

# Commonwealth of Massachusetts

SUPERIOR COURT DEPARTMENT  
OF THE TRIAL COURT

CIVIL ACTION NUMBER: 06-1092-B

ERNEST ORTIZ,  
Plaintiff

v.

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

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## MEMORANDUM OF LAW IN SUPPORT TO DENY MOTION TO DISMISS AND GRANT SUMMARY JUDGMENT FOR PLAINTIFF

### Introduction

“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).... 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, 339 (Mass. 2003)

“[It is] entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards. See *Powers v. Wilkinson*, 399 Mass. 650, 661-662 (1987) (reforming the common-law rule of construction of "issue"); *Lewis v. Lewis*, 370 Mass. 619, 629 (1976) (abolishing common-law rule of certain interspousal immunity).” *Id.* at 343

The Massachusetts family bar has been slow to shine the constitutional light on the state's alimony statutes.

This court is empowered to abolish the common law principle of alimony when it conflicts with current constitutional provisions.

This memorandum will discuss each count, first arguing for summary judgment in favor of the Plaintiff and rebutting the Defendant's argument.

## **ARGUMENT TO DENY DISMISSAL**

### **INTRODUCTION**

“The right of the State to regulate the institution of marriage under its police power is unquestioned *where it does not infringe on fundamental rights*. *Zablocki v. Redhail*, 434 U.S. 374, 396 (1978) (Powell, J., concurring). Cf. *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraceptives in marital relationship).” [Emphasis added] *Commonwealth v. Stowell*, 449 N.E.2d (1983)

In *Stowell* 449 N.E.2d the issue was a statute making adultery during marriage a crime. The statute was found constitutional based on the exercise of the state's police power to maintain the integrity of marriage. The statute at issue here, alimony, is contained in the Chapter entitled Divorce. Divorce falls within the fundamental constitutional right of privacy.

*LittleJohn v. Rose*, 768 F.2d 765, 768 (6<sup>th</sup> Cir. 1985) citing *Zablocki v. Redhail*, 434 US 374, 385 (1978),

“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).”

The Right of Privacy challenge in this lawsuit deals with citizens' fundamental

right of autonomous decision making in the constitutionally recognized zone of privacy “personal decisions relating to marriage.” It is not about the information disclosure context of the right of privacy.

**A. The State Can Only Define Marriage Exit Terms That Are Constitutional**

The Defendant’s first premise is flawed because it focuses on the information disclosure context of the right –the claim raised is the autonomous decision making context.

Defendant’s search missed *LittleJohn v. Rose*, 768 F.2d 765, 768 (6<sup>th</sup> Cir. 1985) citing *Zablocki v. Redhail*, 434 US 374, 385 (1978) and the cases cited below which not only place “personal decisions relating to marriage” within the right of privacy protected zone—but *Littlejohn* 768 F. 2d squarely places divorce as entitled to the protections of the constitutional right of privacy.

Defendant’s argument that because the Plaintiff, or other Massachusettsians, *voluntarily* enter marriage they have “no legitimate complaint that the law also governs the terms and manner of his leaving that relationship” is fatally flawed. The same argument would apply about laws governing citizens while married. Applying the same flawed reasoning *Griswold v. Connecticut*, 381 U.S. 479 (1965), is wrongly decided.

(Right to use contraceptives in a marital relationship)

On the contrary, the principle is that when the state writes a statute that impacts a fundamental right, here “personal decisions relating to marriage.” the statute is presumptively unconstitutional unless the state proves a compelling state interest minimally applied. (See *infra* Count I C.)

It should also be noted the Defendant’s reliance on *Daniel v. Daniel*, 922 So. 2d

1041 (Fla. Dist. Ct. App. 2006) is misplaced. *Daniel* 922 So.2d is a right of privacy case in the information disclosure context. It is also wrongly decided because the linch pin of the argument the appellate court used was outdated law. It grounded its opinion in caselaw<sup>1</sup> that predated the no fault divorce statute, that predated the gender neutral alimony statute and, most importantly, that predated the powerful broad Florida Constitution Right of Privacy Amendment. (Art. I § 23, Right of Privacy, Fla. Const.) that was passed in 1980.

