

**SENATE . . . . . No. 01862**

---

The Commonwealth of Massachusetts

\_\_\_\_\_  
PRESENTED BY:

*Cynthia S. Creem*

\_\_\_\_\_

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act to improve the spousal elective share.

\_\_\_\_\_  
PETITION OF:

NAME:

*Cynthia S. Creem*

DISTRICT/ADDRESS:

*First Middlesex and Norfolk*

# SENATE . . . . . No. 01862

By Ms. Creem, petition (accompanied by bill, Senate, No. 1862) of Creem for legislation to improve the spousal elective share [Joint Committee on the Judiciary].

[SIMILAR MATTER FILED IN PREVIOUS SESSION  
SEE  
□ SENATE  
□ , NO. 1653 OF 2009-2010.]

## The Commonwealth of Massachusetts

\_\_\_\_\_  
**In the Year Two Thousand Eleven**  
\_\_\_\_\_

An Act to improve the spousal elective share.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Section 15 of Chapter 191 of the general laws, as appearing in the 2006  
2 Official Edition, is hereby amended by inserting in place thereof the following: -“DEFINITIONS.  
3 When used in this section the following words or terms shall have, unless the context clearly  
4 indicates otherwise, the following meaning:

5 (a) “Beneficiary” – a beneficiary of the decedent’s probate estate or of a trust holding  
6 property included in the elective estate, including a nominee or realty trust.

7 (b) “Decedent’s nonprobate transfer to others” – the types of transfers specifically  
8 included in the elective estate under paragraphs (c)(2) and (3) of this section.

9 (c) “Elective estate” – all property, whether real or personal, movable or immovable,  
10 tangible or intangible, wherever situated, that constitutes the decedent’s net probate estate, the  
11 decedent’s nonprobate transfers to others, and the decedent’s nonprobate transfers to the  
12 surviving spouse, reduced by all property excluded from the elective estate, determined as  
13 follows:

14 (1) The decedent’s net probate estate is the decedent’s probate estate  
15 reduced by funeral and administration expenses, homestead allowance, family allowances,  
16 exempt property, and enforceable claims.

17 (2) The decedent’s nonprobate transfers to others include any of the  
18 following types to persons or entities other than the surviving spouse, in the amount provided  
19 respectively for each type of transfer:

20 (i) Property owned or owned in substance by the decedent  
21 immediately before death that passed outside probate at the decedent’s death, including:

22 (aa) Property over which the decedent alone,  
23 immediately before death, held a presently exercisable general power of appointment. The  
24 amount included is the value of the property subject to the power, to the extent the property  
25 passed at the decedent’s death, by exercise, release, lapse, in default, or otherwise, to or for the  
26 benefit of any person other than the decedent’s estate or surviving spouse.

27 (bb) The decedent’s fractional interest in property held  
28 by the decedent in joint tenancy with the right of survivorship. The amount included is the value  
29 of the decedent’s fractional interest, to the extent the fractional interest passed by right of

30 survivorship at the decedent's death to a surviving joint tenant other than the decedent's  
31 surviving spouse.

32 (cc) The decedent's ownership interest in property or  
33 accounts held in pay-on-death form, transfer-on-death form, or co-ownership registration with  
34 the right of survivorship. The amount included is the value of the decedent's ownership interest,  
35 to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit  
36 of any person other than the decedent's estate or surviving spouse.

37 (dd) Insurance on the decedent's life as to which the  
38 decedent, either alone or in conjunction with any other person, owned any of the economic  
39 benefits of the policy, including the power to change the beneficiary, to surrender or cancel the  
40 policy, to assign the policy, to revoke an assignment, to pledge the policy for a loan, or to obtain  
41 from the insurer a loan against the surrender value of the policy, or owned a reversionary interest  
42 in the policy or its proceeds, whether arising by the express terms of the policy or other  
43 instrument or by operation of law, but only if the value of the reversionary interest immediately  
44 before the death of the decedent exceeded five percent of the value of the policy. The amount  
45 included is the value of the proceeds, to the extent they were payable at the decedent's death to  
46 or for the benefit of any person other than the decedent's estate or surviving spouse.

47 (ii) Property transferred in any of the following forms by the  
48 decedent during marriage:

49 (aa) Any irrevocable transfer in which the decedent  
50 retained the right to the possession or enjoyment of, or to the income from, the property if and to  
51 the extent the decedent's right terminated at or continued beyond the decedent's death. The

52 amount included is the value of the fraction of the property to which the decedent's right related,  
53 to the extent the fraction of the property passed outside probate to or for the benefit of any person  
54 other than the decedent's estate or surviving spouse.

55 (bb) Any transfer in which the decedent created a  
56 power over income or property, exercisable by the decedent alone or in conjunction with any  
57 other person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors  
58 of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included  
59 with respect to a power over property is the value of the property subject to the power, and the  
60 amount included with respect to a power over income is the value of the property that produces  
61 or produced the income, to the extent the power in either case was exercisable At the decedent's  
62 death to or for the benefit of any person other than the decedent's surviving spouse or the extent  
63 the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise,  
64 to or for the benefit of any person other than the decedent's estate or surviving spouse. If the  
65 power is a power over both income and property and the preceding sentence produces different  
66 amounts, the amount included is the greater amount.

