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TIME FOR CHANGE: BRINGING MASSACHUSETTS HOMESTEAD AND PERSONAL PROPERTY EXEMPTIONS INTO THE TWENTY-FIRST CENTURY

LEE HARRINGTON*

INTRODUCTION

The Massachusetts homestead statute (Homestead Statute)¹ and personal property exemptions statute (Exemption Statute)² are both outdated and in desperate need of being brought into the twenty-first century. Both of these exemption schemes date back hundreds of years³ and there are many who believe that the protections afforded by the Homestead Statute and the Exemption Statute are as antiquated as their origins suggest.⁴

The Homestead Statute sets forth the statutory scheme intended to shield a certain amount of equity in a family's principal residence from the reach of its non-mortgage lender creditors.⁵ The Exemption Statute sets forth the various

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

² MASS. GEN. LAWS ch. 235, § 34 (1975).

³ See generally Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809 (1983) (tracing history of exemption laws from Roman law forward); Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880*, 80 J. AM. HIST. 470 (1993) (recounting history of state homestead exemptions).

⁴ See, e.g., HOWARD J. ALPERIN & ROLAND F. CHASE, DEBT COLLECTION, 36 MASS. PRACTICE SERIES § 20:74 (2009) (the current scheme is obsolete and sets unrealistic amounts for certain allowed exemptions).

⁵ MASS. GEN. LAWS ch. 188, § 1 (2004) (shields \$500,000 in equity value in a homeowner's primary residence from the reach of an enumerated list of creditors).

personal property exemptions available for citizens in the Commonwealth of Massachusetts (Commonwealth).⁶ It is intended to prevent creditors from satisfying debts by attachment of certain discrete articles of personal property that provide the necessities for every day life and the means to make a living.⁷

The exemptions come into play when a citizen of the Commonwealth seeks protection from his or her creditors under the United States Bankruptcy Code (Code).⁸ The exemptions preserve value in that debtor's assets up to the prescribed statutory limits to prevent those assets from being liquidated to pay allowed claims in the bankruptcy case. There is also an analog to the state exemption scheme found in Section 522 of the Code.⁹ An individual debtor can opt to avail himself or herself of the exemptions provided under Section 522 or the exemptions provided at state law, as in the Homestead Statute and Exemption Statute.¹⁰ An individual debtor cannot mix and match the protections found in the provisions of the federal exemption scheme set forth in Section 522 with those set forth in the relevant state exemption scheme.¹¹ Rather, a debtor must choose one or the other scheme in its entirety and seek to take advantage of the protections afforded by that scheme.¹² The choice is driven, primarily by determining which scheme, federal or state, offers the greatest protection for that individual debtor based on the nature and value of that debtor's assets. For example, under Section 522, a debtor can only protect up to \$20,200 in the value of his or her principal residence¹³ while, under the Homestead Statute, that same debtor can protect up to

⁶ MASS. GEN. LAWS ch. 235, § 34 (1975) (sets forth a list on kinds and dollar amounts of personal property, from furniture to livestock, that cannot be reached for satisfaction of debts).

⁷ *See id.*

⁸ *See* 11 U.S.C. §§ 101–1529 (2010).

⁹ *See* 11 U.S.C. § 522 (2010).

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See* 11 U.S.C. § 522(d)(1) (2010).

\$500,000 in equity in his or her home.¹⁴ Conversely, under Section 522, a debtor can protect up to \$3,225 in value in a motor vehicle,¹⁵ while Massachusetts currently allows protection for only \$700 in the value of a motor vehicle.¹⁶ A debtor who does not own a home, but needs his car to get to work, may opt for the federal exemption scheme under Section 522 to protect more value in property necessary under his or her particular circumstances.

As discussed below, the protections afforded by the two exemption schemes in Massachusetts have fallen hopelessly out of date and require immediate amendment, particularly in today's troubled economic environment when bankruptcy filings, home mortgage foreclosures and credit defaults are at historical highs in the Commonwealth.¹⁷ According to one study, the number of personal bankruptcy filings in Massachusetts rose by as much as forty-one percent in 2008 from a year earlier.¹⁸ There were 11,638 filings under Chapter 7 of the Code in 2008, an increase from 8,245 in 2007.¹⁹ The 2008 filings more than doubled the number of Chapter 7 filings in 2006 when there were 4,698 filings.²⁰ Ninety-eight percent of all the Chapter 7 filings in 2008 in Massachusetts were made by individuals, not corporations.²¹ Chapter 7 bankruptcy allows filers to discharge or eliminate most pre-bankruptcy debt, but requires that all of a debtor's non-exempt assets are liquidated and then applied to satisfy pre-bankruptcy debts.²² According to this same study,

¹⁴ MASS. GEN. LAWS ch. 188, § 1 (2004).

¹⁵ See 11 U.S.C. § 522(d)(2) (2010).

¹⁶ MASS. GEN. LAWS ch. 235, § 34 (1975).

¹⁷ See Press Release, The Warren Group, Aglaia Pikounis, *Bankruptcy Filings in Massachusetts Jump 41 Percent in 2008; More than Double in Two Years*, Banker & Tradesman, The Commercial Record (Feb. 12, 2009).

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² See generally 11 U.S.C. § 522 (2010) (defining property that is exempt from a debtor's bankruptcy estate); 11 U.S.C. § 541 (2010) (defining the scope of the property included in a debtor's bankruptcy estate); 11 U.S.C. § 704 (2010) (defining the role of the bankruptcy

Chapter 7 is the most common option for individuals who are seeking relief from debt, accounting for three-quarters of the bankruptcy filings in Massachusetts in 2008.²³

According to another report examining the financial hardships that have befallen citizens of the Commonwealth in recent years, petitions to foreclose in 2007 in Massachusetts “totaled 29,607 petitions, up 55% from 2006.”²⁴ Foreclosures totaled 7,653, up 145% from 2006 (3,130), which is the highest number since the mid-1990s.²⁵ Just under half of the foreclosures in 2006 and 2007 involved owners with a subprime loan (including those who refinanced into a subprime loan).²⁶ Petitions to foreclose in 2008 “totaled 21,804, down 26% from 2007.”²⁷ The same report posits that the decline in 2008 was with no doubt affected by the “right to cure” law that went into effect on May 1, 2008.²⁸ The right to cure law gives borrowers a ninety day notice period in which to cure a default under a home mortgage before a lender can file a petition for foreclosure.²⁹

trustee to include the collection and reduction to money of the debtor’s estate property); and 11 U.S.C. § 727 (2010) (defining the scope of a discharge of debts).

²³ See Press Release, The Warren Group, Aglaia Pikounis, *Bankruptcy Filings in Massachusetts Jump 41 Percent in 2008; More Than Double in Two Years*, Banker & Tradesmen, The Commercial Record (Feb. 12, 2009).

²⁴ See http://www.chapa.org/?q=foreclosure_view_details/22 (Massachusetts 2007 foreclosure statistics).

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*; see also MASS. GEN. LAWS ch. 244, § 35A (2010) (titled the “Right of residential real property mortgagor to cure a default . . .” that became effective May 1, 2008 and pursuant to which any mortgagor of residential real property located in the Commonwealth consisting of a dwelling house with accommodations for four or less separate households and occupied in whole or in part by the mortgagor, shall have a ninety day right to cure a default of a required payment as provided in such residential mortgage or note secured by such residential real property by full payment of all amounts that are due without acceleration of the maturity of the unpaid balance of such mortgage. The right to cure a default of a required payment shall be granted once during any five year period, regardless of the mortgage holder).

²⁹ See MASS. GEN. LAWS ch. 244, § 35A (2007).

