

HOMESTEAD DECLARATIONS IN THE FIFTY STATES

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A man's home is his castle – or is it? Although there is substantial agreement that the family manse deserves some protection even in the worst circumstances, each state handles the issue differently. This article explains the many variations in the homestead exemption across the United States.

A comprehensive survey and review of the homestead exemptions available in the 50 states and the District of Columbia reveals little conformity. Each legislature, presumably proceeding from similar public policy concerns, has produced widely varying results. The old maxim about the value of real estate applies with equal force to homestead exemptions: location, location, and location. The value of a homestead exemption is determined entirely by the legislature of the state in which the property is located.

This article is composed of explanatory text and four tables. Table 1 surveys the substantive law of homestead exemptions across the United States. Table 2 charts the impact of the various marital property regimes on these exemptions. Table 3 lays out several key components of the procedural aspects of each state's homestead program, and Table 4 lists the primary homestead statutes in each state. The text analyzes and discusses trends, ranges, the meager uniformity, and the numerous exceptions.

Although many states choose different language to describe the same concept “homestead exemption” is used here to mean the right given to residents of a state to protect a given amount of equity in their primary residence from the claims of creditors. “Homestead property” is defined here as the real or personal property interest from which a homestead exemption may be claimed.

THE SUBSTANTIVE LAW OF HOMESTEAD

Interests Protected

The homestead exemption is a statutory right, and therefore the language of each statute is particularly important. States have adopted a wide variety of constructions. For example, in some states, the exemption protects the debtor's principal residence.¹ Others protect simply the residence² or, commonly, the dwelling place or house.³ The language is as varied as the statutes themselves. Oregon carves the homestead property out of the debtor's “actual abode”; Iowa attaches the exemption to the “house used as a home.”⁴

Unfortunately, the definitions in many states tend to be so general as to leave considerable ambiguity about the reach of the homestead exemption to other than the traditional fee interest in land and a single-family home. The trend among the states appears, however, to be toward resolving this ambiguity. At least 21 states now specifically include mobile/manufactured homes as homestead property. (See Table 1, column 6.) Other states protect interests in condominiums, cooperatives, leaseholds, and other personal property, including houseboats.⁵ Of course, even in those states with only a general definition, courts may find non-fee interests arrangements protected by the homestead exemption provided the nontraditional interest is the debtor's principal residence.

Table 1 does not indicate which states have expanded (or will expand) the coverage beyond their general statutory definition but only reflects those interests specifically included in each state's statutory scheme. Therefore, Table 1 only depicts those states that have, by legislation, expanded the scope of their generalized homestead exemption language to include a variety of nontraditional interests.

Homestead Exemption Value

The dollar value of the homestead exemption is singularly variable. The amount that may be claimed runs the gamut from zero (Rhode Island, District of Columbia, Delaware, New Jersey, and Pennsylvania have no homestead exemption) to nearly unlimited exemptions (Texas, Florida, Iowa, Oklahoma, and Kansas). Toward the lower end of the scale are Georgia and Maryland, neither of which has what could be accurately defined as a homestead exemption.⁶ Both Georgia and Maryland allow the debtor to claim a rather small, fixed amount in either real or personal property. This floating exemption may be claimed entirely out of homestead property or out of personalty.⁷ Table 1 assumes the debtor elects to claim his or her entire floating exemption out of homestead property in such states.