67 (iii) Property that passed during marriage and during the one year  
68 period next preceding the decedent's death as a result of a transfer by the decedent for less than  
69 full and adequate consideration if the transfer was of any of the following types:

70 (aa) Any property that passed as a result of the  
71 termination of a right or interest in, or power over, property that would have been included in the  
72 elective estate under paragraph (2)(i)(aa), (bb), or (cc), or paragraph (2)(ii), of this section 1(c) if  
73 the right, interest, or power had not terminated until the decedent's death. The amount included

74 is the value of the property that would have been included under those paragraphs if the property  
75 were valued at the time the right, interest, or power terminated, and is included only to the extent  
76 the property passed upon termination to or for the benefit of any person other than the decedent  
77 or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph  
78 "termination", with respect to a right or interest in property, occurs when the right or interest  
79 terminated by the terms of the governing instrument or the decedent transferred or relinquished  
80 the right or interest, and, with respect to a power over property, occurs when the power  
81 terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power  
82 described in paragraph (2)(i)(aa), "termination" occurs when the power terminated by exercise or  
83 release, but not otherwise.

84 (bb) Any transfer of or relating to an insurance policy  
85 on the life of the decedent if the proceeds would have been included in the elective estate under  
86 paragraph (2)(i)(dd) of this section 1(c) had the transfer not occurred. The amount included is the  
87 value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to  
88 or for the benefit of any person other than the decedent's estate or surviving spouse.

89 (cc) Any transfer of property, to the extent not  
90 otherwise included in the elective estate, made to or for the benefit of a person other than the  
91 decedent's surviving spouse. The amount included is the value of the transferred property to the  
92 extent the aggregate transfers to any one donee in any calendar year falling within the one year  
93 period exceeded \$10,000.

94 (3) The decedent's nonprobate transfers to the surviving spouse consist of  
95 all property that passed outside probate from the decedent to the surviving spouse at the

96 decedent's death or by reason of the decedent's death, excluding property passing to the surviving  
97 spouse under the federal social security system. The decedent's nonprobate transfers to the  
98 surviving spouse include any of the following types of transfers, in the amount provided  
99 respectively for each type of transfer:

100 (i) the decedent's fractional interest in property held as a joint  
101 tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to  
102 the surviving spouse as surviving joint tenant;

103 (ii) the decedent's ownership interest in property or accounts held  
104 in co-ownership registration with the right of survivorship, to the extent the decedent's ownership  
105 interest passed to the surviving spouse as surviving co-owner; and

106 (iii) all other property that would have been included in the  
107 elective estate under paragraphs (2)(i) or (ii) of this section 1(c) had it passed to or for the benefit  
108 of a person other than the surviving spouse, the decedent, or the decedent's creditors, estate, or  
109 estate creditors.

110 (4) The value of property included in the elective estate is reduced in each  
111 category by enforceable claims against the included property.

112 (5) In case of overlapping application to the same property of the  
113 paragraphs or subparagraphs of this section including property in the elective estate, the property  
114 is included in the elective estate under the provision yielding the greatest value, and under only  
115 one overlapping provision if they all yield the same value.

116 (6) The following types of property are excluded from the elective estate:

117 (i) Any of the decedent's nonprobate transfers to others to the  
118 extent the decedent received adequate and full consideration in money or money's worth for the  
119 transfer.

120 (ii) Any property (or any interest in property) as to which the  
121 surviving spouse has relinquished his or her right of election pursuant to a written instrument  
122 complying with the provisions of section 10 of this chapter.

123 (iii) Interests in community property arising under the  
124 community property laws of other states.

125 (iv) Any interest in the decedent's principal residence when such  
126 interest was conveyed by the decedent to or for the benefit of any one or more of the issue of the  
127 surviving spouse at a time when the surviving spouse was incapacitated as defined in section 3 of  
128 this chapter.

129 (v) Any property held in trust for the benefit of a disabled child  
130 or grandchild of the surviving spouse.

131 (vi) The decedent's nonprobate transfers to others as defined in  
132 paragraph (2) of this section I (c) that were irrevocable before the enactment date of this chapter.

133 (7) For purposes of this chapter, all property included in the elective estate  
134 shall be valued at its fair market value as of the date of the decedent's death, except that property  
135 included in the elective state under paragraph (2)(iii)(cc) of this section I(c) shall be valued at its  
136 fair market value as of the date of the transfer.



137 (d) "Fractional interest in property held in joint tenancy with the right of survivorship"  
138 whether the fractional interest is unilaterally severable or not, the fraction, the numerator of  
139 which is one and the denominator of which, if the decedent was a joint tenant, is one plus the  
140 number of joint tenants who survive the decedent and which, if the decedent was not a joint  
141 tenant, is the number of joint tenants.

142 (e) "Fraudulent transfer"- any payment of money, assignment, release, transfer,  
143 mortgage or pledge of, or the creation of a lien or encumbrance upon, an asset included in the  
144 elective estate that is fraudulent under chapter 109A as to the surviving spouse as a creditor by  
145 virtue of this chapter. For purposes of determining whether the person making the transfer or  
146 entering into the obligation is or will be thereby rendered insolvent, the transfer shall be deemed  
147 to have been made or the obligation shall be deemed to have been entered into at the time such  
148 person's debt to the surviving spouse is determined by the court under section 7 of this chapter.

