

Bar: new homestead law answers, raises questions



By Al Turco

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Eight months after it went into effect, a statute designed to clarify the state's homestead law has accomplished that mission, attorneys say, though it suffers from some technical glitches and unintended consequences.

"The new law has definitely clarified issues we have wrestled with," said Middlesex County's first assistant register of deeds, Edward A. Wheeler. "The main one is that refinancing a home does not terminate a homestead."

Before the statute was amended, consumers frequently asked his office whether a homestead survived refinancing, Wheeler said. Due to a split in caselaw, staff members were forced to answer: "We really don't know."

Now the answer is clear, he said.

Under the updated law, G.L.c. 188, homeowners pay \$35 to file declarations of homestead for up to \$500,000, as they did previously. But, now, if they do nothing, an automatic \$125,000 homestead applies. Further, pre-existing debts are no longer excluded from protection as the homestead takes priority, and individuals who own property in a trust can enjoy homestead protection.

Boston lawyer Erica P. Bigelow, who worked on the homestead legislation as a member of the Real Estate Bar Association, said she and her colleagues are keeping a log of issues that have arisen in the wake of the changed law.

"There is a question of whether an affidavit must be recorded stating that a person who is getting a mortgage on a home does not have a spouse entitled to a homestead," she said.

The Rich May attorney said she believes it must and includes that information in the deeds she drafts because, without it, the mortgage would not have priority over the homestead.

She also noted that some lawyers have been trying to reopen an issue that appeared closed.

While the statute explicitly gives individuals who own property in trust the same homestead rights as direct owners, some attorneys have questioned whether it is truly the intent of the statute to give homestead protection to an unknown person, which occurs when the automatic homestead applies to the beneficiary of a blind trust, she said.

According to Robert H. Ryan of Estate Preservation Law Offices in Worcester, confusion could arise because §4 creates an automatic homestead for every "owner," and beneficiaries of trusts are not technically owners because the trustees hold title to such property. However, Ryan said §1 explicitly includes beneficiaries within the definition of "owner" to be used throughout the statute.

But Ryan said it is unclear whether a homestead gives an elective share to a spouse who is not on the title.

"If a homeowner dies and leaves his house to his first wife, but his second wife [who is not on the title but lives there] has a homestead right to live in the house, what then?" Ryan asked.

He also questions whether a trustee certificate must be filed to allow a trustee to record a homestead for the beneficiary of a trust. Ryan said the Land Court requires such certificates, but each registry can make its own decision. To be safe, he said, he always files a trustee certificate for \$75.

'Declarations for every purchase'

Attorneys say they have changed their approach since the law was changed earlier this year.

"My colleagues are more consistently doing declarations of homestead for every purchase," said Lisa J. Delaney of Carvin & Delaney in Braintree.

Delaney, who worked on drafting the legislation, credited the change in practice to the focus the revised measure has put on homestead rights. As an example, she pointed to the new requirement that closing attorneys and settlement agents inform clients about homestead options and the automatic homestead protection.

The updated statute also "clears up some old form-over-substance problems," she said, citing the fact that a couple can now declare a homestead for each person in one document, and a trustee declaring for both husband and wife can also use one document. Fewer documents mean lower filing and legal fees, she said.

However, Delaney acknowledged that the statute is a work in progress and that if changes need to be made, they would come after the next legislative session starts in January 2013.

'More relaxed attitude'

Bankruptcy attorneys appear to be adjusting to the new statute with ease.

"I see a distinctly more relaxed attitude among attorneys advising clients on homestead issues," reported Richard L. Levine of Nelson, Kinder & Mosseau in Boston. He said the attitude is the result of "a more definitive" statute.

Levine called the fact that homesteads now protect owners from pre-existing debts a "big thing," noting that Massachusetts had been an outlier with the old law, under which the protection applied only to debts incurred after a homestead was declared.

Bankruptcy attorney Adam J. Ruttenberg of Boston, who represents creditors and debtors, agreed with Levine that G.L.c. 188 has clarified homestead law.

"The new statute confirms that you can stack elderly or disabled homestead interests [to get more than \$500,000 of protection]," the Looney & Grossman lawyer said. "This, in effect, overrules a 1st Circuit case that said you couldn't."

He said it is also now clear that, for tenants in common, homestead shares are allocated pro rata according to their ownership interests.

"You no longer have the issue where if one tenant in common lives there and the others don't, the person living in the home claims the whole share," Ruttenberg said.

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