

The Massachusetts Homestead Act: Throw Out the Bathwater

by Mark W. McCarthy

I. Introduction. The Massachusetts homestead act¹ (the "Act") has been reviled for years. Consider the following comments:

The Act "has been bedeviled by typographical errors, is confusing and therefore has been little utilized."²

"There are many conveyancers of the opinion that a Declaration of Homestead Exemption creates more problems than it solves."³

and most damning:

"The public has been misinformed on this subject and most members of the bar are not familiar with it,"⁴ with the implied stage whisper, "thus the misinformation."

The primary purpose of this article is to explore whether Massachusetts should replace the Act or discard it. In other words, does Massachusetts need a homestead law? And if so, what should it contain?

II. Nature/Purpose/Desirability of Homestead.

A. What is Homestead? Homestead is a statutory (or constitutional) creature and was "unknown to the common law."⁵ In Massachusetts, homestead is a possessory, freehold estate which, except for the carve-outs set forth in the Act, shields a family's home from creditors up to the applicable statutory amount.

Homestead is a "possessory" estate because it exists only so long as the declarant, his/her spouse or any of their minor children occupies the property as their principal residence.

Homestead is a "freehold" estate because it is of uncertain duration⁶; its expiration may ultimately be determined by the life span of the declarant or his/her spouse or their youngest child reaching majority. This is why, for analytical purposes, some have likened an estate of homestead to a modified life estate.

Unlike Massachusetts, most states do not consider homestead to be an estate in land, but merely a right or an exemption which relieves the declarant from levy on execution.⁷ This distinction is subtle and arcane, and despite the urging of various parties, the courts have found it to be a distinction without a difference. For the most part, the literature on the subject uses the terms "estate" and "exemption" interchangeably.



Mark W. McCarthy is a banking and real estate attorney with the firm of Peabody & Arnold LLP.

B. Origin and Purposes of Homestead Laws. An "uniquely American contribution to the law of real property,"⁸ homestead was born of Jacksonian Democracy's emphasis on the common man and a backlash against England's preferential treatment of the commercial/creditor class. Texas enacted the first homestead law in 1839 while still an independent Republic,⁹ and several states in the United States soon followed suit. The Massachusetts Act was enacted in 1851,¹⁰ but homestead law in this state was largely forgotten until 1977 when the Act was amended to make clear that (i) it was applicable to joint property, and (ii) the declarant could waive the homestead rights of minor children, allowing the declarant to sell or mortgage homestead property without the imposition of a guardianship and court approval.¹¹ The late Orrin P. Rosenberg, Esq., former Chief Title Examiner of the Land Court, and a stern critic of homestead law, attributed the revival of the Act to "a thoughtless television commentator [who] suggested it as a 'consumer protection device.'"¹² Whatever the impetus, homestead law in Massachusetts is back, as is illustrated by several recent Bankruptcy Court decisions (discussed below), and its scope is only now being defined by courts seeking to fill in the many interstices left by the Act with rulings which they believe to be consistent with the public policy aims which underpin all homestead laws.

It has been said that homestead laws "are not based on principles of equity nor do they in any way yield thereto; their purpose is to secure the home to the family even at the sacrifice of [the] just demands"¹³ of creditors.

But Homestead laws have, at various times and places, been invoked to achieve numerous other ends, including the following:¹⁴

1. to protect the family home from the misfortunes or irresponsible acts of the declarant;
2. to encourage home ownership;
3. to attract settlers and promote westward migration;
4. to prevent pauperism and to promote a sense of independence and stability;
5. to prevent the alienation of the family home without the consent of the declarant's spouse; and
6. to protect the elderly and disabled.

C. Does Massachusetts Need a Homestead Law? There are those who claim that homestead laws are archaic, harkening back to a time when ours was primarily an agrarian society, and the land upon which a home was situated, the family farm, was the economic engine that drove family finances. This criticism was echoed by Orrin Rosenberg when he stated that "people no longer [have] homesteads in [the] pastoral sense."¹⁵ Of course this is true, but is that determinative? Of the purposes set forth in B above, only #3 seems dated. Financial cycles have never been more volatile than now, and in a world of global markets, mass layoffs, and gyrating economic indicators, our society still needs the safety net which homestead law, in part, provides. But while the concept of homestead is not anachronistic, the form of the Act is. The rest of this article will explain.

