THE MORE THINGS STAY THE SAME, THE MORE THEY CHANGE: THE ONGOING EVOLUTION OF INTERPRETATIVE PRINCIPLES

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Reported Cases

- *Cirrus Wind I, LLC v. Stephens Ranch Wind Energy, LLC*, 2017 WL 1376754 (Tex. App.—Amarillo 2017, no pet).
- *In re Sunset Nursing Home, Inc.*, 2015 WL 4488520 (Tex. App.—Houston [1st] 2015, orig. proceeding).
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- *In re Corbett*, 2012 WL 386744 (Tex. App.—Fort Worth 2012, orig. proceeding).
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- *Hiram Moore, Ltd. v. Greer*, 172 S.W.3d 609 (Tex. 2005).
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- *Bristol v. Placid Oil Co.*, 74 S.W.3d 156 (Tex. App.—Amarillo 2002, no pet.).

Publications and Presentations

- “Winning the AV tax game," Permian Basin Landman's Association Meeting, November 2017.
- “What’s in Your Box?” Joint Seminar of the Texas Association of Defense Counsel and New Mexico, December 2017.
- “Property Tax 101” Midland Odessa Business & Estate Council meeting, May 2017.
- “Arming Yourself to Save Money (AV Tax)”, 18th Annual Conference of the Texas Aggie Bar Association, March 2017.
- “Appellate Update for Non-Appellate Lawyers, What You Need to do to Preserve Error” Joint Seminar Defense Lawyers Association, Ruidoso, New Mexico, July 2016.
- “Standards of Review,” Appellate Boot Camp, September 2015.
- “Making Your Case,” Annual Meeting of the Institute of Professionals in Taxation, San Diego, California, 2015.
- “Energy Production & Good Stewardship: Living in Harmony with Oil, Gas & Wind Energy Operations,” Conference, September 2010.
- “Trespass by Capture: Liability for Subsurface Trespass after Coastal,” presented at the Texas Wesleyan University School of Law, October 2009.
- “The ‘New’ New Mexico Surface Owners Protection Act,” In-house CLE for Range Resources and invited guests, 2009.
- “The More Things Change, the More They Stay the Same: A Practical Analysis of Coastal Garza,” Texas Wesleyan School of Law, Fall 2008.

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I. INTRODUCTION

"The law must be stable, but it must not stand still." These words epitomize Roscoe Pound's view of the proper role of courts—to balance principled predictability through consistent application of methods of decision-making, while facilitating law's growth in response to social changes.[1] In other words, Pounds believed that courts should honor bedrock principles upon which people order their conduct (he particularly disfavored legislative changes, which often abruptly disrupted settled expectations), yet apply those principles in a way that practically addresses the needs of an ever-changing social context. Similarly, Henry Ward Beecher, the 19th Century preacher, orator, and writer, expressed this dichotomy: He variously commented that "Laws are not masters, but servants, and he rules them, who obeys them," expressing the need for stability, and then declared that "laws and institutions, like clocks, must occasionally be cleaned, wound up, and set to true time," a statement that echoes Pounds' assertion that law should be adjusted over time.[2] In short, the tension between preserving what was and embracing what, through a current lens, might have been (or should be) is nothing new.

This paper derives from repeated involvement in the "fixed versus floating" royalty cases, an emerging area that demonstrates the tension expressed by the orators cited above. Courts' continued expressed reliance on age-old principles of interpretation, combined with almost polar outcomes on seemingly-indistinguishable language is both fascinating and frustrating. The fact that many of the "bedrock principles" cited in the current "fixed versus floating" cases derive from the Supreme Court's plurality opinions in the 1990's, which marked a sharp and relatively quick swing in interpretive methods adds another layer of intrigue. *Compare Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984) (*overruled by Luckel v. White*, 819 S.W.2d 459, 464 (Tex. 1991)) *with Luckel* and *Concord Oil Co. v. Pennzoil Exploration and Production Co.*, 966 S.W.2d 451 (1998). Further, courts seem to be subtly moving away from age-old construction principles. While the Court's evolving interpretive methodology affects all documents, not just mineral deeds, the change is aptly demonstrated in the "fixed versus floating" cases. In these cases, courts are charged with interpreting royalty conveyances described as multiple, and often conflicting, fractions.

For those who do not regularly practice oil and gas law, a brief overview of the "fixed versus floating" problem is in order. For most of the history of oil and gas development in this state, leases provided that the lessor/landowner granting the lease would receive a 1/8 royalty—that is, one barrel (cost-free) was attributed to the lessor, and seven barrels (after costs) to the leasing oil company. Given the prevalence of the 1/8 royalty, most royalty conveyances and reservations were described as a fraction of "the 1/8 royalty." For example, a mineral owner might convey minerals under lease, but reserve for himself and his heirs "1/2 of the 1/8 royalty" or "1/2 of the usual 1/8 royalty." Many such conveyances also supplied the resulting fraction—for example, "1/2 of the usual 1/8 royalty, same being equal to 1/16." The royalty interests are alienable and were often reserved when the remaining mineral interests were conveyed. As long as the lease royalty remained 1/8, there could be little doubt about the quantum of interest described. And if an expired lease was replaced by one with the same 1/8 royalty, no dispute arose.

However, like many other things once "certain" in the oil and gas industry, the 1/8 royalty is essentially obsolete. Today, the vast majority of new leases in Texas provide for a 1/4 royalty, or at least a 1/5. The question then arises: when the parties, long ago, agreed to a conveyance or reservation of "1/2 of the usual 1/8 royalty," did they intend to convey a "fixed" 1/16 royalty, or a "floating" 1/2 *of* royalty, whatever its current fraction. In the example cited above, the former interpretation results in the reservation of a 1/16 royalty, while the latter—assuming a current 1/4 lease royalty, results in twice that amount at 1/8. The Court recently explained the dichotomy:

> A *fractional* royalty interest is referred to as a fixed royalty because it 'remains constant' and is untethered to the royalty amount in a particular oil and gas lease. A *fraction of* royalty interest is referred to as a floating royalty because it varies depending on the royalty in the oil and gas lease in effect and is calculated by multiplying the fraction in the royalty reservation by the royalty in the lease.

U.S. Shale Energy II, LLC v. Laborde Props., L.P., 551 S.W.3d 148 (Tex. 2018). It is, of course, "the language used in the conveyance instrument [that] determines whether the interest is fixed or floating." *Id.*

Our jurisprudence adamantly professes that what the parties subjectively intended is of no consequence—that courts interpret documents based on intent, as expressed in the written document, has been drilled into

[1] Interpretation of Legal History, 1923.

