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I. THE PROPERTY CODE - STATUTORY PARTITIONS OF REAL PROPERTY

A. In General

The primary area in which partitions are covered is under Chapter 23 of the Property Code. The statute gives a joint owner or claimant of real property, or an interest in real property, or a joint owner of real property the right to compel a partition of the interests or the property among the joint owners or claimants; V.T.C.A. Property Code §23.001. The statutory procedure described is mandatory; Silva vs. C.J. Webster Oil & Gas Co., 113 S.W.2d 961 (Civ. App. 1938).

The main purpose and ultimate object of a partition is the compulsory division of property between several co-owners according to their respective interests, in order that the same may be owned, possessed and enjoyed in severalty from the partition forward; Sun Oil Co. vs. Bennett, 77 S.W.2d 1086 (Civ. App. 1935).

B. Definition

The “partition” of land means division according to quantity and value; Aspires vs. Hoover, 466 S.W.2d 344 (Civ. App. -El Paso 1971, ref n.r.e.). Partition is simply division of what is owned in common, not an equitable rearrangement of what is owned in severalty; Luker vs. Luker, 226 S.W.2d 482 (Civ. App. 1950). The effect of partition is, not to confer title upon either of the partitioners, but to dissolve the tenancy in common and leave the title as it was before, to locate such rights as the parties may have respectively in the distinct parts of the premises and distinguish such rights in other portions of the property; Lane vs. Hughes, 228 S.W.2d 986 (Civ. App. 1950); Rittgers vs. Rittgers, 802 S.W.2d 109 (Tex. App. - Corpus Christi 1990, err den.).

C. Procedure

The right to partition is absolute. In the event property cannot be partitioned in kind, the property must be sold the proceeds divided; Ware vs. Ware, 809 S.W.2d 569 (Tex. App. -San Antonio 1991, no writ).

A person allotted a share of or an interest in real property in a partition action holds the property of interest in severalty under the conditions and covenants that apply to the property prior to the partition; V.T.C.A. Property Code §23.004(a). When the court decree confirms the report of the commissioners in partition of the real property, it gives the recipient of an interest in the property a title equivalent to a conveyance of the interest by warranty deed; V.T.C.A. Property Code §23.004(b).

1. VOLUNTARY PARTITIONS

Real estate can be voluntarily partitioned by written instrument, deed, or parol agreement amongst the affected parties; Houston Oil Co. of Texas vs. Kirkindall, et al., 145 S.W.2d 1074, 1077 (Tex. 1941). Partition Agreements have been construed as exempt from the statute frauds on the basis that no conveyance of title is effected; Houston Oil Co. of Texas, supra., at 1077; Hamilton vs. Hamilton, 280 S.W.2d 588, 593 (Tex. 1955). Once it has been partitioned by agreement, the court will not set aside the agreement unless the inequities of the arrangement are substantial; Wilkerson vs. Davis, 264 S.W. 545 (Tex. Civ. App. –Austin, 1924, dism).

2. JUDICIAL PARTITIONS

a. In general

Each of the co-tenants has the right to demand partition of the property; Sayers vs. Pyland, 161 S.W.2d 769 (Tex. 1942).

To force a partition, the petitioners must be joint owners of land to be partitioned or some interest therein, and the parties taking partition must have an equal right to possess the land with other joint owners; First National Bank in Dallas vs. Texas Federal Savings & Loan Association, 628 S.W.2d 497 ref n.r.e. (Tex. App. 1982); Burkitt vs. Broyles, 317 S.W.2d 762 (Tex. Civ. App. - Houston 1958, ref. n.r.e.).

Since partition acts upon the possession and not upon the title, and does not create title but merely
severs the previous unity of possession and dissolves the only unity existing between the owners or tenants in common. If there is no unity in the right of possession, there can be no forced partition; Lane vs. Hughes, supra.; Lichtenstein vs. Lichtenstein Building Corp., 442 S.W.2d 765 (Civ. App. 1969); Bralsford vs. Scheltz, 564 S.W.2d 404 (Civ. App. 1978, ref. n.r.e.).

b. Jurisdiction

The prerequisites for maintaining a suit for partition of land is: (1) a common interest in the land; and (2) equal right to present possession; Manchaca vs. Martinez, 148 S.W.2d 391 (Tex. 1941); Savell vs. Savell, 837 S.W.2d 836 (Tex. App. -Houston [14th Dist.] 1992, writ den.).

The district court is the court of general jurisdiction to order survey and to partition the property; Republic National Bank of Dallas vs. Stetson, 382 S.W.2d 775 (Civ. App. 1964, affirmed in part, reversed in part on other grounds 390 S.W.2d 257). The district court is without jurisdiction, however, to partition the decedent’s estate within four years after his death, unless it is pleaded and proved that no administration is pending and none is necessary as by showing that estate owes no debts or that its only debts are to joint owners of the estate; Kirk vs. Head, 152 S.W.2d 726 (Tex. 1941). Statutory provisions that vest in county courts the general jurisdiction of probate matters does not destroy or abridge district court’s jurisdiction to partition real estate; Stevenson vs. Travis, 250 S.W.2d 289 (Civ. App. 1952), as the district court has jurisdiction to partition which joint owners have acquired by inheritance if no administration is pending or necessary; Ray vs. Ray, 234 S.W.2d 933 (Civ. App. 1951); V.T.C.A. Property Code §23.002(a).

