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MORE HOMESTEAD PROTECTION AND
PREDICTABILITY FOR MASSACHUSETTS
HOMEOWNERS?: EXAMINING THE EXPANDED
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ESTATE OF HOMESTEAD

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ABSTRACT

A Declaration of Homestead is a powerful law that protects a homeowner's equity in real estate and provides a financial shield to ward off potential creditor claims. Although initially drafted with good intentions, the Massachusetts homestead law was revised and modified over several decades, producing confusing and inconsistent interpretations. To complicate matters, due to the fact creditor-debtor disputes often end up in United States Bankruptcy Court, federal bankruptcy judges were often forced to make sense of the patchwork that comprised the Massachusetts state homestead law, and often produced outcomes that seemed inconsistent with the objective of protecting home equity. After years of complaints from practitioners, creditors, and homeowners, in 2011, the Massachusetts legislature completely overhauled the Homestead Act as they tried to simplify the law and close any loopholes that had been exploited in the prior Act.

After exploring the background and philosophy of homestead laws

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nationally, this Article explores the problems with the old Massachusetts Act, followed by a detailed analysis of the new Act to examine how the problems were addressed. The authors conclude that although the new Massachusetts Homestead Act better accomplishes the intent of a homestead law, some of the language chosen by the Massachusetts legislature will continue to cause interpretation problems that may produce inconsistent results and new frustrations.

INTRODUCTION

*“The creditor hath a better memory than the debtor.”
James Howell*

Like many terms, the word homestead has dual meanings. Although the common meaning of homestead refers to “[t]he house, outbuildings, and adjoining land owned and occupied by a person or family as a residence,”¹ the legal use often refers not to the estate, but rather the ability to exempt (or keep) a debtor’s home away from creditors. *Black’s Law Dictionary* defines homestead law as “[a] statute exempting a homestead from execution or judicial sale for debt”² In short, homestead statutes act as shields, and are designed to prevent a family’s home from being taken by certain creditors. Although arguably unfair to creditors who could otherwise recoup their debt by selling the home of landowning debtors, the state’s interest in preventing homelessness (and in turn preventing the state from having to care for homeless families) trumps the interests of creditors. However, a homestead only protects a debtor’s “home,” and thus any secondary real property is not exempt and could otherwise be taken to satisfy debts.³ It is important to note that homestead statutes are generally limited to protecting homeowners from involuntary creditors, such as judgment creditors, attachments, and involuntary liens, and therefore a homestead does not provide protection from non-payment of voluntary liens (such as mortgages) and taxes.⁴

The homestead exemption has been described as an “American innovation.”⁵ Texas was the first state to provide a homestead

1. BLACK’S LAW DICTIONARY 802 (9th ed. 2009).

2. *Id.*

3. See 11 U.S.C. § 522(d)(1) (2006).

4. Julia Patterson Forrester, *Home Equity Loans in Texas: Maintaining the Texas Tradition of Homestead Protection*, 55 SMU L. REV. 157, 159 (2002).

5. Julie B. Schroeder, Comment, *Perspectives on Urban Homestead Exemptions—Texas Amends Article XVI, Section 51*, 15 ST. MARY’S L.J. 603, 606-07 (1984).

exemption.⁶ Most states followed the example of Texas and had homestead exemptions by the end of the nineteenth century.⁷ “The principle reason behind its enactment in the states was to provide for the debtor and, more importantly, for his family, an asylum from creditors in the wake of the financial turmoil of the 1830’s [sic].”⁸ In addition, the homestead is a creature of state law, with some states lacking any homestead protection, and other states protecting an unlimited dollar amount in a homestead.⁹ Against a backdrop of various state homestead exemptions, Congress addressed federal bankruptcy homestead exemptions in § 522 of the Bankruptcy Code (Code).¹⁰

The Constitution gives Congress the power to create uniform bankruptcy laws.¹¹ According to § 541(a)(1) of the Code, the filing of a bankruptcy creates an estate that includes “all legal or equitable interests of the debtor in property as of the commencement of the case.”¹² This broadly inclusive provision is narrowed by exemptions the debtor is permitted to claim under § 522(b).¹³ Real and personal property that are properly exempted can be retained by the debtor after the bankruptcy process is concluded.¹⁴ Although “the Bankruptcy Code is a federal statute, it might be expected that it would be applied in a more or less uniform manner throughout the nation,” however, “in practice, consumer bankruptcy varies significantly from state to state.”¹⁵ The debtor must

6. *Id.* at 607. Texas included a homestead exemption in its 1845 Constitution. *See* Forrester, *supra* note 4, at 159.

7. *See* Forrester, *supra* note 4, at 159. “The ten Southern states passed their first homestead exemption laws in the following years: Texas in 1839; Georgia in 1841; Mississippi in 1841; Alabama in 1843; Florida in 1845; South Carolina in 1851 (repealed seven years later); Louisiana in 1852; Tennessee in 1852; Arkansas in 1852; and North Carolina in 1859. The remaining four states—Missouri, West Virginia, Kentucky, and Virginia—did not pass their first laws until 1863, 1864, 1866, and 1867, respectively.” Alison D. Morantz, *There’s No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America*, 24 LAW & HIST. REV. 245, 253 n.24 (2006).

8. Schroeder, *supra* note 5, at 607.

9. For example, compare New Jersey in which no homestead exemption is provided with Florida, which does not place a limit on the dollar amount of the homestead exemption. *Compare* N. J. STAT. ANN. § 2A: 17-17 (West, Westlaw 2012), with FLA. CONST. art. 10, § 4.

10. 11 U.S.C. § 522(b) (2006).

11. *See* U.S. CONST. art. I, § 8, cl. 4.

12. *See* 11 U.S.C. § 541(a)(1) (2006); *see also* CHARLES JORDAN TABB, THE LAW OF BANKRUPTCY § 5.10, at 305 (1997).

13. *See* 11 U.S.C. § 522(b) (2006).

14. George M. Prescott Jr., *Amphisbaena! How 11 U.S.C. 522(c) Expands and Contracts State-Law Exemptions in Bankruptcy*, 9 AM. BANKR. INST. L. REV. 435, 437 (2001).

15. *See* Daniel A. Austin, *State Laws, Court Splits, Local Practice Make Consumer Bankruptcy Anything but “Uniform,”* 29 AM. BANKR. INST. J. 1 (2011).

choose between the federal homestead exemptions found in § 522(d), or the homestead exemptions allowed in their state.¹⁶ Due to lack of clarity, the Massachusetts Homestead Act has been a constant source of frustration for homeowners, lawyers, and judges, especially in bankruptcy court, where most homestead issues seem to play out.

Pursuant to the Code, a debtor filing bankruptcy in Massachusetts can either choose to use the Massachusetts exemptions in order to retain his or her property, or a debtor can choose to use the federal exemptions.¹⁷ In the case of a debtor who owns real estate in Massachusetts which is used as a home, the debtor may be inclined to use the Massachusetts exemptions in order to protect the equity in his or her home as it provides up to \$500,000 in protection,¹⁸ as opposed to federal bankruptcy exemptions, which limit the home's equity to \$20,200.¹⁹ Accordingly, due to the dramatic increase in home equity that can be protected by utilizing the Massachusetts Homestead Act, most bankruptcy debtors who own real estate with equity claim state exemptions. Thus, the United States Bankruptcy Court (Bankruptcy Court) has unwillingly become the primary interpreter of the Massachusetts Homestead Act, and ultimately has to determine overall homestead validity. If the homestead is valid, the home is retained by the debtor. If the homestead is not valid, the bankruptcy trustee for the benefit of creditors may sell the home. This has resulted in numerous bankruptcy decisions that have validated (or invalidated) homestead validity, and at times produced inconsistent and illogical results based on

16. 11 U.S.C. § 522(b)(2) (2006). See also *In re Garran*, 338 F.3d 1, 4 (1st Cir. 2003).