[2] Uncle Anthony's Unabridged Analogies

us since the first week of law school. But if Roscoe Pounds was right, and law *should* change to meet a changing society, is that the "right" result? If the parties intended to reserve 1/2 of what they had, which just happened to be a 1/8 royalty at the time, does that trump the specific expression of a 1/16 as the product of 1/2 and 1/8? After all, had the parties anticipated that the 1/8 royalty would increase over time, they might have said precisely that. And if it does trump the written words, how do the courts go about reflecting the change in this long-settled expectation of a 1/8 lease royalty without upending the even longer-settled principles of contract interpretation?

Let's begin at the beginning, with the bedrock principle that when interpreting an unambiguous document, courts seek the intent of the parties as expressed in that document; in other words, courts attempt to divine "objective intent." What objective intent is—and just as significantly, is not—is addressed in the first portion of this paper. We'll then address the methods by which courts seek that intent, including instances when presumptions to some degree trump the written word. Then, we will look at some of the "fixed versus floating" jurisprudence, with an eye toward examining the process by which courts address "objective intent" in those particular cases.

II. COURTS SEEK THE "OBJECTIVE INTENT" OF THE PARTIES.

A string of case beginning with *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984) demonstrates the courts' struggle with the application of interpretive principles. In *Alford*, the Court considered whether a 1929 deed conveyed only an undivided 1/16 mineral interest, as held by the trial court, or a full 1/2 interest in the permanent mineral estate. *Id*. at 871. The granting clause purported to convey "one-half of the one-eighth interest in and to all of the oil, gas, and other minerals . . . ." *Id*. A subsequent clause explained that since the lands were currently under lease, "it is understood and agreed that this sale is made subject to said lease, but covers and includes 1/16 of all the oil royalty and gas rental or royalty due and to be paid under the terms of said lease." *Id*. at 872. A third clause explaining that if the existing lease terminated, each of the named parties would jointly own "a one-half interest in all oil, gas, and other minerals in and upon said land, together with one-half interest in all future rents." *Id*.

The Court began by reciting the familiar canons—"the primary duty of the courts in interpreting a deed is to ascertain the intent of the parties," "with the restriction that it is not the intention that the parties may have had but failed to express in the instrument, but it is the intention that is expressed," "that is, the question is not what the parties meant to say, but the meaning of what they did say." *Id*. The court continued, stating that it must interpret the language as written without altering it by interpolation or substitution, and "harmonizing" the deed so that every clause has meaning. *Id*. The court then added what would be dispositive in *Alford*: "[W]hen it is impossible to harmonize internally inconsistent expressions of intent, the court must give effect to the 'controlling language' of the deed and not allow ambiguities to 'destroy the key expression of intent' included within the deed's terms." *Id*. The Court elevated the granting clause above the remainder of the deed, explaining that the "controlling language" and "key expression of intent" were to be found in the granting clause, as it defines the nature of the permanent mineral estate conveyed." *Id*. In its analysis, the Court repeatedly returned to this "granting above all" concept; one particularly interesting comment given the current "fixed versus floating" debate is that "it is not permissible to give controlling effect to that which creates an ambiguity, and destroys the certainty which is expressed by other language, and thus overthrow the clear and explicit intention of the parties. . . . We have therefore, given effect to the 'controlling language' in the mineral deed—the granting clause." *Id*. at 873.

Justice Pope's dissent in *Alford* cut to the chase: "The court cites the rules of construction but fails to read the document." *Id*. at 875 (J. Pope, dissenting). Citing the Court's 1957 opinion in *Garrett v. Dils Co.*, Justice Pope chided the majority for disregarding its duty to "harmonize" the deed and give effect to every clause:

> Our method for understanding the meaning of deeds is to ascertain the intention of the parties, when it can be ascertained from a consideration of all parts of the instrument. That intention, we held, prevails over arbitrary rules.

Id. at 876.

Just seven years later in *Luckel v. White*, a plurality overruled *Alford*, marking a sea-change in the stated application of the canons of construction. 819 S.W.2d 459 (Tex. 1991). The deed in *Luckel* contained granting, habendum, and warranty clauses reciting the conveyance of a 1/32 royalty interest; in contrast, its "subject to" and "future lease" clauses stated that the grantee "shall be entitled to receive one-fourth of any and all royalties." *Id*. at 460. The trial court, following *Alford*, held that the deed's granting clause prevailed, so that the deed conveyed a fixed 1/32 royalty interest. *Id*. The court of appeals affirmed. *Id*. The Supreme Court reversed, holding that the deed conveyed a 1/32 fixed royalty under the current lease, then a 1/4 "floating" royalty in any future lease. *Id*. In reaching this result, the plurality expressly overruled *Alford*, explaining that "we have concluded that the majority in *Alford*

incorrectly failed to harmonize the provisions under the four corners rule and then erred in applying the 'repugnant to the grant' rule in disregard of the future lease clause." *Id*. at 464. The concurrence would have gone a step farther and adopted Justice Pope's dissent in *Alford*: "As Chief Justice Pope observed, our interpretation of deeds should not be dictated by arbitrary rules like the 'repugnant to the grant' rule which moved the *Alford* majority. Rather, our method for understanding the meaning of a deed should be 'to ascertain the intention of the parties, when it can be ascertained from a consideration of all parts of the instrument.'" *Id*. at 465 (J. Mauzy, concurring).

Four justices dissented. The dissent would have held that the deed conveyed a fixed 1/32 royalty, because although the future lease clause appeared to grant a 1/4 interest in whatever quantum of royalty might inure to its holder under future leases (a "floating" royalty), the remainder of the deed "unambiguously" conveyed and warranted a 1/32 royalty interest. *Id*. at 465. Again foreshadowing the current "fixed versus floating" issue, the dissent explained:

> [W]hen the Mayes-Luckel deed was executed in 1935, most private oil and gas leases provided for a 1/8 royalty. If we take judicial notice of this fact, as we have before, we may assume that the parties were aware of this standard royalty when they drafted the deed. I believe the parties failed to contemplate that a one-fourth share of future royalties might not always equal 1/32nd of production, and carelessly referred to the interest under future leases as one-fourth of all royalties rather than one fourth of a 1/8th royalty.

Id. at 465. The dissent would hold that the future lease clause's reference to "1/4 of" royalty merely extended the grant of a fixed 1/32 royalty to future leases, regardless of the royalty provided in them. *Id.*

In *Luckel*, the four dissenting justices acknowledged the "common sense" assumption that the parties used both "1/32" and "1/4 of royalty" to describe the same quantum of royalty, because they "probably" assumed that the royalty would always be 1/8. This "assumption," lately dubbed the "estate misconception theory,"[3] undergirds recent analyses in the fixed versus floating cases. But in *Luckel*, the Court emphasized that this assumption cut both ways:

> The assumption that the parties contemplated only the usual one-eighth royalty is equally consistent with an actual intent to convey a fixed 1/32nd interest or a one-fourth of the reserved royalty interest.

