

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE
John Adams Courthouse
One Pemberton Square, Suite 1200
BOSTON, MASSACHUSETTS 02108-1705
(617) 725-8106

July 3, 2008

Michael M. Burke; Esquire
116 Long Pond Road, Suite 9
Plymouth, MA 02360

RE: No. 2007-P-1390

ERNEST ORTIZ
vs.
COMMISSIONER OF REVENUE & another

NOTICE OF DOCKET ENTRY

Please take note that, with respect to the MOTION for leave to submit supplemental appendix in the form included with its brief filed by Commissioner of Revenue: (Paper #4),

on July 3, 2008, the following order was entered on the docket of the above-referenced case:

RE#4 (Revised Action) Supplemental appendix allowed. (C CO FE)
*Notice:

Very truly yours,

The Clerk's Office

Dated: July 3, 2008

To: Michael M. Burke; Esquire
David A. Guberman; A.A.G.
William J. Quaglia; A.A.G.

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vs.

COMMISSIONER OF REVENUE & another

NOTICE OF DOCKET ENTRY

Please take note that on July 3, 2008, the following entry was made on the docket of the above-referenced case:

Decision: Rule 1:28 (C CO FE). Judgment affirmed. Order denying motion for new trial and to alter judgment affirmed. *Notice.
(See image on file.)

Very truly yours,

The Clerk's Office

Dated: July 3, 2008

To: Michael M. Burke, Esquire
David A. Guberman, A.A.G.
William J. Quaglia, A.A.G.

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 07-P-1390

ERNEST ORTIZ

vs.

COMMISSIONER OF REVENUE & another.

Pending in the Superior

Court for the County of Bristol.

Ordered, that the following entry be made in the docket:

Judgment affirmed. Order denying motion for new trial and to alter judgment affirmed.

By the Court,

[Handwritten Signature], Clerk
First Assistant

Date July 3, 2008.

NOTE:

The original of the writ transcript will issue in due course, pursuant to M.R.A.P. 23

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

07-P-1390

ERNEST ORTIZ

vs.COMMISSIONER OF REVENUE & another.¹MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A judge of the Superior Court allowed the defendants' motion to dismiss the plaintiff's complaint seeking a declaratory judgment that the alimony provisions of G. L. c. 208, § 34, violate his rights to privacy, due process, and equal protection under the State and Federal constitutions, as well as the separation of powers and basic rights provisions of the Massachusetts Declaration of Rights.² Before us is the plaintiff's appeal from the judgment of dismissal and from the denial of his postjudgment "motion for new trial and to alter judgment."

Treating the plaintiff's appeal as timely filed,³ we see no

¹ Catherine J. Ortiz.

² As the issue was not raised or briefed by the defendants, we do not consider whether the plaintiff may collaterally challenge the alimony payments ordered in the divorce judgment of January 7, 2000, by means of a later declaratory judgment action.

³ The timeliness of the plaintiff's appeal from the judgment is called into question because his original postjudgment motion pursuant to Mass.R.Civ.P. 59, 365 Mass. 827 (1974), which would have tolled the time for filing a notice of appeal, failed to comply with Superior Court Rules 9A and 9E and was physically returned to him. The plaintiff then filed a second postjudgment

merit to any of his contentions, substantially for the reasons stated by the trial court judge and by the commissioner's brief at pages 11 through 27. As to the plaintiff's particular claim that the statute impermissibly interferes with his constitutional right to autonomous privacy, we see no indication that this argument was misunderstood. To the contrary, the judge correctly perceived that no such right could be implicated where the plaintiff had entered into a civil marriage voluntarily, thereby subjecting himself to the laws of the Commonwealth governing marriage, including those pertaining to its dissolution.

Judgment affirmed.

Order denying motion for new trial and to alter judgment affirmed.

By the Court (Cypher, Cohen & Fecteau, JJ.)

Crist Assante
Clerk

Entered: July 3, 2008.

motion, which was apparently viewed by the judge as untimely under rule 59 and hence treated as a motion pursuant to Mass.R.Civ.P. 60, 365-Mass. 828 (1974). Later, however, a second judge refused to strike the plaintiff's notice of appeal from the final judgment, accepting the plaintiff's position that the appeal period had been tolled until after the decision on his postjudgment motion. The second judge also stated that he would grant the plaintiff leave to file a late notice of appeal, pursuant to Mass.R.A.P. 4(c), as amended, 378 Mass. 928 (1979), if the plaintiff's position on timeliness was incorrect. In these circumstances, we treat the appeal as properly before us