



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108-1598

THOMAS F. REILLY  
ATTORNEY GENERAL

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

October 10, 2006

Mr. Ernest Ortiz  
90 Weeden Road  
Fairhaven, Massachusetts 02719

Re: *Ortiz v. Commissioner of Department of Revenue*, Bristol Superior Court  
No. BRCV 2006-01092-B

Dear Mr. Ortiz:

In accordance with Superior Court Rule 9A, enclosed are copies of the following two documents: (1) Motion to Dismiss by Defendant Alan LeBovidge; and (2) Memorandum of Law in Support of Motion to Dismiss by Defendant Alan LeBovidge, as he is Commissioner of the Massachusetts Department of Revenue.

As provided in the rule, please send me the original and one copy of your opposition, if any.

Very truly yours,

A handwritten signature in black ink, appearing to read "David A. Guberman", followed by a horizontal line.

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

Enclosures

cc: William J. Quaglia, Esquire (w/encs.)





the laws and other basic rights secured by art. 106. Does the complaint fail to state a claim on which relief can be granted?

#### Facts.<sup>1</sup>

Plaintiff Ernest Ortiz (Mr. Ortiz) was married to co-defendant Catherine J. Ortiz (Ms. Ortiz).<sup>2</sup> In 2000, their marriage ended in a divorce.<sup>3</sup> In connection with the divorce, and following consideration of the financial information about the Ortizes 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.<sup>4</sup> In 2004, Mr. Ortiz also was ordered to pay Ms. Ortiz alimony of \$250.00 per week.<sup>5</sup>

To secure payment of that alimony, Mr. Ortiz's real and personal property potentially is subject to attachment.<sup>6</sup> Mr. Ortiz himself is subject to the Probate

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<sup>1</sup>Solely for purposes of this motion, the Commissioner accepts as true all well-pleaded allegations of fact in the complaint and reasonable inferences favorable to the plaintiff, but not "legal conclusions cast in the form of factual allegations" or "subjective characterizations or conclusory descriptions." *Schaer v. Brandeis University*, 432 Mass. 474, 477-78 (2000) (internal quotation marks and citations omitted).

<sup>2</sup>Complaint ¶ 17 & Ex. 1.

<sup>3</sup>*Id.* ¶ 17.

<sup>4</sup>*Id.* ¶¶ 19-20. The complaint refers to a case, in the Bristol Division of the Probate and Family Court, numbered 99D1111-DV1. (*Id.* ¶ 17 & Ex. 1.) No other details are provided about the divorce proceedings or decree.

<sup>5</sup>*Id.* ¶ 18 & Ex. 1.

<sup>6</sup>*Id.* ¶ 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."

and Family Court's equitable power to enforce the alimony award.<sup>7</sup> Indeed, in connection with the Ortizes' divorce, Mr. Ortiz has been subject to contempt proceedings.<sup>8</sup>

### Argument.

I. **Art. 10 does not provide divorcing spouses with a right to keep their finances private from each other or from the Probate and Family Court.**

Mr. Ortiz contends that the alimony statute, G. L. c. 208, § 34, "impermissibly infringe [his] art. 10 . . . Right of Privacy in the privacy protected zone of personal decisions relating to marriage, i.e., divorce[.]"<sup>9</sup> This contention is utterly without merit, ignoring, as it does, the Commonwealth's necessarily intimate involvement in the creation and dissolution of 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>10</sup> Likewise, "while only the parties can agree to end the marriage (absent the death of one of

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<sup>7</sup> *Id.* ¶ 24, citing G. L. c. 208, § 35: "The court may enforce judgments, including foreign decrees, for allowance, alimony or allowance in the nature of alimony, in the same manner as it may enforce judgments in equity."

<sup>8</sup> *Id.* ¶ 25.

<sup>9</sup> *Id.* ¶ 34.

<sup>10</sup> *Goodridge v. Department of Pub. Health*, 440 Mass. 309, 321 (2003).

them or a marriage void ab initio, the Commonwealth defines the exit terms. --

This has been so “since pre-Colonial days[.]”<sup>12</sup>

In light of this historical background, it is unsurprising that not a single case cited in the annotations to art. 10 mentions a right to privacy of one spouse against another, or against the Commonwealth, in connection with divorce proceedings or alimony. Nor has a Westlaw search found any Massachusetts case supporting Mr. Ortiz’s privacy claim.<sup>13</sup>

Mr. Ortiz’s privacy claim fails at a fundamental level because of the intimate governmental involvement in the creation and dissolution of civil marriages in Massachusetts, and because the 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, and that their association carries with it