17. This is known as the "opt out." See 11 U.S.C. § 522(b) (2006).

18. In 2005, Congress capped previously unlimited exemptions in real property acquired within 1,215 days of the debtor filing bankruptcy. See Anthony C. Coveny, Comment, *Saying Goodbye to Texas's Homestead Protection: One Step Toward Economic Efficiency with the Bankruptcy Prevention and Consumer Protection Act of 2005*, 44 HOUS. L. REV. 433, 464 n.242 (2007). Pursuant to 11 U.S.C. § 522(p)(1), one's ability to receive the full benefit of the Massachusetts homestead is capped at \$125,000 if the debtor has owned the home for fewer than 1,215 days. Specifically, the Code states in part as follows:

(p)(1) Except as provided in paragraph (2) of this subsection and sections 544 and 548, as a result of electing under subsection (b)(3)(A) to exempt property under State or local law, a debtor may not exempt any amount of interest that was acquired by the debtor during the 1215-day period preceding the date of the filing of the petition that exceeds in the aggregate \$125,000 in value in –

(A) real or personal property that the debtor or a dependent of the debtor uses as a residence;

(B) a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence;

(C) a burial plot for the debtor or a dependent of the debtor

11 U.S.C. § 522(p)(1) (2006); see also MASS. GEN. LAWS ch. 188, § 1 (2011).

19. See 11 U.S.C. § 522(d)(1) (2006).

an outdated and confusing statute. The Massachusetts state legislature finally responded to the overwhelming complaints of litigants, lawyers, and judges in regard to interpretation inconsistencies by recently amending the Homestead statute.²⁰ Now the question is whether the new statute fixes the problems and inconsistencies that developed under the old statute.

I. SURVEY OF GENERAL HOMESTEAD LAWS THROUGHOUT THE UNITED STATES

As homestead protection is a creature of state law, the acquisition and protections vary from state to state and can be evaluated by reviewing several factors. First, does the state have any homestead protection at all? Although most states have some degree of homestead protection, several do not. Second, how is the homestead created? Some states automatically bestow homestead protection upon all homeowners, whereas others require the homeowner take an overt act in order to obtain the homestead protection—such as Massachusetts, where it was necessary to record a signed and notarized Declaration of Homestead in the Registry of Deeds.²¹ Third, how much home equity can be protected by the homestead? Many states place a dollar limit on the amount of equity that a homeowner can protect with a homestead; however, a few states do not limit the dollar amount that can be protected.²² In addition, some states further vary the homestead dollar amount based on family size, age, and/or disability. Finally, some states vary the level of protection based on the geographic size encompassed in the home. For example, can a 500-acre parcel with a single home be fully protected from creditors via homestead? In addition to limiting the dollar amount of the homestead, some states also limit the geographic size, i.e., acreage, of the homestead.²³

20. See MASS. GEN. LAWS ch. 188, § 1 (2011).

21. See *id.* §§ 1, 5.

22. See Leigh J. Francis, *Calling All Debtors, Want to Defraud Your Creditors? Here is How: The Tenancy by the Entirety Loophole and the Nullification of Section 522(o), (p), and (q) of the 2005 Bankruptcy Amendments*, 18 U. MIAMI BUS. L. REV. 1, 3 n.7 (2010). “Texas, Florida, Iowa, Oklahoma, Kansas, Arkansas, and the District of Columbia have adopted some form of unlimited homestead exemptions.” *Id.* at 12. Texas cited three major public policy rationales for the homestead exemption: (1) the protection of debtors; (2) the protection of women; and (3) fostering the spirit of settler’s independence. Other courts have commented that the “object of all homestead legislation is to protect the home, to furnish shelter for the family, and to promote the interest and welfare of society”
Id.

23. See *infra* Appendix.

II. MASSACHUSETTS HOMESTEAD—ISSUES AND CASE LAW UNDER THE OLD HOMESTEAD LAW

Prior to the legislative overhaul, the Massachusetts homestead statute was a “Frankenstein Statute” as it was comprised of parts dating back over 150 years, and contained a patchwork of amendments and inconsistent revisions. In Massachusetts, the homestead statute is codified in chapter 188, section 1 of the Massachusetts General Laws and is stated in part as follows:

Section 1. An estate of homestead to the extent of \$500,000 in the land and buildings may be acquired pursuant to this chapter by an owner or owners of a home or one or all who rightfully possess the premise by lease or otherwise and who occupy or intend to occupy said home as a principal residence. Said estate shall be exempt from the laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies except in the following cases:

- (1) sale for taxes;
- (2) for a debt contracted prior to the acquisition of said estate of homestead;
- (3) for a debt contracted for the purchase of said home;
- (4) upon an execution issued from the probate court to enforce its judgment that a spouse pay a certain amount weekly or otherwise for the support of a spouse or minor children;
- (5) where buildings on land not owned by the owner of a homestead estate are attached, levied upon or sold for the ground rent of the lot whereon they stand;
- (6) upon an execution issued from a court of competent jurisdiction to enforce its judgment based upon fraud, mistake, duress, undue influence or lack of capacity.²⁴

24. MASS. GEN. LAWS ch. 188, § 1 (2004) (amended 2011). In *Tewhey v. Bodkins*, the court held:

A judgment that is “based upon” fraud, mistake, duress, undue influence or lack of capacity is the type of judgment that is an exception to the homestead exemption. The plain meaning of “based upon” is that the judgment is “rooted in” or is as a result of any one of the descriptive words in the statute. *Cf.*, *Smith v. Registrar of Motor Vehicles*, 66 Mass.App.Ct. 31, 33 (2006) (interpreting “based upon” in another statute). In the present case, the default judgment against Tewhey

Prior to the recent homestead amendment, entitlement to a homestead exemption was not automatic, as an owner of a home was required to file the necessary Declaration of Homestead form in the correct Registry of Deeds office before an exemption came into existence.²⁵ Only one member of a family was permitted to file a Declaration under section 1, however, the single filing by any member of a family protected all members of that family.²⁶ A second type of Massachusetts homestead exemption that could be recorded was only available to elderly or disabled persons.²⁷ According to Massachusetts General Laws chapter 188, section 1A, “[t]he real property or manufactured home of . . . a disabled person, as herein defined, shall be protected against attachment, seizure or execution of judgment to the extent of \$500,000.”²⁸ A Declaration of Homestead under this section only provided protection to individuals who filed a Declaration, and a filing by one member of a family under section 1A would not protect the non-filing members of that family.²⁹

In addition, the language of both sections 1 and 1A indicated that homestead protection did not apply to debts existing before recording the homestead.³⁰ Therefore, one would believe it was important to file a homestead as early as possible. However, one of the early Bankruptcy Court cases contributing to statutory confusion held that despite

is “based upon” his neglect with respect to answering the complaint and his “knowing and wilful” [sic] malpractice in violation of c. 93A.

No case from a Massachusetts court has been found that addresses the “fraud, mistake, duress undue influence or lack of capacity” exception to homestead protection under G.L. c. 188, § 3(b)(6). The Court is aware of the decision by the United States District Court (Gorton, J.), in *ClearOne Communications, Inc. v. Chiang*, 717 F. Supp. 2d 142 (D. Mass. 2010) concluding that § 3(b)(6) is “ambiguous” and holding that it does not create an exception to a homestead exemption for a judgment based upon misappropriation and theft of trade secrets. The court respectfully declines to follow the reasoning of that decision. To do so would, essentially, read out of existence § 3(b)(6). Instead, that section must be given meaning. If a judgment (upon which an execution is obtained to enforce) is based upon one of the descriptive terms in § 3(b)(6), the execution should be an exception to the homestead exemption.

No. 2011-01506, 2012 WL 1390180, at *3 (Super. Ct. Mass. Jan. 6, 2012).

25. MASS. GEN. LAWS ch. 188, § 2 (2010) (amended 2011).

26. *Id.* § 1; *see also In re Garran*, 338 F.3d 1, 4-5 (1st Cir. 2003).

