

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

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**The Commonwealth of Massachusetts**

PRESENTED BY:

*Cynthia S. Creem*

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to the elective share of surviving spouses.

PETITION OF:

NAME:

*Cynthia S. Creem*

DISTRICT/ADDRESS:

*First Middlesex and Norfolk*

# SENATE . . . . . No.

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[Pin Slip]

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## The Commonwealth of Massachusetts

In the Year Two Thousand Thirteen

An Act relative to the elective share of surviving spouses.

*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. PART 2, Sections 2-201 to 2-299. [Reserved] of chapter 190B of the General  
2 Laws, as inserted by section 9 of chapter 521 of the Acts of 2008, is hereby amended to read in  
3 its entirety as follows:

4 Section 2-201. Definitions.

5 In this Part:

6 (1) As used in sections other than Section 2-205, “decedent’s nonprobate transfers to others”  
7 means the amounts that are included in the augmented estate under Section 2-205.

8 (2) “Fractional interest in property held in joint tenancy with the right of survivorship”  
9 whether the fractional interest is unilaterally severable or not, means the fraction, the numerator  
10 of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the  
11 number of joint tenants who survive the decedent and which, if the decedent was not a joint  
12 tenant, is the number of joint tenants.

13 (3) "Marriage" as it relates to a transfer by the decedent during marriage, means any  
14 marriage of the decedent to the decedent's surviving spouse.

15 (4) "Nonadverse party" means a person who does not have a substantial beneficial interest in  
16 the trust or other property arrangement that would be adversely affected by the exercise or  
17 nonexercise of the power that he or she possesses respecting the trust or other property  
18 arrangement. A person having a general power of appointment over property is deemed to have a  
19 beneficial interest in the property.

20 (5) "Power" or "power of appointment" includes a power to designate the beneficiary of a  
21 beneficiary designation.

22 (6) "Presently exercisable general power of appointment" means a power of appointment  
23 under which, at the time in question, the decedent, whether or not he or she then had the capacity  
24 to exercise the power, held a power to create a present or future interest in himself or herself, his  
25 or her creditors, his or her estate, or creditors of his or her estate, and includes a power to revoke  
26 or invade the principal of a trust or other property arrangement.

27 (7) "Probate estate" means property that would pass by intestate succession if the decedent  
28 died without a valid will.

29 (8) "Property" includes values subject to a beneficiary designation.

30 (9) "Right to income" includes a right to payments under a commercial or private annuity, an  
31 annuity trust, a unitrust, or a similar arrangement.

32 (10) "Transfer" as it relates to a transfer by or of the decedent, includes (i) an exercise or  
33 release of a presently exercisable general power of appointment held by the decedent, (ii) a lapse

34 at death of a presently exercisable general power of appointment held by the decedent, and (iii)  
35 an exercise, release, or lapse of a general power of appointment that the decedent created in  
36 himself or herself and of a power described in Section 2-205(2)(ii) that the decedent conferred on  
37 a nonadverse party.

38 (11) For purposes of Sections 2-201 through 2-214 of this Part, ownership interests of a party  
39 during lifetime shall be determined in accordance with the following rules:

40

41 (a) “Net contribution” of a party means the sum of all deposits to an account made by or for  
42 the party, less all payments from the account made to or for the party which have not been paid  
43 to or applied for the use of another party and a proportionate share of any charges deducted from  
44 the account, plus a proportionate share of any interest or dividends earned, whether or not  
45 included in the current balance.

46 (b) An account belongs to the parties in proportion to the net contribution of each to the sums  
47 of deposit, unless there is clear and convincing evidence of a different intent. As between parties  
48 married to each other, in the absence of proof otherwise, the net contribution of each is presumed  
49 to be an equal amount.

50 (c) A beneficiary in an account having a POD (pay on death) designation has no right to  
51 sums on deposit during the lifetime of any party.

52 (d) An agent in an account with an agency designation has no beneficial right to sums on  
53 deposit.

54 Section 2-202. Elective Share.

55 (a) [Elective-Share Amount.] Except as provided in section thirty-six of chapter two  
56 hundred and nine, the surviving spouse of a decedent who dies domiciled in the Commonwealth  
57 has a right of election, under the limitations and conditions stated in this Part, to take an elective-  
58 share amount equal to 50 percent of the value of the marital-property portion of the augmented  
59 estate.