It is impossible to accurately calculate the average homestead exemption given that some states offer none (\$0) while others have unlimited exemptions (infinity) although the number of each is identical. Of the states that have a homestead exemption for a specific amount, the mean for single debtors is \$52,037 and for married debtors \$58,902. Perhaps the more meaningful measure is the median. The median for single debtors is \$25,000, while the median for married debtors is \$30,000. The mode for single debtors is \$5,000 and is \$10,000 for married couples. Table 1, column 3 lists the states where the homestead exemption increases with age, disability, or dependent children.⁸ For instance, Virginia increases the homestead exemption depending upon the number of the debtor's dependent children by \$500 for each dependent.⁹ West Virginia, uniquely, allows a greater homestead exemption from hospital or medical debts in the case of a catastrophic loss.¹⁰ Maryland, while providing only a fairly limited exemption, increases the exemption by \$5,000 in bankruptcy.¹¹

Size Restrictions

Limitations on the physical size of homestead property are most important in states with no limit on the exemption value. (See Table 1, column 4.) Florida, Oklahoma, Texas, Kansas, and Iowa have an unlimited homestead value but limit the size of homestead property.¹² As in several other states, one can homestead more land outside of the city limits. For instance, in Texas, one can homestead up to 200 acres of rural property, but only up to 40 acres of rural property in Iowa.¹³

Conversely, Kansas allows its residents to homestead one acre of urban property, whereas Iowa and Florida limit the urban homestead to one-half acre.¹⁴

Several states that impose value limitations on the homestead exemption also have variable acreage limitations.¹⁵ Table 1, column 5 lists those states that vary the size of homestead property depending upon its location. Most acreage restrictions run from one-half to one acre for urban lots, and most rural homesteads are limited to 160 acres.¹⁶ Only Texas allows a larger claim.

Two states increase the homestead exemption if the homestead property is used for agricultural purposes. In Minnesota, the ordinary homestead exemption is \$200,000,¹⁷ but for agricultural property it is \$500,000.¹⁸ Nebraska, on the other hand, has a completely different homestead regime when the homestead property is a family farm.¹⁹

Debt Exclusions

Every state that allows a homestead exemption excludes certain debts from its protective provisions. Whether by statute or by case law, every state recognizing a homestead exemption does not protect the debtor from consensual liens, mechanic's liens on homestead property, or real property taxes. Many states also carve out of the homestead exemption child support and/or spousal maintenance obligations.²⁰ Beyond these fairly uniform exceptions, there is quite a divergence. For instance, Minnesota excepts from the protection of its homestead exemption certain health care liens.²¹ Several states exempt out-of-state taxes.²² Alabama only protects the debtor from contract claims, and Mississippi's statute offers no protection from bail bond liability.²³ Tennessee, the state with the most unique carve-outs, exempts a number of very specific debts, including fines for voting outside one's precinct, carrying a concealed weapon, and selling liquor on election day.²⁴

MARITAL PROPERTY ISSUES

The difference in homestead exemptions can be attributed, at least in part, to the variety of marital property regimes found throughout the United States. Because the family home is likely to be community property in states that have adopted this civil law concept, the treatment of the homestead property is considerably different from that in the common law states. The law of the non-community property states recognizes that often the family home will belong to only one of the marital partners and gives the nontitled spouse additional rights. Non-community property states often give each spouse a homestead exemption, whereas community property states, more often than not, treat it as a joint exemption. Many of these differences are highlighted in Table 2.

Effect of Title

Column 8 of Table 2 asks whether a spouse may claim his or her homestead exemption in property titled in the other's name. This right can be significant. For instance, in New Hampshire, each spouse is entitled to a \$100,000 homestead exemption for a total of \$200,000 that may be claimed by a married couple.²⁵ Therefore, even if the title is solely in the husband's name, a New Hampshire family can protect \$200,000 of equity in homestead property. New Mexico, on the other hand, allows the same result only if the homestead property is titled in both names.²⁶

Table 2, columns 9 and 10 ask whether the homestead exemption survives in the homestead property after the death of its owner. Column 9 lists those states that continue the homestead ex-

emption in favor of a surviving spouse. Column 10 lists the states that allow surviving minor children to perpetuate the homestead exemption claimed by a deceased parent. As a quick review of Table 2 demonstrates, the majority of states that perpetuate the homestead exemption after death give both the surviving spouse and minor children this protection. New Hampshire and Vermont, however, allow only a surviving spouse to claim the homestead exemption.²⁷