27. MASS. GEN. LAWS ch. 188, § 1A (2004) (repealed 2011).

28. *Id.*

29. *Id.*

30. MASS. GEN. LAWS ch. 188, § 1 (2004) (amended 2011) (“Said estate shall be exempt from the . . . payment of debts . . . except . . . for a debt contracted prior to the acquisition of said estate of homestead”); MASS. GEN. LAWS ch. 188, § 1A (2004) (repealed 2011) (“The following shall be exempt from the provisions of this section . . . any and all debts . . . existing prior to the filing of the declaration”).

seemingly clear language, under federal bankruptcy law, the application of the Massachusetts homestead statute did provide protection from pre-existing creditors.³¹ In sum, the court found that federal bankruptcy law pre-empted state law, and thus debts incurred years prior to the filing of the homestead would be unable to gain access to the home equity even if the homestead was filed only minutes before the filing of the bankruptcy petition.³²

Although homestead statutory language appears deceptively straightforward, a bankruptcy trustee, representing the interests of the creditors, is motivated to challenge the nuances of the homestead statute patchwork. If a particular individual's homestead is determined by the Bankruptcy Court to be invalid, the trustee is able to liquidate that debtor's real estate and ultimately make a distribution to creditors. Although a homestead is a product of the state legislature, ironically the determination of validity often falls on federal bankruptcy judges who are asked to rule based on how the highest court in the state would hypothetically determine validity.³³ In Massachusetts, the Supreme Judicial Court (SJC) has instructed that while the homestead statute must be read literally, it also should be liberally construed in favor of the debtor, and the court must follow the plain language of the statute unless doing so would lead to an absurd result.³⁴ This direction from the SJC has caused widespread frustration. In fact, in one case, United States Bankruptcy Court Judge Henry J. Boroff openly expressed his interpretation frustration when he included dicta in an opinion regarding a homestead issue. Specifically, he wrote:

This Court feels compelled to express at the onset its growing frustration with the application of the Massachusetts Homestead Statute. While it is well settled that the statute's purpose is to protect the family home . . . the statute's ambiguities have proven to be legion and its benefits 1) appear to be available only for those with

31. *In re Leicht*, 222 B.R. 670, 679 (B.A.P. 1st Cir. 1998); *see also Prescott Jr.*, *supra* note 14, at 435.

32. *See In re Whalen-Griffin*, 206 B.R. 277, 291-92 (Bankr. D. Mass. 1997) (ruling that the federal bankruptcy laws preempted Massachusetts homestead exemptions and the effect is to protect homesteads from liens, even where debts are incurred prior to homestead recording); *see also In re Weinstein*, 217 B.R. 5, 7 (Bankr. D. Mass. 1998) (expanding the decision in *Whalen-Griffin* to include both unsecured and secured pre-homestead debt under bankruptcy protection). *Contra Walsh v. Yarossi*, No. 309135, 2006 WL 3493476, at *4 (Mass. Land Ct. Dec. 5, 2006) (finding that a prejudgment attachment filed before a homestead declaration is a valid preexisting lien, negating the homestead protection, even when the judgment is obtained after the homestead).

33. *See In re Garran*, 338 F.3d 1, 6 (1st Cir. 2003).

34. *Shamban v. Masidlover*, 705 N.E.2d 1136, 1138-39 (Mass. 1999).

the legal training or resources necessary to locate a registry of deeds and record what is, for a layperson, a relatively complex document, and 2) may be easily and inadvertently lost by statutory language and conditions that are hyper-technical and often counterintuitive.³⁵

As this article focuses solely on the Massachusetts homestead statute, some examples of the homestead issues faced by the Massachusetts Bankruptcy Court before the amendment was enacted follow. After this discussion, the language of the new homestead statute will be examined to determine if the issues raised by the below case law were adequately addressed or modified by the Massachusetts legislature.

A. *The Problem of Inadvertent Homestead Termination and Lack of Automatic Coverage*

Due to ambiguities, the old homestead statute was unclear on precisely when a homestead would be terminated by conveyance, at times resulting in strange and unintended results. For example, in *In re Hildebrandt*, the chapter 7 bankruptcy trustee objected to the homestead exemption claimed by the debtor based on the theory that the homestead estate had been terminated when property was conveyed from Hildebrandt and his female cohabitant as tenants in common to Hildebrandt as sole owner without an express reservation of homestead estate.³⁶ Specifically, in 2000, Hildebrandt and Ann Renaud purchased real estate located in Southwick, Massachusetts, as tenants in common.³⁷ Hildebrandt subsequently recorded a Declaration of Homestead for the property pursuant to Massachusetts General Laws chapter 188, section 1.³⁸ Three years later, Hildebrandt and Renaud terminated the tenancy in common by jointly deeding the property to Hildebrandt as sole owner.³⁹ Hildebrandt recorded the new deed in 2003, but he did not specifically reserve a homestead estate, as he assumed his previously recorded homestead would continue to protect his ownership.⁴⁰ The issue was whether the debtor terminated his homestead by conveying jointly owned property to just himself without reserving or recording a new homestead.⁴¹ As his ownership remained constant, he claimed his

35. *In re Edward R. Szwyd*, 346 B.R. 290, 291 n.1 (Bankr. D. Mass. 2006) (citations omitted).

36. *In re Hildebrandt*, 320 B.R. 40, 42 (B.A.P. 1st Cir. 2005).

37. *Id.* at 41.

38. *Id.*

39. *Id.* at 42.

40. *Id.*

41. *Id.*

homestead was never terminated, as was his obvious intent.⁴²

In analyzing the issue, the court noted that under section 2, the plain language of the statute indicated that a homestead could be terminated by either a deed of conveyance, which did not specifically reserve an estate of homestead, or by release.⁴³ The Bankruptcy Court held that despite the debtor's probable intent to retain protection, under the "plain meaning" rule, the SJC would hold that the homestead estate terminated if homestead property is "conveyed" without specific reservation of homestead.⁴⁴ This holding is significant as it demonstrates a clear defect in the statutory drafting. Specifically, common sense dictates that someone owning a home jointly with homestead protection would not want that protection terminated simply because the co-owner gives up his or her interest. If the intent of the homestead statute is to protect someone's home from creditors and to prevent homelessness, the *Hildebrandt* case produces a contrary result. In addition, if the homestead statute had included a provision allowing for automatic protection, the debtor's home would have remained protected.

B. *Uncertainty Regarding the Extent of the Homestead Coverage When the Home is Sold*

Does the homestead coverage only protect the physical home, or does it protect the equity in the home even after it is sold? The court struggled with this issue in *In re Cunningham*.⁴⁵ Following a complicated factual history, Cunningham sold his home, which had been subject to a valid homestead exemption.⁴⁶ Despite a challenge by a creditor, the court held that the homestead exemption applied to the sale proceeds, and could not be acquired by creditors.⁴⁷ Following a survey, the court noted that a majority of courts hold that a change in the character of property otherwise claimed as exempt will not change the

42. *Id.*

43. *Id.* at 43-44.

An estate of homestead created under section two may be terminated during the lifetime of the owner by either of the following methods: (1) a deed conveying the property in which an estate of homestead exists, signed by the owner and owner's spouse, if any, which does not specifically reserve said estate of homestead; or by (2) a release of the estate of homestead, duly signed, sealed and acknowledged by the owner and the owner's spouse, if any, and recorded in the registry of deeds for the county or district in which the property is located.

MASS. GEN. LAWS ch. 188, § 7 (2010) (amended 2011).

44. *In re Hildebrandt*, 320 B.R. at 44-45.

45. *In re Cunningham*, 354 B.R. 547 (D. Mass. 2006).

46. *Id.* at 548.

