

HOUSE No. 1623

By Mr. O’Flaherty of Chelsea, petition of Eugene L. O’Flaherty relative to the elective share of spouses in the probating of certain estates. The Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand and Seven.

AN ACT IMPROVING 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. Definitions. When used in this chapter the following
2 words or terms shall have, unless the context clearly indicates other-
3 wise, the following meanings:—
- 4 (a) “Beneficiary”, a beneficiary of the decedent’s probate estate or
5 of a trust holding property included in the elective estate, including a
6 nominee or realty trust.
- 7 (b) “Decedent’s nonprobate” transfers to others the types of trans-
8 fers specifically included in the elective estate under paragraphs
9 (c)(2) and (3) of this section.
- 10 (c) “Elective estate”, all property, whether real or personal, mov-
11 able or immovable, tangible or intangible, wherever situated, that
12 constitutes the decedent’s net probate estate, the decedent’s nonpro-
13 bate transfers to others, and the decedent’s nonprobate transfers to
14 the surviving spouse, reduced by all property excluded from the
15 elective estate, determined as follows:—
- 16 (1) the decedent’s net probate estate is the decedent’s probate
17 estate reduced by funeral and administration expenses, homestead
18 allowance, family allowances, exempt property, and enforceable
19 claims.
- 20 (2) the decedent’s nonprobate transfers to others include any of
21 the following types to persons or entities other than the surviving
22 spouse, in the amount provided respectively for each type of
23 transfer:—

24 (i) property owned or owned in substance by the decedent imme-
25 diately before death that passed outside probate at the decedent's
26 death, including

27 (A) property over which the decedent alone, immediately before
28 death, held a presently exercisable general power of appointment.
29 The amount included is the value of the property subject to the
30 power, to the extent the property passed at the decedent's death, by
31 exercise, release, lapse, in default, or otherwise, to or for the benefit
32 of any person other than the decedent's estate or surviving spouse.

33 (B) the decedent's fractional interest in property held by the dece-
34 dent in joint tenancy with the right of survivorship. The amount
35 included is the value of the decedent's fractional interest, to the
36 extent the fractional interest passed by right of survivorship at the
37 decedent's death to a surviving joint tenant other than the decedent's
38 surviving spouse.

39 (C) the decedent's ownership interest in property or accounts held
40 in pay-on-death form, transfer-on-death form, or co-ownership regis-
41 tration with the right of survivorship. The amount included is the
42 value of the decedent's ownership interest, to the extent the dece-
43 dent's ownership interest passed at the decedent's death to or for the
44 benefit of any person other than the decedent's estate or surviving
45 spouse.

46 (D) insurance on the decedent's life as to which the decedent,
47 either alone or in conjunction with any other person, owned any of
48 the economic benefits of the policy, including the power to change
49 the beneficiary, to surrender or cancel the policy, to assign the
50 policy, to revoke an assignment, to pledge the policy for a loan, or to
51 obtain from the insurer a loan against the surrender value of the
52 policy, or owned a reversionary interest in the policy or its proceeds,
53 whether arising by the express terms of the policy or other instru-
54 ment or by operation of law, but only if the value of the reversionary
55 interest immediately before the death of the decedent exceeded five
56 percent of the value of the policy. The amount included is the value
57 of the proceeds, to the extent they were payable at the decedent's
58 death to or for the benefit of any person other than the decedent's
59 estate or surviving spouse.

60 (ii) property transferred in any of the following forms by the
61 decedent during marriage:—

62 (A) any irrevocable transfer in which the decedent retained the
63 right to the possession or enjoyment of, or to the income from, the
64 property if and to the extent the decedent's right terminated at or
65 continued beyond the decedent's death. The amount included is the
66 value of the fraction of the property to which the decedent's right
67 related, to the extent the fraction of the property passed outside pro-
68 bate to or for the benefit of any person other than the decedent's
69 estate or surviving spouse.

70 (B) any transfer in which the decedent created a power over
71 income or property, exercisable by the decedent alone or in conjunc-
72 tion with any other person, or exercisable by a nonadverse party, to
73 or for the benefit of the decedent, creditors of the decedent, the dece-
74 dent's estate, or creditors of the decedent's estate. The amount
75 included with respect to a power over property is the value of the
76 property subject to the power, and the amount included with respect
77 to a power over income is the value of the property that produces or
78 produced the income, to the extent the power in either case was
79 exercisable at the decedent's death to or for the benefit of any person
80 other than the decedent's surviving spouse or to the extent the prop-
81 erty passed at the decedent's death, by exercise, release, lapse, in
82 default, or otherwise, to or for the benefit of any person other than
83 the decedent's estate or surviving spouse. If the power is a power
84 over both income and property and the preceding sentence produces
85 different amounts, the amount included is the greater amount.

