

SENATE No. 1862

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:

An Act to improve the spousal elective share.

PETITION OF:

NAME:

Cynthia S. Creem

DISTRICT/ADDRESS:

-
-

[District]

SENATE No. 1862

By Ms. Creem, a petition (accompanied by bill, Senate, No. 1862) of Cynthia S. Creem for legislation to improve the spousal elective share. The Judiciary.

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

The Commonwealth of Massachusetts

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
6 holding property included in the elective estate, including a nominee or realty trust.

7 (b) “Decedent’s nonprobate transfer to others” – the types of transfers
8 specifically 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
10 immovable, tangible or intangible, wherever situated, that constitutes the decedent’s net probate
11 estate, the decedent’s nonprobate transfers to others, and the decedent’s nonprobate transfers to
12 the 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
28 property held by the decedent in joint tenancy with the right of survivorship. The amount
29 included is the value of the decedent's fractional interest, to the extent the fractional interest
30 passed by right of survivorship at the decedent's death to a surviving joint tenant other than the
31 decedent's surviving spouse.

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

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

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

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

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

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

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

71 (aa) Any property that passed as a result of the
72 termination of a right or interest in, or power over, property that would have been included in the
73 elective estate under paragraph (2)(i)(aa), (bb), or (cc), or paragraph (2)(ii), of this section 1(c) if
74 the right, interest, or power had not terminated until the decedent's death. The amount included
75 is the value of the property that would have been included under those paragraphs if the property
76 were valued at the time the right, interest, or power terminated, and is included only to the extent
77 the property passed upon termination to or for the benefit of any person other than the decedent
78 or the decedent's estate, spouse, or surviving spouse. As used in this subparagraph
79 "termination", with respect to a right or interest in property, occurs when the right or interest
80 terminated by the terms of the governing instrument or the decedent transferred or relinquished
81 the right or interest, and, with respect to a power over property, occurs when the power
82 terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power
83 described in paragraph (2)(i)(aa), "termination" occurs when the power terminated by exercise or
84 release, but not otherwise.

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

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

96 (3) The decedent's nonprobate transfers to the surviving spouse
97 consist of all property that passed outside probate from the decedent to the surviving spouse at
98 the decedent's death or by reason of the decedent's death, excluding property passing to the
99 surviving spouse under the federal social security system. The decedent's nonprobate transfers to
100 the surviving spouse include any of the following types of transfers, in the amount provided
101 respectively for each type of transfer:

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

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

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

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

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

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

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

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

126 (iii) Interests in community property arising under the
127 community property laws of other states.

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

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

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

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

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

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

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

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

160 (h) "Nonadverse party"- a person who does not have a substantial beneficial
161 interest in the trust or other property arrangement that would be adversely affected by the
162 exercise or nonexercise of the power that he or she possesses respecting the trust or other
163 property arrangement. A person having a general power of appointment over property is deemed
164 to have a beneficial interest in the property.

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

167 (1) from the decedent by lifetime transfer;

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

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

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

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

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

182 (m) "Presently exercisable general power of appointment" a power of
183 appointment under which, at the time in question, the decedent, whether or not he or she then had
184 the capacity to exercise the power, held a power to create a present or future interest in himself
185 or herself, his or her creditors, his or her estate, or creditors of his or her estate, including a
186 power to revoke or invade the principal of a trust or other property arrangement.

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

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

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

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

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

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

202 SECTION 2. ELECTIVE SHARE AMOUNT.

203 (a) The surviving spouse of a decedent who after the effective date of this
204 chapter dies domiciled in Massachusetts may elect, under the limitations and conditions stated in
205 this chapter, to take outright an elective share amount equal to the greater of (i) fifty thousand
206 dollars (\$50,000) or (ii) the value of the elective share percentage of the elective estate, in
207 accordance with the following schedule:

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

209 The Elective share percentage shall be:

210 Shorter than 5 years

211 15% of the elective estate

212 5 years or longer, but shorter than 10 years

213 25% of the elective estate

214 10 years or longer but shorter than 15 years

215 35% of the elective estate

216 15 years or longer

217 40 % of the elective share

218 (b) If the elective share amount provided under paragraph (a) of this section
219 exceeds a maximum equal to one half the sum of (i) the value of the elective estate of the
220 decedent and (ii) the value of the elective estate of the surviving spouse determined and valued
221 as if he or she had died simultaneously with the decedent, the elective share amount shall be

222 reduced to said maximum, except when an election under paragraph (c) of this section has been
223 made.