47. *Id.*

status of that property.⁴⁸ The court relied on the principle that once property is exempt, it is exempt forever and nothing occurring post-petition can change that fact.⁴⁹ This is because § 522(c) “essentially ‘immunizes’ exempt property against any liability for prepetition debts. This immunization continues even after the bankruptcy case is closed.”⁵⁰ The court also noted that “[n]othing in section 522(c) even vaguely suggests that, as a precondition to enjoying the protections of that provision, the debtor must maintain the exempt character of the property.”⁵¹ This decision is important because, for the first time, the court broadly increased the homestead protection by expanding coverage beyond the simple metes and bounds of the home, to also protect the cash value and financial equity in the home.

C. *Is a Homestead Subordinate to a Mortgage?*

Another ambiguity in the homestead statute lead a homeowner to challenge a foreclosure attempt by a bank based on the protections granted by his homestead.⁵² The court ultimately had to determine if the mortgage was subordinate to the homestead when not expressly stated in the mortgage.⁵³ Specifically, in *In re Desroches*, the debtors owned a single family home in Chicopee, Massachusetts as tenants by the entirety, subject to a first mortgage.⁵⁴ In February 2000, the debtors filed a Declaration of Homestead, and later took out a second mortgage.⁵⁵ Upon the foreclosure by the second mortgagor, the debtors argued that the bank took the second mortgage subject to the homestead, and thus the homestead remained valid and was never terminated by the execution of the mortgage because of the “obvious legislative purpose” of Massachusetts General Laws chapter 188.⁵⁶ Specifically, the debtors argued that according to the plain and unambiguous language of section 6, if the mortgage did not contain a specific release of the previously recorded homestead, the mortgage was subordinate to the homestead, regardless of Massachusetts’s common law title theory.⁵⁷

48. *Id.* at 554-55.

49. *Id.* at 554.

50. *Id.* (quoting *In re Reed*, 184 B.R. 733, 738 (Bankr. W.D. Tex. 1995)).

51. *Id.* at 544 (citing *In re Reed*, 184 B.R. at 737-38).

52. See *In re Desroches*, 314 B.R. 19, 21 (Bankr. D. Mass. 2004).

53. *Id.* at 19.

54. *Id.*

55. *Id.*

56. *Id.* at 21.

57. *Id.*

In a “title theory” jurisdiction a mortgage is viewed as a form of title to property. A

The court held that because the mortgage was the standard mortgage form and “contain[ed] words of grant and the term ‘with mortgage covenants’ . . . it served the statutory purpose of ‘conveying the property’ for purposes of triggering the release provision of § 7.”⁵⁸ Thus, although the homestead statute was unclear, the court held that the SJC, if asked, would rule that a standard mortgage form contains adequate language to subordinate the homestead as to the lender, but not as to other involuntary lienholders.⁵⁹ In sum, although not completely clear, a previously recorded homestead does not shield a homeowner from a mortgage foreclosure.

D. *Homestead Stacking—Can More Than One Homestead Be Claimed on a Single Home?*

The previous homestead law was unclear on the notion of adding multiple owners’ homestead values together, known as stacking—especially when applied to a married couple when one spouse was entitled to an elderly or disabled homestead under Massachusetts General Laws chapter 188, section 1A, and the other spouse was not. In *In re Garran*, David and Judith Garran owned a single-family home in Hingham, Massachusetts, as tenants by the entirety.⁶⁰ In February 1996, David executed and delivered a promissory note for \$50,000 to the United States Trust Company, and three years later, Garran executed a second promissory note to the same bank.⁶¹ In August 2000, the owner of the notes commenced an action against David in the Superior Court after he defaulted.⁶² The bank then obtained a writ of attachment against the property.⁶³ David recorded a Declaration of Homestead on the property as a disabled person pursuant to section 1A, and his wife Judith

“mortgage” is a conveyance of title to property that is given as security for the payment of a debt and more. Specifically, a mortgage is often considered a condition of conveyance vesting the legal title in the mortgagee.

Carole Nicole Brown and Serena M. Williams, *Rethinking Adverse Possession: An Essay on Ownership and Possession*, 60 SYRACUSE L. REV. 583, 585 n.13 (2010) (citing 54A AM. JUR. 2D Mortgages § 1 (2009)).

58. *In re Desroches*, 314 B.R. at 23 (citing *Milton Savings Bank v. United States*, 187 N.E.2d 379, 381 (Mass. 1963)) (holding that upon execution of the mortgage, the mortgagor retains only “an equity of redemption accompanied by a right to possession”); *Harlow Realty Co. v. Cotter*, 187 N.E. 118, 119 (Mass. 1933) (holding that the “mortgagee named in the mortgage [at the time of the mortgage’s execution] acquired the legal title” to the property).

59. *In re Desroches*, 314 B.R. at 23.

60. *In re Garran*, 338 F.3d 1, 3 (1st Cir. 2003).

61. *Id.*

62. *Id.* at 4.

63. *Id.*

later recorded a Declaration of Homestead on the same property pursuant to section 1.⁶⁴ Thereafter, David filed a chapter 7 petition for bankruptcy, and on his petition he listed the property as having a value of \$560,000.⁶⁵ He also claimed the property as exempt pursuant to his section 1A exemption for \$300,000, and his wife's section 1 exemption for \$300,000, thereby seeking to exempt the whole value of the home.⁶⁶

David argued that the exemptions should be stacked, "because the purpose of enacting § 1A was to provide additional protection" for disabled debtors.⁶⁷ After analyzing the issue, the court found that prior to the 2000 amendments to the homestead statutes, sections 1 and 1A provided different levels of exemptions in that the section 1 general homestead exemption provided protection up to \$100,000, while the section 1A exemption provided a \$200,000 exemption.⁶⁸ Subsequently, the 2000 amendments raised the monetary value and equalized the sections 1 and 1A exemptions.⁶⁹ As such, the court then explained that even absent stacking, section 1A still provides protections unavailable under section 1.⁷⁰ Under section 1A, a debtor retains his homestead exemption even after a judgment against him based on fraud, mistake, duress, undue influence or lack of capacity, while under section 1, the debtor does not.⁷¹ The court thus rejected Garran's interpretation of the homestead statutes because it concluded that denying a debtor the ability to stack exemptions does not eliminate the value of the section 1A enactment.⁷²

Finally, although the statute was silent on this issue, the court predicted that given the opportunity, the SJC would conclude that the plain language of the homestead statutes prohibits the stacking of the exemptions, and thus, David was entitled only to a maximum of \$300,000 provided by his non-debtor spouse's Declaration of Homestead under section 1.⁷³

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 8.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

E. *The Mobile Home Problem*

Although most people envision home ownership as involving real property, reality differs as thousands of Massachusetts's residents call a mobile park their home. A mobile home differs from a traditional house in that generally, mobile homeowners purchase the physical structure of the house, but lease the land on which it rests. In addition, although technically possessing mobility in the form of wheels, most mobile homes remain stationary during their existence. Should these differences invalidate homestead protection? Based on the intent of the statute, it would appear that the homestead would protect a debtor's residence regardless of what type of structure it is (house versus mobile home); however, the old statute strangely differentiated the protection of mobile homes based on whether the resident was elderly or disabled.⁷⁴ This ambiguity was examined in the *In re Kelly* case.

In *Kelly*, the debtor filed a chapter 7 bankruptcy petition in which he disclosed an interest in a trailer and claimed an exemption for that mobile home under section 1A.⁷⁵ The chapter 7 trustee objected to the exemption because the debtor filed the homestead under section 1, not section 1A.⁷⁶ The trustee further argued that the debtor could not claim an exemption under section 1A, because he met neither the age nor the disability requirements of section 1A.⁷⁷ The debtor claimed that the "A" listed after his section 1 exemption was a typographical error and, thus, moved to amend his petition.⁷⁸ He also argued that he was entitled to an exemption for the trailer because section 1 permits the owner or owners of a "home" to acquire a homestead exemption for a manufactured home.⁷⁹ The trustee argued that a trailer is not included within the meaning of "home" as described in section 1.⁸⁰

The court concluded that section 1 did not permit an exemption for a trailer.⁸¹ The court found most persuasive the fact that section 1A did provide a homestead exemption for mobile homes. The court noted that the statute had been amended in 1990 and 1991 to permit an exemption for manufactured homes under section 1A.⁸² This was important

74. See MASS. GEN. LAWS. ch. 188, § 1A (2004) (repealed 2011).

75. *In re Kelly*, 334 B.R. 772, 772-73 (Bankr. D. Mass. 2005).