60 (b) [Supplemental Elective-Share Amount.] If the sum of the amounts described in Sections  
61 2-207, 2-209(a)(1), and that part of the elective-share amount payable from the decedent's net  
62 probate estate and nonprobate transfers to others under Section 2-209(c) and (d) is less than  
63 \$75,000, the surviving spouse is entitled to a supplemental elective-share amount equal to  
64 \$75,000, minus the sum of the amounts described in those sections. The supplemental elective-  
65 share amount is payable from the decedent's net probate estate and from recipients of the  
66 decedent's nonprobate transfers to others in the order of priority set forth in Section 2-209(c) and  
67 (d).

68 (c) [Effect of Election on Statutory Benefits.] If the right of election is exercised by or on  
69 behalf of the surviving spouse, the surviving spouse's exempt property and family allowance, if  
70 any, are not charged against but are in addition to the elective-share and supplemental elective-  
71 share amounts.

72 (d) [Non-Domiciliary.] The right, if any, of the surviving spouse of a decedent who dies  
73 domiciled outside the Commonwealth to take an elective share in property in the Commonwealth  
74 is governed by the law of the decedent's domicile at death.

75 Section 2-203. Composition of the Augmented Estate; Marital-Property Portion.

76 (a) Subject to Section 2-208, the value of the augmented estate, to the extent provided in  
77 Sections 2-204, 2-205, 2-206, and 2-207, consists of the sum of the values of all property,  
78 whether real or personal, movable or immovable, tangible or intangible, wherever situated, that  
79 constitute:

80 (1) the decedent's net probate estate;

81 (2) the decedent's nonprobate transfers to others;

82 (3) the decedent's nonprobate transfers to the surviving spouse; and

83 (4) the surviving spouse's property and nonprobate transfers to others.

84 (b) The value of the marital-property portion of the augmented estate consists of the sum of  
85 the values of the four components of the augmented estate as determined under subsection (a)  
86 multiplied by the following percentage:

87 If the decedent and the spouse

88 were married to each other: The percentage is:

89

90 Less than 1 year 3%

91 1 year but less than 2 years 6%

92 2 years but less than 3 years 12%

93 3 years but less than 4 years 18%

94 4 years but less than 5 years 24%

95	5 years but less than 6 years	30%
96	6 years but less than 7 years	36%
97	7 years but less than 8 years	42%
98	8 years but less than 9 years	48%
99	9 years but less than 10 years	54%
100	10 years but less than 11 years	60%
101	11 years but less than 12 years	68%
102	12 years but less than 13 years	76%
103	13 years but less than 14 years	84%
104	14 years but less than 15 years	92%
105	15 years or more	100%

106 Section 2-204. Decedent's Net Probate Estate.

107 The value of the augmented estate includes the value of the decedent's probate estate, reduced by  
108 funeral and administration expenses and family allowances, exempt property, and enforceable  
109 claims.

110 Section 2-205. Decedent's Nonprobate Transfers to Others.

111 The value of the augmented estate includes the value of the decedent's nonprobate transfers to  
112 others, not included under Section 2-204, of any of the following types, in the amount provided  
113 respectively for each type of transfer:

114 (1) Property owned or owned in substance by the decedent immediately before death that  
115 passed outside probate at the decedent's death. Property included under this category consists of:

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

121 (ii) The decedent's fractional interest in property held by the decedent in joint tenancy with  
122 the right of survivorship. The amount included is the value of the decedent's fractional interest,  
123 to the extent the fractional interest passed by right of survivorship at the decedent's death to a  
124 surviving joint tenant other than the decedent's surviving spouse.

125 (iii) The decedent's ownership interest in property or accounts held in POD, TOD, or co  
126 ownership registration with the right of survivorship. The amount included is the value of the  
127 decedent's ownership interest, to the extent the decedent's ownership interest passed at the  
128 decedent's death to or for the benefit of any person other than the decedent's estate or surviving  
129 spouse.

130 (iv) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if  
131 the decedent owned the insurance policy immediately before death or if and to the extent the  
132 decedent alone and immediately before death held a presently exercisable general power of

133 appointment over the policy or its proceeds. The amount included is the value of the proceeds, to  
134 the extent they were payable at the decedent's death to or for the benefit of any person other than  
135 the decedent's estate or surviving spouse.