In the community property states, the rights of the surviving spouse are less predictable. If the homestead property is owned as joint tenancy with rights of survivorship or is community property, the surviving spouse retains an interest in the homestead property in his or her own right. In Arizona, Washington and Nevada, single persons and married couples have the same exemption.²⁸ In such cases, the death of one spouse may have little effect on the protection afforded the survivor. When the homestead property is titled in the decedent's name only, however, the surviving spouse will be left in the same condition as surviving spouses in common law states. Of the community property states, only Idaho squarely addresses this issue and passes the community property interest with the homestead exemption intact to the survivor free and clear of any liens.²⁹

For common law states, Arkansas, Georgia, Indiana and Mississippi give a spouse somewhat unusual powers to protect the homestead from invasion even where the spouse holding title will not.³⁰ Under the laws of these states, the spouse who does not hold title can assert the homestead exemption claim in place of the titleholder. Singularly, South Dakota even allows dependents to protect the homestead exemption if they follow a fairly detailed procedure.³¹

Column 11 of Table 2 analyzes whether spousal consent is required to encumber or convey homestead property. This issue is muddled by many community property states. Most such states require the signatures of both spouses to convey or encumber real property under the terms of their marital property regime. Their homestead exemption statutes, then, often remain silent on the issue. Column 11 reflects only whether there is an explicit provision in the homestead exemption statutes preventing one spouse from encumbering or conveying homestead property without the consent of the other. To complicate it even further, community property states traditionally allow spouses to hold real property, including homestead property, as either their sole and separate property or in joint tenancy. In such cases, a spouse could lien or convey his or her interest without the other's consent. Therefore, column 11 lists only those states where the homestead exemption statute explicitly makes spousal consent necessary. Accordingly, most community property states are listed as "no."³² The states are about evenly split on the spousal consent issue. If the community property states were included as a "yes" on this issue, then a clear majority of the states would require spousal consent.

PROCEDURAL ISSUES

As important as the substantive and marital rights are the procedural safeguards. It does a debtor little good to have an exemption if a creditor can force a below-market sale of the property with no opportunity for redemption. Table 3 looks at a variety of issues starting with column 12, which asks whether a homestead exemption is granted by the state constitution. Although it is perhaps odd to include a constitutional analysis in the procedural section, it is helpful in the issue addressed in the next column. Column 13 of Table 3 asks whether the statutes allow waiver of the homestead exemption in documents other than where title is conveyed or a lien granted. Most

state statutes are silent on this point. One asserting a right to waiver, however, should have a stronger case where the right is not constitutionally granted.³³

In those states that allow waivers, the waiver must be written and, almost universally, requires spousal consent.³⁴ Further, as will be discussed more fully below, some states allow the officer levying upon the property to mark off the homestead even when the property owner does not. Indeed, such regimes seem to require the levying officer to do so. In such states, it may be difficult to argue that waiver is allowed when the homestead exemption is protected even when the debtor refuses to make the claim directly.

Columns 14 through 16 address the remaining procedural matters in sequence. Column 14 asks whether the exemption is automatically applied or someone (the debtor or another) must take steps to stake out the homestead property or record a notice or claim. Several states make the homestead exemption protection automatic.³⁵ The effect of automatic homestead protection is, of course, sometimes to leave less property available for creditors. Texas, a state that does not require the debtor to take any affirmative action to claim the homestead, imposes this requirement when the real property upon which the debtor's home is located exceeds the acreage limitation of its homestead exemption.³⁶

The next column, column 15, looks at lien attachment. The vast majority of the states provide that when a judgment is recorded, it becomes lien upon all the real property of the debtor including the homestead property. Some states, however, like Arizona and Mississippi hold differently.³⁷ In such states, a judgment does not become a lien on homestead property even if the property's value exceeds all consensual liens plus the exemption. This difference has at least two effects. First, it makes life easier for title companies. When homestead property is sold, title insurers need not concern themselves with judgment liens, as they simply do not attach in these states. Even when judgment liens do attach, however, the creditor can still levy against homestead property and sell it if there is sufficient equity over and above consensual plus the exemption.

