

**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.

**RECEIVED**  
Date: 4/19/07  
**BRISTOL SUPERIOR COURT**

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**PLAINTIFF'S MOTION FOR NEW TRIAL AND TO ALTER JUDGMENT**

"It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law." *Boyd v. U.S.*, 116 U.S. 616, 635 (1885)

Plaintiff, *pro se* with assistance of counsel, pursuant to Mass. Civil Procedure Rule 59

(a)(2) and (e) and Rule 60 (a) moves this court for a new trial because the court has misapprehended the plaintiff's claims and the caselaw the court chose to apply thus resulting in an erroneous order for dismissal. In addition he requested the judgment to be altered because the order misstates the nature of the claims. In support he offers,

**Alter Judgment & Clerical Error in the Order**

1. The complaint did not ask the court to rule on any federal claims. The court sua sponte improperly cast a wider net in its ruling than the complaint requested. The complaint limited its

claims to state constitutional infringements. The order misreads and miscites the complaint.

**ORDER First Paragraph** "...The complaint seeks a declaratory judgment that the alimony provision of G.G. c. 208 § 34 violate his various state *and federal* constitutional rights to privacy, due process and equal protection." [Emphasis added]

2. The Plaintiff requests the court alter its Order to exclude "and federal" because the complaint did not request adjudication of any federal claims. (Mass. Civil Proc. Rule 59 (e) and Rule 60 (a) ("...Clerical mistakes in judgments, *orders* or other parts of the record and errors therein *arising from oversight or omission may be corrected by the court* at any time of its own initiative or *on the motion of any party...*") At the hearing the Plaintiff merely cited federal law as well as state law in support of his state constitutional claims.

**Right of Privacy Challenge is Not Frivolous—the Law is Neither Well Settled or Settled**

3. *Ganong 66 Mass* was *not* deemed a frivolous challenge to the constitutionality of the alimony statute. The awarded attorney fee portion of the trial court order based on frivolity was vacated. (See attached order)

4. In #1. The court cites *Allen v Batchelder*, 17 Mass. App. Ct. 453, 454 (1984) *Allen* is an estate probate court dealing with very well settled law on adverse possession. The order discussed that an *appeal* was frivolous if the law is well settled.

In the instant action the law is not well settled. No precedential law exists addressing whether the alimony statute infringes the Massachusetts Constitution Right of Privacy or Separation of Powers. On the contrary, *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) has completely altered the legal landscape of marriage and the Right of Privacy and where *Goodridge* 798 N.E. 2d challenges the statutory burdens on the *entry into* marriage under the constitutional right of privacy this action challenges the statutory burdens on the *exit from* marriage under the right of privacy.

*Allen* 17 Mass. App. Ct. at 458 specifically address the circumstances of this lawsuit,

“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. Compare G.L.c. 231, § 6F. In the instant case the 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.”

5. There is no caselaw on the alimony statute infringing the Mass. Constitutional Separation of Powers.

6. There is no precedential caselaw on the alimony statute infringing the Mass. Constitutional Right of Privacy.

**Ganong v Ganong –Unpublished opinion**

7. The court cannot use *Ganong v Ganong*, 66 Mass. App. Ct. 1108 (2006) for any precedential value. It is an unpublished opinion. *Horner v. Boston Edison Co.*, 45 Mass.App.Ct. 139, 140-41 (1998)

8. *Ganong* 66 Mass is not one of the Massachusetts Appeals Court’s shining moments. To its credit the court had the wisdom to render the ruling as an unpublished opinion negating any precedential value.

9. The core holding of *Ganong* 66 Mass demonstrates a profound reasoning flaw such that the Appeals Court must welcome the opportunity to correct and recede from its excruciating opinion, to wit....

“The husband’s argument that the statute impermissibly interferes with his constitutional right to autonomous privacy 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 through marriage carries with it the well-established legal attributes concerning the rights of the parties during the marriage and following its dissolution.”

10. Re *Ganong* 66 Mass: All acts of all citizens are voluntary. A citizen’s volitional act, to exercise a fundamental right to marry or divorce, in no way permits the legislature to write

statutes effecting the right to marry or divorce that impermissibly infringe the state constitution. The legislature is not permitted to write unconstitutional statutes and subsequently have the judiciary justify them by stating the volitional choice of a citizen to exercise a fundamental right creates the force to transmute an unconstitutional statute into a constitutional one.

11. *Re Ganong* 66 Mass: As to entering marriage voluntarily, the definition of voluntary in law is “without legal obligation or consideration.” Therefore the *Ganong* expression is a contradiction of itself within one sentence.