Id. at 426. Stated differently, faced with inconsistent fractions—a fixed 1/32 and a floating 1/4—the court could have held either (1) since the parties assumed that royalty would always be 1/8, use of the 1/32 fraction simply meant "1/4 of the royalty, whatever its current fraction," or (2) based on their assumption that royalty would always be 1/8, the "1/4 of royalty" really meant a 1/32. In other words, depending on whether one advocates the fixed or floating outcome, the assumption that parties assumed that royalty would always be 1/8 may form part of one's argument. Which begs the question—if this assumption can have either effect, then does it mean anything at all? Not only is *Luckel* still good law, it was cited in *U.S. Shale*, the Supreme Court's most recent "fixed versus floating" case for this very point. 551 S.W.3d at 151, 152 (citing *Luckel* for the proposition that "the ubiquity of the 1/8 landowner royalty led many landowners to presume that the landowner royalty would remain 1/8 in perpetuity.").

The Court decided *Jupiter v. Snow* on the same day as *Luckel*. In his concurrence, Justice Hecht acknowledged the Court's adoption of Chief Justice Pope's dissent in *Alford*. The concurrence underscores the Court's rejection, as an interpretive principle, of the elevation of any one part of a deed over its remaining provisions.

Another seven years later, the Court issued its plurality decision in *Concord v. Pennzoil*. 966 S.W.2d 451 (Tex. 1991). The case was argued and reargued, and Court issued an opinion granting a motion for rehearing and withdrawing an earlier opinion in which it acknowledged the difficulty of interpreting deeds with different fractions:

> This case presents an issue with which this Court, other courts, and practitioners have struggled for many years: What interest has been conveyed in an oil and gas property when

[3] This use of the term "estate misconception theory" is recent, appearing to represent the assumption that royalty would always be 1/8 in the last few years. Traditionally, "estate misconception theory" considers whether, when a landowner leases minerals at a set royalty (e.g., 1/8), the lessor conveys 7/8 of the minerals in fee simple determinable, or instead conveys 8/8 of the minerals, subject to a right of reverter in that 8/8. It's "new" use is unfortunate, as it muddies what is already somewhat complicated from the outside looking in. Amicus curiae in *U.S. Shale* addressed the Court on this point alone. The Court in *U.S. Shale* more aptly referred to it as the "historical assumption." The author will use "historical assumption" in this paper.

> two differing fractions appear within the conveying instrument?

Id. at 452. The granting clause of the deed at hand described a 1/96 interest in minerals, but a subsequent clause described "1/12 of all rentals and royalty of every kind and character." *Id*. at 452. The plurality held that the instrument conveyed a 1/12 interest in rights and benefits (including royalty) under the lease currently in existence, and the possibility of reverter of a 1/12 interest in the mineral estate.

But it is the Court's analysis, rather than its holding, that is of interest here. The plurality, citing *Luckel*, explained that the Court's objective was to determine the parties' intent from all of the language in the deed. *Id*. at 454. "We recognized [in *Luckel*] that the intent of the parties must be determined from what they expressed in the instrument, read as a whole, and that the actual, subjective intent of the parties will not always be given effect even if we were able to discern that subjective intent." *Id*. *Luckel* continues to be cited for the courts' reliance on objective versus subjective intent; indeed, almost every case that turns on the interpretation of an unambiguous document cites *Luckel* for this proposition.

The cases cited above demonstrate the Court's steadfast adherence to seeking the "objective" intent of the parties—its overruling of *Alford* and outright adoption of Justice Pope's dissent underscores the Court's determination, at least at the time, not to deviate from or add to the parties' intent as expressed in the written document.

III. WHAT IS THE "OBJECTIVE INTENT" OF THE PARTIES?

That the court's goal when determining a document's meaning is the "objective intent of the parties" is perhaps the most elementary rule of construction; however, it is one that should not be overlooked. In practice, "objective intent of the parties" is perhaps best defined by what it is not. For example, the court's role is not to question the wisdom of the parties' agreement or to rewrite its provisions under the guise of interpreting it. *Fairfield Indus., Inc. v. EP Energy E&P Co., L.P.*, 531 S.W.3d 234, 241 (Tex. App.—Houston [14th dist.] 2017, pet. denied), reh'g denied (Oct. 5, 2017) (citing *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003)).

A. "Objective intent," is, of course, not "subjective":

Absent fraud or mistake, the parties' written word alone will be deemed the intention of the parties. *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 524–25 (Tex. 1982) (citing *Sun Oil Co. v. Madeley*, 626 S.W.2d 726 (Tex.1981), *Rutherford v. Randal*, 593 S.W.2d 949 (Tex.1980), and *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515 (Tex.1968)). Courts focus on expressed intent for a practical reason—contract disputes arise when one party's understanding of the contract differs from the other's. In other words, if the parties agreed as to their subjective intent, neither would challenge the contract's meaning. But the Supreme Court has repeatedly and continually reaffirmed this principle—even if undisputed, the parties' different "understandings" do not matter:

> [W]here an unambiguous writing has been entered into between the parties, the Courts will give effect to the intention of the parties as expressed or as is apparent in the writing. In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls.

Matagorda Cty. Hosp. Dist. v. Burwell, 189 S.W.3d 738, 740 (Tex. 2006) (explaining that a supervisor's undisputed understanding that she could only be dismissed for cause could not be considered in its interpretation of the contract, even though others believed accordingly); *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex.1968) (stating that when there is an unambiguous writing, objective, not subjective, intent controls). Just last year, in explaining the Court's determination of the parties' intent, the Court wrote: "Objective manifestations of intent control not 'what one side or the other alleges they intended to say but did not.'" *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 763-764 (Tex. 2018). Courts thus "presume parties intend what the words of their contract say." *Id*. Thus, courts may not look beyond the document's language to "show that the parties probably meant, or could have meant, something other than what their agreement stated." *Id.* at 769 (quoting *Anglo-Dutch Petrol. Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011). Stated simply, "courts cannot rewrite the parties' contract or add to or subtract from its language." *URI*, 543 S.W.3d at 769.

