

**SENATE . . . . . No. 1653**

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**The Commonwealth of Massachusetts**

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**In the Year Two Thousand Nine**  
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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:-

3 “DEFINITIONS. When used in this section the following words or terms shall have, unless the  
4 context clearly 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 reduced by funeral  
15 and administration expenses, homestead allowance, family allowances, exempt property, and  
16 enforceable claims.

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

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

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

27           (bb) The decedent's fractional interest in property held by the decedent in joint tenancy  
28 with the right of survivorship. The amount included is the value of the decedent's fractional  
29 interest, to the extent the fractional interest passed by right of survivorship at the decedent's  
30 death to a surviving joint tenant other than the decedent's surviving spouse.

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

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

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

47 (aa) Any irrevocable transfer in which the decedent retained the right to the possession or  
48 enjoyment of, or to the income from, the property if and to the extent the decedent's right  
49 terminated at or continued beyond the decedent's death. The amount included is the value of the  
50 fraction of the property to which the decedent's right related, to the extent the fraction of the  
51 property passed outside probate to or for the benefit of any person other than the decedent's  
52 estate or surviving spouse.

53 (bb) Any transfer in which the decedent created a power over income or property,  
54 exercisable by the decedent alone or in conjunction with any other person, or exercisable by a  
55 nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's  
56 estate, or creditors of the decedent's estate. The amount included with respect to a power over  
57 property is the value of the property subject to the power, and the amount included with respect

58 to a power over income is the value of the property that produces or produced the income, to the  
59 extent the power in either case was exercisable At the decedent's death to or for the benefit of  
60 any person other than the decedent's surviving spouse or the extent the property passed at the  
61 decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any  
62 person other than the decedent's estate or surviving spouse. If the power is a power over both  
63 income and property and the preceding sentence produces different amounts, the amount  
64 included is the greater amount.

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

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

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

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

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

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

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

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

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

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

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

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

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

117 (iii) Interests in community property arising under the community property laws  
118 of other states.

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

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

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

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

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

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

143 (f) "Governing instrument"- a deed; a will; a trust; an insurance or annuity policy;  
144 a pension, profit-sharing, retirement, or similar benefit plan; a contract governing a certificate of

145 deposit or checking, savings, mutual fund, money market, brokerage, custody, agency, or any  
146 other financial or depository account; or a security registered with a designated recipient to take  
147 upon the death of the owner.

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

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

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

157 (1) from the decedent by lifetime transfer;

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

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

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

164 (k) "Personal representative"- the executor, administrator, administrator with the will  
165 annexed, special administrator, temporary executor, temporary administrator with the will



166 annexed, or administrator de bonis non of the decedent's estate in Massachusetts, or if none, any  
167 person in actual or constructive possession of any property included in the elective estate.

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

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

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

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

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

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

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

184 (s) "Transfer"- as it relates to a transfer by or of the decedent, includes (1) an  
185 exercise or release of a presently exercisable general power of appointment held by the decedent,  
186 (2) a lapse at death of a presently exercisable general power of appointment held by the

187 decedent, and (3) an exercise, release, or lapse of a general power of appointment that the  
188 decedent created in himself or herself and of a power described in paragraph (c)(2)(ii)(bb) that  
189 the decedent conferred on a nonadverse party.

190 SECTION 2. ELECTIVE SHARE AMOUNT.

191 (a) The surviving spouse of a decedent who after the effective date of this chapter  
192 dies domiciled in Massachusetts may elect, under the limitations and conditions stated in this  
193 chapter, to take outright an elective share amount equal to the greater of (i) fifty thousand dollars  
194 (\$50,000) or (ii) the value of the elective share percentage of the elective estate, in accordance  
195 with the following schedule:

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

197 The Elective share percentage shall be:

198 Shorter than 5 years

199 15% of the elective estate

200 5 years or longer, but shorter than 10 years

201 25% of the elective estate

202 10 years or longer but shorter than 15 years

203 15 years or longer

204 35% of the elective estate

205 40 % of the elective share

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

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

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

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

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

223 (a) Surviving spouse must be living at time of election. The election provided by  
224 this chapter is personal to the surviving spouse, may not be reached by creditors or sold,  
225 assigned, or transferred in any manner, other than a relinquishment as provided in section two of  
226 this chapter, and may only be made during the lifetime of the surviving spouse. In the case of an  
227 incapacitated surviving spouse or a surviving spouse under conservatorship, the election may be

228 made only by the duly appointed conservator or guardian of the surviving spouse based upon a  
229 substituted judgment standard.

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

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

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

249 (1) Neither an incapacitated nor institutionalized beneficiary nor anyone acting on behalf  
250 of an incapacitated or institutionalized beneficiary has a power to terminate the custodial trust;  
251 but if the beneficiary regains capacity and is not institutionalized, the beneficiary then acquires  
252 the power to terminate the custodial trust by delivering to the custodial trustee a writing signed  
253 by the beneficiary declaring the termination. If not previously terminated, the custodial trust  
254 terminates on the death of the beneficiary.

