

Commonwealth of Massachusetts

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

CIVIL ACTION NUMBER: BRCV2006-01092-B

ERNEST ORTIZ
Plaintiff

v.

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

**ACTION FOR DECLARATORY JUDGMENT and INJUNCTIVE RELIEF
G.L. c. 208, § 34 (ALIMONY) IMPERMISSIBLY INFRINGES
DECLARATION OF RIGHTS MASSACHUSETTS CONSTITUTION
art. 10, (DUE PROCESS, RIGHT OF PRIVACY)
art. 30, (SEPARATION OF POWERS),
art 106, (BASIC RIGHTS),
G.L. 214 1B (Right of Privacy)**

“The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.” Parenthood v. Casey, 505 U.S. 833, (1992)

. "A written constitution is the fundamental law for the government of a sovereign State. It is the final statement of the rights, privileges and obligations of the citizens and the ultimate grant of the powers and the conclusive definition of the limitations of the departments of State and of public officers.... To its provisions the conduct of all governmental affairs must conform. From its terms there is no appeal." Loring v. Young, 239 Mass. 349, 376-377 (1921).

“...the infringement on a fundamental right..., the enforcement of the marriage statutes as they are currently understood is forbidden by our Constitution unless the State can present a compelling purpose further by

the statutes that can be accomplished in no other reasonable manner. [FN3] See *Blixt v. Blixt*, 437 Mass. 649, 655-656 (2002), cert. denied, 537 U.S. 1189 (2003); *Lowell v. Kowalski*, 380 Mass. 663, 667-669 (1980).” *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

Comes now Ernest Ortiz, through counsel, seeking a declaratory judgment, temporary injunctive relief, and permanent injunctive relief, pursuant to Declaration of Rights, Ma. Const., art. 10 (Due Process, Right of Privacy), art. 30 (Separation of Powers, art. 106 (Basic Rights), G.L. 214 1b (Right of Privacy) and G.L. c. 231A, § 1 et seq.(Declaratory Judgment)..

The Plaintiff argues that G.L. c. 208, § 34, permanent alimony and its enforcement statutes, impermissibly infringes Declaration of Rights, Ma. Const., art. 10 (Due Process, Right of Privacy), art. 30 (Separation of Powers), art. 106 (Basic Rights) and G.L. 214 1B (right of Privacy) . In support he offers:

G.L. c. 231A, § 1 et seq-- Declaratory Judgment

1. G.L. c. 231A, § 1 et seq. provisions are to be liberally construed (G.L. c. 231A, §9).
2. This Court has jurisdiction pursuant to G.L. c. 231 A, §1 to determine the constitutionality of G.L. c. 208, § 34 alimony and enforcement provisions, postdissolution permanent spousal support provisions Ernest Ortiz has standing pursuant to G.L. c. 231A, §§ 1,2 as one who claims an interest, is in doubt, has his rights, status, equitable and legal relations affected by the noted G.L. c. 208, § 34 alimony provisions such that he desires and requires a declaration of rights, status, equitable and legal relations thereunder.
3. The proper defendant is the State official charged with enforcing G.L. c. 208, § 34 alimony (postdissolution permanent spousal support provisions).

4. Pursuant to G.L. c. 231A, § 8 notice is given to interested party the Attorney General of the State of Massachusetts.

Jurisdiction

5. This court has jurisdiction to hear this declaratory judgment action pursuant to G.L. c. 231A, §1.

Standard of Review

6. “With respect to each such claim, we must first determine the appropriate standard of review. Where a statute implicates a fundamental right or uses a suspect classification, we employ ‘strict judicial scrutiny.’ *Lowell v. Kowalski*, 380 Mass. 663, 666 (1980).” *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

“For equal protection challenges, the rational basis test requires 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 disadvantaged class.’ *English v. New England Med. Ctr.*, supra at 429, quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring). [FN20]” *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

Alimony Statutes

7. G.L. Chapter 208, is entitled “Divorce.”
8. G.L. Chapter 208, permanent alimony, postdissolution permanent spousal support provisions, may require a former spouse to a marriage with the ability to pay to support the other former spouse with a need, for life, based on 2³³ decision points with threat of wage garnishment, loss of professional license, contempt and imprisonment.
9. The spousal support provisions mandate that the state invade the privacy protected zone of marriage, through the judiciary, to examine, evaluate, determine and conclude the terms and nature, inter alia, of the interpersonal relationship,

spousal roles, spousal conduct, parental decision making, parenting conduct, economic standard of living, occupations, education, savings, assets, charitable contributions and most importantly the intimate emotional, psychological and physical details of the parties during their marriage to apply an unbridled discretionary opinion using an equitable standard in order to implement the statutory provisions.

