental policy 26

2. Statute provides inadequate direction for implementation 27

3. Statute does not provide adequate safeguards for abuse of discretion 28

Conclusion 28

Prayer for Relief 30

Certificate of Service 32

Certificate of Compliance 32

Appendix

Trial Court Order of Dismissal...............................1

Transcript of Trial Court Hearing 4

Table of Authorities

Cases

Blixt v. Blixt, 437 Mass. 649 (2002) 5, 10

Boddie v. Connecticut, 401 U.S. 371 (1971) 13

Bush v. Schiavo, 885 So.2d 321(Fla. 2004) 27

Carey v. Population Serv. Int'l., 431 U.S. 678(1977) 5

Chelmsford Trailer Park, Inc. v. Town of Chelmsford, 469 N.E.2d 1259, (Mass. 1984)....................................23, 26

City of Mobile v. Bolden, 466 U.S. 55(1980) 10

Commonwealth v. Stowell, 449 N.E.2d 357(1983) 9

Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409,(1973)..7, 23

Goodrich v. Department of Public Health, 440 Mass. 798 N.E.2d 941 (Mass. 2003)...............................6, 8, 9, 15, 28

Gottsegen v. Gottsegen, 397 Mass.617(1986)....................27

Graham v. Richardson, 403 U.S. 365 (1971) 19

Griswold v. Connecticut, 381 U.S.479 (1965) 9, 16

Harris v. McRae, 448 U.S. 297 (1980) 10

Kramer v. Union Free School District, 395 U.S. 21 (1969) ..10, 19

Lawrence v. Texas, 539 U.S. 558 (2003) 12

Littlejohn v. Rose, 768 F.2d 765 (6th Cir. 1985) 5, 13

Loving v. Virginia, 388 U.S. 1 (1967) 4, 11, 14

Lowell v. Kowalski, 380 Mass. 663 (1980) 9, 10

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 1, 5, 12

Roe v. Wade, 410 U.S. 113 (1973) 13

San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) ... 18

Shapiro v. Thompson, 394 U.S. 618 (1969) 19

Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) ... 14

Washington v. Glucksberg, 521 U.S. 702 (1997) 11

Zablocki v. Redhail, 434 U.S.374 (1978) 11, 13

Statutes

G. L. c. 30A § 7 3

G. L. c. 208, § 34 .... passim

G. L. 209 § 1 20

G. L. 209 § 7 19

Other Authorities

16 Am Jur 2d, Sec 177 late 2d, Sec 256 30

Treatises

Reexamining the Massachusetts Nondelegation Doctrine: Is the "Areas of Critical Environmental Concern" Program An Unconstitutional Delegation of Legislative Authority?, Ben McGovern, Boston College Environmental Affairs Law review, 2004) 24

O.W. Holmes. The Path of the Law. 10 Harvard Law Review 457 (1897) 28

Constitutional Provisions

art. 106, Ma. Const. .... i, 1, 3, 18

art. 30, Ma. Const .... ii, 2, 22

art. 10, Ma. Const .... i, 1, 9

P. II c. 3 art. 5, Ma. Const .... i, 17

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ALAN LeBOVIDGE, COMMISSIONER
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(In his official capacity),
CATHERINE J. ORTIZ
Defendants.

Appeal from Superior Court, County of Bristol,
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INITIAL BRIEF FOR APPELLANT

> "The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847 (1992)

Statement of the Issues

I. Whether G. L. c. 208, § 34 (Alimony) and its Enforcement Provisions Impermissibly Infringe art.10 Ma. Const., Declaration of Rights, Due Process, Right of Privacy.

II. Whether G. L. c. 208, § 34 (Alimony) and its Enforcement Provisions Impermissibly Infringe art. 106, Ma. Const., Basic Rights and Equal Protection.

a. Whether the doctrine of necessaries statute violates art. 106, Ma. Const. equal protection.

b. Whether G. L. c. 208, § 34 violates equal protection as not all divorcing spouses are treated equally.

c. Whether G. L. c. 208, § 34 violates equal protection as spouses and former spouses are treated unequally.

