



MARTHA COAKLEY  
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

(617) 727-2200  
www.ago.state.ma.us

December 21, 2007

BY HAND

Ashley Brown Ahearn, Clerk  
Massachusetts Appeals Court  
John Adams Courthouse  
One Pemberton Square, Suite 1200  
Boston, MA 02108-1705

Re: *Ernest Ortiz v. Commissioner of Revenue*, No. 2007-P-1290<sup>1390</sup>

Dear Ms. Ahearn:

Enclosed for docketing and filing in the above-referenced case are (1) the original and seven copies of Brief of the Defendant-Appellee Commissioner of Revenue and (2) Commissioner's Motion for Leave to Submit Supplemental Appendix in the Form Included with its Brief. I certify under the pains and penalties of perjury that I served this brief on the plaintiff-appellant and on counsel of record by causing two copies of the brief and one copy of the motion to be mailed first-class mail, postage pre-paid to Mr. Ernest Ortiz, 90 Weeden Road, Fairhaven, Massachusetts 02719, and to William J. Quaglia, Esquire, 180 Belmont Street, Brockton, Massachusetts 02301 this twenty-first day of December, 2007.

Thank you for your consideration.

Very truly yours,

A handwritten signature in cursive script that reads "David A. Guberman".

David A. Guberman  
Assistant Attorney General  
(617) 727-2200, Ext. 2072

cc: Mr. Ernest Ortiz (w/encs.) ✓  
William J. Quaglia, Esquire (w/encs.)

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT  
NO. 2007-P-1280 139<sup>0</sup>

ERNEST ORTIZ,

Plaintiff-Appellant,

v.

COMMISSIONER OF REVENUE, et al.,  
Defendants-Appellees.

COMMISSIONER'S MOTION FOR LEAVE TO SUBMIT  
SUPPLEMENTAL APPENDIX IN THE FORM  
INCLUDED WITH ITS BRIEF

Defendant-Appellee Commissioner of Revenue (the commissioner) moves the Court for leave to submit a supplemental appendix (S.A.) in the form included with his brief.:

1. This case is an appeal from a judgment dismissing the plaintiff-appellant's complaint challenging the constitutionality of the Alimony Statute, G. L. c. 208, § 34.

2. Unfortunately, the plaintiff-appellant did not include certain items in the existing appendix that are needed for a full presentation of the case.

3. These items, and the reasons for their importance, are:

a. A letter from the plaintiff to counsel dated April 3, 2007, serving his post-judgment motion. This letter shows that the plaintiff served the motion more than ten days after the entry of judgment. (Reproduced at S.A. 1.)

b. A complete copy of the notice of appeal.

(Reproduced at S.A. 2-4

c. The plaintiff-appellant's opposition to the commissioner's motion to strike the notice of appeal. This pleading shows that the plaintiff-appellant failed to discuss the untimeliness of the filing of his notice of appeal. (Reproduced at S.A. 5-9.)

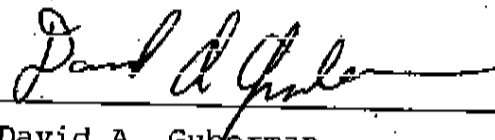
WHEREFORE, the commissioner prays the Court to allow its motion for leave to submit a Supplemental Appendix in the form included with the his brief.

Respectfully submitted,

COMMISSIONER OF REVENUE

By its attorney,

MARTHA COAKLEY,  
ATTORNEY GENERAL

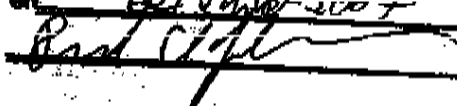


David A. Guberman  
BBO 214020  
Assistant Attorney General  
Government Bureau  
One Ashburton Place, Room 2019  
Boston, Massachusetts 02108  
617.727.2200 ext. 2072

Dated: December 21, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the above document was served upon the attorney of record for each of the party by mail (by hand)

on 20 December 2007  


the  
plaintiff - 2  
appellant and

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**QUESTIONS PRESENTED.**

1. Ernest Ortiz (Mr. Ortiz) had sixty days from the entry of judgment within which to file a notice of appeal, unless he served an appropriate post-judgment motion within ten days of the entry date. He served his motion on the eleventh day, and filed a notice of appeal on the sixty-seventh day. Should his appeal from the judgment be dismissed for non-compliance with Mass. R. App. P. 4?

2. The Massachusetts Constitution empowers the Legislature to decide who will hear "causes of alimony." Mr. Ortiz alleges that the statute authorizing courts to order alimony payments violates his right to privacy and is a prohibited delegation of legislative power to the judiciary. Were his appeal of the judgment properly before this Court, should the judgment below dismissing these claims be affirmed?

3. An appellate brief must provide reasons for the contentions made, supported by citations to the authorities relied on. At least regarding its equal protection claim, Mr. Ortiz's brief does not. Were his appeal of the judgment properly before this Court, should the judgment below dismissing this claim be affirmed?

4. Mr. Ortiz's post-judgment motion, having been served more than ten days after the entry of judgment, had to be treated as coming under Mass. R. Civ. P. 60(b). Its resolution, therefore, lay within the broad discretion of the motion judge. Where Mr. Ortiz fails to show any abuse of that discretion, should the denial of the motion be affirmed?

#### STATEMENT OF THE CASE.

##### Nature of the case.

This is an appeal from a judgment of the Bristol Superior Court dismissing Mr. Ortiz's complaint against the Commissioner of Revenue (commissioner) and Mr. Ortiz's former wife, Catherine J. Ortiz (Ms. Ortiz). The complaint challenged the constitutionality of the alimony and enforcement provisions of G. L. c. 208, § 34 (the Alimony Statute), for allegedly infringing Mr. Ortiz's right to privacy, violating the separation of powers between the Legislature and the Judiciary, and denying him equal protection of the laws.

## Statement of facts and prior proceedings.

### Background.

In connection with the Ortizes' divorce action, and after considering the financial information about them referred to in G. L. c. 208, § 34, the Massachusetts Probate and Family Court assigned part of the estate of Mr. Ortiz to Ms. Ortiz. In September 2004, he also was ordered to pay her weekly alimony.<sup>1</sup>

To secure payment, Mr. Ortiz's real and personal property are subject to attachment. Mr. Ortiz himself is subject to the Probate and Family Court's equitable power to enforce the alimony award. Indeed, Mr. Ortiz has been subject to repeated contempt proceedings.<sup>2</sup>

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<sup>1</sup> *Marriage and divorce*: Complaint; Record Appendix (A.) 11 ¶ 17. *Estate*: *Id.* ¶¶ 19-20. (The complaint refers to a case in the Bristol Division of the Probate and Family Court numbered 99D1111-DV1. [*Id.* ¶ 17]. No other details are provided about the divorce proceedings or decree.) *Alimony*: *Id.* ¶ 18.