149 (f) "Governing instrument"- a deed; a will; a trust; an insurance or annuity policy; a  
150 pension, profit-sharing, retirement, or similar benefit plan; a contract governing a certificate of  
151 deposit or checking, savings, mutual fund, money market, brokerage, custody, agency, or any  
152 other financial or depository account; or a security registered with a designated recipient to take  
153 upon the death of the owner.

154 (g) "Marriage"- with respect to a transfer by the decedent during marriage, any  
155 marriage of the decedent to the decedent's surviving spouse.

156 (h) "Nonadverse party"- a person who does not have a substantial beneficial interest in  
157 the trust or other property arrangement that would be adversely affected by the exercise or  
158 nonexercise of the power that he or she possesses respecting the trust or other property

159 arrangement. A person having a general power of appointment over property is deemed to have a  
160 beneficial interest in the property.

161 (i) "Original recipient"- a person or entity other than a payor that has received or has  
162 the right to receive property included in the elective estate:

163 (1) from the decedent by lifetime transfer;

164 (2) as a personal representative or trustee, including a trustee of a nominee  
165 or realty trust; or

166 (3) from a payor or by operation of law by reason of the decedent's death.

167 (j) "Payor"- an insurer, business entity, employer, government, governmental agency  
168 or subdivision, or any other person obligated by law or a governing instrument to make  
169 payments, excluding a personal representative or a trustee of property included in the elective  
170 estate.

171 (k) "Personal representative"- the executor, administrator, administrator with the will  
172 annexed, special administrator, temporary executor, temporary administrator with the will  
173 annexed, or administrator de bonis non of the decedent's estate in Massachusetts, or if none, any  
174 person in actual or constructive possession of any property included in the elective estate.

175 (l) "Power" or "power of appointment"- includes a power to designate the beneficiary  
176 of a beneficiary designation.

177 (m) "Presently exercisable general power of appointment" a power of appointment  
178 under which, at the time in question, the decedent, whether or not he or she then had the capacity  
179 to exercise the power, held a power to create a present or future interest in himself or herself, his

180 or her creditors, his or her estate, or creditors of his or her estate, including a power to revoke or  
181 invade the principal of a trust or other property arrangement.

182 (n) "Probate estate"- property that would pass by intestate succession if the decedent  
183 dies without a valid will.

184 (o) "Property"- includes values subject to a beneficiary designation.

185 (p) "Right to income"- includes a right to payments under a commercial or private  
186 annuity, an annuity trust, a unitrust, or a similar arrangement.

187 (q) "Surviving spouse"- a person who was married to the decedent at the time of the  
188 decedent's death.

189 (r) "Third party"- a person or entity other than the decedent and the surviving spouse.

190 (s) "Transfer"- as it relates to a transfer by or of the decedent, includes (1) an exercise  
191 or release of a presently exercisable general power of appointment held by the decedent, (2) a  
192 lapse at death of a presently exercisable general power of appointment held by the decedent, and  
193 (3) an exercise, release, or lapse of a general power of appointment that the decedent created in  
194 himself or herself and of a power described in paragraph (c)(2)(ii)(bb) that the decedent  
195 conferred on a nonadverse party.

## 196 SECTION 2. ELECTIVE SHARE AMOUNT.

197 (a) The surviving spouse of a decedent who after the effective date of this chapter dies  
198 domiciled in Massachusetts may elect, under the limitations and conditions stated in this chapter,  
199 to take outright an elective share amount equal to the greater of (i) fifty thousand dollars

200 (\$50,000) or (11) the value of the elective share percentage of the elective estate, in accordance  
201 with the following schedule:

202 If the duration of the marriage between the decedent and the surviving spouse was:

203 The Elective share percentage shall be:

204 Shorter than 5 years

205 15% of the elective estate

206 5 years or longer, but shorter than 10 years

207 25% of the elective estate

208 10 years or longer but shorter than 15 years

209 35% of the elective estate

210 15 years or longer

211 40 % of the elective share

212 (b) If the elective share amount provided under paragraph (a) of this section exceeds a  
213 maximum equal to one half the sum of (i) the value of the elective estate of the decedent and (ii)  
214 the value of the elective estate of the surviving spouse determined and valued as if he or she had  
215 died simultaneously with the decedent, the elective share amount shall be reduced to said  
216 maximum, except when an election under paragraph (c) of this section has been made.

217 (c) If at the date of the decedent's death, divorce proceedings between the decedent  
218 and the surviving spouse were pending and the parties had executed a written property settlement

219 or the court had entered judgment dividing their property which had not yet become final, the  
220 surviving spouse may elect to take under such settlement or judgment, and the rights of the  
221 surviving spouse thereunder shall become the elective share amount for purposes of this chapter.

222 (d) The surviving spouse's homestead allowance, exempt property, and family  
223 allowance, if any, shall not be charged against but shall be in addition to the elective share  
224 amount, except when an election under paragraph (c) of this section has been made.