224 (c) If at the date of the decedent's death, divorce proceedings between the
225 decedent and the surviving spouse were pending and the parties had executed a written property
226 settlement or the court had entered judgment dividing their property which had not yet become
227 final, the surviving spouse may elect to take under such settlement or judgment, and the rights of
228 the surviving spouse thereunder shall become the elective share amount for purposes of this
229 chapter.

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

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

236 SECTION 3. ELECTION PERSONAL TO SURVIVING SPOUSE.

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

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

249 (b) Incapacitated or Institutionalized Surviving Spouse. If the election is
250 exercised by or on behalf of a surviving spouse who is incapacitated or institutionalized,
251 determined as of the date of the election, that portion of the elective share amounts due under this
252 chapter must be placed in a custodial trust for the benefit of the surviving spouse under the
253 provisions of chapter two hundred and three B, except as modified below. For purposes of the
254 custodial trust established by this subsection, (i) the electing guardian or conservator is the
255 custodial trustee, provided however that if this election is being made by an institutionalized
256 surviving spouse who is not incapacitated, the duly appointed fiduciary of the deceased spouse's
257 estate shall be the custodial trustee (or such other suitable trustee as may be appointed by the

258 probate court) (ii) the surviving spouse is the beneficiary, and (iii) the custodial trust is deemed
259 to be a trust created by the will of the decedent spouse.

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

263 (1) Neither an incapacitated nor institutionalized beneficiary nor
264 anyone acting on behalf of an incapacitated or institutionalized beneficiary has a power to
265 terminate the custodial trust; but if the beneficiary regains capacity and is not institutionalized,
266 the beneficiary then acquires the power to terminate the custodial trust by delivering to the
267 custodial trustee a writing signed by the beneficiary declaring the termination. If not previously
268 terminated, the custodial trust terminates on the death of the beneficiary.

269 (2) If the beneficiary is incapacitated or institutionalized, the
270 custodial trustee shall expend so much or all of the custodial trust property as the custodial
271 trustee considers advisable for the use and benefit of the beneficiary and individuals who were
272 supported by the beneficiary when the beneficiary became incapacitated or institutionalized, or
273 who are legally entitled to support by the beneficiary. Expenditures may be made in the manner,
274 when and to the extent that the custodial trustee determines suitable and proper, without court
275 order but with regard to other support, income, and

276 property of the beneficiary and benefits of medical or other forms of assistance from any
277 state or federal government or governmental agency for which the beneficiary must qualify on
278 the basis of need.

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

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

293 As used in this section, the term "institutionalized" shall mean being an
294 inpatient in a nursing facility, being an inpatient in a medical institution and receiving the level
295 of care that would be provided in a nursing facility, being an inpatient in an intermediate care
296 facility for the mentally retarded, or requiring the level of care that would be provided in a
297 hospital, nursing facility, or intermediate care facility for the mentally retarded but for the
298 provision of home or community-based services.

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

301 SECTION 4. PARTIAL ELECTION. A surviving spouse may elect less than
302 all

303 of his or her elective share amount. To make a partial election, the surviving spouse shall
304 indicate on his or her petition for an elective share that he or she is making a partial election and
305 the percentage of the elective share amount elected.

306 SECTION 5. NOTICE TO SURVIVING SPOUSE.

307 (a) On or before the day the personal representative of the decedent's estate
308 files his or her petition for appointment, the personal representative shall send by certified mail
309 or delivery to the decedent's surviving spouse at his or her current address, or if the current
310 address of the surviving spouse is not known to the surviving spouse's last known address, a
311 written notice that the surviving spouse may have a right to elect a share of the decedent's estate
312 under chapter 191C and that the surviving spouse has a right to retain a lawyer to represent him
313 or her in connection with electing under this chapter. The notice shall further inform the
314 surviving spouse of his or her right to written disclosure of a description of the assets and the
315 estimated values of the assets included in the decedent's elective estate as provided in section 6
316 of this chapter, and shall inform the surviving spouse of the date by which the surviving spouse
317 must elect as provided in section 7 of this chapter.

318 (b) The personal representative shall attach to such notice a copy of chapter
319 191C. Every petition for probate of a decedent's will or for administration of a decedent's estate
320 indicating that the decedent left a surviving spouse shall include a sworn statement that the
321 notice to the surviving spouse required by this section has been sent by certified mail or delivery.
322 Any personal representative of the decedent's estate may give such notice at any time prior to
323 commencement of a probate proceeding, if any.

