

A Legal View - Every Owner Should Record a Homestead Declaration to
Protect Equity in a Residence from Creditors
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Q: I own my residence with my wife and a friend mentioned that I should record something called a declaration of homestead because I have been sued and a judgment may be entered against me, but I do not know what it is, how to prepare it, or what benefit it may provide to me. Should I prepare and record a homestead declaration and what do I need to do to have it become effective?

A: So long as the statutory specified procedures are followed, any owner of a residence can declare that it is the owner's homestead. Article XVII of the California Constitution creates the right and the California Code of Civil Procedure, sections 704.720 through 704.995 provide the statutory procedures that must be followed to declare a homestead. The owner does not have to be a citizen of the United States, and an unmarried person can record a declaration on his or her undivided interest in the property that is owned in co-tenancy with the other owner.

The main benefit of declaring a homestead is that it protects that portion of the owner debtor's equity in the property from certain creditors up to the limit of the homestead exemption. The public policy for the homestead exemption is to protect insolvent debtors and their families from being rendered homeless because of an involuntary sale of their residence.

The homestead declaration does not prevent the foreclosure sale of a voluntary lien such as a deed of trust given to secure a loan obtained by the owner on the property. It also does not prevent an involuntary sale of the homestead by creditors if the property has sufficient equity. But it does benefit the owner by preserving for the owner that amount of the equity in the residence up to the applicable exemption limit. The exemption provides that the statutory amount of the equity remaining after an execution sale on a judgment against the owner is exempt and must be paid to the owner, before any remaining proceeds are paid to the creditor.

There are two types of homesteads, an automatic residential exemption, and a recorded declaration of homestead. They provide different rights, and depending upon the circumstances, the owner may have rights under one or both.

The automatic exemption requires the owner to reside at the residence continuously up to the time the exemption is claimed, such as may occur during a bankruptcy filed by the owner. The declared homestead only requires residency by the owner when the homestead declaration is recorded, and the exemption continues even if the owner moves out of the residence and is not a resident when the creditor executes upon a judgment against the owner. Therefore, it is more likely that the owner will receive the benefits of the homestead exemption if a homestead declaration is recorded at the time the owner resides on the property, rather than relying upon the possible existence of the automatic exemption.

Because it is legal under both California law and federal bankruptcy law, an insolvent owner in residency can declare a homestead for the express purpose of preventing creditors from collecting the amount of the exemption. Although the homestead declaration should be recorded as soon as the owner purchases and resides at the property, it can also be recorded immediately prior to the filing of a bankruptcy petition (but not after the bankruptcy filing), or after a lawsuit has been filed against the owner or a judgment is entered against the owner.

A homestead that qualifies for a declared homestead includes the principal dwelling in which the claimant resides, together with any outbuildings (such as a separate garage or shed) and the land upon which they are located. A homestead includes a condominium, community apartment project, a mobilehome and the land on which it is located, and even a boat or other water-borne vessel such as a houseboat.

The main requirement to declare a homestead is that the declarant must reside at the homestead at the time the declaration is recorded. Also, the declarant must have a bona fide intention to make the dwelling a residence, and this requirement is not met if the declarant only intends to reside at the homestead temporarily to declare a homestead. The declaration requires the name of the declarant, the legal description of the property, and the declarant's signature must be acknowledged by a notary public. Then the declaration must be recorded with the county recorder for the county in which the property is located.

The amount of the homestead exemption depends upon whether the declarant/debtor is a "family unit", or is a debtor or spouse who is over the age of 65 years of age or disabled. If the debtor is a member of a "family unit", the exemption is \$100,000. If the debtor is 65 years of age or older, or at least 55 years of age or older with an annual gross income of not more than \$15,000 or \$20,000 for both the debtor and spouse, or is physically or mentally disabled, the exemption is \$175,000. If the debtor or spouse does not qualify under either of the first two circumstances, then the exemption is \$75,000.

Preparation and recording of the declaration of homestead is recommended for every homeowner who intends to reside at the property because the benefits can be substantial, so long as the declaration is properly prepared and recorded. Once recorded, the homestead declaration continues to provide protection for equity in the property of as much as \$175,000 and is effective against many types of creditors. A homestead declaration is a valuable right that every homeowner should consider recording after purchasing a home.

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