Massachusetts and Federal Constitution and Laws

10. Art. 10 Declaration of Rights Ma. Const. severely restricts the government from intruding into the private life of any person.
11. Federal and Massachusetts Constitutions and Judicial rulings have determined the existence of a right of privacy, which includes marriage and personal decisions related to marriage. (U.S. Constitution Fourteenth Amendment Due Process Clause; Griswold v. Connecticut, 381 U.S. 479 (1965); Carey v. Population Serv. Int'l., 431 U.S. 678, 684-685 (1977); Parenthood v. Casey, 505 U.S. 833, (1992); Zablocki v. Redhail, 434 US 374 (1978).
12. Divorce is within the umbrella of protection of the federal Right of Privacy contained within the Fourteenth Amendment U.S. Constitution. Littlejohn v. Rose, 768 F. 2d 765, 768 (6th Cir. 1985)
13. Art. 106, Declaration of Rights provides for basic rights of all Massachusians, “All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”
14. Art. 30, Declaration of Rights mandates that the judiciary shall never exercise

powers exclusive to the legislature,

“Article 30. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the *judicial shall never exercise the legislative and executive powers*, or either of them: to the end it may be a government of laws and not of men.” [Emphasis added]

15. G.L. 214 1B (Right of Privacy)

“Section 1B. A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.”

“The individual liberty and equality safeguards of the Massachusetts Constitution protect ... "freedom from" unwarranted government intrusion into protected spheres of life...” *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

ERNEST ORTIZ

16. Ernest Ortiz is a resident of Fairhaven, Ma, Bristol County

17. Ernest Ortiz marriage was dissolved by Order of the Courts of the State of Massachusetts on January 7, 2000.(Probate and Family Court of Massachusetts Docket Number 9901111-DV1)

18. On September 23, 2004 he was ordered to pay \$250.00 per week alimony. (Order Attached)

19. Prior to issuing its January 7, 2000 Order the State, through its Court, invaded and examined the intimate details of the privacy area of the marriage of Ernest Ortiz.

20. After its invasion and examination of the intimate details of Ernest Ortiz’ privacy area of marriage the State, through its Court reassigned the property rights

- between Ernest Ortiz and Catherine J. Ortiz.
21. The State, through its Court, threatens attachment of his personal and real property to secure alimony. G.L. c 208, § 12.
 22. The State, through its Court's Order of Final Judgment of Dissolution intimidated Ernest Ortiz to add a hand written clause to his marital settlement agreement, "The parties acknowledge wife's ability to seek alimony upon the termination of the said child support as here in set forth" Signed on January 7, 2000.
 23. 4 years later, September, 23, 2004 the former wife petitioned the state for permanent alimony and the Superior Court granted her petition against the wishes of the Plaintiff.
 24. Ernest Ortiz is subject to arrest warrants and imprisonment because of the enforcement provisions of G.L. c. 208, § 34 and its enforcement provisions, G.L. c. 208, § 35 interalia.
 25. Ernest Ortiz' Massachusetts Constitutionally guaranteed right to privacy (art. 10 Dec. of Rights) and art. 106 Dec. of Rights (Basic Rights) have been violated by the State's repeated contempt judicial proceedings and Order awarding alimony against him (September 23, 2004) as well as other related judicial proceedings, judicial orders, the G.L. c. 208, § 34 provisions and the case law those judicial actions are based upon. He has been injured, is now injured and continues to be injured by the alimony statute.
 26. Ernest Ortiz' Massachusetts Constitutionally guaranteed right of privacy (art. 10 Declaration of Rights) has been violated because the State has not proven a compelling State interest, minimally applied, which in fact furthers the interest to

- validate the G.L. c. 208, § 34 (alimony) statute noted above which puts him at risk of imprisonment, invades his privacy, and imperils his art. 106 Declaration of Rights (Basic Rights).
27. G.L. c. 208, §34 alimony (post dissolution permanent spousal support) provisions do not serve a State interest sufficiently compelling to override the rights of Ernest Ortiz, to his Federal and State constitutionally guaranteed Right of Privacy in the facts in this case. To the extent that the noted G.L. c. 208, § 34 alimony provisions serve a compelling State interest, that interest is applied in a highly intrusive manner and is at its weakest in the facts of this case.
 28. Ernest Ortiz, art. 106 Declaration of Rights basic rights have been violated by his being denied such things as the full enjoyment of the fruits of labor and industry, retirement, own property, enjoy the freedom from fear of arrest and imprisonment, enjoy the freedom from the threat of having his Social Security garnished, enjoy the freedom from having adverse credit ratings, enjoy the freedom from the stigma of court proceedings, and to enjoy the remaining few days of his life on Earth, among other pursuits of happiness.
 29. Ernest Ortiz, right to equal protection has been denied him compared with single persons and many other former married persons on whom the State did not statutorily and judicially impose a duty of spousal support during their marriage or after exercising their constitutional associational and privacy rights by choosing to divorce.
 30. Ernest Ortiz, right to equal protection has been denied him by the State compared with single persons and many other former married persons who do not have their

liberty imperiled by the threat of contempt and imprisonment related to the alimony provisions of G. L. c. 208, § 34.