III. Whether G. L. c. 208, § 34 (Alimony) and its Enforcement Provisions Impermissibly Infringe art. 30 Ma. Const., Declaration of Rights, Separation of Powers.

> "it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage…" *Carey v. Population Serv. Int'l.*, 431 U.S. 678, 684-685 (1977)

Statement of the Case and the Facts

The Appellant is a 53 year old who chose to alter his associational interest by changing his marital status, i.e. dissolving his marriage in Bristol County in 2000. The state of Massachusetts, through its judiciary dissolved his marriage. In the process the state levied an undue burden on him by placing a yoke of lifetime alimony on him pursuant to G. L. c. 208, § 34. To this day the Appellant bears that undue burden under the threat of law to be incarcerated as well as having his property and earnings seized through the legal threat of garnishment enforcement.

The Appellee, former and current Commissioner of the Department of Revenue, is the state official designated to enforce the challenged alimony statute.

The Appelle, Cathy Ortiz, is the former wife.

September 1, 2006 the Appellant filed a civil declaratory judgment action (G. L. c. 30A, § 7) challenging the Massachusetts alimony statute as impermissibly infringing the Massachusetts Constitution Right of Privacy, Basic Rights (Equal Protection) and Separation of Powers. [1]

October 10, 2006 the Appellee moved to dismiss arguing that a) financial disclosure is not protected by the right of privacy; b)the former husband voluntarily entered marriage and therefore subjected himself to the laws of leaving marriage; c) the Massachusetts constitution grants authority to the judicial branch of government to adjudicate alimony.

On March 23, 2007, after a hearing, the trial court dismissed the action.

On April 3, 2007 the Appellant Moved to Amend the Order and for a new trial (motion for reconsideration)under Ma. Rule Civ. Proc. Rule 59 (e). The Appellee opposed arguing the Appellant did not precisely comply with Ma. Rules Civ. Proc. Rule 59 (e).

[1] (G.L. c. 208, § 34 violates art.10, Ma. Const. Declaration of Rights, Due Process, Right of Privacy; violates art. 106, Ma. Const., Basic Rights; violates art. 30, Ma. Const., Declaration of Rights, Separation of Powers)

On May 3, 2007 the trial court denied the motion for reconsideration.

On May 29, 2007 the Appellant timely filed this appeal. The Appellee moved to deny the appeal as the Appellant's filing was untimely based on the trial Court's March 23, 2007 order of dismissal which he alleged started the thirty days to appeal.

On June 8, 2007 the Appellant argued that the appeal was timely filed as the time to appeal was tolled until a ruling on the Appellant's motion to reconsider. That order denying reconsideration had been rendered May 3, 2007.

On June 22, 2007 the trial court denied the Appellee's motion to strike the appeal. September 7, 2007 this Appeal was docketed in the Appeals Court of Massachusetts. This Initial brief is filed September 24, 2007.

Summary of the Argument

Marriage—entering and exiting--is a liberty interest protected by the constitutional due process amendment.

> "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights… but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967)."

A. Fundamental Rights-Strict Scrutiny Standard of Review

The state constitutional right of privacy and equal protection are fundamental constitutional rights. When a state statute impermissibly infringes a fundamental right the statute is presumptively unconstitutional and the burden shifts to the state to prove the statute furthers a "compelling" state interest by the "least restrictive means." (*Blixt v. Blixt*, 437 Mass. 649 (2002), cert. denied, 537 U.S. 1189 (2003))

B. Right of Privacy

"Personal decisions relating to marriage," i.e. divorce (exiting marriage) is afforded the protections of the fundamental right of privacy. Any provision written within the divorce statute must not infringe the right of privacy. The state cannot place an undue burden on those entering marriage, nor can it place an undue burden on those existing marriage. Lifetime alimony exceeds the undue burden standard—it is an oppressive burden. (*Carey v. Population Serv. Int'l.*,431 U.S. 678, (1977), *Planned Parenthood of Southeastern Pa. v. Casey*,505 U.S. 833 (1992), *Littlejohn v. Rose*,768 F.2d 765 (6th Cir. 1985)), *Florida Bar v. Brumbaugh*, 355 Sp. 2d 1186 (Fla. 1978)

C. Basic Rights--Equal Protection

When a fundamental right is at issue equal protection of the law must be afforded to all similarly situated citizens. All citizens divorcing must be treated equally. Not all spouses choosing to alter their associational interest by changing their marital status have imposed on them the lifetime burden of supporting their former spouse

to the level of the lifestyle of the marriage imposed via the alimony statute. The issue is not a gender issue, i.e., not whether men or women pay or receive alimony, but whether similarly situated Massachusians exiting marriage are all treated similarly.

