



CLIENT ADVISORY

MASSACHUSETTS HOMESTEAD EXEMPTION

The family home represents the largest single asset for many families and the Massachusetts legislature recognizes its importance to the family for both financial and non-financial reasons. The Massachusetts Homestead Exemption provides limited protection to a family's equity in the home and the Massachusetts Legislature has recently increased that protection from \$300,000 to \$500,000 effective beginning October 26, 2004.

The equity in a home is the value of the home less any outstanding liabilities like, for example, first and second mortgages. In order for the statute to apply, there must be a written declaration of homestead ("Homestead") properly filed in the Registry of Deeds where the property is located. Provided the property is used as the primary residence, a Homestead may be filed by a single homeowner, by either spouse, or by a co-owner of the property, such as a joint tenant or tenant in common. However, only one owner may acquire a Homestead for the benefit of his or her family and the protection does not apply against: 1) any debt contracted for the purchase of the home, 2) judgments related to spousal or child support, 3) judgments based upon fraud, mistake, duress, undue influence or lack of capacity, or 4) ground rent arrangements.

Although many cases recognize that the purpose of the Massachusetts Homestead Statute is to protect the home from claims of creditors, and should thus be liberally construed, the law is not entirely settled with regard to the protection afforded a previously filed Homestead when a subsequent mortgage on the property is granted during refinancing. The issue is whether or not the granting of a mortgage subsequent to a Homestead will subordinate the Homestead's protection to those obligations that occurred after the Homestead filing and prior to the mortgage granted. In other words, if a Homestead was filed on January 1, 2000 and the property was refinanced on July 1, 2004, does the mortgage granted with July's refinancing expose the property to all claims that occurred before July 2004, as this is the newly effective date of the Homestead, or does the full Homestead protection exist from January 1, 2000? Presently, the Massachusetts courts have not addressed this issue. However, a bankruptcy court applying its interpretation of Massachusetts law has and held against the homeowner which, for purposes of our example, means that the Homestead's protection would begin on the date of the refinancing; July 1, 2004.

Massachusetts law also provides for special Homestead exemptions for elderly and disabled people as well. Care must be taken, however, if a Homestead is already on record and a person subsequently qualifies for an elderly or disabled exemption. Once again, according to a bankruptcy court's interpretation of Massachusetts law, an attempt to add an elderly or disabled exemption may void the prior Homestead already recorded. If the Supreme Judicial Court of Massachusetts ultimately agrees with the bankruptcy court's interpretation, then debts arising after the original Homestead but before the "stacked" elderly or disabled Homestead, could defeat the first Homestead as the second Homestead (the elderly or disabled homestead) voids the protection of the first.

The bankruptcy courts' rulings have confused the current state of the law and subsequently made it impossible to be certain exactly what the state of the Homestead law in Massachusetts is at this time. If one is considering refinancing the primary residence and currently has a

Homestead in place, it should be considered carefully what the potential effects refinancing may have on the availability of the Homestead's protection. In circumstances where refinancing is being considered and it is anticipated that contingent or existing obligations may be subject to existing Homestead protection, consultation with an attorney prior to refinancing absolutely should be sought.

In summary, the Massachusetts Homestead Exemption provides low cost and meaningful protection for equity in a principal residence with a maximum amount protected of \$500,000.00. However, one should be wary when refinancing with a homestead declaration already in place, or when considering filing an additional Homestead declaration due to disability or advanced age, as the state of the law in Massachusetts is unsettled at this time. Our recommendation is consultation with an attorney, prior to refinancing or recording a new Homestead, in order to avoid inadvertently terminating any existing Homestead protection currently enjoyed.

FOR QUESTIONS, PLEASE CONTACT ATTORNEY ROBERT BERLUTI, THE FIRM'S LITIGATION PARTNER, OR JOHN McLAUGHLIN, THE FIRM'S CORPORATE PARTNER.