<sup>2</sup> *Subject to attachment*: Complaint; A. 12 ¶ 21, citing G. L. c. 208, § 12: "Upon an action for divorce by either spouse for a cause accruing after marriage, the real and personal property of the other spouse may be attached to secure suitable support and maintenance to the plaintiff and to such children as may be committed to his care and custody." *Equitable powers*: Complaint; A. 12 ¶ 24, citing G. L. c. 208, § 35: "The court may enforce judgments . . . for . . . alimony . . . in the same manner as it may enforce judgments in equity." *Repeated contempt*: Complaint; A. 12 ¶ 25.

**Mr. Ortiz's complaint.**

On September 1, 2006, Mr. Ortiz filed a three-count complaint against the commissioner and Ms. Ortiz in Bristol Superior Court:<sup>3</sup>

- Count I alleges that the Alimony Statute "impermissibly infringes the Plaintiffs' and all Massachusians' [sic] art. 10 Ma. Const. Right of Privacy in the privacy protected zone of personal decisions relating to marriage, i.e. divorce (dissolution of marriage)."
- Count II alleges that the enforcement provisions of the Alimony Statute, in G. L. c. 208, § 35, "impermissibly infringe the Plaintiff's and all Massachusians [sic] art. 106, Ma. Const Basic Rights, i.e., equal protection, right to enjoy the fruits of one's labor, right to property."
- Count III alleges that the Alimony Statute "impermissibly infringes art. 30 Ma. Const. Separation of Powers because the alimony statutes, G. L. c. 208, § 34 inter alia, are an impermissible delegation by the Massachusetts

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<sup>3</sup> Count I: Complaint; A. 15 ¶ 35. Count II: Complaint; A. 16 ¶ 46. Count III: Complaint; A. 18 ¶ 58.

legislature of its exclusive constitutional law making power to the Massachusetts judiciary."

**The motion to dismiss and post-judgment activity.**

On November 6, 2006, the commissioner moved to dismiss the complaint. After hearing argument on March 9, 2007, the court (Macdonald, J.) allowed the motion, characterizing Mr. Ortiz's argument as "so untenable as to be frivolous."<sup>4</sup>

On March 22 or 23, 2007, Mr. Ortiz attempted to file Plaintiff's Motion for New Trial and to Alter Judgment. On March 23, 2007, the court (Macdonald, J.) denied the motion "without prejudice for failure to comply with Superior Court Rule 9A." On March 30, 2007, the court returned the motion "for not being in compliance with Superior Court Rule 9E and 9A."<sup>5</sup>

Judgment dismissing the complaint entered on March 23, 2007. Eleven days later, on Tuesday, April 3, 2007, Mr. Ortiz served his new trial motion. He filed the motion on April 19, 2007. The court

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<sup>4</sup> Motion to dismiss: A. 21 (docket entries). Frivolous: Memorandum and Order on the Defendant Alan LeBovidge's Motion to Dismiss (Dismissal); A. 49 ¶ 1;

<sup>5</sup> "New Trial" motion: A. 22 (docket entries).

(Macdonald, J.), treating it as a motion for reconsideration, denied the motion on May 3, 2007.<sup>6</sup>

Attempting to appeal from both the March 23rd judgment and the "denial of the Plaintiff's Motion for Reconsideration," Mr. Ortiz filed a notice of appeal on May 29, 2007, sixty-seven days after the judgment had entered. The commissioner moved to strike the notice of appeal insofar as it pertained to the March 23rd final judgment. On June 22, 2007, a new motion judge (Kane, J.) denied the commissioner's motion.<sup>7</sup>

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<sup>6</sup> *Judgment*: A. 22 (docket entries), A. 51 (judgment). *Post-judgment motion served on April 3, 2007*: With this brief, the commissioner is submitting a motion for leave to file a supplemental appendix (S.A.) containing, at S.A. 1, a copy of letter from Mr. Ortiz, dated April 3, 2007, serving the motion. *Motion filed and denied*: A. 22 (docket entries).

<sup>7</sup> *Notice of Appeal*: A. 22 (docket entries), A. 65 (motion, first page). *Motion to strike*: A. 22 (docket entries), A. 66-67 (motion), A. 72 (notice of denial).

**ARGUMENT.**

- I. Because Mr. Ortiz failed to serve a post-judgment motion within ten days of the entry of judgment, he did not toll the sixty-day appeal period. Because he also failed to file a notice of appeal within the sixty-day appeal period, his appeal from the judgment should be dismissed.

The purpose of Mass. Rule App. P. 4 "is 'to set a definite point of time when litigation shall be at an end . . . ; and . . . to advise prospective appellees that they are freed of the appellant's demands'"<sup>8</sup> Mr. Ortiz had "to file [his] notice of appeal 'within [sixty] days of the date of the entry of the judgment appealed from.'"<sup>9</sup> But he could have "tolled the running of the [sixty]-day appeal period" by filing a timely and appropriate post-judgment motion.<sup>10</sup>

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<sup>8</sup> *Felch v. General Rental Co.*, 383 Mass. 603, 613 (1981) (referring to Mass. Rule App. P. 4[c]), quoting *Browder v. Director, Dept. of Corrections of Ill.*, 434 U.S. 257, 264 (1978).

<sup>9</sup> *Stephens v. Global Naps*, 70 Mass. App. Ct. 676, 680 (2007), quoting Mass. R. App. P. 4(a).

<sup>10</sup> *Id.* Under Mass. R. App. P. 4(a), "[a] notice of appeal filed before the disposition of any of the . . . [recognized] motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above "

Judgment entered on March 23, 2007; Mr. Ortiz filed his new trial motion on April 19, 2007.<sup>11</sup> To be timely, however, it had to have been served "not later than 10 days after the entry of judgment,"<sup>12</sup> that is, by April 2, 2007. He did not serve it until April 3, 2007, a day late.<sup>13</sup>

Judge Macdonald, who heard and allowed the commissioner's motion to dismiss, treated Mr. Ortiz's motion "as one for reconsideration." On that basis, he denied "the motion for substantially the reasons advanced in the opposition papers."<sup>14</sup>

The appeal period not having been tolled, Mr. Ortiz had sixty days from the entry of judgment, or until May 22, 2007, to file a notice of appeal. He did not file, however, until May 29, 2007, seven days late.<sup>15</sup> Hence his notice of appeal was untimely.<sup>16</sup>

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<sup>11</sup> A. 22 (docket entries).

<sup>12</sup> Mass. R. Civ. P. 59(b).

<sup>13</sup> S.A. 1.

<sup>14</sup> A. 64 (clerk's notice). (The commissioner's opposition is at A. 60-63.)