III. Problems and Solutions.

A. Filing.

1. *Filing Requirement in General.* To create an estate of homestead, the Act requires, among other things, that the declarant record in the Registry of Deeds a declaration evidencing that intention.¹⁶ Some justifications for the filing requirement are as follows: (i) to provide creditors with notice that the declarant has declared a homestead, (ii) to provide notice to third parties that the declarant may not alienate the property without the release of the homestead rights of his/her spouse, (iii) to mark the date from which the homestead exemption runs, so that debts pre-dating the filing date of the declaration may be preserved (which in turn prevents a debtor from defrauding a creditor by liquidating non-exempt assets and converting them into exempt assets in the form of improvements to homestead property), and (iv) to force the owner of more than one home to designate which one is his/her homestead.¹⁷

The problem with the filing requirement is that it undermines the fundamental purpose of the Act, protecting the home from creditors. The average homeowner does not even know that homestead protection is available until it is too late (i.e., when a creditor is already knocking at the door). The filing requirement should be eliminated; homestead protection in Massachusetts should be automatic, as it is in some other states. Why should two families with identical circumstances be treated differently merely because one family files a declaration of homestead and the other does not? The inequity is emphasized in that those who would most benefit from homestead protection (i.e. low income homeowners) are the least likely to be represented by counsel or otherwise be aware of the Act, and therefore the least likely to file a declaration of homestead. An automatic exemption would address justifications (i), (ii) and (iii) above, as follows: Creditors would know that an estate of homestead existed for every primary residence; all spouses would be protected; and the exemption would always run from the date the property was acquired. And justification (iv) above is a red herring – the determination of one's primary residence is always a question of fact.

In addition to hurting homeowners, one commentator has observed that homestead filing requirements stunt the growth of a body of supporting caselaw (because the protection is not being invoked by many homeowners) and cause the statute to atrophy from disuse.¹⁸ The dearth of modern caselaw in Massachusetts supports this theory: most of the cases are grouped in the 1860s, with no significant Massachusetts cases (only Bankruptcy cases) being reported during this century.¹⁹

2. *Joint Filing.* There is an outstanding issue as to whether a husband and wife may each declare a homestead in the same residence. The confusion arises because the Act provides that "only one owner may acquire an estate of homestead in any such home,"²⁰ but also provides that an estate of homestead may be acquired by an "owner or owners"²¹ of a home. It is generally agreed that these provisions are irreconcilable.²² The conservative interpretation of the Act is that only one spouse may acquire an estate of homestead in the family home. Cases show that if a declaration of homestead is recorded with the signa-

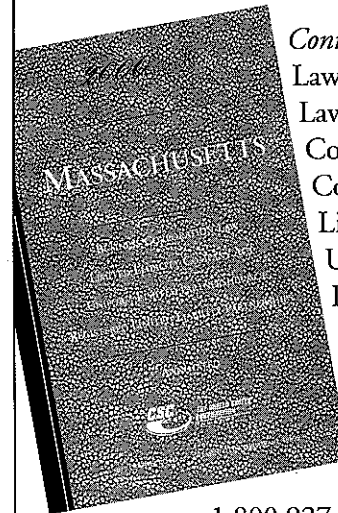
tures of both husband and wife, the first signature appearing creates a valid homestead and the second signature is a nullity.²³ If only one spouse may declare an estate of homestead, how does one choose between them? The usual response is that the declarant should be the spouse with the greater professional liability or more likely to become insolvent,²⁴ which has a certain common sense ring to it. In fact, for as long as both spouses are alive, the result is the same regardless of which spouse is the declarant; the creditors of each of them, and both of them, are subject to the exemption. For further development of this idea, see the discussion in Section G below regarding the interplay of homestead and tenancy by the entirety. The confusion regarding joint filing could be eliminated if the Act were revised to provide that homestead protection is the same regardless of whether a declaration is filed by either spouse or both of them.