Exercising a fundamental right of association to *enter* marriage does not impose a lifetime burden on one spouse to support the other at a lifestyle level commensurate with his ability to pay. Exercising a fundamental right of association to *exit* marriage cannot impose a lifetime burden on one spouse to support the other at a lifestyle level commensurate with his ability to pay.

The same freedom of economic responsibility must be applied to all citizens equally who *exit* marriage as to those who *enter* marriage. Marital status cannot be the source of unequal treatment. *Goodrich v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003).

D. Separation of Powers

Massachusetts has a strong separation of powers constitutional amendment. No branch may usurp the authority of another...and no branch may delegate its authority to another. In G. L. c 208 § 34 the legislature has impermissibly delegated its exclusive lawmaking power to the judiciary by granting it almost unbridled discretion

to make law in determining if the alimony statute will be applied, and for how long, and for want amount. Similarly situated divorcing Massachusians are not all similarly unduly burdened with alimony for the same duration nor for the same amount. Delegation of unbridled discretion, even with suggestions of factors of guidance, represents exclusive legislative law making authority. (*Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 363 Mass. 409, 416 (1973)

Introduction

This is a good faith effort to extend and intercollate current law. The issues raised are issues of first impression and therefore no law exists on point. The issues raised address now well developed constitutional fundamental rights law, i.e. right of privacy and equal protection as well as separation of powers doctrine and applies these constitutional provisions to a statute that has had little substantive revision for over one and a half centuries, i.e. the alimony statute. (G. L. C. 208, § 34)

The last time the alimony statute butted the state constitution was to address gender equal protection. Statutorily men had paid women alimony. With the better understanding of the equal protection fundamental right the

alimony statute was found infirm and adjusted to be gender neutral.

Now it is time for this court to hold the alimony statute to scrutiny against the better understood right of privacy fundamental right. When this court does this review it will be apparent that with today's understanding of the right of privacy the alimony statute is fatally flawed.

In asking this court to review the alimony statute from the perspective of its infringement on impermissible exclusive legislative law making power the former husband is aware he is asking this court to effectively relinquish power it has exercised for over a century.

Massachusetts courts, in the past, have been asked to review separation of powers issues between the legislative and the executive branches or between lower governmental entities. The separation of powers issue here is one of first impression for this court, i.e. impermissibly delegated exclusive lawmaking power from the legislature to the judiciary.

The former husband asks this court to set aside well entrenched judicial misoneism. He asks this court to review the issues with the same open mind and tone toward right of privacy and equal protection relating to the *exit*

from marriage as the equal protection and right of privacy relating to the *entry* into marriage were examined by this court's superiors in *Goodrich v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003).

Argument

> "The right of the State to regulate the institution of marriage under its police power is unquestioned *where it does not infringe on fundamental rights.* Zablocki v. Redhail, 434 U.S. 374, 396 (1978) (Powell, J., concurring). Cf. Loving v. Virginia, 388 U.S. 1 (1967) (right to marry);Griswold v. Connecticut, 381 U.S. 479 1965) (right to use contraceptives in marital relationship)." [Emphasis added] *Commonwealth v. Stowell*, 449 N.E.2d 357(1983)

I. Whether G. .L. c. 208, § 34 (Alimony) and its Enforcement Provisions Impermissibly Infringe art.10 Ma. Const. Declaration of Rights, Due Process, Right of Privacy.

The Massachusetts alimony statute is a provision within the General Laws of Massachusetts Chapter 208 titled "Divorce." The chapter regulates the associational interests of Massachusians when they exercise their fundamental right to alter their marital status, i.e. to divorce. When Massachusians choose to exercise a personal decision relating to their marriage, to exit marriage, the alimony statute adds an impermissible undue burden without any compelling state interest, minimally applied, for the alimony statute to be valid.

