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COMMENTS

THE BUSINESS HOMESTEAD IN TEXAS

IN 1876, by constitutional revision, Texas added to its protection of the family from foreclosure for debts another exemption, the business homestead. This exemption was to put the rapidly expanding class of urban businessmen on an equality with the farmer, the backbone of Texas economy at that time. Article XVI, Section 51, of the Constitution (1876) provides:

... The homestead in a city, town or village, shall consist of lot, or lots, not to exceed in value five thousand dollars, at the time of their designation as a homestead, without reference to the value of any improvements thereon; provided, that the same shall be used for the purpose of a home, or as a place to exercise the calling or business of the head of a family; provided also, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired.

The same declaration is made in Article 3833 of the *Texas Revised Civil Statutes (1925)*. It appears that the basic facts to be determined in applying this provision are: the worth of the bare lot or lots at the time of their designation as a homestead; the use to which the property is put; whether or not the head of the family exercises his business or calling there; and whether or not the business has been abandoned.

The basis of the Texas rural and urban homestead is the thought that every man and his family should be guaranteed a minimum of worldly possessions exempt from foreclosure by creditors. The fundamental rules of law concerning the business homestead are the same as those applied to the rural homestead. Briefly, this means that there must be a family that has designated its homestead by its intent and acts. The business homestead may be on the separate property of either the husband or wife, or on the community property, and it cannot be sold without the wife's

signature and her separate acknowledgment.¹ Also, the business homestead cannot be encumbered by either the husband or the wife except for a purchase money mortgage or a mechanic's lien. Of course, the homestead is subject to tax liens. The husband, being the head of the family, can refuse to carry on a business and can abandon it and subject the property to debts whether the business is on his separate property, his wife's separate property, or the community property.

An example of a business homestead would be a single building housing both residence and business on a lot that, when designated as a homestead, was worth \$5,000 or less, where a business or calling is carried on by the husband as the head of the household. Other fact situations bring up questions of statutory interpretation, and the rest of this paper deals with such situations.

The Texas Constitution gives no definite guide as to what constitutes a city, town, or village. Common sense would tell us what a city or town is, and apparently the same method is used in determining the difference between a town or village and a rural community. In *Iken v. Olenick*² Justice Moore said, "As there is no definite rule by which the precise time can be determined when the country settlement has grown into the village, or where the unincorporated town or village ends and the county begins, evidently it must often be difficult to say to which class any particular homestead claim belongs. In such case, and in the absence of proof by which the matter may be decided as one of fact, it seems to us the nature and character of the property in question and the uses and purposes to which it is applied, may be looked to as furnishing the best guide for its determination."

There is no question that a home on one piece of property and a business house on another may be considered a single business homestead. This was decided as early as 1882.³ A comprehensive

¹ *Willis v. Pounds*, 25 S.W. 715 (Tex. Civ. App. 1894).

² 42 Tex. 195, 198 (1875).

³ *Miller v. Menke*, 56 Tex. 539.

statement as to this matter was made by the Texas Supreme Court in 1896 in the case of *Waggener v. Haskell*.⁴ The court said, "Therefore, if the head of a family be a merchant, in addition to his home, his storehouse is exempt; if a banker, his banking house; if a blacksmith, his shop; if a lawyer or doctor, his office; if a farmer, his farm; if a gardener, his garden, etc., the only limitation as to quantity, in case of urban property being one of value." However, if the business property is on one lot, then other business property, to be considered part of the business homestead, must be on contiguous property and subject to the same use.⁵ Since the value of improvements is not considered in determining the value of a business homestead exemption, there could be a large factory employing many people that would still be exempt as a business homestead if the business lot and the residence lot were worth \$5,000 or less together when designated as a homestead. Improvements on the land can be placed there either before or after the designation as a homestead, and they will not be counted in determining the exemption; only the value of the lots at the time of homestead designation will be counted.

