

Homestead Protection in Massachusetts— Enhanced Benefits for an Old Arrangement

A recent rewriting of the Massachusetts homestead law has further enhanced the protective benefits provided to a homeowner from the Bay State's homestead exemption. The increased benefits now available under the revised law are stimulating renewed interest in that exemption. Some of those benefits may now be provided automatically. However, to obtain the maximum benefits, a homeowner must still take action by filing the requisite Homestead Declaration, and, better yet, integrate the homestead benefits into an over-arching asset protection plan.

The "traditional" Massachusetts homestead law has allowed a homeowner to declare a homestead on his or her primary residence, and thereby protect that home against seizure by unsecured creditors (with a few exceptions) up to a set dollar amount. The legislature has significantly increased the exemption amounts over roughly the past decade—from \$100,000 for the "regular" homestead and \$200,000 for an "elderly/disabled" homestead to \$500,000 for each.

Now the structure of the governing statute has been upgraded as well. The new law, which went into effect on March 16, 2011, addresses a number of important questions left unanswered by the previous homestead statute, and adds several useful benefits.

Three Distinct Types of Homesteads:

Perhaps the most fundamental change enacted in the new law is the provision of an *automatic* homestead right which does not require the filing of any documentation. As a result, Massachusetts law now provides for three different types of homestead—the Automatic Homestead, the regular Declared Homestead, and the special Declared Homestead available to homeowners who have attained the age of 62 or are disabled. Each of these distinct homesteads offers differing levels of protection, with availability depending on a number of factors, including the age and medical status of the homeowners, the manner in which title is held, whether any of the owners have filed a Declaration of Homestead, and (where the home is owned by more than one person) how many of the co-owners have filed a Declaration of Homestead. The distinguishing features of these three types of homestead are outlined below.

Automatic Homestead:

The new Automatic Homestead is available to all persons who occupy or intend to occupy a home as their primary residence. No documentation needs to be filed with any registry of deeds or other agency. However, the maximum amount of protection available under the Automatic Homestead is capped at only \$125,000. If two or more people, for example, a husband and wife, co-own the home, the \$125,000 of protection is apportioned between them in the manners discussed below under the heading "Co-Ownership." The Automatic Homestead puts Massachusetts closer in step with many of

its sister states that provide automatic homestead protection. Unlike those sister states, however, Massachusetts has retained multi-tiered levels of protection. To obtain maximum benefits, a homeowner still needs to go to the effort of affirmatively filing for them.

Regular Declared Homestead:

To establish a regular Declared Homestead, the owner must file a Declaration of Homestead with the applicable registry of deeds and pay the appropriate one-time fee (currently \$35.00). A regular homestead will generally protect \$500,000 of the equity value of a home. As with the Automatic Homestead, this amount of protection is apportioned between co-owners.

Age 62 or Disabled Declared Homestead:

Homeowners who have reached the age of 62 or who are disabled are entitled to file a special Declaration of Homestead. This special homestead also provides protection of \$500,000, but unlike the regular Declared Homestead, generally does not have to be apportioned among the co-owners of the property and can be “stacked” with other Declared Homesteads. Accordingly, special Declared Homestead can often effectively provide protection for an amount in excess of the standard \$500,000.

Trusts:

Another fundamental change introduced by the new law is that homestead protection now explicitly applies to property held through trusts. Trusts are often very useful to help achieve a number of tax-planning and personal objectives. However, up to now, Massachusetts law has steadfastly maintained that the creditors of a beneficiary of a trust created by a third party are entitled to the same claim on the assets of the trust as that beneficiary; and further that where the trust is created by a person for his or her own benefit, the creditors of that person can reach the trust assets to the maximum extent that the trust assets **could** be distributed to that beneficiary. The new homestead law now provides homestead protection to real estate that otherwise qualifies for homestead protection to the same extent as if it were owned outside of the trust.

