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Statement of Issues Presented for Review

- I. Whether Defendant Chief Justice Mulligan promulgated the new Massachusetts Child Support Guidelines by assuming legislative power improperly in violation of the separation of powers set forth in Article XXX of the Massachusetts Declaration of Rights.

- II. Whether the new Massachusetts Child Support Guidelines constitute the imposition of a tax on the appellants without a legislative vote.

- III. Whether application of the new Massachusetts Child Support Guidelines to the Appellants violates their due process rights, in that they arbitrarily determine the amount of child support demanded, without reference to any rational standard.

- IV. Whether application of the new Massachusetts Child Support Guidelines to the Appellants violates their rights to equal protection of the law, by treating the appellant child support payors in a disparate manner, based on marriage, divorce, income, and other factors.

Statement of the Case

1. Plaintiffs filed their complaint in Suffolk Superior Court on March 16, 2009, for declaratory and injunctive relief to enjoin the use of the New Massachusetts Child Support Guidelines, which had become effective January 1, 2009, along with a motion for a preliminary injunction for the same relief. (App. 10)
2. The court heard plaintiff's motion for a preliminary injunction on April 13, 2009, which was denied by the court on April 24, 2009. (App. 9)
3. The court heard defendants' motion to dismiss on August 19, 2009, which was allowed and entered by the court on September 23, 2009. (App. 209)
4. All Plaintiffs, except for Fathers and Families, filed a notice of appeal on October 23, 2009. (App. 210)

Statement of Facts

Plaintiffs here are a number of persons personally affected by the implementation of new Massachusetts child support guidelines ("New Guidelines") which went into affect on January 1, 2009. (App. 99) Each of them either pay child support by an order of the Probate and Family Court, or suffer financial detriment from their application in some way. (App. 11-13, 28-30)

The central theme of the Plaintiffs' complaint is that the New Guidelines were approved by an unconstitutional and illegal process, through formulation by a secret judicial committee, and by unilateral imposition of the Chief Justice for Administration and Management, Defendant Justice Robert Mulligan ("CJAM") (App. 14-16) This action by Justice Mulligan constituted improper enactment of legislation by judicial fiat, in violation of Article XXX of the Massachusetts Declaration of Rights.

Further, the application of the New Guidelines will extract large amounts of money from these plaintiffs in an unfair, inequitable and unequal manner.

On October 6, 2006, Defendant Justice Mulligan appointed a Child Support Guidelines Task Force ("Task Force") to conduct a comprehensive review of the Massachusetts Child Support Guidelines, pursuant to the requirements of Federal Statute 42 USC §667, which requires a review of state child support guidelines at least every four years. (App. 14) The Task Force met a number of times, after which the majority of its members prepared recommendations for new Child Support Guidelines, and issued a report describing the process and the rationale by which they were derived. (App. 15, 59) A copy of the report is attached as Exhibit 1 to the Complaint ("Task Force Report"). (App. 41) This process was done in secret. (App. 59)

The New Guidelines apply to all child support determinations made by any department of The Trial Court in divorce, restraining order, juvenile, separate support, DCF, and guardianship cases. (App. 16, 53)

On November 5, 2008, Justice Mulligan, in his official capacity as CJAM, promulgated the New Guidelines, which must be applied to any cases determining child support in the Probate and Family Court after January 1, 2009. (App. 15) The New Guidelines are attached to the Complaint. (App. 99).

The Legislature has never delegated or authorized the CJAM to formulate new child support guidelines, in lieu of the state legislature. See M.G.L. c. 211B, §§9, 16, 17 & 19. Chapter 208 and 209C contain conclusory references to using the child support guidelines issued by the CJAM, but do not grant the power to formulate or issue them. The Massachusetts Legislature has never considered, debated or voted upon the New Guidelines, nor sent them to the Governor for signature or veto. (App. 16)

The base line requirement for determining the correct amount of child support is set forth in 45 CFR 302.56 (h), which is applicable to all states who take federal funds for child support enforcement, which includes the Commonwealth of Massachusetts. It provides that:

As part of the review of a State's guidelines required under paragraph (e) of this section, a State must consider economic data on the cost of raising children and analyze case data, gathered through sampling or other methods, on the application of, and deviations from, the guidelines. The analysis of the data must be used in the State's review of the guidelines to ensure that deviations from the guidelines are limited.

The Task Force considered a number of methods of determining the cost of raising children, rejecting them all as inaccurate. (App. 60-61) No attempt was

made to gather actual data from families in Massachusetts or elsewhere concerning the cost of raising children, or variations in components of those costs, such as for housing and food, division of parenting time, effect of public benefits, and other significant factors.

The Task Force also prepared a set of New Guidelines, attached as Exhibit 3 to the Complaint. (App. 100) They are based on the so-called "income shares" approach, a drastic change from the previous method. (App. 88) However, the method of calculation is not of concern in this complaint, but rather **who** made the calculation, namely the CJAM and his Task Force, which plaintiffs assert was a violation of constitutional magnitude. Additionally, the complaint seeks relief because the New Guidelines are grossly inequitable as applied to families and children in the Commonwealth.

Federal law allows executive, judicial or legislative determination of child support guidelines. 42 U.S.C. §667. However, due to the strong requirement in Article X of the Declaration of Rights that no property may be expropriated without legislative action, and the unambiguous separation of

powers provision of Article XXX, only the legislature is authorized to make this determination in Massachusetts.