There are presently two pieces of legislation pending on Beacon Hill that are intended to offer amendments to the Homestead Statute and Exemption Statute that would offer meaningful changes and real relief for the citizens of the Commonwealth.³⁰ This article provides a brief history of the two statutory schemes, provides some comparisons to the schemes in other states, and highlights the changes sought by the proposed amendments.

I. A BRIEF HISTORY

The United States is, in no small measure, a nation founded on the primacy of property ownership. There is no more powerful expression of property's place in that political and social fabric than the ability to preserve some of the value of one's home from the reach of one's creditors. The Homestead Statute is said to be part of a "uniquely American contribution to the law of real property"³¹ intended to preserve the value of the family home, encourage home ownership, prevent pauperism and build and stabilize communities.³²

There is something at once quaint and powerful embodied in exemption schemes generally, and Massachusetts is no exception. The religious and agrarian foundations of Massachusetts' society are clearly evidenced in an exemption scheme that, even today, protects a debtor's interest in "the bibles . . . used by him or his family . . .", "[o]ne pew occupied by him or his family in a house of public worship . . ." and "[t]wo cows, twelve sheep, two swine and four tons of hay."³³ The debtor is pre-determined in each

³⁰ See H.R. 1591, 2009 Leg., 186th Sess. (Mass. 2009) (An Act Relative to the Estate of Homestead) and H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009) (An Act Increasing the Value and Kind of Personal Property Exemption from Execution).

³¹ George L. Haskins, *Homestead Exemptions*, 63 HARVARD L. REV. 1289 (1950).

³² See *id.*

³³ MASS. GEN. LAWS ch. 235, § 34 (1975).

instance to be male; all exemptions are for “him” and “his family.”³⁴ While the debtor remains male and the historical protections noted above remain in the proposed legislation, there are efforts not only to increase the scope of the value protected, but to modernize the kinds of items protected.³⁵

II. THE HOMESTEAD STATUTE

The Homestead Statute was first enacted in Massachusetts in 1851.³⁶ Massachusetts was one of the first states in the United States to provide statutory protection for the equity in one’s principal residence.³⁷ The Homestead Statute creates a possessory, freehold estate that protects a homeowner’s principal residence from the reach of his or her creditors.³⁸

The Homestead Statute allows a homeowner in the Commonwealth to receive protection from the reach of creditors in an amount of up to \$500,000 in equity in his or her principal residence, above certain prior existing obligations and the mortgage associated with the purchase of the home (assuming they have complied with the recording requirements of the statute).³⁹ The two elements of the statute highlighted above are critical and bear explanation. First, under the Homestead Statute, at present, a homeowner wishing to avail him or herself of the statute’s protection is required to file a declaration of homestead in the appropriate

³⁴ *See id.*

³⁵ *See* H.R. 1591, 2009 Leg., 186th Sess. (Mass. 2009) (An Act Relative to the Estate of Homestead) and H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009) (An Act Increasing the Value and Kind of Personal Property Exemption from Execution).

³⁶ Law of 1851, c. 340, §§ 1, 4 (current version at MASS. GEN. LAWS ch. 188 § 1 (2004)).

³⁷ *Id.* *See* TEX. CONST. of 1845, art. VII, § 22 (Texas is believed to be the first state to enact a homestead statute).

³⁸ *See generally* Mark W. McCarthy, *The Massachusetts Homestead Act: Throw Out the Bathwater*, 44 BOSTON B. J. 12 (May/June 2000) (for a history of the Homestead Statute and a plea for its reform).

³⁹ *See* MASS. GEN. LAWS ch. 188, §§ 1–2 (2004).

registry of deeds evidencing the intention to avail oneself of the protection.⁴⁰ Second, the right of homestead is automatically subordinated to the mortgage executed in connection with the purchase of the home, even absent any subordination language in the mortgage agreement.⁴¹

The Homestead Statute was last amended in 2004, when the amount of equity exempted by statute was increased from \$300,000 to \$500,000.⁴² The increased dollar amount was no doubt a welcome change to the statute for homeowners across the Commonwealth. However, as set forth below in the proposed amendments, there are a number of other issues with the present law that need redress by the Legislature in order to expand its protections.

III. THE EXEMPTION STATUTE

The Exemption Statute has historical roots in the Commonwealth that date back to the 17th century.⁴³ The United States Supreme Court once stated that the personal property exemption law is intended to “secure [debtors] from unjust and harassing litigation and to protect them in those pursuits which are necessary for the existence and well-being of every community.”⁴⁴ Exemptions, in a very real sense, provide protection not only for a debtor but also for the debtor’s family and the community at large.⁴⁵ Another Court explained the purpose of the exemption law to be “for the protection and benefit of a poor debtor and his helpless family, to give them the bread of life, and a pillow whereon

⁴⁰ See MASS. GEN. LAWS ch. 188, § 2 (2004).

⁴¹ See MASS. GEN. LAWS ch. 188, § 5 (2004).

⁴² See 2004 Mass. Acts 895 (current version at MASS. GEN. LAWS ch. 188, § 1 (2004)).

⁴³ Law of 1698, c. 11, § 5 (current version at MASS. GEN. LAWS c. 235 § 34 (1975)).

⁴⁴ *Bronson v. Kinzie*, 42 U.S. 311, 315–16 (1843).

⁴⁵ See *id.*

to lay the head, to save them . . . from destitution and absolute want.”⁴⁶

Unfortunately, a problematic characteristic of many state exemption statutes is their obsolescence. The National Conference of Commissioners on Uniform State Laws recognized this dilemma and proposed a Uniform Exemptions Act in 1976, which sought to modernize the law of exemptions.⁴⁷ Unfortunately, the Model Act was enacted by only one jurisdiction (Alaska).⁴⁸

The failure of other states to enact the Uniform Exemptions Act might suggest that those who benefit from a useful exemption scheme are often the most powerless in society and are in no position to organize to lobby for reform. In light of the drastic changes to the nation’s federal bankruptcy law enacted in 2005 discussed below, it is especially appropriate, and increasingly overdue that Massachusetts modernizes key aspects of its exemption law.

The Exemption Statute, amended many times since its colonial inception, was last amended almost thirty-five years ago in 1975.⁴⁹ The dollar amounts of various exemptions found in the statute today are woefully inadequate when measured against the exemptions provided in other states, and are in desperate need of change in the current economic climate.⁵⁰

Additionally, changes to the Code enacted in 2005 (such revised Code generally referred to by its acronym, “BAPCPA”) have dramatically circumscribed the rights of individual debtors who seek access to the bankruptcy process.⁵¹ For individual debtors, one of the most significant

⁴⁶ State v. Allen, 35 S.E. 990, 993 (W.Va.1900).

⁴⁷ See generally Richard L. Christenson, *Personal Property Exemptions and the Uniform Exemptions Act*, 1978 BYU L. REV. 462 (1978).

⁴⁸ See ALASKA STAT. §§ 09.38.010, 015, 017 (2010).

⁴⁹ See 1975 Mass. Acts 541–43 (current version at MASS. GEN. LAWS ch. 235, § 34 (1975)).

⁵⁰ See, e.g., MASS. GEN. LAWS ch. 235, § 34 (1975) (allowing only a \$500 exemption for tools of one’s trade).