136 (2) Property transferred in any of the following forms by the decedent during marriage:

137 (i) Any irrevocable transfer in which the decedent retained the right to the possession or  
138 enjoyment of, or to the income from, the property if and to the extent the decedent's right  
139 terminated at or continued beyond the decedent's death. The amount included is the value of the  
140 fraction of the property to which the decedent's right related, to the extent the fraction of the  
141 property passed outside probate to or for the benefit of any person other than the decedent's  
142 estate or surviving spouse.

143 (ii) Any transfer in which the decedent created a power over income or property, exercisable  
144 by the decedent alone or in conjunction with any other person, or exercisable by a nonadverse  
145 party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or  
146 creditors of the decedent's estate. The amount included with respect to a power over property is  
147 the value of the property subject to the power, and the amount included with respect to a power  
148 over income is the value of the property that produces or produced the income, to the extent the  
149 power in either case was exercisable at the decedent's death to or for the benefit of any person  
150 other than the decedent's surviving spouse or to the extent the property passed at the decedent's  
151 death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person  
152 other than the decedent's estate or surviving spouse. If the power is a power over both income  
153 and property and the preceding sentence produces different amounts, the amount included is the  
154 greater amount.

155 (3) Property that passed during marriage and during the two year period next preceding the  
156 decedent's death as a result of a transfer by the decedent if the transfer was of any of the  
157 following types:

158 (i) Any property that passed as a result of the termination of a right or interest in, or power  
159 over, property that would have been included in the augmented estate under paragraph (1)(i), (ii),  
160 or (iii), or under paragraph (2), if the right, interest, or power had not terminated until the  
161 decedent's death. The amount included is the value of the property that would have been  
162 included under those paragraphs if the property were valued at the time the right, interest, or  
163 power terminated, and is included only to the extent the property passed upon termination to or  
164 for the benefit of any person other than the decedent or the decedent's estate, spouse, or  
165 surviving spouse. As used in this subparagraph, "termination," with respect to a right or interest  
166 in property, occurs when the right or interest terminated by the terms of the governing instrument  
167 or the decedent transferred or relinquished the right or interest, and, with respect to a power over  
168 property, occurs when the power terminated by exercise, release, lapse, default, or otherwise,  
169 but, with respect to a power described in paragraph (1)(i), "termination" occurs when the power  
170 terminated by exercise or release, but not otherwise.

171 (ii) Any transfer of or relating to an insurance policy on the life of the decedent if the  
172 proceeds would have been included in the augmented estate under paragraph (1)(iv) had the  
173 transfer not occurred. The amount included is the value of the insurance proceeds to the extent  
174 the proceeds were payable at the decedent's death to or for the benefit of any person other than  
175 the decedent's estate or surviving spouse.

176 (iii) Any transfer of property, to the extent not otherwise included in the augmented estate,  
177 made to or for the benefit of a person other than the decedent's surviving spouse. The amount  
178 included is the value of the transferred property to the extent the transfers to any one donee in  
179 either of the two years exceeded the amount excludable from taxable gifts under 26 U.S.C.  
180 Section 2503(b) or its successor on the date next preceding the date of the decedent's death.

181 Section 2-206. Decedent's Nonprobate Transfers to the Surviving Spouse.

182 Excluding property passing to the surviving spouse under the federal Social Security system, the  
183 value of the augmented estate includes the value of the decedent's nonprobate transfers to the  
184 decedent's surviving spouse, which consist of all property that passed outside probate at the  
185 decedent's death from the decedent to the surviving spouse by reason of the decedent's death,  
186 including:

187 (1) the decedent's fractional interest in property held as a joint tenant with the right of  
188 survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse as  
189 surviving joint tenant,

190 (2) the decedent's ownership interest in property or accounts held in co ownership  
191 registration with the right of survivorship, to the extent the decedent's ownership interest passed  
192 to the surviving spouse as surviving co owner, and

193 (3) all other property that would have been included in the augmented estate under Section 2  
194 205(1) or (2) had it passed to or for the benefit of a person other than the decedent's spouse,  
195 surviving spouse, the decedent, or the decedent's creditors, estate, or estate creditors.