Federal law also requires the states to consider the cost of raising a child as a basis for establishing guidelines. (App. 17) However, the Task Force established the New Guidelines with arbitrary and capricious figures, based upon unproven and esoteric "broad principles", (App. 64), not on economic data reflecting the cost of raising children when the parents are apart, or on any economic model that approximates those costs. (App. 60-65) The New Guidelines based child support payments primarily on income and number of children, not at all on data collected about the actual costs incurred by the custodial parent to raise the child. (App. 18)

The Complaint sets forth dozens of facts showing how the New Guidelines foster inequity, deprivation of due process, and unconstitutional taking of income of payors, a sampling of which follows. (App. 18-28)

The New Guidelines require divorced parents to pay child support and college costs up to age 23, when the obligation of parents ends to their children in intact families at age 18. (App. 80, 98) They treat

divorced parents with children quite differently than never-married parents with children, and differently than married parents with children, and differently than remarried parents with children. (App. 22-26, 74-75, 96-97)

Under the New Guidelines, children in the homes of second marriages can be bereft of basic needs, while their half-siblings who receive child support may be well off, thus causing inequity of treatment within related children. (App. 23, 26)

Even though the Massachusetts Dept. Of Children and Families pays a parent \$116 per week, as the cost of raising a child, the guidelines can force a non-custodial parent to pay up to \$915 per week, whether the recipient is in need of the funds or not. (App. 20) In such instances, many payors can be reduced to destitution, while recipients can be living in luxury with tax-free dollars. (App. 22)

Payors of child support who are also obligated under an alimony order are treated differently than those who are not. This derives from the provision in the New Guidelines allowing non-tax deductible child support to be re-named as tax deductible alimony, a benefit not available to the large number of never-

married parents. (App. 24-25) Another gross inequity is the failure to account for public benefits as income, when the value of such benefits can amount to tens of thousands of dollars per year. (App. 24)

Child support awards issued under the New Guidelines will be virtually impossible to rebut, since the Task Force did not base them on child raising costs or any other objective measure. (App. 27-28) In any challenge to the application of the New Guidelines, there are no criteria under which such a challenge could proceed. Thus, potential payors are deprived of any means of redress.

The Plaintiffs' complaint was dismissed on a motion of the defendants. (App. 111, 209) This appeal followed. (App. 210)

Summary of Argument

Plaintiffs appeal from dismissal of their complaint, which seeks a permanent injunction against the Defendants, to enjoin them from further implementation of new child support guidelines ("New Guidelines"). The New Guidelines are now being applied to all cases in which child support is being

decided in any department of the Trial Court of Massachusetts since January 1, 2009.

Issue I. The New Guidelines were not properly passed by the state legislature, as required by the strict separation of powers provision in Article XXX of the Massachusetts Declaration of Rights. (Pp. 12-27) Rather, they were enacted by unilateral judicial fiat, rather than by the normal process of legislative enactment by the Massachusetts General Court. The New Guidelines are the type of issue which can only be addressed by the Legislature. *Id.*

The Defendants did not comply with the standards courts use to analyze separation of powers matters set out in *Chelmsford Trailer Park Inc. v. Chelmsford*, 393 Mass. 186, 190 (1984):

1) The Legislature improperly delegated the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy. (pp. 16-20); (2) The Legislature failed to provide adequate direction for implementation. (pp. 20-25); and (3) The New Guidelines provide no safeguards such that abuses of discretion can be controlled. (pp. 25-27)

Issue II. The new Massachusetts Child Support

Guidelines constitute the imposition of a tax on the appellants without a legislative vote. (pp. 27-30) Article XIII of the Declaration of Rights requires all taxes to be enacted by the legislature. Article X of the Declaration of Rights provides that no property of an individual can be taken from him, except by act of the legislature. The child support system set out in G.L. ch. 119A is a system of taxation.

Issue III. The New Child Support Guidelines deprive the Appellants of property without due process under Article XI of the Declaration of Rights. (pp. 30-40) They do not allow for actual redress in the family Court. (pp. 33-35) If a judge did allow a challenge, the judge would have no cost basis for making the adjustment, because the Task Force based the New Guidelines on arbitrary "broad principles", not the cost of raising a child. (pp. 35-40)

Issue IV. Application of the new Massachusetts Child Support Guidelines to the Appellants violates their rights to equal protection of the law, by treating the appellant child support payors in a disparate and capricious manner, based on marital status, divorce, income, and other factors. (pp. 40-49) There is no rational basis for their disparities.

Arguments

- I. **Defendant Chief Justice Mulligan promulgated the new Massachusetts Child Support Guidelines by assuming legislative power improperly in violation of the separation of powers set forth in Article XXX of the Massachusetts Declaration of Rights.**

The Superior Court motion judge concluded that The Plaintiffs' "separation of powers" argument under Article XXX of the Massachusetts Declaration of Rights had no merit. (App. 204) The cases cited by the judge in his opinion illustrate the persistent efforts by various departments of the Massachusetts government to arrogate power to themselves at the expense of the other branches over many years. (App. 202)

Article XXX of the Massachusetts Declaration of Rights states, in pertinent part:

The Judicial [Department] shall never exercise the legislative and executive power, or either of them: to the end that it may be a government of laws and not of men.

This separation of powers clause in the Massachusetts Declaration of Rights is unique, and much more stringent than the one in the U.S. Constitution, in which it only appears piecemeal, via individual delegations of powers to the legislative,

executive and judicial branch in its first three articles. (App. 202) In the Massachusetts Constitution, by contrast, Article XXX asserts a firm wall between the branches, and does so in the most forthright manner, using the words, "shall never exercise" the powers of the other branches.

