

**SENATE . . . . . No. 1862**

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The Commonwealth of Massachusetts

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PRESENTED BY:

*Cynthia S. Creem*

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*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 adoption of the accompanying bill:

An Act to improve the spousal elective share.

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

NAME:

*Cynthia S. Creem*

DISTRICT/ADDRESS:

**SENATE . . . . . No. 1862**

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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.

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

The Commonwealth of Massachusetts

\_\_\_\_\_  
**In the Year Two Thousand Eleven**  
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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: -“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 1(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 (1) 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 circumstances 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.