<sup>15</sup> A. 22 (docket entries). Mr. Ortiz omitted a full copy of his notice of appeal from the record appendix. The commissioner has reproduced it at S.A. 2-4.

Indeed, the commissioner moved to strike the notice of appeal as untimely "insofar as it pertains to the final judgment in this case."<sup>17</sup> Judge Kane denied the motion, however, "for reasons argued by [Mr. Ortiz.]"<sup>18</sup> But neither Mr. Ortiz nor Judge Kane discussed late-filing of the notice of appeal.<sup>19</sup>

In all events, "[w]hile motions for reconsideration ordinarily fall within rule 59(e), which tells the running of the thirty-day appeal period, '[r]ule 59(e) motions filed more than ten days after entry of judgment are "considered to fall within [Mass. R. Civ. P. 60(b)]."'<sup>20</sup> Such "motions do not toll the running of the . . . appeal period."<sup>21</sup>

Hence the notice of appeal is untimely as regards the March 23rd judgment, and, to that extent, the

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<sup>16</sup> See *Stephens v. Global Naps*, 70 Mass. App. Ct. at 680.

<sup>17</sup> A. 66 (motion to strike).

<sup>18</sup> A. 72 (clerk's notice). (Mr. Ortiz omitted from the record appendix his opposition to the commissioner's motion to strike. The commissioner is including a copy in the supplemental appendix at S.A. 2-6.)

<sup>19</sup> *Plaintiff's Opposition*: A. 68-71. *Ruling*: A. 72.

<sup>20</sup> *Stephens v. Global Naps*, 70 Mass. App. Ct. at 682 (bracketed insertions by the court), quoting *Piedra v. Mercy Hosp., Inc.*, 39 Mass. App. Ct. 184, 188 n.4 (1995).

<sup>21</sup> *Id.*, citing *Piedra*, 39 Mass. App. Ct. at 187-88.

appeal should be dismissed. Nor does it matter that Judge Kane said that he would "use [Mr. Ortiz's reasons in opposition to the motion to strike] as a basis for granting relief under Mass. R. App. P. 4(c)."<sup>22</sup> First, a request for an extension made after the ten-day period must "be made by motion," and "with notice,"<sup>23</sup> which Mr. Ortiz did do.

Second, moving for an extension, would have required Mr. Ortiz to show "excusable neglect[.]"<sup>24</sup> But he did not even address the untimeliness issue.<sup>25</sup> Moreover, the standard is stringent. "The concept of excusable neglect is meant to apply to circumstances that are unique or extraordinary, not to any 'garden-variety oversight.'"<sup>26</sup>

Because the notice of appeal is untimely insofar as it pertains to the March 23rd judgment, the judgment is beyond review. The only issue properly

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<sup>22</sup> A. 72 (clerk's notice).

<sup>23</sup> See Mass. R. App. P. 4(c).

<sup>24</sup> *Id.* See *Shaev v. Alvord*, 66 Mass. App. Ct. 910 (2006) (rescript).

<sup>25</sup> S.A. 5-9.

<sup>26</sup> *Shaev v. Alvord*, 66 Mass. App. Ct. at 911, quoting *Feltch v. General Rental Co.*, 383 Mass. at 613-14.

before this Court is Mr. Ortiz's appeal from Judge Macdonald's denial of his motion for reconsideration.

II. Were Mr. Ortiz's appeal from the judgment properly before this Court, his privacy claim fails because he has no right of financial privacy against the Commonwealth or his divorced spouse; there is no art. 30 problem because the Massachusetts Constitution recognizes that the authority to award alimony is a judicial power.

A. Art. 10 does not entitle divorcing spouses to keep their finances private from each other or from the Probate and Family Court.

"It is well settled that a statute is presumed to be constitutional, and every rational presumption in favor of its validity is to be made."<sup>27</sup> Although the right to choose to marry is "at the core of individual privacy,"<sup>28</sup> both the role of the Commonwealth in

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<sup>27</sup> *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 367 (2006) (Spina, Cowin, and Sosman, JJ. Concurring). Chief Justice Marshall and Justice Cordy concurred "with much of the reasoning in Justice Spina's opinion," expressing disagreement only with his construction of G. L. c. 207, § 12. *Id.* at 382-83.

<sup>28</sup> See *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 326 n.15 (2003). Although Chief Justice Marshall's opinion commanded the votes of only three justices, the concurring justice (Greaney, J.) speaks of it as "the court's opinion," and agreed "with much of [its] reasoning[.]" *Id.*, at 344. (Subsequently, Justice Greaney described himself as having "joined" in the "opinion of the court" in *Goodridge v. Cote-Whitacre*, 446 Mass. at 394. Justice Spina, who

*Continued on next page*

creating and dissolving civil marriages and its long history of regulating alimony<sup>29</sup> support the power of the Legislature, through the Alimony Statute, to inquire into the financial details of a dissolving, or dissolved, marriage.<sup>30</sup>

The contention that the Alimony Statute "impermissibly infringes . . . the privacy protected zone of personal decisions relating to marriage, i.e., divorce,"<sup>31</sup> ignores the Commonwealth's intimate involvement in creating and dissolving marriages.

"[T]he government creates civil marriage. . . . In a real sense, there are three partners to every civil marriage: two willing spouses and an approving State."<sup>32</sup> Likewise, "the Commonwealth defines the exit terms."<sup>33</sup> This has been so "since pre-Colonial

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dissented in *Goodridge*, subsequently spoke of what "this court [had] opined" in *Goodridge. Id.*, at 367.

<sup>29</sup> See *Heins v. Ledis*, 422 Mass. 477, 480-81 (1996).

<sup>30</sup> See, e.g., *Sloane v. Sloane*, 349 Mass. 318, 320 (1965) ("if circumstances can be shown to a probate judge justifying alimony, further modifications of the decree will be within his competence" [citing the Alimony Statute] [fn. omitted]).

<sup>31</sup> Complaint; A. 15 ¶ 34.

<sup>32</sup> *Goodridge*, 440 Mass. at 321 (emphasis added).

<sup>33</sup> *Id.*

days[.]”<sup>34</sup> Indeed, “hundreds of statutes” relate to marriage, “touching nearly every aspect of life and death.”<sup>35</sup>

Not surprisingly, therefore, Mr. Ortiz fails to cite any case holding that art. 10 recognizes a right to privacy of one spouse against the other or against the Commonwealth in connection with alimony. Nor has a Westlaw search found any reported Massachusetts case supporting Mr. Ortiz’s privacy claim.

Counsel did find a reported Florida case rejecting a similar claim made under that state’s constitution.<sup>36</sup> Also, a recent decision from this Court rejected as “so untenable as to be frivolous” the contention that “the statutory provisions for alimony under G. L. c. 208, ‘34[,] . . . impermissibly interfere with [the husband’s] constitutional right to autonomous privacy[.]’”<sup>37</sup>

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, at 322.