B. Termination of Homestead Estate.

1. *Termination of Interest of Spouse.* A declarant's spouse must join in any release for it to be binding against him/her, even if such spouse is not a record owner of the property.²⁵ When a declarant tries to sell his/her homestead property, the conveyancer must obtain either (i) the spouse's release of homestead rights, either by deed or by a separate instrument, or (ii) if the declarant claims to be unmarried, an affidavit to that effect. Despite the importance of obtaining such a

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⁵³ Brian MacQuarrie, *Cellucci Proposal, Program at Odds 2-Strikes Plan Snubs Sex-Offender Rehab*, Boston Globe, February 22, 1999, at B1, available in 1999 WL 6048831.

⁵⁴ *Id.*

⁵⁵ *State v. Wagstaff*, 164 Ariz. 485 (1990); *State v. Wagstaff*, 161 Ariz. 66 (Ariz. Ct. App. 1988).

⁵⁶ *State v. Wagstaff*, 161 Ariz. 66, 69 (Ariz. Ct. App. 1988).

⁵⁷ *State v. Wagstaff*, 161 Ariz. 66 (Ariz. Ct. App. 1988).

⁵⁸ *Id.* at 70.

⁵⁹ *State v. Wagstaff*, 164 Ariz. 485 (1990).

⁶⁰ *Id.* at 488-490.

⁶¹ *Id.* at 490-493.

⁶² *Id.* at 492.

⁶³ *Yates v. United States*, 753 F.2d 70 (8th Cir. 1985); *United States v. Arellanes*, 767 F.2d 1353, 1358 (9th Cir. 1985).

⁶⁴ See Katie Isaac, *Kansas v. Hendricks: A Perilous Step Forward in the Fight Against Child Molestation*, 35 Hous. L. Rev. 1295, 1327 (1998). See also Peters-Baker, *supra*, note 40, at 648-649 (1998).

⁶⁵ 1999 WL 1411351 (Mass. Super. 1999).

⁶⁶ *Id.* at * 3.

⁶⁷ 426 Mass. 136 (1997).

⁶⁸ *Doe v. Attorney General*, 426 Mass. 136, 145-6 (1997).

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release or affidavit, the issue is not always obvious. In most cases the failure to obtain the release of a non-owner spouse is a short-lived issue because the homestead is terminated by the non-owner spouse's post-sale "abandonment" of the property. There are, however, other possible outcomes.

POTENTIAL PITFALL

Underlying Law: A spouse's signature is required to terminate that spouse's estate of homestead upon a sale of the property to a third party.

Facts: Wife holds title to family's principal residence. Family consists of wife, husband and three minor children. Wife files a declaration of homestead, and thereafter, without husband's knowledge or joinder, conveys the property to a third party. Wife takes the sale proceeds and strikes out for parts unknown, leaving husband and children behind. Third party shows up at the house with a moving van and is informed by husband that he knows nothing of the purported sale and intends to live out the rest of his days in the family home.

Analysis: Wife's filing of a declaration of homestead created rights in husband that could only be terminated by husband's execution of the deed or other written release thereof. Husband's estate of homestead survives wife's deed of the property to third party and is superior to the rights of third party. Effectively, the third party has purchased a future interest and will not be entitled to possession until the last of the homesteaders vacates the property.

Consider also that "the traditional, and apparently most prevalent, view is that a spouse's contract to convey homestead property which is not signed by the other spouse in accordance with statutory requirements is void, and therefore is not only not enforceable in specific performance, but also may not be made the basis for the imposition of damages on account of failure to perform if

in consequence of the withholding of consent by the nonsigning spouse."²⁶ The Greater Boston Real Estate Board's standard form of purchase and sale agreement provides for the consent of a non-owner spouse to the conveyance, but this is not a provision on which the parties or their counsel focus, opening up the possibility that the non-owner spouse's signature will not always be obtained.

