

**Commonwealth of Massachusetts**

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT

No. **BRCV 2006-01092-B**

ERNEST ORTIZ  
Plaintiff

v.

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

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**PLAINTIFF'S REPLY TO DEFENDANT CATHERINE ORTIZ ANSWER**

Plaintiff replies to Defendant Catherine Ortiz Answer and motion to dismiss.

**A. Standard of Review**

"In reviewing the grant of a rule 12 dismissal, we examine the 'complaint to determine if, viewing its allegations and inferences broadly and in the plaintiff[s]' favor, "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim" entitling [them] to relief.' *Hobson v. McLean Hosp. Corp.*, 402 Mass. 413, 415 (1988), quoting from *Nader v. Citron*, 372 Mass. 96, 98 (1977)." *Ritchie v. Department of State Police*, 60 Mass. App. Ct. 655, 659 (2004)

**B. Defendant's General Denial**

Defendant denies Massachusetts Declaratory Judgment statute, jurisdiction of this court to hear this action for declaratory and injunctive relief, standard of review, Massachusetts and U.S. Constitutional provisions, Massachusetts alimony statute, and the details of the dissolution of marriage proceedings between her and the Plaintiff.

The Plaintiff merely requests this court take Judicial Notice of the above law and the

proceedings with Final Order of Judgment in *Ortiz v. Ortiz*, Probate and Family Court of Massachusetts Docket Number 9901111-DV1.

**C. Plaintiff states a claim upon which relief can be granted**

G.L. c. 231A, § 1 et seq. provisions are to be liberally construed (G.L. c. 231A, § 9) (Complaint, C 1). In this action the Plaintiff has standing. He has been, is and will continue to suffer injury from the challenged statute. (C 18-24)

The Plaintiff is entitled to a determination of his rights, duty, status and other legal relations under the challenged alimony statute. (G.L. c. 231A, § 2) (C 2)

The Plaintiff seeks declaratory and injunctive relief both of which are permitted under the Massachusetts Declaratory Judgment statute. (G.L. c. 231A, § 5)

**D. Claims are not frivolous and have merit**

G.L. c. 231A grants citizens the right to have a court declare their rights under a statute as long as the citizen has standing, i.e. personally suffers an injury effected by the challenged statute, the controversy is active and the declaration is not an advisory opinion. Because the Plaintiff is suffering current injury there is an active controversy and this is not an advisory opinion.

The legal arguments are colorable arguments with merit. See *Littlejohn v. Rose*, 786 F.2d 785 (6<sup>th</sup> Cir. 1985) and *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)..

A declaration of rights will terminate the controversy giving rise to the proceedings, i.e. whether the Plaintiff has a statutory obligation to pay alimony for life. (See G.L. c. 231A § 3)

**E. Action is filed in good faith and without malice**

This action is filed in good faith for a determination of the Plaintiff's rights. No malice is intended. Defendant's counsel could easily have noted G.L. c. 231A, § 8. It is evident this

Defendant was statutorily mandated to be a Defendant. The declaratory judgment statute of many other states merely require notice to effected parties but the Massachusetts legislature chose, “When declaratory relief is sought, *all* persons *shall* be made parties who have or claim *any* interest which would be effected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” [Emphasis added] (See Chapter 86 Declaratory Judgment, Fla. Stat. where interested parties need only be noticed and not made parties.)

Plaintiff was merely following the declaratory judgment statute.

Plaintiff’s intention to have his own rights and duties under a statute clarified in order to resolve a current controversy cannot be viewed as in bad faith or with malice.

#### **F. Attorney fees and costs are not proper**

Attorney fees are not awardable under G.L. c. 231A, § 7. Only costs are awardable and then “wholly in the discretion of the court.”

The Plaintiff has made a good faith effort to change existing law, has not acted with malice, and despite not having counsel available to represent him as [has] made a reasonable effort to seek legal guidance, not be dilatory nor in any way waste judicial resources. Plaintiff has made the effort to learn and understand the law applicable to the best of his ability.

Defendant’s counsel had the same declaratory judgment statute available to him to review when making his affirmative defenses. Here G.L. 231 § 6F only makes reasonable expenses and costs, not fees available because the Plaintiff is not “represented” by counsel.

Further, G.L. 231 § 6F makes both of these statements,

“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.”

“No finding shall be made that a claim or action is frivolous or in bad faith solely because a novel or unusual argument or principle of law was advanced in support

thereof.”

**G. This court has jurisdiction over the parties and subject matter**

G.L. c. 231 § 1 grants jurisdiction to this court to hear this constitutional challenge to a state statute. The nature of the action is a constitutional issue not a family law issue. There is no mandate to prohibit this court from reviewing this action and granting the relief requested. On the contrary, nothing would indicate the Probate and Family courts would have jurisdiction over a declaratory judgment constitutional challenge to a state statute.

**H. This “matter” was never heard in any prior action among the parties**

Defendant errors in his representation that this matter should be brought as a Modification in the Probate Court.

The Complaint in this action does not ask this court to review any other state court decision. It does not ask this court to grant a divorce, child support, alimony, child custody or modification of any of those. It does not ask for review of a Probate or Family Court decision or ruling. This is not an attempt to circumvent appellate review of any Probate or Family Court decision.

There is no action pending among the parties. Even for Defendant Catherine J. Ortiz v. the Plaintiff, a Final Order of Divorce has been entered and noted in the complaint. (C 17 and B. above)

Nothing in G.L. c. 231A requires an exhaustion of remedies in seeking a declaratory judgment as to the Plaintiff’s rights and duties under the challenged statute.

There is no law of the case, res judicata or estoppel bar to this court ~~statutorially~~ [statutorily] granting declaratory and injunctive relief.

Plaintiff’s request for injunctive relief is relief from enforcement of the statute challenged

as an unconstitutional statute. An unconstitutional statute is void ab initio and unenforceable under well established constitutional principles.

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

### **Prayer for Relief**

“The law will never make men free; it is men who have got to make the law free. They are the lovers of law and order, who observe the law when the government breaks it.” -- Henry David Thoreau, *Slavery in Massachusetts*

WHEREFORE Plaintiff prays this court assume its authorized jurisdiction to review this action; declare this action as not frivolous and with merit entitled to review; declare the Plaintiff filed this action in a good faith attempt to change existing law without malice; deny Defendant's motion to dismiss; deny request for attorney fees, expenses and costs.

Respectfully submitted,

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October 9, 2006

**Certificate of Service**

I hereby certify that on this 9<sup>th</sup> day of October, 2006, I caused a true and accurate copy of the foregoing Reply to be mailed via U.S. Postal Service, prepaid, to

Alan Le Bovidge, Commissioner  
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Respectfully submitted,

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