A. Standard of Review—Strict Scrutiny

> "With respect to each such claim, we must first determine the appropriate standard of review. Where a statute implicates a fundamental right or uses a suspect classification, we employ 'strict judicial scrutiny.' Lowell v. Kowalski, 380 Mass. 663, 666 (1980)." *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

The Right of Privacy having attached to the alimony provision, G. L. C. 208, § 34, it is presumptively unconstitutional, and requires strict scrutiny review.

> "It is well settled that . . . if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.'" *Harris v. McRae*, 448 U.S. 297, 312 (1980) (quoting *City of Mobile v. Bolden*, 466 U.S. 55, 76 (1980))

> "Just as our obligation to exercise restraint when reviewing statutes is paramount under rational basis review, our obligation to protect fundamental rights is paramount under strict scrutiny. Indeed, the United States Supreme Court has specifically held that 'when we are reviewing statutes which deny some residents [a fundamental right], the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' . . . are not applicable.'" *Kramer v. Union Free School District*, 395 U.S. 621, 627-28, (1969).

Also Justice Coldy dissenting in *Goodridge* 798 N.E. 2d,

> "If a statute either impairs the exercise of a fundamental right protected by the due process or liberty provisions of our State Constitution, or discriminates based on a constitutionally suspect classification such as sex, it will be subject to strict scrutiny when its validity is challenged.

> See Blixt v. Blixt, 437 Mass. 649, 655-656, 660-661 (2002), cert. denied, 537 U.S. 1189 (2003) (fundamental right); Lowell v. Kowalski, 380 Mass. 663, 666 (1980) (sex-based classification).”

> …“If a right is found to be ‘fundamental,’ it is, to a great extent, removed from ‘the arena of public debate and legislative action’; utmost care must be taken when breaking new ground in this field ‘lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [judges].’” *Washington v. Glucksberg,* 521 U.S. 702, 720 (1997).

When the state chooses to regulate Divorce, any provisions therein are presumptively unconstitutional unless the state proves a compelling state interest minimally applied to validate the undue burden caused by the impermissibly infringing statute. The alimony statute as part of the Divorce Chapter (G.L. 208) is therefore presumptively unconstitutional.

B. The Alimony Provision is Within the Zone of the Right of Privacy

> “"While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967)…” *Zablocki v. Redhail*, 434 US 374, 385 (1978)

> “The Court's decisions have afforded constitutional protection to personal decisions relating to marriage, see, e.g., *Loving v. Virginia*, 388 U.S. 1…” *Casey* 505 at 834

"Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Carey v. Population Services International, 431 U.S., at 685." *Casey* 505 at 851

"In a Constitution for a free people, there can be no doubt that the meaning of `liberty' must be broad indeed." Board of Regents v. Roth, 408 U.S. 564, 572 . The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights." *Roe* 408 at 572 citing *Griswold*

"In *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*, at 851. In explaining the respect the Constitution demands for the autonomy of the person in making these choices:
' These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.' Ibid." *Lawrence v. Texas*, 539 US 558 (2003)

There is no common law right to alimony. Alimony (G.L. c. 208 § 34) is merely a statute, part of G.L. Chapter 208 entitled "Divorce." Quite simply, as a statute,

it must conform to the constraints set forth in the Massachusetts Constitution. G. L. Chapter 208 regulates "the personal decision related to marriage" of Massachusians to exit marriage—i.e. their liberty interest in freedom to make adjustments to their associational interest. The alimony provisions are written within that privacy-protected zone of divorce.