⁵¹ See, e.g., 11 U.S.C. § 707 (2010) (dismissal or conversion of case under Chapter 11 or 13) (requiring a court to measure a putative debtor’s average income against the median income in that debtor’s state or

changes to the Bankruptcy Code among the 2005 Amendments was the instituting of the means test to draw a line between those individuals who could file a case under Chapter 7 (liquidation) and those who had to file under Chapter 13 (which requires a planned repayment of a certain percentage of debt).⁵² The means test is a formula triggered by a particular state's set median income established by the Census Bureau against which a debtor's income and expenses are measured to determine under which chapter that debtor can file.⁵³ Briefly, in applying the means test, the courts look at the debtor's average income for the six months prior to filing and compare that average income against the state's median income.⁵⁴ In Massachusetts, at present, the median annual income for a single wage-earner is \$53,315.⁵⁵ If the debtor's annualized average income falls below the median in his or her state, then the debtor may seek relief under Chapter 7.⁵⁶ If the debtor's annualized average income exceeds the state's median, there are further steps in the means test that will determine the appropriate chapter for that debtor.⁵⁷

The next step in the means test calculation measures income, minus living expenses (excluding payments on the debts that are to be included in the debtor's bankruptcy), and multiplies that amount by sixty, representing available income to service debt for a five-year period.⁵⁸ If that income

residence to determine if that debtor's Chapter 7 bankruptcy filing should be dismissed or converted).

⁵² *See id.*; *see also*, 11 U.S.C. § 1322 (2010) (describing the contents of a Chapter 13 plan).

⁵³ *See* 11 U.S.C. § 707 (2010).

⁵⁴ *See* 11 U.S.C. § 101(10A) (2007) (defining current monthly income) and § 707(b)(6) (setting out the formula for determining Chapter 7 eligibility based on current monthly income).

⁵⁵ *See* Census Bureau Median Family Income by Size, posted on a website managed by the Office of the United States Trustee, http://www.justice.gov/ust/eo/bapcpa/20100315/bci_data/median_income_table.html (last visited June 17, 2010).

⁵⁶ *See* 11 U.S.C. § 707 (2010).

⁵⁷ *See id.*

⁵⁸ *See id.*

is \$10,000 or greater (i.e. \$166/month), then a debtor will be required to seek bankruptcy relief under Chapter 13.⁵⁹

For those above the median income but with less than \$166/month in available income, if the available income is less than \$100/month, then it may be possible to file a Chapter 7.⁶⁰ If the available income is between \$100 and \$166/month, then it is measured as a percentage of the debtor's total debt.⁶¹ If the amount available is less than twenty-five percent of the total debt, the debtor can file under Chapter 7.⁶²

Limiting access to bankruptcy relief has already increased the need to update the state exemptions for the citizens of Massachusetts in order to protect the basic necessities of living.⁶³

IV. THE PENDING REFORM LEGISLATION

Presently pending before the Commonwealth's Legislature are proposed amendments to both the Homestead Statute⁶⁴ and the Exemption Statute.⁶⁵

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See* 11 U.S.C. § 707 (2010).

⁶³ *See generally* MASS. GEN. LAWS ch. 235, § 34 (1975) (in which the amounts permitted for exemptions are facially inadequate).

⁶⁴ S. 1619, 2009 (Mass. 2009) was filed on January 12, 2009 by its senate sponsors, Senator Cynthia Stone Creem, Senator Susan C. Tucker and Senator Bruce E. Tarr. H.R. 1591, 2009 Leg., 186th Sess. (Mass. 2009), which is identical in all respects, was filed on January 14, 2009 by its House sponsors, Representative Eugene L. O'Flaherty, Representative John D. Keenan, Representative Lida E. Harkins, Representative Garrett J. Bradley, Representative Ruth B. Balser and Representative Charles A. Murphy. There was a hearing scheduled on the proposed legislation for October 15, 2009. As of the time of publication, the proposed legislation had not been enacted. The text of the proposed amendment is provided herein at Appendix A.

⁶⁵ H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009) was filed by its House sponsor, Eugene L. O'Flaherty on January 2, 2009. There was a hearing scheduled on the proposed legislation for October 15, 2009. As of

A. *The Changes to the Homestead Statute*

The proposed changes to the Homestead Statute constitute a complete rewriting of the statute. The statute is to be stricken in its entirety and replaced by a new law.⁶⁶ The only salient aspect of the proposed statute unchanged from the existing law is the dollar amount of the available exemption, \$500,000. The aim of the proposed amendment, as explained by one of its principal proponents, the Real Estate Bar Association (REBA), is to “eliminate ambiguities over filing requirements, reduce unanticipated and adverse consequences to homeowners, and modernize the statute in light of changing circumstances affecting families in the Commonwealth.”⁶⁷ Some of the key changes in the proposed legislation designed to address the concerns voiced by REBA include the following:

- (i) changes to Section 1 now include all relevant definitions used throughout the statute to avoid confusion and uncertainty, including definitions of “family,” “family member,” “home,” “disabled person,” “owner,” “minor,” “maximum homestead declaration,” and “maximum automatic homestead declaration”⁶⁸ (more on this list below) and seeks to address confusion as to the exclusion of pre-existing debts from the homestead protection by expressly providing that the pre-existing unsecured debts of the declarant are

the time of publication, the proposed legislation had not been enacted. The text of the proposed amendment is provided herein at Appendix B.

⁶⁶ Compare MASS. GEN. LAWS ch. 188, § 1 (2004), with H.R. 1591 (at Appendix A) (to see the wholesale changes proposed by the new homestead legislation).

⁶⁷ REAL ESTATE BAR ASSOCIATION, SUMMARY REPORT ON PROPOSED AMENDMENTS TO THE HOMESTEAD STATUTE, CHAPTER 188 at 1 (Oct. 2007).

⁶⁸ See H.R. 1591, 2009 Leg., 186th Sess. (Mass. 2009), § 1.

no longer excluded from the homestead protections;

- (ii) changes to Section 1A seek to address issues related to homesteads in favor of the elderly or disabled, including clarifying prior confusion with the “stacking” of concurrent homesteads between Sections 1 and 1A by elderly or disabled declarants. The changes make clear the distinct nature of the grant of homestead exemptions under Section 1 and Section 1A: under Section 1, multiple owners may declare homestead exemptions but the aggregate value of that homestead will be \$500,000; under Section 1A, qualified owner declarants may each declare a homestead exemption and the maximum \$500,000 value of each exemption so that, for example, two qualified elderly declarants will have an aggregate homestead of \$1,000,000. In the situation where multiple owners of the same home file Section 1 and 1A exemptions (i.e. where one of the declarants qualifies under 1A but the other does not), a Section 1 exemption will be allocated in accordance with the declarant’s percentage ownership of the house, but the Section 1A declarant’s maximum exemption amount will not be reduced. In such instances, the declarant over the age of sixty-two will have a maximum exemption amount of \$500,000, while the other declarant will have a maximum exemption amount of \$250,000. If, when the Section 1 declarant reaches the age of sixty-two, he or she files a declaration under Section 1A, the maximum exemption amount for that declarant would increase to \$500,000;
- (iii) changes to Section 2 seek to clarify confusion surrounding the mechanics of homestead declaration, for example: (a) a requirement that both spouses on a title to real property

sign a homestead declaration (rather than the antiquated and confusing requirement that only the husband sign); (b) allowing a trustee to sign a declaration on behalf of trust beneficiaries who reside in the subject property; (c) a requirement that the declaration be made under pains and penalties of perjury; (d) a declaration that each person identified as enjoying the homestead protections occupies or intends to occupy the subject property as a principal residence; eliminating the ability to declare a homestead within a deed or other like instrument requiring a separate filing of declaration; and (e) a relation back provision that provides that a second homestead declaration filed with respect to the same primary residence relates back to the initial declaration to avoid termination of the initial homestead and complications associated with intervening liens;

- (iv) changes to Section 4 eliminate the provision that terminated a surviving spouse's homestead rights upon remarriage;
- (v) changes to Section 7 include termination of homestead upon abandonment of the subject property; and
- (vi) changes to Section 8 provide protections to the proceeds derived from the sale, taking or casualty damage to property subject to a homestead declaration for the earlier of (a) one year from a sale or two years from a fire or (b) the declaration of a new homestead.

