

# The Proper Use of the Owelty Agreement and Lien

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## INTRODUCTORY REMARKS

The reason I address this issue from a financial perspective is because *the Owelty Agreement and Lien is more important as a finance document than a divorce document.*

## TEXAS EQUITY FINANCING LAWS

To understand the uniqueness of the Owelty Agreement in Texas, one must understand a few basics about Texas Equity Financing. This is critical, as you will see. For example, the accessible equity in a \$400,000 home differs by 15% - 20% or \$60,000 to \$80,000, depending on whether or not Texas Equity finance limits apply.

Overview of pertinent features of Texas Equity Financing

1. 80% Rule. Each time Texas Equity laws apply, the maximum loan amount allowed is 80% (LTV – Loan To Value ratio) of the new appraised value of the property.
2. Once a “cash out” - always a “cash out.” Recent reform has allowed refinancing “out” of an equity loan into a regular loan. But, the 80% rule still applies.
3. Rates can be higher and terms more restrictive.
4. 12-month rule. A Texas Equity finance transaction may not be take place on a property more than once per year. This sounds like a reasonable limitation. But, the result may be that if a borrower wants to take advantage of a significant drop in interest rates, he/she will not be able to do so if they have refinanced in the past 12 months – not until that 12 month period has passed.
5. Subordinate equity liens (HELOC’s, 2<sup>nd</sup> equity installment mortgages) encumber the financing on the property as well to the same LTV restrictions.

### Example: The Texas Equity limitations

The \$200,000 House with \$145,000 Mortgage Scenario

Facts:

1. John and Mary own a house valued at \$200,000 and are divorcing.
2. The existing mortgage balance is \$145,000.
3. The equity is determined to be \$50,000 (\$200,000 less \$145,000 less \$5,000 costs to finance).
4. The parties have agreed that John will grant his interest in the home to Mary for payment of \$25,000 (1/2 the agreed equity) and the requirement that she refinance the mortgage to take his name off of the liability.

If Mary (grantee) attempts to “cash out” in order to pay John his equity, the transaction would work like this: The appraised value of \$200,000 X 80% (maximum LTV) = \$160,000. But, the amount needed to borrow is \$175,000 (\$145,000 existing balance plus \$5,000 costs plus \$25,000 for payment to John). The “top” \$40,000 of equity in the home’s property is inaccessible in Texas Equity financing.

The proper way to pay John is via the Owelty Agreement and Lien. Provided no other features have triggered Texas Equity Finance provisions (previous equity financing by the current owners on the property in which an outstanding balance remains, cash going directly to the borrower, the inclusion of other subordinate equity liens in the financing, etc.)

## **MINDY'S PROBLEM: THE CASE OF THE MISSING \$25,000 – TRUE STORY**

### **THE DEED OF TRUST TO SECURE ASSUMPTION WORTHLESS BUT NECESSARY**

#### **COMMON PROBLEMS IN DIVORCE/PROPERTY SETTLEMENTS**

The best way to illustrate the "creative use of the Owelty Agreement" is to look at real problems in particular cases.

**Problem 1:** One party wants to keep the house but can't "buy out" the other person because there isn't enough money in the cash accounts. All of the equity is in the house and the person NOT keeping the house does not want a payout (over time).

Solution: (Even if there is cash in the accounts) write the Owelty Agreement into the Decree also specifying the Owelty Lien. Provide for the grantee to refinance the house within a specified time frame.

Key: Preapproval (and commitment) for mortgage financing before finalizing the settlement/agreement.

Examples:

1. Provided the party qualifies for financing, preparation and attention to the file during the process of divorcing allow for the grantor to be paid within days after the divorce is final.
2. When the party does not qualify immediately, obtain a projected amount of time before the party would qualify and write that time-frame into the decree.

**Problem 2:** One party wants to keep the house, but it appears that they cannot "afford" or "qualify" to refinance to release the other person from the mortgage.

Solution: Do NOT qualify or disqualify your client. Let a competent Divorce-Mortgage Specialist do that.

Key: Often, there are creative ways to qualify an applicant not known to casual observers. Additionally, those who may not qualify now may well be brought into qualification within a short period of time with proper planning and strategy.

