

ARGUMENT

I. THE HUSBAND'S APPEAL IS NOT FRIVOLOUS AND THE WIFE IS NOT ENTITLED TO HER REASONABLE ATTORNEY'S FEES OR HER COSTS.

The wife argues that she is entitled to her reasonable attorney's fees and her costs "for having to respond to the husband's frivolous appeal" (Wife's Brief p. 20). The wife contends that she is entitled to her reasonable attorney's fees and costs pursuant to G.L. c. 231 § 6F (Wife's Brief p. 20). G.L. c. 231 § 6F provides, in pertinent part:

"Upon motion of any party in any civil action in which a finding, verdict, decision, award, order or judgment has been made by a judge or justice or by a jury, auditor, master or other finder of fact, the court may determine, after a hearing, as a separate and distinct finding, that all or substantially all of the claims, defenses, setoffs or counterclaims, whether of a factual, legal or mixed nature, made by any party who was represented by counsel during most or all of the proceeding, were wholly insubstantial, frivolous and not advanced in good faith. The court shall include in such finding the specific facts and reasons on which the finding is based".

The statute also provides that, "no finding shall be made that any claim, defense, setoff or counterclaim was wholly insubstantial, frivolous and not advanced in good faith solely because a novel or unusual argument or principle of law was advanced in support thereof." Id.

The wife cites two cases in support of her request for costs and attorney's fees pursuant to G.L. c. 231 § 6F, Allen v. Batchelder, 17 Mass. App. Ct. 453 (1984) and Avery v. Steele, 414 Mass 450 (1993) (Wife's Brief p. 20). The wife does not discuss the facts of either case. Nor does she argue that the facts of either Allen or Avery have some relevance or similarity to this case. The wife fails to discuss the legal reasoning employed by the Allen and Avery courts in their discussion of frivolous appeals and how the Allen and Avery courts applied their legal reasoning to the facts present in those appeals. Curiously, the wife does not even attempt to explain why the application of the Allen and Avery frivolousness principles to the facts in Allen and Avery merits consideration here.

Nevertheless, the wife's reliance on Allen and Avery is misplaced. In Allen, a successor to an earlier, nonpossessory co-tenant contended that "his predecessors in title, nonpossessory co-tenants, were not affirmatively ousted from possession of the locus and that, therefore, the Allen family could not, as the Land Court Judge determined, have acquired exclusive title to the farm by adverse possession." Allen v. Batchelder, 17 Mass App. Ct. at 454. On appeal, Batchelder argued that "the interest of a co-tenant cannot be wiped out by prescription without an

ouster and, more to the point, communication of that ouster to the absent co-tenant." Allen at 455-456.

In his opinion, Judge Kass discussed the development of adverse possession jurisprudence, particularly how it addressed the issue of (1) whether an absent co-tenant must have specific, actual knowledge that a possessory co-tenant was in the process of ousting him; and (2) "precisely how long a possession should be to raise a presumption of ouster." *Id.* at 457. Judge Kass dwelled at some length on the cases concerning what knowledge, if any, an absent co-tenant must have, or deemed to have had, in determining whether an ouster should be presumed. He opined that Batchelder distorted the relevant cases in arguing that they stood for the proposition that an absent co-tenant "must have knowledge that he is dispossessed." *Id.* at 456. This court concluded that Batchelder's contention that his predecessors had not affirmatively been ousted by the Allen family was "so untenable as to be frivolous." *Id.* at 454.

This court granted the appellee's request for damages and costs under Mass R.A.P. 25. Allen v. Batchelder, 17 Mass App. Ct. 453, 458 (1984). This court did not award sanctions pursuant to G.L. c. 231 § 6F. Although Judge Kass stated that, "when the law is well settled, when there can be no reasonable expectation of a reversal, an appeal

is frivolous," the wife fails to add that in the ensuing sentence, Judge Kass, citing G.L. c. 231 § 6F, tempers that statement, writing "an appeal should not, however, be tarred as frivolous because it presents an argument that is novel, unusual or ingenious, or urges adoption of a new principle of law or revision of an old one." Allen at 458.