See *Littlejohn v. Rose*, 768 F.2d 765, 768 (6th Cir. 1985) citing *Zablocki v. Redhail*, 434 US 374, 385 (1978) for the rule that divorce (exiting marriage, dissolving marriage) falls within the umbrella of the constitutional protections of the right of privacy,

> "Decisions of the Supreme Court have firmly established that 'matters relating to marriage [and] family relationships" involve privacy rights that are constitutionally protected against unwarranted governmental interference. E.g., Roe v. Wade, 410 U.S. 113, 152-53, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). The Court has "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' Zablocki v. Redhail, 434 U.S. 374...
>
> The Supreme Court has established broad protection for matters relating to the marital relationship including the availability of due process in seeking adjustments to the marital relationship. Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct.780 (1971). Given the 'associational interests that surround the

establishment and dissolution of [the marital] relationship', such 'adjustments' as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy. See Zablocki, 434 U.S. at 385; U.S. v. Kras, 409 U.S. 434, 444, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1975)."

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights… but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967)." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847 (1992)

"Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties 'protected by the Due Process Clause of the Fourteenth Amendment.'" *Roe v. Wade,* 410 U.S. 113, 168 (1973)

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)

C. <u>Art 10 Ma. Const. Declaration of Rights</u>

"**Article X.** Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their

> constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. [See Amendments, Arts. XXXIX, XLIII, XLVII, XLVIII, The Initiative, II, sec. 2, XLIX, L, LI and XCVII.]"

Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003) is now the sentinel caselaw on fundamental state constitutional rights of Massachusians in the privacy protected zone of marriage.

D. No Compelling State Interest

The former husband asks, "What public policy rises to the level of a compelling state interest to permit the state to invade the privacy area of marriage during dissolution?" If there is a state interest, if it were a compelling one, then *all* dissolutions of marriage should be examined whether contested or uncontested to assure the policy was fostered. If there is a compelling state interest, there should be no difference in how the courts treat parties of a marriage regardless of the length of the marriage, their individual wealth or individual earning capacity. Entering *and* exiting marriage is a fundamental right.

If there is a compelling state interest, then it should be determinative as to permanent spousal support,

not the length of the marriage, not whether the dissolution is contested, and not the 2[33] factors in G. L. c. 208 § 34. The public policy interest would be expected to be labelled "compelling" in the statute and be contained in the purposes provision of the statute. It is not.

E. Exercising One Fundamental Right Cannot Deny Another

The state would argue that because the former husband—and all other Massachusians--voluntarily chose to exercise their fundamental right to *enter* marriage they voluntarily subject themselves to the state's regulation of *exiting* their marriage. While that is true it still does not permit the state to define unconstitutional terms for exiting marriage. By exercising a fundamental right one is not obligated to forsake another constitutional right.

Using the state's logic Estelle Griswold had no case against the state of Connecticut because citizens of Connecticut voluntarily entered marriage and exposed themselves to the state's regulatory power over marriage.(*Griswold v. Connecticut*, 381 U.S. 479 (1965)) Further examples are simply not necessary to point out the flawed reasoning of the state's position.

F. Right of Privacy: Autonomous Decision Making v. Disclosure of Personal Information

The state confused the two contexts of the right of privacy in its arguments before the trial court. The state argues the context of personal information disclosure when the former husband's argument is grounded in the autonomous decision making context of the right of privacy. Liberty interest and the constitutional fundamental right address primarily the autonomous decision making context of the right as noted in the case citings from the United States Supreme Court above.

G. P. II c. 3 art. 5 Ma. Const.

P. II c. 3 art. 5 Ma. Const. merely ***assigns*** alimony disputes to the Judicial branch of government. It does not ***validate*** the alimony statute. Because the concept and statute of alimony existed over one and a half centuries ago the constitution made provisions ***where*** disputes were to be settled. The provision of a forum for resolution of alimony disputes in the Ma. Constitution is not a validation of the constitutionality of alimony or, more importantly, the alimony statute. To try to validate the constitutionality of the alimony statute because the word alimony exists in the constitution is error.

The constitutional right of privacy is far better understood today that it was one and a half centuries ago. This court must review and decide the issue raise based on

current law and not based on a constitutional statement as to which branch of government was to hear alimony disputes one and a half centuries ago.

II. Whether G. .L. c. 208, § 34 (Alimony) and its Enforcement Provisions Impermissibly Infringe art. 106, Ma. Const., Basic Rights and Equal Protection.

San Antonio School District v. Rodriguez, 411 U.S. 1, 16 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.

