

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2007-P-1390

ERNEST ORTIZ
Plaintiff, *pro se*

v.

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

CATHERINE J. ORTIZ
Defendants.

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

REPLY BRIEF FOR APPELLANT

Ernest Ortiz, *pro se*
With assistance of counsel
90 Weeden Road
Fairhaven, MA 02719
508-997-0920
llswedel12@aol.com

Table of Contents

Table of Contents.....	i
Table of Authorities.....	iii
Preface	1
Argument	3
I. This Appeal Was Timely Filed.....	3
II. A. Right of Privacy Is Infringed.....	4
1. Right of Privacy: Autonomous Decision Making v. Public Disclosure of Private Information	4
2. <i>Daniel v Daniel</i> , 922 So. 2d 1041 (Fla. Dist. Ct. App.2006)	6
3. <i>Ganong v Ganong</i> , 66 Mass. App. Ct. 1108(2006)	7
4. Standard of Review is Strict Scrutiny	9
5. Statutes Infringing Fundamental Rights are Presumed Unconstitutional	9
6. The State Constitution Limits the State's Police Power	10
II. B. The Word Alimony in the Mass. Const. Does not Validate the Alimony Statute (G.L. c. 208 § 34).....	11
1. Separation of Powers: Constitutional Clarity	12
2. The Alimony Act (Statute) Fails All 3 Prongs of <i>Chelmsford</i>	14
a. The Alimony Statute Impermissibly Delegates Fundamental Policy Making Power to the Judiciary	15
b. The Act (Statute) Lacks Direction for Implementation	16

c. The Act (Statute) Is Completely Devoid of Safeguards Against Abuse	16
III. Equal Protection Argument is an Appellate Argument.....	17
IV. The Trial Court Order Misstated the Claims in the Complaint.....	18
Conclusion.....	18
Prayer for Relief	20
Certificate of Service.....	1
Certificate of Compliance	1

Table of Authorities

Cases

Bowers v Hardwick, 478 U.S. 186 (1986)7, 9

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

City of Mobile v. Bolden, 466 U.S. 55 (1980) 9

Commonwealth v Stowell, 389 Mass. 171 (1983)5, 10

Connecticut v Griswald, 381 U.S. 479 (1965) 8

*Construction Indus. of Mass. V Commissioner of Labor
and Indus.*, 406 Mass. 162 (1989).....12

Goodrich v. Department of Public Health, 440 Mass.
309, 798 N.E.2d 941 (Mass. 2003).....5, 9, 11

Griswold v. Connecticut, 381 U.S. 479 (1965)10

Harris v. McRae, 448 U.S. 297 (1980) 9

Kramer v. Union Free School District, 395 U.S. 621
(1969).....10

Lawrence v. Texas, 539 U.S. 558 (2003) 7

Loving v. Virginia, 388 U.S. 1 (1967)10

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

Olsen v Olsen, 557 P. 2d 604 (1976)1, 18

Opinions of the Justices, 372 Mass. 883(1977)12

Posner v. Posner, 233 So. 2d 381 (Fla. 1970) 6

<i>Roe v Wade</i> , 410 U.S. 113 (1973)	8
<i>San Antonio School District v. Rodriguez</i> , 411 U.S. 1 (1973).....	17
<i>Simmons v. U.S.</i> , 390 U.S. 389 (1968)	8
<i>Springer v. Government of the Phil.Islands</i> , 277 U.S. 189 (1928).....	13
<i>Whalen v. Roe</i> , 429 U.S. 589 (1977)	4, 5
<i>Zablocki v. Redhail</i> , 434 U.S. 374 (1978)	10

Statutes

G.L. c. 208 § 34.....	passim
-----------------------	--------

Rules

Mass. R. Civ. P. Rule 59.....	2, 3
Mass. R. Civ. P Rule 60	3
Mass. R. Civ. P Rule 60 (a).....	3

Constitutional Provisions

art.10 Ma. Const.	2, 19
art. 30 Ma. Const	passim
art. 106, Ma. Const.	2, 20
art. I sec 23, Fla. Const	6

COMMONWEALTH OF
MASSACHUSETTS
APPEALS COURT

NO. 2007-P-1390

ERNEST ORTIZ
Plaintiff, *pro se*
v.