196 Section 2-207. Surviving Spouse's Property and Nonprobate Transfers to Others.

197 (a) [Included Property.] Except to the extent included in the augmented estate under Section  
198 2 204 or 2 206, the value of the augmented estate includes the value of:

199 (1) property that was owned by the decedent's surviving spouse at the decedent's death,  
200 including:

201 (i) the surviving spouse's fractional interest in property held in joint tenancy with the right of  
202 survivorship,

203 (ii) the surviving spouse's ownership interest in property or accounts held in co ownership  
204 registration with the right of survivorship, and

205 (iii) property that passed to the surviving spouse by reason of the decedent's death, but not  
206 including the spouse's right to family allowance, exempt property, or payments under the federal  
207 Social Security system; and

208 (2) property that would have been included in the surviving spouse's nonprobate transfers to  
209 others, other than the spouse's fractional and ownership interests included under subsection  
210 (a)(1)(i) or (ii), had the spouse been the decedent.

211 (b) [Time of Valuation.] Property included under this section is valued at the decedent's  
212 death, taking the fact that the decedent predeceased the spouse into account, but, for purposes of  
213 subsection (a)(1)(i) and (ii), the values of the spouse's fractional and ownership interests are  
214 determined immediately before the decedent's death if the decedent was then a joint tenant or a  
215 co owner of the property or accounts. For purposes of subsection (a)(2), proceeds of insurance  
216 that would have been included in the spouse's nonprobate transfers to others under Section 2  
217 205(1)(iv) are not valued as if he or she were deceased.

218 (c) [Reduction for Enforceable Claims.] The value of property included under this section is  
219 reduced by enforceable claims against the surviving spouse.

220 Section 2-208. Exclusions, Valuation, and Overlapping Application.

221 (a) [Exclusions.] The value of any property is excluded from the decedent's nonprobate  
222 transfers to others (i) to the extent the decedent received adequate and full consideration in  
223 money or money's worth for a transfer of the property or (ii) if the property was transferred with  
224 the written joinder of, or if the transfer was consented to in writing before or after the transfer by,  
225 the surviving spouse.

226 (b) [Valuation.] The value of property:

227 (1) included in the augmented estate under Section 2-205, 2-206, or 2-207 is reduced in each  
228 category by enforceable claims against the included property; and

229 (2) includes the commuted value of any present or future interest and the commuted value of  
230 amounts payable under any trust, life insurance settlement option, annuity contract, public or  
231 private pension, disability compensation, death benefit or retirement plan, or any similar  
232 arrangement, exclusive of the federal Social Security system.

233 (c) [Overlapping Application; No Double Inclusion.] In case of overlapping application to  
234 the same property of the paragraphs or subparagraphs of Section 2-205, 2-206, or 2-207, the  
235 property is included in the augmented estate under the provision yielding the greatest value, and  
236 under only one overlapping provision if they all yield the same value.

237 Section 2-209. Sources from Which Elective Share Payable.

238 (a) [Elective-Share Amount Only.] In a proceeding for an elective share, the following are  
239 applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due  
240 from the decedent's net probate estate and recipients of the decedent's nonprobate transfers to  
241 others:

242 (1) amounts included in the augmented estate under Section 2-204 which pass or have passed  
243 to the surviving spouse by testate or intestate succession and amounts included in the augmented  
244 estate under Section 2-206; and

245 (2) the marital-property portion of amounts included in the augmented estate under Section  
246 2-207

247 (b) [Marital Property Portion.] The marital-property portion under subsection (a)(2) is  
248 computed by multiplying the value of the amounts included in the augmented estate under  
249 Section 2-207 by the percentage of the augmented estate set forth in the schedule in Section 2-  
250 203(b) appropriate to the length of time the spouse and the decedent were married to each other.

251 (c) [Unsatisfied Balance of Elective-Share Amount; Supplemental Elective-Share Amount.]  
252 If, after the application of subsection (a), the elective-share amount is not fully satisfied, or the  
253 surviving spouse is entitled to a supplemental elective-share amount, amounts included in the  
254 decedent's net probate estate, other than assets passing to the surviving spouse by testate or  
255 intestate succession, and in the decedent's nonprobate transfers to others under Section 2-205(1),  
256 (2), and (3)(i) or (iii), are applied first to satisfy the unsatisfied balance of the elective-share  
257 amount or the supplemental elective-share amount. The decedent's net probate estate and that  
258 portion of the decedent's nonprobate transfers to others are so applied that liability for the  
259 unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is

260 apportioned among the recipients of the decedent's net probate estate and of that portion of the  
261 decedent's nonprobate transfers to others in proportion to the value of their interests therein.