It is a slippery slope to argue, as does the judge, that the implementation of child support guidelines is a valid delegation of legislative authority to the CJAM. (App. 204-205) The rationales for such delegations appear to have become more attenuated and illegitimate over time, so that a court can now defend the delegation to the judicial department of a completely legislative function such as child support guidelines. By that logic, the establishment of the state budget could be delegated by the legislature to each department.

Article X of the Declaration of Rights draws a bright line on this issue. It states, in relevant part:

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.

While federal law, in 42 U.S.C. §667, allows child support guidelines to be established by "law or

by judicial or administrative action", the Massachusetts Constitution is unambiguous that only the Legislature has the power to pass such a law in this state. "The General Court may not delegate the general power to make laws." *Opinion of the Justices*, 393 Mass. 1209, 1219 (1984). Nor may it "abandon any of the powers entrusted to it by the Constitution or transfer those powers to any other person or group of persons." *Opinion of the Justices*, 328 Mass. 674, 675 (1952). Enactment of the New Guidelines falls squarely under the ambit of the legislative branch, in that these guidelines assess large, involuntary financial payments against a large swath of citizens, under penalty of incarceration for non-compliance.

Due to the additional strong requirement in Article X of the Declaration of Rights that no property may be expropriated without legislative action, and the unambiguous separation of powers provision of Article XXX, only the legislature is authorized to make this determination in Massachusetts.

Where there may be ambiguity in some cases under Article XXX cited by the judge (App. 202-203), the matter of child support guidelines allows of none. Child support takes the property of an individual

without his or her consent. Thus, the "representative body of the people" referred to in Article X is the only locus of the exercise of such legislative power.

In reviewing a claim of improper delegation of legislative power, the Massachusetts court has considered three factors: (1) Did 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?

Construction Indus. of Mass. v. Commissioner of Labor & Indus., 406 Mass. 162, 171, (1989), quoting *Chelmsford Trailer Park Inc. v. Chelmsford*, 393 Mass. 186, 190 (1984).

While this has indeed been the framework that the court uses to analyze separation of powers questions, it gravely diminishes the power and authority of the powerful and clear language in the Massachusetts constitution, and confers ambiguity where there is none in the text. Even so, Justice Mulligan's

promulgation of the New Guidelines does not satisfy these more anemic requirements, and his actions in this regard go far beyond his constitutionally and statutorily permitted duties.

On the first *Chelmsford* factor, namely whether the Legislature improperly delegated the making of fundamental policy decisions, rather than just the implementation of legislatively determined policy: The promulgation of child support guidelines involves formulation of fundamental social policy and imposing value judgments, as well as imposing large income transfers.

Some of the "fundamental policy decisions" inherent within the New Guidelines, which the Task Force considered and deliberated, in the fashion of a legislature are:

1. Whether child support should be to provide primarily for the economic needs of the child, or for the custodial parent's household as a whole; (App. 66, 88)
2. Whether child support payments should be based on the actual costs of raising children, on the gross incomes of the parties, or on some other standard; (App. 97)

3. Whether child support should provide the same level of economic support to all children of a parent, or whether children of a second relationship should be treated differently than children of a first relationship; (App. 83, 96-97)
4. Whether indigent Payors should pay significant amounts of their income as child support on principle, even if the child is economically comfortable in the home of the custodial parent; (App. 67-68, 93-94)
5. Whether incarcerated Payors should be ordered to pay child support, leading to large arrearages for inmates at the time of release; (App. 68)
6. Whether child support orders should be high enough to effectively include alimony for which never-married custodial parents are not otherwise eligible under statute; (App. 74, 88)
7. Whether child support payments should be pro-rated according to the division of parenting time, to promote shared parenting, or whether doing so might increase custody litigation; (App. 78)

8. Whether Payors should be liable for college expenses, or whether that policy improperly imposes a burden on non-custodial parents that is not placed on married parents; (App. 98)
9. Whether child support orders should include the income from second jobs and overtime pay in the definition of income for purposes of the Guidelines, or should promote increased parenting by the Payor by releasing him from the obligation to work excessive hours; (App. 73)
10. How should we adjust child support for the myriad tax consequences of policy decisions in the guideline, including whether to base support on gross or net income, adjustments for alimony, which parent takes dependancy exemptions, when income of a party derives from non-taxable public benefits, and the like. (App. 69, 74, 75)

These issues reflect social policy judgments which were made after long debate by the Task Force (App. 71-72) The Task Force did not just flesh out a policy set forth by the legislature. These issues, and many more which were raised in the Task Force reports, should have been debated and determined by the Legislature, with public input and accountability,

rather than being made into law by Justice Mulligan under the New Guidelines.

By way of analogy, the Legislature enacted the statute concerning unfair and deceptive trade practices, which is codified at G.L. c. 93A in 1967, and which has since been expanded by the Legislature through numerous amendments. The statute also provides that the Attorney General can promulgate regulations to enforce it, which he has done. See 940 CMR 3.01ff. However, the Legislature itself explicitly set forth the parameters of the law in a number of sections, the public policy behind the law, and gave the authorization to the Attorney General to provide details of its enforcement. All of these characteristics are absent in the promulgation of the child support guidelines.

The Legislature could have determined the many social policies set forth above, and devised the mathematical formulas, which then could have been applied by rote to child support calculations. However, the Legislature abdicated its policy-making responsibility, and allowed the Task Force to enact a comprehensive framework of rules which required the Task force create social policies that govern much of the social, familial, and financial well being of tens

of thousands of families around Massachusetts. In so doing, the Task Force crossed the bright line between policy making by the legislature and application of policy by the other branches.