Thus, in Allen, this court recognized that there are restraints on an appellate court's authority to impose sanctions for parties making allegedly frivolous arguments. Indeed, Judge Kass affirmed this principle in declaring that Batchelder's appeal "covers no ground not gone over by the cases, and the appellant has urged no policy consideration which would warrant reappraisal of the settled rule." *Id.* at 458.

Here, the husband is making novel arguments and he is urging this court to adopt a new principle of law and to revise an old one. Unlike Allen, where the appeal did not cover ground not addressed by the cases, the husband is making arguments which have not been comprehensively addressed by Massachusetts appellate courts.

The wife fails to note that the issue of sanctions in Allen were aggravated by the "case's champertous antecedents." *Id.* at 459. Judge Kass devoted a full page, in a six page opinion, to the champerty present. He was

quite frank about the "champertous antecedents" bearing on this court's "willingness to apply the sanctions available under the rule and, as well, color our view of the damages which are appropriate." Id.

In Avery, the primary issue was "whether an appellate court has the authority to impose sanctions on a party or on her attorney for inappropriate matter contained in her appellate brief." Avery v. Steele, 414 Mass 450, 450-51 (1993). The Supreme Judicial Court sanctioned Avery's counsel for distorting her opponent's arguments, misrepresenting the trial court's holding and making disrespectful and inappropriate arguments, including impugning the integrity of the attorney appellee Steele, all totally without record support. Avery v. Steele, 414 Mass at 454-456. For example, Avery's brief contained this statement: "In the course of trying to bluff, bluster, and obstruct her way past Ms. Avery's legal rights, Attorney Steele has regrettably resorted to outright dishonesty. Her patently perjurious answers to [the questions concerning tenant complaint] is proof of it, and goes directly to her credibility in the principal action..." Avery at 454. One argument heading written by Avery's counsel stated: "The trial court ignored the greater weight of the evidence in basing his decision entirely upon the

[sic] Attorney Steele's credibility and asserted stupidity." Id. at 454. According to Chief Judge Liacos, said argument heading "misrepresented the trial judge's carefully written memorandum of decision." Id.

The husband notes that the sanctions imposed by the Avery court were made pursuant to Rule 25 and G.L. c. 211 § 10. Id. at 455. G.L. c. 231 § 6F played no role in the decision. This point further demonstrates that both Allen and Avery are of no support for the wife's proposition that the husband's appeal is frivolous.

Moreover, the wife does not allege, nor could she, that the husband is not presenting a novel argument. The wife does not allege, nor could she, that the husband is not urging the "adoption of a new principle of law or revision of an old one." Allen at 458. The wife does not allege, nor could she, that the husband has made inappropriate argument, misrepresented, or distorted the wife's argument and / or impugned, without record support, the integrity of the wife's counsel. Furthermore, the wife does not allege, nor could she, that the husband is a vexatious litigant, or that this appeal is being prosecuted for delay or some other improper purpose.

Thus, in the husband's view, given that (1) Allen and Avery are of no support to the wife; (2) the record will

not support any allegation that the husband's appeal is infected with any of the mischief cited in Allen and Avery; and (3) the wife cites no Massachusetts appellate case or United States Supreme Court case which has unequivocally rejected the husband's principal arguments, it would appear that the wife's argument seeking sanctions is, itself, frivolous.

The husband notes that the wife is not requesting an award for her attorney's fees and costs pursuant to Mass. R.A.P. 25 or G.L. c. 211A § 15. The husband acknowledges that, in addition to G.L. c. 231 § 6F, this court is "authorized by statute to award double costs to an appellee in a civil case when the appeal is frivolous, immaterial, or intended for delay." Avery v. Steele, 414 Mass at 455. The husband notes that Rule 25 of the Massachusetts Rules of Appellate Procedure and G.L. c. 211A § 15 do not contain the language found in G.L. c. 231 § 6F which states, "no finding shall be made that any claim, defense, setoff or counterclaim was wholly insubstantial frivolous and not advanced in good faith solely because a novel or unusual argument or principle of law was advanced in support thereof." The Husband submits that Mass R.A.P 25, G.L. c. 211A § 15 and G.L. c. 231 § 6F should be read in harmony as it would be preposterous to hold that an appellate court

has the power, inherent or otherwise, to deem an appeal as frivolous, where, as here, an appellant "presents an argument that is novel, unusual or ingenious, or urges adoption of a new principle of law or revision of an old one." Allen at 458.