<sup>36</sup> *Daniel v. Daniel*, 922 So.2d 1041, 1044-45 (Fla. Dist. Ct. App. 2006).

<sup>37</sup> *Ganong v. Ganong*, 66 Mass. App. Ct. 1108, 1108, 2006 WL 1344864, slip op. at 1 (2006) (internal quotation marks and citation omitted) (Rule 1:28 decision). N.b., as unpublished Appeals Court decisions “are not

*Continued on next page*

in all events, Mr. Ortiz's privacy claim fails because of the intimate governmental involvement in the creation and dissolution of civil marriages in Massachusetts, and because his contention "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[.]"<sup>38</sup> Having voluntarily entered into the legal relationship of civil marriage, Mr. Ortiz has no legitimate complaint that the law also governs the terms and manner of his leaving that relationship.<sup>39</sup>

One of these exit terms is the disclosure of financial information: "Each spouse in a divorce proceeding has the obligation to provide adequate

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to be relied upon or cited as authority in unrelated cases," *Purvis v. Commissioner of Correction*, 29 Mass. App. Ct. 190, 192 n.5 (1990), we cite *Ganong* not as controlling precedent but instead solely for its persuasive value, just as one cites decisions of the Superior Court or Single Justice of the Supreme Judicial Court.

<sup>38</sup> *Ganong v. Ganong*, slip op. at 1.

<sup>39</sup> *Cf. Mason v. Coleman*, 447 Mass. 177, 187 (2006) (rejecting mother's contention that "judge's refusal to authorize removal of children from the Commonwealth offended her right to freedom of movement pursuant to the Fifth and Fourteenth Amendments to the United States Constitution").

financial data to the other spouse and to the court."<sup>40</sup> Indeed, since the Supreme Judicial Court has recognized that the Commonwealth is one of "three partners to every civil marriage,"<sup>41</sup> Mr. Ortiz would be hard-pressed to justify keeping financial information bearing on the dissolution of the marriage from the Commonwealth. He has not done so. Insofar as a right of privacy exists regarding these matters, it applies only to strangers to the marriage.<sup>42</sup>

1. **The Alimony Statute would survive judicial scrutiny because it has a rational basis.**

If the Alimony Statute somehow infringed the right to privacy, which as shown above it does not, the statute would survive judicial scrutiny because it has a rational basis. The "rational basis" test

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<sup>40</sup> *Saiten v. Ackerman*, 64 Mass. App. Ct. 868, 872-73 (2005), rev. denied, 445 Mass. 1109 (2005); *Sloane v. Sloane*, 349 Mass. at 320 (recognizing court's right to determine alimony by inquiring into the parties' financial statuses of parties).

<sup>41</sup> *Goodridge*, 440 Mass. at 321.

<sup>42</sup> Cf. *George W. Prescott Pub. Co. v. Register of Probate for Norfolk County*, 395 Mass. 274, 278 (1985) (holding that "legitimate expectations of privacy, possessed by most litigants in domestic relations proceedings, would ordinarily constitute 'good cause' to justify impoundment of discovery materials which are confidential in nature").

applies here because Mr. Ortiz's purported right to keep his finances private from Ms. Ortiz and the Commonwealth cannot be regarded as fundamental. Rights are regarded as fundamental only when they are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."<sup>43</sup> As discussed above, however, the deeply rooted history and tradition of the Commonwealth regarding marriage and divorce pre-existed statehood. Indeed, the Commonwealth has adjudicated alimony disputes throughout its existence.

Accordingly, Mr. Ortiz's privacy-based constitutional challenge to the Alimony Statute would be tested for a rational basis,<sup>44</sup> asking whether the statute "bear[s] a reasonable relation to a permissible legislative objective."<sup>45</sup> The statute easily survives such scrutiny.

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<sup>43</sup> *Cote-Whitacre*, 446 Mass. at 366 (Spina, Cowin, and Sosman, JJ. concurring) (internal citations omitted).

<sup>44</sup> See *Goodridge*, 440 Mass. at 329-31.

<sup>45</sup> *Id.* at 329-330.

2. The Alimony Statute also would survive strict scrutiny.

Strict scrutiny tests whether a statute serves "a compelling interest" and "is limited as narrowly as possible consistent with its proper purpose."<sup>46</sup> A statute survives strict scrutiny so long as any imposition on a fundamental right is minimal and limited in light of the state's interests.<sup>47</sup>

Mr. Ortiz argues that the Commonwealth lacks a compelling state interest.<sup>48</sup> As *Goodridge* recognizes, however, "[c]ivil marriage is . . . regulated through exercise of the police power."<sup>49</sup> And, as Judge Macdonald stated, "[t]he institution of marriage and the incidents of its dissolution deeply implicate the State's interest. This is directly reflected in the provisions of the Constitution of the Commonwealth."<sup>50</sup>

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<sup>46</sup> *DuPont v. Commissioner of Correction*, 448 Mass. 389, 406 (2007).

<sup>47</sup> *Kendall v. Kendall*, 426 Mass. 238, 249-50 (1997). (recognizing the minimal burden and limited scope of a divorce judgment on a fundamental right).

<sup>48</sup> Appellant's Brief at 17-18, 31.

<sup>49</sup> *Goodridge*, 440 Mass. at 321.

<sup>50</sup> Dismissal at 2, ¶ 2; A. 49.

Civil marriage "is a 'social institution of the highest importance.'"<sup>51</sup> By entering into a civil marriage, Mr. Ortiz qualified for "valuable property rights," in consideration of which he "agree[d] to what might otherwise be a burdensome degree of government regulation of [his] activities," including "substantial restrictions . . . on [his] ability freely to dispose of [his] assets," for example, the provisions of the Alimony Statute "providing for payment of alimony and the equitable division of property on divorce."<sup>52</sup> The Commonwealth's compelling interest in civil marriages amply justifies the Alimony Statute, which is narrowly tailored to meet the exigencies of a civil marriage's dissolution.

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<sup>51</sup> *Goodridge*, 440 Mass. at 322, quoting *French v. McArney*, 290 Mass. 544, 546 (1935).

<sup>52</sup> *Goodridge*, 440 Mass. at 322 & n.13.

B. **The Massachusetts Constitution expressly recognizes the authority to award alimony as part of the judicial power for whose exercise the Legislature may make provision. Hence the grant of authority to the judiciary in G. L. c. 208, § 34, does not violate art. 30.**

Mr. Ortiz also contends that the Alimony Statute violates the separation of powers doctrine embodied in art. 30 of the Constitution of the Commonwealth because (so he says) it is "an impermissible delegation by the Massachusetts legislature of its exclusive law making power to the Massachusetts judiciary."<sup>53</sup> Article 30 encompasses the general principle that the Legislature cannot delegate the power to make laws.<sup>54</sup> But this principle "does not require three 'watertight compartments' within the government"<sup>55</sup> Indeed, "an absolute division of the three general types of functions is neither possible

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<sup>53</sup> Complaint ¶ 58; A. 18. See also Appellant's Brief at 25-32.