On the second prong of the *Chelmsford* test, the legislature has not provided adequate direction or guidance for the implementation of its policy, in the form of statutory standards or in giving any specific instruction to the CJAM.

Originally, the legislature authorized the predecessor to the CJAM to promulgate child support guidelines in 1986, in a statute codified as G.L. c. 211B, §15, which was repealed in 1992. The full text of that statute is set out in the judge's opinion at Appendix page 193.

The statute authorizes a committee to formulate guidelines and must "consider all relevant social, economic, and legal principles." *Id.* To the extent it did so, it transgressed Article XXX in the same fashion as current Task Force. It was required to complete its work by January 1, 1987, and the statute was repealed.

To argue that such a delegation of power was not challenged then is to justify two wrongs, not merely

one. Regardless of whether the Legislature delegated its power to a similar committee some twenty-three years ago without challenge, that does not bear on whether it was proper then or proper now. Additionally, the social policies of that time have surely changed, and the federal requirement of a quadrennial review anticipates that fact.

Previous abdication of a legislative duty to a committee, in violation of the Declaration of Rights, does not justify doing it again. Intuitively, one can see why the legislature would wish to delegate it. This is a very politically sensitive issue, and tens of thousands of payors may descend on Beacon Hill to make their voices heard, and substantial pressure would be applied from all sides of the debate. How much easier to slip the political hot-potato to a secret committee, and receive it back as a *fait-accomplis*, without any trouble from those persons who would be affected.

The only flaw in the plan is that the entire purpose of Article XXX is to unambiguously bar the legislature from precisely this kind of cowardly delegation, and to make them face their constituents. Obversely, and just as important, the constituents get to face their legislators and hold their feet to the

fire. Given the intense and pervasive effect of this policy on so many families in the Commonwealth, the debate would almost certainly be a conflagration. And Article XXX will have accomplished its purpose.

After the repeal of G.L. ch. 211B, §15 in 1992, all that remains as guidance from the legislature concerning child support is a thin admonition that the trial courts, "shall apply the child support guidelines promulgated by the chief justice for administration and management." See G.L. c. 208, §28 and parallel statutes. That does not remotely satisfy the requirement in *Chelmsford* that the legislature provide adequate guidance and specific statutes which clarify the implementation of the policy.

Under no reading could that mere reference in Section 28 to applying guidelines promulgated by the chief justice constitute a "fundamental policy" adopted by the legislature on how to construct child support guidelines. The statute does not set forth how to establish amounts of child support, how to determine the persons against whom those amounts should be assessed, and the myriad other fundamental social policy decisions which were made by Justice Mulligan and the Task Force. Nor does that assumptive reference override the clear, unambiguous prohibition

in Article XXX against encroaching on legislative power.

The Legislature has made no delegation of fundamental policy such as would enable the CJAM to determine child support. What powers it did confer legislatively are set forth in several sections of M.G.L. c. 211B, most particularly Section 9, and a few stragglers in Sections 16, 17 and 19. All of the duties set forth in those sections are purely ministerial, involving administration of the trial court. No policy or rule-making is authorized in those sections. Establishment of child support guidelines is not mentioned or listed as a duty of the CJAM anywhere in that chapter, nor does it provide guidance of any sort as to how they should be constructed.

The Supreme Judicial Court has repeatedly delineated the general limits of judicial rule-making to "customary judicial activities or to the operation of the courts." *Opinion of the Justices to the Senate*, 372 Mass. 883, 893 (1977). The CJAM may roam into the province of the Executive and Judicial departments only to the extent "necessary to the court's ability to perform its core judicial functions." *Gray v.*

Commissioner of Revenue, 422 Mass. 666, 672 (1996).

The role of the CJAM was addressed at some length in the case of *Brach v. Chief Justice of Dist. Court Dept.*, 386 Mass. 528 (1982). The Court summarized the limits of judicial power, after an explication of the powers in Chapter 211B, as follows: "All the inherent powers of this court . . . have involved the internal functioning of the judiciary." *Brach* at 535. It made the point even clearer by saying, "the prohibition of Art. 30 cannot be evaded by agreement between one branch of government and another." Thus, the Legislature's tacit delegation of the enactment of child support guidelines to the CJAM cannot be justified under Article XXX.

All delegation is not inherently improper, as long as it merely involves fleshing out the details of a policy adopted by the legislature. See, e.g. *Di Loreto v. Fireman's Fund Ins. Co.*, 383 Mass. 243, 246 (1981).

However, the sweeping kind of power assumed by the CJAM in this instance, cannot be inferred from the oblique reference in our statutes that constitutes the entire extent of legislative guidance on the subject of establishment of child support guidelines, namely that the courts, "shall apply the child support

guidelines promulgated by the chief justice for administration and management." See G.L. c. 208, §28, c. 209C, §9, c. 209 §32F, and c. 119 §28.

On the third prong of the Separation of Powers test, there are no safeguards built into the Legislature's "hands-off" approach, to stop the unbridled increases in child support which appear in the New Guidelines, which increases were not based on child-raising cost data. Nor is there any check on the many other inequities and constitutional deprivations within them, as set forth in the Complaint. Delegation is only legitimate when judicial review and public accountability are provided. *Corning Glass Works v. Ann & Hope, Inc.*, 363 Mass. 409, 420-424 (1973). The CJAM simply promulgated the New Guidelines without any role whatsoever by the Legislature.