2. *Termination of Interests of Minor Children.* A declarant and his/her spouse (or the declarant alone, if his/her spouse is deceased) may automatically terminate the homestead interest of their minor children by conveying the property - no express language is required.²⁷ After the declarant dies, however, the surviving spouse cannot terminate the homestead interests of his/her minor children without the appointment of a guardian.²⁸ This is an unnecessary, and I suspect unforeseen, hardship for a newly widowed parent. If the declarant could terminate a minor's homestead interest without a guardian, why not the surviving spouse? This requirement should be eliminated.

3. *Termination Due to Criminal Forfeiture.* The Legislature should also consider whether or not a homestead should be subject to forfeiture to a governmental entity under state or federal laws authorizing the forfeiture of property used to facilitate the commission of a criminal act. The Act does not currently address this issue.

C. Subordination. A declarant, by executing a mortgage, is automatically subordinating his/her estate of homestead with respect to that mortgage, even if the mortgage contains no express language of subordination as is found in paragraph 23 of the Standard FNMA/FHLMC Mortgage (form 3022).²⁹ However, by executing a mortgage the declarant does not automatically subordinate the homestead rights of a non-declarant spouse, and if that non-declarant spouse is not a record title holder, his/her homestead interest is often overlooked.

POTENTIAL PITFALL

Underlying Law: Spouse's signature is required to subordinate his/her estate of homestead to any mortgage (other than a purchase money mortgage).

Facts: Wife is record title holder of home where she resides with husband and three minor children. Wife files a declaration of homestead and thereafter obtains a loan from lender, secured by a non-purchase money mortgage on home, such mortgage being executed by wife only. Wife defaults on loan, lender desires to foreclose. Husband refuses to vacate property based upon his homestead rights.

Analysis: By filing a declaration of homestead, wife created certain homestead rights in husband. Lender may foreclose its mortgage, but cannot take possession of the property as lender's mortgage is subordinate to husband's estate of homestead. The family may occupy the property until last to occur of husband's death or the youngest child attaining majority.

D. Extent of Protection

1. *Calculation of Value.* The Act should be revised to indicate whether or not the homestead exemption applies to the debtor's equity in the home or to the home's total value unreduced by the mortgage debt. The Bankruptcy

Court has taken the former view,³⁰ but the legislature should confirm or reject it.

2. **Aggregating Protection.** Another ambiguity in the Act is whether or not Section 1 (regular homestead) and Section 1A (elderly/disabled homestead) protections are cumulative? Put another way, is "stacking" permitted? Although the Act states that "the acquisition of a new estate or claim of homestead shall defeat and discharge any such previous estate,"³¹ there are no cases clarifying whether this applies to acquiring a new type of homestead. Consequently there is room for debate, and in a 1993 *Massachusetts Lawyers Weekly* article, William V. Hovey suggested that "[a] couple, both of whom are 62 or older and own their home jointly, should be able to declare three homesteads under Chapter 188 - one regular \$100,000 homestead under Section 1, a second \$200,000 elderly homestead for one spouse under Section 1A and a third \$200,000 elderly homestead for the other spouse under Section 1A...[t]he question remains as to exactly how much of the couple's equity is protected under Sections 1 and 1A."³² A word of caution: If a disabled or elderly person decides to file for homestead protection under both Sections 1 and 1A, they should do so via separate declarations, with the 1A declaration being recorded last, so that if the latter declaration is deemed to defeat the former declaration, the greater protection is preserved. The Act should be revised to authorize or prohibit the "stacking" of homesteads.

3. **Effect of Cap on Exemption.** What is the effect of capping the declarant's homestead exemption by designating a maximum dollar amount? The answer is that it has no effect. Because the creditor can't effectively reach the value of the property in excess of the exemption (see discussion in Section IV. (B) below), effectively *all* of the declarant's equity in the homestead is protected until the estate is terminated, at which point only the statutory amount remains protected. Here are two remedial options:

a. The cap is illusory, eliminate it. If this were done there would be only one type of homestead, not three, and all of the other issues discussed herein which are tied to the cap would disappear. The down side to this solution is that Massachusetts would, like Florida, become a haven for deadbeats with multi-million dollar homes (distinguished from our status quo of deadbeats with moderately priced homes).

b. Give the cap some teeth. For example, once the debtor's equity in the property exceeds the amount of the exemption, allow the creditor to force a sale of the property, setting off the value of the exemption to the debtor, together with any overage remaining after paying off the creditor. The problem with this remedy is (i) it discourages building equity in the home because the excess equity is vulnerable to creditors, and more obviously (ii) it dispossesses the family of their home. Despite the dispossession argument, the forced sale option better implements the legislative intent, which clearly did not contemplate an unlimited exemption of unlimited value.