76. *Id.* at 773.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 774.

81. *Id.* at 776.

82. *Id.*

because the court concluded that, pursuant to Massachusetts law, the omission of “manufactured housing” from section 1 was intentional and the exemption was denied.⁸³ Contrary to common sense, this holding divests those Massachusetts residents who reside in mobile homes of homestead protection.

F. *Does the Homestead Apply to a Property Held in Trust?*

As the prevalence of real estate trusts continues to increase as a method of estate planning, a serious issue arises regarding the existence of homestead protection. Specifically, it was unclear under the old statute whether the homestead provided protection for those homeowners who put their house into a trust for estate planning purposes.

In *In re Rodrigues*, the debtor filed a chapter 7 bankruptcy and owned real property in South Dartmouth, Massachusetts.⁸⁴ The bankruptcy trustee objected to the homestead exemption because the debtor had executed it in her capacity as trustee of the Olga M. Rodrigues Living Trust.⁸⁵ Subsequently, the debtor also individually executed a Declaration of Homestead.⁸⁶ The trustee argued that the debtor could not “claim a Massachusetts homestead exemption on real estate held in trust, unless the trust is in name only and is collapsible, thus vesting legal and equitable title in one person.”⁸⁷

After reviewing the case, the court held that the debtor, in her capacity as trustee, granted herself rightful possession of the property and intended to occupy it as her principal residence, and thus she did not need to execute a lease with herself to authorize rightful possession.⁸⁸ Although the debtor may not have successfully revoked the trust, the record contains evidence in the form of the Declaration of Homestead and Schedule A that she viewed the property as her home and intended to occupy it as such.⁸⁹ Despite the ambiguity of the homestead statute,

83. *Id.*

84. *In re Rodrigues*, No. 09-11960-JNF, 2010 WL 716192, at *1 (Bankr. D. Mass. Feb. 23, 2010).

85. *Id.* at *2 (internal citations omitted).

86. *Id.*

87. *Id.*

88. *Id.* at *6.

89. *Id.* See *In re Szwyd*, 370 B.R. 882, 890-91 (B.A.P. 1st Cir. 2007). The Bankruptcy Appellate Panel, Kornreich, J., held that: (1) regardless of whether chapter 7 debtor, as beneficiary of nominee trust, would have been eligible under Massachusetts law to claim homestead exemption in real property owned by trust, his eligibility was established once he became sole trustee and sole beneficiary, and legal and equitable title merged in same individual, and (2) debtor’s declaration of homestead sufficiently manifested design by debtor

the court held the debtor was entitled to the homestead exemption in this specific set of circumstances, but was silent on how it would rule on different types of trust ownership.⁹⁰ Its holding was limited to the specific trust instrument specified in the *Rodrigues* case, and not to all trusts. As such, many believe this case actually raised more questions about trust homestead protection than it answered.

G. *Defining the Extent of Family Protection Under the Old Homestead Statute*

In another interesting and important decision, the court was forced to determine how far the homestead protection extended to family members.⁹¹ This is important because the old homestead statute was ambiguous in regards to this issue. Specifically, in the *In re Vasques* case, the debtor's parents conveyed the property to him and his wife as tenants in common, but reserved a life estate for themselves.⁹² The debtor's mother then recorded a homestead, on which the debtor relied when he filed his chapter 7 bankruptcy.⁹³ The trustee then objected to the exemption claim on three grounds as follows: (1) the debtor did not adequately reside at the property as of the date of filing; (2) the homestead only reached the mother's life estate, and not the debtor's tenancy in common, which could only be protected by the debtor's separate homestead Declaration; and (3) for homestead purposes, the mother's "family" protected by the homestead was comprised of parents, and did not include adult children.⁹⁴

In its analysis, the court indicated that two key sections of the homestead statute were implicated: first, the section regarding acquisition, and second, the continuance section.⁹⁵ The acquisition section reads in pertinent part as follows:

An estate of homestead to the extent of \$500,000 in the land and buildings may be acquired . . . by an owner or owners of a home or one or all who rightfully possess the premise by lease or otherwise and who occupy or intend to occupy said home as a principal residence [A]n owner of a home shall include a sole owner, joint tenant, tenant by the entirety or tenant in common; provided,

to acquire homestead as owner because of his beneficial interest and not simply to protect his beneficial interest in trust. *Id.* at 891.

90. *Id.*

91. *In re Vasques*, 337 B.R. 255, 257 (Bankr. D. Mass. 2006).

92. *Id.* at 256.

93. *Id.*

94. *Id.* at 257-58.

95. *Id.* at 258-59.

that only one owner may acquire an estate of homestead in any such home for the benefit of his family; and provided further, that an estate of homestead may be acquired on only one principal residence for the benefit of a family. For the purposes of this chapter, the word “family” shall include either a parent and child or children, a husband and wife with their children, if any, or a sole owner.⁹⁶

The continuance section of the homestead statute reads in pertinent part as follows:

The estate of homestead existing at the death of a person holding a homestead shall continue for the benefit of the surviving spouse and minor children and shall be held and enjoyed by them . . . until the youngest unmarried child is eighteen and until the marriage or death of the spouse⁹⁷

The trustee argued that family membership for homestead purposes ended after the declarant’s death upon the majority of the youngest minor child.⁹⁸ Thus, the claim was that “Section One homestead protection is not available to an adult child of a living declarant where both principally reside in the family home.”⁹⁹ Accordingly, the trustee claimed a “preference” in the homestead statute that existed for minor children only.¹⁰⁰ After reviewing the statute, the court was unable to locate such a preference.¹⁰¹ Instead, the court noticed that section 1 extended the homestead benefits to members of a family, and then defined family to include “a husband and a wife and their children.”¹⁰² The court recognized that section 1 contained no limitation whatsoever on the definition of children.¹⁰³ “The Trustee’s attempt to export the minor child limitation from Section Four (*the continuance section*) into the family definition in Section One (*the acquisition section*) is barred by the plain and explicit text of the latter section.”¹⁰⁴

96. MASS. GEN. LAWS ch. 188, § 1 (2004) (amended 2011).

97. *Id.* § 4

98. *In re Vasques*, 337 B.R. at 258.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 258-59.

104. *Id.* at 259 (emphasis in original).

III. CHANGES UNDER THE NEW HOMESTEAD ACT—FIXING AMBIGUITIES?

On December 16, 2010, Massachusetts Governor Deval L. Patrick signed Senate Bill 2406, entitled “An Act Relative to the Estate of Homestead” (Act), which was a significant overhaul of the Massachusetts homestead law.¹⁰⁵ Although the statute will still be known as Massachusetts General Laws chapter 188, the substantive provisions are much improved, and for the most part, clearer. The new law became effective on March 16, 2011, and replaced the old Massachusetts General Laws chapter 188.¹⁰⁶

In general, one of the most important changes under the new law is automatic protection.¹⁰⁷ Specifically, prior to the Act, it was required that all Massachusetts homeowners formally record a Declaration of Homestead in the Registry of Deeds—or reserve a homestead in a recorded deed—in order to receive homestead protection.¹⁰⁸ Through inadvertence or mistake, this requirement has posed significant issues for some homeowners who erroneously thought they had a valid homestead, when in fact they did not, as one was never recorded or was unintentionally extinguished. Statutory changes are highlighted in the following sections.

