



The poster child for progressive marriage laws, Massachusetts is also a singularly nightmarish place to get a divorce—especially for the better-off spouse. Now a brewing reform movement is pushing to rewrite the state's outdated alimony rules, led by one very fed-up ex-husband.

Till Death Do Us Pay.

By Kris Frieswick
PHOTOGRAPH BY HUGH KRETSCHMER

Steve Hitner sits on a bench in the Marlborough District Probate Court, drumming his fingers on the wood. It's 10 a.m., and already a half dozen supplicants have been granted an audience with Judge Randy Jill Kaplan, a fiftyish woman with tousled blond curls: ex-spouses seeking settlement approvals, estranged parents sparring over visitation rights, a divorced mom making the case for why she should be allowed to travel abroad with her kid. The bailiff has opened every window on this brisk spring morning, making the courtroom as cold as a morgue.

Dressed sharply in a black blazer, silk tie, gray slacks, and rimless glasses, Hitner, 61, has the look and hopped-up energy of a salesman about to close the biggest deal of his life. He has quite a bit riding on this hearing. So, too, does his ex-wife, Joan, 66, seated with her lawyer on the opposite end of the bench, decked out in a formfitting gray pantsuit, ornate hair clips, stylish white leather purse, and long, manicured nails. She's flown up from her home in Florida for the occasion. At stake is the \$45,000 in alimony Hitner has paid her every year since their 1999 divorce, but says he can no longer afford. With his printing and copying business hemorrhaging cash, he says he took just \$36,000 in salary last year.

Despite these dire straits—Hitner relies on his second wife, Jeanie, to pay most of the household expenses plus the part of the monthly alimony bill he can't cover—he isn't optimistic that Judge Kaplan will be moved. Four years ago, he'd sought a modification from this same judge. "I told her, 'I really need help here, because I'm running out of credit cards to borrow on to pay this alimony,'" says Hitner. "The judge's response was, like, 'Lemme know when you run out of credit cards and I'll put you in jail.'" He ended up filing for bankruptcy in December 2006. A separate court battle with Joan (who declined to be interviewed for this article) over stock in his company has dragged on for 10 years. Hitner estimates that he's spent, at minimum, \$200,000 in legal costs just to get where he is today. Which is to say, exactly where he was in 1999.

While he's been fighting these personal skirmishes, Hitner has also been engaged in a larger war: to finally, and fundamentally, change the way Massachusetts does alimony. When he isn't busy keeping himself out of financial ruin, not to mention lockup, he's leading that charge as president of Massachusetts Alimony Reform, a group he started in 2005 with like-minded first husbands (and the second wives who support them, often financially). His target is a system that many in the legal profession—both judges and attorneys, in our state and around the nation—contend is among the most backward in the country.

"We have a society that should encourage people to take care of themselves," says Hitner. "But in Massachusetts, when two people split up, the court system ties them together for the rest of their lives."

SUCH IS THE UNIQUE HELL THAT is Massachusetts alimony law—a particularly ironic hell, given our pioneering, progressive reputation when it comes to marriage. Completely separate from child support—about which state law is surprisingly lucid—alimony is intended to provide for the financial needs of the lesser-earning, or "dependent," spouse after a divorce. "Need," according to Massachusetts case law, is whatever is required to keep up, to the extent possible, the standard of living the parties enjoyed before divorce. (Although it's a gender-neutral law, most alimony recipients in Massachusetts are female.)

Today many states have statutorily defined the purpose of alimony—for instance, as a temporary arrangement allowing the dependent spouse to get on his or her feet financially; as compensation for money invested in a marriage (like paying for a spouse's medical school); or as punishment in an at-fault divorce. In Massachusetts, by contrast, the statute mandates that alimony exist, but neither the courts nor the legislature has formally explained why. As such, the rules on who gets alimony, how much, and for how long are murky at best.

Because the statute is so vaguely worded, award decisions are habitually based on case law, the growing mountain of which is a hydra of rulings that point in so many directions that almost any decision can be defended or overturned on appeal, depending on how smart your lawyer is and

which precedent he selects to argue your case. "There's no predictability about what a judge will do," says David H. Lee, a family law attorney and cochair of the Boston Bar Association's alimony task force, "and no predictability about whether an appellate court is going to be consistent with what was said months or years earlier. It's a real struggle." He adds, "A lot of people are looking for logical explanations. But when you look at alimony [in Massachusetts], you have to check logic at the door."