12. *Ganong* 66 Mass is stating that the Plaintiff by “voluntarily” exercising one fundamental right (right of association to alter his marital status) he must therefore subject himself to the loss of another constitutional right abrogated by the alimony statute.

“...we find it intolerable that one Constitutional right should have to be surrendered in order to assert another.” *Simmons v. U.S.*, 390 U.S. 389 (1968)

13. Using the holding and logic of *Ganong* 66 Mass any Massachusetts Supreme Court or United States Supreme Court case that overturned a statute was wrongly decided because the citizen voluntarily chose the conduct that triggered application of an unconstitutional statute. Thus, *Roe v Wade*, 410 U.S. 113 (1973) statute jailing for having or performing an abortion was wrongly decided because Norma Leah MCCorvey (“Jane Roe”) voluntarily chose to get pregnant and have an abortion thus subjecting herself to the abortion statute. Thus, *Lawrence v Texas*, 539 U.S. 558 (2003), statute jailing for voluntarily and privately committing sodomy was wrongly decided because medical technologist 60 year old John Geddes Lawrence and street-stand barbecue vendor 36 year old Tyron Garner chose to have consensual anal sex thus voluntarily subjecting themselves to the sodomy statute. Thus, *Connecticut v Griswold*, 381 U.S. 479 (1965), statute jailing for prescribing contraceptives was wrongly decided because Estelle Griwold and Dr. C. Lee Buxton voluntarily chose to open an abortion clinic thus

subjecting themselves to the contraceptive statute. Need more be said?

14. Using the holding and logic of *Ganong* that making a right of privacy challenge to the alimony statute is frivolous then *Lawrence v Texas*, 539 U.S. 558 (2003) must be the height of frivolity because *Bowers v Hardwick*, 478 U.S. 186 (1986) had clearly established sodomy laws were constitutional.

15. It is not usual for a Superior Court to disagree with the reasoning in an unpublished opinion. See as an example, *Commonwealth of Massachusetts v Ormon*, No. 031581 (Ma. Super. Middlesex, SS, Mar. 7, 2006)

16. Not to reargue his case but the Appellant point out that divorce is judicially recognized as within the umbra of the right of privacy. *LittleJohn v. Rose*, 768 F.2d 765, 768 (6<sup>th</sup> Cir. 1985).

“Given the ‘associational interests that surround the establishment and dissolution of [the marital] relationship’, such ‘adjustments’ as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy. See *Zablocki*, 434 U.S. at 385; *U.S. v. Kras*, 409 U.S. 434, 444, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1975).”

17. *Ganong* 66 Mass conflicts with *LittleJohn*, 768 F.2d.

18. This lawsuit cannot be frivolous—nor is *Ganong*-- because *Littlejohn* 768 F. 2d. had established divorce as entitled to the constitutional protections of the right of privacy.

19. The Appellant respectfully request this court reconsider and dissociate itself from the unpublished reasoning, holding and conclusion in *Ganong* 66 Mass., i.e. this Court’s order 1. “This court can perceive no reason to depart from the Appeals Court’s conclusion.”

20. The court’s reliance on *Goodridge* 798 N.E. 2d as cited in the order is a misapprehension. This court’s order uses a comment removed from context and did not cite the complete paragraph. When the comment is placed in context and the complete paragraph is reported the

meaning changes 180 degrees. The reliance on *Goodridge* 798 N.E. 2d at 321 is fatally misplaced. (Order erroneously cites 312). The proper citing should be,

“Civil marriage is created and regulated through exercise of the police power. See *Commonwealth v. Stowell*, 389 Mass. 171, 175 (1983) (regulation of marriage is properly within the scope of the police power). “Police power” (now more commonly termed the State’s regulatory authority) is an old-fashioned term for the Commonwealth’s lawmaking authority, as *bounded by the liberty and equality guarantees of the Massachusetts (Page 322) Constitution and its express delegation of power from the people to their government.* [Italics added]

21. The police power argument this court’s order used is expressed by the *Goodridge* 798 N.E. 2d dissent—which was the non-prevailing argument. The *Goodridge* 798 N.E. 2d court placed constitutional limits on the police power argument. Therefore this court’s order applying the state’s police power justifying the alimony statute is in direct conflict with the existing law established in *Goodridge* 798 N.E. 2d. This court must reconsider its analysis and follow the law prescribed in *Goodridge* 798 N.E. 2d.