COMMISSIONER
MASSACHUSETTS DEPARTMENT OF REVENUE
(In his official capacity),
CATHERINE J. ORTIZ
Defendants.

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

REPLY BRIEF FOR APPELLANT

"...the time has long since past when the state and its judiciary should cease its unwarranted, unnecessary, irrational intrusion into the lives of its citizens simply because at one time they occupied a marital status." Justice Shepard dissenting in *Olsen v Olsen*, 557 P. 2d 604, 616 (1976)

Preface

Mr. Ortiz, in a declaratory judgment action, offered a facial and an as applied challenge to the Massachusetts alimony statute (G.L. c. 208 § 34). He argued that he and others have a fundamental right to adjust their associational interest by altering their marital status (divorcing) without the state imposing an undue burden on them.

Ortiz argued the statutory language of G.L. c. 208 § 34 impermissibly infringes art.10 Ma. Const., Right of Privacy; art. 106, Ma. Const., Equal Protection; and art. 30 Ma. Const., Separation of Powers.

The Commissioner, in answer, argues,

I. A post judgment Mass. R. Civ. P. Rule 59 motion was untimely filed by one (1) day ultimately resulting in an untimely Notice of Appeal.

II. A. Disclosure of financial information in a dissolution proceeding is not entitled to right of privacy protection; Mr. Ortiz subjected himself to the alimony statute because he voluntarily married and therefore cannot complain; statutes are presumed constitutional; here the statutory standard of review is rational basis; the alimony statute has a rational basis; the state's police power justifies the alimony statute; *Daniel v Daniel*, 922 So. 2d 1041 (Fla. Dist. Ct. App.2006) and (*Ganong v Ganong*, 66 Mass. App. Ct. 1108 (2006) (unpublished))-- Florida and Massachusetts marriage dissolution information disclosure cases should be persuasive.

II. B. Because the Mass. Const. contains the word alimony ergo the alimony statute is constitutional;

P. II c. 3 art. 5 Ma. Const. permitting the legislature to grant the judiciary the venue for alimony adjudication eliminates any separation of powers issue; the statute satisfies *Chelmsford Trailer Park, Inc. v. Town of Chelmsford*, 469 N.E.2d 1259, (Mass. 1984) elements.

III. Mr. Ortiz did not provide caselaw citations sufficient to consider his equal protection argument a valid appellate argument.

IV. Mr. Ortiz' contention that the lower court erred by ruling on federal claims does not constitute a claim under Ma. R. Civ. P Rule 60 (a).

Argument

I. This Appeal Was Timely Filed

This Appeal of the Final Judgment of Dismissal Order and the Denial of the Motion for Retrial was timely filed. The Commissioner's argument hinges on his assertion that the Motion for a Retrial was not filed within the ten (10) days requirement pursuant to Mass. R. Civ. P. Rule 59 (A). Because the Motion for Retrial was not timely filed, the Commissioner asserts, it became a Mass. R. Civ. P Rule 60 motion

which does not toll the time for filing a notice of appeal of a final judgment.

In fact, the Motion for Retrial was timely filed as the Motion's Certificate of Service and U.S. Postal Service Return Receipts in the Supplemental Appendix prove. The timeline is,¹

9 March 2007	Final Judgment Order of Dismissal made
14 March 2007	Final Judgment Order of Dismissal mailed
22 March 2007	Motion for New Trial served
3 April 2007	Motion for New Trial re-served
3 May 2007	Order Denying Motion for New Trial made
29 May 2007	Notice of Appeal of the Final Judgment and Motion for Retrial served and filed

The Commissioner's own Supplemental Appendix confirms the above timeline. Mr. Ortiz' letter to the Commissioner states "...I am *resubmitting* to you Plaintiff's Motion for Retrial and To Alter Judgment originally sent *March 22, 2007* return receipt."

Mr. Ortiz's services and filings were all timely. The Appeal is timely.