All owners are necessary parties, if all parties interested in real estate are not before the court, the property cannot be partitioned; Porter vs. Rogers, 293 S.W. 577 (Civ. App. 1927).


(1) Upon hearing the cause of action, the court must determine the share or interest of each of the joint owners or claimants in the real estate sought to be divided, and all questions of law or equity affecting the title to such land which may arise; T.R.C.P. Rule 760.

The court is then required to determine whether or not the party is susceptible to partition in kind and, if so, enters a decree directing the partition of the real estate and appointing three or more competent disinterested persons to act as commissioners to make such a partition in accordance with the decree, and the majority vote of the commissioner’s controls; T.R.C.P. Rule 761. Either the court or the commissioners can cause the property to be surveyed into the partitioned tracts; T.R.C.P. Rule 764 and Rule 767.

(2) When the commissioners have completed the partition, they report the same in writing and under oath to the court. The report must contain: (1) the property divided, describing the same; (2) the several tracts or parcels into which the same was divided, describing each particularly; (3) the number of shares and the land which constitutes each share, and the estimated value of each share; (4) the allotment of each share; and (5) the report shall be accompanied by such field notes and maps as may be necessary to make the report intelligible; T.R.C.P. Rule 769.

If the commissioners report is found to be erroneous, either party to the suit can file objections and if found to be unequal and unjust, the court may report other commissioners to begin the proceedings again; T.R.C.P. Rule 771. Whether or not a property can be partitioned in kind is a question in fact for determination for the jury; Rayson vs. Johns, 724 S.W.2d 380 (Tex. Civ. App. -Texarkana 1975, ref. n.r.e.). One would presume that on partitioning of their property, it would also affect the partition of the minerals unless they have been otherwise severed; Gilbreath vs. Douglas, 388 S.W.2d 279 (Tex. Civ. App. -Amarillo 1965, ref. n.r.e.). Once the minerals have been severed, however, the stay separated and would not be included in the subsequent partition; Barfield vs. Holland, 844 S.W.2d 759 (Tex. App. -Tyler 1992 no writ history to date).
The law favors partition in kind, rather than a sale with partition of the proceeds; Irons vs. Fort Worth Sand & Gravel Company, 284 S.W.2d 215 (Civ. App. 1956, ref. n.r.e.). Partition in kind does not operate as a conveyance, but is simply distribution of interest in land between the persons who are part owners; Gilbreath vs. Douglas, 388 S.W.2d 279 (Tex. Civ. App. -Amarillo 1965, ref. n.r.e.). A partition deed does not operate as a conveyance or transfer of title, the effect is to divide the property and to give to each the share which he only owned by virtue of some prior deed or other conveyance; Odstrcil vs. Odstrcil, 384 S.W.2d 403 (Civ. App. 1965, err dis’m.).

The question of whether or not the property is susceptible of division in kind is for determination by court before appointment of commissioners; Nrvson vs. Johns, 528 S.W.2d 380 (Civ. App. 1975, ref. n.r.e.). Once the trial court determines the property is susceptible to partition in kind, and such finding is supported by the evidence, the appointment of commissioners to make the partition is mandatory; Benson vs. Fox, 589 S.W.2d 823 (Civ. App. 1979). The partition can be effected by a written instrument or a deed; Chandler vs. Hartt, 467 S.W.2d 629 (Civ. App. 1971, ref n.r.e.).

Should the court be of the opinion that the fair and equitable division of the estate cannot be made, it shall order a sale for cash or upon such other terms as the court may direct, and the proceeds will be partitioned among the respective interests; T.R.C.P. Rule 770.

c. Appeals

There are two appealable orders corresponding to the two-step procedure for the partition of real estate. The first order is the interlocutory decree and determines the interest of each of the joint owners or claimants, all questions of law affecting the title, and appoints commissioners who gives them appropriate directions; Griffin vs. Wolfe, 610 S.W.2d 466 (Tex. 1980); and Marmion vs. Wells, 246 S.W.2d 704 (Tex. Civ. App. –San Antonio, 1952, writ ref’d). Matters decided in the preliminary decree cannot be reviewed in an appeal from the second step of the order. The second order or “final decree” approves the commission’s report and partitions the property. Campbell vs. Tufts, 2 S.W.3d 256 (Tex. App. –Waco, 1999, no pet.) and TRCP 771.

A party in a partition suit is not entitled to recover attorney’s fees. Cecola vs. Ruley, 12 S.W.3d 848 (Tex. App. –Texarkana 2000, no pet.).

II. COMMUNITY PROPERTY ISSUES AND HOMESTEAD ISSUES

Title to land belonging to a community estate when it is not divided at the time of the divorce vests in the parties as co-tenants and the spouse is entitled to partition; Smith vs. Cooper, 541 S.W.2d 274 (Civ. App. 1976). The homestead interest in an undivided interest in land is subordinate in the right of the co-tenant or co-tenants to partition, and the exercise of the right of partition may involve the involuntary divestiture of title to the homestead; Travelers’ Insurance Company vs. Nauert, 200 S.W.2d 661 (Tex. Civ. App. -El Paso, 1941, no writ); Williams vs. Williams, 569 S.W.2d 867 (Tex. 1978). Children of decedent cannot partition and sell the property as long as the wife of the decedent claimed a homestead right in the tract; Franklin vs. Woods, 59 S.W.2d 946 (Civ. App. 1980).