E. Proceeds/Priority

1. **Proceeds of Homestead.** Upon the sale of homestead property, do the proceeds remain protected up to the statutory limit from the claims of creditors so that the declarant may roll the money into a new homestead? Does it matter whether or not the proceeds are the result of a voluntary sale? Some states have home-

stead statutes which expressly provide such protections, but the Act is silent, and some suggest that "[i]f the homestead is sold, probably the proceeds may be levied against."³³ With this result, the "homestead becomes a virtual prison for the debtor and his family."³⁴ No family member may accept employment which would require moving without running the risk that the creditor will seize the sale proceeds. The Act should be revised to protect sale proceeds up to the statutory limit, from the claims of creditors, perhaps for a period of one (1) year from the date of sale.

2. **Priority.** If a declarant safely rolls the amount of his/her statutory exemption into a replacement homestead, is the new homestead subject to the claims of intervening creditors? In other words, has the declarant lost priority and moved to the end of the queue? Some states have homestead statutes which expressly provide that the priority of a replacement homestead relates back to the priority of the prior homestead, but again the Act is silent. This same relation back issue arises when a declarant who files a regular homestead and later becomes eligible for elderly or disabled homestead and files a new declaration reflecting this change in status to obtain the increased protection. If the subsequent declaration is deemed to discharge the prior declaration, does declarant lose priority to all intervening creditors? This result would be contrary to the purposes of the Act, but there is neither caselaw nor statutory law which provides an answer. The Act should be revised to provide that both a replacement homestead and a change of homestead election relate back to the time of the original homestead.

F. Homestead Protection as a Complement to Tenancy by the Entirety. For a married couple owning their home as tenants by the entirety, homestead protection is duplicative to the extent that the nature of their tenancy already protects that couple against the creditors of either of them alone.³⁵ However, filing for homestead provides such couples with the following additional protections: (i) protection from their joint creditors; (ii) protection in the event that either spouse dies, resulting in the entire interest vesting in the surviving spouse, and thereby subjecting 100% of the surviving spouse's equity in the home to the claims of his/her creditors; (iii) in the event both spouses die, protection for the benefit of any minor children, through the age of majority for the youngest child; (iv) protection in the event of divorce whereupon the tenancy by the entirety protection would be lost. An interesting note on a recent case involving tenants by the entirety: In *Patriot Portfolio, LLC v. Joseph, et al*,³⁶ the Court held that a married couple could bar a sheriff's sale of their jointly owned property, when such sale is predicated upon a judgment against only one of the spouses, by declaring a tenancy by the entirety election pursuant to M.G.L. ch. 209, § 1A, even if such election was not declared until *after* execution.

G. The Homestead Levy and Set-Off Statute.

1. **Text of Homestead Levy Statute.** A creditor seeking to levy on homestead property must proceed under M.G.L. Ch. 236, Sec. 18 (the "Homestead Levy Statute"), which provides, in part, as follows:

"[i]f a judgment creditor requires an execution to be levied on property which is claimed by the debtor to be as a homestead exempt from such levy and if the officer holding such execution is of the opinion that the premises are of greater value

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than fifty thousand dollars, appraisers shall be appointed to appraise the property in the manner provided by section six. If, in the judgment of the appraisers, the premises are of greater value than fifty thousand dollars, they shall set off to the judgment debtor so much of the premises, including the dwelling house, in whole or in part, as shall appear to them to be of the value of fifty thousand dollars; and the residue of the property shall be levied upon and disposed of in like manner as land not exempt from levy on execution."