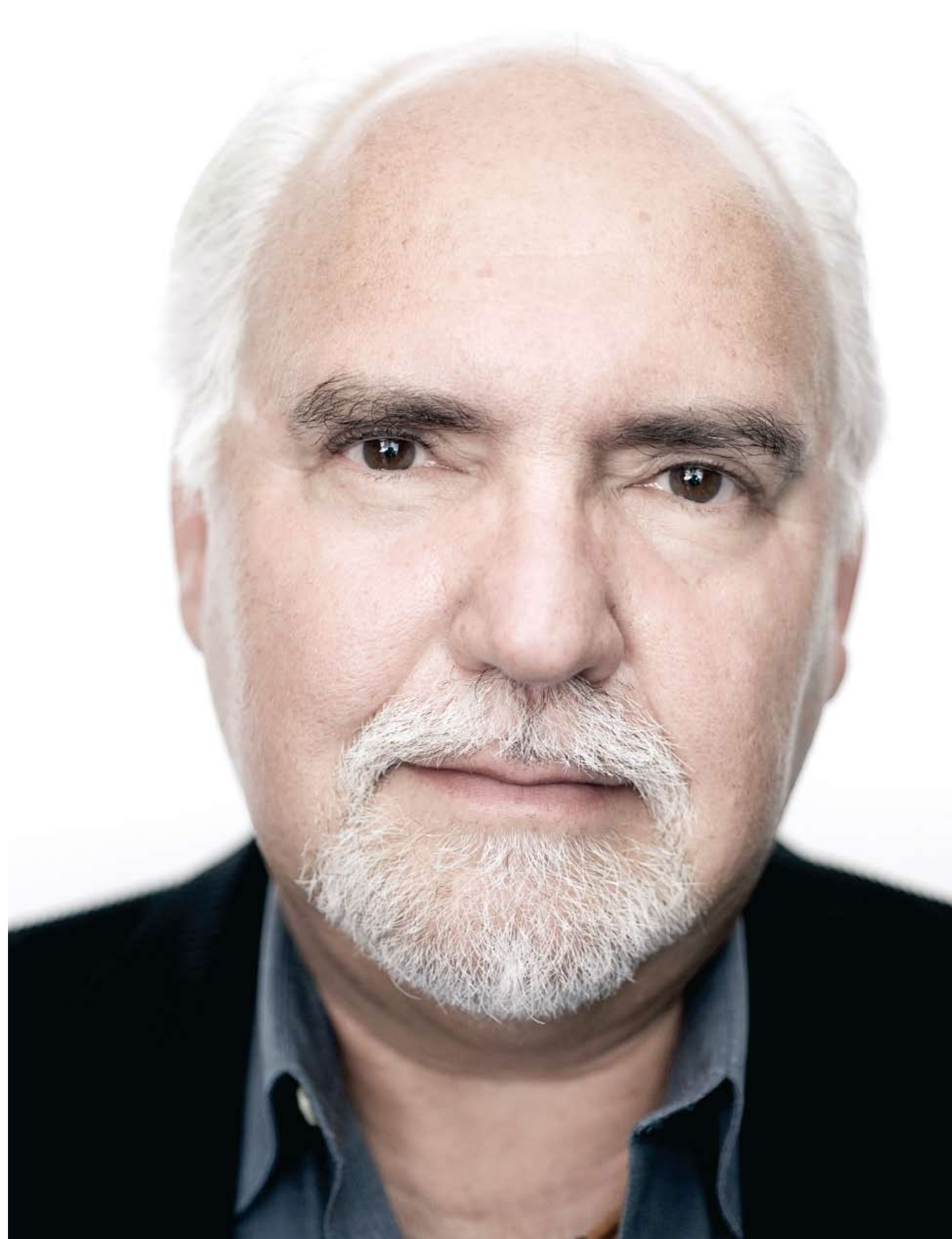
When an alimony case comes up before a judge, the focus is almost exclusively on the wealthier ex-spouse's ability to shell out, and hardly ever on the recipient's ability to fund his or her own needs. If the court believes a payor is intentionally underemployed in an attempt to lower alimony obligations, it will base the award on previous earnings history. In modification hearings, judges frequently count a second spouse's income as part of "total household income" and then use that figure in determining whether the payor has enough income to keep paying alimony (a backhanded way of tapping into a second spouse's income). But unlike in most states—and every other state in New England—here judges historically do not assume

"Society should encourage people to take care of themselves. But in Massachusetts, when two people split up, the court system ties them together for the rest of their lives."