**Mass. Const. Pt.2 c 3 art. 5 Expresses Interests of the “People” Not the “State.”**

22. This court’s order misapprehends the interests expressed in the Massachusetts Constitution. The Constitution expresses the *interests* of the “people” not those of the “state.” The Constitution regulates the power of the state..*not* vice versa as this court’s order expresses.

23. The court order misapprehends Pt. 2 c. 3 art. 5 Mass. Const. It is merely an expression of the delegation by the people to the executive branch to adjudicate matters of marriage, divorce and alimony. It permits the legislature to alter the government authority that will have jurisdiction power of adjudication. The article is *not* an expression of the validity of any statute written on those matters. By this court’s order and reasoning *Goodridge* 798 N.E. 2d would be ~~indirect~~ [in direct] conflict of this constitutional article...and clearly is it not. If anything, this

court's order on Pt. 2 c.3 art. 5 conflicts with the law expressed in *Goodridge* 798 N.E. 2d. This court must reconcile its order to not conflict with *Goodridge* 798 N.E. 2d.

### **Separation of Powers**

24. Contrary to the Order's assertion at 4. , none of the reasoning or cases in the order "dispose of the plaintiff's Article 30 Separation of powers" claim. The court seriously misapprehends Article 30 and its caselaw. The Plaintiff relies on its Memorandum of Law on the Separation of Powers issue. The Plaintiff respectfully asks the court to reconsider the caselaw and reasoning cited in the memorandum. The Plaintiff will not burden the court with repeating the argument here.

### **Equal Protection Unequal Treatment of "Some" Divorcing Spouses**

25. The court misapprehends the equal protection claim. The complaint alleges the Plaintiff, and many divorcing Massachusians are treated unequally by the application of the alimony statute against them as opposed to *all* divorcing spouses. (Complaint # 29, # 30) Only "some" divorcing spouses have the yoke of alimony placed around their neck. Only "some" divorcing spouses are forever shackled to their former spouses. Only "some" dissolution of marriage proceedings have the state consider application of the alimony statutes. The vast majority of dissolutions of marriage take place without an application of the lifetime liability of the challenged statute to a divorcing spouse. The complaint alleges unequal treatment of similarly situated citizens, i.e. divorcing citizens.

26. The Plaintiff does not base *nor* allege in his complaint that the equal protection burden is a *gender* based burden. Therefore *Saraceno v Saraceno*, 369 Mass. 967 (1976) is inapplicable.

27. There is no caselaw on the equal protection claim raised herein. This too is a good faith attempt to change existing law.

### Prayer for Relief

"There can be no sanction or penalty imposed upon one because of his exercise of Constitutional Rights." *Sherar v. Cullen*, 481 F. 2d 946 (1973)

Wherefore,

...because no precedential law exists on whether the alimony statute infringes the Massachusetts Constitution Right of Privacy and/or Separation of Powers this declaratory judgment action is not frivolous based on *Allen v Batchelder*, 17 Mass. App. Ct. 453, 454 (1984) and this court must reconsider its ruling;

...because *Ganong* 66 Mass is fatally flawed reasoning and conclusion this court should dissociate itself from the *Ganong* 66 Mass ruling;

...because none of the case law cited by this court addressed the infringement of the alimony statute on the Mass. Constitution Separation of Powers this court should analyze the arguments offered by the parties in this case and enter a new ruling;

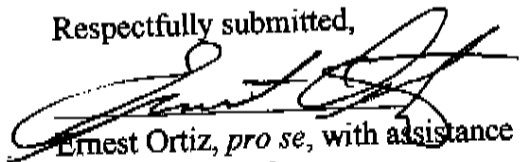
...because the equal protection claims and argument made by the Plaintiff do not address gender bias but unequal treatment of similarly situated citizens effects by a statute infringing a fundamental right this court should reconsider its ruling and apply a strict scrutiny standard of review;

...because the court's order expresses the misapprehension that the Massachusetts Constitution represents the interest of the state and not the people this court must harmonize its order to conform with fundamental well settled established law;

...because the complaint does not request a ruling on any federal constitutional infringement this court should alter its order to remove any implications of a ruling on federal

constitutional issues.

Respectfully submitted,



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March 22, 2007

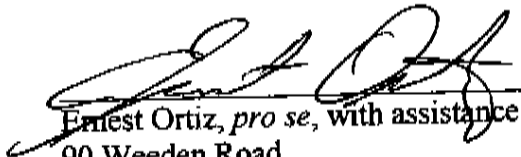
**Certificate of Service**

I hereby certify that on this 22nd day of March, 2007, I caused a true and accurate copy of the foregoing Reply to be mailed via U.S. Postal Service, certified mail, prepaid, to

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