<sup>54</sup> *Commonwealth v. Clemmey*, 447 Mass. 121, 134 (2006), quoting *Construction Indus. of Mass. v. Commissioner of Labor & Indus.*, 406 Mass. 162, 171 (1989).

<sup>55</sup> *Id.*, quoting *Opinions of the Justices*, 372 Mass. 883, 892 (1977).

nor always desirable."<sup>56</sup> Whether a delegation of power is unconstitutional is a "question of degree."<sup>57</sup>

**1. History and practice demonstrate the absence of any art. 30 problem.**

The Massachusetts Constitution itself recognizes the judicial nature of decisions concerning marriage, treating the subject in Pt. 2, c. 3, relating to the power of the judiciary:<sup>58</sup> "All causes of marriage, divorce, and alimony . . . shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision."

The Legislature first made "other provision" for hearing and determining these cases as early as 1785, when it transferred jurisdiction to the Supreme Judicial Court.<sup>59</sup> In 1887, jurisdiction over divorce and alimony was transferred to the Superior Court.<sup>60</sup> In 1922, domestic relations jurisdiction was given to

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*, quoting *Construction Indus.*, 406 Mass. at 171.

<sup>58</sup> Massachusetts Constitution Pt. 2, c. 3, art. 5.

<sup>59</sup> St. 1785, c. 69, § 7.

<sup>60</sup> St. 1887, c. 332.

the Probate Court.<sup>61</sup> Since 1986, the Probate and Family Court has had exclusive original jurisdiction.<sup>62</sup>

2. **The Chelmsford Trailer Park test confirms that the Legislature properly delegated implementation of the Alimony Statute to the judiciary.**

In *Chelmsford Trailer Park v. Chelmsford*, the Supreme Judicial Court established a three-prong test for claims of an unconstitutional delegation of power.<sup>63</sup> The first prong asks whether "the Legislature delegate[d] the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy"; the second prong asks whether "the act provide[s] adequate direction for implementation"; and the third prong, asks whether "the act provide[s] safeguards such that abuses of discretion can be controlled?"<sup>64</sup>

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<sup>61</sup> St. 1922, c. 542, § 2.

<sup>62</sup> St. 1986, c. 462, § 15.

<sup>63</sup> *Chelmsford Trailer Park v. Chelmsford*, 393 Mass. 186 (1984).

<sup>64</sup> *Id.*, at 190.

- a. The Legislature delegated only implementation of the Alimony Statute to the judiciary.

The Alimony Statute does not delegate "the making of fundamental policy decisions"<sup>65</sup> to the judiciary. Rather, the Legislature mandated that courts "shall consider" the various factors specified in the statute.<sup>66</sup> As Judge Macdonald recognized, "the Constitution of the Commonwealth and the cases cited . . . [in his opinion] dispose of the plaintiff's Article 30 separation of powers claim[.]"<sup>67</sup>

Mr. Ortiz asserts that the Legislature's use of "may," "in lieu of," and "if any" -- as in "the court . . . may make a judgment for either of the parties to pay alimony to the other" - "give[s] unbridled, exclusive legislative policy making decisions to the judiciary[.]" In fact, however, the Legislature, doubtlessly recognizing the need for intensively fact-based decisions in this highly sensitive area, merely

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<sup>65</sup> *Id.*

<sup>66</sup> See G. L. c. 208, § 34.

<sup>67</sup> *Motion to dismiss*: A. 21 (docket entries).  
*Frivolous: Dismissal* at 3 ¶ 4, A. 50.

gave the judiciary some discretion in carrying out the policy mandate expressed in the Alimony Statute.

**b. The Alimony Statute provides adequate direction for implementation.**

Mr. Ortiz, without citing any cases,<sup>68</sup> further argues that the permutations of factors listed in the statute for determining alimony provide inadequate direction for "reproducible" implementation.<sup>69</sup> To the contrary, the factors specified in the Alimony Statute provide judges with clear guidance for making necessarily individualized decisions regarding alimony or the assignment of a part of one party's estate to the other.

**c. The Alimony Statute and the judicial system provide adequate safeguards against abuse.**

Again without citing any supporting authority, Mr. Ortiz argues that the statute lacks adequate safeguards against abuses of discretion.<sup>70</sup> But trial

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<sup>68</sup> See *Powers v. Secretary of Admin.*, 412 Mass. 119, 130 (1992), citing Mass. R. App. P. 16(a)(4).

<sup>69</sup> Appellant's Brief at 31.

<sup>70</sup> *Id.*, at 31-32.

court decisions are subject to appellate review. Also, courts may revise and alter alimony judgments "upon the action for modification of either party."<sup>71</sup>

**III. Were the judgment properly before this Court, dismissal of the equal protection claim would have to be affirmed because Mr. Ortiz's cursory presentation fails to rise to the level of appellate argument.**

"[T]he appellant . . . has the burden of demonstrating error in the judgment . . . and furnishing legal argument that enables [the appellate court] to decide the central issue."<sup>72</sup> Accordingly, "[a]n appellant's brief must set forth an argument, which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."<sup>73</sup> This requirement "is more than a mere technicality. It is founded on the sound principle that the right of a party to have this court consider a point entails a duty: that duty

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<sup>71</sup> G.L. c. 208, § 37.

<sup>72</sup> *Yung v. Reymonde*, 433 Mass. 1123, 1124 (2000) (rescript).

<sup>73</sup> *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85 (1995), quoting Mass. R. App. P. 16(a)(4).

is to assist the court with argument and appropriate citation of authority.'<sup>74</sup>

Here, Mr. Ortiz offers no authority to support his assertion that "the classification of divorcing spouses via the alimony statute interferes with their exercise of a fundamental right[.]"<sup>75</sup> "This manner of cursory presentation fails to meet the basic requirements for appellate argument[.]"<sup>76</sup> This Court, therefore, should "not consider this argument."<sup>77</sup>

In all events, "[f]or equal protection claims, rational basis analysis requires [only] that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the distinguished class."<sup>78</sup> Moreover, in the case of "remedial social enactments," such as the Alimony Statute, "[a] court is only to inquire into whether

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<sup>74</sup> *Id.*, at 85-86, quoting *Lolos v. Berlin*, 338 Mass. 10, 14 (1958).

<sup>75</sup> Appellant's brief at 21.

<sup>76</sup> *Powers v. Secretary of Admin.*, 412 Mass. at 130 (1992), citing Mass. R. App. P. 16(a)(4).