324 SECTION 6. DISCLOSURE TO SURVIVING SPOUSE.

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

328 (i) a list of the assets and interests included in the elective estate,
329 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 each estimate.

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

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

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

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

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

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

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

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

358 (a) The election shall be made by filing a petition for the elective share in the
359 court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no
360 proceedings have been commenced, in the court having jurisdiction of probate proceedings in the
361 county where the decedent was last domiciled, not later than the expiration of the earlier of (1)

362 six months after the surviving spouse receives notice in accordance with section 5 or (ii) one year
363 after the decedent's date of death. A copy of the petition or the elective share shall be mailed or
364 delivered to the personal representative (if any) at the time the petition is filed.

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

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

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

373 (e) If the supreme judicial court, upon a complaint filed by a surviving spouse
374 whose petition for the elective share shall not have been filed within the time limit prescribed in
375 subpart (a) of this section 7, deems that justice and equity require it and that such surviving
376 spouse is not chargeable with culpable neglect in not filing said petition within the prescribed
377 time limits, it may determine the elective share amount and enter

378 judgment ordering its payment as appears appropriate under section 9; provided,
379 however, forthwith upon the filing of said complaint a notice thereof (in the nature of a lis
380 pendens) shall have been filed in the registry of probate where probate proceedings are pending,
381 or, if none, where the decedent was domiciled at the date of death, provided further that such
382 judgment shall not affect any payment or distribution made before the filing of such complaint
383 and notice.

384 SECTION 8. EFFECT OF ELECTION.

385 (a) If the right of election is exercised by or on behalf of the surviving spouse,
386 the surviving spouse's homestead allowance under chapter 188 right to occupy the decedent's
387 house under section 1 of chapter 196, and allowance for necessities under section 2 of chapter
388 196, if any, are not charged against but are in addition to the elective share amount.

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

393 SECTION 9. SATISFYING ELECTIVE-SHARE AMOUNT.

394 (a) Unless the decedent provides otherwise by will, or unless otherwise
395 provided in section 12 below, or unless the probate court orders otherwise as justice and equity

396 may require, in a proceeding for an elective share, property or interests in property included in
397 the elective estate shall be applied to satisfy the elective share amount in the following order:

398 (1) Outright Transfers to Surviving Spouse

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

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

406 (C) property or interests in property which pass or have
407 passed outright to the surviving spouse otherwise than by testate or intestate succession but by
408 reason of the decedent's death, including the decedent's interest in joint property in which the
409 surviving spouse held a right of survivorship, or which would have so passed to the surviving
410 spouse but for the filing of the petition for an elective share by or on behalf of the

411 surviving spouse;

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

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

420 (A) trusts of which the decedent was a donor and (i) the
421 assets of which may be reached by the surviving spouse acting alone through the exercise of a
422 power of appointment either during life or by will, or (ii) the assets of which are to be paid to the
423 surviving spouse's estate;

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

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

428 (3) Other Transfers by Decedent. If after the application of
429 subsections (1) and (2) the elective share amount is not fully satisfied, property or interests in

430 property included in the elective estate, but not including any gifts made within one year of
431 death, shall be applied to satisfy the elective share amount in the following order:

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

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

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

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

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

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

460 (c) Interest. Each payment of cash in satisfaction of the elective share amount
461 shall bear interest from the date of the decedent's death, at the rate provided for pecuniary
462 legacies under section 20 of chapter 197 as it may be from time to time amended, or any
463 successor section. Each distribution in kind in satisfaction of the elective share amount shall
464 carry with it the right of the surviving spouse to receive from the distributing party all income (if

465 any) attributable to the distributed asset or assets between the date of valuation set forth in
466 section 1 and the date of distribution.

467 (d) Liability of Original Recipients and Beneficiaries. An original recipient or
468 a beneficiary other than the surviving spouse is liable to make contribution toward satisfaction of
469 the elective share amount in accordance with the provisions of the foregoing subsections (a)
470 through (c) inclusive. A person liable to make contribution may choose to give up such property
471 (or a proportional part thereof, as the case may be) or to pay the value of the amount for which
472 the person is liable. No original recipient who shall conform to the standard of a Massachusetts
473 executor or administrator with respect to the care and management of assets included in the
474 elective estate, or who shall hold all such assets in the form in which such original recipient
475 received them, shall be liable to the surviving spouse in an amount greater than the sum of (1)
476 the value of the elective estate assets received by such original recipient, determined as of the
477 date of distribution or payment to the surviving spouse in satisfaction of such liability, and (2)
478 any interest or income due under subsection (c). No beneficiary shall be liable to the surviving
479 spouse in an amount greater than the sum of (1) the value of such beneficiary's share of the
480 elective estate at the date of distribution or payment to the surviving spouse in satisfaction of
481 such liability, and (2) any interest or income due under subsection (c).

