

Advice — on the House

Check Your Homestead Protection Now to Prevent Problems Later

By DAVID K. WEBBER, Esq.

If you own a small business, you should carefully choose a business entity and buy good insurance. But a properly prepared homestead declaration can be the single most important tool in protecting your personal assets against the claims of creditors.

The rules have changed, so if you haven't checked yours lately, now is a good time. The Massachusetts homestead statute, M.G.L. c. 188, became much more complex in 2011. In fact, a bankruptcy judge recently called it a "statute of teeth-cracking complexity." This complexity means new opportunities for asset protection. But it also sets many traps for the unwary. Now, more than ever, the document must perfectly describe your home, its ownership, and its occupants.

What Is It?

A homestead declaration is simply a sworn, written statement that an equitable owner resides, or intends to reside, in a particular home. The document must be signed by the legal owner, notarized, and recorded in the registry of deeds where the property is located. Once recorded, it serves as legal notice to potential creditors that the equity in your home is off limits.

Why Do I Need It?

If, for example, you file for personal bankruptcy, default on a debt, or a court judgment enters against you, a properly recorded homestead declaration will protect your home equity against subsequent claims by unsecured creditors. The law limits this protection depending on who occupies the property. The general rule is that the exemption is limited to the first \$500,000 in equity.

However, the individual exemptions for disabled individuals and owners age 62 or older can 'stack' to provide a \$1 million exemption for a married couple, or \$750,000 for joint owners where only one owner is over 62 or disabled. If you do not record a homestead declaration, an 'automatic' homestead protects only the first \$125,000 of your equity, regardless of the number, age, or ability of the occupants.

Note that a homestead declaration will not

protect against foreclosure under a mortgage or home-equity line of credit. In that case, the lender has priority over the homestead exemption. And if you recorded a homestead declaration years ago, consult a real-estate attorney before you decide to record a new one, just to be sure.

Many old homestead declarations are still

whichever comes first.

Which Owners Are Eligible?

No matter how you own your primary residence, you are likely to qualify for homestead protection. Section 1 of the statute defines an owner as being "a natural person who is a sole owner, joint tenant, tenant-by-the-entirety, tenant-in-common, life-estate holder, or holder of a beneficial interest in a trust." In most cases, your deed will state which type of ownership applies to you.

The new definition of owner allows many homes held in trust to qualify for homestead protection. This opens up new estate-planning opportunities, both for devising the family home to your children without giving up control during your lifetime, and for avoiding probate.

However, we are finding that many homes conveyed into trust before 2011 are not yet protected by a homestead declaration.

The rules are very specific. Section 5 of the statute requires the trustee of the trust to sign the declaration. The resident beneficiaries must each be named in the document, and will share the exemption in proportion to their shares of the trust. Note that the exemption applies only to the primary, lifetime trust beneficiaries, not to remainder or contingent beneficiaries.

Unfortunately, homestead protection is not available when the residence is owned by a corporate entity, like a limited-liability company. If a corporate entity is the owner, and the home's equity is at risk, it may make sense to retitle the property and record a homestead declaration. Leased property is also generally ineligible, unless you have an equity interest associated with it, such as a cooperative housing share linked to a particular residential unit and long-term lease.

How Do I Do It?

With so many ownership variations, there is no one-size-fits-all homestead declaration form. While the Mass. Real Estate Bar Assoc. and some registries of deeds provide sample homestead forms, they will not work in every situation. The attorney preparing the homestead declaration should begin with a care-



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effective, and recording a new declaration can unwittingly expose you to claims filed in the interim. A title search can usually detect any such problems.

What Property Is Eligible?

You can protect almost any kind of home, but at least one residential unit of the home must be your primary residence. It can be a single-family or multi-family home (up to four units), manufactured home, condominium, or cooperative housing unit. A vacation home can be protected as long either you or your spouse can establish it as your primary residence, but unless one or both spouses are over 62 or disabled, you will divide the exemption (\$250,000 for each home). Note that an accurate property description and deed reference are critical, especially if your residence includes more than one building or one lot.

Under most circumstances, a homestead declaration also protects proceeds from the sale of, or damage to, your home. In the event that your home is sold or taken, the proceeds will be protected for up to one year or until you buy new home, whichever comes first. And if your home is damaged or destroyed by fire or other casualty, the insurance proceeds will be protected for up to two years, until it is repaired, or until you buy a new home,

ful inspection of your deed. The names on the homestead declaration must match the deed exactly, including any 'also-known-as' names. It should cross-reference the book and page of the deed or other ownership document. If only one spouse owns the home, the declaration should identify the other spouse as a benefitted party.

If the home is held in trust, be sure to record a declaration of trust, trustee's certificate, or nominee trust, and include a registry cross-reference. If one owner is under 62 and the other is over 62, you each need a separate homestead declaration. Again, the purpose is to give legal notice to creditors that you are

claiming the homestead exemption on your property.

Conclusion

When things go wrong, a homestead declaration can suddenly become very important. It is wise to confirm that ours is valid now, so that it is already in place in the unlikely event you need it. Because courts are reluctant to allow seizure of the family home, the law is construed liberally in favor of the homeowner. However, even the Supreme Judicial Courts will not "stretch that principle in a manner that fundamentally ignores the words of the statute," according to *Weiss*

v. Boyle, 461 Mass. 519 (2012).

Following the letter of the law gives the best chance of protecting the family home. Given the complexity of the law, this article is intended to be informative but should not be relied upon as legal advice. Consult your attorney if you have any doubts. ■

David K. Webber is an attorney at Shatz, Schwartz and Fentin P.C. in Springfield, Massachusetts. He practices in the areas of real estate, business transactions, business planning, estate planning, probate, and bankruptcy; (413) 737-1131; dwebber@ssfpc.com