Many of the changes summarized above are intended to clarify existing ambiguities and confusion.⁶⁹ One change provides significant substantive relief that is nonexistent

⁶⁹ See REAL ESTATE BAR ASS'N, *supra* note 68, at 1.

under the Homestead Statute.⁷⁰ Under Section 1, a maximum automatic homestead declaration is created without the requirement of a formal, recorded declaration of homestead and every homeowner is entitled to a maximum exemption of \$125,000 in the subject residence.⁷¹ This change provides at least some measure of protection to all homeowners in the Commonwealth by preserving an amount of equity in the home even in those instances where the homeowner fails to record a proper declaration.⁷²

B. The Changes to the Exemption Statute

The proposed changes to the Exemption Statute would not constitute as dramatic a change as would the proposed changes to the Homestead Statute, but would nevertheless provide some meaningful relief for the citizens of the Commonwealth. The proposed changes would:

- (i) double most of the personal property exemptions in order to partially adjust for the cost of living since the exemptions were last revised in 1975;
- (ii) suggest new exemptions to account for items necessary to a twenty-first century household;
- (iii) create two new sections to include (1) a wildcard exemption to cover personal property not covered by any of the more-specific exemptions and (2) a limited exemption for jewelry;
- (iv) include a new automatic triennial cost of living adjustment; and

⁷⁰ Compare MASS. GEN. LAWS ch. 188, § 1 (2004), with H.R. 1591, § 1.

⁷¹ H.R. 1591, § 1 (providing for the automatic homestead).

⁷² See *id.*

- (v) bring the Massachusetts personal property exemption scheme more in line with the schemes provided by other states.⁷³

The most significant and necessary change in the legislation is the proposed increase for most of the personal property exemptions in order to partially adjust for the cost of living⁷⁴ since the exemptions were last revised more than thirty years ago.⁷⁵ Set forth below are some of the proposed exemptions under M.G.L. c. 235 § 34 and the intended effect of the proposed changes.⁷⁶

Clothing, Bedding, Heating. The first change affects the “necessary wearing apparel, beds and bedding for the debtor and the debtor’s family; one heating unit used for warming the dwelling house; one stove used primarily for the personal, family, or household use of the debtor or a dependent of the debtor; one refrigerator so used; one freezer so used; one hot water heater so used; and the amount each month, not exceeding \$250, reasonably necessary to pay for fuel, heat, refrigeration, water, hot water and light for the debtor and the debtor’s family.”⁷⁷ When energy prices during the winter can easily exceed several hundred dollars per month, the \$75 presently provided for by statute is plainly inadequate. The upward adjustment for this provision is necessary if citizens are to have a meaningful exemption for energy expenditures. Additionally, a modern household cannot function without a stove, a refrigerator and a hot-water heater. Logic dictates the inclusion of a freezer among the exempt items, because so

⁷³ See H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009).

⁷⁴ See *infra* note 115 and Appendix C (for an analysis on the impact of inflation).

⁷⁵ See 1975 Mass. Acts 541-43 (current version at MASS. GEN. LAWS ch. 235, § 34 (1975)).

⁷⁶ The commentary is derived from a summary of the proposed Exemption Statute amendments that was first drafted by John Loughnane, a partner at Eckert Seamans Cherin & Mellott, LLC, during his tenure as co-chair of the Boston Bar Association (BBA) Bankruptcy Section’s Law and Public Policy Committee. Mr. Loughnane and the BBA’s Bankruptcy Section were, and remain, major proponents of the proposed legislation.

⁷⁷ See H.R. 1585.

many households use freezers to facilitate the buying of food in bulk or the storage of game animals.

Furniture. The second proposed change increases the dollar amount of the exemption for other household furniture necessary for everyday living, not to exceed \$15,000 in value.⁷⁸ The \$3,000 limit in the current law was added in 1970.⁷⁹ Adjusted to current dollars, that translates to approximately \$15,000 in today's economy.⁸⁰

Books. The third change is intended to protect the value of bibles, school books and other books in a personal library, not to exceed \$500 in value.⁸¹ The present-day \$200 limit established almost forty years ago in 1970 is grossly inadequate. Adjusted to current dollars, that 1970s figure translates to approximately \$1,000.⁸²

Tools and Materials of Trade. Another change affects one's tools, implements and fixtures necessary for carrying on a trade or business, not exceeding \$3,500 in value.⁸³ The amendment is intended to reflect changes in the nature of employment that have brought changes in the nature of the tools needed to carry on a trade by increasing the dollar amounts and scope of the tools protected by the statute.⁸⁴ For example, the original draftsmen of the exemption laws could not have foreseen the ubiquitous use of personal computing that now makes a computer with internet access a virtual necessity for nearly every trade or business.⁸⁵ The building trades also now depend on sophisticated and specialized power tools. The current limit of \$500 is plainly inadequate to provide meaningful protection for tradesmen in the

⁷⁸ *See id.*

⁷⁹ *See* 1970 Mass. Acts 616 (current version at MASS. GEN. LAWS ch. 235, § 34 (1975)).

⁸⁰ *See infra* Appendix C.

⁸¹ *See* H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009).

⁸² *See infra* Appendix C.

⁸³ *See* H.R. 1585.

⁸⁴ *See id.*

⁸⁵ The Exemption Statute, first drafted in 1698, predates the use of electricity, let alone the use of personal computers. Even at the time of the latest amendment to the statute in 1975, the use of personal computers was all but non-existent by today's standards.

Commonwealth.⁸⁶ Additionally, a tradesman's materials and stock designed, procured and necessary for carrying on a trade or business, and intended to be used or made within the context of that trade, are protected up to \$1,000 in value.⁸⁷ The current \$500 limit, as of 1970, is out of date.⁸⁸ Adjusted to current dollars, that translates to approximately the \$2,500 that the proposed amendment seeks to establish.⁸⁹

Food and Provisions. The proposed amendments also seek to increase the value exempt for food and provisions necessary and intended for the use of the family, or their money equivalent, from the current \$300 limit to an amount, adjusted to \$600.

Fishing Needs. There is also an increase in the exempt value for boats, fishing tackle and nets of fishermen to the extent the equipment is actually used by them in the fishing business, from \$500 to up to \$1500 in value.⁹⁰

Rental Costs. For real property renters, in lieu of the Homestead Exemption, the proposed amendment increases the amount exempt for rental of a dwelling unit occupied by the debtor and his family from the present \$200 per month to a more reasonable \$2,500 per month.⁹¹ Clearly, the present level of \$200 per month is not adequate to obtain adequate housing in the current rental market in Massachusetts.⁹² Families whose income is subject to garnishment will now be

⁸⁶ Consider that a single table saw can now cost as much as \$900.00. *See, e.g.*, the suggested retail price for Powermatic 1791227K 1-1/2" HP, 1 PH, 115/230V Model 64A 10" Tablesaw w/30" Accu-Fence as listed by the tool retailer, Tools-Plus.com.

⁸⁷ *See* H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009).

⁸⁸ *See infra* Appendix C.

⁸⁹ *See id.*

⁹⁰ *See* H.R. 1585.

