

Introduction

Every homeowner with a primary personal residence in Massachusetts should have a homestead declaration filed with the registry of deeds in the county where the property is located. A properly prepared and filed homestead declaration provides protection of your home of up to \$500,000 in equity value against creditors. The protection is provided by Massachusetts law (Chapter 188 of the Massachusetts General Laws) but protection is not automatic. The homeowner must make the proper filing with the registry of deeds before it becomes effective.

We prepared this memo to help provide some basic information and education about how homestead protection works in Massachusetts.

A description of the services we offer in this area and the cost is at the end of this document.

What information do I need to file a homestead?

A homestead declaration is a one page form that elects protection under the Massachusetts homestead statute. To file a homestead declaration, we need the following information:

- Home owner's name
- Address of home (including county of residence)
- The registry of deeds book and page number where the deed is recorded (we can help you find this if you are uncertain)
- The nature of ownership (for example, is the home held jointly with a spouse or others? Is it in a trust?)
- The age of the homeowners

After we have this information, the homestead declaration must be signed by the homeowner in the presence of a notary public and then filed with the registry of deeds to be effective.

How much protection does a homestead provide?

A homestead declaration allows homeowners in Massachusetts to protect their principal residence in an amount up to five hundred thousand dollars (\$500,000) per residence, per family. For married couples over the age of 62, it may be possible to expand coverage up to \$1,000,000 in certain situations.

What is not protected by a homestead declaration?

Not all debts are protected from filing a homestead declaration. These exceptions include:

- Federal, state and local taxes, assessments, claims, and liens
- Debt incurred prior the declaration
- Liens from federal, state or local government

- Spousal or child support obligations
- Debt secured by the home (for example, mortgage debt)
- Law suit judgments that are based on fraud, mistake, duress, undue influence or lack of capacity

Who may acquire homestead protection?

A homestead declaration may be made by anyone who has an ownership interest in a home that is their primary personal residence. For unrelated individuals that are not married, each individual may file a homestead declaration. For married couples under the age of 62, only one person should file a homestead declaration. For people over the age of 62 or disabled individuals, see the special rules discussed below.

Special rules for people over the age of 62 or disabled

For people who are disabled or over the age of 62, there is a separate homestead declaration that may be filed. The primary advantage for this form of homestead is that it eliminates the restriction that one person per family may file. Thus, if both spouses are 62 years or older or disabled, they may both file and protect up to \$1,000,000 in equity value. That said a filing under these special rules does not protect other family members in the way a traditional homestead does.

When does homestead protection end?

People that have filed a homestead declaration are often unaware that the protection may be terminated by certain events. For example, depending on the facts, a homestead declaration will no longer provide protection if any of the following have occurred:

- Any subsequent transfer of the homestead property without expressly reserving the homestead protection (for example, adding or removing someone from a deed may terminate the homestead protection).
- Abandonment or cessation of use of the property as a principal residence (for example, a couple that is in the process of retiring to a new Florida home may terminate a homestead declaration filed on their Massachusetts residence).
- Death of the person filing the homestead declaration (however, in some cases the surviving spouse and minor children continue to be protected).
- Filing a second homestead declaration will terminate the protection offered under the first exemption. This will expose the individual to debts that were incurred after the first homestead but before the second.
- One area of uncertainty is whether refinancing a mortgage terminates a previously filed homestead declaration. Some documents you may have signed in a refinancing may contain language releasing protection from the homestead. Some courts have held that this kind of release only applies to the mortgage debt. The law in this area, however, is unsettled. Although filing a new homestead declaration after refinancing may be a safe course of action, please proceed with caution as you

will lose protection from debts incurred between the first and second homestead declarations.

Other homestead issues and questions

Although the purpose of a homestead declaration is straightforward, there is a great deal of uncertainty about how the law applies to some specific factual situations. This is due in part to the way the statute was drafted and to the relatively few court decisions interpreting the statute. Here are some specific situations that may apply to you:

- *Property held in trust.* If a home is held in a trust (which is a common outcome of estate planning strategies), it is likely that homestead protection will not be effective. Although the law is unclear, we advise clients that, if they want to be certain of homestead protection, the best course of action is to move the home out of the trust and into the owner's name individually.
- *Large parcels of land.* Generally, there is no limitation as to the size of the property that can be protected. That said, this depends on the particular facts of the case. Courts have held that multiple parcels of land that are connected or multi-family homes were protected by a properly filed homestead declaration.
- *Family protection.* In general, for people under age 62, only one person per family may file a homestead declaration. A homestead declaration filed by one family member, however, protects that family member's spouse and children. Unrelated co-owners of a home, however, each may file a homestead to protect their interest in the home.
- *Principal residence.* To obtain homestead protection, the home must be the principal residence of the person(s) making the declaration. That person must also occupy the home. In some special cases, protection may be available if the individual intends to occupy the home in the near future.
- *Proceeds from the sale of a protected home.* Although the Massachusetts homestead statute does not provide that protection continues for the proceeds from the sale of property covered by a homestead, some bankruptcy court decisions have held that a debtor's exception in homestead proceeds continues after the sale of the homestead property.
- *Equity value or fair market value.* In the common situation where a home is mortgaged, the Bankruptcy courts have held that the homestead will protect up to \$500,000 in equity value (fair market value of the home less debts secured by the home).
- *Bankruptcy.* A homestead declaration provides substantial protection to homeowners who may file for bankruptcy. If you are considering filing for bankruptcy, note that the homestead declaration must be filed with the registry of deeds prior to filing a bankruptcy petition. Proceed with caution here and work with your bankruptcy attorney to make absolutely certain that your homestead declaration has been properly filed with the registry of deeds and is effective. Note that protection may *not be available*, if the residence was acquired less than 1,215 days prior to filing for bankruptcy protection or if the debtor recently moved to the state.

- *Law suits.* If you think you may be sued or are currently defending a law suit, it may not be too late to file a homestead declaration to protect your home. Depending on the facts, the filing of a homestead declaration prior to judgment being rendered and/or your home being attached should provide protection.

What services do you provide in this area?

We will prepare, notarize, and file your homestead declaration. Typically this involves the following steps: (1) obtaining the required information from you which can be done over the phone; (2) verifying the information with the registry of deeds; (3) arranging an appointment for you to sign the homestead declaration at our office in the presence of a notary public; and (4) filing the homestead declaration with the registry of deeds.

Our fee for these legal services is \$125 and there is a separate \$35 recording fee that goes to the registry of deeds. In some situations, we may need to research the title to your property which may incur additional costs. We will tell you if this is the case before doing the work. If you are in need of estate planning services, we can quote you a flat fee that includes the homestead declaration.

Please contact us if you have any further questions at (617) 965-9100.

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