<sup>77</sup> *Id.*

<sup>78</sup> *Cote-Whitacre*, 446 Mass. at 367 (Spina, Cowin, and Sosman, JJ. concurring), quoting *English v. New England Med. Ctr., Inc.*, 405 Mass. 423, 429 (1989).

the Legislature had the power to enact the statute and not whether the statute is wise or efficient."<sup>79</sup>

Mr. Ortiz claims that the Alimony Statute discriminates according to "the relative wealth between spouses."<sup>80</sup> But he offers no supporting authority. In all events, he is not a member of a recognized suspect class.<sup>81</sup> He does not claim discrimination based upon his sex,<sup>82</sup> race, color, creed, or national origin. He implies that he is a member of a new suspect class, one based upon "the relative wealth of the spouses and their earning capacity."<sup>83</sup> But our courts have not recognized any such suspect class.<sup>84</sup>

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<sup>79</sup> *Id.*, quoting *American Mfrs. Mut. Ins. Co. v. Commissioner of Ins.*, 374 Mass. 181, 190 (1978), and *St. Germaine v. Pendergast*, 416 Mass. 698, 703 (1993).

<sup>80</sup> Appellant's Brief at 22.

<sup>81</sup> See *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. at 367. (Spina, Cowin, and Sosman, JJ., concurring).

<sup>82</sup> In opposing the commissioner's motion to dismiss the complaint, Mr. Ortiz wrote that his equal protection "claim is not a gender-based claim." (A. 35).

<sup>83</sup> Appellant's Brief at 21.

<sup>84</sup> *Cf. San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) ("Court has never . . . held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny").

Nor is there anything to the contention that the "Massachusetts doctrine of necessities violates the state constitution equal protection provisions."<sup>85</sup> Among other things, this common law doctrine makes a husband liable for the debts of his spouse.<sup>86</sup> This doctrine benefits the "'institution of marriage' by recognizing that 'marriage involves shared wealth, expenses, rights, and duties.'"<sup>87</sup> Although some courts have criticized the doctrine on grounds of gender-discrimination,<sup>88</sup> and others have abolished it,<sup>89</sup> the doctrine of necessities remains a vital part of Massachusetts law.<sup>90</sup> It does not deny equal protection, however, because it is gender neutral.<sup>91</sup>

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<sup>85</sup> Appellant's Brief at 22.

<sup>86</sup> See Charles P. Kindregan & Monroe L. Inker, FAMILY LAW AND PRACTICE, 1 Mass. Prac. Series § 16:2 (1996).

<sup>87</sup> Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 503 (2005).

<sup>88</sup> See, e.g., *Medical Business Assoc., Inc. v. Steiner*, 588 N.Y.S.2d 890, 893 (N.Y. App. Div. 1992).

<sup>89</sup> See *Condore v. Prince George's County*, 425 A.2d 1011 (Md. 1981).

<sup>90</sup> See G. L. c. 209, § 1.

<sup>91</sup> See St. 1979, c. 727, amending G. L. c. 209, § 1. Mr. Ortiz also attacks, G. L. c. 209, § 7, which well may be subject to constitutional challenge because it is not gender-neutral. Indeed, the Appellate Division of the Massachusetts District Court has held that it

*Continued on next page*

IV. The absence of any clerical error in the judgment or clear abuse of discretion by Judge Macdonald defeats Mr. Ortiz's appeal from the denial of his post-judgment motion.

A. Mr. Ortiz's contention that the lower court erred by ruling on federal claims does not present a claim under Rule 60(a).

Mr. Ortiz contends that Judge Macdonald "improperly cast a wider net . . . than the complaint requested" by deciding federal claims.<sup>92</sup> But "Rule 60(a) merely seeks to ensure that the record of judgment reflects what actually took place."<sup>93</sup> It "allows the court to correct '[c]lerical mistakes in judgments[.]'"<sup>94</sup> "It is . . . well settled that where the judgment correctly expressed the decision of the court, no matter how erroneous that decision may have been . . ., the trial court cannot modify the judgment

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was "impliedly repealed" by the 1979 amendment to § 1. *Pioneer Valley Postal Federal Credit Union v. Soja*, 2002 Mass. App. Div. 193, 2002 WL 31487763, at \*3 (2002). But no infirmity in § 7 advances Mr. Ortiz's argument against the Alimony Statute. Nor does he make one. (See Appellant's Brief at 22-23).

<sup>92</sup> New trial motion; A. 52 ¶ 1. N.b., the motion's text expressly invokes Rule 60(a). (*Id.*; A. 53 ¶ 2.

<sup>93</sup> Reporters' Notes to Mass. R. Civ. P. 60, quoted with approval in *Gagnon v. Fontaine*, 36 Mass. App. Ct. 393, 396 (1994) (capitalization conformed).

<sup>94</sup> *M.B. Claff, Inc. v. Massachusetts Bay Transp. Auth.*, 441 Mass. 596, 602 (2004) (first bracketed insertion by the court), quoting Mass. R. Civ. P. 60(a).

so as to change the rights thereby fixed and determined."<sup>95</sup> As Mr. Ortiz does not claim a clerical mistake, he does not qualify for relief under Rule 60(a).

In all events, the judgment does not contain a clerical mistake. Although Mr. Ortiz says that Judge Macdonald ruled on federal claims that he did not bring, a simple reading of the judgment shows that it does not mention any federal claims. It simply dismisses the complaint with prejudice.<sup>96</sup>

**B. Judge Macdonald did not abuse his discretion.**

Because Mr. Ortiz filed his post-judgment motion more than ten days after the entry of judgment, it is "considered to fall within [Mass. R. Civ. P. 60(b)]."<sup>97</sup> Except where, as is not the case here, "a judgment is void for lack of subject matter or personal jurisdiction, or for failure to conform to the requirements of due process of law," "[i]t is well

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<sup>95</sup> *Gagnon v. Fontaine*, 36 Mass. App. Ct. at 397, quoting *Oregon Mort. Co. v. Kunneke*, 245 P. 539, 542 (Mont. 1926).

<sup>96</sup> Judgment on Motion to Dismiss; A. 51.

<sup>97</sup> *Stephens v. Global Naps*, 70 Mass. App. Ct. at 682, quoting *Piedra*, 39 Mass. App. Ct. at 188 n.4.

established as a general matter that denial of a motion under rule 60(b) will be set aside only on a clear showing of an abuse of discretion."<sup>98</sup>

As Mr. Ortiz makes no argument that Judge Macdonald abused his discretion, much less clearly abused his discretion, there is nothing for this Court to consider regarding this issue.<sup>99</sup>

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<sup>98</sup> *Wang v. Niarakos*, 67 Mass. App. Ct. 166, 169 (2006).  
*Accord, e.g., Nortek v. Liberty Mut. Ins. Co.*, 65  
Mass. App. Ct. 764, 775 (2006).

