

Homestead Law Protects Businesses

A business homestead receives the same protection as a residence under Texas law. Tools, equipment, books and apparatus used in a trade are covered. An individual may claim both an urban and a business homestead; those claiming a rural homestead, however, may not claim a business homestead. In addition, the claimant must have a calling or business to which the property is adapted, and it must be used for that purpose.

By Judon Fambrough

Texas Homestead Law discussions commonly focus on residential protection. Generally ignored is the business homestead protection established by the same laws. The constitutional provisions and the case law construing these provisions form a unique shield against creditors' claims.

The Texas Constitution, as amended November 8, 1983, states, "The homestead . . . in a city, town or village, shall consist of a lot or lots amounting to not more than one acre of land; provided that it shall be used for the purpose of a home, or a place to exercise the calling or business of the homestead claimant, . . . provided also, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired" (Article 16, Section 51).

The protection granted the business homestead parallels that of the residential homestead. None of the business premises may be taken by creditors for payment of debts except:

- All or part of the purchase money for the business property
- Taxes on the business property
- Work and material used in constructing improvements on the business property

As part of the business homestead, the tools, equipment, books and apparatus used in a trade or profession also are protected. The case of *Moore v. Neyland*, 180 S.W. 2d 658 (Tex. App. 1944) exemplifies this protection. The case held that tanks, pumps and similar equipment used to conduct a wholesale gas station were

adapted to and necessary to that vocation. They were protected from creditors as tools and apparatus of the trade.

Three main elements are required for a business homestead. First, the person claiming the business homestead (the claimant) must have an urban homestead or no homestead at all. Second, the claimant must have a calling or business to which the property is adapted and reasonably necessary. Third, the property must be used as a place to exercise the calling or business.

The business homestead protection arises only when there is no rural residential homestead being claimed. The rationale for this rule lies with the amount of land protected by the homestead laws. The rural homestead protects as much as 200 acres for the head of a household and as much as 100 acres for a single adult. The urban homestead protects as much as one acre only.

The rural homestead is considered large enough to protect both a place for a home and also a place to exercise a business or calling. The same is not necessarily true for the urban homestead. Consequently, the business homestead is associated only with the urban homestead or when no residential homestead is claimed.

The terms *calling* or *business* are not defined precisely either in the constitution or statutes. However, case law suggests some definitions and distinctions.

The case of *Shamburger Lumber Co. v. DeLavan*, 106 S.W. 2d 351 (Tex. App. 1937) held that a business, as distinguished from a calling, is that which occupies the time, labor and efforts of its owner or operator for profit or improvement. It may be temporary. A calling, on the other hand, refers to a profession or trade acquired by study or apprenticeship. The acquired skill or ability is one followed more permanently than a business. An attorney's office is an example of "a place to exercise the calling" as envisioned by the drafters of the constitution.

The court in the Shamburger case concluded that the "calling" and the "business" taken together embrace every legitimate avocation by which an honest livelihood may be obtained.

The property must be necessary to the calling or business. Accordingly, a real estate broker may not establish a business homestead in an apartment house that has no room suitable for an office. Likewise, a person who is both a cattle dealer and real estate agent may not claim a storehouse as a business homestead.

Finally, the property must be used as a place to exercise the calling or business. Two issues surface with this concept. First, how far does the protection extend to facilities not primarily used in the business? Second, when does an actual use cease? The courts have had to differentiate between a temporary cessation and an actual abandonment.

The business exemption does not include a lot or parcel used only in aid of or as auxiliary to the business premises. For example, a warehouse or storeroom is not protected when used in conjunction with the main store or shop.

The rules state that a temporary cessation does not disallow the protection as long as the owner intends to resume the same or pursue some other calling or business on the property within a reasonable period. An abandonment, on the other hand, is a cessation of use with no present intent to resume that or some other calling or business on the property.

On the surface, it appears that the difference lies solely in the owner's intent. However, the case law emphasizes an intent to resume a use within a reasonable time. Any intent not to resume within one year is highly suspect.