Steve Hitner, right, founder and president of Massachusetts Alimony Reform

any income for the recipient, even if he or she is able to work but chooses not to. (In fact, Massachusetts' alimony system doesn't even conform with state rules for other areas of family law. In child support cases, recent reforms explicitly encourage the judge to impute potential income to a recipient if the judge believes the recipient is shirking higher-paying work.) Finally, when determining a payor's ability to meet alimony obligations after retirement, judges can count

▶ PAGE 107



TILL DEATH DO US PAY

CONTINUED FROM PAGE 80

the income from retirement accounts, including those already divided in half during the original divorce proceedings. This last precedent confuses even the judges who must abide by it. "The courts have said up until now that it's not a double dip," says Edward M. Ginsburg, a retired judge who heard alimony cases for 25 years in the Middlesex Probate and Family Court. "But it is a double dip."

For all this, what really sticks in the craw of would-be reformers is that alimony in Massachusetts is so often a burden without end. While permanent alimony is frequently awarded nationwide for unions that lasted more than 20 years, judges in other New England states can set alimony duration, even for the longest marriages.

New Hampshire, for example, tapers alimony over time to encourage a recipient to support him- or herself (judges there also take into account the recipient's income in setting the payment level). Alimony in the Granite State is by definition transitional, says Margaret Kerouac, chair of the family law section of the New Hampshire Bar Association. "There is case law that specifically says it is not a lifelong profit-sharing plan," she says. Not so in Massachusetts:

The only way judges here will set a cutoff for alimony is if it is tied to a specific event, like the recipient's remarriage, death, or new inheritance. And since judges cannot predict what a recipient's financial circumstances will be at a point in the future, most simply award indefinite alimony and leave it to the payor to seek modification. The vast majority of judges who do want to set a duration get overturned on appeal, so few ever try.

"Massachusetts is unusual," says Gaetano "Guy" Ferro, a family lawyer in Connecticut and past president of the American Academy of Matrimonial Lawyers. "They're not consistent with

the laws as I understand them anyplace else." He laughs. "I think I'm going to tell my female clients to move there."

WHEN THEIR CASE IS FINALLY CALLED, Hitner, Joan, and their attorneys approach the table in front of Kaplan's bench. They are old pros at this by now. After their three-day divorce trial in 1998, the couple waited almost a year for Middlesex Probate and Family Court Judge Sheila McGovern to rule on alimony and the disposition of their marital assets. In the interim, Joan sued Hitner in Superior Court for the profits on her 50 percent of the stock in his printing business. When McGovern at last ruled on their divorce case, she awarded Joan \$865 a week in alimony until the Superior Court decided the profits question. Two and a half years after that, the Superior Court ruled that it was a probate matter, not a civil one, and threw the case back to McGovern...who died in



"If not for their spouses, they wouldn't be where they are today.... It's unfair to make it hard to get support."

State Senator Cynthia Stone Creem, in her Beacon Hill office

November 2002, before she could give a final ruling. The couple had to start the process all over again with Judge Kaplan.

Hitner represented himself at his 2005 modification hearing. To get his alimony payments lowered, he needed to prove a material change in circumstances, so he brought his accountant as a witness and handed over tax returns, credit reports, and other financial papers that documented his troubles. No dice. Kaplan ruled that because Hitner had control over his own income, the documentation wasn't credible, and the modification was denied. After Hitner filed for bankruptcy

in late 2006, he had to borrow against his house to support his business and keep making his alimony payments.

Today's hearing is short and, in the end, just as inconclusive as the last round. This time, Kaplan says the only way she'll rule on the value of the contested company stock is if a credible witness testifies—for instance, she suggests, the trustee who worked on Hitner's bankruptcy case. A moment later, though, Kaplan realizes she knows the trustee socially. She'll have to recuse herself if Hitner calls him. Because the alternative, hiring a business appraiser, would cost \$10,000 or more, Hitner says, his only real option is to go with the trustee, and go back to square one with another judge.