86 (iii) property that passed during marriage and during the one year
87 period next preceding the decedent's death as a result of a transfer by
88 the decedent for less than full and adequate consideration if the
89 transfer was of any of the following types:—

90 (A) any property that passed as a result of the termination of a
91 right or interest in, or power over, property that would have been
92 included in the elective estate under paragraph (2)(i)(A),(B),(C), or
93 under paragraph (2)(ii), of this section 1(c) if the right, interest, or
94 power had not terminated until the decedent's death. The amount
95 included is the value of the property that would have been included
96 under those paragraphs if the property were valued at the time the
97 right, interest, or power terminated, and is included only to the
98 extent the property passed upon termination to or for the benefit of
99 any person other than the decedent or the decedent's estate, spouse,
100 or surviving spouse. As used in this subparagraph "termination",

101 with respect to a right or interest in property, occurs when the right
102 or interest terminated by the terms of the governing instrument or
103 the decedent transferred or relinquished the right or interest, and,
104 with respect to a power over property, occurs when the power termi-
105 nated by exercise, release, lapse, default, or otherwise, but, with
106 respect to a power described in paragraph (2)(i)(A), “termination”
107 occurs when the power terminated by exercise or release, but not
108 otherwise.

109 (B) any transfer of or relating to an insurance policy on the life of
110 the decedent if the proceeds would have been included in the elec-
111 tive estate under paragraph (2)(i)(D) of this section 1(c) had the
112 transfer not occurred. The amount included is the value of the insur-
113 ance proceeds to the extent the proceeds were payable at the dece-
114 dent’s death to or for the benefit of any person other than the
115 decedent’s estate or surviving spouse.

116 (C) any transfer of property, to the extent not otherwise included
117 in the elective estate, made to or for the benefit of a person other
118 than the decedent’s surviving spouse. The amount included is the
119 value of the transferred property to the extent the aggregate transfers
120 to any one done in any calendar year falling within the one year
121 period exceeded \$10,000.

122 (3) the decedent’s nonprobate transfers to the surviving spouse
123 consist of all property that passed outside probate from the decedent
124 to the surviving spouse at the decedent’s death or by reason of the
125 decedent’s death, excluding property passing to the surviving spouse
126 under the federal social security system. The decedent’s nonprobate
127 transfers to the surviving spouse include any of the following types
128 of transfers, in the amount provided respectively for each type of
129 transfer:—

130 (i) the decedent’s fractional interest in property held as a joint
131 tenant with the right of survivorship, to the extent that the decedent’s
132 fractional interest passed to the surviving spouse as surviving joint
133 tenant;

134 (ii) the decedent’s ownership interest in property or accounts held
135 in co-ownership registration with the right of survivorship, to the
136 extent the decedent’s ownership interest passed to the surviving
137 spouse as surviving co-owner; and

138 (iii) all other property that would have been included in the elec-
139 tive estate under paragraphs (2)(i) or (ii) of this section 1(c) had it

140 passed to or for the benefit of a person other than the surviving
141 spouse, the decedent, or the decedent's creditors, estate, or estate
142 creditors.

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

145 (5) in case of overlapping application to the same property of the
146 paragraphs or subparagraphs of this section including property in the
147 elective estate, the property is included in the elective estate under
148 the provision yielding the greatest value, and under only one over-
149 lapping provision if they all yield the same value.

150 (6) the following types of property are excluded from the elective
151 estate:—

152 (i) any of the decedent's nonprobate transfers to others to the
153 extent the decedent received adequate and full consideration in
154 money or money's worth for the transfer.

155 (ii) any property (or any interest in property) as to which the sur-
156 viving spouse has relinquished his or her right of election pursuant
157 to a written instrument complying with the provisions of Section 10
158 of this chapter.

159 (iii) interests in community property arising under the community
160 property laws of other states.

161 (iv) any interest in the decedent's principal residence when such
162 interest was conveyed by the decedent to or for the benefit of any
163 one or more of the issue of the surviving spouse at a time when the
164 surviving spouse was incapacitated as defined in Section 3 of this
165 chapter.

166 (v) any property held in trust for the benefit of a disabled child or
167 grandchild of the surviving spouse.

168 (vi) the decedent's nonprobate transfers to others as defined in
169 paragraph (2) of this section 1(c) that were irrevocable before the
170 enactment date of this chapter.

171 (7) for purposes of this chapter, all property included in the elec-
172 tive estate shall be valued at its fair market value as of the date of the
173 decedent's death, except that property included in the elective state
174 under paragraph (2)(iii)(cc) of this section 1(c) shall be valued at its
175 fair market value as of the date of the transfer.

176 (d) "fractional interest in property held in joint tenancy with the
177 right of survivorship" whether the fractional interest is unilaterally
178 severable or not, the fraction, the numerator of which is one and the

179 denominator of which, if the decedent was a joint tenant, is one plus
180 the number of joint tenants who survive the decedent and which, if
181 the decedent was not a joint tenant, is the number of joint tenants.