**B. Ma. Const. Does not Authorize the Award of Alimony as a Judicial Function**

The Defendant mischaracterizes P.II c. 3 art.5 Ma. Const. That amendment does not mention any judicial authority to award alimony. It merely designates who shall hear causes of marriage, divorce, and alimony--and the judiciary is not included. The Judiciary became involved, as the Defendant points out, when the legislature authorized that change.

The Defendant's reliance that the propriety of an award of alimony is etched in the Massachusetts Constitution is simply erroneous.

This part of Defendant's argument cannot support itself. The legislature gave the judiciary the power to hear causes of marriage, divorce and alimony based on the statutes created by the legislature. The claim challenges not the judicial power to hear alimony causes but the imperfection of the alimony statute. It is the statute as legislatively constructed that violates the nondelegation doctrine of exclusive legislative law making and public policy making power.

When the legislature creates statutory provisions within the Chapter "Divorce"

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<sup>1</sup> *Posner v. Posner*, 233 So.2d 381, 383 (Fla. 1970); *Wall v. Wall*, 134 So.2d 288, 289 (Fla. 2d DCA 1961).

those provisions must comport with the right of privacy contained in the Massachusetts Constitution. As noted above in *Littlejohn* 768 F.2, statutes and their provisions addressing divorce are subject to the limitation of the right of privacy.

Defendant's argument does not address the complaint's allegation that the legislative statute of alimony (G.L. c. 208 § 34) is flawed because its language impermissibly grants exclusive legislative law making and public policy making power to the judiciary. (See full argument infra at Count III)

**C. The Alimony Statute Violates the Equal Protection Clause of the Ma. Const.**

The Defendant misreads the violation of equal protection claim. The claim is not a gender based claim. It is a claim based on the dissimilar treatment of similarly situated Masschusians choosing to adjust their associational interest by altering their marital status. To wit, not all divorcing Massachusians are shackled with the yoke of lifetime alimony as was the Plaintiff. Because the statute impacts a fundamental right this equal protection argument requires strict scrutiny analysis.

The Defendant argues that the commonwealth's police power empowers it to impose the undue burden of lifetime alimony on only *some* divorcing citizens relying on *Goodrich* 798 N.E. 2d at 321 "glossing" *Stowell* 449 N.E. 2d. This reasoning too is flawed. *Stowell* specifically limits state police power when it infringes a fundamental constitutional right.<sup>2</sup> The reliance on the doctrine of the police power of the state in

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<sup>2</sup> *Stowell* 449 N.E.2d at 1457,

The right of the State to regulate the institution of marriage under its police power is unquestioned where it does not infringe on fundamental rights. *Zablocki v. Redhail*, 434 U.S. 374, 396 (1978) (Powell, J., concurring). Cf. *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to use contraceptives in marital relationship). The Commonwealth has extensively exercised this power to regulate numerous aspects of the marriage relationship. See generally G.L.c. 207. Given this broad concern with the institution of marriage, the State has a legitimate

*Stowell* 449 N.E.2d was specifically to protect the integrity of marriage (*Stowell* validated a criminal adultery statute in a case where a married spouse was charged with the statute). Nothing in the alimony statute address the integrity of marriage. Nothing about the alimony statute invokes the police power of the state.

All of the Defendant's arguments to dismiss fail. For this reason and the reasons below in the Argument for Summary Judgment this court must deny the Motion to Dismiss.