Because the intent of the parties turns on the language actually utilized, parol evidence may not alter a contract's terms. *Id*. at 767. However, evidence of "surrounding circumstances that *inform*, rather than *vary from or contradict*, the contract's language may be considered." *Id*. (emphasis supplied). The Supreme Court gave this example: Extrinsic evidence may enable one to locate "the green house on Pecan Street," but "cannot be used to show the parties' motives or intentions apart from" the contract's express language. The Court explained:

> Mindful of our responsibility to 'honor the parties' agreement' without altering it, we have thus made a clear distinction between extrinsic evidence that *illuminates* contract language and extrinsic evidence that *adds to, alters, or contradicts* the contract's text. . . . In the same way that dictionary definitions, other statutes, and court decisions may inform the common, ordinary meaning of a statute's unambiguous language, circumstances surrounding the formation of a contract inform the meaning of a contract's unambiguous language.

Id. at 767 (emphasis supplied). In practice, whether evidence "informs," "varies from," or "contradicts," is, in practice, in the eye of the beholder—parties propounding opposite meanings will necessarily disagree as to whether outside facts "inform" (i.e., support) or "contradict" the plan language of the contract. One statement, clear in expression but maybe less so in application, is this: "[C]ourts may not rely on evidence of surrounding circumstances to make the language say what it unambiguously does not say." *Id*. at 767.

When permitted, courts review only "objective" circumstantial evidence. *Id.* Examples include:

- The commercial or other setting in which the contract was negotiated;
- Other objectively determinable facts giving context to the parties' transaction;
- Setting (i.e., the identity and relative position of the parties);
- Trade custom (e.g., which provisions are stricken from a form contract);
- Trade usage; and
- Facts surrounding a document's execution (although this could constitute parol evidence depending on the case).

Id. at 768. The particular "facts and circumstances" deemed applicable will necessarily vary from case to case. *Id*. at 767-68. Likewise, a "certain degree of latitude is inherent in the inquiry . . . ." *Id*. at 768. However, "absolute limits" exist—parties cannot look to extrinsic evidence to "give the contract a meaning different from that which its language imports, add to, alter, or contract the terms contained within the agreement itself, make the language say what it unambiguously does not say, or show that the parties probably meant, or could have meant, something other than what their agreement stated." *Id*. at 769.

This apparent broadening scope of what the courts may consider to divine the parties' intent—particularly given their stated "latitude" in determining, on a case-by-case basis, exactly what evidence is "fair game"—approaches an undefinable standard. And as a practitioner, this "standard" presents practical problems: what evidence should one put before a court when advocating a client's interpretive position? And at what point does a trial court, faced with conflicting "evidence" of the parties' intent in an unambiguous document, throw its hands up, find ambiguity, and submit it to a jury? Doesn't the use of extrinsic evidence to create ambiguity violate age-old canons of construction? The increasing weight given to "facts and circumstances" epitomizes a "slippery slope."

B. "Intent" is not what's "right" or "fair":

An early application of this principle, and the Supreme Court's application of it, can be found in *Provident Fire Ins. Co. v. Ashy*, 162 S.W.2d 684 (Comm'n App. 1942), opinion adopted. There, Ashy, a minor, lost a store to a fire. Ashy's father managed the store's affairs and after the fire, worked with the insurance company's employee to make a claim under the policy. Ashy's father did not file a proper inventory of the loss, even after alleged reassurance by the broker that there was nothing else that needed to be done to apply for payment. The insurance company refused to cover the loss because Ashy failed to file a proper inventory within the policy's stated time frame. Ashy's father, in the words of the Court, was "an uneducated man of foreign birth . . . that may not have fully understood all that happened or the full significance of what he did or failed to do"; the Court also noted that the insurance company's complaint about his conduct under the policy terms would likely have made no difference to the insurance company. A jury found for Ashy, but the Supreme Court held as a matter of law that Ashy's failure to comply with the policy terms supported the company's denial of the claim, explaining that the Court cannot rescue the parties from their contractual bargain. Citing an earlier Supreme Court opinion, the Court explained: Parties make their own contracts, and it is not within the province of this court to vary their terms in order to protect them from the consequences of their own oversights and failures in nonobservance of obligations assumed." *Id*. at 686–87.

Ashy is a 1942 case, but its progeny have been recently cited, and this principle applied, by Texas courts, including the Supreme Court. *See, e.g*., *Yzaguirre v. KCS Res., Inc*., 53 S.W.3d 368, 374 (Tex. 2001) ("We will not now rewrite this lease's plain terms to give the Royalty Owners the benefit of a bargain they never made."). *Yzaguirre* is a particularly intriguing contrast to the current "fixed versus floating" jurisprudence. In this 2001 case, the TSC's refusal to rewrite an agreement on the basis of what was allegedly "fair" or "right" expressly denied royalty owners "the

benefit of a bargain they never made." 53 S.W.3d at 374.

C. "Objective intent" precludes saving the parties from a bad bargain.

Without question, Texas jurisprudence precludes courts from rewriting the parties' contract under the guise of interpretation, even when had the parties' known what they later learned, they might have contracted differently.

Tenneco Inc. v. Enterprise Prods. Co., 925 S.W.2d 640 (Tex. 1996) is a good example. There, Tenneco and Enterprise owned interests in a natural gas liquids fractionation plant. The relevant operating agreement gave each owner a preferential right to purchase the others' interests before those interests could be sold outside of the ownership group: "[I]f any Owner should desire to sell, transfer or assign all or any part of its Ownership Interest, the other Owners shall have the prior and preferential right and option to purchase proportionately the interest to be sold by such Owner upon the same terms and conditions . . . ." *Id*. at 644. In a blatant attempt to avoid the right of first refusal, Tenneco, Inc. first sold the stock of the Tenneco entity that held the ownership interest to a different Tenneco entity, Tenneco Natural Gas Liquids Corporation. Then, Tenneco Natural Gas Liquids Corporation sold its stock to Enron Gas Processing Company, and the Tenneco entity became "Enron Natural Gas Liquids Corporation." Finally, Enron Gas Processing sold Enron Natural Gas Liquids' stock to Enron Liquids Pipeline Operating Limited Partnership, who became the owner what had been Tenneco's interest in the plant. The other owners, including Enterprise, cried foul—Tenneco had obviously intended to evade its contractual obligation to first offer the other owners the right to buy Tenneco's interest; Enterprise argued that the court should look to the parties' intent to evade the right and hold Tenneco to its stated obligation. The Supreme Court disagreed. Relying on "the plain language" of the Operating Agreement, the court explained that only a transfer of an ownership interest would trigger the right; it said nothing about a change in stockholders. Clearly, had Enterprise and the other owners envisioned Tenneco's creativity in utilizing a series of stock sales to accomplish an exchange of assets, they would have done so. The Court then stated: "We have long held that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained. . . ." *Id*. at 646. The Enterprise Parties could have included a change-of-control provision to trigger the preferential right, but the Court would not infer one or expand upon the plain language of the contract to save Enterprise from what was, in hindsight, not the deal it subjectively intended to make.