"People in my situation think they're the only one. They're like, 'I had a bad lawyer, I had a bad judge,'" says Hitner following the hearing, sitting at the dining room table in his three-bedroom house in a manicured neighborhood in Marlborough. "But when I started my website, I got horror stories from all over. I said, 'Wow, this is incredible!'"

Hitner has hung on to those horror stories, in the event they might prove potent ammunition on Beacon Hill. At his urging, Lincoln attorney Tim Taylor drafted legislation that Massachusetts Alimony Reform managed to get introduced during the 2007 legislative session, only to have it die in the judiciary committee. Updated legislation was introduced this spring by state Representa-

tive Steven M. Walsh, this time with 72 cosponsors. The bill takes language from the laws that exist in most of our neighboring states: It defines the purpose of alimony as transitional help for a divorcee to become financially independent. It caps alimony at half the length of the marriage (up to 12 years unless there are minor children in the home). It ends alimony when the payor reaches retirement age, but allows permanent alimony if the recipient is determined to be incapable of working. It prohibits counting a second spouse's income toward alimony calculations. ■ } PAGE 108

The last time the Massachusetts Bar Association and the Boston Bar Association worked on alimony reform, the proposal amounted to little more than adding the word “duration” to the language of the current statute. Such limited efforts aren’t surprising to Hitner, who wonders if attorneys who make their living trying alimony cases would voluntarily work against their own financial interests. Guy Ferro, the Connecticut family law attorney, says they won’t. Indeed, when a committee of the American Academy of Matrimonial Lawyers tried to draft alimony guidelines, other attorneys successfully pushed to spike that initiative. Ferro says the thinking was: “If a person can go to guidelines and plug in a number to show what they have to pay in alimony and for how long, what do they need lawyers for?”

Hitner thinks the same thing will likely happen to the local bar associations’ efforts. But that’s okay. He and his fellow alimony reformers have just gained another, potentially much more potent avenue for change.

IT COMES COURTESY OF A PARTICULARLY charged example of Hitner’s horror stories, this one involving Rudolph Pierce, a former Massachusetts Superior Court judge who’d also found success lawyering in Washington, DC. After retiring from his practice, Pierce, who is now 67, asked for termination of the \$110,000 alimony he was paying his ex-wife, Carneice, 65. But in September 2008, Middlesex Probate and Family Court Judge Leilah A. Keamy ruled against that request, telling him that given his extensive legal background, he was capable of earning more than his planned retirement income, which included Social Security and disbursements from his retirement account, which had been divided during the divorce. By taking on a few side jobs, the judge ruled, Pierce could easily continue to pay Carneice the reduced—but still not inconsiderable—sum of \$42,000 a year.

At no point in her ruling did Keamy question Carneice’s decision, just weeks before the trial, to leave her \$95,000-a-year job. She didn’t impute any significant income to Carneice at all. Instead,

the judge decided Carneice needed the alimony to continue to support her lifestyle, which includes a 2008 BMW x5 SUV, a condo in DC, and a rental apartment in Brookline. (Carneice told the judge she hopes to get another job soon, though plans to retire in two years.)

Pierce appealed Keamy’s ruling to the Massachusetts Supreme Judicial Court, which agreed to hear the case this fall. It is the most significant alimony-related case the court has taken up in years. If it goes their way, the case could enact the limit advocates have sought, allowing payors to retire. More than that, it gives them a double-barreled shot at securing major alimony overhauls.

OF THE HALF A DOZEN ALIMONY recipients contacted for this article, only one was willing to talk. Betty O’Brien (who asked that her real name be withheld) lives on the South Shore, and receives \$1,500 a week in alimony from her ex-husband, “Rob.” Last winter, Rob told the judge at his modification hearing that his construction business was failing due to the recession and he simply could not afford the payments. He spent two weeks in jail. O’Brien says she felt bad when that happened, but that it was his own fault.

“He made a great deal of money and, unfortunately, the economy turned, and that’s not my problem,” says O’Brien, who works part time at a local hospital. “[Rob and his second wife] went crazy financially and that’s not my problem, either. They are putting me in a very bad financial situation.”