⁹¹ *See id.*

⁹² *See, e.g., Interest Strong for Assets Inside Route 128*, APARTMENT RESEARCH MARKET UPDATE (Marcus and Millichap, Boston, Mass. 2009), at 3 (stating that average rent in and around Metro Boston now stands at \$1,641 per month, even in a depressed market); Megan Woolhouse, *Advantage Renters: Landlords Offer Deals as Rising Vacancy Rates Depress Prices*, BOSTON GLOBE, June 19, 2009, (stating average rent in Boston market at present is approximately \$1,644 per month).

able to insulate up to \$1,000 per month, representing the lower limit on the cost of subsidized housing in an urban area like Boston.⁹³

Cash. The exemption for cash, savings or other deposits in a banking institution, and/or for money owed for each pay period as wages, or any combination of cash, deposits or wages owing, would be increased from the present \$125 to an amount not to exceed \$500.⁹⁴ Also protected would be any sum of money that was received by, or is owed under a qualified public assistance program.⁹⁵

Car. The exemption for the value of an automobile necessary for personal transportation or to secure or maintain employment would be increased from the present level of \$700 to \$7,500 in value.⁹⁶ As discussed above, by way of comparison, Rhode Island amended its exemption statute in 2008 to provide a \$12,000 exemption for automobiles.⁹⁷ Kansas provides a \$20,000 exemption.⁹⁸ While many other states exempt up to \$5,000 in the value of a debtor's automobile, the proposed \$7,500 exemption seems more in line with the current market and is a vast improvement over the present \$700 limit which is the lowest of all fifty states.⁹⁹ Even a simple adjustment for inflation from the 1970s dollars as applied in the other amendments proposed would only translate to approximately \$2,500 in present dollars.¹⁰⁰

Wildcard. In addition to all of the enumerated categories of specific personal property exemptions listed above, the proposed amendment would create a so-called "wild card" category of exemption that would exempt up to \$1,000 in value in a debtor's interest in any personal property, plus up

⁹³ See H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009).

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ R.I. GEN. LAWS § 9-26-4 (2008).

⁹⁸ KAN. STAT. ANN. § 60-2304 (2008).

⁹⁹ See, e.g., H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009); see also Arizona (\$5,000 for motor vehicle exemption); California (\$2,300 for motor vehicle exemption); Florida (\$1,000 for motor vehicle exemption); Idaho (\$5,000 for motor vehicle exemption); Maine (\$5,000 for motor vehicle exemption); Mississippi (\$10,000 for motor vehicle exemption).

¹⁰⁰ See *infra* Appendix C.

to \$5,000 of any unused dollar amount of the aggregate exemptions provided for furniture, tools and a car.¹⁰¹ Massachusetts currently does not have a catch-all or wildcard exemption. Many other states do.¹⁰² For example, a professional musician who doesn't own a car, but does own \$10,000 worth of instruments necessary to earn a livelihood, would be able to protect a total of \$9,000 in value in his equipment under the proposed amended law: \$3,000 in value in tools; \$1,000 under the first clause of the wildcard exemption; and up to an additional \$5,000 of the unused automobile exemption.¹⁰³ Under the current scheme, this same debtor can only shelter \$500 in equipment.¹⁰⁴

Jewelry. Another new addition to the existing exemption scheme found in the proposed legislation is a debtor's ability to exempt an aggregate interest, not to exceed \$1,225 in value, in jewelry held primarily for the personal, family, or household use by the debtor or a spouse or a dependent.¹⁰⁵ Once again, at present, Massachusetts is in the distinct minority of jurisdictions that does not provide some measure of protection for items of personal jewelry.¹⁰⁶ By contrast, a debtor in bankruptcy who elects the federal exemptions may currently exempt up to \$1,350 in personal or family jewelry.¹⁰⁷ The new exemption merely seeks to provide an equivalent exemption.¹⁰⁸

Cost of Living Adjuster Under Section 34a: One concern moving forward is that legislative inertia or political opposition might lead to another prolonged period during which the exemption amounts would go unchanged despite inflationary pressures facing the citizens of the

¹⁰¹ See H.R. 1585.

¹⁰² See, e.g., Delaware, Indiana, Missouri, and North Carolina.

¹⁰³ See H.R. 1585.

¹⁰⁴ See MASS. GEN. LAWS ch. 235, § 34 (1975).

¹⁰⁵ See H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009).

¹⁰⁶ See, e.g., Alaska (\$1,000 jewelry exemption); Arkansas (wedding ring exemption); Colorado (\$2,000 jewelry exemption); Idaho (\$1,000 jewelry exemption); Iowa (\$2,000 jewelry exemption); Maine (\$750 jewelry exemption).

¹⁰⁷ See 11 U.S.C. § 522(d)(4) (2007).

¹⁰⁸ See H.R. 1585.

Commonwealth. The proposed legislation would impose an automatic cost of living adjustment every three years.¹⁰⁹ The proposed process envisions that at every third-year interval after enactment of the amendments, the dollar amounts of exemptions in the Exemption Statute are to be adjusted upon review by the Judicial Council (Council).¹¹⁰ The Council is to make its determinations based on changes in the annual Massachusetts Consumer Price Index for All Urban Consumers, published by the Department of Industrial Relations, Division of Labor Statistics with each adjusted amount rounded to the nearest \$25.¹¹¹ Any adjustments so enacted would not apply retroactively to cases commenced before the date of the adjustment, subject to any contrary rule applicable under the Code.¹¹²

This section provides a new automatic triennial cost-of-living adjustment (COLA) for personal property exemptions applicable to enforcement of judgments in bankruptcy. Such triennial adjustments to exemptions are made under the Code and also under the revised exemption statute recently enacted in California.¹¹³ Proponents of the amended legislation believe that the automatic indexing of exemption amounts is necessary to keep the Massachusetts exemption scheme current without the necessity of legislative involvement in the future.¹¹⁴

V. CONCLUSION

The proposed changes to the Homestead Statute and the Exemption Statute described above and set forth in the attached appendices, have a singular purpose; to modernize Massachusetts property exemption laws to reflect the realities

¹⁰⁹ *See id.*

¹¹⁰ *See id.*

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See* 11 U.S.C. §§ 104(a)–(c) (2008); *see also*, CAL. CIV. PROC. CODE § 703.150 (2010).

¹¹⁴ *See* H.R. 1585, 2009 Leg., 186th Sess. (Mass. 2009).

confronting the Commonwealth's citizens today, at the end of the first decade of the twenty-first century. The fact that it has been almost forty years since the last changes to the Exemption Statute seems evidence enough that the present system is broken and ineffective. We live at a time in the Commonwealth's history when the stark realities of the economy have focused increased attention on the plight of those struggling to get by. The hope here is that there will at last be sufficient political momentum to effect real, positive change for the Commonwealth in preserving the basics of existence for its citizens in bankruptcy.

Appendix A**TEXT OF HOUSE No. 1591**

AN ACT RELATIVE TO THE ESTATE OF HOMESTEAD.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 188 of the General Laws is hereby amended by striking out sections 1 through 10 and inserting in place thereof the following thirteen sections:

Section 1.

(a) For the purposes of this chapter, the following terms shall have the meanings set forth below.

“disabled person”, an individual who has any medically determinable permanent physical or mental impairment that would meet the disability requirements for supplemental security income under the provisions of 42 USC 1382c(a)(3)(A) and (C) as in effect at the time of recording.

“elderly person”, an individual aged sixty-two or older.

“family” and “family members”,

(1) married individuals, both of whom own a home, and any minor child as defined herein;

(2) a married individual who owns a home, his or her non-titled spouse, and any minor child as defined herein; or

(3) an unmarried individual who owns a home, and any minor child as defined herein.

“home”, the aggregate of:

(1) any of the following: (i) a single family dwelling, including accessory structures appurtenant thereto and the land on which it is located; (ii) a two-to-four family dwelling, including accessory structures appurtenant thereto and the land on which it is located; (iii) a manufactured home as defined in section 32Q of chapter 140; (iv) a unit in a condominium, as both terms are defined in section 1 of chapter 183A, that is used for residential purposes; or (v) a residential cooperative housing unit established pursuant to chapters 156B, 157B, 180 or otherwise;

(2) the sale proceeds as provided in clause (a) of section 8; and

(3) the proceeds of any policy of insurance insuring the home against fire or other casualty loss as provided in clause (b) of section 8.