The restriction that a business homestead shall not be worth more than \$5,000 at the time of its designation does not mean that if such property was worth more than the statutory limitation it will not be exempt at all. Such fact does not invalidate the homestead but merely subjects the excess to sale.⁶

Even though there can be a homestead including business property on another lot, a family may not live in a rural homestead and have a business in town and have these two exempt as a business homestead.⁷ The location of the homestead, rural or urban, determines its character and not the business of the head of the

⁴ 89 Tex. 435, 437, 35 S.W. 1.

⁵ *McDonald v. Campbell*, 57 Tex. 614 (1882).

⁶ *Hargadine v. Whitfield*, 71 Tex. 482, 9 S.W. 475 (1888).

⁷ *Williams v. Willis*, 84 Tex. 398, 19 S.W. 683 (1892); *Davis v. Hawn Lumber Co.*, 193 S.W. 2d 263 (Tex. Civ. App. 1946).

family. In many instances, rural homesteads are incorporated into small towns or villages. The courts have held that the portion of the rural homestead which is not within the town limits or which is not actually used for homestead purposes loses its homestead character.⁸ By virtue of that determination, a rural homestead containing a small store would become a business homestead if the store and residence were taken into a town by incorporation, subject to the limitation of original value of the lots. In such an instance the question arises as to what the value of the homestead is to be. As a rural homestead, it was probably worth less than it is as an urban homestead, and since the fact of incorporation redesignates the homestead, there would be a logical reason for holding that the new value would be the worth of the homestead in computing its exemption. Such a holding would make many rural homestead exemptions subject to the vote of people uninterested in the public policy of protecting the family's home and business. In the opinion of the writer it would also be contrary to the intent of the framers of the Texas Constitution. In the case of *Boerner v. Cicero*⁹ a district court had held that the new value was the one to be used in determining the value of the homestead. The Texas Commission of Appeals, reversing on another ground, expressed the view that such a holding was erroneous.¹⁰

The first proviso of the constitutional section concerning the business homestead has brought about more litigation than any other part of the section. This provides that "the same shall be used for the purpose of a home, or as a place to exercise the calling or business of the head of a family." The difficulty inherent in the provision is the proper definition of the words "calling" and "business." The courts have chosen to differentiate between the two words. A lengthy but accurate and authoritative definition is given in *Shryock & Rowland v. Latimer*.¹¹ The court first said

⁸ *Ayres v. Patton*, 111 S.W. 1079 (Tex. Civ. App. 1908) *er. ref.*

⁹ 293 S.W. 632 (Tex. Civ. App. 1927).

¹⁰ *Boerner v. Cicero*, 298 S.W. 545 (1927).

¹¹ 57 Tex. 674 (1882).

that "calling" and "business" cover every form of work by which a legitimate support for a family may be obtained and then declared:

... The former was probably used in the sense of "profession" or "trade," which would embrace all such employments as by course of study or apprenticeship in any of the learned professions, liberal arts or mechanical occupations, a person has acquired skill or ability to follow, and which has become practically a matter of personal skill, in its nature not temporary in existence.

The latter word was probably used in contradistinction to the other, to denote that which Mr. Webster defines to be the general meaning of the word, "that which occupies the time, attention, and labor of men for the purpose of profit or improvement," and this may be temporary.

The "calling" may exist as a fact, whether it be practiced or not; with the other, the actual employment in the given occupation furnishes the only means to determine whether the "business" exists or not.¹²

It is definitely established that the calling or business of the husband must be a legal one. If the business itself is illegal or the business is merely a camouflage for an illegal occupation, then there is no business homestead exemption.¹³

Referring to the above definition, one observes that the "calling" of a man is considered to be a profession, a skill or art in his own mind and body that exists whether the man uses it or not. Thus, the office of a banker, doctor, lawyer, architect, mechanic, etc., would be exempt as part of the business homestead if such person, as the head of a family, attempted to carry on his vocation there. This would be the result whether or not he had any clients, as long as he made a bona fide attempt to work there.