This lack of safeguards can have dire consequences, because a Payor's failure to fulfill an obligation under the child support guidelines can result in arrest and imprisonment by the court. *Furtado v. Furtado*, 380 Mass. 137, 147 (1980) Any law, the disobedience of which can result in what amounts to criminal penalties, is inherently

undelegable. *Opinion of the Justices*, 239 Mass. 606 (1921). This alone is sufficient grounds for rejection of the present method of imposition of the New Guidelines by Judicial Committee.

No case interpreting Article XXX of the Declaration of Rights has ever allowed the Judiciary to transgress the Legislative power in this fashion, i.e. to impose a large levy on a substantial class of citizens, and to effectuate social and family policies of this magnitude. Neither is there any jurisdiction for the judicial department under the regulation-making authority of G.L. c. 30A, §1, which specifically excludes the judiciary from the list of agencies which may promulgate regulations.

Twenty-five other states establish their child support guidelines through enactment by their state legislatures. See e.g. Cal. Family Code §4055, Ohio Rev. Code 3119.1 et seq.; Code of Virginia § 20-108.2; Texas Family Code Sec. 154.121; Illinois 750 ILCS 5/505; New Jersey St. Title 2A, Chap. 34-23; New York Dom. Rel. Laws - Art. 13 §§ 236, 240, 243; Florida St. 61.30. Others use various combinations of executive, judicial, and administrative action. Only a minority of states delegate the matter to a judicial committee, without legislative action, as

Massachusetts has done.

In sum, Justice Mulligan's enactment of the New Guidelines violated Article XXX of the Massachusetts Declaration of Rights, and should be struck down as unconstitutional.

II. The new Massachusetts Child Support Guidelines constitute the imposition of a tax on the appellants without a legislative vote.

The motion judge rejected the argument in his opinion that the current child support regimen in the New Guidelines was taxation without legislative action, in violation of Article XXIII and XXX of the Massachusetts Declaration of Rights. (App. 205)

Article XXIII of the Declaration of Rights fixes the power to tax only in the Legislature, and leaves no ambiguity about the matter. It states:

No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature.

Amendment Art. 44 to the Massachusetts Constitution speaks of "full power and authority" being vested in the Legislature to levy taxes on

income. The structure and effect of the New Guidelines constitute a taxation scheme on the incomes of a substantial class of inhabitants, regardless of the label placed on it. Simply put, the Judiciary cannot exercise the power to tax.

The motion judge, as well as the Defendants and the child support authorities assert that such assessments are not a tax. (App. 206) The judge distinguishes child support from a tax, stating that a tax raises revenue to defray public expense, and that child support advances the public goal of providing for children. (App. 205)

However, *Black's Law Dictionary* defines the term broadly: "In a general sense, any contribution imposed by government upon individuals, for the use and service of the state...", no matter what its name. The Supreme Judicial Court has long regarded "debts" created by law as taxes: "Whatever the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge." [citations omitted] Taxes are debts, within these definitions." *Appleton v. Hopkins*, 71 Mass. 530 (1855).

Under G.L. ch. 119A, §6, every recurrent child support payment becomes a judgment lien against the

payor as of the time it is due. It is then enforceable by the Massachusetts Dept. Of Revenue (DOR) like any other tax it collects. *Id.* The DOR has the power to enforce subrogation rights of the Dept. Of Transitional Assistance, the Dept. Of Children and Families, the Division of Medical Assistance and others, pursuant to G.L. ch. 119A, §2. The DOR can enforce these taxes using all of the traditional enforcement mechanisms which they apply to income taxes, including levies, attachment, trustee process, garnishments, loss of driver's license, etc. G.L. ch. 119A, §6, 13, 16. They initiate complaints in the Probate and Family Court. Ch. 119A, §3.

Most child support payments under the New Guidelines are remitted directly to the Commonwealth, as would be a tax. In Title IV-A TANF cases, the revenues received from child support Payors go into a fund, and amounts paid to Recipients are not related to the amount taxed, but are calculated by a different formula than the child support guidelines. G.L. ch. 119A, §§9, 10. The amounts collected could be more, less, or the same as the amounts tendered to the Recipient. The surplus collected is "for the use and service of the state".

Thus, regardless of the name one gives to the

extraction of millions of dollars from the inhabitants of Massachusetts, enforced by the hammer of judicial action, the child support collection scheme in Massachusetts functions as a tax. Even if this court is squeamish about applying that label to this system, the clear language of Article X prohibits any levy without approval of the "representative body of the people", a non-optional step which was entirely skipped by Justice Mulligan and the Task Force.

III. Application of the new Massachusetts Child Support Guidelines to the Appellants violates their due process rights, in that they arbitrarily determine the amount of child support demanded, without reference to any rational standard.

The Motion judge rejected the plaintiffs' arguments that their complaint properly stated a cause of action for violation of due process. (App. 198) The Plaintiffs' due process claim asserts several deprivations, namely that the Task Force based child support on income rather than the cost of raising a child, the fact that they were deprived of constitutionally required legislative action, and that there is no mechanism for challenging their application in an actual case in the family court. (App. 34)

The state legislature is the only branch of government which can promulgate child support guidelines, pursuant to the ironclad jurisdictional mandate of Article X of the Massachusetts Declaration of Rights. Under 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 the standing Laws. . . . 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.

Article X of the Declaration of Rights, among others, is comparable to the due process clause of the Federal Constitution. *Pinnick v. Cleary*, 360 Mass. 1, 14, footnote 8 (1975). Article X is as strong in the protection of individual rights as the Fifth and Fourteenth Amendments to the U.S. Constitution. *Opinion of the Justices*, 271 Mass. 598, 601 (1930). Similarly, Article XII of the Declaration of Rights imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests.