### **ARGUMENT TO GRANT SUMMARY JUDGMENT FOR THE PLAINTIFF**

"*Casey, supra*, at 851, 112 S.Ct. 2791--which confirmed that the Due Process Clause protects personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education..." *Lawrence v. Texas*, 539 US 558, 559 (2003)

#### **Standard of Review**

This court is to grant summary judgment if the material facts are undisputed and if the movant is entitled to judgment as a matter of law. Mass R. Civ. P. 56(c)); *Cassesso v. Comm. of Corr.*, 390 Mass. 419, 422 (1983); *Com. Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976). The moving party shoulders the burden of affirmatively demonstrating the absence of a triable issue, and its entitlement on the record to judgment as a matter of law. *Pederson v. Time, Inc.*, 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating the opposing party's lack of any reasonable

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interest in prohibiting conduct which may threaten that institution. See *Green v. Richmond*, 369 Mass. 47, 51 (1975) ("Massachusetts has a strong public interest in ensuring that its rules governing marriage are not subverted"); *French v. McAnarney*, 290 Mass. 544, 546 (1935) ("The Commonwealth has a deep interest that [marital] integrity is not jeopardized"). As the Supreme Court has stated: "Adultery is an offense against the marriage relation and belongs to the class of subjects which each State controls in its own way." *Southern Sur. Co. v. Oklahoma*, 241 U.S. 582, 586 (1916).

expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 716 (1991).

### Count I

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

“it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage...” *Carey v. Population Serv. Int’l.*, 431 U.S. 678, 684-685 (1977)

The Massachusetts alimony statute is a provision within the General Laws of Massachusetts Chapter 208 titled “Divorce.” The chapter regulates the associational interests of Massachusians when they exercise their fundamental right to alter their marital status, i.e. to divorce. The alimony statute adds an undue burden when Massachusians chose to divorce without any compelling state interest for the statute that is minimally applied.

#### **A. The Alimony Statute is Within the Zone of the Right of Privacy**

““While the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967)...” *Zablocki v. Redhail*, 434 US 374, 385 (1978);

“The Court's decisions have afforded constitutional protection to personal decisions relating to marriage, see, e.g., *Loving v. Virginia*, 388 U.S. 1...” *Casey* 505 at 834;

“Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Carey v. Population Services International, 431 U.S., at 685.” *Casey* 505 at 851;

“In a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.” Board of Regents v. Roth, 408 U.S. 564, 572 . The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.” *Roe* 408 at 572 citing *Griswold*;

“In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Id.*, at 851. In explaining the respect the Constitution demands for the autonomy of the person in making these choices:

“ These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” *Ibid.*” *Lawrence v. Texas*, 539 US 558 (2003)

There is no common law right to alimony. Alimony (G.L. c. 208 §34) is merely a statute, part of G.L. Chapter 208 entitled “Divorce.” Quite simply, as a statute, it must conform to the constraints set forth in the Massachusetts Constitution. As such it regulates “the personal decision related to marriage” of Massachusettsians to divorce—i.e. their liberty interest in freedom to make adjustments to their associational interest. The alimony provisions are written within that privacy-protected zone of divorce.

See *LittleJohn v. Rose*, 768 F.2d 765, 768 (6<sup>th</sup> Cir. 1985) citing *Zablocki v. Redhail*, 434 US 374, 385 (1978) for the rule that divorce falls within the umbrella of the constitutional protections of the right of privacy,

"Decisions of the Supreme Court have firmly established that "matters relating to marriage [and] family relationships" involve privacy rights that

are constitutionally protected against unwarranted governmental interference. E.g., *Roe v. Wade*, 410 U.S. 113, 152-53, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). The Court has "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Zablocki v. Redhail*, 434 U.S. 374...

The Supreme Court has established broad protection for matters relating to the marital relationship including the availability of due process in seeking adjustments to the marital relationship. *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct.780 (1971). 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)."

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights... but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967)." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992),

"Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. 113, 168 (1973)

"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)

## **B. Art 10 Ma. Const. Declaration of Rights**

**Article X.** Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which

their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. [See Amendments, Arts. XXXIX, XLIII, XLVII, XLVIII, The Initiative, II, sec. 2, XLIX, L, LI and XCVII.]

*Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) is now the sentinel caselaw on fundamental state constitutional rights of Massachusettsians in the privacy protected zone of marriage.

### C. **Standard of Analysis—Strict Scrutiny**

“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)

The Right of Privacy having attached to the alimony provision, G. L. C. 208, § 34, it is presumptively unconstitutional, and requires strict scrutiny review.