2. *Confusing Language.* The above-quoted language is confusing. What does it matter if the "premises are of greater value than fifty thousand dollars"? Isn't it the debtor's equity (i.e. appraised amount minus mortgages and other encumbrances senior to the estate of homestead), rather than the "value" of the premises, that needs to be determined? And shouldn't the relevant figure be the amount of the applicable exemption? Further, the language above contemplates the unworkable possibility of the debtor retaining ownership and possession of only part of the dwelling house, with the creditor, or its assignee, owning and possessing the remainder.

3. *Impractical Remedy.* The set-off language in the Homestead Levy Statute ignores that the remedy of set off is no longer in common use in Massachusetts. Basically, the "set-off acts as an involuntary conveyance to the creditor of a portion of the debtor's real estate which has been levied against."³⁷ Assuming for the moment that the language is implying a partition of the value of the property in excess of the exemption, it ignores the reality that single-family homes today, unlike the rural farm homesteads of years ago, do not lend themselves to this sort of division. In such situations, even being able to satisfy local zoning requirements as to lot size and setbacks would be a rarity. This remedy is impractical, as evidenced by a comment by Jordan Shapiro (Massachusetts lawyer and author of "Collection Law") that, in over thirty years of representing debtors and creditors in this state, he has never seen the Homestead Levy Statute invoked by a creditor to levy on the value of homestead in excess of the exemption. Instead, creditors record their execution without regard to whether or not there is equity in the property, and then they suspend, waiting until the debtor needs to sell or refinance and comes to them to clear the encumbrance. As a practical matter, under the current system a creditor's judgment may be reduced to a lien, but the creditor cannot execute on that lien. The Act should be revised to allow a credit or to force a sale of the home and reach the amount in excess of the exemption. Otherwise, the exemption is effectively unlimited in amount until a voluntary sale of the home and this was not the intent of the Legislature.

4. *Levy on Future Interest.* Assuming that a parcel of homestead property is not readily divisible spatially, can a creditor seek to divide the interest in the property temporally, by executing upon a future interest in the property consisting of the fee less the estate of homestead? Probably not under the current law. This is unfortunate, as it deprives the creditor of its only real opportunity to generate current cash flow out of homestead property. A bidder could calculate the value of this future interest by consid-

ering the current value of the property, and the actuarially determined likely duration of the estate of homestead (i.e. the life span of the declarant and his/her spouse and time remaining until their minor children attain the age of 18.) To the extent that the sale price is higher than the judgment, the excess would be paid to the declarant. This remedy would seem consistent with the statutory language above which provides that "the residue of the property shall be levied upon and disposed of in like manner as land not exempt from levy on execution." And unlike the remedy of dividing the homestead property spatially, allowing the sale of a future interest would protect the family's current possession of the property. However, this proposed remedy has serious drawbacks. Besides being overly technical, and therefore unappealing to most creditors, there would be only a limited primary or secondary market for this type of future interest.

H. Bankruptcy.

1. *General.* In Massachusetts, virtually all homestead caselaw derives from bankruptcy cases, and any new homestead law must anticipate the interaction between the two.

2. *Pre-emption.* This is the topic that has seen the most action recently in a trio of cases: *Patriot Portfolio, LLC v. Weinstein*,³⁸ *Davis v. Davis*,³⁹ and less significantly, *In re: Ballirano*.⁴⁰ These cases make plain that the Act cannot be viewed as a free-standing statute; we must anticipate the interplay between the Act and the Bankruptcy Code.