In the case of *Blaylock v. Slocomb*, 250 S.W. 218 (Tex. App. 1923), the businessman owned and operated a restaurant. He was severely burned on the hands, arms and body and totally disabled for several months. He leased the business to another person for 12 months while he recovered. The court held this constituted only a temporary cessation.

A similar decision was made in the case of *Schoellkopf v. Cameron*, 47 S.W. 548 (Tex. App. 1898). A shoemaker was elected county treasurer of Coleman County. His official functions were performed in the county courthouse. He occasionally repaired shoes in his shop while serving as treasurer.

The courts held he had not abandoned the business of a shoemaker, and his shop continued to be protected. A merchant, elected to an office, does not necessarily have to retire from his or her mercantile pursuit.

However, abandonment was found in *Alexander v. Lovitt*, 69 S.W. (Tex. 1902). A businessman leased his building for three years with a possible two-year extension. The businessman maintained that he intended to resume business in the future. The court held abandonment had occurred, stating, "There was a definite cessation of both the business and use of the property by a transaction which put it out of his power to resume for three years at least, and the power of the lessees to prevent such resumption for five years." The mere intention to engage again in the business was insufficient to protect the business homestead under such circumstances.

Other cases have held that the intention "to resume business as a merchant when his financial condition is such to enable him to do so" or "to resume the same business at the same place when, and if, his health improved sufficiently to enable him to do so" were likewise insufficient. *Hull v. Naumberg*, 20 S.W. 1125 (Tex. App. 1892) and *Texas Pacific Coal and Oil Co. v. Guthrie*, 100 S.W. 2d 125 (Tex. App. 1936).

Ultimate determination of abandonment, however, is a fact question for a jury. The party asserting abandonment must prove it by clear and convincing evidence. At the same time, the constitutional provision defining the business homestead has consistently been given liberal construction to carry out its purpose, that is, to shield from creditors a place to exercise one's calling or business.

Renting the business homestead raises other issues besides abandonment. Can a person claim a business homestead in property rented from others? Can a person claim a business homestead in property rented to others?

The first question was addressed in the bankruptcy case of *In Re Simpson*, 299 F. 866 (1924). Simpson was a druggist with a two-year business lease. He had no other business. The bankruptcy court used the lease as an asset of Simpson by subletting the building for the duration of the lease term.

In reversing the bankruptcy court, the federal court recognized that Texas law has uniformly held the right of a homestead exists in a lease lasting for more than one year. Because Simpson's lease was for two years, it was protected as a business homestead.

To answer the second question, the **temporary renting of business property to others does not disqualify the exemption**. The protection is granted specifically in the Texas Constitution as shown in the previous cases involving temporary cessation of use.

Renting houses, not business property, to others on a more permanent basis is viewed differently. Renting houses is a special category. The courts have uniformly held that rental of a house or houses to others cannot be a business as described by the constitution.

The case of *Lyon v. Files*, 110 S.W. 999 (Tex. App. 1908) illustrates the rationale of the court. The owner, an elderly man unable to work, built an extra house on his residential lot and rented it. The rent was the only income that sustained him and his wife. Homestead protection to the rent house was denied.

The court in the *Shamburger* case ruled that a rent house is not a business homestead. It does not encompass the idea of that which occupies the time, attention and labor of men for the purpose of profit or improvement. A man could own many rent houses and yet devote his business hours, time, labor and attention to other business pursuits. In fact, owning rental houses requires little time or attention and does not comport to the general idea of a distinctive business. It would be more accurate to class it as an investment.

Mays v. Mays, 43 S.W. 2d 148 (Tex. App. 1931) further exemplifies this point. Mays owned 16 contiguous lots in Jasper. One lot fronting on the highway contained the family dwelling. On ten of the other 15 lots, Mays constructed rent houses and leased them. The rent proceeds supported the family. Mays' only occupation was building and renting tenant houses.

The court denied Mays a business homestead claim on the tenant

houses. It ruled, "The building and renting of houses is not a 'business' as that term is used in the Constitution."

However, the courts have recognized a business homestead for persons owning and operating tourist camps, rooming houses, hotels and apartments. These enterprises are distinguished from renting houses evidently because the owner lived on the business premises and devoted full-time attention to the endeavor.