<sup>99</sup> See above at 24-25.

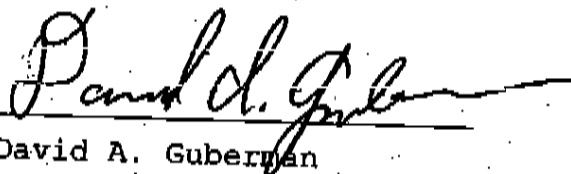
**CONCLUSION.**

For the reasons presented and on the authorities cited, the Commissioner prays the Court to affirm the judgment dismissing Mr. Ortiz's complaint.

COMMISSIONER OF REVENUE,

By his attorney,

MARTHA COAKLEY,  
ATTORNEY GENERAL,

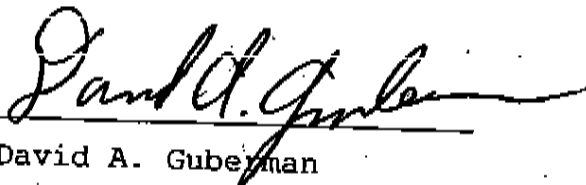


David A. Guberman  
BBO #214020  
Assistant Attorney General  
Government Bureau  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 727-2200, ext. 2072

Dated: December 21, 2007

**RULE 16(K) CERTIFICATION.**

I certify that this brief complies with the rules pertaining to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.



David A. Guberman

**STATUTORY  
ADDENDUM**

**G.L. c. 209, § 1****MASSACHUSETTS GENERAL LAWS ANNOTATED  
PART II. REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS (CH.  
183-210)****TITLE III. DOMESTIC RELATIONS (CH. 207-210)****CHAPTER 209. HUSBAND AND WIFE  
GENERAL PROVISIONS**

Current through Chapter 36 of the 2007 1st Annual Session.

**§ 1. Married persons; separate property and property held as tenants by entirety; liability for debts**

The real and personal property of any person shall, upon marriage, remain the separate property of such person, and a married person may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if such person were sole. A husband and wife shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety.

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 necessities furnished to either spouse or to a member of their family.

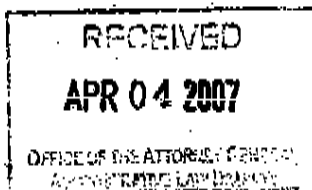
**G.L. c. 208, § 34****MASSACHUSETTS GENERAL LAWS ANNOTATED  
PART II. REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS (CH.  
183-210)****TITLE III. DOMESTIC RELATIONS (CH. 207-210)****CHAPTER 208. DIVORCE****GENERAL PROVISIONS**

Current through Chapter 36 of the 2007 1st Annual Session.

**§ 34. Alimony or assignment of estate; determination of amount; health insurance**

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.

**SUPPLEMENTAL  
APPENDIX**



Ernest Ortiz  
90 Weeden Road  
Fairhaven, MA 02719

April 3, 2007

Atty. General Martha Coakley  
1 Ashburton Place  
Boston, MA 02108  
Attn: David Guberman

RE: Superior Court Department, No. BRCV 2006-01092-B  
Ernest Ortiz v. Alan LeBovidge, Commissioner, Massachusetts Department of Revenue,  
And Catherine J. Ortiz

Dear Sir/Madam;

Pursuant to Rule 9a, I am resubmitting to you the Plaintiff's Motion for New Trial and To  
Alter Judgment, originally sent March 22, 2007, return receipt.

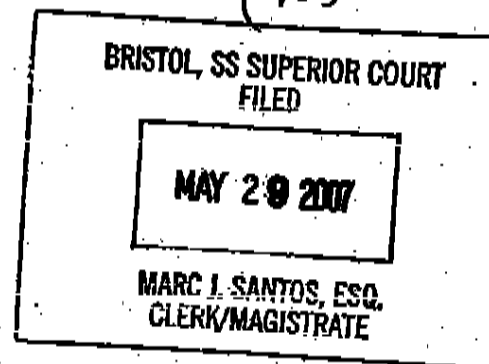
Regards,



Ernest Ortiz

**COMMONWEALTH OF MASSACHUSETTS****Bristol, SS****Superior Court  
Docket No. 06-1092-B**

<p>Ernest Ortiz <i>Plaintiff</i></p> <p>V.</p> <p>Alan LeBovidge, Commissioner Massachusetts Department of Revenue (in his official capacity), Catherine J. Ortiz <i>Defendants</i></p>
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**Plaintiff's Notice of Appeal**

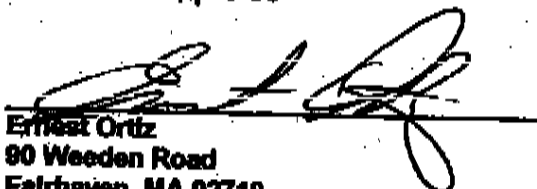
Notice is hereby given that Ernest Ortiz, the above-named Plaintiff, hereby appeals from the judgment, entered by the Bristol County Superior Court (D. Lloyd Macdonald, J.), on March 23, 2007, which dismissed all of the Plaintiff's claims and the denial of the Plaintiff's Motion for Reconsideration entered by Judge Macdonald on May 3, 2007.

Specifically, the Plaintiff appeals the dismissal of the following claims against the Defendants:

- (1) Article X of the Declaration of Rights of the Massachusetts Constitution.
- (2) Article 106 of the Basic Rights of the Massachusetts Constitution.

(3) **Article XXX of the Declaration of Rights of the  
Massachusetts Constitution.**

**Respectfully submitted  
Ernest Ortiz, pro se**



---

**Ernest Ortiz  
90 Weeden Road  
Fairhaven, MA 02719  
Dated: May 29, 2007**

**CERTIFICATE OF SERVICE**

I, Ernest Ortiz the Plaintiff, hereby certify that the within Plaintiff's Notice of Appeal has been served upon the following as noted below, this 29<sup>th</sup> day of May, 2007.