“maximum automatic homestead exemption”, \$125,000.00, provided that:

(1) with respect to a home owned as joint tenants or as tenants by the entirety, the maximum 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 \$125,000.00.

(2) with respect to a home owned by multiple owners as tenants in common or as trust

beneficiaries, the maximum automatic homestead exemption shall be allocated among all owners in proportion to their respective ownership interests.

“maximum declared homestead exemption”, \$500,000.00, provided that:

(1) with respect to a home owned by joint tenants or as tenants by the entirety, and who are benefited by an estate of homestead declared pursuant to section one, the maximum declared homestead exemption shall remain whole and unallocated, provided that the owners together shall not be entitled to a declared homestead exemption in excess of \$500,000.00.

(2) if a home is owned by tenants in common or trust beneficiaries, the maximum declared homestead exemption for each co-tenant and trust beneficiary who benefits by an estate of homestead declared pursuant to section one shall be the product of (i) \$500,000.00 and (ii) such co-tenant's or trust beneficiary's percentage ownership interest.

(3) except as provided in clause (4), each person who owns a home and who is benefited by an estate of homestead declared pursuant to section 1A shall be entitled to the maximum declared homestead exemption without reduction, pro-ratio or allocation between or among other owners of the home.

(4) separate estates of homestead may be declared pursuant to sections one and 1 A on the same home, and in such event:

(i) if the home is owned by tenants in common or trust beneficiaries, the maximum declared homestead exemption for each co-tenant and trust beneficiary who benefits by an estate of homestead declared pursuant to section one shall be calculated in the manner provided in clause (2), and the maximum declared homestead exemption for each co-tenant and trust beneficiary who benefits by an estate of homestead declared pursuant to section 1A shall be calculated in the manner provided in clause (3), or

(ii) if the home is owned as joint tenants or as tenants by the entirety, the maximum declared homestead exemption for the owners together shall be the sum of \$500,000.00 multiplied by the number of declarations recorded pursuant to section 1A, plus \$250,000.00. As calculated in accordance with this paragraph, the maximum homestead exemption shall remain whole and unallocated among the owners, provided that no one owner who declares homestead, acting individually, shall be entitled to claim more than a \$500,000.00 exemption.

(5) the calculation of the amount of homestead exemption available to any owner shall not be deemed to sever any joint tenancy or tenancy by the entirety.

“minor child”, 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 statute, notwithstanding any provision of law to the contrary.

“mortgage” shall include an instrument granting a security interest in a manufactured home or cooperative housing unit and the term “mortgagee” shall include the secured party under any such instrument.

“owner”, any 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.

“principal residence”, the home where an owner, and his or her family, if applicable, reside or intend to reside as the primary dwelling. No person may hold concurrent rights under this chapter in more than one home.

“record”, “recording” and “recorded”, the act of recording in the registry of deeds or registry district of the land court for the county or district where the home lies, except that, with respect to a manufactured home located on registered land, recording in the registry of deeds shall be sufficient.

(b) An estate of homestead to the extent of the maximum declared homestead exemption in a home may be acquired subject to the provisions of section two by one or more owners who occupy or intend to occupy said home as a principal residence. Said estate of homestead shall be created by a written declaration prepared, executed and recorded in compliance with section two. A homestead declaration shall benefit each owner identified as provided in section two and such owner’s family members who occupy or intend to occupy the home as a principal residence. The homestead rights of non-titled family members shall consist of the right to use, occupy and enjoy the home as a principal residence.

(c) Said estate shall be exempt from the laws of conveyance, descent, devise, attachment, seizure, execution on judgment, levy and sale for payment of debts or legacies except in the following cases:

- (1) 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 any mortgage on the home as provided in sections five and six;
- (4) upon an order by a court that a spouse, former spouse or parent 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 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.

Section 1A. The estate of homestead of each owner who is an elderly or disabled person, regardless of marital status, shall be protected under this section against attachment, seizure, execution on judgment and levy, except as provided in subsection (c) of section one, to the extent of the maximum declared homestead exemption; provided that a declaration of homestead protection for such elderly or disabled person that complies with section two has been recorded; and, provided further, that such person occupies or intends to occupy such home as his or her principal residence.

An owner of a home who qualifies under the provisions of this section shall, upon recording of an elderly or disabled person's declaration of homestead protection, be eligible for protection of such ownership interest to the extent of the maximum declared homestead exemption as set forth in subsections (3) and (4) of the definition regardless of whether

such declaration is recorded individually or jointly with another.

Except as provided in the following paragraph, each elderly or disabled person's estate of homestead shall terminate upon (a) the sale or transfer of that person's ownership interest in the home, except where such elderly or disabled person is also the transferee of all or a portion of the transferred interest; (b) the recorded release of that person's homestead estate; (c) the subsequent declaration of an estate of homestead on other property; (d) the abandonment of the home as the principal residence by the person (e) upon the death of the person, or (f) with respect to a home owned in trust, the execution of a deed or recorded release by the trustee(s).

In the event that an owner records a declaration under this section, and such owner conveys to, or is survived by, a spouse who does not have the benefit of an estate of homestead under either section one or this section, and the spouse occupies or intends to occupy the home as his or her principal residence, then the spouse shall be deemed, as of the time he or she acquired title, to have the benefit of the declaration previously recorded, as if such declaration had been recorded under section one, until the spouse is eligible for and does record a declaration creating an estate of homestead under this section.

No declaration creating an estate of homestead pursuant to section 1A shall terminate the existing homestead rights of a non-titled spouse or minor children.

Nothing in this section shall prohibit an elderly or disabled person from declaring or continuing a homestead pursuant to section one, but no one person may concurrently hold rights under both section one and this section.

Section 2. Each declaration of homestead shall be in writing, signed and acknowledged under penalty of perjury by each owner to be benefited by the homestead, except as provided in subparagraph (d), shall be recorded and shall comply with the following:

(a) Each owner to be benefited by the homestead, and such owner's non-titled spouse, if any, must be identified.

(b) The declaration shall state that each person so identified occupies or intends to occupy the home as his or her principal residence.

(c) If the home is co-owned by a married couple, whether only in their names or as co-tenants with one or more other parties, and the home is or is intended to be both spouses' principal residence, a declaration under section 1 must be executed by both spouses.

(d) If the home is owned in trust, only the trustee shall execute the declaration.

(e) In addition to the foregoing, a declaration creating an estate of homestead under section 1A shall include the following:

(1) a statement that the owner to be benefited is either an elderly person or a disabled person, as defined in section 1; and

(2) with respect to a declaration of homestead benefiting a disabled person, there shall be recorded with the declaration either: (i) an original or certified copy of a disability award letter issued to the person by the United States Social Security Administration; or (ii) a letter signed by a licensed physician registered with the Massachusetts Board of Registration in Medicine certifying that the person meets the disability requirements stated in 42 USC 1382c(a)(3)(A) and (C) as in effect at the time of recording.

A single instrument may contain separate homestead declarations by eligible co-owners of the same home, and such instrument shall not be treated as a multifunctional document for purposes of determining the recording fee. A declaration of homestead may not be created within a deed or other instrument vesting title in the owner.

The statement of principal residence required in subparagraph (b) shall be binding upon any identified owner, including one who is a beneficiary of a trust, but may be overcome by an interested third party upon presentation of clear and convincing evidence to the contrary. In the event that spouses occupy or intend to occupy separate homes, and valid declarations are recorded with respect to each, then both estates of homestead together shall not exceed the maximum declared homestead exemption.

The estate of homestead of an individual who records a declaration under section one and who subsequently marries shall automatically be deemed to benefit such individual's spouse.

Any subsequent recording of a declaration of homestead benefiting (i) a family member identified on a prior declaration on the same home or (ii) the spouse of such person, without an intervening release, shall be deemed to relate back to the filing date of the earliest recorded declaration, but the section of this chapter pursuant to which the later recorded declaration is made shall control the rights of a person identified in such later declaration.