225 (e) No federal or state estate, inheritance, generation skipping, or other taxes arising as  
226 a result of the decedent's death shall be allocated to or chargeable against the elective share  
227 amount.

### 228 SECTION 3. ELECTION PERSONAL TO SURVIVING SPOUSE.

229 (a) Surviving spouse must be living at time of election. The election provided by this  
230 chapter is personal to the surviving spouse, may not be reached by creditors or sold, assigned, or  
231 transferred in any manner, other than a relinquishment as provided in section two of this chapter,  
232 and may only be made during the lifetime of the surviving spouse. In the case of an incapacitated  
233 surviving spouse or a surviving spouse under conservatorship, the election may be made only by  
234 the duly appointed conservator or guardian of the surviving spouse based upon a substituted  
235 judgment standard.

236 No surviving spouse, or the conservator or guardian of said surviving spouse shall be compelled  
237 to make an election under this chapter nor penalized, disadvantaged, or discriminated against by  
238 virtue of the relinquishment of or failure to make an election under this chapter. Relinquishment  
239 of election or failure to make an election shall not affect the eligibility of the surviving spouse  
240 for benefits or assistance under any governmental program.

241 (b) Incapacitated or Institutionalized Surviving Spouse. If the election is exercised by  
242 or on behalf of a surviving spouse who is incapacitated or institutionalized, determined as of the  
243 date of the election, that portion of the elective share amounts due under this chapter must be  
244 placed in a custodial trust for the benefit of the surviving spouse under the provisions of chapter  
245 two hundred and three B, except as modified below. For purposes of the custodial trust  
246 established by this subsection, (i) the electing guardian or conservator is the custodial trustee,  
247 provided however that if this election is being made by an institutionalized surviving spouse who  
248 is not incapacitated, the duly appointed fiduciary of the deceased spouse's estate shall be the  
249 custodial trustee (or such other suitable trustee as may be appointed by the probate court) (ii) the  
250 surviving spouse is the beneficiary, and (iii) the custodial trust is deemed to be a trust created by  
251 the will of the decedent spouse.

252 (c) Custodial Trust. For the purposes of subsection (b) of this section chapter two  
253 hundred and three B shall be applied as if section six (b) thereof were repealed and sections two  
254 (e), nine (b), and seventeen (a) were amended to read as follows:

255 (1) Neither an incapacitated nor institutionalized beneficiary nor anyone  
256 acting on behalf of an incapacitated or institutionalized beneficiary has a power to terminate the  
257 custodial trust; but if the beneficiary regains capacity and is not institutionalized, the beneficiary  
258 then acquires the power to terminate the custodial trust by delivering to the custodial trustee a  
259 writing signed by the beneficiary declaring the termination. If not previously terminated, the  
260 custodial trust terminates on the death of the beneficiary.

261 (2) If the beneficiary is incapacitated or institutionalized, the custodial  
262 trustee shall expend so much or all of the custodial trust property as the custodial trustee

263 considers advisable for the use and benefit of the beneficiary and individuals who were  
264 supported by the beneficiary when the beneficiary became incapacitated or institutionalized, or  
265 who are legally entitled to support by the beneficiary. Expenditures may be made in the manner,  
266 when and to the extent that the custodial trustee determines suitable and proper, without court  
267 order but with regard to other support, income, and  
  
268 property of the beneficiary and benefits of medical or other forms of assistance from any state or  
269 federal government or governmental agency for which the beneficiary must qualify on the basis  
270 of need.

271 (3) Upon the beneficiary's death, the custodial trustee shall transfer the  
272 unexpended custodial trust property in the following order: (i) to or as directed by the person  
273 who would have taken under the disposition originally made by the beneficiary's predeceased  
274 spouse against whom the elective share was taken or (ii) under the residuary clause, if any, of the  
275 will of the beneficiary's predeceased spouse against whom the elective share was taken, as if that  
276 predeceased spouse died immediately after the beneficiary; or (iii) to that predeceased spouse's  
277 heirs.

278 As used in this section, the term "incapacitated" shall mean lacking sufficient  
279 soundness of mind to (i) understand correctly the nature and situation of the individual's  
280 property, properly care for such property, and make informed decisions regarding such property,  
281 (ii) understand the nature of the act the individual is committing when the individual enters into  
282 or terminates a legal relationship with another person, and (iii) think and act on the individual's  
283 own behalf as to matters concerning the individual's personal health, safety, and general welfare.  
284 An individual having a duly appointed guardian shall be presumed to be incapacitated.

285           As used in this section, the term "institutionalized" shall mean being an inpatient in a  
286 nursing facility, being an inpatient in a medical institution and receiving the level of care that  
287 would be provided in a nursing facility, being an inpatient in an intermediate care facility for the  
288 mentally retarded, or requiring the level of care that would be provided in a hospital, nursing  
289 facility, or intermediate care facility for the mentally retarded but for the provision of home or  
290 community-based services.

291           Any dispute regarding whether a surviving spouse is incapacitated or institutionalized  
292 as defined in this section shall be resolved by the probate court.

293           SECTION 4. PARTIAL ELECTION. A surviving spouse may elect less than all  
294 of his or her elective share amount. To make a partial election, the surviving spouse shall  
295 indicate on his or her petition for an elective share that he or she is making a partial election and  
296 the percentage of the elective share amount elected.