Similarly, in *Ashcraft v. Lookadoo*, the Dallas Court of Appeals refused to imply that the assignment of an asset included the assignment of the right to recover that asset. 952 S.W.2d 907 (Tex. App.—Dallas 1997, pet. denied). Ashcraft purchased a note deficiency, along with all supporting documentation. The note referenced Lookadoo's guaranty to satisfy the note. Ashcraft sued Lookadoo on the guaranty to satisfy the deficiency. Lookadoo argued that the plain language of the assignment included only the deficiency and supporting documentation; although the note referenced the guaranty, the guaranty itself was not specifically included. Ashcraft argued that the assignment of the right to collect the deficiency necessarily included the right to collect it through enforcement of the guaranty; otherwise, he argued, the asset he purchased was "rendered valueless." The court declined to imply the guaranty's assignment, explaining that the parties "made their own contract, and we lack the power to vary those terms to protect one of them from the unforeseen consequences of their agreement." *Id*. at 911. This was particularly true, said the court, because the assignment specifically stated the assets to be assigned—to include the guaranty, even though necessary for the deficiency's collection, would be to "imply terms in opposition to the express language that the parties themselves have written into the contracts."

In short, courts do not rewrite contracts to save parties from their lack of foresight. This is true even when, had the parties anticipated the future, the contract might well have included language protecting them from their current situation.

IV. WHAT COURTS CONSIDER TO DIVINE "OBJECTIVE INTENT"

Historically, the principles adopted in *Luckel v. White* governed the courts' search for the parties' objective intent:

- The writing alone will be deemed to express the intention of the parties;
- The intention of the parties prevails over arbitrary rules;
- The court should attempt to "harmonize" all parts of the writing within the "four corners" of the instrument;
- The parties intend every clause to have some effect and in some way, express their agreement; and
- The court should not strike down any part of the document, unless an irreconcilable conflict would necessarily destroy one part of the document.

Luckel, 819 S.W.2d at 461-61. As with the term "objective intent," the devil in the stated principles is in

the details. An examination of the principles driving the courts' pursuit of "objective intent" is instructive.

A. Written words are given their "plain and ordinary meaning" . . . except when they are not.

When construing a contract, the terms are typically given "their plain, ordinary, and generally accepted meaning." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996); *see also FWT, Inc. v. Haskin Wallace Mason Prop. Mgmt., L.L.P.*, 301 S.W.3d 787, 794 (Tex. App.—Fort Worth 2009, pet. denied) (op. on reh'g) (citations omitted) ("We presume that the parties to the contract intend every clause to have some effect. We give terms their plain, ordinary, and generally accepted meaning unless the contract shows that the parties used them in a technical or different sense."). A term's common-law meaning will not override the definition given to a contractual term by the contracting parties. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 217–19 (Tex. 2003). Courts may look to dictionaries to discern the meaning of a commonly used term that the contract does not define. *Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011). An unambiguous document will be enforced as written. *Heritage Res.*, 939 S.W.2d at 121.

This "bedrock" principle appears to be shifting. In its 2018 opinion in *URI, Inc. v. Kleberg County*, 543 S.W.3d 755, the Texas Supreme Court suggested its fluidity:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.

Id. at 757 (quoting Oliver Wendell Holmes). It then reiterated its "focus on the words the parties chose to memorialize their agreement," but with significant qualification:

> [W]ords are simply implements of communication, and imperfect ones at that. Oftentimes they cannot be assigned a rigid meaning, inherent in themselves. Rather, their meaning turns upon use, adaption and context as they are employed to fit various and varying situation. Even a single word can carry subtle—and significant—differences in meaning when applied to different situations.

Id. at 764. The court's somewhat lengthy discussion of the certainty of words concluded ambiguously that "courts may not seek the parties' intent beyond the meaning the contract language reasonably yields when construed in context." *Id*. at 763. Although far short of a free-for-all, this statement represents a clear departure from *Luckel's* "plain meaning" rule.

B. The Court confines its inquiry to the "four corners" of the document, but "facts and circumstances" may aid its interpretation.

Luckel reaffirmed another age-old principle: When seeking the intent of the parties, the Court looks only within the "four corners" of the document. *Luckel*, 819 S.W.2d at 461 (citing *Garrett v. Dils Co.*, 299 S.W.2d 904, 906 (Tex. 1957). The parol evidence rule has long precluded consideration of facts outside of an unambiguous contract. But courts are increasingly focusing on outside "facts and circumstances" outside of the document to aid in its interpretation.

URI is a good example. First, the Court explained that although "facts and circumstances" might be utilized to derive intent, the limitations were clear: "surrounding facts and circumstances cannot be employed to 'make the language say what it unambiguously does not say' or 'to show that the parties probably meant, or could have meant, something other than what their agreement stated.'" Stated differently, "extrinsic evidence may only be used to aid the understanding of an unambiguous contract's language, not change it or 'create ambiguity.'" *Id*. at 757.

The Court then seemed to open the door to a broader consideration of outside "facts and circumstances:" "Contract language is construed in its lexical environment, which may include objectively determinable facts and circumstances that contextualize the parties' transaction." *Id.* at 758. Courts may utilize extrinsic evidence, the Court continued, but only "to aid the understanding of an unambiguous contract's language." *Id*. If the Court's role is it interpret (i.e., "aid the understanding") of an unambiguous contract, then the Court's admonition to use extrinsic evidence only to do precisely that is no limitation at all. The exception thus swallows the rule.

C. Courts "harmonize" seemingly inconsistent provisions . . . but context is the key?

When confronted with seemingly inconsistent language within a written document, courts "harmonize" all of its parts. *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986). "The parties to an instrument intend every clause to have some effect and in some measure to evidence their agreement." *Id*. Thus, a court will not strike down or write out any part of the document, unless an irreconcilable internal conflict exists, such as when one part of an instrument effectively destroys another part. *Benge v. Scharbauer*, 259 S.W.2d 166, 167 (Tex. 1953).