She gets prickly when asked whether she deserves the \$78,000 a year she receives in alimony—“I don’t have to give you the reasons”—but it’s clear she feels she’s earned it, that it’s a kind of back wages. “When we were married I gave him money. I inherited money. I worked very hard. I had to account for every penny I spent. We made money on the houses we bought. I supported the whole thing,” she says. “I don’t hold a grudge against either of them, but there are two sides to every story.”

O’Brien’s thinking dovetails with the argument most popular among defenders of the existing alimony system, who hold that the payments are just part of the standard division of assets that comes with a divorce. “The expectation is that the product of the marriage would be divided about equally,” says Ginsburg, the retired Middlesex judge. But in

practice it’s rarely that simple. Retirement assets can’t be tapped until retirement age. The marital home is illiquid (or today, underwater) and throws off no income. “So what is the major asset that most people accumulate during a marriage?” says Ginsburg. “It’s earning capacity. That’s the major asset.” Never mind that the Internal Revenue Service doesn’t categorize things that way. If you want to treat ex-spouses equitably, the thinking goes, factoring in salary-earning potential has to be in-bounds.

Preserving that option is crucial to state Senator Cynthia Stone Creem, cochair of the judiciary committee—and, as such, the person in position to stop Massachusetts Alimony Reform’s efforts in their tracks. Her view is that any changes to the current statute should be limited to allowing for finite alimony, and nothing more. Off the Hill, Creem is a family lawyer who argues alimony cases, and she sees marriages as partnerships, ones that ought to compensate dependent spouses for making their exes the successes they are. “But for their spouses, they wouldn’t be where they are today,” she says. “They brought up their children or helped with their businesses or entertained their associates.” Creem is opposed to Hitner’s legislation, and, as judiciary cochair, has the power to kill it before the full Senate and House get a chance to vote. “It’s unfair to make it so difficult to get support,” says Creem. “This bill, it’s set up by people who basically want to eliminate alimony.”

Hitner denies that’s his goal. He thinks there’s a place for alimony, even in perpetuity, if a recipient is physically or emotionally unable to work. Which is indeed the reality for many women who were married in a different era—no one can fairly expect a newly single 60-year-old whose career was homemaker to readily support herself on her own.

The problem is that the Massachusetts system treats all dependent spouses as if they fall into that category, ignoring that these days, and especially in this state—where nearly two-thirds of families with children are dual-income—that’s rarely true. And so alimony is routinely awarded to women (and some men) who are fully capable of supporting themselves.

Defined the way it is now, the purpose of alimony in Massachusetts is not to help the recipient *survive*, but instead to maintain the lifestyle he or she had before the divorce. This is why exes like

Carneice Pierce, who has proven she is more than capable of making over \$90,000 a year in income, can still claim “need.” She in fact does need that \$42,000 in alimony to maintain the upper-class habits she had when married. Massachusetts law says it is her right to expect it, and her former husband’s duty to provide it.

That makes the state’s alimony system one that not only punishes some men, but also takes a dim view of the women it’s supposed to help, enshrining biases that treat them as if it’s the 1950s and women are uneducated, unemployable traditional mother/homemakers who shouldn’t be stripped of the lifestyle to which they’ve grown accustomed. Actually, Ira Mark Ellman, a professor at Arizona State University’s law school and author of the American Law Institute’s recommendations on family law and alimony, would go further than that, having looked at our setup. “It’s like a leftover from the old gender-based laws, ‘women can’t work, we can’t put that obligation on them,’” he says. “It’s right out of 1850.”

THE DAY AFTER HITNER’S HEARING in family court, he calls with news. Joan has signed an agreement that gives him back his stock in exchange for a cut of the profits of any eventual sale of the business. It also lowers his alimony payments by the amount Joan gets in Social Security, and eliminates them completely when he turns 65. For the first time since he and Joan separated in 1996, Hitner says, “it feels like there is a light at the end of the tunnel. I am free, or I will be soon.” It is fitting that after a decade, hundreds of thousands of dollars in legal bills, and weeks in front of judges, it was a private agreement, and not the court system, that put an end to the couple’s drama.

Hitner says he’s now more committed than ever to see that change comes for those still stuck in Massachusetts alimony hell. “I’m going to spend all the time I used to spend working on my own case working on getting reform passed. I write that last check on January 28, 2013. After that I can keep whatever I make. My life will be my own again.”

KRIS FRIESWICK is a freelance writer living in the South End.