A. The Family Code - Partition or Exchange of Community Property to Separate Property

Texas law clearly provides that spouses may partition between them any part of their community property, then existing or to be required, as they may desire. Upon such partition, the property becomes his or her separate property; V.T.C.A. Family Code §4.102. The partition agreement must be in writing and signed by both parties; V.T.C.A. Family Code §4.104 and is also required in any contract which attempts to establish rights of survivorship that any partitioner exchange was not a valid antenuptial agreement; Hibbler vs. Knight, 735 S.W.2d 924 (Tex. App. - Houston [1st Dist] ref. n.r.e.); Maples vs. Nimitz, 615 S.W.2d 690 (Tex. 1981).

As a result, one spouse cannot convey his or her interest in community property to a third party to
effectuate a partition, as the property can only be partitioned upon compliance of the provisions of this statute and the Texas Constitution; *Dalton vs. Don J. Jackson, Inc.*, 691 S.W.2d 765 (Tex. Civ. App. 1985).

The partition agreement is not enforceable if the party against whom the enforcement is sought proves that: (1) the party did not execute the agreement voluntarily; or (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party: (a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (b) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (c) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party; *V.T.C.A. Family Code §4.105(a)*. The issue of unconscionability of a partition shall be decided by the courts as a matter of law; *V.T.C.A. Family Code §4.105(b)*. Note where a partition agreement has been held to be unconscionable considering the circumstances of the execution, lack of alternatives, and a spouse’s bargaining ability at the time of the execution; *Fanning vs. Fanning*, 828 S.W.2d 135 (Tex. App. 1992, err den.), or threats concerning child custody; *Matthews vs. Matthews*, 724 S.W.2d 275 (Tex. App. -Houston [1st Dist] 1986, ref. n.r.e.). The partition agreement may be recorded in the deed records of the county in which the party resides and in the county which the real property is located. Only then is it constructive notice to a good faith purchaser for value or creditor without actual notice; *V.T.C.A. Family Code §4.106*.

Partition can also be used to create a joint tenancy. To create a joint tenancy with right of survivorship can only be done by converting their community property into separate property through a partition agreement, then after the partition effected, they can then establish a joint tenancy by execution of a separate agreement that complies with §46 of the Probate Code; *McCarver vs. Tremble*, 660 S.W.2d 595 (Tex. App. - Corpus Christi, 1983).

While I could not find a Texas case on point, it’s arguable that in order to create the joint tenancy one must also have the original unities of time, title, interest, and possession that we recognized as common law in creating a joint tenancy. So, in preparing the documentation, one would want to be sure that title came from the source, at the same time, acquiring the same interest and all parties are deemed to be in possession.

So far we have discussed the joint tenancy in the community between husband and wife. Can one set up a joint tenancy between those who are not husband and wife? Certainly this should be easier, because it would be the separate property of each. The exception here is when both parties are married (i.e. a married father and married daughter). In that event, acquiring a property may be a little more complicated. The best remedy may be to acquire the property in the names as co-tenants then partitioning the community property between the spouses, creating separate property for each co-tenant, then agreeing to hold it as joint tenants with right of survivorship. Again, we would be maintaining the consistency of the time, title, interest, and possession issues.

Can a joint tenancy be done unwittingly? One may consider the recent Texas Supreme Court case of *Holmes vs. Beatty*, 290 S.W.3d 852 (Tex. 2009), wherein husband wife, married for 37 years, had acquired a sizeable estate (over 10 million dollars) in brokerage accounts and acquired security certificates issued from those accounts. They both had children from prior marriages. Mom passed away first, appointed her son as executor of her estate. Dad died approximately 9 months later, appointing his son as executor of his estate. Apparently all of the accounts were styled joint tenancy with right of survivorship. Under the law of joint tenancy, all of Mom’s interest went to Dad, which ultimately went to his children from a previous marriage. Mom’s children were disappointed. The facts do beg a question, however. Did Mom understand what a joint tenancy with right of survivorship was? The court did an excellent history of how joint tenancy was enabled in Texas, but it’s still a rather new concept, especially to the elderly and uneducated who think community property is still the presumption.
B. The Probate Code - Partition and Distribution of Estate Property