**By Regular Mail:**

Aian Letovidge, Commissioner  
Massachusetts Department of Revenue  
100 Cambridge Street  
Boston, MA 02114

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

Attorney General Martha Coakley  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108



Ernest Ortiz  
dated: May 29, 2007

**COMMONWEALTH OF MASSACHUSETTS****Bristol, SS****Superior Court  
Docket No. 06-1092-B****Ernest Ortiz***Plaintiff***V.****Alan LeBovidge, Commissioner  
Massachusetts Department of Revenue  
(In his official capacity),  
Catherine J. Ortiz***Defendants***Plaintiff's Opposition to Defendant Commissioner's Motion to Strike  
Plaintiff's Notice of Appeal from Final Judgment**

Ernest Ortiz hereby submits his Opposition to Commissioner of the Massachusetts Department of Revenue's (herein after referred to as "Commissioner") Motion to Strike the Plaintiff's Notice of Appeal from the Final Judgment. In support of his opposition, the Plaintiff states as follows:

1. A final judgment of dismissal was entered by this court on March 23, 2007.
2. The Plaintiff filed a Motion for New Trial and to Alter Judgment on April 3, 2007. This court treated the motion "as one for reconsideration" and denied it "for substantially the reasons advanced in the opposition papers." The Plaintiff's motion was denied on April 26, 2007 and notice of the same was mailed to the Plaintiff on May 3, 2007.
3. The Plaintiff filed his Notice of Appeal on May 29, 2007.
4. As the Commissioner concedes that the Plaintiff has timely appealed the denial of his motion for reconsideration, the only issue before the

court is whether the Plaintiff's postjudgment motion, one that this court deemed as a motion for reconsideration, tolled the time within which the Plaintiff could file an appeal from this court's entry of judgment. Put another way, the question presented is whether the appeal period began to run as of the date of this court's entry of judgment or as of the date of this court's entry of its denial of the Plaintiff's Motion for Reconsideration.

5. The Commissioner claims that a "motion for reconsideration does not stay the running" of the time within which the Plaintiff may timely appeal from this court's entry of judgment. The Plaintiff submits that the Commissioner's position is at odds with both statutory and decisional authority. To wit, Rule 4(a) of the Massachusetts Rules of Appellate Procedure states, in pertinent part, as follows:

**"If a timely motion under the Massachusetts Rules of Civil Procedure is filed in the lower court by any party: (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend a judgment; or (4) under Rule 59 for a new trial, *the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.*" (italics added)**

6. The Plaintiff's motion was styled as a Motion for New Trial and to Alter Judgment. Although this court deemed the motion one of reconsideration, the plaintiff's pleading was nonetheless a request within the ambit of Rule 59(e) of the Massachusetts Rules of Civil Procedure. The reporters notes to Rule 59 specify in part that "since [a Rule 59(e)] motion affects the finality of the judgment, *it tolls the time for taking an appeal from the judgment; the time does not begin to run again until after disposition of the motion.*" (italics added). Reporters Notes to Rule 59, 2006 main volume.

7. Moreover, according to the Reporters Notes, "Rule 59(e) encompasses many motions seeking relief of a type which technically might not be considered a motion for a new trial: for example, a motion for rehearing, reconsideration or vacation."

8. Some years ago the Supreme Judicial Court opined that "substance, not labels, should control in determining whether a postjudgment motion is a Rule 59(e) motion." Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Commission, 394 Mass 233, 236 (1985). There, the court articulated an approach to determine whether postjudgment motions would be treated as Rule 59(e) motions. Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Commission, 394 Mass at 237. Essentially, the court held that where doubts exist as to the proper characterization of a postjudgment motion that calls into question the correctness of a judgment, the courts of Massachusetts will treat it as a rule 59(e) motion. Pentucket Manor Chronic Hosp., Inc., 394 Mass at 237.

9. In Pentucket, the Rule Setting Commission argued that the appellant's motion to vacate the underlying judgment in the case should not be treated as a motion under Rule 59(e). *id.* at 237. Although the Appeals Court bought the Rule Setting Commission's flawed argument, the Supreme Judicial Court rejected it as too narrow and in conflict with the overarching purposes of the revision of the Rules of both civil and appellate procedure. *id.* The Plaintiff contends that the Supreme Judicial Court adopted its position, at least in part, to reflect the philosophy that undergirded the overhaul of the rules of civil and appellate procedure. Indeed, the court, quoting from a 1975 opinion, stated,

"one of the purposes of the rules of [civil and] appellate procedure was undoubtedly to simplify that procedure by eliminating many of the previous rigid statutory time limitations which often served as fatal or near fatal booby traps for inexperienced or unwary

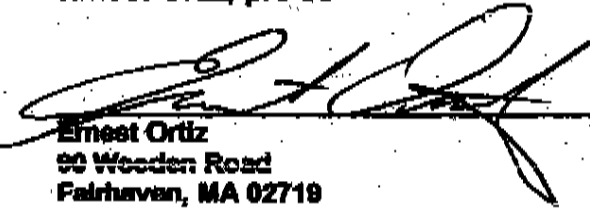
practitioners taking a case from the trial court to the appellate court."

10. Pentucket at 237 quoting Giacobbe v. First Coolidge Corp., 367 Mass 309, 315 (1975). Pentucket has not been overruled. In fact, it has been consistently cited for the proposition that any postjudgment motion that questions the legal correctness of a judgment must be treated as a motion under Rule 59(e). Please see Carver v. Waldman, 21 Mass. App. Ct. 958, 959, (1993) ("to be sure, a timely motion to "vacate" the judgment, construed according to the precept of Pentucket Manor Chronic Hosp., Inc. v. Rule Setting Commission, 394 Mass. 233, 234-237 (1983) as a motion under Mass. R. Civ. P. 59(e) to "alter or amend a judgment" would have the effect of extending the time to appeal"); Muir v. Hall, 37 Mass. App. Ct. 38, 41 (1999) (when the proper characterization of the motion is in doubt, courts treat all timely filed motions which question the correctness of the judgment as Rule 59(e) motions); Piedra v. Mercy Hosp., Inc., 39 Mass. App. Ct. 184, 187 (1995) ("motions for reconsideration ordinarily fall within Rule 59(e)").

11. The Plaintiff's postjudgment motion unequivocally called into question the correctness of this court's judgment. Accordingly, the Plaintiff's motion for reconsideration falls within the ambit of Rule 59(e).

For the reasons presented above, the Plaintiff asks this court to deny the Defendant Commissioner's Motion to Strike Plaintiff's Notice of Appeal.

Respectfully submitted  
Ernest Ortiz, pro se



Ernest Ortiz  
90 Wooden Road  
Fairhaven, MA 02719  
Dated: June 8, 2007

**CERTIFICATE OF SERVICE**

I, Ernest Ortiz the Plaintiff, hereby certify that the within Plaintiff's Opposition to Defendant Commissioner's Motion to Strike Plaintiff's Notice of Appeal from Final Judgment has been served upon the following, pursuant to Superior Court Rule 9A, as noted below, this 8<sup>th</sup> day of June, 2007.

**By Regular Mail:**

Alan LeBovidge, Commissioner  
Massachusetts Department of Revenue  
100 Cambridge Street  
Boston, MA 02114

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

Attorney General Martha Coakley  
Assistant Attorney General David A. Guberman  
Office of the Attorney General  
One Ashburton Place  
Boston, MA 02108

  
Ernest Ortiz  
dated: June 8, 2007