262 (d) [Unsatisfied Balance of Elective-Share and Supplemental Elective-Share Amount.] If,  
263 after the application of subsections (a) and (c), the elective-share or supplemental elective-share  
264 amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to  
265 others is so applied that liability for the unsatisfied balance of the elective-share or supplemental  
266 elective-share amount is apportioned among the recipients of the remaining portion of the  
267 decedent's nonprobate transfers to others in proportion to the value of their interests therein.

268 (e) [Unsatisfied Balance Treated as General Pecuniary Devise.] The unsatisfied balance of  
269 the elective-share or supplemental elective-share amount as determined under subsection (c) or  
270 (d) is treated as a general pecuniary devise for purposes of Section 3-904.

271 Section 2-210. Personal Liability of Recipients.

272 (a) Only original recipients of the decedent's nonprobate transfers to others, and the donees  
273 of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have  
274 the property or its proceeds, are liable to make a proportional contribution toward satisfaction of  
275 the surviving spouse's elective-share or supplemental elective-share amount. A person liable to  
276 make contribution may choose to give up the proportional part of the decedent's nonprobate  
277 transfers to him or her or to pay the value of the amount for which he or she is liable.

278 (b) If any section or part of any section of this Part is preempted by federal law with respect  
279 to a payment, an item of property, or any other benefit included in the decedent's nonprobate  
280 transfers to others, a person who, not for value, receives the payment, item of property, or any  
281 other benefit is obligated to return the payment, item of property, or benefit, or is personally

282 liable for the amount of the payment or the value of that item of property or benefit, as provided  
283 in Section 2 209, to the person who would have been entitled to it were that section or part of  
284 that section not preempted.

285 Section 2-211. Proceeding for Elective Share; Time Limit.

286 (a) Except as provided in subsection (b), the election must be made by filing in the Court and  
287 mailing or delivering to the personal representative, if any, a petition for the elective share within  
288 nine months after the date of the decedent's death, or within six months after the probate of the  
289 decedent's will, whichever limitation later expires. The surviving spouse must give notice of the  
290 time and place set for hearing to persons interested in the estate and to the distributees and  
291 recipients of portions of the augmented estate whose interests will be adversely affected by the  
292 taking of the elective share. Except as provided in subsection (b), the decedent's nonprobate  
293 transfers to others are not included within the augmented estate for the purpose of computing the  
294 elective-share, if the petition is filed more than nine months after the decedent's death.

295 (b) Within nine months after the decedent's death, the surviving spouse may petition the  
296 court for an extension of time for making an election. If, within nine months after the decedent's  
297 death, the spouse gives notice of the petition to all persons interested in the decedent's  
298 nonprobate transfers to others, the court for cause shown by the surviving spouse may extend  
299 the time for election. If the court grants the spouse's petition for an extension, the decedent's  
300 nonprobate transfers to others are not excluded from the augmented estate for the purpose of  
301 computing the elective-share and supplemental elective-share amounts, if the spouse makes an  
302 election by filing in the court and mailing or delivering to the personal representative, if any, a  
303 petition for the elective share within the time allowed by the extension.

304 (c) The surviving spouse may withdraw his or her demand for an elective share at any time  
305 before entry of a final determination by the court.

306 (d) After notice and hearing, the court shall determine the elective-share and supplemental  
307 elective-share amounts, and shall order its payment from the assets of the augmented estate or by  
308 contribution as appears appropriate under Sections 2-209 and 2-210. If it appears that a fund or  
309 property included in the augmented estate has not come into the possession of the personal  
310 representative, or has been distributed by the personal representative, the court nevertheless shall  
311 fix the liability of any person who has any interest in the fund or property or who has possession  
312 thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than  
313 all persons against whom relief could be sought, but no person is subject to contribution in any  
314 greater amount than he or she would have been under Sections 2-209 and 2-210 had relief been  
315 secured against all persons subject to contribution.

316 (e) An order or judgment of the court may be enforced as necessary in suit for contribution  
317 or payment in other courts of this State or other jurisdictions.

318 Section 2-212. Right of Election Personal to Surviving Spouse; Incapacitated Surviving Spouse.

319 (a) [Surviving Spouse Must Be Living at Time of Election.] The right of election may be  
320 exercised only by a surviving spouse who is living when the petition for the elective share is  
321 filed in the court under Section 2-211(a). If the election is not exercised by the surviving spouse  
322 personally, it may be exercised on the surviving spouse's behalf by his or her conservator,  
323 guardian, or agent under the authority of a power of attorney.