182 (e) “fraudulent transfer”, any payment of money, assignment,
183 release, transfer, mortgage or pledge of, or the creation of a lien or
184 encumbrance upon, an asset included in the elective estate that is
185 fraudulent under Chapter 109A as to the surviving spouse as a cred-
186 itor by virtue of this chapter. For purposes of determining whether
187 the person making the transfer or entering into the obligation is or
188 will be thereby rendered insolvent, the transfer shall be deemed to
189 have been made or the obligation shall be deemed to have been
190 entered into at the time such person’s debt to the surviving spouse is
191 determined by the court under Section 7 of this chapter.

192 (f) “governing instrument”, a deed; a will; a trust; an insurance or
193 annuity policy; a pension, profit-sharing, retirement, or similar ben-
194 efit plan; a contract governing a certificate of deposit or checking,
195 savings, mutual fund, money market, brokerage, custody, agency, or
196 any other financial or depository account; or a security registered
197 with a designated recipient to take upon the death of the owner.

198 (g) “marriage” with respect to a transfer by the decedent during
199 marriage, any marriage of the decedent to the decedent’s surviving
200 spouse.

201 (h) “nonadverse party” a person who does not have a substantial
202 beneficial interest in the trust or other property arrangement that
203 would be adversely affected by the exercise or nonexercise of the
204 power that he or she possesses respecting the trust or other property
205 arrangement. A person having a general power of appointment over
206 property is deemed to have a beneficial interest in the property.

207 (i) “original recipient”, a person or entity other than a payor that
208 has received or has the right to receive property included in the elec-
209 tive estate:—

210 (1) from the decedent by lifetime transfer;

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

213 (3) from a payor or by operation of law by reason of the dece-
214 dent’s death.

215 (j) “payor”, an insurer, business entity, employer, government,
216 governmental agency or subdivision, or any other person obligated
217 by law or a governing instrument to make payments, excluding a

218 personal representative or a trustee of property included in the elec-
219 tive estate.

220 (k) “personal representative”, the executor, administrator, admin-
221 istrator with the will annexed, special administrator, temporary
222 executor, temporary administrator with the will annexed, or adminis-
223 trator de bonis non of the decedent’s estate in Massachusetts, or if
224 none, any person in actual or constructive possession of any property
225 included in the elective estate.

226 (l) “power” or “power of appointment”, includes a power to des-
227 ignate the beneficiary of a beneficiary designation.

228 (m) “presently exercisable general power of appointment”, a
229 power of appointment under which, at the time in question, the dece-
230 dent, whether or not he or she then had the capacity to exercise the
231 power, held a power to create a present or future interest in himself
232 or herself, his or her creditors, his or her estate, or creditors of his or
233 her estate, including a power to revoke or invade the principal of a
234 trust or other property arrangement.

235 (n) “probate estate”, property that would pass by intestate succes-
236 sion if the decedent dies without a valid will.

237 (o) “property”, includes values subject to a beneficiary designa-
238 tion.

239 (p) “right to income”, includes a right to payments under a com-
240 mercial or private annuity, an annuity trust, a unitrust, or a similar
241 arrangement.

242 (q) “surviving spouse”, a person who was married to the decedent
243 at the time of the decedent’s death.

244 (r) “third party”, a person or entity other than the decedent and the
245 surviving spouse.

246 (s) “transfer”, as it relates to a transfer by or of the decedent,
247 includes (1) an exercise or release of a presently exercisable general
248 power of appointment held by the decedent, (2) a lapse at death of a
249 presently exercisable general power of appointment held by the
250 decedent, and (3) an exercise, release, or lapse of a general power of
251 appointment that the decedent created in himself or herself and of a
252 power described in paragraph (c)(2)(ii)(B) that the decedent con-
253 ferred on a nonadverse party.

1 SECTION 2. Elective Share Amount. (a) The surviving spouse of
2 a decedent who after the effective date of this chapter dies domiciled

3 in Massachusetts may elect, under the limitations and conditions
4 stated in this chapter, to take outright an elective share amount equal
5 to the greater of (i) fifty thousand dollars (\$50,000) or (ii) the value
6 of the elective share percentage of the elective estate, in accordance
7 with the following schedule:—

8 If the decedent and the surviving spouse were married to each other
9 The elective share percentage is:—

10 Less than 5 years	15% of the elective estate
11 Five years or more but less than 10 years	25% of the elective estate
12 10 years or more but less than 15 years	35% of the elective estate
13 15 years or more	40% of the elective estate

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

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

28 (d) The surviving spouse's homestead allowance, exempt prop-
29 erty, and family allowance, if any, shall not be charged against but
30 shall be in addition to the elective share amount, except when an
31 election under paragraph (c) of this section has been made.

32 (e) No federal or state estate, inheritance, generation skipping, or
33 other taxes arising as a result of the decedent's death shall be allo-
34 cated to or chargeable against the elective share amount.