“It is well settled that . . . if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’” *Harris v. McRae*, 448 U.S. 297, 312 (1980) (quoting *City of Mobile v. Bolden*, 466 U.S. 55, 76 (1980))

“Just as our obligation to exercise restraint when reviewing statutes is paramount under rational basis review, our obligation to protect fundamental rights is paramount under strict scrutiny. Indeed, the United States Supreme Court has specifically held that ‘when we are reviewing [\*\*93] statutes which deny some residents [a fundamental right], the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a ‘rational basis’ . . . are not applicable.’” *Kramer v. Union Free School District*, 395 U.S. 621, 627-28, (1969).

Also Coldy dissenting in *Goodridge* 798 N.E. 2d,

“If a statute either impairs the exercise of a fundamental right protected by the due process or liberty provisions of our State Constitution, or discriminates based on a constitutionally suspect classification such as sex, it will be subject to strict scrutiny when its validity is challenged. See Blixt

v. Blixt, 437 Mass. 649, 655-656, 660-661 (2002), cert. denied, 537 U.S. 1189 (2003) (fundamental right); Lowell v. Kowalski, 380 Mass. 663, 666 (1980) (sex-based classification).”

...“If a right is found to be "fundamental," it is, to a great extent, removed from "the arena of public debate and legislative action"; utmost care must be taken when breaking new ground in this field "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [judges]." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).”

When the state chooses to regulate Divorce, any provisions therein are presumptively unconstitutional unless the state proves a compelling state interest minimally applied to validate the undue burden caused by the statute. The alimony statute as part of the Divorce Chapter (G.L. 208) is therefore presumptively unconstitutional.

**D. No Compelling State Interest**

What public policy rises to the level of a compelling state interest to permit the state to invade the privacy area of marriage during dissolution? Whatever the compelling interest, if it were compelling, *all* dissolution of marriages should be examined whether contested or uncontested to assure the policy was fostered. If there is a compelling state interest, there should be no difference in how the courts treat parties of a marriage regardless of the length of the marriage. The compelling interest should be determinative as to permanent spousal support, not the length of the marriage, not whether the dissolution is contested, and not the 2<sup>33</sup> factors in G.L. c. 208 § 34. The public policy interest should be called compelling and be contained in the purposes provision of the statute. It was not.

## Count II

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

*San Antonio School District v. Rodriguez*, 411 U.S. 1, 16 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.

A classification based on wealth that affects a fundamental right requires strict scrutiny analysis. The Massachusetts alimony statute is founded on wealth...though not stated in the statute, the judiciary has created the law that a former spouse with an ability to pay should pay to a former spouse who is needy. The statute then creates 2<sup>33</sup> classes of citizens to make the determination of wealth. Thereby the alimony statute impermissibly interferes with the exercise of a "fundamental" right ("personal decision relating to marriage", i.e. to divorce) and that accordingly the prior decisions of the United States Supreme Court require the application of the strict standard of judicial review. *Graham v. Richardson*, 403 U.S. 365, 375 -376 (1971); *Kramer v. Union School District*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

#### **A. The Doctrine of Necessaries**

“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” O.W. Holmes. *The Path of the Law*. 10 Harvard Law Review 457 (1897)

Massachusetts doctrine of necessities violates the state constitution equal protection provisions.

**G.L. Chapter 209: Section 7. Married woman; liabilities**

Section 7. A married woman shall not be liable for her husband's debts, nor shall her property be liable to be taken on an execution against him. But a married woman shall be liable jointly with her husband for debts due, to the amount of one hundred dollars in each case, for necessaries furnished with her knowledge or consent to herself or her family, if she has property to the amount of two thousand dollars or more.

G.L. 209 § 7 does not hold the married woman to the same economic liability as the state does the married man in G. L. 209 § 1,

**Chapter 209: Section 1. Married persons; separate property and property held as tenants by entirety; liability for debts**

Section 1. The real and personal property of any person shall, upon marriage, remain the separate property of such person, and a married person may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if such person were sole. A husband and wife shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety.

