

Overhauled Massachusetts Homestead Law Effective March 16, 2011

March 2011

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On December 16, 2010, Governor Deval Patrick signed a complete overhaul of the Massachusetts homestead statute. It is codified as M.G.L. c.188, as amended by Chapter 395 of the Acts of 2010. The new homestead statute takes effect on March 16, 2011.

[Click here for copy of New M.G.L. Chapter 188](#)

The original Massachusetts homestead statute was enacted in 1851, and its language was the source of much uncertainty, which resulted in conflicting interpretations and unpredictable results in courts within the Commonwealth. Since its enactment, the homestead statute was amended numerous times; however, many flaws remained. The new homestead statute resolves many of the uncertainties and ambiguities of the original law. Some highlights include:

- \$125,000 automatic homestead for all homeowners, with an additional \$375,000 upon recording of a homestead for a total \$500,000 of equity protected
- Multiple owners of property may now have the benefit of

homestead

- Owners of manufactured homes now eligible for homestead
- Homestead now protects equity even as against debts incurred prior to existence of the homestead
- Homesteads now relate back to original filing date, regardless of refinancing transactions
- Elderly and disabled homesteads now may be aggregated for the benefit of any elderly or disabled residents
- Trust beneficiaries now entitled to homestead for trust owned residential real estate
- Enhanced protections for non-titled spouses and modern family structures
- New disclosure notice must be given at mortgage closings

\$125,000 automatic homestead for all homeowners, with an additional \$375,000 upon recording of a homestead for a total \$500,000 of equity protected.

An automatic homestead is now provided to all Massachusetts homeowners in the amount of \$125,000. This coverage is a safety net for most homeowners as it is automatic and represents a typical 20% down payment on a home purchased for \$625,000, a value in excess of the average price of a single family home in Massachusetts. Additionally, a homeowner can record a declaration of homestead to receive up to a total of \$500,000 protection.

Multiple owners of property may now have the benefit of a homestead.

A flaw in the old law allowed for only one owner to declare a homestead. Now, multiple ownership interests as tenants by the entirety or joint tenants are permitted a whole and unallocated homestead among owners. Under either form of ownership, owners (as a group) are entitled to full homestead protection up to \$500,000 (if they record their additional homestead). Multiple owners collectively are not entitled to homesteads of more than the maximum amount of \$500,000. Tenants in common are entitled to homestead protection according to their proportional ownership interest in the property. To illustrate, a tenant in common with a fifty percent interest would have an automatic homestead of \$62,500, or \$250,000 upon recording of a declaration of homestead.

Manufactured homes now eligible for homestead.

The definition of a "home" eligible for homestead protection has been clarified to include manufactured homes. Despite the fact that deeds are generally not recorded on manufactured homes, the homestead declaration can be recorded at the registry of deeds for the municipality where the manufactured home is located.

The definition of "home" also now includes proceeds from the sale of real estate until a new homestead is acquired or for one year, whichever comes first. Insurance proceeds paid due to a fire or other casualties are also included in the definition of "home" and are protected for up to two years after the loss. The protection expires on such earlier date that the home is reconstructed or a new home

purchased. The extension of homestead protection to sale and insurance proceeds may prove contentious if such funds are comingled by the owner of the homestead during the time that such proceeds are protected. The new statute, however, does not require any escrow or other sequestration of such funds.

Homestead declaration now protects equity even as against debts incurred prior to existence of the homestead.

Prior to the new law, homeowners were not able to enjoy homestead protection against creditors for debts incurred prior to a homestead declaration. However, treatment of pre-existing debt differed in federal bankruptcy court which permits use of the state homestead protections as to pre-existing debt. Section 3(b) of the new law no longer includes an exception from homestead protection for pre-existing debts. This exclusion in the new homestead law addresses the ruling in *Patriot Portfolio, LLC v. Weinstein*, 163 F.3d 677 (1st Cir. 1999). In the *Weinstein* case, the First Circuit Court of Appeals confirmed rulings in previous cases holding that the exclusion for pre-existing debts under Massachusetts homestead law was unenforceable in bankruptcy court as the state law was preempted by federal bankruptcy law.

The *Weinstein* case gave homeowners in bankruptcy a clear advantage in utilizing homestead protections over homeowners who did not declare bankruptcy. A homeowner could declare an estate of homestead prior to the filing of bankruptcy and then take advantage of the Massachusetts homestead exemption in bankruptcy court, using

the homestead to protect equity that would not have otherwise been protected in state court. The new homestead statute provides all homeowners the same protection against creditors seeking to collect debts incurred prior to the homestead, whether the homeowner files bankruptcy or not. It should be noted that the new law retains the previously stated exception from homestead protection for pre-existing liens recorded against the home.

Homesteads now relate back to original filing date, regardless of refinancing transactions. Under the old homestead statute, confusion existed as to the effect a mortgage refinance transaction had on a previously declared homestead. As a result, lenders required homeowners to either subordinate or release the homestead at the closing of the refinance transaction, and the homeowner would have to declare a new homestead to ensure continued homestead protection. The new homestead law renders this unnecessary as it provides for the automatic subordination of the previously declared homestead to the new mortgage.