After the expiration of 12 months after the original grant of letters testamentary, the executor administrator or the heirs, devisees or legatees may by written application filed in the court in which the estate is pending, request the partition and distribution of the estate; *V.T.C.A. Probate Code §373(a)*. The probate court has jurisdiction to partition the same among the heirs and wife of the decedent; *Case vs. Penn, 62 S.W. 801 (Civ. App., 1901)*. To authorize the partition, it should be shown that there are no debts not provided for; *Moore vs. Moore, 31 S.W. 532 (Civ. App., 1895)*. On filing of the application, the probate court clerk issues a citation which must be personally served upon each person residing in the state and entitled to share in the estate. If there are missing heirs, service is by publication; *V.T.C.A. Probate Code §374*. If there are minors or persons of unsound mind who have no guardians, the court must appoint a guardian ad litem to attend to represent the named minors or persons of unsound mind; *V.T.C.A. Probate Code §376*. The appointment of a guardian ad litem is discretionary with the trial court; *Parr vs. Parr, 207 S.W.2d 187 (Civ. App., 1948, ref. n.r.e.)*. If the court is of the opinion that the estate should be partitioned and distributed, it must enter decree which states: (1) the name and address, if known, of each person entitled to a share of the estate, specifying those who are known to be minors, and the names of their guardians, or the guardians ad litem, and the name of the attorney appointed to represent those who are unknown or who are not residents of the state; (2) the proportional part of the estate to which each is entitled; (3) a full description of all the estate to be distributed; and (4) that the executor or administrator retained in his hand the payment of all debts, taxes, and expenses of the administration, a sufficient amount of money or property for that purpose, specifying the amount of money that property to be so retained; *V.T.C.A. Probate Code §378*. Once the court has determined that the estate is capable of partition, to effect a partition, the probate court must appoint three or more discreet and disinterested persons as commissioners, to make a partition and distribution of estate; *V.T.C.A. Probate Code §380(a)*. The clerk of the probate court issues a writ of partition to the commissioners, the commissioners are required to make a fair, just, and impartial partition and distribution of the estate in the following order: (1) of land or other property, by allotting to each distributee a share in each parcel or shares in one or more parcels, or one or more parcels separately, either with or without the addition of a share or shares of other parcels, shall be most for the interest of the distributees; provided, the real estate is capable of being divided without manifest injury to all or any of the distributees; (2) if the real estate is not capable of a fair, just and equitable division in kind, but may be made so by allotting to one or more of the distributees a portion of the money or the personal property to supply the deficiency of deficiencies, the commissioners shall have power to make, as nearly as may be, an equal division of the real estate and apply the deficiency of any share or shares from the money or other property; (3) The commissioner shall proceed to make a like division in kind, as nearly as may, of the money and other personal property, and shall determine by lot, among equal shares, to whom each particular share shall belong; *V.T.C.A. Probate Code §380(c)*. The commissioners then must make a written sworn report to the court for review. If the division appears to have been fairly made according to law, and no exceptions are taken to it, the court shall approve it, and shall enter a decree vesting title and distribute to each of their respective shares or portions of the property as set apart to them by the commissioners; otherwise, the court may set aside said report and division and order a new partition to be made; *V.T.C.A. Probate Code §380(e)*.

1. PARTITION OF COMMUNITY PROPERTY

When a husband or wife shall die leaving the community property, the survivor may, at any time after letters testamentary or if administration had been granted, and an inventory, appraisement, and list of the claims of the estate have been returned, make application in writing to the court which granted such letters for a partition of such community property; *V.T.C.A. Probate Code §385(a)*. The surviving spouse then executes a bond of the corporate surety or two or more good
and sufficient personal sureties payable to and approved by the judge for an amount equal to the amount of the survivor’s interest in such community property, conditioned for the payment of one-half of all debts existing against such community property. The court must then proceed to make a partition of said community property into two equal moieties, one to be delivered to the survivor and the other to the executor administrator of the deceased. The statute provides that a lien shall exist on the property delivered to the survivor to secure the payment of the aforementioned bond; *V.T.C.A. Probate Code §385(b)(c).*

2. PARTITION OF JOINTLY OWNED PROPERTY

Any person having a joint interest with the estate of a decedent in any real property may make an application to the court in accordance with the remainder of the provisions of the Probate Code; *V.T.C.A. Probate Code §386.* All expenses of partition of the estate of the decedent shall be paid by the distributees pro rata; *V.T.C.A. Probate Code §387.*

3. PARTITION OF WARD’S INTEREST IN REALTY

If a ward owns an interest in real estate in common with other part owners or owners, and if, in the opinion of the guardian, it is in the best interest of such ward’s estate that such real estate be partitioned the guardian may agree upon a partition with the other owner or owners, subject to the approval of the court in which the guardianship proceedings are pending. This also requires a filing with the court and an application to have such agreement approved describing the land to be divided and why it is in the best interest of the ward’s estate that the real estate be partitioned; *V.T.C.A. Probate Code §388(b).* The court then is required to hold a hearing on the application no less than ten days after the application is filed. If the judge is satisfied that the proposed partition is in the best interest of the ward’s estate, the court shall enter an order approving partition and directing the guardian to execute the necessary agreement or agreements for the purposes of carrying out the partition.

In absence of the agreement, the guardian may bring suit in the court in which the guardianship proceedings are pending against the part owner for the partition of such real estate; *V.T.C.A. Probate Code §388(f).*

IV. THE TAX CODE - PARTITIONING OF REAL PROPERTY FOR TAX LIENS

There is a special provision for partitioning of real property if the suit is pending to foreclose a tax lien. If the property is owned in undivided interest by two or more persons, one or more of the owners may have the property partitioned in the same manner provided for statutory partition under §23 of the Property Code; *V.T.C.A. Tax Code §33.46(a).* The court is then required to apportion the taxes, penalties, interests, and costs sued for to the owners of the property with proportions of the interests of each after the partition. The paying owner is then free from further claims or liens of the taxes involved in the lawsuit. The remaining, defaulting owner, will then have liability only for the apportioned remaining amount; *V.T.C.A. Tax Code §33.46(b).* The court must also allow for a recovery of reasonable attorney’s fees and costs for partitioning which is taxed as cost against each owner in proportion to its interest; *V.T.C.A. Tax Code §33.46(c).*