The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the nondebtor spouse; provided, however, both spouses shall be liable jointly or severally for debts incurred on account of necessaries furnished to either spouse or to a member of their family.

**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**

**A. Art. 30 Ma. Const.**

Article 30 of the Massachusetts Declaration of Rights (Article 30) dictates that:

“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]

*Corning Glass Works v. Ann & Hope, Inc. of Danvers*, 363 Mass. 409, 416 (1973) says,

“It is well established in this Commonwealth and elsewhere, that the Legislature cannot delegate the general power to make laws, conferred upon it by a constitution like that of Massachusetts.” *Brodhine v. Revere*, 182 Mass. 598, 600, and cases cited. Article 30 of the Declaration of Rights.”

## **B. Standard of Review**

The current standard of review for challenging the constitutionality of a state statute as violative of the separation of powers amendment nondelegation doctrine has been established in *Chelmsford Trailer Park, Inc. v. Town of Chelmsford*, 469 N.E.2d 1259, (Mass. 1984). G.L. c 208, § 34 readily passes the three prong requirements because the statute establishes public policy rather than merely addressing details, and the statute lacks the required totality of protection against arbitrariness.

Despite an unambiguous state constitutional amendment declaring a stern bright line rule of separation of powers this state’s courts have been reluctant to find statute in violation of the amendment. This case is a radical departure from prior precedents on separation of powers as the statute at issue here effects liberty interests and fundamental state and federal rights-- the right of association, the right of privacy and the right to adjust one’s marital status. This case is sentinel for the courts to return to a stricter interpretation of the separation of powers amendment. (See for a review of Massachusetts Separation of Powers amendment, generally, Reexamining the Massachusetts Nondelegation Doctrine: Is the “Areas of Critical Environmental Concern” Program An Unconstitutional Delegation of Legislative Authority?, Ben McGovern, Boston College Environmental Affairs Law review, 2004)

## **C. G.L. c. 208, § 34, Alimony Provisions of the “Divorce” Statute**

The highlighted portion show the delegation of public policy making authority

and the lack of adequate direction for implementation manifest as a myriad plethora of permutations so boundless as to be amenable to consistent implementation.

**Chapter 208: Section 34. Alimony or assignment of estate; determination of amount; health insurance**

Section 34. Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, *may* make a judgment for either of the parties to pay alimony to the other. *In addition to or in lieu of a judgment to pay alimony, the court may* assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which *shall include, but not be limited to*, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. In determining the amount of alimony, *if any*, to be paid, or in fixing the nature and value of the property, *if any*, to be so assigned, the court, after hearing the witnesses, *if any*, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court *may* also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.

## **D. Chelmsford Trailer Park test**

*Chelmsford Trailer Park* 469 NE 2d three prongs,

“No formula exists for determining whether a delegation of legislative authority is "proper" or not. Here, in order to make that determination, we undertake a threefold analysis: (1) [d]id the Legislature delegate the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy; (2) does the act provide adequate direction for implementation, either in the form of statutory standards or, if the local authority is to develop the standards, sufficient guidance to enable it to do so; and (3) does the act provide safeguards such that abuses of discretion can be controlled?”

### **1. Statute delegates fundamental policy**

The “may’s,” the “in lieu of’s,” the “if any’s,” give unbridled, exclusive legislative policy making decisions to the judiciary operating in a court of “equity” to adjudicate, and effectively deprive, the Plaintiff and all Massachsians of their fundamental constitutional rights, i.e., rightof association, right of privacy and property rights. Such unbridled discretion is impermissible. (For a discussion of the nondelegation doctrine, the determinative elements, and the impermissible broad discretion that violates the separation of powers principle see, *Bush v. Schiavo*, 885 So.2d 321, (Fla. 2004))

### **2. Statute provides inadequate direction for implementation**

The statute is devoid of any direction for implementation of *how* to determine whether or not alimony is to be awarded. The statute only listed a staggering permutation of factors for the court to consider when making a determination of the *amount* of alimony.