324 (b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a surviving  
325 spouse who is an incapacitated person, that portion of the elective-share and supplemental

326 elective-share amounts due from the decedent's probate estate and recipients of the decedent's  
327 nonprobate transfers to others under Section 2-209(c) and (d) must be placed in a custodial trust  
328 for the benefit of the surviving spouse under the provisions of the Massachusetts Uniform  
329 Custodial Trust Act, except as modified below. For the purposes of this subsection, an election  
330 on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be  
331 on behalf of a surviving spouse who is an incapacitated person. For purposes of the custodial  
332 trust established by this subsection, (i) the electing guardian, conservator, or agent is the  
333 custodial trustee, (ii) the surviving spouse is the beneficiary, and (iii) the custodial trust is  
334 deemed to have been created by the decedent spouse by written transfer that takes effect at the  
335 decedent spouse's death and that directs the custodial trustee to administer the custodial trust as  
336 for an incapacitated beneficiary.

337 (c) [Custodial Trust.] For the purposes of subsection (b), the Massachusetts Uniform  
338 Custodial Trust Act must be applied as if Section 6(b) thereof were repealed and Sections 2(e),  
339 9(b), and 17(a) were amended to read as follows:

340 (1) Neither an incapacitated beneficiary nor anyone acting on behalf of an incapacitated  
341 beneficiary has a power to terminate the custodial trust; but if the beneficiary regains capacity,  
342 the beneficiary then acquires the power to terminate the custodial trust by delivering to the  
343 custodial trustee a writing signed by the beneficiary declaring the termination. If not previously  
344 terminated, the custodial trust terminates on the death of the beneficiary.

345 (2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the  
346 custodial trust property as the custodial trustee considers advisable for the use and benefit of the  
347 beneficiary and individuals who were supported by the beneficiary when the beneficiary became

348 incapacitated, or who are legally entitled to support by the beneficiary. Expenditures may be  
349 made in the manner, when, and to the extent that the custodial trustee determines suitable and  
350 proper, without court order but with regard to other support, income, and property of the  
351 beneficiary and benefits of medical or other forms of assistance from any state or federal  
352 government or governmental agency for which the beneficiary must qualify on the basis of need.

353 (3) Upon the beneficiary's death, the custodial trustee shall transfer the unexpended custodial  
354 trust property in the following order: (i) under the residuary clause, if any, of the will of the  
355 beneficiary's predeceased spouse against whom the elective share was taken, as if that  
356 predeceased spouse died immediately after the beneficiary; or (ii) to that predeceased spouse's  
357 heirs under Section 2-711 of Massachusetts Uniform Probate Code.

358 Section 2-213. Waiver of Right to Elect and of Other Rights.

359 (a) [Scope]. A waiver is enforceable against the surviving spouse if it is enforceable under  
360 (i) this section or (ii) the law governing the enforceability of the waiver where and when it was  
361 executed.

362 (b) [Waiver Before or After Marriage]. The right of election of a surviving spouse and the  
363 rights of the surviving spouse to exempt property, family allowance, and intestate share, or any  
364 of them, may be waived, wholly or partially, before or after marriage, unilaterally or pursuant to  
365 an agreement contained in a record signed by the surviving spouse.

366 (c) [Consideration Unnecessary]. Consideration is not necessary to the enforcement of a  
367 waiver.

368 (d) [Requirements for Enforceability; Burden of Persuasion]. For a waiver to be enforceable  
369 against the surviving spouse, the spouse's waiver must have been informed and not obtained by  
370 fraud, undue influence, or duress. Except as otherwise provided in subsection (e), the enforcing  
371 party has the burden of persuasion to establish that the spouse's waiver was informed. The  
372 surviving spouse has the burden of persuasion to establish that the waiver was obtained by fraud,  
373 undue influence, or duress.