297           SECTION 5. NOTICE TO SURVIVING SPOUSE.

298           (a) On or before the day the personal representative of the decedent's estate files his or  
299 her petition for appointment, the personal representative shall send by certified mail or delivery  
300 to the decedent's surviving spouse at his or her current address, or if the current address of the  
301 surviving spouse is not known to the surviving spouse's last known address, a written notice that  
302 the surviving spouse may have a right to elect a share of the decedent's estate under chapter 191C  
303 and that the surviving spouse has a right to retain a lawyer to represent him or her in connection  
304 with electing under this chapter. The notice shall further inform the surviving spouse of his or  
305 her right to written disclosure of a description of the assets and the estimated values of the assets  
306 included in the decedent's elective estate as provided in section 6 of this chapter, and shall inform



307 the surviving spouse of the date by which the surviving spouse must elect as provided in section  
308 7 of this chapter.

309 (b) The personal representative shall attach to such notice a copy of chapter 191C.  
310 Every petition for probate of a decedent's will or for administration of a decedent's estate  
311 indicating that the decedent left a surviving spouse shall include a sworn statement that the  
312 notice to the surviving spouse required by this section has been sent by certified mail or delivery.  
313 Any personal representative of the decedent's estate may give such notice at any time prior to  
314 commencement of a probate proceeding, if any.

315 SECTION 6. DISCLOSURE TO SURVIVING SPOUSE.

316 (a) No later than one month after the surviving spouse's written request for disclosure  
317 from the personal representative, the personal representative shall, by certified mail or delivery,  
318 provide to the surviving spouse the following written information:

319 (i) a list of the assets and interests included in the elective estate, with each  
320 asset or interest identified with particularity;

321 (ii) an estimate of the fair market value of each listed asset, as of the  
322 valuation date set forth in section 1; and

323 (iii) the information relied upon in making each estimate.

324 (b) No later than one month after the surviving spouse's written request for disclosure  
325 from a person or entity holding property included in the elective estate, the person or entity  
326 holding such property shall, by certified mail or delivery, provide to the surviving spouse the  
327 following written information:

328 (i) a list of the assets and interests included in the elective estate and held  
329 by that person or entity, with each asset or interest identified with particularity;

330 (ii) an estimate of the fair market value of each listed asset, as of the  
331 valuation date set forth in section 1; and

332 (iii) the information relied upon in making the estimate.

333 (c) If a federal estate tax return or any state estate or inheritance tax returns are  
334 required under the applicable tax laws, then upon written request of the surviving spouse the  
335 personal representative shall provide to the surviving spouse copies of all such tax returns within  
336 one month after filing such returns with the Internal Revenue Service or state taxing authority.

337 (d) In every case where a petition for an elective share has been timely filed, the  
338 personal representative shall provide in writing to the surviving spouse the information normally  
339 required by a federal estate tax return regarding the assets and the values of the assets included in  
340 the decedent's estate, by the later of (i) the due date for filing the federal estate tax return as  
341 extended, if an estate tax return is required to be filed, or (ii) three months after the filing of the  
342 petition for the elective share.

343 (e) In the event that any person or entity shall fail to comply with the provisions of this  
344 section six within the time specified, that person or entity shall be liable to the surviving spouse  
345 for the costs and fees reasonably incurred by the surviving spouse to secure such compliance,  
346 unless the court finds that the delay or noncompliance was due to excusable neglect.

347 SECTION 7. PROCEEDING FOR ELECTIVE SHARE; TIME LIMIT.

348           (a) The election shall be made by filing a petition for the elective share in the court  
349 having jurisdiction of the probate proceedings relating to the decedent's estate, or if no  
350 proceedings have been commenced, in the court having jurisdiction of probate proceedings in the  
351 county where the decedent was last domiciled, not later than the expiration of the earlier of (1)  
352 six months after the surviving spouse receives notice in accordance with section 5 or (ii) one year  
353 after the decedent's date of death. A copy of the petition or the elective share shall be mailed or  
354 delivered to the personal representative (if any) at the time the petition is filed.

355           (b) After notice and hearing, the court shall determine the elective share amount and  
356 shall enter judgment ordering its payment as appears appropriate under section 9. In such  
357 judgment, the court shall fix the liability of each person or entity required to make contribution  
358 toward satisfaction of the elective share amount under section 9.

359           (c) A judgment of the probate court entered under this chapter shall be enforceable in  
360 other courts of this state or in other Jurisdictions.

361           (d) A surviving spouse may withdraw or amend the petition for an elective share at  
362 any time before entry of a final determination by the court.

363           (e) If the supreme judicial court, upon a complaint filed by a surviving spouse whose  
364 petition for the elective share shall not have been filed within the time limit prescribed in subpart  
365 (a) of this section 7, deems that justice and equity require it and that such surviving spouse is not  
366 chargeable with culpable neglect in not filing said petition within the prescribed time limits, it  
367 may determine the elective share amount and enter  
368 judgment ordering its payment as appears appropriate under section 9; provided, however,  
369 forthwith upon the filing of said complaint a notice thereof (in the nature of a lis pendens) shall

370 have been filed in the registry of probate where probate proceedings are pending, or, if none,  
371 where the decedent was domiciled at the date of death, provided further that such judgment shall  
372 not affect any payment or distribution made before the filing of such complaint and notice.