The only case that deals with tax code partition issues is *Orange County Development Company vs. Orange County Appraisal District*, 810 S.W.2d 884 (Tex. App. -Beaumont, 1991). In *Orange County*, a partition action was brought in the district court effecting a portion of property taxing authorities (the appraisal district, the county) were made parties to the suit because some of the undivided interest owners owned delinquent taxes for prior years. The district court determined that the property was not susceptible to partition in kind or to the sale of the property with the subsequent division of the proceeds. The order stated that upon the sale of the property

“the proceeds of such sale be distributed among the following co-owners in accordance with their proportional interests
set opposite their names after first deducting from each any ad valorem taxes owing...”

the order was signed by the trial court judge and by the three attorneys representing the taxing authorities. The taxing authority later sued to foreclose on their tax lien to collect the taxes. The Orange County court held that the taxing authority could have appealed from the court order in the partition process but since they hadn’t res judicata barred the taxing authorities for suit of the subsequent lawsuit.

V. OWELTY

A. Owelty Issues

Complicated? Consider the following definitions:

(1) The difference which is paid or secured by one coparcener to another, for the purpose of equalizing a partition.

(2) Under common law, an amount that one co-owner must pay to another after a lawsuit to partition real estate, so that each co-owner receives equal value for the property.

(3) Law Equality, especially in financing transactions.

(4) A lien created or a pecuniary sum paid by order of the court to effect an equitable partition of the property (as in divorce). When such a partition in kind would be impossible, impracticable, or prejudicial to one of the parties.

(5) Owelty is a payment made to another party when it is impossible to partition land into units of exactly equal value. Yturria vs. Kimbro 921 S.W. 2nd. 338 (Tex. App. Corpus Christi, 1996, no writ.).

Owelty has always had unusual application in Texas because of the nature of our homestead laws because of the inability to perfect liens on homestead property for any purpose other than purchase money, home improvements, and taxes.

A primary complication arises because the co-tenants of the property acquire title at a given date (say, 1953), and at such time, as tenants in common, they are deemed to have possession of the property. A subsequent partition (1969) in liens securing the acquisition of a co-tenant’s separate parcel cannot then, technically be purchase money if a lien is perfected on the remainder of the partitioned property. Logically, the lien for the acquired parcel could only encumber the ½ interest acquired.

The seminal case on owelty in Texas is Sayers vs. Pyland, 161 S.W.2d 769 (Tex. 1942). Sayers involved a suit to foreclose a lien on a homestead. It involved two lots, roughly lot 4 and lot 5, with lot 5 being the improved property, while lot 4 was an adjacent unimproved parcel. A partition deed was executed wherein Williams acquired the vacant portion of lot 4, and Pyland retained the ownership to the improved lot 5. Williams, however, assumed a portion of the debt encumbering both lots 4 and 5. It was a complicated financial transaction, but the net result of the petition was that Williams owed debts secured by his one-half interest on the entire property, encumbering the more expensive lot 5. The partition deed indicated that the property was to be secured by purchase money lien and vendor’s lien against the entire property. The primary questions in Sayers involve the fact that the tract 5 was Pyland’s homestead, and could the lien be a valid lien as purchase money. The Sayers court held that the lien was valid, noting that the parties were tenants in common, and that their interests extends to every part thereof. The court further noted that each party had the right to defend partition upon the property as co-tenants. The court went on to give Texas’s classic definition of owelty:

“In partition proceedings the court may, if necessary, divide the property into shares of unequal value, and fix a lien on the larger share in favor of the party receiving the smaller share, for the difference. This difference is referred to as owelty. In such cases, the owelty so assessed in adjusting the equities is recognized as being in the nature of purchase money secured by a vendor’s lien on the larger tract.”
Moor vs. Moor, 63 S.W. 347 (Tex. Civ. App.) the court cites with approval that “the owners are not entitled to a share of each property, but only to an equal share of the whole.” The homestead issue was dealt with under the concept that homestead rights and property of which the homestead claimant is not the exclusive owner is subordinate to all the rights and equitable remedies that his co-tenant would have in the absence of the homestead claim including the right to affix the lien for owelty. One co-tenant cannot defeat this right in the other by moving onto the property and asserting a homestead right therein.

B. The Owelty Confusion

Sayers was cited by a companion case by the Court of Civil Appeals, Travelers’ Insurance Company vs. Nauert, 200 S.W.2d 661 (Tex. Civ. App. -El Paso, 1941, no writ). Both of these cases have been deemed the standard and landmark cases on owelties in Texas. Both of these cases involved a true partition of real estate where co-parceners divided their interests and secured that acquisition by liens on the entire property. A presumption that has been made for years in Texas, is that relying on Sayers and Travelers’, the reverse seems to be logically true. If you have two co-tenants who choose to (instead of separating the parcels) convey one parcel to the other co-owner, so that title to the large parcel will be held entirely by one party should be logically allowed the same treatment: (1) there is an agreement between co-tenants to equalize their portions, in the second instance for cash rather then partition of ownership interests; (2) it is agreed to by the parties and is “in the nature of” purchase money; (3) the net effect, in both circumstances, is nothing more than creating a lien on both parcels with a cross de fault provisions (i.e. it’s the same) creating a lien on the whole parcel for the purpose of purchase money reflecting the sharing of equity interests between the co-parceners. This has been useful in acquiring separated interests of property from heirs who choose to “take their money and run” while the remaining co-tenants acquires the entire interest in the property. The lien, if the remaining co-tenant chooses to borrow money, allows the lender to lien the entire property rather than just the selling tenant’s one-half interest.