Neither Mass R.A.P 25 nor G.L. c. 211A § 15 define the word frivolous. Nevertheless, words in a statute "are to be accorded their ordinary meaning and approved usage."

Allstate Insurance Co. v. Reynolds, 43 Mass App. Ct. 927, 929, quoting Hashimi v. Kalil, 388 Mass 607, 609 (1983).

The word "frivolous" is defined in Webster's New World Compact School and Office Dictionary, 1989 edition, as 1. of little value; trivial; 2. silly and light minded, giddy. "Where the language of a statute is plain, courts enforce the statute according to its wording." Allstate Insurance Co. v. Reynolds, 43 Mass App. Ct. at 929.

Thus, if this court is to accord the word frivolous its ordinary meaning and enforce Mass R.A.P. 25 and G.L. c. 211A § 15 according to their wordings, then, no appeal can be deemed frivolous where, as here, an appellant presents issues for review which have not been previously adjudicated in this Commonwealth and where, as here, the appellant "presents an argument that is novel, unusual or

ingenious, or urges adoption of a new principle of law or revision of an old one." Allen at 458.

In Avery, Chief Justice Liacos cautioned that sanctions should not be imposed for frivolous appeals except in egregious cases. Avery at 456. In the context of Rule 11 of the Federal Rules of Civil Procedure, there is ample authority for the proposition that Rule 11, "should not be applied to adventuresome, though responsible, lawyering which advocates creative legal theories. Mary Ann Pensiero, Inc. v. Lingle, 847 P.2 90, 94 (3rd Cir. 1988). The Rule must not be "interpreted to inhibit imaginative legal or factual approaches to applicable law or to unduly harness good faith calls for reconsideration for settled doctrine." Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3rd Cir. 1987).

The husband acknowledges, in his brief, the existing decisional law in this Commonwealth concerning the scope and application of G.L. c. 208 § 34. (Husband's Brief p.22-24). In addition, the husband discusses the origins and development of alimony. (Husband's Brief p.18-24). Thus, his appeal cannot be tarred as frivolous for ignoring current authority. But this issue is a non-starter here because there is no decisional law in this Commonwealth

which has comprehensively addressed the issues presented by the husband.

Nothing in Mass R.A.P. 25, G.L. c. 231 § 6F or G.L. c. 211A § 15 requires counsel to cite only cases directly on point. The same is true for Rule 11 of the Federal Rules of Civil Procedure. See, e.g. Protective Life Insurance Co. v. Dignity Viatical Settlement Partners, 171 F.3d 52, 57 (1st Cir. 1999) ("Rule 11 does not restrict counsel to citing cases directly on point"); FDIC v. Calhoun, 34 F.3d 1291, 1298 (5th Cir. 1999) (reversing sanctions order when the attempted analogy to a line of cases failed to persuade but nonetheless constituted a good-faith argument to extend the law).

Although the husband is not requesting sanctions here, he urges this court to adopt a rule which would require the imposition of sanctions upon any party, and their counsel, where, as here, said party, in connection with its assertion that an appellant's argument is frivolous, requests costs, attorney's fees or other sanctions, when the said appellant's argument is "novel, unusual, or ingenious, or urges adoption of a new principle of law or revision of an old one." Allen at 458.

II. THE WIFE DISTORTS AND MISPERCEIVES THE HUSBAND'S ARGUMENTS.

The husband submits that portions of the wife's argument reveal that she has distorted and misperceived his arguments. The husband also submits that the wife's argument concerning the Thirteenth Amendment is inappropriate as the husband is not pressing a Thirteenth Amendment claim in this appeal.