373 SECTION 8. EFFECT OF ELECTION.

374 (a) If the right of election is exercised by or on behalf of the surviving spouse, the  
375 surviving spouse's homestead allowance under chapter 188 right to occupy the decedent's house  
376 under section 1 of chapter 196, and allowance for necessities under section 2 of chapter 196, if  
377 any, are not charged against but are in addition to the elective share amount.

378 (b) After the right of election has been exercised by or on behalf of the surviving  
379 spouse and the elective share amount has been satisfied, all property or interests in property  
380 remaining in the elective estate shall pass to the decedent's beneficiaries other than the Surviving  
381 spouse, as if the surviving spouse had predeceased the decedent.

382 SECTION 9. SATISFYING ELECTIVE-SHARE AMOUNT.

383 (a) Unless the decedent provides otherwise by will, or unless otherwise provided in  
384 section 12 below, or unless the probate court orders otherwise as justice and equity may require,  
385 in a proceeding for an elective share, property or interests in property included in the elective  
386 estate shall be applied to satisfy the elective share amount in the following order:

387 (1) Outright Transfers to Surviving Spouse

388 (A) property or interests in property which were transferred  
389 outright to the surviving spouse by the decedent within one year of the decedent's death valued  
390 as of the date of transfer;

391 (B) property or interests in property which pass or have passed  
392 outright to the surviving spouse by testate or intestate succession, or which would have so passed  
393 to the surviving spouse but for the filing of the petition for an elective share by or on behalf of  
394 the surviving spouse;

395 (C) property or interests in property which pass or have passed  
396 outright to the surviving spouse otherwise than by testate or intestate succession but by reason of  
397 the decedent's death, including the decedent's interest in joint property in which the surviving  
398 spouse held a right of survivorship, or which would have so passed to the surviving spouse but  
399 for the filing of the petition for an elective share by or on behalf of the  
400 surviving spouse;

401 (D) property or interests in property which would have passed  
402 outright to the surviving spouse by reason of the decedent's death but were disclaimed.

403 (2) Trusts for Surviving Spouse. If after the application of subsection (1)  
404 the elective share amount is not fully satisfied, property or interests in property included in the  
405 elective estate which pass or have passed in trust to the surviving spouse, or which would have  
406 so passed to the surviving spouse but for the filing of the petition for an elective share by or on  
407 behalf of the surviving spouse, shall be applied to satisfy the elective share amount in the  
408 following order:

409 (A) trusts of which the decedent was a donor and (1) the assets of  
410 which may be reached by the surviving spouse acting alone through the exercise of a power of  
411 appointment either during life or by will, or (ii) the assets of which are to be paid to the surviving  
412 spouse's estate;

413 (B) trusts of which the decedent was a donor and the surviving  
414 spouse is named as the sole beneficiary during the surviving spouse's lifetime.

415 For purposes of this subsection (2), the term "trust" shall include any interest in property  
416 measured by a period of time, including, for example, a life

417 (3) Other Transfers by Decedent. If after the application of subsections (1)  
418 and (2) the elective share amount is not fully satisfied, property or interests in property included  
419 in the elective estate, but not including any gifts made within one year of death, shall be applied  
420 to satisfy the elective share amount in the following order:

421 (A) trusts of which the decedent was a donor and which have  
422 more than one beneficiary including the surviving spouse during the surviving spouse's lifetime;

423 (B) property or interests in property which pass or have passed to  
424 beneficiaries or recipients other than the surviving spouse outright by testate or intestate  
425 succession or otherwise by reason of the decedent's death, including the decedent's interest in  
426 joint property with right of survivorship, or in any trust of which the decedent is or was a donor  
427 and of which the surviving spouse is not a beneficiary.

428 (4) Power of Appointment Property. If after the application of subsections  
429 (1), (2) and (3) the elective share amount is not fully satisfied, amounts included in the elective  
430 estate as defined in section 1 (c) of this chapter because the decedent possessed one or more  
431 powers of appointment shall be applied to satisfy the elective share amount. Said powers of  
432 appointment shall be deemed exercised to the extent necessary to give effect to this subsection.

433 (5) Gifts Made Within One Year of Death. If after the application of  
434 subsections (1), (2), (3) and (4) the elective share amount is not fully satisfied, amounts included  
435 in the elective estate which have passed to recipients other than the surviving spouse because of  
436 any gifts made within one year of death shall be applied to satisfy the elective share amount.

437 (b) Pro-rata Apportionment; Valuation. If the elective share amount will be fully  
438 satisfied by application of less than all assets within any one category set out in the foregoing  
439 subsection (a), a portion of each asset within the category shall be allocated in satisfaction of the  
440 elective share amount to be determined by a fraction, the numerator of which is the value of the  
441 asset and the denominator of which is the value of all assets within the category. The amount so  
442 allocated shall not be apportioned between temporary and remainder estates.