This is in theory no different than the Sayers decision of allowing a lien on the entire property for the partition. Utilizing the owelty theory for the acquisition of the co-tenant’s is also logically supported in divorce cases wherein the wife may want to acquire the husbands proportional interest in the property awarded during the divorce. This would result in a ratification of the existing purchase money mortgage. A second mortgage for the acquisition of the one-half interest which is “in the nature of purchase money” instead of cross categorizing the loans, both of which are theoretically legal, we simply roll all of them into both liens into one loan, and it stands to reason that that lien would be valid and enforceable, even on homestead property under the Sayers doctrine. This preserves the homestead claim, rather than destroying it, which has always been the ultimate aim of homestead protection.

C. The Fly in the Ointment

In Shultz vs. Farmers’ Home Administration, 97 B.R. 874 (N.D. Tex., Lubbock Div., 1989), the court held that the acquisition of an undivided interest was not a proper perfection of an owelty lien. In that case, there was a vendor’s lien retained in the deed “to enable them to purchase the property described above” [the undivided interest]. The court held, however, that the lien did not extend to the entire property, taking a narrow view of both Sayers and Travelers by saying that the owelty lien can be perfected only on partitioning of the property and not acquiring the other party’s proportional interest. See Shultz at 978.

Hopefully, this issue has been finally resolved with the constitutional amendment passed in 1998, specifically providing for the validity of a lien created as an owelty of partition imposed against the entirety of the property by a court order or written agreement of the parties. See Article XVI, §50(a)(3).
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APPENDIX

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

PARTITION DEED
(Cash)

THE STATE OF TEXAS §

COUNTY OF *___________ §

KNOW ALL MEN BY THESE PRESENTS:

THAT WHEREAS, *________________________, have and hold in common that certain real estate (the "Property") hereinafter mentioned, and are desirous of making partition of same;

NOW THEREFORE, in consideration of the covenants herein contained and the conveyance herein made and to effect such partition, it is hereby COVENANTED, GRANTED, CONCLUDED, AND AGREED, by, between, and among said parties and each of them COVENANTS, GRANTS, CONCLUDES, AND AGREES, for himself, herself, themselves, her, his, and their heirs, executors, and administrators, that a partition of said Property be made as follows:

1. That *__________________________, shall from henceforth have, hold, possess, and enjoy, in severalty, by themselves and to them and their heirs, executors, administrators, and assigns, for their part, share, and proportion of the said Property, free from any and all claims of the other parties hereto, all that certain real estate lying and being situated in *______________ County, Texas, being more particularly described in Exhibit "A" attached hereto and made a part hereof for all purposes.

And the other parties hereto, *__________________________, HAVE GRANTED, RELEASED, CONFIRMED, AND CONVEYED, and by these presents DO HEREBY GRANT, RELEASE, CONFIRM, AND CONVEY unto the said *__________________________, the Property described above.

This conveyance is made and accepted subject to any and all restrictions, easements, encumbrances, and conditions filed for record in the Official Records of Real Property of *______________ County, Texas, if any, affecting the Property.

TO HAVE AND TO HOLD the above-described Property and premises, together with all the rights and appurtenances lawfully accompanying it, by the Grantee, Grantee's heirs, executors, administrators, successors, and/or assigns forever; and Grantor does hereby bind Grantor, Grantor's heirs, executors, administrators, successors, and/or assigns, to WARRANT AND FOREVER DEFEND all the said Property and premises unto the said Grantee, Grantee's heirs, executors, administrators, successors, and/or assigns, against every person whomsoever lawfully claim or to claim the same or any part thereof.

2. That *__________________________, shall from henceforth have, hold, possess, and enjoy, in severalty, by themselves and to them and their heirs, executors, administrators, and assigns, for their part, share, and proportion of the said Property, free from any and all claims of the other parties hereto, all that certain real estate lying and being situated in *______________ County, Texas, being more particularly described in Exhibit "A" attached hereto and made a part hereof for all purposes.
*___________________ County, Texas, being more particularly described in Exhibit "B" attached hereto and made a part hereof for all purposes.

And the other parties hereto, *___________________, HAVE GRANTED, RELEASED, CONFIRMED, AND CONVEYED, and by these presents DO HEREBY GRANT, RELEASE, CONFIRM, AND CONVEY unto the said *___________________, the Property described above.

This conveyance is made and accepted subject to any and all restrictions, easements, encumbrances, and conditions filed for record in the Official Records of Real Property of *___________________ County, Texas, if any, affecting the Property.

