

# Homestead Exemptions and Subdivisions

## Description

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One question faced by creditors of a consumer debtor in bankruptcy is how to reach what is often their most valuable asset, their home. The Bankruptcy Code and state laws provide exemptions for property—or for up to a certain value in that property—often making it impossible for creditors, especially unsecured creditors, to reach that real estate. However, in [Nealon v. Matthews \(In re Nealon\)](#), an unsecured creditor attempted a creative way to reach parts of the debtor's real estate, where the debtor had previously begun—but not completed—a subdivision of his property. BAP NO. MW 15–035 2016 WL 312409, at \*1 (1st Cir. B.A.P. Jan. 20, 2016).

In the case before the Massachusetts Bankruptcy Court, the court had to determine whether the debtor's attempted subdivision of the parcel on which his home was located was sufficient to re-characterize his homestead exemption as being only over the subdivided parcel which contained his family home. The debtor had attempted to subdivide the land into four parcels—one containing his then-home, one on which he would build his future home, and two which would be preserved as wetlands over which he would donate a Conservation Restriction. This plan was accepted by his local Planning Board, subject to, *inter alia*, the condition that he obtain a partial release of his mortgage as against the two parcels destined for conservation—failure to do this would invalidate the approval. The debtor executed a Conditional Approval Agreement reflecting those conditions, and recorded the Agreement and a Subdivision Plan reflecting the proposed new lots. However, the debtor learned that it would be too expensive to obtain the partial release of the mortgage, and abandoned the plan. Years later, he declared Chapter 7 bankruptcy, and declared his entire parcel as subject to his homestead exemption.

One of his unsecured creditors, however, made the argument that the recorded Conditional Approval Agreement and Subdivision Plan evidenced intent to cease using the additional parcels as part of his home, thus making three of the parcels available for unsecured creditors seeking to levy on them. In response, the debtor presented ample evidence of actual use of the entire parcel as part of his home, including affidavits and pictures of himself and his family engaged in sporting activities such as cross-country skiing and hiking, storing boats for winter, and otherwise using the entire, undivided parcel. The Massachusetts Bankruptcy Court, applying [Mass. Gen. Laws ch. 188, § 3\(a\)](#), found that the debtor had intended to subdivide the parcels, and did not believe testimony suggesting that this intent had been abandoned, rather than merely temporarily delayed. Therefore, it found that the extent of the debtor's homestead exemption was only the subdivided parcel containing the debtor's home, as a result of the debtor's continued, if frustrated, intent to subdivide.

The First Circuit Bankruptcy Appellate Panel reversed, finding that actual use of an attached parcel as part of one's homestead is sufficient for an otherwise valid homestead exemption to apply to that parcel. The panel considered what elements Chapter 188 § 3 lays out for a valid homestead exemption, and determined that there are two: actual or intended occupation of the property in question as a home, and a recorded declaration, either in the deed or as a separate declaration. While the panel did not hold that the bankruptcy court's finding that the debtor was only temporarily delayed in his intent to subdivide the parcel was clearly erroneous, the panel nevertheless reversed because it found that the court erred as a matter of law, by focusing on the debtor's intentions for the future to the exclusion of his actual use in the present. The panel held that, even if the unsecured creditor were correct that she rebutted the presumption in favor of a complete homestead exemption, the debtor still introduced sufficient evidence of his actual use of the parcel.

This case underscores the importance for both debtors' and creditors' counsel to pay attention to use as well as intention when dealing with individuals who may own multiple subdivided parcels, may have purchased

neighboring parcels, or whose homesteads may otherwise include more than one parcel.

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