In *Luckel*, the Texas Supreme Court reversed the lower court's holding based on its application of this principle. 819 S.W.2d at 460, 462. There, the deed

contained granting, habendum, and warranty clauses reciting the conveyance of a 1/32 royalty interest; in contrast, its "future lease" clause stated that the grantee "shall be entitled to receive one-fourth of any and all royalties." *Id*. at 460, 461. The Court of Appeals "harmonized" the seemingly-inconsistent clauses by assuming that the parties contemplated that all future leases would provide for one-eighth royalty. Thus, the Court of Appeals reasoned that "one-fourth of any and all royalties" really meant 1/4 times 1/8, or a fixed 1/32, just as specified in the other lease clauses. *Id*. at 462. The Supreme Court reversed the Court of Appeals, opining that this reasoning "is not a proper 'harmonizing' under the four corners rule." *Id*. The Court explained:

> We do not quarrel with the assumption that the parties probably contemplated nothing other than the usual one-eighth royalty. But that assumption does not lead to the conclusion that the parties intended only a fixed 1/32 interest. *It is just as logical to conclude that the parties intended to convey one-fourth of all reserved royalty, and that the reference to 1/32nd in the first three clauses is "harmonized" because one-fourth of the usual one-eighth royalty is 1/32nd.*

Id. In other words, the assumption that royalty would always be 1/8 cuts both ways; therefore, to "harmonize" the clauses, the Court of Appeals chose one over the other, improperly forcing one clause to match the other. *Id*. The Court instead held that two different meanings were intended—a fixed 1/32 under the lease in existence when the deed was executed, but a 1/4 floating royalty in all future leases. *Id*.

Luckel recognized that either consequence of the assumption that royalty would always be 1/8 was equally reasonable: "The assumption that the parties contemplated only the usual one-eighth royalty is equally consistent with an actual intent to convey a fixed 1/32nd interest or a one-fourth of the reserved royalty interest." The obvious question, then is why, if the Court acknowledged two reasonable meanings of the key language, the deed was deemed unambiguous. By choosing to "harmonize" not by reconciling the two fractions, but instead holding that a fixed 1/32 was intended until an event certain (lease termination) followed by a floating 1/4 thereafter. (This is in marked contrast to the Court's most recent "harmonization" of seemingly-inconsistent clauses in *U.S. Shale*, which resulted in diametric majority and dissenting opinions. There, the majority and dissent each chose to harmonize to a different clause, effectively "forcing" opposite interpretations. *U.S. Shale* will be discussed in this context below.)

How does the court "harmonize" inconsistent language? One key concept is that the parties' ascertained intent trumps specific rules. *Wenske v. Ealy*, 521 S.W.3d 791, 794 (Tex. 2017). *Harris v Windsor*, 294//798, 800. *Luckel* remains an excellent example of the Court's application of this principle. 819 S.W.2d at 464. There, of course, the Texas Supreme Court overruled *Alford v. Krum*, which had prioritized the granting clause over the remainder of the deed, opining that the granting clause was the "key expression of intent" in a conveyance and trumped inconsistent clauses. *See Alford*, 671 S.W.2d at 872. "[W]hen it is impossible to harmonize internally inconsistent expressions of intent, the court must give effect to the 'controlling language' of the deed and not allow ambiguities to 'destroy the key expression of intent' included within the deed's terms." *Id*. In overruling *Alford*, the Texas Supreme Court held that it was error to choose one clause over another; instead, courts are to "harmonize" the clauses and ensure that each had meaning." *Luckel*, 819 S.W.3d at 464. Justice Mauzy's concurrence stated it cleanly: "As Chief Justice Pope observed [in his dissent in *Alford v. Krum*], our interpretation of deeds should not be dictated by arbitrary rules like the 'repugnant to the grant' rule which moved the *Alford* majority. Rather, our method for understanding the meaning of a deed should be 'to ascertain the intention of the parties, which it can be ascertained from a consideration of all parts of the instrument.'" *Id*. at 465 (J. Mauzy, concurring). As later confirmed, "The *substance* of what has been conveyed must be determined taking into account all provisions of the conveyance." *Concord Oil Co. v. Pennzoil Expl. & Prod. Co.*, 966 S.W.2d 451, 457 (Tex. 1998) (rejecting mechanical rules of construction, such as giving priority to certain clauses over others or requiring the use of "magic" words).

Again, however, recent Texas Supreme Court opinions suggest a shift. In *Hysaw*, the court "reaffirm[ed] [its] commitment to a holistic approach aimed at ascertaining intent from all words and all parts of the conveying instrument. Stated differently, "apparent inconsistencies or contradictions must be harmonized, to the extent possible, by construing the document as a whole." *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016). What follows this explanation, however, foreshadows further deviation from "harmonizing" based on a document's plain language:

> But considering whether inconsistencies might exist and how they may be harmonized is part of the process for determining intent; it is not merely a cross-check method of validating an interpretation derived by segregating key terms and phrases. That is to say, meaning derived without reference to

> context is not confirmed merely because such a construction would not produce an inconsistency with another provision.

Id. at 13. "'Meaning derived without reference to context is not confirmed' simply because that meaning is consistent across the document" taken to its logical conclusion, leads to an absurd result—the Court seems to say that a deed consistent in its terms may be rendered "inconsistent," and thus, in need of harmonizing, if consideration of extrinsic facts and circumstances call the parties' stated intent into question. But that is surely not the case.

D. Courts rely on "presumption" in certain circumstances.

Besides the often-recited interpretive principles, courts may rely on presumptions based on facts or legal relationships to inform intent. Here are some examples:

1. Family Conveyances (presumed intent to gift property)

Several interpretive presumptions arise when evaluating intent in property conveyances between family members. When property is deeded from a parent to a child, it is a presumed to be a gift creating a presumption that the child holds a separate property interest. *See Richardson v. Laney*, 911 S.W.2d 489, 492 (Tex. App.—Texarkana 1995, no writ). In *Matter of Marriage of Morrison*, the Amarillo Court of Appeals recognized longstanding Texas law that if a "deed of conveyance recites no consideration or only nominal consideration, it is construed as evidencing an intention on the part of [one spouse] to donate the property to [the other spouse] as a gift." *Id*. (citing *Pevehouse v. Pevehouse*, 304 S.W.2d 770, 772 (Tex. App.—Amarillo 1957, writ dism'd), *Forman v. Glasgow*, 219 S.W.2d 845, 847 (Tex. App.—Waco 1949, no writ) ("Where no consideration passes [in a deed from husband to wife], or a mere nominal one is stated, the courts construe the transaction as evidencing an intention to donate), and *Babb v. McGee*, 507 S.W.2d 821, 823 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (recognizing that a deed reciting consideration of $10.00 and love and affections held to constitute a gift to wife). Thus, even when there is some evidence of nominal consideration, or the customary nominal consideration coupled with other valuable consideration, the gift presumption holds and shifts the burden to those challenging gifts. *See Kyles v. Kyles*, 832 S.W.2d 194, 197 (Tex. App.—Beaumont 1992, no writ) (recognizing that the party seeking to rebut the real property gift presumption must do so by clear and convincing evidence); Carolyn Neill Jennings v. Anthony Joseph Piazza, No. 12-18-00253-CV, 2019 WL 271026, at *5 (Tex. App.—Tyler June 28, 2019, no pet. h.) (discussing the role of consideration in presumed gifts of real property and the effect of a challenger's failure to prove recited consideration was, in fact, paid).