(a) *Pre-existing Debts.* The issue is whether or not the pre-existing debt carve-out from the Act is pre-empted by Sec. 522(c) of the Bankruptcy Code, which states that exempt property is not liable for debts except those expressly listed therein, which include liens for taxes, and alimony and other "super-priority" type liens. In a First Circuit Court of Appeals case, *Patriot Portfolio, LLC*, a creditor of Weinstein, obtained a judgment and filed a lien against Weinstein's home. Weinstein thereafter filed a declaration of homestead, followed by a Petition in Bankruptcy claiming the Massachusetts homestead exemption. In attempting to void the exemption, *Patriot Portfolio* posed the following losing argument: "The property exempted for purposes of Section 522(c) must be defined by Massachusetts law, including all of its built-in limitations. Under this view, the exceptions to the homestead statute operate to define the value of the estate, which is the 'property exempted,' and therefore there is no conflict between Section 522(c) and the Act. The Court rejected this argument stating: "We recognize that Congress afforded significant deference to state law [in bankruptcy matters]...[y]et, such deference does not warrant the conclusion that the 'property exempted' in section 522(c) must be defined by first applying all the built-in exceptions to the state exemption statute." Instead, the Court accepted Weinstein's argument and held that "[e]xempt property in a bankruptcy case remains liable only for the specific types of debt listed in Sec. 522 (c)(1)-(3). Because the Massachusetts prior contracted debt exception is not one of the types of debt specified in Sec. 522(c), it is invalid in bankruptcy."

Although Weinstein obtained the exemption he was seeking, commentators have observed that the pre-emption ruling laid out in *Patriot Portfolio* can cut both ways. This ruling makes plain that it is malpractice to fail to advise a client to file a declaration of homestead prior to filing a petition in bankruptcy.

(b) Alimony. The issue is whether a claim for alimony, preserved under Section 522(c), is enforceable by forced sale of homestead property in contravention of a state law prohibiting this remedy. In the Fifth Circuit Court of Appeals case of *Davis v. Davis*, the debtor filed for bankruptcy, whereupon his ex-wife pursued and obtained a judgment from the Bankruptcy Court that her claim for alimony, child support and maintenance was nondischargeable under Section 523(a)(5). The ex-wife then sought to enforce her judgment by foreclosing on the debtor's homestead, and the debtor protested on the grounds that the Texas homestead law provided an exemption of property from seizure and sale to satisfy the debtor's alimony and child support debts. The Court held that the ex-wife was entitled, under Section 522(c)(1), to enforce her nondischargeable judgment, but that the remedies available to her were governed by Texas collection laws because "Sec. 522(c) is not an execution statute and does not preempt relevant Texas law." The Court noted that the U.S. Congress could alter this situation by enacting a federal execution statute, but that until that time Texas's enforcement mechanisms controlled. The *Davis* ruling is consistent with the First Circuit's decision in *Weinstein*, and there is no reason to believe that a Massachusetts Court would rule differently given the same circumstances.

IV. Conclusion. Because some provisions of the Act are ambiguous, while others conflict, the Act is, in some respects, unknowable. The irony of this confusion is that the purpose of the Act is simple - protect the family home from creditors. First enacted in 1851, the Act was amended 11 times before being rewritten in 1977, and has been amended 17 times since then. These are not the vital statistics of a healthy statute. Many of these amendments failed to solve existing problems or created new problems. At the dawn of the 21st century, we are left with a 19th century statute, with a few 20th century bells and whistles. It's ugly, clumsy, even embarrassing - and it just doesn't work. The baby is long gone; let's throw out the bathwater. This proposal is necessary because, in a very real sense, there currently is no Massachusetts homestead law: the Act is unintelligible or silent on many issues and the vast majority of the cases are coming out of the Bankruptcy Court, not state courts.

The Act should be replaced and the new statute should:

1. make homestead protection automatic, without any filing requirement or, barring this, make filing relate back to the date of purchase;
2. expressly provide for joint filing;
3. provide that a creditor may force the sale of the property in order to liquidate the equity in excess of the exemption;
4. shield sale proceeds of homestead property for a limited time so that the owner may reinvest the proceeds into a new homestead;
5. provide that a replacement homestead or change of election for an existing homestead (assuming the three types of homestead are retained) relates back to the time of the original homestead;
6. make homestead protections under the Act cumulative;
7. provide that a surviving spouse may terminate the homestead interest of minor children without having to have a guardian appointed.

With these suggested changes incorporated into the Act, it would be, on or about the sesquicentennial of its enactment, better than new.