G. L. c. 208, § 34 creates a myriad of unequally classified divorcing spouses based on 2^{33} factors that result in the deprivation of the fundamental rights of some of them simply because they chose to exercise their fundamental right to change their marital status. The classification of divorcing spouses via the alimony statute interferes with their exercise of a fundamental right, i.e to alter their marital status and associational interest.

A classification based on wealth and earning power that effects a fundamental right requires strict scrutiny analysis. The application of the Massachusetts alimony statute is grounded on the relative wealth of the spouses

and their earning capacity. The judiciary has created the law that a former spouse with an ability to pay should pay to a former spouse who is needy and maintain the needy spouse at the level of the lifestyle of the marriage. The statute then creates 2[33] classes of citizens to make the determination of relative wealth between the spouses. Thereby, the alimony statute impermissibly interferes with the exercise of a "fundamental" right ("personal decision relating to marriage", i.e. to divorce) and that accordingly the prior decisions of the United States Supreme Court require the application of the strict scrutiny standard of judicial review. *Graham v. Richardson*, 403 U.S. 365, 375 -376 (1971); *Kramer v. Union School District*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969). There is no compelling state interest, minimally applied to justify reclassifying citizens based on marital status that then infringes a fundamental right and strips their property rights—for the rest of their lives!

A. The Doctrine of Necessaries

Massachusetts doctrine of necessaries violates the state constitution equal protection provisions. The state through G.L. 209, § 7 does not hold the married woman to the same economic liability as the state does the married

man in G. L. 209 § 1. Section 1 below creates a mutual doctrine of necessaries. Section 7 selectively then limits a married woman's liability for necessaries.

> **Chapter 209: Section 1.** Married persons;...; liability for debts.
> ...The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the nondebtor spouse; provided, however, both spouses shall be liable jointly or severally for debts incurred on account of necessaries furnished to either spouse or to a member of their family.

> **G.L. Chapter 209: Section 7.** Married woman; liabilities
> Section 7. A married woman shall not be liable for her husband's debts, nor shall her property be liable to be taken on an execution against him. But a married woman shall be liable jointly with her husband for debts due, to the amount of one hundred dollars in each case, for necessaries furnished with her knowledge or consent to herself or her family, if she has property to the amount of two thousand dollars or more.

B. Married Spouses and Divorced Spouses are Treated Unequally

G.L. c. 208, § 34 treats divorced spouses differently than married spouses. The alimony statute mandates that a divorced spouse maintain his former spouse in the lifestyle of the marriage permanently. No such provision is mandated against a married spouse. There is no compelling reason minimally applied to justify the state treating married and

divorced spouses differently based on their exercising their fundamental right to alter their marital status.

Furthermore the statute, and the courts’ application of it, mandates that the divorced supporting spouse must continue to work at the same income level and make payments otherwise the statute, and the courts’ application, permits imputation of income, garnishment of wages and incarceration as enforcement mechanisms. No such enforcement exists toward a married spouse.

C. **Divorcing Parties in a Marriage are Treated Unequally**

Chapter 208, the Divorce statute, through the alimony provision treats the two divorcing spouses in a marriage unequally based on their wealth and earning capacity. When Massachusians chose to exercise their fundamental right to change their marital status the state reclassifies each party based on wealth and earning capacity. The two parties in a marriage dissolution process are thereby treated unequally.

Also, not all parties of all divorces are treated similarly. Those in uncontested divorces are treated differently that those in contested divorces. Divorcing Massachusians in contested divorces must disclosed all their marital intimate economic, earning, tax, wages, assets, debts, education, health, psychological and

emotional details to the court, the state and the public record. Other divorcing spouses who do not contest their divorce are free of those state intrusions.

No fault divorce statutes were created to minimize the trauma and expenses to parties dissolving their marriage. When it passed no fault divorce the legislature dramatically changed public policy to lower the state's interest in the integrity of marriage by permitting far easier dissolution. The state has not carried through that public policy to eliminate the costly court experience of warring over alimony.

That the state does not treat all dissolutions similarly, hold both spouses to a similar standard, but arbitrarily reclassifies them based on wealth and earning capacity does not represent a compelling state interest, minimally applied, to justify the alimony statute.