2. Contracts

a. Court concludes that even though they did not expressly do so, the parties' intended to include a mandatory statutory provision.

A court may interpret a contract as including the provisions of a statute mandating its inclusion, particularly when the alternative is to invalidate the contract. For example, in *Sadler Clinic Assn'n, P.A. v Hart*, the Beaumont Court of Appeals went beyond the four corners of a non-compete agreement to find that the parties intended to include a statutorily mandated arbitration provision when, in fact, there was no such arbitration language in the parties' agreement. 403 S.W.3d 891, 897 (Tex. App.—Beaumont 2013, pet denied). In relevant part, the statute in question states that to be enforceable, a covenant not to compete relating to the practice of medicine must

> provide for a buy out of the covenant by the physician at a reasonable price *or, at the option of either party, as determined by a mutually agreed upon arbitrator or, in the case of an inability to agree, an arbitrator of the court whose decision shall be binding on the parties[.]*

TEX. BUS. & COM. CODE ANN. § 15.50(b)(2) (emphasis added). The trial court declared the physician's noncompete unenforceable because it did not meet the statutory requirements of a reasonable buyout clause. *Sadler Clinic Ass'n, P.A.*, 891 S.W.3d at 893. Although the noncompete in question contained a price, which the trial court agreed was unreasonable, the covenant made no mention of arbitration. *Id* at 897. In reversing the trial court, the court of appeals concluded that even though the noncompete was silent as to arbitration, the parties presumably intended to invoke the statutes arbitration clause—essentially saving the agreement by incorporating an implied alternate buy-out fee mechanism. *Id*. ("We presume that the parties contracted with knowledge of the statute's arbitration provision concerning the price, and that the parties intended the statute's application in determining a reasonable price) (citing *generally Danciger Oil & Ref. Co. of Tex. v. Powell*, 137 Tex. 484, 154 S.W.2d 632, 635 (1941) (An implied covenant "must arise from the presumed intention of the parties as gathered from the instrument as a whole."). Rationalizing its insertion of implied intent, the court of appeals stated:

> Under the statute, if the physician elects to compete despite signing a valid noncompetition covenant with a buyout

> provision, the physician must pay the agreed amount or elect to have a reasonable price determined by an arbitrator. *See* TEX. BUS. & COM. CODE ANN. § 15.50(b)(2). The statute does not give the trial court the role of determining a reasonable price. *See id.* § 15.51(c). An arbitrator is given that role. *See id.* § 15.50(b)(2). We hold the trial court erred in declaring the entire covenant not to compete unenforceable because the court believed the stipulated buyout price was unreasonable. The proper remedy was binding arbitration to determine a reasonable price. Issue one is sustained."

Sadler Clinic Ass'n, P.A., 403 S.W.3d at 898 (internal citations to cases omitted).

b. Intent of effort to resolve potential dispute applied to changed circumstances.

In 2013, the San Antonio Court of Appeals looked to the circumstances of the types and location of wells relative to the parties' interests in order to discern the parties' intent to resolve a question about mineral ownership. *Springer Ranch, Ltd. v. Jones*, 421 S.W.3d 273, 277 (Tex. App.—San Antonio 2013, no pet.). The parties or their immediate predecessors in interest, relatives that all took their interests via inheritance, entered into a contract to resolve a potential dispute about how royalties would be paid to each successor-in-interest under a lease executed by their predecessor in interest.

> The operative language of the agreement provides: [the parties] contract and agree with each of the other parties, that all royalties payable under the above described Oil and Gas Lease from any well or wells on said 8,545.02 acre tract, shall be paid to the owner of the surface estate on which such well or wells are situated, without reference to any production unit on which such well or wells are located . . . .

In 1993, each of the three sets of parties had two vertical wells on their "surface estates," whose "production units" included acreage from an adjoining party's property. Therefore, the parties agreed each party would receive all the royalties from the wells "situated on" their "surface estate" and would forego any claims to the royalties from wells on the adjoining parties' surface estates. *Id* at 280-81. The 1993 agreement sufficed to resolve royalty issues for nearly two decades. But, with the drilling of the first horizontal well that crossed the boundaries of two of the parties' properties, the royalty disputes reignited. *Id* at 277. The court of appeals expressly noted that these surrounding circumstances informed its interpretation of the text of the parties' 1993 agreement concerning royalty payments. *Id* at 281-85. Ultimately, the court concluded:

> [T]the parties have offered competing interpretations of "production unit," which is not a term that carries any standardized oil and gas meaning. Without choosing to apply one definition over the other, we note that this provision is at the heart of the 1993 contract in light of the surrounding circumstances. The contract was made because one of the parties questioned whether he should receive royalties from a well that, although it was on an adjacent party's property, was located in a production unit which included much of its acreage from his property. The contract's recitals and the surrounding circumstances confirm that this dispute and the desire to promptly resume royalty payments was the impetus for the 1993 contract. The objective meaning of this provision was to remove a well's location in a production unit that included acreage from adjoining parties as a basis for one party demanding a portion of the royalties from the well. Therefore, the parties agreed to allocate royalties on the basis of a well's situation on a party's property and not on the basis of a well's location in a production unit comprised of adjoining parties' acreage.

Id at 284–85 (internal references omitted).

c. Use of drafts exchanged during negotiations to inform intent.

In another case out of the San Antonio Court of Appeals, the court relied on drafts used during negotiations to discern the parties' intent. *See PNP Petroleum I, LP v. Taylor*, 438 S.W.3d 723, 736–37 (Tex. App.—San Antonio 2014, pet. denied). In reaching its conclusion, the court in construing a savings clause first noted that "the Savings Clause refers to a "shut-in royalty" payment even independent of its heading, the general legal principle would appear to apply to our construction of the lease." *Id*. However, the court then reviews the parties' negotiations as captured in drafts of the lease in question:

> When the parties' negotiations as reflected in the lease drafts are considered, however, an express reference to "***capable of*** " producing in paying quantities was stricken from the draft as follows:

> If, at the expiration of the primary term—or at any time thereafter, there is located on the leased premises a well or wells ***not*** ~~capable of~~ producing ***oil/*** gas in paying quantities ***or being used as a salt-water injection well(s),*** ~~and such gas is [q]uantities for lack of suitable market maintained in force and effect,~~ Lessee may pay [to extend the lease term.].

