

Overview of the New Homestead Reform Legislation



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Major Highlights of the New Law

Automatic homestead for all homeowners

Beneficiaries of trusts are entitled to homestead protection

Elderly/disabled homestead expressly allows homesteads to be aggregated

Manufactured homes are eligible for protection under all provisions of the statute



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Major Highlights of the New Law

Proceeds, from insurance or from the sale of a home, are entitled to homestead protection

Rules for homestead declarations are reworked to make them more logical

Effects of marriage, divorce, and death are clarified

Terminations and subordinations are clarified



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Homestead Acquisition

- Automatic protection of \$125,000 of equity in the owner's home
- Sufficient to provide substantial, if not total, equity protection to most consumers
- Increase to \$500,000 “Declared Homestead Exemption” by recording declaration



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Creating the Homestead

- Both titled spousal owners sign (along with other unmarried owners of same property who want to declare)
- If only one titled person, that person:
 - Signs
 - Discloses marital status
 - Identifies resident non-titled spouse (if married)
 - If spouse living apart, so states (no need to disclose address of non-resident spouse)



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Creating the Homestead

- A single declaration by multiple owners must be accepted as one homestead (one fee)
- Must be created by a separate instrument
- Declaration (and notary jurat) is under penalties of perjury
- Closing attorneys obligated to provide mortgagors with notice of right to declare homestead – receipt must be acknowledged in writing by mortgagor



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It's All in the Family

- Non-Titled Family Members have Homestead right to use, occupy, and enjoy the home
- Family: married individuals – not gender-specific, and accommodates *Goodridge*
- Minor children: persons aged 21 and under
- Non-titled spouses: must be identified in the declaration of homestead (which must also disclose marital status)
- New law provides enhanced protections to non-titled spouses and divorcing spouses against loss of homestead through termination or divorce



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Marriage, Divorce, and Death

- Existing Declaration automatically benefits spouse upon Marriage
- Existing Declaration automatically benefits former spouse upon Divorce
- Surviving Spouse automatically succeeds to deceased declarant's homestead



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Trusts

- Trusts Can Get Protection
- Statute's definition of "Owner" includes holder of a beneficial interest in a trust
- Where property is in trust, trustee files the declaration
- No need to convey out to file homestead, then convey back to trust; no §522(p) risk



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Multiple Ownership

Tenants by the entirety and joint tenants

- Whole and Unallocated between owners, but together not entitled to more than maximum

Tenants in common and trust beneficiaries

- Allocated among owners in proportion to their ownership interests

Elderly and Disabled

- Not reduced, prorated, or allocated among other owners (can be aggregated by spouses or co-owners)



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Manufactured Homes

New law eliminates uncertainty in bankruptcy decisions whether manufactured homes can be protected – THEY CAN

Eligible for “regular” homestead as well as elderly/disabled homestead

Any homestead can be recorded in the Registry of Deeds on a manufactured home – even though there’s no deed on record



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Proceeds

- If home is sold, sale proceeds are protected for one year after the date of sale
 - Protection expires on such earlier date that new home purchased with proceeds
- If home damaged in fire, insurance proceeds are protected for two years after date of fire
 - Protection expires on such earlier date that home is reconstructed or new home purchased
- Excess proceeds, if any, lose homestead status after new home purchase or reconstruction



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Exceptions from Homestead Protection

- Mortgages
- Liens recorded prior homestead creation
- Federal, state, and local taxes
- Support of spouse or child
- Judgment for fraud, mistake, duress, undue influence, or lack of capacity
- NO LONGER AN EXCEPTION for Pre-existing debts



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Pre-existing debts

- Former law: exception to homestead protection
- *Patriot Portfolio v. Weinstein*: 1st Circuit rules pre-existing debt exclusion not enforceable in bankruptcy
- New law: *Weinstein* result applies in and out of bankruptcy; no need to file bankruptcy to protect homestead against pre-existing debts
- Exception still applies to pre-existing liens (i.e., attachments)



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Retroactivity

- Second homestead declaration relates back to the first – does not void the earlier homestead
- Effective against intervening attachments
- With elimination of pre-existing debt exclusion, not as critical an issue



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Mortgages and Subordination

- Automatic subordination of homestead to mortgage signed by all owners
- No statement shall be required in the mortgage to effect subordination of homestead to it
- No statement in mortgage releasing homestead or purporting to affect homestead will have any effect other than subordination



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Mortgages and Subordination

- For those who have previously executed mortgages with homestead waivers, new law applies to the existing homestead – so the homestead “waiver” is treated as a subordination, and the previously executed homestead is enforceable – no need to file new homestead (although it couldn’t hurt!)
- Execution of a mortgage automatically subordinates homestead – but only as to signing owners of the home



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Special subordination provision

- Automatic homesteads may be subordinated to an unsecured loan or credit line of up to \$20,000
- Subordination must be executed by all owners and non-titled spouses
- No subordination to credit card debt, payday loans or loans in advance of tax refunds or insurance settlements
- Subordination must contain Section 4 disclosure



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Terminations

- Deed by titled and non-titled identified spouse; for trusts, deed by trustee
- Recorded release (but does not affect non-titled spouse without his/her signature); for trusts, signed by trustee or beneficiary
- Trustee or beneficial owner can record a termination on property held in trust
- Abandonment (but only as to person leaving)



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Terminations

- Subsequent declaration on another home
- Filing homestead on vacation home terminates prior homestead on actual residence – and invalidation of vacation home mortgage does not “resuscitate” homestead on actual residence



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“Safe harbor” transfers

- The following transfers do not terminate a previously declared homestead:
 - Between spouses
 - Between former spouses
 - Between co-owners
 - Between a trustee and beneficiary
 - Between a life tenant and a remainderman
- Unless all persons entitled to the benefit of the homestead sign a release



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Conveyancing Issues

- BFP for value may rely on an affidavit by grantor, releasor or mortgagor stating that affiant had no spouse entitled to claim benefits of homestead
- Closing attorneys obligated to provide mortgagors with notice of right to declare homestead – receipt must be acknowledged in writing by mortgagor



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Challenges and Exceptions to Homestead

- To challenge statement of principal residence in declaration of homestead, third party must present Clear and Convincing evidence to the contrary
- Mass Gen. Laws c.236, s.18 – If Judgment Creditor wants to levy an execution on homestead property because excess equity, appraisers to be appointed.
- BFP for value may rely on a affidavit by grantor, releasor or mortgagor stating that affiant had no spouse entitled to claim benefits of homestead
- Nothing in statute changes effect of 11 U.S.C. 522(o), (p), or (q)



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Transition

- Effective Date of Law March 16, 2011
- All existing Estates of Homestead in effect on the Effective Date shall continue in full force and effect even if don't comply with requirements of new law
- “Old” homesteads will be construed in accordance with new law



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