The wife argues, "If the husband wants this Court to construe the words in Part 2, Chapter III, Article V of the Massachusetts Constitution according to their meaning at the time of its adoption (Husband's Brief p. 24) he has failed to explain why this Court should construe the Ninth and Thirteenth Amendments to the United States Constitution under "evolving" theories of natural rights, privacy, and/or coercion." (Wife's Brief p. 9). It is true that the husband has requested this court to construe the meaning of the words in Part 2, Chapter III, Article V of the Massachusetts Constitution according to their ordinary meaning and usage in 1780. However, the preceding assertion distorts the husband's argument as he has not requested this court to construe the Ninth and Thirteenth Amendments under "evolving theories of natural rights, privacy, and/or coercion." For the wife to make such an assertion demonstrates, in the husband's view, that she has

either misperceived his arguments or deliberately distorted them.

There is not one word in the husband's argument that supports the proposition that the husband is asking this court to construe the Ninth and Thirteenth Amendments pursuant to "evolving theories of natural rights, privacy and/or coercion." Throughout his argument, the husband asserts that his positions are rooted in First Principles, the plain meaning of the Ninth Amendment, the natural rights philosophy which dominated the founding era and which served as the philosophical underpinning of the Declaration of Independence and the Ninth Amendment itself.

The husband rejects the judicial philosophy that our constitutions should be construed under evolving social values or "evolving social theories." The husband also rejects the so-called "living constitution" philosophy as, in his view, this philosophy has mortally wounded our constitutions. On page thirty-one of his brief, the husband stated, "although the Ninth Amendment does empower judges to protect individual rights rooted in First Principles and natural law, it is not a source of welfare or collective rights." (Husband's Brief p. 31). In the ensuing sentence, the husband quotes a law review article, with approval, which underscores the husband's position

that the Ninth Amendment should not be read as a green light for judges to "draw rights indiscriminately from ...'evolving social values'". Kimberly C. Shankman and Roger Pilon, Revising the Privileges and Immunities Clause to Redress the Balance Among States, Individuals and the Federal Government, 3 Texas Rev. of Law and Policy 1, 19 (1998). (Husband's Brief p. 31, 32).

On page ten of her brief, the wife argues, "if the laws of the Commonwealth did not permit alimony, the husband's expansive reading of the Ninth Amendment...would give the wife as much authority to claim that said amendment provided her with the right to collect alimony." (Wife's Brief p. 10). This assertion also distorts the husband's argument because, again, there is not one word in the husband's brief which supports the proposition that the husband's position is that the Ninth Amendment should be read as a source of welfare or collective rights. Again, the husband's Ninth Amendment arguments are rooted in First Principles, original intent and the natural rights philosophy which undergirds the Declaration of Independence and the Ninth Amendment itself. In short, the husband's position is a libertarian one and he argues that the Ninth Amendment reflects the libertarian vision of Madison. (Husband's Brief p.28-29). That vision does not embrace

the concept that one has a "right" to ask the judiciary to place a perpetual lien on the property and income of another. That vision also does not embrace the concept that one has a "right" to ask a probate court judge to play commissar and redistribute income and/or property of another. ("in the husband's view, the Framers, as witnessed by their writings and the founding documents themselves rejected the proposition that the state could confiscate A's property, without his consent, in order to give it to B"). (Husband's Brief p.29). The husband is emphatic that Fabian, Leninist, Maoist, Marxist, New Deal, Progressive, Socialist and Soviet principles should have no place in our constitutional jurisprudence. Income and property redistribution is income and property redistribution and no amount of linguistic legerdemain and sophistry advanced to conceal, disguise, or otherwise justify it, changes its nature.

To be fair, perhaps the wife just misperceives the thrust of the husband's arguments concerning the Ninth Amendment. However, the husband is at a loss to understand just how the wife could so grossly misperceive his Ninth Amendment arguments. The wife read the husband's memorandum of law in support of his motion to void the alimony portion of the divorce judgment. She has also read

the husband's brief in this appeal. There is no rational, logical explanation for the wife's assertion that the husband's arguments concerning the Ninth Amendment "would give the wife as much authority to claim that said amendment provided her with the right to collect alimony." (Wife's Brief p. 10).