The staggering number of permutations prevents a consistency in application of the statute so that divorcing parties can be aware of whether they are at risk of a lifetime sentence to support another Massachusian at the economic lifestyle they experience—

forever. The preposterous number of permutations makes consistency of implementation of the statute an impossibility. The chance of two similar fact pattern divorce cases resulting in the same decision on alimony and alimony amount is almost prohibitive. Because of the galactic number of permutations ( $2^{33}$ ) in the statute, the unbridled discretion granted to the judiciary, and the standard of equity, the chances of winning the state lottery are far superior than a reproducible court order.

### **3. Statute does not provide safeguards for abuse of discretion**

The only safeguard on abuse of discretion is appeal. That is insufficient in equity cases as the standard is too nebulous. The unbridled discretion granted the trial court in its decision making among the  $2^{33}$  permutations is limited only as to whether there was trial evidence to support the court's decision. There is no mandate that the trial court order contain a narrative of the statutory factors weighed and how they were weighted. Certainly that did not occur in the instant case. The safeguard of appeal is more window dressing than a valid tool to avert trial court abuse of discretion.

## **Injunctive Relief**

### **A. Standard of Review**

A party seeking a preliminary injunction must show a likelihood of success on the merits and, that absent injunctive relief, it will be subject to a substantial risk of irreparable harm. *Packaging Industries Group v. Cheney*, 380 Mass. 609, 617 (1980). Additionally, the moving party must demonstrate that the risk of harm to which it will be subjected without the preliminary injunction outweighs any possible risk of harm to the opposing party while subject to the injunction. *Packaging Industries Group*, 380 Mass. at 617. A court may grant the relief requested if the balance of the parties' interests cuts in favor of the moving party. *Packaging Industries Group*, 380 Mass. at 617.

## **1. Substantial Risk of Irreparable Harm to Plaintiff-None to Defendants**

It is apparent that without injunctive relief the Plaintiff will be deprived of his fundamental constitutional rights and property rights by the court ordered required *weekly* payments of alimony predicated on the unconstitutional statute.

The Defendants, on notice of the claim for injunctive relief, have offered no indication that granting the relief will in any way harm them. The Defendant Commissioner LeBovidge is manifestly unaffected by such relief.

The Defendant Cathy J. Ortiz will merely have a lower month income. (The Plaintiff will lose constitutional rights and his property will be taken by the state and transferred to another citizen.) The Defendant former spouse has expressed no concern in her answer regarding this court's granting injunctive relief. Mr. and Mrs. Ortiz have been divorced over six years. It was not until four years after divorce that the trial court ordered Mr. Ortiz to begin payment lifetime alimony. The former spouse has received alimony payments for over two years. She has had ample opportunity to return to self sufficiency and economic independence.

## **2. Likelihood of Success on the Merits**

The alimony statute infringes three distinct state constitutional sections. The above legal arguments are sufficient to prevail on all three sections, i.e. right of privacy in the well recognized privacy protected zone of divorce and personal decisions relating to marriage, equal protection because not all similarly situated divorcing Massachusians are ordered to pay lifetime alimony and the separation of powers infringement based on the impermissible delegation by the legislature of its exclusive lawmaking and policy making power.

**3. A grant of Injunctive Relief Will Not Violate Any Public Policy**

No public policy will be violated by a grant of injunctive relief. On the contrary, to not grant the relief violates public policy by the deprivation of the Plaintiff's constitutional rights.

**WHEREFORE** for the above stated reasons this court must declare the Massachusetts alimony statute (G.L. c. 208 § 34) impermissibly infringes the state constitutional right of privacy, equal protection and separation of powers sections. This court must provide the Plaintiff injunctive relief against any court actions to imperil his liberty interest, constitutional rights, property rights, predicated on his required payments of alimony based on any court order which is grounded in G.L. c. 208 § 34.

Respectfully submitted,

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October 19, 2006

**Certificate of Service**

I hereby certify that on this 19th day of October, 2006, I caused a true and accurate copy of the foregoing to be served in the manner specified on the following:

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