A. *Benefit of \$500,000 Homestead by Recording (Section 4)*

The Act now provides for automatic homestead protection (1) for the benefit of the owner and family; (2) up to \$125,000; (3) upon acquisition; (4) of a principal residence occupied or intended to be occupied as a home.¹⁰⁹ If a resident already owns a home with a valid Declaration of Homestead on record, the Act states that “[a]ll existing estates of homestead . . . shall continue in full force and effect” up to the full value of \$500,000.¹¹⁰ The new automatic homestead provision provides a huge benefit to home owning debtors as it protects against a creditor’s ability to take away a debtor’s home based on technical error with his or her recorded homestead, as the debtor can still fall back on

105. Jenifer B. Mckim, *New Law Clarifies Mass. Homestead Protections*, THE BOSTON GLOBE (Dec. 18, 2010), http://www.boston.com/business/personalfinance/articles/2010/12/18/new_law_clarifies_mass_homestead_protections/.

106. See MASS. GEN. LAWS ch. 188, §§ 1-14 (2011).

107. *Id.* § 4.

108. MASS. GEN. LAWS ch. 188, § 1 (2004) (amended 2011).

109. MASS. GEN. LAWS ch. 188, § 1 (2011).

110. An Act Relative to the Estate of Homestead, ch. 395, § 3, 2010 Mass. Acts. 1380.

the \$125,000 automatic protection.¹¹¹ Now, as long as the above four requirements are met, the debtor still has the protections bestowed by the automatic homestead—albeit a smaller benefit than a recorded homestead—even if his or her recorded homestead is somehow invalidated. It is important to note that although deemed “automatic,” this homestead can still be challenged if a creditor or trustee can prove the debtor is not occupying—or intending to occupy—the home as a principal residence. The Act now clearly provides coverage to individuals, tenants in common, joint tenants, tenants by the entirety, and trust beneficiaries.¹¹² The ability to clearly protect trust beneficiaries is an important change when compared to the old homestead law; however, it is important to note that protection is not extended to the trustee. From a creditor’s standpoint, this provision may also pose a problem as most trust beneficiaries are not public record, and therefore, the creditor is at a disadvantage because it is not able to confirm the validity of homestead holder by confirming ownership with a quick search of the Registry of Deeds.

B. *Benefit of \$500,000 Homestead by Recording (Section 2)*

Although homeowners now have the benefit of automatic homestead protection, in order to get the full benefit of the Act, it is suggested that a Declaration of Homestead still be filed in the Registry of Deeds. By recording a valid Declaration of Homestead, which now must also be notarized, the protection increases from the \$125,000 that is automatically allocated to \$500,000.¹¹³ Specifically, the law states that any owner(s) may acquire \$500,000 of protection by Declaration if in writing, recorded, signed by each owner to be “benefited” and acknowledged.¹¹⁴ This allows two spouses to protect two homes if

111. See generally *Shamban v. Masidlover*, 705 N.E.2d 1136 (Mass. 1999); *Dwyer v. Cempellin*, 673 N.E.2d 863 (Mass. 1996).

112. The Act states the following about multiple owners:

[W]ith respect to a home owned as joint tenants or as tenants by the entirety, the automatic homestead exemption shall remain whole and unallocated between the owners, provided that the owners together shall not be entitled to an automatic homestead exemption in excess of \$125,000; and (2) with respect to a home owned by multiple owners as tenants in common or as trust beneficiaries, the automatic homestead exemption shall be allocated among all owners in proportion to their respective ownership interests.

MASS. GEN. LAWS ch. 188, § 1 (2011). As such, if a husband and wife own a home as tenants by the entirety and are relying on the automatic homestead, and the wife’s creditors cover \$125,000 in equity, the husband has no homestead coverage. *Id.*

113. MASS. GEN. LAWS ch. 188, § 1 (2011).

114. *Id.* It is important to note that there is no longer any ability to reserve a homestead in a deed as was available in the prior Homestead Act. Instead, the new law mandates

separated. Unlike the old homestead law in which only one spouse could claim a homestead on behalf of the family, the Act now permits both spouses to file their own homesteads.¹¹⁵ In addition, if the homeowners record a second homestead, the new law clarifies that the new recording relates back to the filing of the first homestead, thus closing a gap in the old law that discouraged some homeowners from filing a new homestead for fear of terminating all protection provided as of the date of the recording of the first homestead.¹¹⁶ Specifically, section 1 of the old Massachusetts General Laws chapter 188 states in part as follows:

Said [homestead] estate shall be exempt from the laws of conveyance, descent, devise, attachment, levy on execution and sale for payment of debts or legacies except in the following cases:
 (1) sale for taxes;
 (2) for a debt contracted prior to the acquisition of said estate of homestead¹¹⁷

Therefore, if someone recorded a homestead in 2000, and then contracted for a debt in 2001, the 2000 homestead would protect the homeowner against any claim by the 2001 creditor. Pursuant to the old statutory language of Massachusetts General Laws chapter 188, section 1, a problem would have arisen if the homeowner recorded a new homestead in 2002. Specifically, the statute was silent on whether the 2002 homestead would relate back to the original 2000 filing and thus provide protection against the 2001 creditor, or whether the 2002 filing would be considered a new homestead recording, thus exposing the homeowner to liability for the 2001 debt, which could be deemed pre-existing.

C. *Elderly/Disabled (Section 2)*

Elderly or disabled people are still able to declare an elderly/disabled homestead by filing a Declaration.¹¹⁸ Because a homestead protects spouses, an interesting issue arises if one spouse is elderly and the other is not. Looking to resolve the issue addressed in *In*

creation of the \$500,000 homestead by recording a separate instrument. *Id.* § 5.

115. *Id.* § 3.

116. *Id.* § 4.

117. MASS. GEN. LAWS ch. 188, § 1 (2004) (amended 2011).

118. MASS. GEN. LAWS ch. 188, § 2 (2011). An elderly person is defined as someone age 62 or older. *Id.* § 1. A disabled person is defined as a person “who has a medically-determinable, permanent physical or mental impairment” that meets the requirements for Supplemental Security Income. *Id.*

re Garran,¹¹⁹ under the Act, a mathematical equation resolves this issue by multiplying the number of spouses eligible for protection under the elderly/disabled homestead plus \$250,000 (i.e., if both are eligible for the elderly/disabled homestead, the total protection is \$500,000 x 2 plus \$250,000=\$1,250,000; and if one spouse is eligible for elderly/disabled protection and the other is not, the total protection is \$500,000 plus \$250,000=\$750,000).¹²⁰ The termination of an elderly/disabled homestead is accomplished by sale, release, new Declaration in new home, or abandonment.¹²¹ One potentially unresolved issue is the effect of a reverse mortgage and whether it is abandonment.

D. Protection (Section 3)

Pursuant to section 3 of the Act, a valid homestead protects real estate from attachment, levy, seizure, and execution on judgment *except*:

- (1) for a sale for federal, state and local taxes, assessments, claims and liens; (2) for a lien on the home recorded prior to the creation of the estate of homestead; (3) for a mortgage on the home . . . ; (4) upon an order by a court that a spouse, former spouse or parent shall pay a certain amount weekly or otherwise for the support of a spouse, former spouse or minor children; (5) where buildings on land not owned by the owner of the estate of homestead are attached, levied upon or sold for the ground rent of the lot upon which they are situated; and (6) upon an execution issued from a court of competent jurisdiction to enforce its judgment based upon fraud, mistake, duress, undue influence or lack of capacity.¹²²

Special rules apply to mortgages.¹²³

Responding to *In re Desroches*,¹²⁴ the homestead is statutorily subordinated to the mortgage if executed by all owners of home.¹²⁵ The subordination does not require the signature of a spouse who is not an owner.¹²⁶ “A mortgage executed by fewer than all of the owners of a home that is subject to an estate of homestead shall be superior only to the homestead estate of the owners who are parties to the mortgage and

119. 338 F.3d 1 (1st Cir. 2003). *See supra* section II.D (examining the uncertainty of whether co-owners could “stack” homestead exemptions).

120. MASS. GEN. LAWS ch. 188, § 1 (2011).

121. *Id.* § 2.

122. *Id.* § 3.

123. *Id.*

124. 314 B.R. 19 (Bankr. D. Mass. 2004).