III. Whether G. L. c. 208, § 34 (Alimony) and its Enforcement Provisions Impermissibly Infringe art. 30 Ma. Const. Declaration of Rights, Separation of Powers.

A. art. 30 Ma. Const.

Article 30 of the Massachusetts Declaration of Rights (Article 30) mandates that:

> "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them:

> the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." [Emphasis added]

Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 416 (1973) says,

> "It is well established in this Commonwealth and elsewhere, that the Legislature cannot delegate the general power to make laws, conferred upon it by a constitution like that of Massachusetts." *Brodbine* v. *Revere,* 182 Mass. 598, 600, and cases cited. Article 30 of the Declaration of Rights."

B. Standard of Review

The current standard of review for challenging the constitutionality of a state statute as violative of the separation of powers amendment nondelegation doctrine has been established in *Chelmsford Trailer Park, Inc. v. Town of Chelmsford*, 469 N.E.2d 1259, (Mass. 1984). G.L. c 208, § 34 readily fails the three prong requirements for separation because the statute establishes public policy rather than merely addressing details, and the statute lacks the required totality of protection against arbitrariness.

Despite an unambiguous state constitutional amendment declaring a stern bright line rule of separation of powers this state's courts have been reluctant to find statutes in violation of the amendment.

This case is a radical departure from prior precedents on separation of powers as the statute at issue here effects liberty interests along with fundamental state and federal rights-- the right of association, the right of privacy, the right of equal protection, the fundamental right to adjust one's marital status. This case is sentinel for the courts to return to a stricter interpretation of the separation of powers amendment. (See for a review of Massachusetts Separation of Powers amendment, generally, Reexamining the Massachusetts Nondelegation Doctrine: Is the "Areas of Critical Environmental Concern" Program An Unconstitutional Delegation of Legislative Authority?, Ben McGovern, Boston College Environmental Affairs Law review, 2004)

C. G. L. c. 208, § 34, Alimony

The highlighted portions below show the impermissible delegation of public policy making authority and the lack of adequate direction for implementation manifest as a myriad plethora of permutations so boundless as to be unamenable to consistent implementation…let alone predictability and uniform, consistent reproducibility.

Chapter 208: Section 34. Alimony or assignment of estate; determination of amount; health insurance

Section 34. Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, ***may*** make a judgment for either of the parties to pay alimony to the other. ***In addition to or in lieu of a*** judgment to pay alimony, ***the court may*** assign ***to either husband or wife all or any part of the estate of the other, including but not limited to***, all vested and nonvested benefits, rights and funds accrued during the marriage and which ***shall include, but not be limited to,*** retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. ***In determining the amount*** of alimony, ***if any***, to be paid, or in fixing the nature and value of the property*,* ***if any***, to be so assigned, the court, after hearing the witnesses, ***if any***, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court ***may*** also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or

> coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.

D. Chelmsford Trailer Park Test

Chelmsford Trailer Park 469 NE 2d three prongs,

> "No formula exists for determining whether a delegation of legislative authority is "proper" or not. Here, in order to make that determination, we undertake a threefold analysis: (1) [d]id the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of statutory standards or, if the local authority is to develop the standards, sufficient guidance to enable it to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?"

1. Statute delegates fundamental policy

The "may's," the "in lieu of's," the "if any's," give unbridled, exclusive legislative policy making decisions to the judiciary operating in a court of "equity" to adjudicate, and effectively deprive, the former husband and all Massachusians of their fundamental constitutional rights, i.e., right of association, right of privacy and property rights. Such unbridled discretion is impermissible. (For a discussion of the nondelegation

doctrine, the determinative elements, and the impermissible broad discretion that violates the separation of powers principle see sister state ruling, *Bush v. Schiavo*, 885 So.2d 321, (Fla. 2004))

2. Statute provides inadequate direction for implementation

The statute is devoid of any direction for implementation of *how* and *whether* to award alimony. That policy decision is unbridled discretion placed in the judiciary. The statute only lists a staggering permutation of factors for the court to consider when making a determination of the *amount* of alimony.