II. A. Right of Privacy Is Infringed

1. Right of Privacy: Autonomous Decision Making v. Public Disclosure of Private Information

¹ For terminology and definition the former husband relies on the Glossary of Terms provide by the Massachusetts Court System at <http://www.mass.gov/courts/admin/ji/repyourselfappbglossary.pdf>

The Commissioner erroneously argues the information disclosure not the independent important decision making context of the right of privacy.

Whalen v. Roe, 429 U.S. 589, 599 (1977),

“The cases sometimes characterized as protecting ‘privacy’ have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.”

Massachusetts has also recognized the liberty interest privacy right of individual decision making context in established zones of privacy. *Commonwealth v Stowell*, 389 Mass. 171 (1983),

“These cases implicate two separate privacy interests. The first is the ‘individual interest in avoiding disclosure of personal matters.’ *Whalen v. Roe*, 429 U.S. 589, 599 (1977). The second is ‘the interest in independence in making certain kinds of important decisions.’ The defendant claims that her decision to commit adultery is protected by this second strand of the privacy right found in those cases relating to marriage, procreation, and family relations.”

This appeal must be viewed through the lens of the “interest in independence in making certain kinds of important decisions” caselaw culminating in the right of privacy relating to marital decisions law in *Goodrich v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003).

The Commissioners reliance on *Daniel* 922 So.2d and *Ganong* 66 Mass. is misplaced.

2. *Daniel v Daniel*, 922 So. 2d 1041 (Fla. Dist. Ct. App.2006)

Daniel 922 So. 2d deals with the information disclosure context not the autonomous decision making context of the Florida Constitutional Right of Privacy (art. I sec 23, Fla. Const.). Because it is the improper context of the right of privacy, it is inapposite in this appeal. Further, *Daniel* 922 So. 2d is wrongly decided.

For its holding *Daniel* 922 So. 2d improperly relies on a 1973 case (*Posner v. Posner*, 233 So. 2d 381, 383 (Fla. 1970) to assert that a marriage has three parties, i.e. the spouses and the state and the state's interest supersedes the spouses'. The *Daniel* ruling completely ignores the impact of the intervening passage of the Florida Constitution Right of Privacy (art. I sec 23) in 1980.²

² Fla. Const. Art. I SECTION 23. Right of privacy.-- Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

The application in 2006 of *Posner* 233 So. 2d without addressing its infringement on the autonomous decision making liberty interest expressed in Fla. Const. art. I sec 23 is flawed. It is Mr. Ortiz' position that today *Posner* 233 So. 2d would not survive an attack under the Florida Constitution right of privacy—not dissimilar to *Lawrence v. Texas*, 539 U.S. 558 (2003) overruling *Bowers v Hardwick*, 478 U.S. 186 (1986).

3. *Ganong v Ganong*, 66 Mass. App. Ct. 1108 (2006)

The Commissioner implores this court to be persuaded by its prior unpublished opinion. Mr. Ortiz affords this Court the opportunity to reconsider its reasoning in *Ganong* 66 Mass. As the former husband noted to the trial court in his Motion for New Trial,

"The husband's argument that the statute impermissibly interferes with his constitutional right to autonomous privacy ignores the fact that the statutory right to continuing support in the form of alimony derives from an association voluntarily entered into by the parties to a marriage, and that their association through marriage carries with it the well-established legal attributes concerning the rights of the parties during the marriage and following its dissolution." [Reasoning in *Ganong*]

1. Re *Ganong* 66 Mass: All acts of all citizens are voluntary. A citizen's volitional act, to exercise a fundamental

right to marry or divorce, in no way permits the legislature to write statutes effecting the right to marry or divorce that impermissibly infringe the state constitution. The legislature is not permitted to write unconstitutional statutes and subsequently have the judiciary justify them by stating the volitional choice of a citizen to exercise a fundamental right creates the force to transmute an unconstitutional statute into a constitutional one.

2. Re *Ganong* 66 Mass: As to entering marriage voluntarily, the definition of voluntary in law is "without legal obligation or consideration." Therefore the *Ganong* expression is a contradiction of itself within one sentence.

3. *Ganong* 66 Mass is stating that the Plaintiff by "voluntarily" exercising one fundamental right (right of association to alter his marital status) he must therefore subject himself to the loss of another constitutional right abrogated by the alimony statute.