1 SECTION 3. Election Personal to Surviving Husband or Wife. (a)
2 Surviving husband or wife must be living at time of election. The
3 election provided by this chapter is personal to the surviving hus-
4 band or wife, may not be reached by creditors or sold, assigned, or
5 transferred in any manner, other than a relinquishment as provided in
6 Section 2 of this chapter, and may only be made during the lifetime

7 of the surviving husband or wife. In the case of an incapacitated sur-
8 viving spouse or a surviving spouse under conservatorship, the elec-
9 tion may be made only by the duly appointed conservator or
10 guardian of the surviving spouse based upon a substituted judgment
11 standard.

12 No surviving husband or wife, or the conservator or guardian of
13 said surviving husband or wife shall be compelled to make an elec-
14 tion under this chapter nor penalized, disadvantaged, or discrimi-
15 nated against by virtue of the relinquishment of or failure to make an
16 election under this chapter. Relinquishment of election or failure to
17 make an election shall not affect the eligibility of the surviving hus-
18 band or wife for benefits or assistance under any governmental pro-
19 gram.

20 (b) Incapacitated or Institutionalized Surviving Spouse. If the
21 election is exercised by or on behalf of a surviving spouse who is
22 incapacitated or institutionalized, determined as of the date of the
23 election, that portion of the elective share amounts due under this
24 chapter must be placed in a custodial trust for the benefit of the sur-
25 viving husband or wife under the provisions of Chapter 203B,
26 except as modified below. For purposes of the custodial trust estab-
27 lished by this subsection, (i) the electing guardian or conservator is
28 the custodial trustee, provided however that if this election is being
29 made by an institutionalized surviving spouse who is not incapaci-
30 tated, the duly appointed fiduciary of the deceased spouse's estate
31 shall be the custodial trustee (or such other suitable trustee as may be
32 appointed by the probate court) (ii) the surviving spouse is the bene-
33 ficiary, and (iii) the custodial trust is deemed to be a trust created by
34 the will of the decedent spouse.

35 (c) Custodial Trust. For the purposes of subsection (b) of this
36 section Chapter 203B shall be applied as if Section 6(b) thereof were
37 repealed and Sections 2(e), 9(b), and 17(a) were amended to read as
38 follows:—

39 (1) Neither an incapacitated nor institutionalized beneficiary nor
40 anyone acting on behalf of an incapacitated or institutionalized bene-
41 ficiary has a power to terminate the custodial trust; but if the benefi-
42 ciary regains capacity and is not institutionalized, the beneficiary
43 then acquires the power to terminate the custodial trust by delivering
44 to the custodial trustee a writing signed by the beneficiary declaring
45 the termination. If not previously terminated, the custodial trust ter-
46 minates on the death of the beneficiary.

47 (2) If the beneficiary is incapacitated or institutionalized, the cus-
48 todial trustee shall expend so much or all of the custodial trust prop-
49 erty as the custodial trustee considers advisable for the use and
50 benefit of the beneficiary and individuals who were supported by the
51 beneficiary when the beneficiary became incapacitated or institu-
52 tionalized, or who are legally entitled to support by the beneficiary.
53 Expenditures may be made in the manner, when and to the extent
54 that the custodial trustee determines suitable and proper, without
55 court order but with regard to other support, income, and property of
56 the beneficiary and benefits of medical or other forms of assistance
57 from any state or federal government or governmental agency for
58 which the beneficiary must qualify on the basis of need.

59 (3) Upon the beneficiary's death, the custodial trustee shall
60 transfer the unexpended custodial trust property in the following
61 order:— (i) to or as directed by the person who would have taken
62 under the disposition originally made by the beneficiary's prede-
63 ceased spouse against whom the elective share was taken or
64 (ii) under the residuary clause, if any, of the will of the beneficiary's
65 predeceased spouse against whom the elective share was taken, as if
66 that predeceased spouse died immediately after the beneficiary; or
67 (iii) to that predeceased spouse's heirs.

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

78 As used in this section, the term "institutionalized" shall mean
79 being an inpatient in a nursing facility, being an inpatient in a med-
80 ical institution and receiving the level of care that would be provided
81 in a nursing facility, being an inpatient in an intermediate care
82 facility for the mentally retarded, or requiring the level of care that
83 would be provided in a hospital, nursing facility, or intermediate care
84 facility for the mentally retarded but for the provision of home or
85 community-based services.

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

1 SECTION 4. Partial Election. A surviving spouse may elect less
2 than all of his or her elective share amount. To make a partial elec-
3 tion, the surviving spouse shall indicate on his or her petition for an
4 elective share that he or she is making a partial election and the per-
5 centage of the elective share amount elected.

1 SECTION 5. Notice to Surviving Spouse. (a) On or before the
2 day the personal representative of the decedent's estate files his or
3 her petition for appointment, the personal representative shall send
4 by certified mail or delivery to the decedent's surviving spouse at his
5 or her current address, or if the current address of the surviving
6 spouse is not known to the surviving spouse's last known address, a
7 written notice that the surviving spouse may have a right to elect a
8 share of the decedent's estate under Chapter 191C and that the sur-
9 viving spouse has a right to retain a lawyer to represent him or her in
10 connection with electing under this chapter. The notice shall further
11 inform the surviving spouse of his or her right to written disclosure
12 of a description of the assets and the estimated values of the assets
13 included in the decedent's elective estate as provided in Section 6 of
14 this chapter, and shall inform the surviving spouse of the date by
15 which the surviving spouse must elect as provided in Section 7 of
16 this chapter.

17 (b) The personal representative shall attach to such notice a copy
18 of Chapter 191C. Every petition for probate of a decedent's will or
19 for administration of a decedent's estate indicating that the decedent
20 left a surviving spouse shall include a sworn statement that the
21 notice to the surviving spouse required by this section has been sent
22 by certified mail or delivery. Any personal representative of the
23 decedent's estate may give such notice at any time prior to com-
24 mencement of a probate proceeding, if any.

1 SECTION 6. Disclosure to Surviving Spouse. (a) No later than
2 one month after the surviving spouse's written request for disclosure
3 from the personal representative, the personal representative shall,
4 by certified mail or delivery, provide to the surviving spouse the
5 following written information:—

- 6 (i) a list of the assets and interests included in the elective estate,
7 with each asset or interest identified with particularity;
- 8 (ii) an estimate of the fair market value of each listed asset, as of
9 the valuation date set forth in Section 1; and
- 10 (iii) the information relied upon in making each estimate.
- 11 (b) No later than one month after the surviving spouse's written
12 request for disclosure from a person or entity holding property
13 included in the elective estate, the person or entity holding such
14 property shall, by certified mail or delivery, provide to the surviving
15 spouse the following written information:—
- 16 (i) a list of the assets and interests included in the elective estate
17 and held by that person or entity, with each asset or interest identi-
18 fied with particularity;
- 19 (ii) an estimate of the fair market value of each listed asset, as of
20 the valuation date set forth in Section 1; and
- 21 (iii) the information relied upon in making the estimate.
- 22 (c) If a federal estate tax return or any state estate or inheritance
23 tax returns are required under the applicable tax laws, then upon
24 written request of the surviving spouse the personal representative
25 shall provide to the surviving spouse copies of all such tax returns
26 within one month after filing such returns with the Internal Revenue
27 Service or state taxing authority.
- 28 (d) In every case where a petition for an elective share has been
29 timely filed, the personal representative shall provide in writing to
30 the surviving spouse the information normally required by a federal
31 estate tax return regarding the assets and the values of the assets
32 included in the decedent's estate, by the later of (1) the due date for
33 filing the federal estate tax return as extended, if an estate tax return
34 is required to be filed, or (ii) three months after the filing of the peti-
35 tion for the elective share.
- 36 (e) In the event that any person or entity shall fail to comply with
37 the provisions of this section six within the time specified, that
38 person or entity shall be liable to the surviving spouse for the costs
39 and fees reasonably incurred by the surviving spouse to secure such
40 compliance, unless the court finds that the delay or noncompliance
41 was due to excusable neglect.

1 SECTION 7. Proceeding for Elective Share; Time Limit. (a) The
2 election shall be made by filing a petition for the elective share in

3 the court having jurisdiction of the probate proceedings relating to
4 the decedent's estate, or if no proceedings have been commenced, in
5 the court having jurisdiction of probate proceedings in the county
6 where the decedent was last domiciled, not later than the expiration
7 of the earlier of

8 (1) six months after the surviving spouse receives notice in accor-
9 dance with Section 5 or (ii) one year after the decedent's date of
10 death. A copy of the petition for the elective share shall be mailed or
11 delivered to the personal representative (if any) at the time the peti-
12 tion is filed.

13 (b) After notice and hearing, the court shall determine the elective
14 share amount and shall enter judgment ordering its payment as
15 appears appropriate under Section 9. In such judgment, the court
16 shall fix the liability of each person or entity required to make con-
17 tribution toward satisfaction of the elective share amount under
18 Section 9.

19 (c) A judgment of the probate court entered under this chapter
20 shall be enforceable in other courts of this state or in other Jurisdic-
21 tions.

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

25 (e) If the supreme judicial court, upon a complaint filed by a sur-
26 viving spouse whose petition for the elective share shall not have
27 been filed within the time limit prescribed in subpart (a) of this
28 Section 7, deems that justice and equity require it and that such sur-
29 viving spouse is not chargeable with culpable neglect in not filing
30 said petition within the prescribed time limits, it may determine the
31 elective share amount and enter judgment ordering its payment as
32 appears appropriate under Section 9; provided, however, forthwith
33 upon the filing of said complaint a notice thereof (in the nature of a
34 lis pendens) shall have been filed in the registry of probate where
35 probate proceedings are pending, or, if none, where the decedent was
36 domiciled at the date of death, provided further that such judgment
37 shall not affect any payment or distribution made before the filing of
38 such complaint and notice.

1 SECTION 8. Effect of Election. (a) If the right of election is exer-
2 cised by or on behalf of the surviving spouse, the surviving spouse's

3 homestead allowance under Chapter 188 right to occupy the dece-
4 dent's house under Section 1 of Chapter 196, and allowance for
5 necessities under Section 2 of Chapter 196, if any, are not charged
6 against but are in addition to the elective share amount.

7 (b) After the right of election has been exercised by or on behalf
8 of the surviving spouse and the elective share amount has been satis-
9 fied, all property or interests in property remaining in the elective
10 estate shall pass to the decedent's beneficiaries other than the
11 Surviving spouse, as if the surviving spouse had predeceased the
12 decedent.

1 SECTION 9. Satisfying Elective Share Amount. (a) Unless the
2 decedent provides otherwise by will, or unless otherwise provided in
3 Section 12 below, or unless the probate court orders otherwise as
4 justice and equity may require, in a proceeding for an elective share,
5 property or interests in property included in the elective estate shall
6 be applied to satisfy the elective share amount in the following
7 order:—

8 (1) outright transfers to surviving spouse;

9 (i) property or interests in property which were transferred out-
10 right to the surviving spouse by the decedent within one year of the
11 decedent's death valued as of the date of transfer;

12 (ii) property or interests in property which pass or have passed
13 outright to the surviving spouse by testate or intestate succession, or
14 which would have so passed to the surviving spouse but for the
15 filing of the petition for an elective share by or on behalf of the sur-
16 viving spouse;

17 (iii) property or interests in property which pass or have passed
18 outright to the surviving spouse otherwise than by testate or intestate
19 succession but by reason of the decedent's death, including the dece-
20 dent's interest in joint property in which the surviving spouse held a
21 right of survivorship, or which would have so passed to the sur-
22 viving spouse but for the filing of the petition for an elective share
23 by or on behalf of the surviving spouse;

24 (iv) property or interests in property which would have passed
25 outright to the surviving spouse by reason of the decedent's death
26 but were disclaimed.

27 (2) trusts for surviving spouse. If after the application of subsec-
28 tion (1) the elective share amount is not fully satisfied, property or

29 interests in property included in the elective estate which pass or
30 have passed in trust to the surviving spouse, or which would have so
31 passed to the surviving spouse but for the filing of the petition for an
32 elective share by or on behalf of the surviving spouse, shall be
33 applied to satisfy the elective share amount in the following order:—

34 (i) trusts of which the decedent was a donor and (1) the assets of
35 which may be reached by the surviving spouse acting alone through
36 the exercise of a power of appointment either during life or by will,
37 or (ii) the assets of which are to be paid to the surviving spouse's
38 estate;

39 (ii) trusts of which the decedent was a donor and the surviving
40 spouse is named as the sole beneficiary during the surviving
41 spouse's lifetime.

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

45 (3) other transfers by decedent. If after the application of subsec-
46 tions (1) and (2) the elective share amount is not fully satisfied, prop-
47 erty or interests in property included in the elective estate, but not
48 including any gifts made within one year of death, shall be applied
49 to satisfy the elective share amount in the following order:—

50 (i) trusts of which the decedent was a donor and which have more
51 than one beneficiary including the surviving spouse during the sur-
52 viving spouse's lifetime;

53 (ii) property or interests in property which pass or have passed to
54 beneficiaries or recipients other than the surviving spouse outright
55 by testate or intestate succession or otherwise by reason of the dece-
56 dent's death, including the decedent's interest in joint property with
57 right of survivorship, or in any trust of which the decedent is or was
58 a donor and of which the surviving spouse is not a beneficiary.

59 (4) power of appointment property. If after the application of sub-
60 sections (1), (2) and (3) the elective share amount is not fully satis-
61 fied, amounts included in the elective estate as defined in Section 1
62 (c) of this chapter because the decedent possessed one or more
63 powers of appointment shall be applied to satisfy the elective share
64 amount. Said powers of appointment shall be deemed exercised to
65 the extent necessary to give effect to this subsection.

66 (5) gifts made within one year of death. If after the application of
67 subsections (1), (2), (3) and (4) the elective share amount is not fully

68 satisfied, amounts included in the elective estate which have passed
69 to recipients other than the surviving spouse because of any gifts
70 made within one year of death shall be applied to satisfy the elective
71 share amount.

72 (i) pro-rata apportionment; valuation. If the elective share amount
73 will be fully satisfied by application of less than all assets within any
74 one category set out in the foregoing subsection (a), a portion of
75 each asset within the category shall be allocated in satisfaction of the
76 elective share amount to be determined by a fraction, the numerator
77 of which is the value of the asset and the denominator of which is
78 the value of all assets within the category. The amount so allocated
79 shall not be apportioned between temporary and remainder estates.

80 Assets distributed in kind shall be valued at the date of distribu-
81 tion, which date shall be set by agreement of the interested parties
82 or, in the absence of such agreement, by order of the probate court.

83 (ii) interest. Each payment of cash in satisfaction of the elective
84 share amount shall bear interest from the date of the decedent's
85 death, at the rate provided for pecuniary legacies under Section 20 of
86 Chapter 197 as it may be from time to time amended, or any suc-
87 cessor section. Each distribution in kind in satisfaction of the elec-
88 tive share amount shall carry with it the right of the surviving spouse
89 to receive from the distributing party all income (if any) attributable
90 to the distributed asset or assets between the date of valuation set
91 forth in Section 1 and the date of

92 (iii) liability of original recipients and beneficiaries. An original
93 recipient or a beneficiary other than the surviving spouse is liable to
94 make contribution toward satisfaction of the elective share amount
95 in accordance with the provisions of the foregoing subsections (a)
96 through (c) inclusive. A person liable to make contribution may
97 choose to give up such property (or a proportional part thereof, as
98 the case may be) or to pay the value of the amount for which the
99 person is liable. No original recipient who shall conform to the stan-
100 dard of a Massachusetts executor or administrator with respect to the
101 care and management of assets included in the elective estate, or
102 who shall hold all such assets in the form in which such original
103 recipient received them, shall be liable to the surviving spouse in an
104 amount greater than the sum of (1) the value of the elective estate
105 assets received by such original recipient, determined as of the date
106 of distribution or payment to the surviving spouse in satisfaction of

107 such liability, and (2) any interest or income due under subsection
108 (c). No beneficiary shall be liable to the surviving spouse in an
109 amount greater than the sum of (1) the value of such beneficiary's
110 share of the elective estate at the date of distribution or payment to
111 the surviving spouse in satisfaction of such liability, and (2) any
112 interest or income due under subsection (c).

113 (iv) protection of subsequent transferees. A person other than an
114 original recipient, a beneficiary, or a payor who, whether for value or
115 as a gift, receives an asset included in the elective estate shall be nei-
116 ther obligated under this chapter to return the asset or any portion
117 thereof nor liable under this chapter for the value of the asset or any
118 portion thereof, regardless of whether at the time such asset was
119 received such person had notice of the surviving spouse's intention
120 to file a petition for the elective share or notice that a petition for the
121 elective share had been filed, unless the transfer to such person was
122 a fraudulent transfer as to the surviving spouse.

123 (v) nonexistence of liens or encumbrances. The elective share
124 rights of a surviving spouse under this chapter shall not be construed
125 as imposing a lien or other encumbrance on any personal property
126 included in the elective estate. Nothing in this chapter shall preclude
127 the court from allowing attachments, trustee process or entering
128 case-specific orders for equitable relief in a proceeding for elective
129 share pursuant to Section 7 hereof.

1 SECTION 10. Relinquishment of Right to Elect. (a) The right of
2 election may be relinquished by agreement as to the entire elective
3 estate or a portion thereof. A relinquishment by agreement is valid if
4 all of the following conditions are met:—

- 5 (i) the agreement is in writing;
- 6 (ii) the agreement is signed by both spouses;
- 7 (iii) the agreement specifically refers to the right of election;
- 8 (iv) the surviving spouse is provided full disclosure of the dece-
9 dent's assets and liabilities as of the date of execution; and
- 10 (v) the agreement is fair and reasonable as of the date of execu-
11 tion.

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

- 14 (i) the relinquishment is in writing and specifically refers to the
15 right of election under this chapter;

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

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

20 (c) The provisions of the foregoing section (b) to the contrary
21 notwithstanding, the signature of the surviving spouse to a written
22 consent to the designation of a beneficiary other than the surviving
23 spouse to receive benefits other than a plan intended to be qualified
24 under Section 401 of the Internal Revenue Code, or an employee
25 pension plan subject to the provisions of the Employee Retirement
26 Income Security Act of 1974, as amended, provided such consent
27 satisfies the requirements of section of the Internal Revenue Code or
28 Section 205 of said Act, as applicable, shall be deemed a valid relin-
29 quishment of the right of election as to said benefits.

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

1 SECTION 11. Protection of Payors. (a) A payor is not liable for
2 having made a payment or transferred an item of property or other
3 benefit included in the decedent's elective estate to a beneficiary
4 designated, in a governing instrument, or for having taken any other
5 action in good faith reliance on the validity of a governing instru-
6 ment, upon request and satisfactory proof of the decedent's death,
7 before the surviving spouse, or the surviving spouse's representative
8 has given written notice to the payor, or agent of the payor, by mail
9 or delivery, that (i) the surviving spouse intends to file a petition for
10 an elective share, or (ii) a petition for an elective share has been
11 filed.

12 (b) A payor is liable for payments made or other actions taken
13 after the surviving spouse or the surviving spouse's representative
14 has given written notice to the payor, or agent of the payor, by mail
15 or special delivery, that (i) the surviving spouse intends to file a peti-
16 tion for an elective share, or (ii) a petition for an elective share has
17 been filed.

18 (c) Upon receipt of written notice of intention to file a petition for
19 an elective share or written notice that a petition for an elective share
20 has been filed, a payor may pay any amount owed, or transfer or
21 deposit any item of property held by it, to or with the court having

22 jurisdiction of the probate proceedings relating to the decedent's
23 death, or, if no proceedings have been commenced and said court
24 cannot be identified, to or with the court having jurisdiction of pro-
25 bate proceedings relating to decedents' estates located in the county
26 of the decedent's last known address. Payments, transfers, or
27 deposits made to or with the court discharge the payor from all
28 claims for the value of amounts paid to, or items of property trans-
29 ferred to or deposited with the court.

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

1 SECTION 12. Real Estate. (a) Any third party holding an interest
2 in real estate shall have no obligation under Section 9 of this chapter
3 nor have any right or obligation based thereon under the following
4 circumstances:—

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

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

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

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

16 (5) if the third party is a bank, licensed mortgage lender, insur-
17 ance company or other institutional lender and the interest of the
18 third party is that of mortgagee or secured party; or

19 (6) if the third party acquired such interest as a result of foreclo-
20 sure, deed in lieu of foreclosure, or otherwise as a result of an exer-
21 cise of rights under a mortgage or other lien; or

22 (7) if there is of record (i) an affidavit by the decedent certifying
23 that the real estate in which the decedent transferred an interest was
24 the decedent's residence at the time of the transfer and that the
25 person or persons to whom the decedent transferred such interest
26 were the person to whom the decedent was married at the time of the
27 transfer, and (ii) a physician's affidavit certifying that as of a date

28 within ten days of the transfer the person to whom the decedent was
29 married at such date was incapacitated as defined in Section 3 of this
30 chapter; or

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

33 (b) Under any of the circumstance s specified above in Section
34 12(a) (1-7), and in accordance with Section 9(f) of this chapter, (i)
35 the exercise of the elective share right hereunder shall not divest,
36 encumber or have any operation or effect on any interest in real
37 property held by any third party, and (ii) any third party shall hold
38 title to any interest in real property free of the elective share and any
39 right or obligation based thereon.

40 (c) The provisions of this section shall apply to any interest in real
41 property, direct, indirect, choate, inchoate, beneficial, legal or other-
42 wise. An interest in real property is held of record by the decedent
43 within the meaning of this section only if (i) the records of the reg-
44 istry of deeds or land registration district of the Land Court for each
45 of the districts where the real property lies contain a deed or other
46 instrument of conveyance indexed in the chain of title to the real
47 property, vesting title to the interest in the decedent, or (ii) if the
48 decedent has acquired and holds title to the interest by testate or
49 intestate succession, as demonstrated by records of the appropriate
50 Registry of Probate which are indexed and available within the chain
51 of title to the real property. In no event shall the interest be deemed
52 to be held of record by a decedent solely because the decedent holds
53 title as trustee of any form of trust, including a nominee or realty
54 trust.

55 (d) Any person interested in title to real property shall be entitled
56 to rely conclusively and without further investigation upon any
57 written representation of record by the decedent that the decedent is
58 unmarried or any written representation of record by a person that
59 such person is the decedent's spouse. A waiver of the right of elec-
60 tion as to any specific real property or interest therein (i) shall be
61 deemed to identify such real property or interest with reasonable par-
62 ticularity if it refers to such interest by any form of legal description,
63 by reference to real property described in the same or other instru-
64 ments or plans of record, by street address or location, by tax assess-
65 ment references, or in any other manner reasonably calculated to
66 identify such real property or interest therein) (ii) shall be valid

67 whether recorded, signed, dated, or delivered before, on, or after the
68 date on which the third party acquired such real property or Interest
69 therein; and (iii) shall be valid whether contained in or appended to
70 an instrument of conveyance or other instrument of record affecting
71 title to such real property or in a separate certificate or other instru-
72 ment of record.

73 (e) An attorney, settlement agent, or other person representing or
74 otherwise acting on behalf of any third party shall have no duty
75 arising by operation of law by reason of such representation or
76 action, to advise, explain, describe, or make any disclosure con-
77 cerning the legal or financial consequences of executing and/or
78 delivering a waiver prepared pursuant to the requirements of Section
79 10, subsection (b) above.

1 SECTION 13. This act shall take effect upon its passage.