482 (e) Protection of Subsequent Transferees. A person other than an original
483 recipient, a beneficiary, or a payor who, whether for value or as a gift, receives an asset included
484 in the elective estate shall be neither obligated under this chapter to return the asset or any
485 portion thereof nor liable under this chapter for the value of the asset or any portion thereof,
486 regardless of whether at the time such asset was received such person had

487 notice of the surviving spouse's intention to file a petition for the elective share or notice
488 that a petition for the elective share had been filed, unless the transfer to such person was a
489 fraudulent transfer as to the surviving spouse.

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

495 SECTION 10. RELINQUISHMENT OF RIGHT TO ELECT.

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

499 (i) the agreement is in writing;

- 500 (ii) the agreement is signed by both spouses;
- 501 (iii) the agreement specifically refers to the right of election;
- 502 (iv) the surviving spouse is provided full disclosure of the
503 decedent's assets and liabilities as of the date of execution; and
- 504 (v) the agreement is fair and reasonable as of the date of execution.

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

- 507 (i) the relinquishment is in writing and specifically refers to the right
508 of election under this chapter;
- 509 (ii) the relinquishment identifies the asset or assets to which it
510 pertains with reasonable particularity; and
- 511 (iii) the relinquishment is signed by the surviving spouse and
512 acknowledged before a notary public.

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

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

522 SECTION 11. PROTECTION OF PAYORS.

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

530 (b) A payor is liable for payments made or other actions taken after the
531 surviving spouse or the surviving spouse's representative has given written notice to the payor, or

532 agent of the payor, by mail or special delivery, that (i) the surviving spouse intends to file a
533 petition for an elective share, or (ii) a petition for an elective share has been filed.

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

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

545 SECTION 12. REAL ESTATE.

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

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

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

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

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

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

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

564 (7) if there is of record (i) an affidavit by the decedent certifying
565 that the real estate in which the decedent transferred an interest was the decedent's residence at

566 the time of the transfer and that the person or persons to whom the decedent transferred such
567 interest were the the person to whom the decedent was married at the time of the transfer, and (ii)
568 a physician's affidavit certifying that as of a date within ten days of the

569 transfer the person to whom the decedent was married at such date was incapacitated as
570 defined in section 3 of this chapter; or

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

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

578 (c) The provisions of this section shall apply to any interest in real property,
579 direct, indirect, choate, inchoate, beneficial, legal or otherwise. An interest in real property is
580 held of record by the decedent within the meaning of this section only if (i) the records of the
581 registry of deeds or land registration district of the Land Court for each of the districts where the
582 real property lies contain a deed or other instrument of conveyance indexed in the chain of title
583 to the real property, vesting title to the interest in the decedent, or (ii) if the decedent has
584 acquired and holds title to the interest by testate or intestate succession, as demonstrated by
585 records of the appropriate Registry of Probate which are indexed and available within the chain
586 of title to the real property. In no

587 event shall the interest be deemed to be held of record by a decedent solely because the
588 decedent holds title as trustee of any form of trust, including a nominee or realty trust.

589 (d) Any person interested in title to real property shall be entitled to rely
590 conclusively and without further investigation upon any written representation of record by the
591 decedent that the decedent is unmarried or any written representation of record by a person that
592 such person is the decedent's spouse. A waiver of the right of election as to any specific real
593 property or interest therein (i) shall be deemed to identify such real property or interest with
594 reasonable particularity if it refers to such interest by any form of legal description, by reference
595 to real property described in the same or other instruments or plans of record, by street address or
596 location, by tax assessment references, or in any other manner reasonably calculated to identify
597 such real property or interest therein) (ii) shall be valid whether recorded, signed, dated, or
598 delivered before, on, or after the date on which the third party acquired such real property or
599 Interest therein; and (iii) shall be valid whether contained in or appended to an instrument of
600 conveyance or other instrument of record affecting title to such real property or in a separate
601 certificate or other instrument of record.

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

607 SECTION 13 EFFECTIVE DATE.

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