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

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

265 (3) Upon the beneficiary's death, the custodial trustee shall transfer the  
266 unexpended custodial trust property in the following order: (i) to or as directed by the person  
267 who would have taken under the disposition originally made by the beneficiary's predeceased  
268 spouse against whom the elective share was taken or (ii) under the residuary clause, if any, of the  
269 will of the beneficiary's predeceased spouse against whom the elective share was taken, as if that

270 predeceased spouse died immediately after the beneficiary; or (iii) to that predeceased spouse's  
271 heirs.

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

279 As used in this section, the term "institutionalized" shall mean being an inpatient in a  
280 nursing facility, being an inpatient in a medical institution and receiving the level of care that  
281 would be provided in a nursing facility, being an inpatient in an intermediate care facility for the  
282 mentally retarded, or requiring the level of care that would be provided in a hospital, nursing  
283 facility, or intermediate care facility for the mentally  
284 retarded but for the provision of home or community-based services.

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

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

291 SECTION 5. NOTICE TO SURVIVING SPOUSE.

292 (a) On or before the day the personal representative of the decedent's estate files  
293 his or her petition for appointment, the personal representative shall send by certified mail or  
294 delivery to the decedent's surviving spouse at his or her current address, or if the current address  
295 of the surviving spouse is not known to the surviving spouse's last known address, a written  
296 notice that the surviving spouse may have a right to elect a share of the decedent's estate under  
297 chapter 191C and that the surviving spouse has a right to retain

298 a lawyer to represent him or her in connection with electing under this chapter. The  
299 notice shall further inform the surviving spouse of his or her right to written disclosure of a  
300 description of the assets and the estimated values of the assets included in the decedent's elective  
301 estate as provided in section 6 of this chapter, and shall inform the surviving spouse of the date  
302 by which the surviving spouse must elect as provided in section 7 of this chapter.

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

309 SECTION 6. DISCLOSURE TO SURVIVING SPOUSE.

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

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

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

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

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

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

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

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

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

331 (d) In every case where a petition for an elective share has been timely filed, the personal  
332 representative shall provide in writing to the surviving spouse the information normally required  
333 by a federal estate tax return regarding the assets and the values of the assets included in the



334 decedent's estate, by the later of (i) the due date for filing the federal estate tax return as  
335 extended, if an estate tax return is required to be filed, or (ii) three months after the filing of the  
336 petition for the elective share.

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

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

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

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

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

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

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

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

368 SECTION 8. EFFECT OF ELECTION.

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

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

377 SECTION 9. SATISFYING ELECTIVE-SHARE AMOUNT.

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

382 (1) Outright Transfers to Surviving Spouse

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

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

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

394 surviving spouse;

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

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

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

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

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

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

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

416                   (B) property or interests in property which pass or have passed to beneficiaries or  
417 recipients other than the surviving spouse outright by testate or intestate succession or otherwise

418 by reason of the decedent's death, including the decedent's interest in joint property with right of  
419 survivorship, or in any trust of which the decedent is or was a donor and of which the surviving  
420 spouse is not a beneficiary.

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

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

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

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

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

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

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

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

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

#### 474 SECTION 10. RELINQUISHMENT OF RIGHT TO ELECT.

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

478 (i) the agreement is in writing;

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

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

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

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

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

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

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

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

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

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

501 SECTION 11. PROTECTION OF PAYORS.



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

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

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

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

524 SECTION 12. REAL ESTATE.

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

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

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

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

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

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

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

541 (7) if there is of record (i) an affidavit by the decedent certifying that the real estate in  
542 which the decedent transferred an interest was the decedent's residence at the time of the transfer  
543 and that the person or persons to whom the decedent transferred such interest were the the person

544 to whom the decedent was married at the time of the transfer, and (ii) a physician's affidavit  
545 certifying that as of a date within ten days of the

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

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

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

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

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

565 (d) Any person interested in title to real property shall be entitled to rely  
566 conclusively and without further investigation upon any written representation of record by the  
567 decedent that the decedent is unmarried or any written representation of record by a person that  
568 such person is the decedent's spouse. A waiver of the right of election as to any specific real  
569 property or interest therein (i) shall be deemed to identify such real property or interest with  
570 reasonable particularity if it refers to such interest by any form of legal description, by reference  
571 to real property described in the same or other instruments or plans of record, by street address or  
572 location, by tax assessment references, or in any other manner reasonably calculated to identify  
573 such real property or interest therein) (ii) shall be valid whether recorded, signed, dated, or  
574 delivered before, on, or after the date on which the third party acquired such real property or  
575 Interest therein; and (iii) shall be valid whether contained in or appended to an instrument of  
576 conveyance

577 or other instrument of record affecting title to such real property or in a separate  
578 certificate or other instrument of record.

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

#### 584 SECTION 13 EFFECTIVE DATE.

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