The new homestead statute prohibits a mortgage lender from requiring or recording a release or waiver of homestead in connection with the making and recording of any mortgage. Under the new homestead statute, any waiver language in a mortgage is treated only as a subordination. Even without express subordination language, homesteads are automatically subordinated to mortgages, as are the homestead rights of non-titled spouses and minor children.

The new homestead law permits collection of unsecured loans or credit lines (up to \$20,000) notwithstanding the automatic or declared

homestead if the property owner agrees to subordinate the homestead to such debts. The subordination must be executed by all owners and any non-titled spouse. This subordination must contain a disclosure under Section 4 of the homestead statute that the homeowner is voluntarily giving up the right to protection under the homestead law. It should be noted that the subordination provision is limited by excluding its application to credit card debt, payday loans, loans in advance of tax refunds or insurance settlements.

Elderly and disabled homesteads may be aggregated for the benefit of any elderly or disabled residents.

For disabled and elderly property owners (age 62 and older) the new homestead statute can increase the protection available to these homeowners by allowing the aggregation of the homesteads for each elderly or disabled person living in the home. At \$500,000 per elderly or disabled resident, the aggregation of these homesteads adds up to provide significant protection. For example, if a married couple, both over age 62 reside together and each declare an elderly homestead, they each would be permitted up to \$500,000 in homestead protection, for a total of \$1,000,000. If the married couple included one spouse over age 62 and one under age 62, the new statute still permits some aggregation, though at a reduced amount. In this scenario, if both spouses record homesteads, the elderly spouse would be entitled to up to \$500,000 of protection and the non-elderly spouse would be entitled to \$250,000, for a total of \$750,000 of protection. Further, in this case, if the elderly spouse in bankruptcy did not use all of their \$500,000 of homestead protection, then the non-elderly

spouse would be permitted to use any homestead protection remaining, up to their full \$500,000.

The precise homestead amounts applicable to any given scenario can be complex. There is some confusion among practitioners regarding the mechanics of the aggregation of elderly and disabled homesteads, in combination with non-elderly homesteads and partial homestead entitlements for trust beneficiaries and partial owners. Additionally, elderly and disabled homesteads are now personal to the elderly or disabled individual and if that property owner passes away, non-elderly, non-disabled heirs who have not declared (or who were not eligible to declare) their own homesteads, may have only the automatic homestead until they do declare their own. Under the new homestead statute, close examination of specific circumstances is critical to understanding the applicable homestead protections.

Trust beneficiaries now entitled to homestead for trust owned residential real estate.

The new homestead statute clarifies that trust beneficiaries residing in a property held in trust are entitled to automatic and recorded homesteads. The trustee of the trust records the homestead for the resident beneficiary. This homestead, however, is apportioned according to the beneficiary's interest in the trust. Thus, if a beneficiary has a 50% interest in a trust, the automatic homestead will protect only \$62,500 of equity and the declared homestead will protect up to \$250,000. This allocation requirement does not apply to elderly and disabled homesteads. Due to the many ownership options trusts provide, the actual protection a homestead will provide to a trust

beneficiary depends on a number of variables, including how many properties are held in the trust, how many beneficiaries reside in the trust property, the age and disability status of such residents and the resident beneficiary's proportional interest in the trust. In many cases, homestead protection may be enhanced by holding no more than one property in a trust.

Enhanced protections for non-titled spouses and modern family structures.

The revamped homestead statute provides enhanced protections if only one spouse has title to the property. In that situation, the titled spouse must disclose their marital status and identify the resident non-titled spouse. The non-titled spouse is then entitled to the homestead protection to use, occupy and enjoy the home. If the non-titled spouse lives apart from the title spouse, the declaration must so state, but need not provide the non-titled spouse's address.

The new homestead statute also clarifies issues related to the variations in modern families. For example, the term "family" is now defined as "married individuals", and is not gender specific. Minor children are now defined as persons age 21 and younger. The new statute also specifically protects non-titled spouses and divorcing spouses against loss of homestead through termination or divorce. Homesteads now remain in effect until ordered otherwise by the probate court.

New Disclosure Must be Given Out by Closing Attorneys and Settlement Agents.

A provision of the new homestead law requires closing attorneys and settlement agents to provide mortgagors with notice of the right to declare homestead protection, which is arguably so broad as to include commercial transactions. Closing attorneys or settlement agents must obtain the mortgagor's written acknowledgement of receipt of this disclosure. The disclosure notice must include a summary of the differences between the automatic homestead protection and the enhanced benefits acquired by making a declaration of homestead.

Conclusion.

It is important to note that all existing homestead declarations in effect on March 16, 2011, will continue in full force and effect. The new law is a welcome overhaul of a statute that was out of date for modern times and mired in often contradictory caselaw. The new Massachusetts homestead statute eliminates much confusion over the interpretation of homesteads, though it will undoubtedly give rise to new issues and questions. Nevertheless, as of March 16, 2011, the new Massachusetts homestead statute will provide expanded homestead protection to most Massachusetts homeowners, and greater (though not absolute) certainty for lenders and creditors.

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