125. MASS. GEN. LAWS ch. 188, § 9 (2011).

126. *Id.*

their non-titled spouses and minor children, if any.”¹²⁷ In addition, a mortgage does not need recitation of subordination of homestead, and a mortgage lender cannot require a release of homestead in connection with the mortgage.¹²⁸

E. *Special Trust Issues*

Responding to the decision in *In re Rodrigues*,¹²⁹ the beneficiaries of a trust must file for homestead protection, as the full \$500,000 exemption is not automatic.¹³⁰ Although the identity of the beneficiaries in a trust are typically not made public under trust law, in order to obtain protection under the Act, the beneficiaries must be disclosed in the Declaration of Homestead. This requirement also poses significant questions regarding the effect of a homestead: if there is a change of beneficiary, if one beneficiary moves out, or is a minor, is the homestead abandoned?¹³¹

Regarding multiple beneficiaries, in determining the percentage of homestead protection for trust beneficiaries, the new Act states that:

if a home is owned by tenants in common or trust beneficiaries, the declared homestead exemption for each co-tenant and trust beneficiary who benefits by an estate of homestead declared pursuant to said section 3 shall be the product of: (i) \$500,000; and (ii) the co-tenant’s or trust beneficiary’s percentage ownership interest.¹³²

F. *Release/Termination (Section 10)*

Under the new Act, the homestead can be terminated by a deed signed by the owner(s) and non-owner spouse or former spouse to a non-family member.¹³³ Absent express language, deeds between spouses, life tenants, remaindermen, trustees, and beneficiaries do not terminate homestead protection. This is an important distinction, as prior to the Act, it had been held that any transfer—including intra-family transfers—without reservation would terminate the homestead, even

127. *Id.*

128. *Id.*

129. No. 09-11960-JNF, 2010 WL 716142 (Bankr. D. Mass. Feb. 23, 2010).

130. MASS. GEN. LAWS ch. 188, §§ 1, 5 (2011).

131. A “minor child” is “a person aged 21 and under, who is the natural or adopted child of an owner or owner’s spouse entitled to the benefits of this chapter, notwithstanding any law to the contrary.” *Id.* § 1.

132. *Id.* § 1.

133. *Id.* § 10(a).

when it was very unlikely that the intent of the grantor was to do the same.¹³⁴ Other ways to terminate a homestead include (1) a written termination signed by owner(s) and non-owner spouse or former spouse; (2) abandonment as principal resident; and (3) recording of a new Declaration.¹³⁵ If the home is owned by a trust, the homestead can be terminated by (1) a release or termination signed by the trustee; (2) a release or terminations signed by the beneficiary; or (3) abandonment by the beneficiary.¹³⁶

G. *Multiple Owners*

The new act clarifies that, although multiple owners of a principal residence may benefit from homestead protection, the aggregate protection is limited to the \$500,000 homestead amount.¹³⁷ However, in the case of a married couple where both spouses can benefit from what is known as an elder and disabled homestead, the aggregate protection for the principal residence may be increased to \$1,000,000 of equity.¹³⁸ In the case of non-married co-owners of a principal residence, *e.g.* sibling co-owners, who all file for the elderly or disabled homestead, the aggregate protection is the product of \$500,000 of equity multiplied by the number of owners who qualify for the elderly or disabled homestead.¹³⁹

H. *Family Transfers*

The Act provides that the transfer of a principal residence between family members does not terminate an existing homestead, even if the new deed fails to reserve the homestead upon the transfer.¹⁴⁰ In addition, a homestead existing at the death or divorce of a person holding a homestead shall continue for the benefit of his or her surviving spouse or former spouse and minor children who occupy or intend to occupy said home as a principal residence.¹⁴¹ However, any adult child who has an ownership interest in the principal residence is required to file his or her own homestead Declaration in order to have the increased protection of the \$500,000 amount.

134. *See supra* Part II.A.

135. MASS. GEN. LAWS ch. 188, § 10(a) (2011).

136. *Id.* § 10(a)(4).

137. *Id.* § 1.

138. *Id.* §§ 1-2.

139. *Id.*

140. *Id.* § 10.

141. *Id.* § 7.

I. *Sales and Insurance Proceeds*

The proceeds from the sale of a principal residence, or the insurance proceeds from a principal residence that suffers a casualty loss, are protected by the homestead in order to purchase a new principal residence or repair a damaged one.¹⁴² The proceeds from a sale are protected for the period of one year from the sale of the current principal residence, but the insurance proceeds are protected for a two-year period from receipt of the proceeds.¹⁴³

J. *Mortgage Waiver of Homestead*

Does a blanket waiver of a homestead in mortgage documents terminate the protection of a homestead against all creditors? The Act provides the sensible answer that a mortgage does not terminate a previously filed homestead, but only subordinates the homestead to the specific mortgage at issue.¹⁴⁴

K. *Which Spouse Files the Homestead?*

Prior to the new Act, an issue arose regarding how to resolve the question of which spouse should file the homestead. The legislature chose a simple solution, as the Act requires both spouses who have an ownership interest in the principal residence to sign the Declaration of Homestead.¹⁴⁵ In addition, the Declaration must identify each person receiving homestead protection, including the name of a spouse who may not be an owner.¹⁴⁶ The Declaration must also state that each person occupies, or intends to occupy, the property as his or her principal residence.¹⁴⁷

L. *Closing Attorneys' Obligations (Section 14)*

In order to provide additional safeguards to homeowners, the mortgagor must now provide notice of the right to declare homestead exemption.¹⁴⁸ In fact, the borrower must also sign the notice. The statute is silent regarding the notice requirement for borrowers obtaining a home equity loan; however, section 14 appears very broad and thus

142. *Id.* § 11.

143. *Id.*

144. *Id.* § 9.

145. *Id.* § 5.

146. *Id.*

147. *Id.*

148. *Id.* § 14.

likely applies.¹⁴⁹

CONCLUSION

Although it appears the Act has rectified many of the inconsistencies that existed under the old homestead law, only time will tell if the Act actually produces reliable and consistent results that benefit Massachusetts's homeowners. The Act may not be viewed favorably by creditors and bankruptcy trustees as it further limits their ability to liquidate a debtor's house; however, it appears the Massachusetts legislature made a conscious decision to protect residents and ensure that despite troubled finances, homelessness should not be added to a debtor's list of financial woes. Further, the new Act encourages the overall public policy, which dictates that exemption laws, such as homestead provisions, should be liberally construed to comport with their beneficent spirit of protecting the family home.¹⁵⁰

149. *Id.*

150. *See Dwyer v. Cempellin*, 673 N.E.2d 863, 866 (Mass. 1996).

APPENDIX: 50 STATE SURVEY OF HOMESTEAD PROTECTIONS

To understand the diversity of homestead statutes in the United States, a survey of the various protections can be summarized as follows:

Alabama: Up to \$5,000 in value, or up to 160 acres in area. ALA. CODE § 6-10-2 (West, Westlaw 2012).

Alaska: Up to \$54,000, no area limitation. ALASKA STAT. ANN. § 09.38.010 (West, Westlaw 2012).

Arizona: Up to \$150,000, no area limitation. ARIZ. REV. STAT. ANN. § 33-1101 (West, Westlaw 2012).

Arkansas: Up to \$2,500 in value, or at least 1/4 acre for city homesteads, 80 acres for rural homesteads. ARK. CODE ANN. §§ 16-66-210, -218 (West, Westlaw 2012).

California: At least \$75,000 in value. CAL. CIV. PROC. CODE § 704.730 (West, Westlaw 2013).

Colorado: Up to \$90,000 in value, no area limitation. COLO. REV. STAT. ANN. § 38-41-201 (West, Westlaw 2012).

Connecticut: \$75,000. CONN. GEN. STAT. § 52-352b (2012).

Delaware: None provided. DEL. CODE ANN. tit. 10, § 4901 - 03 (West, Westlaw 2010).