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<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>A very similar contention, made under the Florida Constitution, was rejected in the only reported decision counsel has found. *Daniel v. Daniel*, 922 So.2d 1041, 1044–45 (Fla. Dist. Ct. App. 2006). A recent, unreported Massachusetts Appeals Court decision rejected as “so untenable as to be frivolous” the contention that “the statutory provisions for alimony under G. L. c. 208, § 34[,] . . . impermissibly interferes with [the husband’s] constitutional right to autonomous privacy[.]” *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 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 directly controlling precedent but instead solely for its persuasive value, in the same manner as one cites decisions of the Superior Court or Single Justice of the Supreme Judicial Court. *See also Wolbach v. Beckett*, 20 Mass. App. Ct. 302, 306 n.5 [1985] [Rule 1:28 decisions “unavailable for use as precedent”] [emphasis added].)

the well-established legal attributes concerning the rights of the parties during the marriage and following its dissolution.”<sup>14</sup> Having voluntarily entered into the legal relationship of marriage, Mr. Ortiz has no legitimate complaint that the law also governs the terms and manner of his leaving that relationship.<sup>15</sup>

II. The Massachusetts Constitution expressly recognizes the authority to award alimony as being a judicial power for whose exercise the Legislature is empowered to make provision. Hence the grant of authority to the Probate and Family Court 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>16</sup> But the Constitution itself recognizes the judicial nature of decisions concerning marriage, divorce, and alimony, treating the subject in Pt. 2, c. 3, relating to the power of the judiciary:<sup>17</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.

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<sup>14</sup>*Ganong v. Ganong*, slip op. at 1. (For the status of unpublished Appeals Court opinions, see above at n.13.)

<sup>15</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”).

<sup>16</sup>Complaint ¶ 58.

<sup>17</sup>Pt. 2, c. 3, art. 5, of the Constitution of the Commonwealth.

The Legislature first exercised its authority to “make other provision” for hearing and determining these cases as early as 1785, when it transferred jurisdiction to the Supreme Judicial Court.<sup>18</sup> In 1887, jurisdiction over divorce and alimony was transferred to the Superior Court.<sup>19</sup> And, in 1922, domestic relations jurisdiction was given to the Probate Court.<sup>20</sup> Since 1986, the Probate and Family Court has had exclusive original jurisdiction.<sup>21</sup>

In sum, history and practice confirm the language of the Constitution: there is no art. 30 separation of powers problem in the Probate and Family Court having jurisdiction over alimony cases. Moreover, in G. L. c. 208, § 34, the Legislature has carefully specified the factors a court must consider in deciding whether to award alimony and, if so, in what amount.

### **III. The alimony statute does not violate Mr. Ortiz’s right to equality under the law.**

Finally, Mr. Ortiz contends that the alimony statute, together with its enforcement provisions, violates his right to equal protection under art. 106 of the Massachusetts Declaration of Rights.<sup>22</sup> A generation ago, the Supreme Judicial Court found “wholly without merit” the claim that the alimony statute “is unconstitutional against husbands[,]” noting that the statute “had been amended

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<sup>18</sup>St. 1785, c. 69, § 7.

<sup>19</sup>St. 1887, c. 332.

<sup>20</sup>St. 1922, c. 542, § 2.

<sup>21</sup>St. 1986, c. 462, § 15.

<sup>22</sup>Complaint ¶ 46.

[in 1974] to eliminate any possible discrimination between husbands and wives.”<sup>23</sup>

Mr. Ortiz’s current contention, that the alimony statute denies him “equal protection compared with other divorcing Massachusians [*sic*] and compared with married Massachusians [*sic*] who have no legal obligation of spousal support,” fares no better.

As noted above, the Massachusetts Constitution itself recognizes alimony.<sup>24</sup> And the Supreme Judicial Court has noted that, “[f]or those who choose to marry, . . . marriage . . . imposes weighty legal, financial, and social obligations,” one of which is alimony.<sup>25</sup> The “regulation of marriage is properly within the scope of the [Commonwealth’s] police power[.]”<sup>26</sup> The alimony statute and its enforcement provisions are a reasonable exercise of this power.

### Conclusion.

For the reasons presented and on the authorities cited, the Commissioner prays the Court to dismiss the complaint with prejudice for failure to state a claim on which relief can be granted.

Respectfully submitted,

ALAN LeBOVIDGE, as he is  
Commissioner of the Massachusetts  
Department of Revenue,

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<sup>23</sup>*Saraceno v. Saraceno*, 369 Mass. 967, 967 (1976).

<sup>24</sup>Pt. 2, c. 3, art. 5.

<sup>25</sup>*Goodridge v. Department of Pub. Health*, 440 Mass. at 312, 322 n.13, 324.