## **CREATING AN OWELTY AGREEMENT and OWELTY LIEN IN THE DIVORCE DECREE**

**1. Division of Marital Estate.** The court finds that the following is a just and right division of the parties' marital estate, having due regard for the rights of each party. **IT IS ORDERED** that the estate of the parties be divided as follows:

**A. Property to <name>.** Petitioner/Respondent is awarded the following as his/her sole and separate property, subject to any existing indebtedness, lien or tax, and Respondent/Petitioner is divested of all right, title and interest, and claim in and to such property:

- (1) The following real property and improvements located at 1234 Elm St. Somewhere, Texas, including but not limited to, any escrow funds, prepaid insurance, utility deposits, keys, house plans, home security system access and code, garage door opener, warranties and service contracts, title and closing documents and gifts from the Chinese Ambassador:

[Full Legal Description] Lot 1, Block 1, Elm Acres Addition to the City of Somewhere, TX according to the plat thereof recorded in Volume 1, Page 1, Deed and Plat Records in the County Records.

**B. Property to Petitioner/Respondent (reverse of previous paragraph)**

Respondent/Petitioner is awarded the following as his/her sole and separate property, subject to any existing indebtedness, lien or tax, and Petitioner/Respondent is divested of all right, title and interest, and claim in and to such property:

- (1) Guns in the closet
- (2) The sum of \$40,000.00 payable to <party awarded the house subject to the Owelty> by <other party> within 60 days [see your Divorce-Lending Specialist for how many days] of the entry of this Decree of Divorce [and/or upon closing and funding of refinance of Property by homeowner] as set forth in Paragraph 2C below.

### **2. Division of Debts.**

**A. Debts to Grantee (of Marital Residence Award). IT IS ORDERED** that <Grantee Name> shall pay as a part of the division of the estate, the following debts and obligations and shall indemnify and hold <Grantor Name> harmless from any failure to so discharge these debts:

- (1) The balance due, including principal, interest, liens, ad valorem taxes and insurance escrow, on that certain real estate lien note secured by deed of trust on the real property at 1234 Elm Street, Somewhere, TX herein awarded to <Grantee Name> in this decree.
- (2) The sum of \$40,000.00 payable to <Grantor Name> as part of the property division as set forth in ***Provisions Regarding Marital Residence and Owelty of Partition*** below, pursuant to the Proceeds Allocation Letter attached herein as Exhibit X.

**B. Debts to Grantor (of Marital Residence Award). IT IS ORDERED** that <Grantor Name> shall pay as a part of the division of the estate, the following debts and obligations and shall indemnify and hold <Grantee Name> harmless from any failure to so discharge these debts:

- (1) Any and all liabilities and other obligations due or to become due on the personal property awarded to <Grantor Name> in this decree.
- (2) Etc.

**Provisions Regarding Marital Residence and Owelty of Partition**

**Owelty of Partition.** The Court, having awarded the marital residence to <Grantee Name>, finds that it is necessary and equitable to impose an encumbrance for **Owelty of Partition** against the entirety of the property to secure the payment of the debt resulting from the award.

IT IS ORDERED AND DECREED that an encumbrance for **Owelty of Partition** is imposed against the entirety of the property described as follows:

[Full Legal Description] Lot 1, Block 1, Elm Acres Addition to the City of Somewhere, TX according to the plat thereof recorded in Volume 1, Page 1, Deed and Plat Records in the County Records.

The purpose of the encumbrance is to secure the payment of the debt of \$40,000.00 in favor of <Grantor Name> resulting from the award of the marital residence to <Grantee Name> **to be disbursed according to the Proceeds Allocation Letter attached herein as Exhibit X.**

This debt is part of the division of community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony or child support.

# EXHIBIT X PROCEEDS ALLOCATION LETTER

Date: June 12, 2020

File No: \_\_\_\_\_



We the undersigned to hereby authorize Title Co. to disburse the Owelty Lien proceeds for the above referenced transaction as follows:

PAYEE	AMOUNT
See addendum for wiring/mailling instruction for each account	
Net payment to Grantee of Owelty Interest	\$ 25,000.00
Citi Visa	10,000.00
Attorney Trust Account	<u>5,000.00</u>
<b>TOTAL PROCEEDS:</b>	<b>\$ 40,000.00</b>

APPROVED:

**Grantee Name:** John Smythe

Signature:

Date:

STATE OF \_\_\_\_\_ §  
COUNTY OF \_\_\_\_\_ §

This document was acknowledged before me on \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, by \_\_\_\_\_.

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_