This distinction was made in *Hinzie v. Moody*, 35 S.W. 832 (Tex. App. 1896). Hinzie owned and used a two-story building for his business. The business failed. Hinzie constructed an outside entry to the upper floor and partitioned it for rooms to rent. He leased the lower story for a saloon except for a 12-by-15-foot room in one corner that he used as a real estate and insurance office. The court held that the entire building qualified as a business homestead.

The *Hinzie* case, as well as the other cases granting a business homestead to rented property, protects only the business property

Business homestead protection arises only when there is no rural residential homestead being claimed. . . . The rural homestead is considered large enough to protect both a place for a home and also to exercise a business or calling.

and related tools and equipment. It does not protect the rent proceeds from being garnished by creditors.

Finally, there are three other business homestead distinctions.

First, the urban residential homestead protects as much as one acre of land only. The courts view the urban and business homestead as a unit. Consequently, the urban residential homestead combined with the business homestead cannot exceed the one-acre limitation.

The urban and business homestead need not be on the same or contiguous lots. However, must the two homesteads be situated in the same city, town or village?

The case of *Purdy v. Grove*, 35 S.W. 2d 1078 (Tex. App. 1931) addressed the issue. It concluded that the two homesteads cannot exist in separate nonadjoining municipalities. However, the two can exist in one urban community where two municipalities are separated only by a corporate line.

The *Purdy* case was decided in 1931. An argument could be made in 1988 that an urban community encompasses an even larger area such as a metroplex.

Second, certain forms of business cannot claim a business homestead. According to Texas law, neither a corporation nor trust is entitled to homestead protection. Therefore, a person who incorporates his or her business or whose business is owned by a trust loses the business exemption. However, a Texas case has held that a business homestead may be claimed by a partner in a solvent partnership's property. *Postal Savings & Loan Ass'n v. Powell*, 47 S.W. 2d 343 (Tex. App. 1932).

Third, only one business homestead may be claimed.

If a person has more than one place for the exercise of a business or calling, only one may be designated for homestead protection.

The protection afforded residential homesteads in Texas is unique. However, Texas law goes a step farther and protects the qualified place where a person exercises a business or calling.

This article is for information only and is not a substitute for legal counsel.

Fambrough is an attorney, member of the State Bar of Texas and a senior lecturer with the Real Estate Center and in agricultural economics at Texas A&M University.

A Reprint from the  **REAL ESTATE CENTER** *Journal*

Director
Assistant Director
Chief Economist
Senior Editor
Associate Editor
Art Director
Assistant Editor
Circulation Manager
Production Assistant

Advisory Committee

Typography

Lithography

Real Estate Center Journal

Dr. James W. Christian
Gary Maler
Dr. Ted C. Jones
David S. Jones
Dr. Shirley E. Bovey
Robert P. Beals II
Kammy Senter
Gary Earle
Emma Kubin

Don Ellis, Del Rio, chairman; Conrad Bering Jr., Houston, vice chairman; Michael M. Beal, College Station; Patsy Bohannon, The Woodlands; Dr. Donald S. Longworth, Lubbock; Andrea Lopes Moore, Houston; Richard S. Seline, Arlington, VA; Jack W. Tumlinson, Cameron; Thomas A. Wilder, North Richland Hills; and Henry Santamaria, Houston, ex-officio representing the Texas Real Estate Commission.

Real Estate Center

Williamson Printing Corporation, Dallas

The Journal (ISSN 0893-3332), now renamed *Tierra Grande*, is published quarterly by the Real Estate Center at Texas A&M University, College Station, Texas 77843-2115 (telephone 409-845-0369). Comments from readers are welcome.

Subscriptions are free to real estate licensees who provide their name, address, telephone and license numbers to Department JS at the address given. Other subscribers, \$25.

Address changes should include name of the magazine, old and new addresses, real estate license number, telephone number and old mailing label.

Permission to reprint is granted for articles and columns, excluding photographs and illustrations, if proper credit is given the *Real Estate Center Journal* and the Real Estate Center.

Views expressed are those of the authors and do not imply endorsement by the Real Estate Center, the College of Business Administration or Texas A&M University.