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Massachusetts Homestead Act

### LEGAL UPDATE: MASSIVE OVERHAUL OF THE MASSACHUSETTS HOMESTEAD ACT

By: Adam J. Ruttenberg, Esq., John G.F. Ruggieri, Esq. & Robert C. Barber, Esq.<sup>1</sup>

On December 17, 2010, Governor Patrick signed legislation modernizing the way Massachusetts residents protect their most prized asset – their family home – from seizure by creditors. The law, which takes effect March 16, 2011, is the product of efforts aimed at addressing deficiencies of the former Massachusetts Homestead Act. Not only does the law expand coverage and flexibility for homeowners, but it also resolves a plethora of ambiguities inherent to G.L. c. 188's prior incarnation.

Previously, estates of homestead required filing a written declaration with the Registry of Deeds and were available only to a single owner of any home. Under the new law, however, all Massachusetts homeowners will receive an "automatic homestead exemption" of \$125,000 on their principal residence without having to raise a finger. With respect to a home owned as joint tenants or tenants by the entirety, the maximum automatic exemption will remain whole and unallocated between the owners. A distinction is drawn for homes owned by multiple owners as tenants in common or as trust beneficiaries; in such cases, the maximum automatic exemption is to be allocated among all owners in proportion to their respective ownership interests.

Massachusetts residents can replace the automatic homestead exemption with a \$500,000 "declared homestead exemption" by filing a written declaration of homestead at the Registry of Deeds. With respect to a home owned as joint tenants or tenants by the entirety, the maximum declared exemption will remain whole and unallocated, with the owners together now in the aggregate entitled to a declared exemption of \$500,000 (more if elderly or disabled). With respect to a home owned by tenants in common or as trust beneficiaries, the declared exemption for each co-tenant and trust beneficiary shall be the product of: (i) \$500,000 and (ii) the co-tenant's or trust beneficiary's percentage ownership interest. For married couples who co-own (or any other co-owners), both owners must now execute the declaration. If, as a single person, a homeowner declared a homestead, upon later marriage, that homestead now automatically protects the new spouse. As for elderly or disabled homeowners, such declarants are entitled to the declared homestead exemption without reduction, proration or allocation among other owners of the home, meaning that if the home is owned by two elderly or disabled persons then the total exemption in the home can be \$1,000,000.

Not only does the new law allow all homeowners' access to statutory protections from creditors, but homesteads are also now available on 2 to 4 family dwellings, manufactured homes, and homes held in trust. Further, homesteads existing at the death or divorce of a person holding a homestead now pass to the surviving or former spouse and children who live in the family home. Previously, upon the death of the declarant (but not divorce), the homestead protected the family's residence until the

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youngest unmarried child reached the age of 18 and until the surviving spouse died or remarried. Now, not only has the threshold for minor status been increased to 21 years of age, but the law explicitly provides that the homestead shall continue notwithstanding the remarriage of the surviving or former spouse; occupancy or intent to occupy the home as the principal residence by the surviving or former spouse and minor children now govern the continuance of the homestead for their benefit. Another notable modification pertains to the promulgated definition of "family," which was changed to include solely gender-neutral language. Presumably, this was done in an effort to incorporate the recognition of same-sex marriage resulting from the Supreme Judicial Court's 2003 landmark decision in *Goodridge v. Dep't. of Pub. Health*, 440 Mass. 309 (2003).

For years, bankruptcy practitioners faced difficulty advising clients on matters involving homestead exemptions. The comprehensive nature of the changes to G.L. c. 188, however, definitively answers many of these often vexing questions. For example, we now know that the proceeds from the sale of a home subject to an estate of homestead are entitled to protection until another principal residence is acquired or one year from the date of sale, whichever occurs first. Homes titled in trusts gave practitioners particular difficulty: keep the home in the trust and hope the court allows the homestead, or transfer the home to the trust beneficiary and risk the court limiting the homestead under 11 U.S.C. § 522(p)? Now that the homestead law covers properties owned by trusts, no transfer is needed.

Finally, it is now clear that a homestead need not be re-filed after refinancing, because the new law automatically subordinates estates of homestead to mortgages. Lenders in fact are now expressly prohibited from requiring or recording a homestead release in connection with the making and recording of a mortgage. Notably, however, the law contains a narrow carve-out for unsecured commercial loans not in excess of \$20,000; voluntary subordination is permitted for such loans as applied to the \$125,000 automatic homestead exemption without a recorded document.

For those Massachusetts homeowners who previously declared an estate of homestead, such homesteads will continue in full force (at least for the declarant and the declarant's family) notwithstanding the sweeping transformation of the legal landscape. As for those homeowners with no prior homestead protection, however, the new law automatically provides \$125,000 in coverage. In either case, it makes great sense to review your "declared homestead exemption" (if any) and, if necessary, file with the appropriate Registry of Deeds to increase your coverage amount to the maximum statutory protection of \$500,000.

*If you would like more information or assistance in reviewing or filing homestead declarations, please contact Robert Barber at (617) 951-2800 or [rbarber@lgllp.com](mailto:rbarber@lgllp.com) or John Ruggieri at (617) 951-2800 or [jruggieri@lgllp.com](mailto:jruggieri@lgllp.com). If you would like more information regarding the impact of the new Massachusetts homestead law on bankruptcy matters, you may contact Adam Ruttenberg at (617) 951-2800 or [aruttenberg@lgllp.com](mailto:aruttenberg@lgllp.com)*