374 (e) [Presumption]. A rebuttable presumption arises that the surviving spouse's waiver was  
375 informed, shifting the burden of persuasion to the surviving spouse to establish that his or her  
376 waiver was not informed, if the enforcing party establishes that:

377 (1) before the waiver was executed, (i) the surviving spouse knew, at least approximately, the  
378 decedent's assets and asset values, income, and liabilities; or (ii) the decedent or his or her  
379 representative provided in timely fashion to the surviving spouse a written statement accurately  
380 disclosing the decedent's significant assets and asset values, income, and liabilities; and either

381 (2) the surviving spouse was represented by independent legal counsel; or

382 (3) if the surviving spouse was not represented by independent legal counsel, (i) the decedent or  
383 the decedent's representative advised the surviving spouse, in timely fashion, to obtain  
384 independent legal counsel, and offered to advance sufficient funds to pay for the reasonable costs  
385 of the surviving spouse's representation or to reimburse those costs; and (ii) the waiver stated, in  
386 language easily understandable by an adult of ordinary intelligence with no legal training, the  
387 nature of any rights or claims otherwise arising at death that were altered by the waiver, and the  
388 nature of that alteration.

389 (f) [Unconscionability]. A waiver is unenforceable if it was unconscionable when it was  
390 executed. An issue of unconscionability of a waiver is for decision by the court as a matter of  
391 law.

392 (g) [Waiver of “All Rights”]. Unless it provides to the contrary, a waiver of “all rights”, or  
393 equivalent language, in the property or estate of a present or prospective spouse or a complete  
394 property settlement entered into after or in anticipation of separation or divorce is a waiver of all  
395 rights of elective share, exempt property, and family allowance by each spouse in the property of  
396 the other and a renunciation by each of all benefits that would otherwise pass to him or her from  
397 the other by intestate succession or by virtue of any will executed before the waiver or property  
398 settlement.

399 Section 2-214. Protection of Payors and Other Third Parties.

400 (a) Although under Section 2 205 a payment, item of property, or other benefit is included in  
401 the decedent's nonprobate transfers to others, a payor or other third party is not liable for having  
402 made a payment or transferred an item of property or other benefit to a beneficiary designated in  
403 a governing instrument, or for having taken any other action in good faith reliance on the validity  
404 of a governing instrument, upon request and satisfactory proof of the decedent's death, before the  
405 payor or other third party received written notice from the surviving spouse or spouse's  
406 representative of an intention to file a petition for the elective share or that a petition for the  
407 elective share has been filed. A payor or other third party is liable for payments made or other  
408 actions taken after the payor or other third party received written notice of an intention to file a  
409 petition for the elective share or that a petition for the elective share has been filed.

410 (b) A written notice of intention to file a petition for the elective share or that a petition for  
411 the elective share has been filed must be mailed to the payor's or other third party's main office  
412 or home by registered or certified mail, return receipt requested, or served upon the payor or  
413 other third party in the same manner as a summons in a civil action. Upon receipt of written  
414 notice of intention to file a petition for the elective share or that a petition for the elective share  
415 has been filed, a payor or other third party may pay any amount owed or transfer or deposit any  
416 item of property held by it to or with the court having jurisdiction of the probate proceedings  
417 relating to the decedent's estate, or if no proceedings have been commenced, to or with the court  
418 having jurisdiction of probate proceedings relating to decedents' estates located in the county of  
419 the decedent's residence. The court shall hold the funds or item of property, and, upon its  
420 determination under Section 2 211(d), shall order disbursement in accordance with the  
421 determination. If no petition is filed in the court within the specified time under Section 2 211(a)  
422 or, if filed, the demand for an elective share is withdrawn under Section 2 211(c), the court shall  
423 order disbursement to the designated beneficiary. Payments or transfers to the court or deposits  
424 made into court discharge the payor or other third party from all claims for amounts so paid or  
425 the value of property so transferred or deposited.

426 (c) Upon petition to the probate court by the beneficiary designated in a governing  
427 instrument, the court may order that all or part of the property be paid to the beneficiary in an  
428 amount and subject to conditions consistent with this Part.

429 SECTION 2. Section 2-801 of said chapter 190B, is hereby amended by striking out subsection  
430 (j) and inserting in place thereof the following subsection:

431 (j) Except for the provisions of subsection (h), this section shall not abridge the right of  
432 any person to disclaim, waive, release, renounce, or abandon any interest in property under  
433 section 2-201 or any other statute or rule of law.

434 SECTION 3. Sections 15 and 16 of chapter 191 of the General Laws are hereby repealed.

435 SECTION 4. This act shall apply to pre-existing governing instruments, except that none of its  
436 provisions shall apply to governing instruments that became irrevocable prior to the effective  
437 date of this act.