Section 2A. In the absence of a valid declaration of homestead recorded under this chapter, an estate of homestead to the extent of the maximum automatic homestead exemption shall exist in any home for the benefit of the owner and the owner's family members who occupy or intend to occupy the home as a principal residence. The homestead rights of non-titled family members shall consist of the right to use, occupy and enjoy the home as a principal residence. Said estate shall be held subject to the provisions of this chapter, except for subsection (b) of section 1 and sections 1A and two.

In the event that spouses occupy or intend to occupy separate homes, then both estates of homestead together shall not exceed the maximum automatic homestead exemption. The recordation of a declaration of homestead under this chapter shall supersede the automatic homestead exemption provided by this section, but shall not terminate the automatic homestead exemption applicable to the period between the

creation of the automatic homestead and the later recording of a declaration of homestead. If a superseding declaration of homestead on the same home is later invalidated or terminated, the estate of homestead provided in this section shall be reinstated as of the date of its original creation.

Section 3. In a case where a complaint for divorce, separate support, guardianship or conservatorship has been filed in the probate court by or against any person entitled to the benefit of an estate of homestead, his or her spouse and minor children shall have the right to use, occupy and enjoy such homestead estate until ordered otherwise by the probate court. The recording of an order of the probate court, together with the description of the homestead estate, shall operate to prevent any beneficiary of the homestead estate from disposing of said estate until such time as the probate court may revoke said judgment.

Section 4. The estate of homestead existing at the death or divorce of a person holding a homestead under sections one or 2A 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. The estate of homestead of the surviving spouse or former spouse and minor children shall continue notwithstanding the remarriage of the surviving or former spouse. The right, title and interest of the deceased in the home, except the estate of homestead thus continued, shall be subject to the laws relating to devise, descent, and sale for the payment of debts and legacies.

Section 5. No estate of homestead shall affect a mortgage, lien or other encumbrance previously existing, except as provided in this chapter.

Section 6. An estate of homestead shall be subordinate to any mortgage encumbering the home executed by all the owners of such home. Such subordination shall not require the signature of any spouse who is not an owner. 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 their non-titled spouses and minor children, if any.

It shall not be necessary to indicate in any mortgage that a homestead estate is subordinate as aforesaid and nothing contained in a mortgage or any document executed in connection therewith shall affect, or be construed to create, modify or terminate, a homestead estate, other than to subordinate it to the mortgage as aforesaid. No mortgage lender shall require or record a release of homestead in connection with the making and recording of any mortgage.

Section 7. An estate of homestead created under section one or 2A of this chapter may be terminated by any of the following methods:

- (a) a deed to a non-family member conveying the home, signed by the owner and, with respect to estates of homestead created under section one of this chapter, any non-owner spouse or former spouse residing in the home as a principal residence as of the date of such deed;
- (b) a recorded release of the estate of homestead, duly signed and acknowledged by the owner and, with respect to estates of homestead created under section one of this chapter, any non-owner spouse or former spouse residing in the home as a principal residence as of the date of such release;
- (c) the subsequent recorded declaration of an estate of homestead under section two on other property, except that such declaration shall terminate only the rights of the owner making such subsequent declaration and the rights of that owner's spouse and minor children who reside or intend to reside in the other property as their principal residence;

- (d) the abandonment of the home as the principal residence by the owner, the owner's spouse, former spouse or minor children, except that such abandonment shall terminate only the rights of persons who have abandoned the home; or
- (e) in the case of a home the title to which is held in trust, by either:
 - (1) the execution of a deed or a release of homestead by the trustee; or
 - (2) action of a beneficial owner identified in the declaration, who is not a minor child, taken in the same manner as provided in clauses (b), (c) and (d).

No person in "military service" as defined in the Section 511 of the Servicemembers Civil Relief Act, 50 USC App. Section 501 et seq., shall be deemed to have abandoned the home due to such military service.

No deed between spouses or former spouses or co-owners who singly or jointly hold an estate of homestead under sections one or 2A, nor any deed between a trustee and trust beneficiary or between a life tenant and remainderman shall be deemed to terminate said homestead unless each co-owner, spouse, former spouse or trust beneficiary entitled to the benefit of the homestead, has executed an express release thereof pursuant to clause (b).

If a subsequent declaration on other property which terminates a homestead under clause (c) is later invalidated, the prior declaration shall not be reinstated, but the owner shall have the benefit of the provisions of section 2A of this chapter.

Except for the subordination provided in section six, nothing contained in a mortgage or any document executed in connection therewith shall be construed to terminate or otherwise affect a homestead estate. A deed reserving said estate of homestead shall convey, according to its terms, any

title or interest in the property beyond the estate of homestead.

Section 8. In the event that a home subject to an estate of homestead is sold, whether voluntarily or involuntarily, taken, or damaged due to fire or other casualty, then the proceeds received on account of such event shall be entitled to the protection of this chapter during the following periods:

(a) In the event of a voluntary or involuntary sale or taking, for a period ending on the earlier to occur of (1) the date on which the person benefited by the homestead acquires another home that he or she intends to occupy as a principal residence, or (2) the expiration of one year after the date on which such sale or taking occurred.

(b) In the event of a fire or other casualty, for a period ending on the earlier to occur of (1) the date upon which (i) the reconstruction or repair to the home is completed, or (ii) the person benefited by the homestead acquires another home that he or she intends to occupy as a principal residence, or (2) the expiration of two years after the date on which such fire or other casualty occurred. For purposes of this section occupancy of a trailer, manufactured home or other temporary housing shall not establish principal residency in a reconstructed or replacement home.

Section 9. If the property of a debtor is assigned under the laws relative to insolvent debtors, and such debtor claims, and it appears to the court wherein the proceedings in insolvency are pending, that he or she is entitled to hold a part thereof as a homestead and that the property in which such estate of homestead exists is of greater value than either the maximum declared homestead exemption or maximum automatic homestead exemption, as applicable, the court shall cause the property to be appraised by three disinterested appraisers, one of whom shall be appointed by the insolvent, one by the assignee and the third by the court; or if either the assignee or insolvent neglects to appoint, the court shall appoint for him or her. The appraisers shall be sworn

faithfully and impartially to appraise the property, and shall appraise and set off an estate of homestead therein to the insolvent debtor in the manner prescribed in section eighteen of chapter two hundred and thirty-six in case of a judgment debtor; and the residue shall vest in and be disposed of by the assignee in the same manner as property which is not exempt by law from levy on execution. The appraisers shall be entitled to the same fees, to be paid out of the estate in insolvency, as are allowed to an appraiser of land seized upon execution.

Section 10. All existing estates of homestead which have been acquired under any law heretofore in force shall continue to be held and enjoyed notwithstanding the repeal of such law.

Section 11. A deed containing a statement of the marital status of the grantor may be relied upon by a good faith purchaser for value. As to acts undertaken in good faith reliance thereon, an affidavit executed and acknowledged by a grantor, releasor or mortgagor under penalty of perjury stating that, at the time of delivery of the deed, release or mortgage, the affiant had no spouse who was then entitled to claim the benefit of an existing declaration of homestead, shall be conclusive proof of the nonexistence of such benefit at that time. Such affidavit may be recorded in connection with the execution and delivery of any deed, release or mortgage, and shall be accepted in all registries of deeds and registry districts of the land court. The subsequent residency or renewal of residency in the home by a spouse of the grantor, releasor or mortgagor shall not defeat the priority of any mortgage, release or conveyance accepted in reliance on such affidavit.