31. Ernest Ortiz, right to equal protection has been denied him by the State because of the Massachusetts Judicial System implementing an implicit Affirmative Action Gender based bias program grounded in the Gender Bias Study of the Court System in Massachusetts (Gender Bias Study).
32. Ernest Ortiz, constitutionally guaranteed art. 10 Declaration of Rights (Right of Privacy), art. 106 Declaration of rights (Basic Rights) are violated by the State in G.L. c. 208, § 34 acting in a court of chancery, applying an unbridled judicial standard of equity in a self acknowledged Gender Bias setting by a judiciary granted unbridled discretionary powers.

"While the State retains wide latitude to decide the manner in which it will allocate benefits, it may not use criteria which discriminatorily burden the exercise of a fundamental right." *Moe v. Secretary of Admin. & Fin.*, 382 Mass. 629, 652 (1981). Nor can the State's wish to conserve resources be accomplished by invidious distinctions between classes of citizens. See *Plyler v. Doe*, 457 U.S. 202, 216-217, 227 (1982). [FN4]" *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

"The history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded.' *United States v. Virginia*, 518 U.S. 515, 557 (1996) (construing equal protection clause of the Fourteenth Amendment to prohibit categorical exclusion of women from public military institute). This statement is as true in the area of civil marriage as in any other area of civil rights. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987); *Loving v. Virginia*, 388 U.S. 1 (1967); *Perez v. Sharp*, 32 Cal.2d 711 (1948). As a public institution and a right of fundamental importance, civil marriage is an evolving paradigm." *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003)

Count I

Declaratory and Injunctive Relief: G.L. c. 208, § 34 and its
Enforcement Provisions Impermissibly Infringe
art.10 of the Declaration of Rights. Due Process, Right of Privacy

33. The Plaintiff incorporates 1 to 32 above.
34. G.L. c. 208, § 34 alimony and enforcement provisions impermissibly infringe the Plaintiff's and all Massachusians art. 10 Ma. Const. Right of Privacy in the privacy protected zone of personal decisions relating to marriage, i.e. divorce (dissolution of marriage).
35. Plaintiff pray this court declares G.L. c. 208, § 34 alimony and enforcement provisions impermissibly infringe the Plaintiff's and all Massachusians' art. 10 Ma. Const. Right of Privacy in the privacy protected zone of personal decisions relating to marriage, i.e. divorce (dissolution of marriage).
36. Plaintiff prays this court declare that G.L. c. 208, § 34 alimony provisions place an undo burden on his fundamental constitutional right and liberty interest to alter his associational interests by altering his marital status, i.e. Right of Privacy in the protected zone of "personal decisions relating to marriage" i.e to divorce.
- 37.** Plaintiff prays this court declare G.L. c. 208, § 34 unconstitutional, void ab initio and unenforceable as impermissibly conflicting with art. 10 Ma. Const.
38. Ernest Ortiz has no adequate remedy at law and continues to face imminent ongoing, current, future and irreparable loss of his constitutional rights.
39. Absent expedited consideration and prompt injunction, Ernest Ortiz will continue to suffer substantial and irreparable harm and his rights will continue to be denied before this court can rule.

40. Ernest Ortiz has been, continues to be, and will be imminently further deprived of his art. 10 Ma. Const. Right of Privacy by the State of Massachusetts through its Court system.
41. The Plaintiff is likely to prevail on the merits.
42. Plaintiff prays this court grant a temporary and permanent injunction against the enforcement of court orders predicated upon G.L. c. 208, § 34 alimony provisions against the Plaintiff and all Massachusians.
43. Ernest Ortiz has been forced to incur costs to preserve his constitutional basic rights and right of privacy. He has been forced to incur costs to prosecute this action.
44. Ernest Ortiz is entitled to recover all costs pursuant to G.L. C. 231 A, § 7.