Child support guidelines inherently deprive persons of property by their very operation. The failure of Justice Mulligan to submit the proposed guidelines to the State Legislature for a debate and

vote, and approval of the Governor is a deprivation of due process, in that it takes property without consent and without the consent of "the representative body of the people". The failure of a Payor to remit amounts ordered under the guidelines, without excuse, often results in arrest and incarceration. See *Salvesen v. Salvesen*, 370 Mass. 608, 610 (1976). Thus, fundamental due process rights of both liberty and property are implicated.

In order to prevail on a claim for deprivation of procedural due process, "the claimant must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate." *Lamoureux v. Haight*, 648 F. Supp. 1169, 1175 (D. Mass. 1986), quoting *Hudson v. Palmer*, 468 U.S. 517, 533, 539 (1984). (O'Connor, J. concurring).

In this case, the Plaintiffs are unwilling victims of a child support guidelines formulation that was never submitted to the state legislature, and thus they have been deprived of the opportunity to shape that law with the input of their vote for their representatives, and their ability to influence those representatives. It is not possible to speculate on the outcome of that process had it been properly done,

because it was never lawfully undertaken.

The motion judge asserted, with the defendants, that persons have an adequate means of challenging child support orders, namely in the Probate and Family Court, during their individual cases. (App. 201) However, the decision by the motion judge to dismiss the plaintiffs' complaint actually left them with no reasonable means of redress.

The starting point of such an analysis is Article XI of the Massachusetts Declaration of Rights, which states:

Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

No individual remedy is available in the Probate and Family Court because the New Guidelines, by their own terms, allow almost no variation. There is a rebuttable presumption that they must be mechanically applied to all child support determinations, with exceptionally few variations. (App. 100) The Task Force report states:

The Child Support Guidelines are intended to apply without deviation to most families and the vast majority of cases based on the most common facts.

(App. 85)

The variety of family circumstances today makes such a one-size-fits-all approach quite unfair. There a radical economic, social, geographical, health, and lifestyle differences among families in the Commonwealth. Even in something so simple as the cost of an apartment, there could be many thousands of dollars difference per year in the cost of identical accommodations depending on their locations.

As a practical matter, challenges to the child support guidelines **cannot** reasonably be handled on a case-by-case basis in the Family Court, as shown by the complexity of the plaintiffs' complaint and this appeal. Few individual child support litigants in the Family Court could marshal the constitutional arguments set forth herein, nor deal with the opposition which the plaintiffs have had to endure from the "establishment".

The imposition of the New Guidelines virtually ensures that individual litigants will be deprived of a reasonable opportunity to challenge their application to his or her case. "The fundamental

requisite of [procedural] due process is an opportunity to be heard at a meaningful time and in a meaningful manner." *Matter of Kenney*, 399 Mass. 431, 435 (1987).

Even if a child support payor succeeded in asserting the need for variation from the New Guidelines, those variations cannot be undertaken with any consistency, because the Defendants did not supply cost data, nor on any economic model intended to estimate those costs. After investigating a number of economic models, the Task Force stated:

The Task Force determined that there is no single economic study that, for the purposes of making guidelines recommendations, reliably isolates child costs or estimates the cost of raising a child in Massachusetts. . . . Therefore, the recommendations of the Task Force on the guidelines formula and corresponding Chart reflect some broad principles and implications of the economic research but not any specific numeric result.

(App. 33)

In other words, no economic model they investigated was accurate, so rather than actually gather data from the inhabitants of the Commonwealth on the cost of raising a child to get accurate data, they just improvised. They simply used "broad principles", rather than actual costs. Thus, any "specific numeric result" will be arbitrary and

capricious, not rooted in actual data. Nothing precluded the Task Force from gathering such data. They impliedly spent a great deal of money on consultants to tell them they had no answers, when they could have invested it in obtaining the actual "specific numeric" data that would have yielded a formula that was tied to actual costs, not speculative guesses.

The New Guidelines are also inequitable in their application, in that they fail to account for numerous variations in circumstances of parties subject to child support orders, such as large differences in the cost of housing around the Commonwealth, differences in taxation, receipt of public in-kind benefits, and differences in the situations of divorced and never married persons who pay child support.

In order to vary from applying the New Guidelines to a particular case, a court must make specific written findings about four things: 1) the amount of an order that would result from application of the guidelines; 2) why the guidelines amount would be unjust; 3) The specific facts which justify the variation; and 4) that the deviation is in the best interests of the child. (App 105)

However, since Justice Mulligan did not use actual cost data to determine the New Guidelines, judges have no objective criteria on which to make deviations. For example, if a judge wished to deviate from the guidelines because the housing cost of a party was lower or higher than the "average", the judge would have no baseline amount of what was "average", nor would he or she know what percentage of the New Guidelines which comprised its housing component. Similarly, if extraordinary medical costs, transportation, or any other aspect of child care warranted a variation in a support order, no objective criteria exists for making such a variation. Thus, any deviation is completely arbitrary.

In 1989, early in era of the establishment of child support guidelines, the District of Columbia Court of Appeals discerned the harm from having no clearly codified standards, and giving judges no information about the assumptions upon which guideline calculations are based. Without that information, a judge cannot make a decision on when the guidelines should not be presumptively applied, and when and how to make fair deviations from them. The court criticized D.C.'s guidelines because of this failing:

Since the Guideline is presumptively fair, any party opposing its application would have a higher burden of proof than it might have without the Guideline. Although mandated by federal regulations, the numeric formulae make it difficult to ascertain what assumptions are being made. Amici NCCR argues that it is impossible to tell the basis on which the Guideline is presumptively applied. The Guideline Report offers no economic basis for the Child Support Guideline Committee's determinations.