4.

"...we find it intolerable that one Constitutional right should have to be surrendered in order to assert another." *Simmons v. U.S.*, 390 U.S. 389 (1968)

5. Using the holding and logic of *Ganong* 66 Mass any Massachusetts Supreme Court or United States Supreme Court case that overturned a statute was wrongly decided because the citizen voluntarily chose the conduct that triggered application of an unconstitutional statute. Thus, *Roe v Wade*, 410 U.S. 113 (1973) statute jailing for having or performing an abortion was wrongly decided because Norma Leah McCorvey ("Jane Roe") voluntarily chose to get pregnant and have an abortion thus subjecting herself to the abortion statute. Thus, *Lawrence v Texas*, 539 U.S. 558 (2003), statute jailing for voluntarily and privately committing sodomy was wrongly decided because medical

technologist 60 year old John Geddes Lawrence and street-stand barbecue vendor 36 year old Tyron Garner chose to have consensual anal sex thus voluntarily subjecting themselves to the sodomy statute. Thus, *Connecticut v Griswold*, 381 U.S. 479 (1965), statute jailing for prescribing contraceptives was wrongly decided because *Estelle Griwold and Dr. C. Lee Buxton* voluntarily chose to open an abortion clinic thus subjecting themselves to the contraceptive statute. Need more be said?

6. Using the holding and logic of *Ganong* that making a right of privacy challenge to the alimony statute is frivolous then *Lawrence v Texas*, 539 U.S. 558 (2003) must be the height of frivolity because *Bowers v Hardwick*, 478 U.S. 186 (1986) had clearly established sodomy laws were constitutional.

4. Standard of Review is Strict Scrutiny

The Commissioner erroneously urges this court to apply the rationally related standard of review when strict scrutiny is proper.

"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)

5. Statutes Infringing Fundamental Rights are Presumed Unconstitutional

The Commissioner mistakenly argues here that statutes are presumed constitutional. A statute that

infringes a fundamental right is presumptively unconstitutional.

"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).

The burden shifts to the Commissioner to prove a compelling state interest, minimally applied. He has not done so.

6. The State Constitution Limits the State's Police Power

The Commissioner errs when he urges this court to find the alimony statute constitutional because the police power of the state is authority for the statute. The state has police power *only* up to the limits of the constitution.

"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)

II. B. The Word Alimony in the Mass. Const. Does not Validate the Alimony Statute (G.L. c. 208 § 34)

The Commissioner argues that the presence of the word alimony in the Mass. Const. makes the alimony statute constitutional. The Commissioner seeks to homogenize the constitutional venue for hearing alimony with the legislative act (G.L. c. 208 § 34) sufficient to validate the statute.

G. P. II c. 3 art. 5 Ma. Const. merely assigns a venue for the adjudication of alimony issues. It permits the legislature to alter that venue. It in no way addresses the propriety of G.L. c. 208 § 34. The Commissioner's argument is misapplied and overreaches.

G. P. II c. 3 art. 5 Ma. Const. does not address the content of the alimony statute nor its construction. Mr. Ortiz argues that it is the content, construction and wording of the statute that violates

the separation of powers clause. The statute is worded to grant almost unbridled discretion to the judiciary. Unbridled discretion represents law and policy making power.

1. Separation of Powers: Constitutional Clarity

The Commissioner argues that art. 30 Mass. Const. has been interpreted loosely by the Supreme Judicial Court and that applying this blurred character of the separation of powers the alimony passes muster.

Mr. Ortiz, with profound respect, challenges the properness of the Supreme Judicial Court rulings which blur the line of power between any two of the three primary governmental branches. (*Opinions of the Justices*, 372 Mass. 883 (1977); *Construction Indus. of Mass. V Commissioner of Labor and Indus.*, 406 Mass. 162 (1989); *Chelmsford Trailer Park, Inc. v. Town of Chelmsford*, 469 N.E.2d 1259, (Mass. 1984)). The former husband argues the language of art. 30 Ma. Const. is precise, mutually exclusive, rigorous and unambiguous.