District of Columbia: D.C. provides an exemption equal to owner's aggregate interest in real property (no monetary or area limitations). D.C. CODE § 15-501(a)(14) (West, Westlaw 2012). D.C. does not call this a homestead exemption.

Florida: Exemption equal to value of property as assessed for tax purposes (no monetary limitations); area limitations of 1/2 acre urban land or 160 acres rural land. FLA. CONST. art. X, § 4.

Georgia: Up to \$5,000 in value, no area limitation. GA. CODE ANN. §§ 44-13-1, -100 (West, Westlaw 2012).

Hawaii: Up to \$20,000, but the head of a family and persons sixty-five years of age or older are allowed up to \$30,000, no area limitation. HAW. REV. STAT. §§ 651-91, -92 (West, Westlaw 2012).

Idaho: Up to \$100,000 in value, no area limitation. IDAHO CODE ANN. § 55-1003 (West, Westlaw 2012).

Illinois: Up to \$15,000 in value, no area limitation. Where multiple owners, can be increased to \$30,000 but each individual is limited to a share correlating to the percentage of ownership. 735 ILL. COMP. STAT. ANN. 5 / 12-901 (West, Westlaw 2012).

Indiana: Up to \$1,500 for residence, up to \$8,000 for additional property, no area limitation. Co-owner, if also a joint debtor, may claim additional \$7,500. IND. CODE ANN. § 34-55-10-2 (West, Westlaw 2012).

Iowa: No monetary limitation, but a minimum value of \$500. Area limitations of 1/2 acre urban land or 40 acres rural land. IOWA CODE ANN. §§ 561.2, .16 (West, Westlaw 2012).

Kansas: No monetary limitation. Area limitations of one acre urban land or 160 acres rural land. KAN. CONST. art. XIV, § 9; KAN. STAT. ANN. § 60-2301 (West, Westlaw 2012).

Kentucky: Up to \$5,000 in value, no area limitation. KY. REV. STAT. ANN. § 427.060 (West, Westlaw 2012).

Louisiana: Up to \$35,000, but may include entirety of property in cases of catastrophic or terminal illness or injury. Area limitations of five acres urban land or 200 acres rural land. LA. REV. STAT. ANN. § 20:1 (West, Westlaw 2012).

Maine: Up to \$47,500 in value, but may be up to \$60,000 under certain circumstances, no area limitation. ME. REV. STAT. ANN. tit. 14, § 4422 (West, Westlaw 2011).

Maryland: Up to \$6,000, but in Title XI bankruptcy proceedings, up to \$5,000, no area limitation. MD. CODE ANN. CTS. & JUD. PROC. § 11-504 (West, Westlaw 2012).

Massachusetts: Up to \$500,000 in value, no area limitation. MASS. GEN. LAWS ch. 188, § 1 (2011).

Michigan: Up to \$3,500 in value. Area limitations of one acre urban land or 40 acres rural land. MICH. COMP. LAWS ANN. § 600.6023 (West, Westlaw 2012).

Minnesota: Up to \$300,000 in value, but up to \$750,000 if used primarily for agricultural purposes. Area limitations of 1/2 acre urban land or 160 acres rural land. MINN. STAT. ANN. § 510.02 (West, Westlaw 2012).

Mississippi: Up to \$75,000 in value. Area limitation of 160 acres. MISS. CODE ANN. § 85-3-21 (West, Westlaw 2012).

Missouri: Up to \$15,000 in value, no area limitation. MO. ANN. STAT. § 513.475 (West, Westlaw 2012).

Montana: Up to \$250,000 in value, no area limitation. MONT. CODE ANN. §§ 70-32-101, -104, -201 (West, Westlaw 2011).

Nebraska: Up to \$60,000 in value. Area limitation of two lots, urban land or 160 acres rural land. NEB. REV. STAT. ANN. § 40-101 (West, Westlaw 2012).

Nevada: Up to \$550,000 in equity, no area limitation. NEV. REV. STAT. ANN. § 115.010 (West, Westlaw 2011).

New Hampshire: Up to \$100,000 in value, no area limitation. N.H. REV. STAT. ANN. § 480:1 (West, Westlaw 2013).

New Jersey: No homestead exemption is provided, but an exemption for personal property of up to \$1,000 is allowed. N.J. STAT. ANN. §§ 2A:17-1, -17 (West, Westlaw 2012).

New Mexico: Up to \$60,000 in value, no area limitation. N.M. STAT. ANN. § 2-10-9 (West, Westlaw 2012).

New York: Up to \$150,000 above liens and encumbrances in value, no area limitation. N.Y. C.P.L.R. 5206 (MCKINNEY 2012).

North Carolina: Up to \$35,000 in value, no area limitation. N.C. CONST. art X, § 2; N.C. GEN. STAT. ANN. § 1C-1601 (West, Westlaw 2012).

North Dakota: Up to \$100,000 in value, no area limitation. N.D. CENT. CODE ANN. § 47-18-01 (West, Westlaw 2011).

Ohio: Up to \$20,200 in value, no area limitation. OHIO REV. CODE ANN. § 2329.66 (West, Westlaw 2011).

Oklahoma: Unlimited in value; area limitations of one acre urban land or 160 acres rural land. However, where using more than 25% of property for business purpose, the value drops to \$5,000. OKLA. STAT. ANN. tit. 31, §§ 1, 2 (West, Westlaw 2012).

Oregon: Up to \$40,000 in value; area limitations of one city block if within a city or 160 acres rural land. OR. REV. STAT. ANN. § 23.240 (West, Westlaw 2012).

Pennsylvania: No homestead exemption provided, but a general monetary exemption of \$300 exists. 42 PA. CONS. STAT. ANN. §§ 8121-8123 (West, Westlaw 2012).

Rhode Island: Up to \$500,000 in value, no area limitation. R.I. GEN. LAWS ANN. § 9-26-4.1 (West, Westlaw 2012).

South Carolina: Although no homestead exemption is provided, an exemption for personal and real property of up to \$50,000 in value may include property claimed as a residence. S.C. CODE ANN. § 15-41-30 (West, Westlaw 2012).

South Dakota: No monetary limitation; area limitation of one dwelling house and contiguous lots used in good faith. S.D. CODIFIED LAWS §§ 43-31-1 to -3 (West, Westlaw 2012).

Tennessee: Up to \$5,000, but may be up to \$7,500 if claimed by two persons as a homestead, no area limitation. TENN. CODE ANN. § 26-2-301 (West, Westlaw 2012).

Texas: No monetary limitation; area limitation of ten acres urban land or 100 acres of rural land if claimed by a single person. A family may claim 200 acres of rural land. TEX. CONST. art. XIV, §§ 50-51; TEX. PROP. CODE ANN. §§ 41.001, .002 (West, Westlaw 2011).

Utah: Up to \$20,000 in value, but only \$5,000 in value if property is not primary residence. Area limitation of one acre. UTAH CODE ANN. § 78B-5-503 (West, Westlaw 2012).

Vermont: Up to \$125,000 in value, no area limitation. VT. STAT. ANN. tit. 27, § 101 (West, Westlaw 2012).

Virginia: Up to \$5,000, but may be increased by \$500 for each dependent residing on the property, no area limitation. VA. CODE ANN. § 34-4 (West, Westlaw 2012).

Washington: Generally, up to \$125,000 in value, but may be unlimited if used against income taxes on retirement plan benefits, no area limitation. WASH. REV. CODE ANN. § 6.13.030 (Westlaw 2012).

West Virginia: Up to \$5,000 in value, but an additional \$7,500 may be available in cases of "catastrophic illness or injury," no area limitation. W. VA. CODE ANN. §§ 38-9-1, -10-4 (West, Westlaw 2012).

Wisconsin: Up to \$75,000 in value, no area limitation. WIS. STAT. ANN. § 815.20 (West, Westlaw 2011).

Wyoming: Up to \$20,000 in value, each co-owner is entitled to a homestead exemption. WYO. STAT. ANN. § 1-20-101 (West, Westlaw 2012).