The staggering number of permutations prevents a consistency in application of the statute so that divorcing parties can foresee whether they are at risk of a lifetime sentence to support another Massachusian at the economic lifestyle she/he experienced—forever. The preposterous number of permutations makes consistency of implementation of the statute an impossibility. The chance of two similar fact pattern divorce cases resulting in the same decision on alimony and alimony amount is almost prohibitive. Because of the galactic number of permutations (2^{33}) in the statute, the unbridled discretion granted to the judiciary, and the standard of equity, the chances of winning the

state lottery are far superior to the occurrence of a reproducible court order.

3. Statute does not provide adequate safeguards for abuse of discretion

The only safeguard on abuse of discretion is appeal. That is insufficient in equity cases as the standard is too nebulous. The unbridled discretion granted the trial court in its decision making among the 2^{33} permutations is limited only as to whether there was trial evidence to support the court's decision. (*Gottsegen v. Gottsegen*, 397 Mass. 617 (1986)) There is no mandate that the trial court order contain a narrative of the statutory factors weighed and how they were weighted. Certainly that did not occur in the instant case. The safeguard of appeal is more window dressing than a valid tool to avert trial court abuse of discretion.

Conclusion

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." O.W. Holmes. The Path of the Law. 10 Harvard Law Review 457 (1897)

Goodrich 789 N.E. 2d examined the *entry* into marriage in the context of right of privacy and equal protection.

This appeal from a declaratory judgment action asks this court to review the *exit* from marriage in the context of the right of privacy and equal protection—as well as in the context of the separation of powers doctrine.

In the same manner that the United States and the Massachusetts Supreme Courts found that the state cannot create undue burdens to *entry* into marriage, likewise the state cannot create undue burdens to *exit* from marriage as it has done with overburdening, oppressive, stigmatizing permanent alimony statute. No compelling state interest exists to justify the statute and certainly if one does exist it is not minimally applied as is a requirement to resurrect this presumptively unconstitutional statute that infringes a fundamental right.

So, too, with equal protection…all Massachusians now must be treated equally as to *entering* marriage—gender requirements having been precluded. Likewise all citizens *exiting* marriage must be treated equally—the two spouses exiting the one marriage, and all spouses exiting all marriages in the state.

Neither can married spouses be treated differently than divorced spouses especially with reclassification to separate classes based on wealth and earning capacity.

Finally, the impermissible delegation of exclusive legislative lawmaking and policy making must be returned by the judiciary to the legislature. This court must demand the legislature rework Chapter 208 to retain its exclusive public policy making power by eliminating the alimony statute.

The former husband is aware this court's ruling has major repercussions-- both good and bad--to divorced citizens, but the consequences of this court's ruling must take a backseat to the need for persistent vigilance in maintaining the constitutionality of this state's statutes.

Whatever the ramifications of this court's declaring the alimony statute unconstitutional, the preservation of liberty interest and fundamental constitutional rights far exceeds that price.

Prayer for Relief

> "The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of it's enactment, and not merely from the date of the decision so branding it. No one is bound to obey an unconstitutional law, and no courts are bound to enforce it." -- 16 Am Jur 2d, Sec 177 late 2d, Sec 256

WHEREFORE the former husband prays this court pass the alimony provision (G.L. c. 208, § 34) of the Divorce Chapter through the prism of the right of privacy and equal protection state constitutional amendments and find that the statute, G. L. c. 208, § 34 impermissibly infringes both the right of privacy and equal protection amendments.

Further this court must find the current structure and nature of G. L. c. 208, § 34 impermissibly infringes the state constitution separation of powers.

Finally, this court must find the alimony statute being unconstitutional it is void ab initio, could never have created any vested rights and is not enforceable.

Respectfully submitted,

______________________ September 26, 2007

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Certificate of Service

I hereby certify that on this 26th day of September, 2007, I caused a true and accurate copy of the foregoing Reply to be mailed via U.S. Postal Service, prepaid, to

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Certificate of Compliance

I hereby certify that this Appellant’s Initial Brief is in Compliance with the Massachusetts Rules of Appellate Procedure.

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