Art. 30 Ma. Const.: "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]

The imperative “shall” and the completely exclusive “never” does not permit any blurring of distinctions in branch governmental roles. If the framers wished a blurred line of power between branches they would have chosen vaguer, less precise and less totality in their language. Mr. Ortiz argues, because of the wording of art. 30 Mass. Const., that any challenge to a separation of powers must be read and reviewed with a caution to illuminate a distinct, crisp, bright line approach erring by over applying the constitutional provision rather than under applying.³ This is particularly true when a legislative act that seeks to regulate a liberty interest and fundamental right is the subject of a separation of powers controversy.

The former husband is respectful in urging this court review the origins of the Massachusetts blurred view of separation of powers. The origin of the line of cases weakening the state constitution separation of powers is grounded in a dissent (not the prevailing majority strong ruling of separation of powers) of

Justice Holmes in *Springer v. Government of the Phil. Islands*, 277 U.S. 189, 211 (1928) as cited in *Opinion of the Justices*, 372 Mass. 883, 892 (1977). In *Springer* 277 U.S. the majority noted that the federal separation of powers is not explicitly eternal. The Mass. Const. separation of powers is more distinctly expressed than the federal one. So, if the federal separation of powers, less explicitly expressed, is viewed to be a bright line distinction, then the bright line Mass. Const separation of powers must be interpreted strictly—with no blurring.

2. The Alimony Act (Statute) Fails All 3 Prongs of *Chelmsford*

The former husband argues that even if this court applies the blurred model of separation of powers the alimony statute nonetheless fails all of the *Chelmsford* prongs.

G.L. c. 208 § 34 regulates a fundamental right. As such the separation of powers clause must be applied with more care than it is in state regulation of non rights issues such as rent control. Much of the reasoning used in *Chelmsford* to validate a rent control act seems inapposite to validate an act of the state regulating a fundamental right. For instance,

"In the absence of evidence to the contrary, it is to be presumed that the rent board will act in a reasonable and timely manner." [Emphasis added]

a. The Alimony Statute Impermissibly Delegates Fundamental Policy Making Power to the Judiciary

G.L. c. 208 § 34 does not clearly express policy or purpose regarding the award of alimony in a divorce as required in *Chelmsford* 469 N.E. 2d at 190, "The purpose, to a substantial degree, sets the standards..." Instead it grants unbridled discretion to the judiciary to make policy beginning with the statement that the court "...may make a judgment for either of the parties to pay alimony to the other." The statute is completely devoid of a definition of alimony, a purpose of alimony, a policy for granting alimony, a duration of payment of alimony, and monitoring requirements to prevent abuse. Those are all policy elements and the legislature delegates the judiciary the full freedom to make that policy. The judiciary is given no direction or guidance to determine *whether* alimony is to be awarded. Unbridled discretion is policy and law making by the judiciary not permitted by art. 30 Ma. Const.

The statute grants the judiciary the policy making power of awarding a substitute for alimony, "**In addition to** or **in lieu of** a judgment to pay alimony, the court **may** assign to or any part of the estate of the other either husband or wife all,..." The legislature through the statute grants policy making power to the judiciary to strip a citizen's property rights without any guidance of why (policy), for what purpose, for what good, by what authority. Property rights are central to liberty interest.

The statute merely provides a "laundry list" of factors the court shall consider in determining the amount of alimony.

b. The Act (Statute) Lacks Direction for Implementation

As noted in a. above there is no direction or guidance in the act (statute) except guidance to determine the amount of alimony. Even the direction to determine amount lists so many factors but gives no direction on how to weigh each factor for each spouse. Direction is absent.

c. The Act (Statute) Is Completely Devoid of Safeguards Against Abuse

Chelmsford 469 N.E. 2d at 190 mandates that the act (statute) contain safeguards against abuse "... (3)

does the *act* provide safeguards such that abuses of discretion can be controlled?" [Emphasis added] The Commissioner argues that the judicial application of the alimony statute against a citizen is appealable and therefore meets this prong of *Chelmsford* as protection against abuse. The Commissioner errs. It is the *act* (statute) that must provide the safeguard. It contains absolutely no safeguards.