SECTION 2. Chapter 236 of the General Laws is hereby amended by striking out section 18 and inserting in place thereof the following section:

Section 18. If 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 than an amount equal to either the maximum declared homestead exemption or the maximum automatic homestead exemption, as applicable, as defined in section 1 of chapter 188, 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 said amount, 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 said amount; and the residue of the property shall be levied upon and disposed of in like manner as land not exempt from levy on execution; and if the property levied on is subject to a mortgage, it may be set off or sold subject to the mortgage and to the estate of homestead, in like manner as land subject to a mortgage only.

SECTION 3. This act shall apply to all estates of homestead arising or created prior to, on and after the effective date hereof, provided that estates of homestead acquired under any law heretofore in force shall not be deemed invalid for failure to comply with the execution requirements of section 2 of chapter 188 of the General Laws, as appearing in section one of this act. An estate of homestead that arises under section 2A of said chapter 188, as appearing in section one of this act, shall not have priority over, and shall be subordinate to, any lien, right or interest recorded or filed for registration before the effective date of this act.

Appendix B**TEXT OF HOUSE No. 1585****AN ACT INCREASING THE VALUE AND KIND OF
PERSONAL PROPERTY EXEMPT FROM EXECUTION**

*Be it enacted by the Senate and House of Representatives in
General Court assembled, and by the authority of the same,
as follows:*

SECTION 1. Section 34 of Chapter 235 of the General Laws, as appearing in the 2003 Official Edition, is hereby amended by striking out Paragraph First and inserting, in its place, the following:

First, The necessary wearing apparel, beds and bedding for the debtor and the debtor's family; one heating unit used for warming the dwelling house; one stove used primarily for the personal, family, or household use of the debtor or a dependent of the debtor; one refrigerator so used; one freezer so used; one hot water heater so used; and the amount each month, not exceeding two hundred fifty dollars, reasonably necessary to pay for fuel, heat, refrigeration, water, hot water and light for the debtor and the debtor's family.

SECTION 2. Said Section 34 is hereby further amended by replacing, in Paragraph Second, the words "three thousand dollars" with the words "fifteen thousand dollars".

SECTION 3. Said Section 34 is hereby further amended by replacing, in Paragraph Third, the words "two hundred dollars" with the words "five hundred dollars".

SECTION 4. Said Section 34 is hereby further amended by replacing, in Paragraph Fifth, the words “five hundred dollars” with the words “three thousand five hundred dollars”.

SECTION 5. Said Section 34 is hereby further amended by replacing, in Paragraph Sixth, the words “five hundred dollars” with the words “one thousand dollars”.

SECTION 6. Said Section 34 is hereby further amended by replacing, in Paragraph Seventh, the words “three hundred dollars” with the words “six hundred dollars”.

SECTION 7. Said Section 34 is hereby further amended by replacing, in Paragraph Ninth, the words “five hundred dollars” with the words “one thousand five hundred dollars”.

SECTION 8. Said Section 34 is hereby further amended by replacing, in Paragraph Fifteenth, the words “one hundred and twenty-five dollars” with the words “two hundred fifty dollars”.

SECTION 9. Said Section 34 is hereby further amended by replacing, in Paragraph Fourteen, the words “two hundred dollars” with the words “two thousand five hundred dollars”.

SECTION 10. Said Section 34 is hereby further amended by replacing, in Paragraph Fifteenth, the words “one hundred and twenty-five dollars” with the words “five hundred dollars”.

SECTION 11. Said Section 34 is hereby further amended by replacing, in Paragraph Sixteenth, the words “seven hundred dollars” with the words “seven thousand five hundred dollars”.

SECTION 12. Said Section 34 is hereby further amended by inserting the following two paragraphs after Paragraph Sixteenth, as so amended:

Seventeenth, The debtor's aggregate interest in any personal property, not to exceed in value one thousand dollars plus up to five thousand dollars of any unused dollar amount of the aggregate exemptions provided under paragraphs Second, Fifth and Sixteenth of this Section.

Eighteenth, The debtor's aggregate interest, not to exceed one thousand two hundred twenty-five dollars in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

SECTION 13. Said Section 34 is hereby amended by inserting, in Paragraph Eighteenth thereof, the words "spouse or a" before the word "dependent".

SECTION 14. Said Section 34 is hereby further amended by inserting immediately after Paragraph Eighteenth thereof, the following new Section 34a:

Section 34a:

- (a) On April 1, 2007, and at each three-year interval ending on April 1 thereafter, the dollar amounts of exemptions provided in M.G.L. ch. 235, Section 34 in effect immediately before that date shall be adjusted as provided in subdivision (b).
- (b) The **[Judicial Council]** shall determine the amount of the adjustment based on the change in the annual Massachusetts Consumer Price Index for All Urban Consumers, published by the Department of Industrial Relations, Division of Labor Statistics, for the most recent three-year period ending on December 31 preceding the adjustment, with each adjusted amount rounded to the nearest twenty-five dollars (\$25).
- (c) Beginning April 1, 2007, the **[Judicial Council]** shall publish a list of the current dollar **amounts**

of exemptions provided in M.G.L. ch. 235, Section 34, together with the date of the next scheduled adjustment.

- (d) Adjustments made under subdivision (a) do not apply with respect to cases commenced before the date of the adjustment, subject to any contrary rule applicable under the federal Bankruptcy Code.

SECTION 15. Section 28 of Chapter 246 of the General Laws, as so appearing, is hereby amended by replacing, in the first sentence thereof, the words “one hundred twenty-five dollars” with the words “two hundred fifty dollars”.

SECTION 16. Section 28A of Chapter 246 of the General Laws, as so appearing, is hereby amended by replacing the words “five hundred dollars” with the words “one thousand dollars” each time they appear.

Appendix C

INFLATION ANALYSIS

Many of Massachusetts' statutory exemptions have not been increased since the 1970s. Accordingly, inflation has eroded much of the original value of these exemptions. The following chart illustrates what the value of each indicated exemption at the time it was last amended would be in 2005 dollars.¹

MASSACHUSETTS STATUTORY EXEMPTIONS

Statute Ch. 235 § 34	Category	Last Amended	Current Limit	Inflation Multiple ²	Adjusted Limit ³
Clause 1	Wearing apparel Beds, bedding One heating unit \$75/month for utilities	1975	\$75 (utilities only)	3.65	\$274
Clause 2	Household furnishings	1970	\$3,000	5.09	\$15,270
Clause 3	Bibles, school books, library	1970	\$200	5.09	\$1,018
Clause 5	Tools of trade	1970	\$500	5.09	\$2,545
Clause 6	Trade materials or stock	1970	\$500	5.09	\$2,545
Clause 7	Household provisions	1970	\$300	5.09	\$1,527
Clause 9	Fisherman's boat and equipment	1970	\$500	5.09	\$2,545
Clause 12	One sewing machine	1970	\$200	5.09	\$1,018
Clause 15	Cash and/or wages	1975	\$125	3.65	\$456
Clause 16	One automobile	1975	\$700	3.65	\$2,555

¹ The fact that the proposed amendment relies on numbers keyed to inflationary effect as of 2005 (almost five years out of date) speaks to how long and inexorable a legislative process is involved in getting this law revised.

² The Inflation Multiple is derived from the Consumer Price Index for All Urban Consumers in the Northeast as compiled by the Bureau of Labor Statistics of the U.S. Department of Labor. The Inflation Multiple for 1970 is derived by dividing the index value of 203.6 for February 2005 by the annual index value of 40.0 for 1970 and rounding the quotient to the nearest hundredth. Similarly, the Inflation Multiple for 1975 is derived by dividing the index value of 203.6 for February 2005 by the annual index value of 55.8 for 1975 and rounding the quotient to the nearest hundredth.

³ The Adjusted Limit is derived by multiplying the Current Limit by the Inflation Multiple and rounding the product to the nearest whole dollar.