Co-Owners:

The new law contains a number of provisions that attempt to clarify how homestead protection works where the home is co-owned. Except in the case of the special Declared Homestead, the amount of homestead protection (either \$125,000 or \$500,000) is the amount of protection applied against the equity value of the home, regardless of how many owners are listed on the deed. Accordingly, the amount of this protection is divided among the co-owners in one of two ways, depending on whether title is held between them as (1) *joint tenants* or *tenants by the entirety*, on the one hand; or (2) *tenants in common* or through a *trust*, on the other. Where title is held as joint tenants or as tenants by the entirety, the amount of protection available under an

Automatic Homestead or a regular Declared Homestead remains whole and unallocated between the owners, provided that the total amount exempt from attachment by the creditors of all of the owners cannot exceed the dollar amount of the applicable homestead - \$125,000 or \$500,000, as the case may be. However, where title is held as tenants in common or through a trust, protection amount must be apportioned among the owners in proportion to their respective ownership interests in the property.

Stacking of Special Homesteads:

Special homesteads (available to homeowners who have reached the age of 62 or are disabled) may be “stacked” with the benefits available under Declarations of Homestead filed by co-owners. Where at least one of the co-owners has filed a special Declaration of Homestead, and co-owners hold title as *tenants in common* or through a *trust*, the amount homestead protection available under *each* of the special Declarations of Homestead is \$500,000 without reductions, proration or allocation among the other owners of the home. While it is clear that the legislature also intended that special homestead benefits “stack” where title is held jointly or as tenants by the entirety, the statute is unfortunately ambiguous about exactly how those stacked benefits are calculated.

Scope of Protection:

Homestead protection in Massachusetts applies by preventing certain unsecured creditors from seizing a person’s home to satisfy a judgment. It does not reduce the underlying amount of the debt. Likewise, it does not protect property from most secured debts (for example, mortgages), pre-existing liens, delinquent taxes or governmental assessments, claims or liens (including Medicaid liens), or court orders to pay for the support of a spouse or minor child.

Although the new legislation goes far in clarifying the mechanics of *determining* the applicable dollar cap on the homestead exemption, it does not address the fundamental ambiguities of the *operation* of such a cap. What does the cap mean in any practical sense? Applicable law would require a creditor to obtain a physical partition of the homestead property as a precondition to levying on the nonexempt portion. But in the absence of any practical way to physically partition any but the most expansive residence, there is no realistic way for the creditor to levy. So the “exempt” amount, as a practical matter, typically would not be limited at all. The irony is that the homestead exemption may afford even better protection than meets the eye. Nevertheless, it still seems sensible to affirmatively file for whatever the maximum protection may be available, rather than relying on the stingy automatic exemption.

| Effect on Estate Planning:

Unlike the homestead laws of most states, Massachusetts explicitly refers to the homestead as an “estate” – or legal right - in the property, rather than merely an exemption from creditor claims. For most purposes, this is a distinction without a

difference. In some estate-planning contexts, however, it may make a considerable difference. The homestead estate is established for the benefit of the owner's spouse and minor children, if any. Those family members are granted express rights to use, occupy and enjoy the home, under an express exemption from the laws of conveyance, descent, and devise, as well as from applicable laws related to creditor claims. The homestead estate existing on the death (or divorce) of the homeowner expressly continues for the benefit of the family occupants. The effect of these overriding property rights will require increased attention in estate-planning documents. For example, if a husband's will left his homesteaded residence to the children of his first marriage, his second wife might be within her rights to remain in possession of the residence for the rest of her days, contrary to the husband's intent. This might be the case even for a house protected only by an automatic exemption to which no one had give much thought. Planning may now increasingly require an express release of homestead rights.

Incorporating Homestead Protection into Personal Planning:

The new homestead law includes a number of important improvements over its predecessor. However, the homestead law has limitations and will be most effective when incorporated into a comprehensive asset protection strategy. If you have any questions about the new Massachusetts homestead law or would like to review the asset protection status of your planning (and perhaps file a Homestead Declaration), please do not hesitate to contact us.