<sup>26</sup>*Id.*, at 321, *glossing Commonwealth v. Stowell*, 389 Mass. 171, 175 (1983).

By his attorney,

THOMAS F. REILLY  
ATTORNEY GENERAL,

A handwritten signature in cursive script, reading "David A. Guberman", written over a horizontal line.

David A. Guberman BBO# 214020  
Assistant Attorneys General  
Government Bureau  
One Ashburton Place, Room 2019  
Boston, Massachusetts 02108  
(617) 727-2200, ext. 2072

Dated: October 10, 2006



THE COMMONWEALTH OF MASSACHUSETTS  
OFFICE OF THE ATTORNEY GENERAL

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BOSTON, MASSACHUSETTS 02108-1598

THOMAS F. REILLY  
ATTORNEY GENERAL

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

October 10, 2006

Clerk for Civil Business  
Taunton Superior Court  
9 Court Street, Room 13  
Taunton, Massachusetts 02780

Re: *Ortiz v. Commissioner of Department of Revenue*, Bristol Superior Court  
No. BRCV 2006-01092-B

Dear Madam or Sir:

Please docket and file the enclosed Notice of Motion to Dismiss.

Thank you for your consideration.

Very truly yours,

A handwritten signature in cursive script, reading "David A. Guberman".

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

Enclosure

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



COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

ERNEST ORTIZ,

Plaintiff

v.

ALAN LeBOVIDGE, as he is  
COMMISSIONER OF THE  
MASSACHUSETTS DEPARTMENT OF  
REVENUE, and CATHERINE J. ORTIZ,

Defendants.

C.A. 06-1092-B

NOTICE OF MOTION TO DISMISS

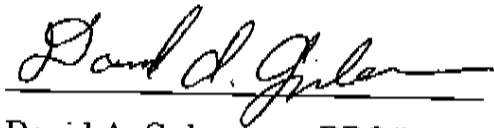
In accordance with Superior Court Rule 9E, defendant Alan LeBovidge, as he is Commissioner of the Massachusetts Department of Revenue, gives notice that he served his (1) Motion to Dismiss by Defendant Alan LeBovidge and (2) Memorandum of Law in Support of Motion to Dismiss by Defendant Alan LeBovidge, as he is Commissioner of the Massachusetts Department of Revenue, by mailing copies first-class mail, postage prepaid to plaintiff Ernest Ortiz and counsel to co-defendant Catherine J. Ortiz, this tenth day of October, 2006.

Respectfully submitted,

ALAN LeBOVIDGE, as he is  
Commissioner of the Massachusetts  
Department of Revenue,

By his attorney,

THOMAS F. REILLY  
ATTORNEY GENERAL,



David A. Guberman BBO# 214020  
Assistant Attorneys General  
Government Bureau  
One Ashburton Place, Room 2019  
Boston, Massachusetts 02108  
(617) 727-2200, ext. 2072

Dated: October 10, 2006

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

ERNEST ORTIZ,	)
	)
Plaintiff	)
	)
v.	)
	)
ALAN LeBOVIDGE, as he is	)
COMMISSIONER OF THE	)
MASSACHUSETTS DEPARTMENT OF	)
REVENUE, and CATHERINE J. ORTIZ,	)
	)
Defendants.	)

C.A. 06-1092-B

MOTION TO DISMISS BY DEFENDANT ALAN LeBOVIDGE

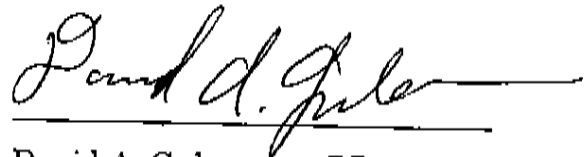
Defendant Alan LeBovidge, as he is Commissioner of the Massachusetts Department of Revenue, moves the Court under Mass. R. Civ. P. 12(b)(6) to dismiss the complaint with prejudice for failure to state a claim on which relief can be granted. This lawsuit is a frivolous attack on the constitutionality of G. L. c. 208, § 34, which authorizes a Massachusetts court having personal jurisdiction over both parties to "make a judgment for either of the parties to pay alimony to the other." In support of his motion, the defendant relies on his accompanying memorandum of law.

Respectfully submitted,

ALAN LeBOVIDGE, as he is  
Commissioner of the Massachusetts  
Department of Revenue,

By his attorney,

THOMAS F. REILLY  
ATTORNEY GENERAL,

A handwritten signature in cursive script, reading "David A. Guberman", with a horizontal line underneath.

David A. Guberman BBO# 214020  
Assistant Attorneys General  
Government Bureau  
One Ashburton Place, Room 2019  
Boston, Massachusetts 02108  
(617) 727-2200, ext. 2072

Dated: October 10, 2006