The wife devotes a considerable portion of her brief to arguments concerning the Thirteenth Amendment. The Thirteenth Amendment is not an issue in this appeal. Nevertheless, the wife argues, "not one of the cases or 'authorities' cited by husband, supports his allegation that alimony is unconstitutional under the Ninth or Thirteenth Amendments." (Wife's Brief p. 4). The wife also discusses the Thirteenth Amendment on the next page, "for the husband to even remotely compare alimony to slavery is unconscionable." (Wife's Brief p. 5). Likewise, page six of the wife's brief is devoted entirely to the Thirteenth Amendment. Moreover, the wife revisits the Thirteenth Amendment on pages nine and nineteen of her brief.

The wife argues that "nowhere does the Olsen dissent mention the Ninth or Thirteenth Amendments." (Wife's Brief p. 19). In the second sentence of the third paragraph of his dissent, Justice Shepard stated: "the question facing the court is whether a judicially imposed system of

involuntary servitude [emphasis added] is to be continued wherein one human being is placed in bondage to another for what is effectively the remainder of his natural life." Olsen v. Olsen, 557 P.2d 604, 606 (1976). Later in his dissent, Justice Shepard adds, "without guidance from this court and at the sole whim of a trial judge, bound by no ascertainable standard, **eternal peonage** can be imposed upon a man solely because he was once called a husband." The wife also argues that the husband cannot rely upon the Olsen dissent because the "Olsen dissent makes an equal protection argument against alimony." (Wife's Brief p. 18). Such an assertion is meritless. It implies that the entirety of the Olsen dissent is anchored to equal protection. Such is not the case. The dissent's statement, "in my judgment that time has long since passed 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" reflects its concerns for privacy and the husband sees no reason why he should not be able to rely upon this wisdom, Olsen v. Olsen, 557 P.2d at 616.

Moreover, the husband has an absolute right to rely upon the wisdom of Justice Shepard's philosophical

pronouncements concerning the undeniable, indisputable evils inherent in alimony to support his arguments. For instance, the husband asserts, in furtherance of his argument that G.L. c. 208 § 34 should be subject to strict scrutiny, that the state does not have a compelling interest in the economic welfare of former spouses such that it can compel one former spouse to finance the lifestyle of the other in the manner which they may have enjoyed while married. (Husband's Brief p. 33-34, 38-39). The husband, in making this assertion, is mindful of Justice Shepard's observation that, "somehow the legitimate interest of society in preventing destitute divorcees (unable as contrasted to unwilling to work) from being cast upon the relief rolls has been perverted into an instrument to level economic disparities, both real and imagined, between two people in which there exists no legal relationship." Olsen at 612. The bottom line is that the passionate dissent in Olsen is not confined to equal protection analysis. To argue otherwise is to distort the dissent's candid and eloquent opinion.

CONCLUSION

The husband contends that the redress of one's grievances with government is a right, which, in theory, is supposed to separate Americans from other, more barbaric

regimes. This right is recognized in both the Declaration of Independence and the First Amendment. It is a right which the Framers understood was a necessary check on those who would succumb to the temptations of tyranny. The Husband, like any other citizen, has an absolute right to seek the aid of the courts in order to protect his property, where, as here, he is asserting that his property has been and continues to be confiscated, without his consent, and, where, as here, he is presenting issues for review which have not been comprehensively addressed by either the Commonwealth's appellate courts or the United States Supreme Court. Under these circumstances, the husband should not have to contend with baseless assertions that his appeal is frivolous.

For all of the reasons set forth in his brief and this reply brief, the Husband requests that this court reverse the denial of his motion to void the alimony portion of the divorce judgment and to enter an order voiding the same. In addition, the Husband requests this court to deny the Wife's request for costs and attorney's fees and to adopt a rule, to be applied prospectively, which would require the imposition of sanctions upon any party, and their counsel, where, as here, said party, in connection with its assertion that an appellant's argument is frivolous,

requests costs, attorney's fees or other sanctions, when the said appellant's argument is "novel, unusual, or ingenious, or urges adoption of a new principle of law or revision of an old one." Allen at 458.