Consequently, the party trying to argue against application of the Guideline faces a monumental obstacle in attempting to demonstrate a case is "exceptional" without knowing what "unexceptional" is.

Fitzgerald v. Fitzgerald, 566 A.2d 719, 731 (D.C. Ct. of Appeals 1989) [emphasis added]

The statutes of many states include the federal requirement to obtain data on the cost of raising a child, which is designed to avoid the *Fitzgerald* problem, and the one now facing our Massachusetts Probate and Family Courts. For Example, the California Family Code states:

The review shall include economic data on the cost of raising children and analysis of case data, gathered through sampling or other methods, on the actual application of the guideline after the guideline's operative date. The review shall also include an analysis of guidelines and studies from other states, and other research and studies available to or undertaken by the Judicial Council.

California Family Code 4054(b).

With regard to the establishment of support guidelines, due process consists of gathering and utilizing actual data showing the costs of raising a child, and having the Legislature debate and enact the child support guidelines as the people's representatives, thus allowing public input and accountability. Additionally, the executive branch, in the person of the Governor, must be allowed to approve or veto the bill, as another check on government power.

A regulation such as the New Guidelines has the force of law and must be accorded all the deference due to a statute. *Mass. Fed'n of Teachers v. Bd. of Educ.*, 436 Mass. 763, 771 (2002).

The Plaintiffs, being subject to that arbitrary determination which deprives them of property and liberty, are deprived of due process. See *Sierra Club v. Martin*, 168 F.3d1 (11th Cir. 1999). In the *Sierra Club* case, the Court determined that the National Forest Service acted arbitrarily and capriciously and violated applicable law when it approved timber sales from a Georgia national forest, without first gathering data about the impact of the timber sales on the residents. Child support determinations are far

more intrusive on individual liberty than timber cutting.

Thus, there is no existing "adequate remedy" for this deprivation. It can only be remedied by a declaration by this court that the New Guidelines are the product of an unlawful deprivation of due process, and that the legislature must consider any future child support guidelines promulgated in the Commonwealth.

IV. Application of the new Massachusetts Child Support Guidelines to the Appellants violates their rights to equal protection of the law, by treating the appellant child support payors in a disparate manner, based on marriage, divorce, income, and other factors.

The motion judge rejected the Plaintiffs' cause of action which claims that the New Guidelines violated their right to equal protection of the law. (App. 198)

The Plaintiffs are - and will be - treated unequally by several provisions of the New Guidelines, both on their face and as applied, including on the basis of marital status and economic class.

The "indispensable element of a valid equal protection claim is that individuals who are similarly

situated have been treated differently." *Machado v. Leahy*, 17 Mass.Law.Rep. 263 (Sup. Ct. 2004). The standard of review under the cognate provisions of the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment to the Federal Constitution. *Commonwealth v. Franklin Fruit Co.*, 388 Mass. 228, 235 (1983). Unless a statute burdens a suspect group or fundamental interest, it will be upheld as long as it is rationally related to the furtherance of a legitimate state interest. See *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *Opinion of the Justices*, 373 Mass. 883, 886 (1977).

The Defendants assert that the New Guidelines meet this rationale basis test, "under which they easily pass muster as an enactment intended to comply with Federal law, secure federal funding, and provide a comprehensive and uniform system that provides adequate support for children while accounting for the variety of circumstances in which parents raise children." (App. 130-131) They cite *Romer v. Evans*, 517 U.S. 620 (1996), holding that a legislative classification will be upheld "so long as it bears a rational relation to some legitimate end." *Id.* at 631.

This classification scheme of diminishing the protection of certain rights is itself arbitrary. The constitution does not arbitrarily diminish protection of selected politically unpopular rights, yet the court cavalierly does so, without any justification other than its own opinion. The court has no basis for according a lower quantum of protection for an enumerated right, where it is not given a lower rank in the constitutional text. Such action is arbitrary, not rooted in the text or any implied meaning of it. The court thereby emboldens the government to interfere with that right with impunity, since there will be no consequence for doing so.

That said, the Defendants' assertions that the New Guidelines pass the rational basis test are far too glib. The New Guidelines fail to, "bear a rational relation to some legitimate end" under the *Romer* test, and they do not comport with the equal protection arguments of the Defendants in their memorandum.

First, the New Guidelines are not a legislative enactment or a statute, but a creature of judicial fiat, unconstitutionally circumventing legislative enactment. This has been explored in detail above, and needs no further explanation.

Second, they do not comply with federal law, particularly 45 CFR 302.56 (h), requiring the use of cost data in formulating child support guidelines. In their argument, the Defendants are now at war with their own claim that they do not have to comply with federal law, and that plaintiffs cannot bring a private right of action to enforce it. (App. 128-129) Both cannot be true.

Third, and most importantly, the New Guidelines do not bear a rational relationship to the stated end of ensuring that children are adequately supported in the Commonwealth. As set forth in detail in the Complaint, application of the New Guidelines to the Plaintiffs results in wildly disparate results, which seem to bear no logical relationship to the cost of raising children. (App. 20-28, 32-33) Second families are treated differently than first families, who are treated different than never married families, who are treated differently than married families.

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not

made with mathematical nicety or because in practice it results in some inequality.' See *Murphy v. Department of Correction*, 429 Mass. 736, 741 (1999), quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). However, as shown by the facts in the Plaintiffs' Complaint, the disparities in the New Guidelines go well beyond reasonable distinctions, and substantially disadvantage large numbers of similarly situated persons.