Iowa and Mississippi employ a somewhat different scheme. Although the homestead exemption does not automatically attach, the officer levying upon the property is required to mark off the homestead exemption if the debtor does not.³⁸ Although this is different from the procedure in the automatic attachment states, the result is much the same. California's scheme is also unique. In California, the debtor may record its notice of a homestead before the judgment is recorded or may choose not to with different rights arising each way.³⁹ In most other states, the homestead either automatically attaches or it may be claimed after levy.

Some states allow a sheriff or other similar officer to sell the homestead property; others always mandate court involvement. Column 16 on Table 3 lists those jurisdictions on which the court either directs, supervises or approves sale of homestead property with equity. In most cases, neither the court nor the sheriff can sell the homestead property so long as the sale proceeds are less than the consensual liens plus the exemption.⁴⁰ These statutes ensure that homestead property cannot be sold unless the debtor obtains the full value of the exemption.

Alaska and Indiana have very different sales mechanisms, but they share something in common that separates them from the rest.⁴¹ Only these two states allow a sale at less than the full exemption. Alaska's statutory scheme is quite different. It allows the debtor the right to repurchase the homestead property for the amount bid in excess of the exemption.⁴² Therefore, Alaska's statutory scheme is not so much a homestead exemption as a limited right of redemption. The right of a creditor to force the debtor to take less than the full value significantly impairs the exemption.

Many states attempt to resolve the differences arising when the value exceeds the exemption limits. The states have adopted basically two solutions. First, the levying officer hires three citizens or qualified appraisers to evaluate and to select the homestead property.⁴³ Alternatively, the court may be invoked to truncate the debtor's property to fit within the homestead exemption.⁴⁴ If the court or the levying officer cannot appropriately reduce the debtor's property to fit within the acreage or value limitations of the homestead exemption, then the court or the officer may sell the property, turning over the homestead exemption proceeds to the debtor.⁴⁵

Finally, proceeds sometimes maintain their exempt status even after the homestead property itself has been lost, sold or destroyed. Those states protecting proceeds do so most often in the case of either a forced or voluntary sale.⁴⁶ Usually, the proceeds are exempt for only a fixed period. In Mississippi, only the insurance proceeds are exempt if the homestead property is destroyed.⁴⁷

CONCLUSION

Homestead exemption statutes are a bit like snowflakes; although they have much in common, each is unique. It is puzzling to note that similar, and often adjoining, states can reach vastly different results concerning common issues of public policy. Though some of this can be explained by historical, cultural and marital property differences, much of it cannot. In this area of the law, the only constant is no constant at all.

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¹ Alaska Stat. § 09.38.010(a); Mass. Gen. Laws. Ann. Ch. 188 § 1; N.Y. Civ. Prac. Law § 5206(a).

² Ill. Comp. Stat. Ch. 735 § 5/12-901; Me. Rev. Stat. Ann. Tit. 14 § 4422(1).

³ Minn. Stat. Ann. § 510.01; Neb. Rev. Stat. § 40-101; N.M. Stat. Ann. § 42-10-9.

⁴ Or. Rev. Stat. § 18.395(1); Iowa Code Ann. § 561.1.

⁵ See, generally Table 1., Col. 6, infra. Cal.Civ.Proc. Code § 704.710. In In re Margano 158 B.R. 532 (Bankr. S.D. Fla. 1993) a bankruptcy court found the homestead exemption protected a motor home.

⁶ Ga. Code Ann. § 44-13-1; Md. Cts. & Jud. Proc. Code. Ann. § 11-504.

⁷ Id.

⁸ For instance, Massachusetts has an exemption of \$500,000 per person for residents over 62 years old.