Count II

Declaratory and Injunctive Relief: and its Enforcement Provisions Impermissibly Infringe art. 106, Ma. Const., Basic Rights

45. The Plaintiff incorporates 1 to 32 above.
46. G.L. c. 208, §§ 34, 35 alimony and enforcement provisions impermissibly infringe the Plaintiff's and all Massachusians art. 106, Ma. Const Basic Rights, i.e. equal protection, right to enjoy the fruits of one's labor, right to property.
47. Plaintiff pray this court declares G.L. c. 208, §§ 34, 35 alimony and enforcement provisions impermissibly infringe the Plaintiff's and all Massachusians Art. 106, Ma. Const. Basic Rights, i.e. equal protection, right to the fruits of his labor and right to property.
48. Plaintiff prays this court declare that G.L. c. 208, § 34 alimony provisions place

- an undo burden on his fundamental constitutional right and liberty interest of equal protection compared with other divorcing Massachusians and compared with married Massachusians who have no legal obligation of spousal support.
49. Plaintiff prays this court declare G.L. c. 208, § 34 alimony statute is unconstitutional, void ab initio and unenforceable as impermissibly conflicting with Art. 106, Ma. Const.
 50. Ernest Ortiz has no adequate remedy at law and continues to face imminent ongoing, current, future and irreparable loss of his constitutional rights.
 51. Absent expedited consideration and prompt injunction, Ernest Ortiz will continue to suffer substantial and irreparable harm and his rights will continue to be denied before this court can rule.
 52. Ernest Ortiz has been, continues to be, and will be imminently further deprived of his Art. CVI Basic Rights by the State of Massachusetts through its Court system.
 53. The Plaintiff is likely to prevail on the merits.
 54. Plaintiff prays this court grant a temporary and permanent injunction against the enforcement of court orders predicated upon G.L. c. 208, § 34 alimony provisions against the Plaintiff and all Massachusians.
 55. Ernest Ortiz has been forced to incur costs to preserve his constitutional basic rights and right of privacy. He has been forced to incur costs to prosecute this action.
 56. Ernest Ortiz is entitled to recover all costs pursuant to G.L. 231 a, § 7.

Count III

Declaratory and Injunctive Relief: G.L. c. 208, § 34 and its
Enforcement Provisions Impermissibly Infringe
Art. 30 of the Massachusetts Declaration of Rights, Separation of Powers

57. The Plaintiff incorporates 1 to 32 above.
58. G.L. c. 208, § 34 alimony provisions impermissibly infringe 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 legislature of its exclusive constitutional law making power to the Massachusetts judiciary.
59. Plaintiff pray this court declares G.L. c. 208, § 34 alimony statute impermissibly infringe art. 30 Ma. Const. Separation of Powers.
60. Plaintiff prays this court declare G.L. c. 208, § 34 alimony statute is unconstitutional, void ab initio and unenforceable as impermissibly conflicting with art. 30, Ma. Const.
61. Ernest Ortiz has no adequate remedy at law and continues to face imminent ongoing, current, future and irreparable loss of his constitutional rights.
62. Absent expedited consideration and prompt injunction, Ernest Ortiz will continue to suffer substantial and irreparable harm and his rights will continue to be denied before this court can rule.
63. Ernest Ortiz has been, continues to be, and will be imminently further deprived of his constitutional rights provided by art. 30 Ma. Const.
64. The Plaintiff is likely to prevail on the merits.
65. Plaintiff prays this court grant a temporary and permanent injunction against the enforcement of court orders predicated upon G.L. c. 208, § 34 alimony

- provisions against the Plaintiff and all Massachusians.
66. Ernest Ortiz has been forced to incur costs to preserve his constitutional basic rights and right of privacy. He has been forced to incur costs to prosecute this action.
67. Ernest Ortiz is entitled to recover all costs pursuant to G.L. 231 A, § 7.

VII. Jennings Reservation

Ernest Ortiz reserves all his federal and state constitutional claims for subsequent litigation in federal court by making on the record, at this outset, a reservation as to the disposition of the entire case by the state courts to preserve access to the federal forum. Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299, 1303 (11th Cir. 1992) citing Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (5th Cir. 1976).

Respectfully submitted,

Ernest Ortiz, *pro se*, with assistance of counsel
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September 1, 2006

Certificate of Service

I hereby certify that on this 1st day of September, 2006, I caused a true and accurate copy of the foregoing to be served in the manner specified on the following:

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

[SERVICE OF PROCESS]

Catherine J. Ortiz
1926 Rodman Street, Apt. 2 North
Fall River, MA 02721

[Service of Process]

Attorney General Thomas Reilly
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Boston, MA 02108
[FIRST CLASS MAIL]

Respectfully submitted,

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