If the word "rational" is to be applied in its normal context, the New Guidelines go far beyond "imperfect", and substantially violate the notion of having a "rational relation to some legitimate end." The results of applying the New Guidelines to the Plaintiffs ranges from levying huge child support payments which vastly exceed any reasonable notion of the cost of raising a child, to impoverishing children of second families, due to the amounts required to be paid to the first family under the Guidelines. They provide for treating similarly situated children unequally, and they do not even pretend to require equity, which undercuts the rationale for the alleged "important government interest" of supporting children.

For example, there is no mechanism to ensure that a child of the same parent in a second family, married or unmarried, is not disadvantaged compared to a child in the first family for whom the parent is paying child support. There is no "floor" or downward stop mechanism in the New Guidelines to protect the younger child's need for support against the sometimes ravaging child support orders which drain the parent, and leave that parent unable to provide for a second child. No rational reason is given for this disparity.

Similarly, a child of a divorced first family gains a huge financial advantage over a child of the same parent in a second family. That first child is entitled to up to five more years of child support until age 23, if he or she attends college, unlike the half-sibling living with the Payor parent, who is only entitled to support until age 18. The first child may benefit from a court order requiring the Payor to pay for the first child's college education, but no court order for college expenses can be issued for the benefit of the second child. No rational reason is given for this disparity.

The New Guidelines contain no requirement for the custodial parent to provide health insurance, but only

that the Payor must do so. No rational reason is given for this disparity.

Poorer Payors are prejudiced in relation to wealthier Recipients, in that their orders are arbitrarily doubled or tripled. Even if the Payor parent is the primary financial support for a child, there is no means to assure that he obtains the tax related child exemption, which can amount a difference of thousands of dollars. Public benefits are not counted as income to the Recipient, even though they contribute to the support of the Recipient and the children. No rational reasons are given for these disparities.

Parents with identical after-tax incomes are treated differently if their gross incomes are different. Recipients can, under their status as custodial parents, avail themselves of numerous public benefits not available to Payors, but not count them as income for the purpose of calculating child support under the New Guidelines. Parents whose incomes are equivalent when public benefits are included are treated differently than parents whose income is exactly the same, but derived from earnings. No rational basis is given for these disparities.

Never-married parents are treated differently under the New Guidelines because of the inclusion of alimony in increased child support calculations. Divorced parents can denominate some of their child support obligation as alimony, which allows the Payor to take a deduction from the gross taxable income for all alimony paid. Child support, however, is not deductible to the Payor. 26 U.S.C. §71. Child support orders of divorced parents can be deemed alimony by the Probate and Family Court, but not to never-married parents under M.G.L. c. 209C, the paternity statute. No rational basis is given for this disparity.

Massachusetts state law does not require a parent to provide support for a child after the age of 18, or earlier if the child is legally emancipated. See G.L. c. 231, §85P and G.L. c. 4, §7 ¶48. However, divorced and never married parents can be required to pay a full amount of child support until a child reaches the age of 23 if the child is in college, even if the child does not live with the custodial parent/Recipient. No married parent is required to provide this measure of financial support to a child. No rational basis is given for this disparity.

A court can also order divorced and never-married parents to supply college costs to a child until

graduation, which is not a legal obligation of married parents. Thus, divorced and never-married parents are treated in a significantly different manner than married ones, with no rational basis asserted.

Since these inequitable provisions in the law are not based on the actual cost of raising children, it cannot be argued that the New Guidelines show a rational relationship to the expressed government interest of supporting children. They allow wild variations on the lawfully mandated payments, with no assurance that children are actually being supported adequately, since there is absolutely no accountability for their use.

Thus, the New Guidelines are not neutral on their face, or as applied. Admittedly, a facially neutral law does not violate the equal protection clause merely because it has a disproportionate impact; the disproportionate impact must be traced to a purpose to discriminate. *Washington v. Davis*, 426 U.S. 229 (1976).

The disparate treatment of different categories of payors and recipients, set forth above, were well known to the Task Force. They were deliberately incorporated into their child support calculations,

knowing that they would wreak substantial discrimination. There appears to be no other viable conclusion other than the Task Force intended to discriminate against Payors, second families, never-married, and divorced or re-married parents, in favor of Recipients.

The Plaintiffs will be radically harmed by this matter. Failure to pay any child support amounts which are ordered under the New Guidelines can result in that Payor's arrest and incarceration for contempt. Failure to properly provide for children in a new or second family, while being impoverished by large payments required under the New Guidelines, can result in action for neglect by the Massachusetts DCF.

Higher child support payments, higher tax payments, higher health insurance payments, and higher day care payments required under the New Guidelines cause harmful family tension, and can affect the quality of life or ability to have the necessary funds to take care of the supported children during the Payor's parenting time. Those constitute irreparable harm, which redounds to the children.

Any classification "must be reasonable, not arbitrary, and must rest upon some ground of

difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971), citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The foregoing discrepancies in the law are unreasonable and arbitrary, and violate the plaintiffs' right to equal protection of the law.

CONCLUSION

Appellants respectfully request that this Honorable Court would find that Plaintiff's have stated a proper claim for relief in their complaint, and would vacate the Superior Court Judge's order dismissing the Plaintiffs' complaint.

Respectfully Submitted,
The Appellant, by counsel

Dated: March 30, 2010

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Rule 16 (k) Certification

I, Gregory A. Hession, hereby certify that the foregoing brief complies with all rules of court that pertain to the filing of briefs, pursuant to Rule 16(k) of the Rules of Appellate Procedure.

Gregory A. Hession J.D.

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