⁹ Va. Code § 34-4.

¹⁰ W. Va. Code Annot. § 38-9-3(b).

¹¹ Md. Cts. & Jud. Proc. Code Ann. § 11-504(b)&(f).

¹² See, e.g. Vern. Tex. Prop. Code Ann. § 41.005 and -.002.

¹³ Iowa Code Ann. § 561.2.

¹⁴ Iowa Code Ann. § 561.2; Vern. Tex. Prop. Code Ann. § 41.002(a) and (b).

¹⁵ Id.; Fla. Const. Art. 10 § 4(a); Kan. Const. Art. 15 § 9. See, e.g. La. Rev. Stat. Ann. § 20:1; Mich. Compiled Laws Ann. § 600-6023(h).

¹⁶ See, e.g. Miss. Code Ann. § 85-3-21.

¹⁷ Minn. Stat. Ann. § 510.02. The homestead is limited to 160 acres outside the city and one-half acre within city limits.

¹⁸ Id.

¹⁹ Neb. Rev. Stat. § 76-1901 to § 76-1916.

²⁰ See Table 1; Column 7.

21 Minn. Stat. Ann. § 510.05. This exception to the exemption does not apply to agricultural
land, however.

22 See Table 1; Column 7.

23 Miss. Code Ann. § 85-3-47; Ala. Const. Art. X, § 205.

24 Tenn. Code Annot. § 26-2-301(c) and -306.

25 N.H. Rev. Stat. Ann. Chpt. 480:1.

26 N.M. Stat. Ann. § 42-10-9.

27 N.H. Rev. Stat. Ann. Chpt. 480:3-9(a); Vt. Stat. Ann. tit. 27 § 105.

28 Ariz. Rev. Stat. Ann. § 33-1101; Wash. Rev. Code Ann. § 6.13.030; Nev. Rev. Stat. Ann.
§ 115.010.

29 Idaho Code Ann. § 15-2-402.

30 Ark. Stat. Ann. § 16-66-212; Ga. Code Ann. § 44-13-2; Ind. Stat. Ann. § 34-55-10-13;
Miss. Code Ann. § 85-3-33.

31 S.D. Codified Laws Ann. § 43-31-6.

32 The two community property states which address this issue, Washington and Idaho, both
require spousal consent. Wash. Rev. Code Ann. § 6.13.060; Id. Code Ann. § 55-1007.

33 (See, e.g. Celco, Inc. of America v. Davis Van Lines, Inc., 226 Kan. 366, 598 P.2d 188
(1979).

34 See, e.g. Ken. Rev. Stat. Ann. § 427.100.

35 See, e.g. Ariz. Rev. Stat. Ann. § 33-1101.

36 Vern. Tex. Prop. Code Ann. §§ 41.005 and .022 (200 acres outside the city limits and 10
acres inside city limits).

37 Ariz. Rev. Stat. Ann. § 33-1101; Miss. Code Annot. § 85-3-49.

38 Ia. Code Ann. § 561.5; Miss. Code Ann. § 85-3-31.

39 Calif. Code of Civ. Proc. § 704.950.

40 See, e.g. Colo. Rev. Stat. § 38-41-206; Ken. Rev. Stat. Ann. § 427.090; Mass. Gen. Laws
Ann. ch. 188 § 9.

41 Alaska Stat. § 09.38.010(c); Ind. Ann. § 34-55-10-9 and -10.

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- 42 Alaska Stat. § 09.38.010(c).
- 43 See, e.g. Ala. Code § 6-10-38.
- 44 Haw. Rev. Stat. Ann. § 651-94; Ill. Rev. Stat. ch. 735 § 5/12-908.
- 45 Id.; Wash. Rev. Code Ann. § 6.13.160 and 170; Wisc. Rev. Stat. § 815.21.
- 46 See Table 3 Column 17.
- 47 Miss. Code Ann. § 85-3-23.