ENDNOTES

- ¹ Mass. Gen. L. ch.188
- ² 21 Massachusetts Practice (Probate Law and Practice) §7.6 at p.99 (1997)
- ³ 5 Massachusetts Practice (Methods of Practice) §294 at p.234 (1981)
- ⁴ Land Court Guidelines to Registry Districts
- ⁵ 14B Massachusetts Practice (Summary of Basic Law) §17.89 at p.672 (1996)
- ⁶ Mass. Lawyers Weekly, March 31, 1996, p.27
- ⁷ Thompson on Real Property §21.03(a) at p.157 (D.A. Thomas, ed., 1994)
- ⁸ 1 American Law of Property §5.75 at p.810 (A. J. Casner, ed., 1952)
- ⁹ Act of Jan. 26, 1839, [1838-1840] Laws of the Republic of Texas, p. 113
- ¹⁰ St. 1851, c.340 §§1, 4
- ¹¹ Harold Lavien and Judy K. Mencher, *The Eclipse of Massachusetts Tenancy by the Entirety and a Reappraisal of Homestead as They Relate to Bankruptcy*, Mass. L. Rev., Winter 1982, pp.176-177
- ¹² 28 Massachusetts Practice (Real Estate Law) §6.9 at p.155 (note 1) (1995)
- ¹³ 40 Am Jur 2d, Homestead §4 at p.254 (1999)
- ¹⁴ George L. Haskins, *Homestead Exemptions*, 63 Harvard Law Review 1289-90 (1950); also 40 Am Jur 2d, Homestead §4 at pp.253-254 (1999)
- ¹⁵ *Supra* note 12
- ¹⁶ Mass. Gen. L. ch.188 §2
- ¹⁷ *Supra* note 8, §5.84 at pp.832-833
- ¹⁸ Haskins, *supra* note 14, at p.1301
- ¹⁹ *Supra* note 12
- ²⁰ Mass. Gen. L. ch.188 §1
- ²¹ Mass. Gen. L. ch.188 §1
- ²² See *Dwyer v. Cempellin*, 424 Mass. 26, 673 N.E.2d 863 (1996)
- ²³ *In re: Cempellin*, 175 B.R. 1 (Bkrcty. D. Mass. 1994)
- ²⁴ Jordan B. Cherrick, *The Homestead Act: An Important Law to Protect the Family But a Law in Need of Reform*, Mass. L. Rev., July/October 1980, p.178
- ²⁵ Mass. Gen. L. ch.188 §7
- ²⁶ 5 ALR 4th (Contract to Convey Homestead - Signature) §2 at p.1312 (1981)
- ²⁷ Mass Gen. L. ch.188 §7
- ²⁸ Mass Gen. L. ch.188 §8
- ²⁹ *Atlantic Savings Bank v. Metropolitan Bank & Trust Co.*, 9 Mass. App. Ct. 286 (1980)
- ³⁰ See *In re Giarrizzo*, 128 B.R. 321 (Bkrcty. D. Mass. 1990)
- ³¹ Mass. Gen. L. ch.188 §2
- ³² 21 M.L.W. 863 (January 25, 1993)
- ³³ 5 Massachusetts Practice (Methods of Practice) §294 at p.235 (1981)
- ³⁴ Haskins, *supra* note 14, at p.1314
- ³⁵ Mass. Gen. L. ch.209 §1A
- ³⁶ Lawyers Weekly No. 14-035-99
- ³⁷ Massachusetts Collection Law, at §9.52 (Jordan L. Shapiro, Marc G. Perlin and John M. Connors (1992))
- ³⁸ 164 F.3d 677 (1st Cir. 1999)
- ³⁹ 170 F.3d 475 (5th Cir. 1999)
- ⁴⁰ 233 B.R. 11 (Bankr. D. Mass. 1999)

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with, the placement of the child in the home of the Adoptive Parents. Furthermore, we understand that neither [Agency] nor any of its representatives can guarantee the present or future medical condition of the child. Therefore, we agree not to hold [Agency] or any of its representatives responsible for any medical conditions which might develop, or be discovered in the future.¹²

After reviewing this language, Judge Hinkle determined that "early in the adoption process, plaintiffs agreed that they read, understood and acknowledged the risks of international adoption and agreed to indemnify and hold

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