

Homestead: Protection for Your Home

"I hereby declare that I own and am possessed and occupy the premises as a residence and homestead under Massachusetts General Laws Chapter 188, as amended."

The above is a core statement to be made in a homestead filing and for a Massachusetts homeowner, could preserve equity in his or her residence of up to \$500,000. The Massachusetts Homestead Act was enacted as a legal safeguard for a homeowner and his or her family by protecting the family's primary residence against the claims of creditors. The Act stands for the idea that the family home should be protected regardless of the homeowner's financial condition. In today's turbulent economic times, where many families are suffering from mounting fiscal difficulties, more homeowners should be taking advantage of the protection of the Homestead Act.

The Homestead Act permits a homeowner who occupies a house as his/her principal residence to shield up to \$500,000 in equity in that house from the claims of future creditors. The Act currently permits only one spouse to file a Declaration of Homestead with the Registry of Deeds if each spouse has an ownership interest in the home. A disabled or elderly person (62 years of age and older) is entitled to even greater protection because a husband and wife who own a home together can each file for the \$500,000 protection. Debts excepted from homestead protection include taxes, pre-existing mortgages, debts incurred prior to the acquisition of the homestead estate, alimony and child support obligations, and debts incurred in connection with the purchase of the home. Nevertheless, a properly recorded Declaration of Homestead is very often a prudent, effective, and inexpensive means by which to put one's home beyond the reach of potential creditors.

Many homeowners file their Declaration of Homestead at the time they purchase their home. The homestead can be released by any conveyance of the property without reserving homestead protection, by a written recordable release, by the abandonment or cessation of use of the property as a principal residence, by failure to qualify for protection, or by the acquisition of a subsequent homestead. Homestead termination raises the question of whether a person should file a new homestead after refinancing his or her home. Most lenders include a clause in their mortgage documents that specifically waives any existing homestead protection in order to perfect the mortgage on the property. Yet, this requirement seems rather backward as it may force a homeowner to file a new Homestead Declaration even though a perfectly sound prior homestead exemption may have already been declared. Termination of the first homestead exemption would

expose homeowners to any debts that incurred after the first Declaration but before the second. As a result, homeowners can often inadvertently release their homestead protection, and what was once a future excepted debt can suddenly become a prior unprotected debt to a newly filed Declaration.

To address such ambiguities in existing homestead law, a series of new amendments to the Homestead Statute have been proposed by the Homestead Subcommittee of the Real Estate Bar Association's Legislative Committee. Following these changes, a second Homestead Declaration on the same primary residence would "relate back" to the first Homestead Declaration to avoid the problems embedded in the example above. Any mortgage clause terminating previously-filed homesteads would be construed to effect a subordination, not a termination, of the homestead and would prohibit mortgage lenders from requiring a release of homestead in connection with the making and recording of any mortgage. The subsequent homestead would not terminate the coverage of the prior Declaration but would rather relate back to the first Declaration to maintain a continuous stream of protection. This concept would also apply when a person has filed a regular homestead but then subsequently files a homestead as an elderly or disabled person.

Another series of proposed changes would result in the creation of an "automatic homestead," which provides for homestead protection without ever having to file a formal Declaration. For owners who occupy, or intend to occupy, their homes as a primary residence, these amendments would afford an automatic protection of \$125,000. These changes would help those people who are unfamiliar with the Homestead Act. The new automatic provision would at least give the homeowner a baseline of protection in the event of a financial crisis so that they can protect their homes from the collection efforts of creditors.

With the automatic homestead baseline in place, the amendments allow for homeowners to increase the amount of the exemption to \$500,000 by filing a formal Declaration of Homestead. Another portion of the amendments concerns the filing requirements of a formal Declaration. The proposed changes would eliminate the confusing constraint of the existing statute that only one spouse may sign the Declaration. Co-owning, married persons residing together would both need to sign their names on the Homestead Declaration, now paralleling the double-signature requirement present in all other title documents.

Absent enactment of these amendments by the state legislature, a homeowner needs to take caution in declaring a new homestead following a refinancing. A homeowner should check to see if the lenders' contract waives homestead protection as to that mortgage lender alone or whether the waiver applies to all creditors. If the waiver applies to the one mortgage lender, the homeowner is advised not to file a new homestead as the timing of the protection provided by the initial homestead filing would be lost as to other creditors. If the waiver applies to all lenders, then filing another Homestead Declaration could be a prudent decision. However, take note of the fact that any debts incurred in the interim between the first Homestead Declaration and the second will not be protected. Due to the strong endorsement of the Real Estate Bar Association, the Boston Bar Association, and the Massachusetts Bar Association, the amendments have received unprecedented, coordinated support. The changes would resolve these confusing aspects of homestead law,

and a Declaration of Homestead would become an even more straightforward process. As it stands today, homestead protection remains a smart and inexpensive way to protect the family home in these uncertain economic times. We recommend taking advantage of the protection offered by the Homestead Act, and homeowners should consider it as they execute any real estate or estate planning documents.

RESPONSIVE SOLUTIONS

Two simple words that explain our commitment to you. Being responsive is a critical element in building a strong attorney-client relationship. Whether you are a new or existing client, we'll be quick to respond to your needs with the knowledge necessary to find solutions to your legal concerns.

www.flechertilton.com

Fletcher Tilton PC
Attorneys at law

THE GUARANTY BUILDING

370 Main Street, 12th Floor
Worcester, MA 01608
TEL 508.459.8000 FAX 508.459.8300

THE MEADOWS

161 Worcester Road, Suite 501
Framingham, MA 01701
TEL 508.532.3500 FAX 508.532.3100

CAPE COD

1579 Falmouth Road, Suite 3
Centerville, MA 02632
TEL 508.815.2500 FAX 508.459.8300

This material is intended to offer general information to clients and potential clients of the firm, which information is current to the best of our knowledge on the date indicated below. The information is general and should not be treated as specific legal advice applicable to a particular situation. Fletcher Tilton PC assumes no responsibility for any individual's reliance on the information disseminated unless, of course, that reliance is as a result of the firm's specific recommendation made to a client as part of our representation of the client. Please note that changes in the law occur and that information contained herein may need to be reverified from time to time to ensure it is still current. This information was last updated August, 2009.