443 Assets distributed in kind shall be valued at the date of distribution, which date shall be set by  
444 agreement of the interested parties or, in the absence of such agreement, by order of the probate  
445 court.

446 (c) Interest. Each payment of cash in satisfaction of the elective share amount shall  
447 bear interest from the date of the decedent's death, at the rate provided for pecuniary legacies  
448 under section 20 of chapter 197 as it may be from time to time amended, or any successor  
449 section. Each distribution in kind in satisfaction of the elective share amount shall carry with it  
450 the right of the surviving spouse to receive from the distributing party all income (if any)  
451 attributable to the distributed asset or assets between the date of valuation set forth in section 1  
452 and the date of distribution.

453 (d) Liability of Original Recipients and Beneficiaries. An original recipient or a  
454 beneficiary other than the surviving spouse is liable to make contribution toward satisfaction of

455 the elective share amount in accordance with the provisions of the foregoing subsections (a)  
456 through (c) inclusive. A person liable to make contribution may choose to give up such property  
457 (or a proportional part thereof, as the case may be) or to pay the value of the amount for which  
458 the person is liable. No original recipient who shall conform to the standard of a Massachusetts  
459 executor or administrator with respect to the care and management of assets included in the  
460 elective estate, or who shall hold all such assets in the form in which such original recipient  
461 received them, shall be liable to the surviving spouse in an amount greater than the sum of (1)  
462 the value of the elective estate assets received by such original recipient, determined as of the  
463 date of distribution or payment to the surviving spouse in satisfaction of such liability, and (2)  
464 any interest or income due under subsection (c). No beneficiary shall be liable to the surviving  
465 spouse in an amount greater than the sum of (1) the value of such beneficiary's share of the  
466 elective estate at the date of distribution or payment to the surviving spouse in satisfaction of  
467 such liability, and (2) any interest or income due under subsection (c).

468           (e) Protection of Subsequent Transferees. A person other than an original recipient, a  
469 beneficiary, or a payor who, whether for value or as a gift, receives an asset included in the  
470 elective estate shall be neither obligated under this chapter to return the asset or any portion  
471 thereof nor liable under this chapter for the value of the asset or any portion thereof, regardless of  
472 whether at the time such asset was received such person had  
473 notice of the surviving spouse's intention to file a petition for the elective share or notice that a  
474 petition for the elective share had been filed, unless the transfer to such person was a fraudulent  
475 transfer as to the surviving spouse.



476 (f) Nonexistence of Liens or Encumbrances. The elective share rights of a surviving  
477 spouse under this chapter shall not be construed as imposing a lien or other encumbrance on any  
478 personal property included in the elective estate. Nothing in this chapter shall preclude the court  
479 from allowing attachments, trustee process or entering case-specific orders for equitable relief in  
480 a proceeding for elective share pursuant to section 7 hereof.

481 SECTION 10. RELINQUISHMENT OF RIGHT TO ELECT.

482 (a) The right of election may be relinquished by agreement as to the entire elective  
483 estate or a portion thereof. A relinquishment by agreement is valid if all of the following  
484 conditions are met:

485 (i) the agreement is in writing;

486 (ii) the agreement is signed by both spouses;

487 (iii) the agreement specifically refers to the right of election;

488 (iv) the surviving spouse is provided full disclosure of the decedent's assets  
489 and liabilities as of the date of execution; and

490 (v) the agreement is fair and reasonable as of the date of execution.

491 (b) The right of election may be relinquished as to any particular asset or assets if all  
492 of the following conditions are met:

493 (i) the relinquishment is in writing and specifically refers to the right of  
494 election under this chapter;

495 (ii) the relinquishment identifies the asset or assets to which it pertains with  
496 reasonable particularity; and

497 (iii) the relinquishment is signed by the surviving spouse and acknowledged  
498 before a notary public.

499 (c) The provisions of the foregoing section (b) to the contrary notwithstanding, the  
500 signature of the surviving spouse to a written consent to the designation of a beneficiary other  
501 than the surviving spouse to receive benefits other than a plan intended to be qualified under  
502 section 401 of the Internal Revenue Code, or an employee pension plan subject to the provisions  
503 of the Employee Retirement Income Security Act of 1974, as amended, provided such consent  
504 satisfies the requirements of section 417 of the Internal Revenue Code or section 205 of said Act,  
505 as applicable, shall be deemed a valid relinquishment of the right of election as to said benefits.

506 (d) A relinquishment meeting the requirements of this section shall be valid regardless  
507 of surviving spouse before or during the marriage.

#### 508 SECTION 11. PROTECTION OF PAYORS.

509 (a) A payor is not liable for having made a payment or transferred an item of property  
510 or other benefit included in the decedent's elective estate to a beneficiary designated, in a  
511 governing instrument, or for having taken any other action in good faith reliance on the validity  
512 of a governing instrument, upon request and satisfactory proof of the decedent's death, before the  
513 surviving spouse, or the surviving spouse's representative has given written notice to the payor,  
514 or agent of the payor, by mail or delivery, that (i) the surviving spouse intends to file a petition  
515 for an elective share, or (ii) a petition for an elective share has been filed.