TO HAVE AND TO HOLD the above-described Property and premises, together with all the rights and appurtenances lawfully accompanying it, by the Grantee, Grantee's heirs, executors, administrators, successors, and/or assigns forever; and Grantor does hereby bind Grantor, Grantor's heirs, executors, administrators, successors, and/or assigns, to WARRANT AND FOREVER DEFEND all the said Property and premises unto the said Grantee, Grantee's heirs, executors, administrators, successors, and/or assigns, against every person whomsoever lawfully claim or to claim the same or any part thereof.

IN WITNESS WHEREOF, we have hereunto set our hands this *______ day of *________________, *__________.

ADDRESS:
* __________________________  * __________________________
* __________________________  * __________________________

ADDRESS:
* __________________________  * __________________________
* __________________________  * __________________________

THE STATE OF TEXAS  §
COUNTY OF *__________ §

This instrument was acknowledged before me on this *______ day of *________________, *______, by * ____________________.

____________________________________
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS
NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

OWELTY DEED
(Tenants in Common)
(To acquire 100% of the fee-Loan from Third Party Lender)

THE STATE OF TEXAS

COUNTY OF *____________

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, *_____________________, of the County of *_____________, State of Texas, hereinafter called "Grantor," and *__________________, of the County of *_____________, State of Texas, hereinafter called "Grantee," as tenants in common own that certain real property described on attached Exhibit "A," hereinafter called the "Property," and at this time desire to have a partition of the Property, and Grantee desires to take one hundred percent (100%) of the Property in fee simple but is unable to pay the full value of the undivided interest owned by Grantor, and Grantee has arranged to borrow the sum of *_____________ ($*_________) from *______________, hereinafter called "Lender," in order to acquire the Property in fee simple, which sum Lender is willing to advance, provided it is secured by an owelty of partition lien on the full fee simple title in the Property and a Deed of Trust lien is created by the Grantee on the Property; and

WHEREAS, the Property is not susceptible to partition in kind, and in order to acquire the full fee simple title in and to the Property, it will be necessary to fix a lien on the entirety of the Property in the sum of *___________ ($*_________), representing an owelty of partition, and the necessary adjustment between the parties to this Deed in order to carry out their purpose of partitioning the Property, and the said Grantee specifically acknowledges that said lien of owelty of partition is superior to Grantee's rights and use and occupancy of the Property as Grantee's homestead or otherwise, and as fully and completely as if said lien or owelty of partition were fixed and decreed by a court of competent jurisdiction in a partition suit between the parties of this Deed;

NOW, THEREFORE, Grantor in consideration of the premises and other good and valuable consideration to me in hand paid by the said Grantee, the receipt of which is hereby acknowledged, and the further consideration of Grantee's execution of a promissory note in the original principal sum of *___________ ($*_________), dated *____________, payable to the order of *______________, and secured by a Deed of Trust on the herein real property, filed and recorded of record under Clerk's File Number *_________________, and/or Volume *__________, Page *______, of the Official Public Records of Real Property of *________________ County, Texas; and the further consideration of other good and valuable consideration to me in hand paid by the said Grantee, the receipt of which is hereby acknowledged, and the further consideration of the sum of *___________ ($*_________), as hereinafter provided, and for the purpose of effecting a partition of the Property, Grantor has GRANTED, SOLD, and CONVEYED, and by these presents does GRANT, SELL, and CONVEY unto the Grantee the Property.

FOR TEN DOLLARS ($10.00) and other good and valuable consideration, and the further consideration that Lender has at the request of and as a loan to Grantee advanced the sum of *___________ ($*_________), and to evidence said indebtedness, the Grantee has made and executed Grantee's certain promissory note of even date herewith, payable to the order of Lender as therein
specified, and to secure the payment of said note, Grantor has retained a valid and subsisting owelty lien on the entirety of the Property and by these presents does simultaneously convey, transfer, and assign to Lender said liens until said note, both principal and interest, and other charges therein stipulated have been fully paid according to the face, tenor, effect, and reading thereof, when this Deed shall become absolute. The payment of said note is additionally secured by an Owelty Deed of Trust of even date herewith from Grantee to *________________, TRUSTEE, which Owelty Deed of Trust is a cumulative remedy and security for the enforcement of the payment of said indebtedness.

TO HAVE AND TO HOLD the Property and premises, together with all the rights and appurtenances lawfully accompanying it by the Grantee, Grantee's heirs, executors, and administrators forever; and the Grantor does hereby bind Grantor, Grantor's heirs and assigns to WARRANT AND FOREVER DEFEND the title to the Property unto the Grantee, Grantee's heirs, executors, and administrators, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Grantee joins in the execution of this Deed for the purposes of accepting the delivery thereof and acknowledging to Lender's successors and/or assigns the validity of the Owelty Deed of Trust lien securing the payment of said $*____________ on the entirety of the Property and the full fee simple owelty lien and the validity of the liens, rights, equities, and remedies of the title thereto, and does hereby expressly acknowledge that said liens are prior and superior to any right of use, occupancy, and homestead which Grantee may have, hold, or claim in and to the Property, and further state that Grantee knows that Lender would not advance such funds for Grantee's use and benefit except for the confidence and reliance Lender has upon the representations made and the facts stated in this Deed.

EXECUTED this *_____ day of *___________________, *______.