All other legal activities would seem to be included in determining the "business" of the head of a household. One activity that presents many perplexing fact situations as to the extent of the business homestead is that of leasing. A man living at home and leasing tenant houses on other but contiguous lots does not

¹² *Id.* at 677.

¹³ *Tillman v. Brown*, 64 Tex. 181 (1885).

have a business homestead exemption in them.¹⁴ This is true even though this is his sole method of earning a living. The reasoning is that although the lessor collects the rents, still he does not use any part of the tenant houses as a place for the conduct of any business. On the other hand, a man who owns and rents an apartment house, living there with his family, does have the exemption.¹⁵ This arrangement could be considered a home or a business or both. The only difference between the two cases is the location of the family home. The business in each is the same. Still another type of leasing is that of a motel. In *Orr v. Orr*¹⁶ the surviving wife was held entitled to a homestead in the motel left by her deceased husband. This was their only occupation. The distinguishing facts from the first case were that the residence and motel were on contiguous lots and that there was an office in the motel.

From these decisions it would seem that in order for a lessor to be entitled to a business homestead in his rented property, where leasing is his only occupation, he must either live in the property or have his office there.

In conducting his business or calling, the head of a family may well choose to do it in a partnership. Does such a business method deprive him of his business homestead exemption? In 1886 the Texas Supreme Court held that such property could be set aside as a business homestead.¹⁷ The partner selects his proportionate share, subject to the other partners' approval, and thus imbues it with the exemption. The partnership should be solvent at the time: able to pay the partnership obligations and to equalize the partners' shares in proportion to their respective interests in the business. When the partnership is dissolved, then the homestead right is subject to an equitable partition of the property among the members of the partnership.¹⁸

¹⁴ *Mays v. Mays*, 43 S.W. 2d 148 (Tex. Civ. App. 1931).

¹⁵ *Person v. Levenson*, 143 S.W. 2d 419 (Tex. Civ. App. 1940).

¹⁶ 226 S.W. 2d 172 (Tex. Civ. App. 1949).

¹⁷ *Swearingen & Garrett v. Bassett*, 65 Tex. 267.

¹⁸ *Gordon v. McCall*, 20 Tex. Civ. App. 283, 48 S.W. 1111 (1899).

As the head of the family, the husband is entitled to homestead rights in the business property after his wife's death. This is true so long as he continues to exercise his calling or business there.¹⁹ Since the statute calls for the head of the family to carry on his business there, does this mean that an equal right does not exist in the surviving wife? If the business homestead is established in the family, it continues after the death of either spouse. In the case of the wife, she has the homestead right in the business property so long as she carries on the business. She is entitled to the rents and revenues from the property.²⁰ As a practical point, the wife would apparently not be entitled to the business homestead if her husband had a calling that she was not schooled in and was unable to continue.

The last requirement of the statute is that there be no other business homestead and that there be no permanent leasing of the business homestead. The general rules of construction of intent plus actual use or preparation to build a business homestead are applicable here in determining whether a homestead has been abandoned or continued. Determining whether there has been a temporary leasing or whether there has been an abandonment is, of course, a fact question. Even though the husband should rent his business property and use the money for family support, still, if the constitutional calling ceases, he is not entitled to the exemption.²¹ One who leases to another reserving the right to maintain a garden on the premises and the right to re-enter at any time has been held to abandon the exemption.²² The courts are strict in limiting the business portion of the urban homestead to the exact premises and for the statutory purposes. Otherwise, many arrangements could be worked out to keep creditors at bay and to nullify the intentions of the framers of the constitutional exemption.

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¹⁹ Haynes v. Vermillion, 242 S.W. 2d 444 (Tex. Civ. App. 1951) *er. ref. n.r.e.*

²⁰ Orr v. Orr, 226 S.W. 2d 172 (Tex. Civ. App. 1949).

²¹ Shryock & Rowland v. Latimer, 57 Tex. 674 (1882).

²² Duncan v. Alexander, 83 Tex. 441, 18 S.W. 817 (1892).