516 (b) A payor is liable for payments made or other actions taken after the surviving  
517 spouse or the surviving spouse's representative has given written notice to the payor, or agent of  
518 the payor, by mail or special delivery, that (i) the surviving spouse intends to file a petition for an  
519 elective share, or (ii) a petition for an elective share has been filed.

520 (c) Upon receipt of written notice of intention to file a petition for an elective share or  
521 written notice that a petition for an elective share has been filed, a payor may pay any amount  
522 owed, or transfer or deposit any item of property held by it, to or with the court having  
523 jurisdiction of the probate proceedings relating to the decedent's death, or, if no proceedings have  
524 been commenced and said court cannot be identified, to or with the court having jurisdiction of  
525 probate proceedings relating to decedents' estates located in the county of the decedent's last  
526 known address. Payments, transfers, or deposits made to or with the court discharge the payor  
527 from all claims for the value of amounts paid to, or items of property transferred to or deposited  
528 with the court.

529 (d) The probate court shall hold and disburse the funds or item of property deposited  
530 with it in accordance with the provisions of this chapter.

531 SECTION 12. REAL ESTATE.

532 (a) Any third party holding an interest in real estate shall have no obligation under  
533 section 9 of this chapter nor have any right or obligation based thereon under the following  
534 circumstances:-

535 (1) if, at the time the third party acquired such interest, the interest was not  
536 held of record by the decedent, unless the transfer to the third party was a fraudulent transfer as  
537 to the surviving spouse; or

538 (2) if there is of record a waiver of the right of election as to such interest  
539 that satisfies the requirements of section 10, subsection (b) above; or

540 (3) if the instrument of conveyance by which the third party acquired such  
541 interest identifies the decedent as being unmarried at the time of conveyance; or

542 (4) if such interest was conveyed to a third party purchaser for value; or

543 (5) if the third party is a bank, licensed mortgage lender, insurance  
544 company or other institutional lender and the interest of the third party is that of mortgagee or  
545 secured party; or

546 (6) if the third party acquired such interest as a result of foreclosure, deed in  
547 lieu of foreclosure, or otherwise as a result of an exercise of rights under a mortgage or other  
548 lien; or

549 (7) if there is of record (i) an affidavit by the decedent certifying that the  
550 real estate in which the decedent transferred an interest was the decedent's residence at the time  
551 of the transfer and that the person or persons to whom the decedent transferred such interest were  
552 the the person to whom the decedent was married at the time of the transfer, and (ii) a physician's  
553 affidavit certifying that as of a date within ten days of the  
554 transfer the person to whom the decedent was married at such date was incapacitated as defined  
555 in section 3 of this chapter; or

556 (8) if the third party acquired such interest prior to the enactment date of  
557 this chapter.

558 (b) Under any of the circumstances specified above in section 12(a) (1-7), and in  
559 accordance with section 9(f) of this chapter, (i) the exercise of the elective share right hereunder  
560 shall not divest, encumber or have any operation or effect on any interest in real property held by  
561 any third party, and (ii) any third party shall hold title to any interest in real property free of the  
562 elective share and any right or obligation based thereon.

563 (c) The provisions of this section shall apply to any interest in real property, direct,  
564 indirect, choate, inchoate, beneficial, legal or otherwise. An interest in real property is held of  
565 record by the decedent within the meaning of this section only if (i) the records of the registry of  
566 deeds or land registration district of the Land Court for each of the districts where the real  
567 property lies contain a deed or other instrument of conveyance indexed in the chain of title to the  
568 real property, vesting title to the interest in the decedent, or (ii) if the decedent has acquired and  
569 holds title to the interest by testate or intestate succession, as demonstrated by records of the  
570 appropriate Registry of Probate which are indexed and available within the chain of title to the  
571 real property. In no  
572 event shall the interest be deemed to be held of record by a decedent solely because the decedent  
573 holds title as trustee of any form of trust, including a nominee or realty trust.

574 (d) Any person interested in title to real property shall be entitled to rely conclusively  
575 and without further investigation upon any written representation of record by the decedent that  
576 the decedent is unmarried or any written representation of record by a person that such person is  
577 the decedent's spouse. A waiver of the right of election as to any specific real property or interest  
578 therein (i) shall be deemed to identify such real property or interest with reasonable particularity  
579 if it refers to such interest by any form of legal description, by reference to real property

580 described in the same or other instruments or plans of record, by street address or location, by tax  
581 assessment references, or in any other manner reasonably calculated to identify such real  
582 property or interest therein) (ii) shall be valid whether recorded, signed, dated, or delivered  
583 before, on, or after the date on which the third party acquired such real property or Interest  
584 therein; and (iii) shall be valid whether contained in or appended to an instrument of conveyance  
585 or other instrument of record affecting title to such real property or in a separate certificate or  
586 other instrument of record.

587 (e) An attorney, settlement agent, or other person representing or otherwise acting on  
588 behalf of any third party shall have no duty arising by operation of law by reason of such  
589 representation or action, to advise, explain, describe, or make any disclosure concerning the legal  
590 or financial consequences of executing and/or delivering a waiver prepared pursuant to the  
591 requirements of section 10, subsection (b) above.

592 SECTION 13 EFFECTIVE DATE.

593 This act shall be effective for estates of persons dying on or after January one, two thousand  
594 nine.