GRANTEE:      GRANTOR:

* __________________________       * __________________________
* __________________________       * __________________________

GRANTEE'S ADDRESS:
* __________________________
* __________________________

THE STATE OF TEXAS §
COUNTY OF *__________  §

The foregoing instrument was acknowledged before me on this *_____ day of *______________, *_______, by *_______________________________.

NOTARY PUBLIC IN AND FOR  
THE STATE OF TEXAS
NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

OWELTY DEED
(Divorce Decree)
(To acquire 100% of the fee-Loan from Third Party Lender)

THE STATE OF TEXAS § KNOW ALL MEN BY THESE PRESENTS:

COUNTY OF *____________ §

WHEREAS, by virtue of the Divorce Decree dated *________, rendered in Cause No. *______, in the *____________ Judicial District Court, *____________ County, Texas, *____________, hereinafter called "Grantor" and *______________________, hereinafter called "Grantee," and by virtue of said divorce, own as tenants in common that certain real property on attached Exhibit "A," hereinafter called the "Property," and at this time desire to have a partition of the Property, and Grantee desires to take one hundred percent (100%) of the Property in fee simple but is unable to pay the full value of the undivided interest owned by Grantor, and Grantee has arranged to borrow the sum of *_____________ ($*_________) from Third Party Lender, hereinafter called "Lender," in order to acquire the Property in fee simple, which sum Lender is willing to advance, provided it is secured by an owelty of partition lien on the full fee simple title in the Property and an Owelty Deed of Trust lien is created by the Grantee on the Property; and

WHEREAS, the Property is not susceptible to partition in kind, and in order to acquire the full fee simple title in and to the Property, it will be necessary to fix a lien on the entirety of the Property in the sum of *_____________ ($*_________), representing an owelty of partition, and the necessary adjustment between the parties to this Deed in order to carry out their purpose of partitioning the Property, and the said Grantee specifically acknowledges that said owelty of partition is superior to Grantee's rights and use and occupancy of the Property as Grantee's homestead or otherwise, and as fully and completely as if said lien or owelty of partition were fixed and decreed by a court of competent jurisdiction in a partition suit between the parties of this Deed;

NOW, THEREFORE, Grantor in consideration of the premises and pursuant to the above-referenced Divorce Decree, and Grantee's assumption of the unpaid principal and interest on that certain promissory note executed by *____________ and *____________ in the original principal sum of *_____________ ($*_________), dated *________, payable to the order of *____________, and secured by a deed of trust on the herein real property, filed and recorded of record under Clerk's File Number *_______ and/or Volume *______, Page *______, of the Official Public Record of Real Property of *____________ County, Texas; and the further consideration of other good and valuable consideration to me in hand paid by the said Grantee, the receipt of which is hereby acknowledged, and the further consideration of the sum of *_____________ ($*_________), as hereinafter provided, and for the purpose of effecting a partition of the Property, Grantor has GRANTED, SOLD, and CONVEYED, and by these presents does GRANT, SELL, and CONVEY unto the Grantee the Property.

FOR TEN DOLLARS ($10.00) and other good and valuable consideration, and the further consideration that Lender has at the request of and as a loan to Grantee advanced the sum of *_____________ ($*_________), and to evidence said indebtedness, the Grantee has made and

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executed Grantee's certain promissory note of even date herewith, payable to the order of Lender as therein specified, and to secure the payment of said note, Grantor has retained a valid and subsisting owelty lien on the entirety of the Property and by these presents simultaneously convey, transfer, and assign to Lender said liens until said note, both principal and interest, and other charges therein stipulated have been fully paid according to the face, tenor, effect, and reading thereof, when this Deed shall become absolute. The payment of said note is additionally secured by an Owelty Deed of Trust of even date herewith from Grantee to *_____________________, TRUSTEE, which Owelty Deed of Trust is a cumulative remedy and security for the enforcement of the payment of said indebtedness.

TO HAVE AND TO HOLD the above described Property and premises, together with all the rights and appurtenances lawfully accompanying it, by the Grantee, Grantee's heirs, executors, and administrators forever; and the Grantor does hereby bind Grantor, Grantor's heirs and assigns to WARRANT AND FOREVER DEFEND the title to the Property unto the Grantee, Grantee's heirs, executors, and administrators, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Grantee joins in the execution of this Deed for the purposes of accepting the delivery thereof and acknowledging to Lender, and Lender's successors and/or assigns the validity of the owelty lien and the validity of the liens, rights, equities, and remedies of the Owelty Deed of Trust lien securing the payment of said $*___________ on the entirety of the Property and the full fee simple title thereto, and does hereby expressly acknowledge that said liens are prior and superior to any right of use, occupancy, and homestead which Grantee may have, hold, or claim in and to the Property, and further state that Grantee knows that Lender would not advance such funds for Grantee's use and benefit except for the confidence and reliance Lender has upon the representations made and the facts stated in this Deed.

EXECUTED this the *_______ day of *____________________, *_________.

GRANTEE:      GRANTOR:

*______________________________   *_____________________________
*______________________________   *_____________________________

GRANTEE'S ADDRESS:
*_______________________________
*_______________________________

THE STATE OF TEXAS  §
COUNTY OF *___________  §

The foregoing instrument was acknowledged before me on this *_____ day of *____________________, *__________, by *______________.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS