

SENATE NO. 833

AN ACT IMPROVING 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. Definitions. When used in this chapter the following words or terms shall have, unless
2 the context clearly indicates otherwise, the following meanings:

3 (a) "Beneficiary", a beneficiary of the decedent's probate estate or of a trust holding property included
4 in the elective estate, including a nominee or realty trust.

5 (b) "Decedent's nonprobate" transfers to others the types of transfers specifically included in the
6 elective estate under paragraphs (c)(2) and (3) of this section.

7 (c) "Elective estate", all property, whether real or personal, movable or immovable, tangible or
8 intangible, wherever situated, that constitutes the decedent's net probate estate, the decedent's

9 nonprobate transfers to others, and the decedent's nonprobate transfers to the surviving spouse,
10 reduced by all property excluded from the elective estate, determined as follows:

11 (1) the decedent's net probate estate is the decedent's probate estate reduced by funeral and
12 administration expenses, homestead allowance, family allowances, exempt property, and enforceable
13 claims.

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

16 (i) property owned or owned in substance by the decedent immediately before death that passed
17 outside probate at the decedent's death, including

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

22 (B) the decedent's fractional interest in property held by the decedent in joint tenancy with the right of
23 survivorship. The amount included is the value of the decedent's fractional interest, to the extent the
24 fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant
25 other than the decedent's surviving spouse.

26 (C) the decedent's ownership interest in property or accounts held in pay-on-death form, transfer-on-
27 death form, or coownership registration with the right of survivorship. The amount included is the

28 value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the
29 decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse.

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

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

40 (A) any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of,
41 or to the income from, the property if and to the extent the decedent's right terminated at or continued
42 beyond the decedent's death. The amount included is the value of the fraction of the property to which
43 the decedent's right related, to the extent the fraction of the property passed outside probate to or for
44 the benefit of any person other than the decedent's estate or surviving spouse.

45 (B) any transfer in which the decedent created a power over income or property, exercisable by the
46 decedent alone or in conjunction with any other person, or exercisable by a nonadverse party, to or for
47 the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the
48 decedent's estate. The amount included with respect to a power over property is the value of the

49 property subject to the power, and the amount included with respect to a power over income is the
50 value of the property that produces or produced the income, to the extent the power in either case was
51 exercisable at the decedent's death to or for the benefit of any person other than the decedent's
52 surviving spouse or to the extent the property passed at the decedent's death, by exercise, release,
53 lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or
54 surviving spouse. If the power is a power over both income and property and the preceding sentence
55 produces different amounts, the amount included is the greater amount.

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

59 (A) any property that passed as a result of the termination of a right or interest in, or power over,
60 property that would have been included in the elective estate under paragraph (2) (i) (A), (B), or (C),
61 or under paragraph (2) (ii), of this section 1(c) if the right, interest, or power had not terminated until
62 the decedent's death. The amount included is the value of the property that would have been included
63 under those paragraphs if the property were valued at the time the right, interest, or power terminated,
64 and is included only to the extent the property passed upon termination to or for the benefit of any
65 person other than the decedent or the decedent's estate, spouse, or surviving spouse. As used in this
66 subparagraph "termination", with respect to a right or interest in property, occurs when the right or
67 interest terminated by the terms of the governing instrument or the decedent transferred or relinquished
68 the right or interest, and, with respect to a power over property, occurs when the power terminated by
69 exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (2)
70 (i) (A), "termination" occurs when the power terminated by exercise or release, but not otherwise.

71 (B) any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would
72 have been included in the elective estate under paragraph (2) (i) (D) of this section 1(c) had the
73 transfer not occurred. The amount included is the value of the insurance proceeds to the extent the
74 proceeds were payable at the decedent's death to or for the benefit of any person other than the
75 decedent's estate or surviving spouse.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

113 (7) for purposes of this chapter, all property included in the elective estate shall be valued at its fair
114 market value as of the date of the decedent's death, except that property included in the elective state
115 under paragraph (2) (iii) (cc) of this section 1(c) shall be valued at its fair market value as of the date
116 of the transfer.

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

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

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

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

132 (g) "marriage" with respect to a transfer by the decedent during marriage, any marriage of the decedent
133 to the decedent's surviving spouse.

134 (h) "nonadverse party" a person who does not have a substantial beneficial interest in the trust or other
135 property arrangement that would be adversely affected by the exercise or nonexercise of the power
136 that he or she possesses respecting the trust or other property arrangement. A person having a general
137 power of appointment over property is deemed to have a beneficial interest in the property.

138 (i) "original recipient", a person or entity other than a payor that has received or has the right to receive
139 property included in the elective estate:

140 (1) from the decedent by lifetime transfer;

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

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

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

146 (k) "personal representative", the executor, administrator, administrator with the will annexed, special
147 administrator, temporary executor, temporary administrator with the will annexed, or administrator de

148 bonis non of the decedent's estate in Massachusetts, or if none, any person in actual or constructive
149 possession of any property included in the elective estate.

150 (l) "power" or "power of appointment", includes a power to designate the beneficiary of a beneficiary
151 designation.

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

157 (n) "probate estate", property that would pass by intestate succession if the decedent dies without a
158 valid will.

159 (o) "property", includes values subject to a beneficiary designation.

160 (p) "right to income", includes a right to payments under a commercial or private annuity, an annuity
161 trust, a unitrust, or a similar arrangement.

162 (q) "surviving spouse", a person who was married to the decedent at the time of the decedent's death.

163 (r) "third party", a person or entity other than the decedent and the surviving spouse.

164 (s) "transfer", as it relates to a transfer by or of the decedent, includes (1) an exercise or release of a
165 presently exercisable general power of appointment held by the decedent, (2) a lapse at death of a
166 presently exercisable general power of appointment held by the decedent, and (3) an exercise, release,

167 or lapse of a general power of appointment that the decedent created in himself or herself and of a
168 power described in paragraph (c) (2) (ii) (B) that the decedent conferred on a nonadverse party.

169 SECTION 2. Elective Share Amount. (a) The surviving spouse of a decedent who after the effective
170 date of this chapter dies domiciled in Massachusetts may elect, under the limitations and conditions
171 stated in this chapter, to take outright an elective share amount equal to the greater of (i) fifty thousand
172 dollars (\$50,000) or (ii) the value of the elective share percentage of the elective estate, in accordance
173 with the following schedule:

174

175 If the decedent and the surviving spouse were married to each other:

176 Less than 5 years 15% of the elective estate

177 Five years or more but less than 10 years 25% of the elective estate

178 10 years or more but less than 15 years 35% of the elective estate

179 15 years or more 40% of the elective estate

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

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

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

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

195 SECTION 3. Election Personal to Surviving Husband or Wife. (a) Surviving husband or wife must be
196 living at time of election. The election provided by this chapter is personal to the surviving husband or
197 wife, may not be reached by creditors or sold, assigned, or transferred in any manner, other than a
198 relinquishment as provided in section 2 of this chapter, and may only be made during the lifetime of
199 the surviving husband or wife. In the case of an incapacitated surviving spouse or a surviving spouse
200 under conservatorship, the election may be made only by the duly appointed conservator or guardian
201 of the surviving spouse based upon a substituted judgment standard.

202 No surviving husband or wife, or the conservator or guardian of said surviving husband or wife shall
203 be compelled to make an election under this chapter nor penalized, disadvantaged, or discriminated
204 against by virtue of the relinquishment of or failure to make an election under this chapter.

205 Relinquishment of election or failure to make an election shall not affect the eligibility of the
206 surviving husband or wife for benefits or assistance under any governmental program.

207 (b) Incapacitated or Institutionalized Surviving Spouse. If the election is exercised by or on behalf of a
208 surviving spouse who is incapacitated or institutionalized, determined as of the date of the election,
209 that portion of the elective share amounts due under this chapter must be placed in a custodial trust for
210 the benefit of the surviving husband or wife under the provisions of chapter 203B, except as modified
211 below. For purposes of the custodial trust established by this subsection, (i) the electing guardian or
212 conservator is the custodial trustee, provided however that if this election is being made by an
213 institutionalized surviving spouse who is not incapacitated, the duly appointed fiduciary of the
214 deceased spouse's estate shall be the custodial trustee (or such other suitable trustee as may be
215 appointed by the probate court) (ii) the surviving spouse is the beneficiary, and (iii) the custodial trust
216 is deemed to be a trust created by the will of the decedent spouse.

217 (c) Custodial Trust. For the purposes of subsection (b) of this section chapter 203B shall be applied as
218 if section 6 (b) thereof were repealed and sections 2 (e), 9 (b), and 17 (a) were amended to read as
219 follows:

220 (1) Neither an incapacitated nor institutionalized beneficiary nor anyone acting on behalf of an
221 incapacitated or institutionalized beneficiary has a power to terminate the custodial trust; but if the
222 beneficiary regains capacity and is not institutionalized, the beneficiary then acquires the power to
223 terminate the custodial trust by delivering to the custodial trustee a writing signed by the beneficiary
224 declaring the termination. If not previously terminated, the custodial trust terminates on the death of
225 the beneficiary.

226 (2) If the beneficiary is incapacitated or institutionalized, the custodial trustee shall expend so much or
227 all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of
228 the beneficiary and individuals who were supported by the beneficiary when the beneficiary became
229 incapacitated or institutionalized, or who are legally entitled to support by the beneficiary.

230 Expenditures may be made in the manner, when and to the extent that the custodial trustee determines
231 suitable and proper, without court order but with regard to other support, income, and property of the
232 beneficiary and benefits of medical or other forms of assistance from any state or federal government
233 or governmental agency for which the beneficiary must qualify on the basis of need.

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

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

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

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

254 SECTION 4. Partial Election. A surviving spouse may elect less than all of his or her elective share
255 amount. To make a partial election, the surviving spouse shall indicate on his or her petition for an
256 elective share that he or she is making a partial election and the percentage of the elective share
257 amount elected.

258 SECTION 5. Notice to Surviving Spouse. (a) On or before the day the personal representative of the
259 decedent's estate files his or her petition for appointment, the personal representative shall send by
260 certified mail or delivery to the decedent's surviving spouse at his or her current address, or if the
261 current address of the surviving spouse is not known to the surviving spouse's last known address, a
262 written notice that the surviving spouse may have a right to elect a share of the decedent's estate under
263 chapter 191C and that the surviving spouse has a right to retain a lawyer to represent him or her in
264 connection with electing under this chapter. The notice shall further inform the surviving spouse of his
265 or her right to written disclosure of a description of the assets and the estimated values of the assets
266 included in the decedent's elective estate as provided in section 6 of this chapter, and shall inform the
267 surviving spouse of the date by which the surviving spouse must elect as provided in section 7 of this
268 chapter.

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

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

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

279 (ii) an estimate of the fair market value of each listed asset, as of the valuation date set forth in section
280 1; and

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

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

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

287 (ii) an estimate of the fair market value of each listed asset, as of the valuation date set forth in section
288 1; and

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

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

294 (d) In every case where a petition for an elective share has been timely filed, the personal
295 representative shall provide in writing to the surviving spouse the information normally required by a
296 federal estate tax return regarding the assets and the values of the assets included in the decedent's
297 estate, by the later of (1) the due date for filing the federal estate tax return as extended, if an estate tax
298 return is required to be filed, or (ii) three months after the filing of the petition for the elective share.

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

303 SECTION 7. Proceeding for Elective Share; Time Limit. (a) The election shall be made by filing a
304 petition for the elective share in the court having jurisdiction of the probate proceedings relating to the
305 decedent's estate, or if no proceedings have been commenced, in the court having jurisdiction of
306 probate proceedings in the county where the decedent was last domiciled, not later than the expiration
307 of the earlier of

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

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

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

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

319 (e) If the supreme judicial court, upon a complaint filed by a surviving spouse whose petition for the
320 elective share shall not have been filed within the time limit prescribed in subpart (a) of this section 7,
321 deems that justice and equity require it and that such surviving spouse is not chargeable with culpable
322 neglect in not filing said petition within the prescribed time limits, it may determine the elective share
323 amount and enter judgment ordering its payment as appears appropriate under section 9; provided,
324 however, forthwith upon the filing of said complaint a notice thereof (in the nature of a lis pendens)
325 shall have been filed in the registry of probate where probate proceedings are pending, or, if none,
326 where the decedent was domiciled at the date of death, provided further that such judgment shall not
327 affect any payment or distribution made before the filing of such complaint and notice.

328 SECTION 8. Effect of Election. (a) If the right of election is exercised by or on behalf of the
329 surviving spouse, the surviving spouse's homestead allowance under chapter 188 right to occupy the
330 decedent's house under section 1 of chapter 196, and allowance for necessities under section 2 of
331 chapter 196, if any, are not charged against but are in addition to the elective share amount.

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

336 SECTION 9. Satisfying Elective Share Amount. (a) Unless the decedent provides otherwise by will,
337 or unless otherwise provided in section 12 below, or unless the probate court orders otherwise as
338 justice and equity may require, in a proceeding for an elective share, property or interests in property
339 included in the elective estate shall be applied to satisfy the elective share amount in the following
340 order:

341 (1) outright transfers to surviving spouse.

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

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

347 (iii) property or interests in property which pass or have passed outright to the surviving spouse
348 otherwise than by testate or intestate succession but by reason of the decedent's death, including the
349 decedent's interest in joint property in which the surviving spouse held a right of survivorship, or
350 which would have so passed to the surviving spouse but for the filing of the petition for an elective
351 share by or on behalf of the surviving spouse;

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

354 (2) trusts for surviving spouse. If after the application of subsection (1) the elective share amount is
355 not fully satisfied, property or interests in property included in the elective estate which pass or have
356 passed in trust to the surviving spouse, or which would have so passed to the surviving spouse but for
357 the filing of the petition for an elective share by or on behalf of the surviving spouse, shall be applied
358 to satisfy the elective share amount in the following order:

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

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

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

366 (3) other transfers by decedent. If after the application of subsections (1) and (2) the elective share
367 amount is not fully satisfied, property or interests in property included in the elective estate, but not
368 including any gifts made within one year of death, shall be applied to satisfy the elective share amount
369 in the following order:

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

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

376 (4) power of appointment property. If after the application of subsections (1), (2) and (3) the elective
377 share amount is not fully satisfied, amounts included in the elective estate as defined in section 1 (c) of
378 this chapter because the decedent possessed one or more powers of appointment shall be applied to
379 satisfy the elective share amount. Said powers of appointment shall be deemed exercised to the extent
380 necessary to give effect to this subsection.

381 (5) gifts made within one year of death. If after the application of subsections (1), (2), (3) and (4) the
382 elective share amount is not fully satisfied, amounts included in the elective estate which have passed
383 to recipients other than the surviving spouse because of any gifts made within one year of death shall
384 be applied to satisfy the elective share amount.

385 (i) pro-rata apportionment; valuation. If the elective share amount will be fully satisfied by application
386 of less than all assets within any one category set out in the foregoing subsection (a), a portion of each

387 asset within the category shall be allocated in satisfaction of the elective share amount to be
388 determined by a fraction, the numerator of which is the value of the asset and the denominator of
389 which is the value of all assets within the category. The amount so allocated shall not be apportioned
390 between temporary and remainder estates.

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

393 (ii) interest. Each payment of cash in satisfaction of the elective share amount shall bear interest from
394 the date of the decedent's death, at the rate provided for pecuniary legacies under section 20 of chapter
395 197 as it may be from time to time amended, or any successor section. Each distribution in kind in
396 satisfaction of the elective share amount shall carry with it the right of the surviving spouse to receive
397 from the distributing party all income (if any) attributable to the distributed asset or assets between the
398 date of valuation set forth in section 1 and the date of

399 (iii) liability of original recipients and beneficiaries. An original recipient or a beneficiary
400 other than the surviving spouse is liable to make contribution toward satisfaction of the elective share
401 amount in accordance with the provisions of the foregoing subsections (a) through (c) inclusive. A
402 person liable to make contribution may choose to give up such property (or a proportional part thereof,
403 as the case may be) or to pay the value of the amount for which the person is liable. No original
404 recipient who shall conform to the standard of a Massachusetts executor or administrator with respect
405 to the care and management of assets included in the elective estate, or who shall hold all such assets
406 in the form in which such original recipient received them, shall be liable to the surviving spouse in an
407 amount greater than the sum of (1) the value of the elective estate assets received by such original
408 recipient, determined as of the date of distribution or payment to the surviving spouse in satisfaction of

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

413 (iv) protection of subsequent transferees. A person other than an original recipient, a
414 beneficiary, or a payor who, whether for value or as a gift, receives an asset included in the elective
415 estate shall be neither obligated under this chapter to return the asset or any portion thereof nor liable
416 under this chapter for the value of the asset or any portion thereof, regardless of whether at the time
417 such asset was received such person had notice of the surviving spouse's intention to file a petition for
418 the elective share or notice that a petition for the elective share had been filed, unless the transfer to
419 such person was a fraudulent transfer as to the surviving spouse.

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

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

428 (i) the agreement is in writing;

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

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

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

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

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

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

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

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

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

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

449 SECTION 11. Protection of Payors. (a) A payor is not liable for having made a payment or
450 transferred an item of property or other benefit included in the decedent's elective estate to a
451 beneficiary designated, in a governing instrument, or for having taken any other action in good faith
452 reliance on the validity of a governing instrument, upon request and satisfactory proof of the
453 decedent's death, before the surviving spouse, or the surviving spouse's representative has given
454 written notice to the payor, or agent of the payor, by mail or delivery, that (i) the surviving spouse
455 intends to file a petition for an elective share, or (ii) a petition for an elective share has been filed.

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

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

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

470 SECTION 12. Real Estate. (a) Any third party holding an interest in real estate shall have no
471 obligation under section 9 of this chapter nor have any right or obligation based thereon under the
472 following circumstances

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

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

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

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

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

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

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

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

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

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

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

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

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

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