III. Equal Protection Argument is an Appellate Argument

Mr. Ortiz' equal protection argument is grounded in the principle that the standard of review is strict scrutiny because a fundamental right is at issue. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 (1973), is clearly cite for that purpose. The argument then develops the three similarly situated classes of spouses and how they are unequally treated because of the construction of the alimony statute and the unbridled discretion given to the judiciary. Again, with presumptive unconstitutionality, the burden shifts to the state and the state has not borne its burden to show a compelling interest minimally applied for the disparity in treatment among the classes.

IV. The Trial Court Order Misstated the Claims in the Complaint

There can be little dispute that the former husband request for the order to be altered was proper. The Motion for Retrial and to Alter Judgment requests the order be amended to remove the words "and federal,"

Order of Dismissal, Paragraph 1: "The complaint seeks a declaratory judgment that the alimony provisions of G.L. c. 208 § 34 violate his various state and federal constitutional rights to privacy, equal protection..."

The complaint never asks for adjudication of any federal claims. The complaint merely states federal law in support of state claims. The former husband entered a reservation in the complaint primarily to preserve adjudication of federal claims for federal court should he not prevail in state court on state claims.

Conclusion

"... the law of domestic relations needs more than placebos and patent medicines. It is long past time for judicial surgery to excise the doctrine of alimony from the body of law of domestic relations." *Olsen*,_557 P. 2d at 616.

G.L. c. 208 § 34 regulates a well established fundamental right, i.e. the personal decision relating

to marriage to alter one's associational interest by changing his marital status. There is no compelling state interest for the statute and it is not minimally applied--therefore it is unconstitutional and unenforceable.

G.L. c. 208 § 34 strips property rights, denies liberty interest, and effectively enslaves some citizens to work for the benefit of others under threat of coercion of the law without any compelling state interest minimally applied.

G.L. c. 208 § 34, by regulating a fundamental right must treat all similarly situated citizens equally. It does not. The statute renders disparate treatment to divorcing spouses compared with each other in a divorce, and compared with other couples divorcing. It treats married and divorcing citizens differently simply because of their marital status and their exercising a fundamental right to change their marital status.

G.L. c. 208 § 34, regulating a fundamental right, impermissibly infringes the separation of powers clause, art. 30 Ma. Const. Current Massachusetts separation of powers caselaw is ill grounded in a nonprevailing federal dissent opinion contrary to

explicit state constitution language of requiring a strict separation of powers doctrine. The alimony statute also fails all *Chelmsford* criteria and is therefore unconstitutional.

The Commissioner's arguments are seriously flawed on all the issues raised sufficient that they cannot prevail.

Prayer for Relief

WHEREFORE the former husband prays this court declared that G.G. c. 208 § 34 impermissibly infringes art.10 Ma. Const. Declaration of Rights, Due Process, Right of Privacy; impermissibly infringes art. 106, Ma. Const., Basic Rights and Equal Protection; and impermissibly infringes art. 30 Ma. Const. Declaration of Rights, Separation of Powers. Further, that because the statute is unconstitutional it is void ab initio and unenforceable.

Respectfully submitted,

January 3, 2008

Ernest Ortiz, *pro se*, with assistance of counsel
90 Weeden Road,
Fairhaven, MA 02719
508-997-0920
llswedel12@aol.com

Certificate of Service

I hereby certify that on this 3rd day of January, 2008, I caused a true and accurate copy of the foregoing Reply Brief to be mailed via U.S. Postal Service, prepaid, to

William J. Quaglia,
Esq.
Attorney for Catherine
J. Ortiz
180 Belmont Street
Brockton, MA 02301
508.586.6584

David A. Guberman
BBO # 214020
Asst. Attorney General
Government Bureau
One Ashburton Place,
Room 2019
Boston, Massachusetts
02108

Respectfully submitted,

Ernie Ortiz, *pro se*, with assistance of counsel
90 Weeden Road
Fairhaven, MA 02719
508.997.0920
llswedel12@aol.com

Certificate of Compliance

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

Ernest Ortiz, *pro se*, with assistance of counsel
90 Weeden Road
Fairhaven, MA 02719
508-997-0920
llswedel12@aol.com