

Homestead Declaration

Research Guide

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Scope

This Research Guide will assist in understanding Homestead Declarations. It is not intended as a substitute for legal advice. Please consult with an attorney if you need legal advice. A homeowner who is in financial trouble, or one who expects to encounter financial trouble, should consult an attorney for advice on how to protect their home.

What is a Homestead Declaration?

Under California law, homeowners are entitled to protection of a certain amount of equity in their home from creditors. The amount protected varies depending on a number of factors. This protection may exist through an automatic homestead exemption, or can be created through a process called 'homestead declaration'.

A 'homestead declaration' is a written statement, made under penalty of perjury that claims a particular "dwelling" (for example, a house, condominium, boat, mobilehome, etc.) as the owner's principal place of residence. This guide uses the word "home" to signify a person's principal residence.

When a homestead declaration is (1) signed by a homeowner, (2) notarized, and (3) "recorded," it helps to protect the home against loss to creditors. "Recorded" means that the original signed and notarized homestead declaration is filed in the clerk's or recorder's office for the county in which the home is located. A properly prepared and recorded homestead declaration immunizes the home (and the land on which it is situated) from many (but not all) legal enforcement measures. For example, if a homeowner files a petition in bankruptcy, it may be possible, because of a homestead declaration, to retain the home, or at least a portion of the equity in the property, instead of losing it to creditors.

However, neither the *automatic* homestead nor the *declared* homestead will protect a homeowner against the loss of his or her home to a secured creditor -- such as the lender who has financed the original purchase, or a lender who extended a second mortgage loan, or to a contractor, subcontractor or laborer who has filed a valid claim of mechanic's lien. The protections of both the *declared* and *automatic* homesteads, however, extend to most other kinds of creditors.

The two types of Homestead Exemptions: Automatic vs. Declared

There are two types of Homestead Exemptions: automatic and declared. The process above describes the declared homestead exemption.

- **Automatic:** The automatic exemption applies only to a forced sale of property by a creditor, and requires continuous residence from the date the judgment creditor's lien attaches until the date the court determines that the dwelling is a homestead. If a creditor attempts to sell the home, the burden of proof is on the homeowner to prove to the court that an automatic homestead exemption exists.
- **Declared:** applies both to forced and voluntary sales of the property. Exempt proceeds from a voluntary sale are protected if another home is purchased within 6 months. Homeowners must reside in the dwelling on the date the homestead declaration is recorded. If a creditor attempts to sell your home, the burden of proof is on the creditor to prove to the court that your homestead declaration is invalid.

A homeowner would file a *declared* homestead and not rely on the *automatic* homestead for the following reasons:

- The owner who files a *declared* homestead can choose which of several different dwellings will be protected as the person's home.
- The protection that is provided by a *declared* homestead will continue to apply to that homestead even if the owner moves. If a *declared* homestead has not been recorded, the *automatic* homestead protection may be lost if the owner moves.
- The protection that is provided by a *declared* homestead will apply to the proceeds of a voluntary sale. If no *declared* homestead has been recorded, the protection of the owner's equity in a home may be lost in the event of a voluntary sale of the home. This means that the proceeds of the voluntary sale of the home will go to the judgment creditor(s) rather than the owner.
- If a *declared* homestead has been recorded, the law is clear that the proceeds of sale (up to the dollar limits of the homestead law) can be used to purchase another home.
- Only if a *declared* homestead has been recorded will the proceeds of a voluntary sale assuredly be protected after they are used to purchase another home; only then will the protection given to the first home be carried over to the second home.

Amount of Homestead Exemption

The amount of the exemption varies, depending on the age, marital status, and income of the property owner. Under CCP 704.720-730, the exemptions are:

1. \$75,000 unless the judgment debtor or their spouse who resides in the homestead is a person described below in (2) or (3)

2. \$100,000 if the judgment debtor or spouse is a member of a family unit, and if at least one member of the family unit owns no interest in the homestead, or has only community property interest in the homestead with the judgment debtor.
3. \$175,000 if the judgment debtor who resides in the homestead is at the time of the sale either (a) a person 65 years old, (b) a person physically or mentally disabled and as a result of that disability unable to engage in substantial gainful employment, or (c) a person 55 years old with a gross annual income less than \$15,000, or, if the judgment debtor is married, a gross annual income, including that of the spouse, of not more than \$20,000, and the sale is involuntary.

How Do I Record a ‘Homestead Declaration’?

If you are declaring the homestead, a Homestead Declaration must be notarized and filed in the County Recorder’s Office of where the property is located.

For Declaration of Homestead *forms* for individuals and spouses, please go to the following link and scroll down to ‘Homestead Forms’:

<http://www.saclaw.lib.ca.us/pages/forms-page-topical.aspx>

For *information on recording* the document, please go San Diego County Assessor/Recorder/Clerk

http://arcc.co.san-diego.ca.us/services/document_general.aspx

Where Can You Find the Law on Homesteads?

Homestead law (covering both *automatic* homesteads and *declared* homesteads) can be found at California Code of Civil Procedure 704.710-704.995. You can access California codes online:

- (1) Go to <http://www.leginfo.ca.gov/calaw.html>
- (2) Click the box next to ‘Code of Civil Procedure’, then click ‘Search’ at the bottom of the page,
- (3) scroll down to Part 2, Title 9, Division 2, Chapter 4 ‘Exemptions’ and click on the code sections to access the actual code.

Research at the Law Library:

California Forms of Pleading and Practice, volume 25, chapter 294. (Matthew Bender) (KFC 1010 .A65)

California Real Estate Law and Practice, chapter 344 (Matthew Bender) (KFC 140 .B45)