> These negotiations deviate from the general law that would engraft the "*capable of"* producing in paying quantities requirement into this lease. Therefore, taking into consideration the parties' negotiations as reflected in the lease drafts and the plain language of the lease, we hold that the parties did not intend to apply the oil and gas industry's generally accepted meaning of the term "shut-in royalty" in the Savings Clause. Quite simply, the parties could not have intended for the law to engraft into their agreement the very language they removed. Because wells were located on the leased premises that were not producing oil/gas in paying quantities at the end of the primary term, we hold PNP's May 12, 2010 payment extended the term of the lease as a matter of law.

Id at 736-37 (internal citations omitted).

d. Presumption Against Partial Intestacy.

Courts generally apply a strong presumption against partial intestacy in the presence of an executed will, especially so when the will contains a residuary clause. *See Estate of Neal*, 02-16-00381-CV, 2018 WL 283780, at *5 (Tex. App.—Fort Worth Jan. 4, 2018, no pet.) (citing *Shriner's Hosp. for Crippled Children of Tex. v. Stahl*, 610 S.W.2d 147, 151 (Tex. 1980); *Dudley v. Jake & Nina Kamin Found.*, No. 01–12–00579–CV, 2014 WL 298270, at *3–4 (Tex. App.–Houston [1st Dist.] Jan. 28, 2014, no pet.) (mem. op.); and *Harrington v. Walker*, 829 S.W.2d 935, 937 (Tex. App.—Fort Worth 1992, writ denied)). In *Estate of Neal*, the Fort Worth Court of Appeals, in part, relied on the circumstances to conclude that, despite this presumption, the decedent's will did not convey real property, resulting in partial intestacy. No. 02-16-00381-CV, 2018 WL 283780, at *6-7 (Jan. 4, 2018, no pet.) (mem. op., op. on reh'g). In overcoming the presumption against partial intestacy, the court noted that the decedent's will demonstrated understanding of the difference between real and personal property and that the will devised only personal property. The court also relied on a lease and reversion agreement entered into by the decedent—that was not incorporated into the decedent's will—requiring, at the end of the lease, the removal or surrender of additions to the lease premises to the lessor, could have informed the decedent's belief that the property in question was personal property. And, that ultimately, it did not matter because if not removable, the property in question, by virtue of the lease agreement, was not owned by the decedent; or, if removeable, was personal property devised under the will. And, that either way, based on the decedent's intent discerned by the court, the Will unambiguously bequeathed tangible and intangible personal property and allowed real property to pass through intestacy. *See id.*

3. Royalty Deeds and the "Historical Assumption"

Disputes over whether a conveyance or reservation reflects a fixed or floating royalty interest are common when a deed contains multiple fractions. *See U.S. Shale Energy II, LLC v. Laborde Properties, L.P.*, 551 S.W.3d 148, 152 (Tex. 2018) (citing *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984); *Brown v. Havard*, 593 S.W.2d 939 (Tex. 1980); *Garrett v. Dils Co.*, 157 Tex. 92, 299 S.W.2d 904 (1957); *Tipps v. Bodine*, 101 S.W.2d 1076 (Tex. Civ. App.—Texarkana 1936, writ ref'd)). These so-called double- and restated-fraction cases frequently involve multiples of 1/8, which was "the usual royalty provided in mineral leases" during the 1920's and 30's when a number of contested deeds were executed—it was not until the 1970's that royalty interests greater than 1/8 became increasingly common. *See Garrett*, 299 S.W.2d at 907 *see also Hysaw v. Dawkins*, 483 S.W.3d 1, 9 n.8 (Tex. 2016). Courts presume that the ubiquity of the 1/8 landowner royalty led many landowners to presume that the landowner royalty would remain 1/8 in perpetuity. *See Hysaw*, 483 S.W.3d at 10; *Luckel*, 819 S.W.2d at 462. In other words, courts presume, in the absence of language to the contrary, that when the parties described their interest as "the 1/8 royalty," they really intended "landowner's royalty," whatever the current percentage. Thus, the Texas Supreme Court, in *U.S. Shale*, reiterated that it recognized that, "[t]hough not inexorably so, the reality is that use of 1/8 (or a multiple of 1/8) in some instruments undoubtedly embodies the parties' expectation that a future lease will provide the typical 1/8th landowners' royalty with no intent to convey a fixed fraction of gross production." *Hysaw*, 483 S.W.3d at 11.

However, harmonizing this seemingly clear directive related to discerning the parties' intent in deeds containing multiple fractions still presents challenges when applied to the actual language of deeds in their entirety. The presence of multiple fractions does not always result in a floating interest. *See,*

e.g., *Hudspeth v. Berry,* No. 2–09–225–CV, 2010 WL 2813408, at *3 (Tex. App.—
Fort Worth July 15, 2010, no pet.) (mem. op.). Like snowflakes, no two deeds are exactly alike, particularly given the courts' apparent increasing willingness to consider "surrounding circumstances." However, one can hardly ignore the trend toward deeming interests "floating," even when an interest is expressly qualified by its product (i.e., "same being equal to" a stated fraction.) As noted by the San Antonio Court of Appeals

> When a deed contains a reservation of "a fraction of one-eighth," "a fraction of one-eighth royalty," "a fraction of the one-eighth royalty," or "a fraction of the usual one-eighth royalty," a party may argue that "one-eighth" should be understood as a stand-in for the landowner's royalty and therefore convey or reserve unto them a floating royalty interest. *E.g., Hudspeth v. Ber ry*, No. 2–09–225–CV, 2010 WL 2813408, at *3 (Tex. App.—Fort Worth July 15, 2010, no pet.) (mem.op.) (distinguishing *Luckel* to conclude the deed in question conveyed a fixed mineral interest and reversing and remanding the trial court's judgment finding a floating interest).

Over the years, courts have deemed particularly-described interests as "fixed" or "floating," somewhat equally, and generally after a complete analysis of the entire document. Beginning with the San Antonio Court of Appeals' opinion in *Graham v. Prochaska*, 429 S.W.3d 650, 658 (Tex. App.—San Antonio 2013, pet. denied), however, the courts seem predisposed to find a "floating" interest, although not without exception. Although this predisposition has not been dubbed a formal "presumption," the courts' analyses in various cases including *Graham* and the Supreme Court's opinions in *Hysaw*, and *U.S. Shale* suggest one. Whatever term one finds appropriate, the practitioner must recognize the growing pervasiveness of this "historical assumption" and the Court's willingness to make for the parties the contract they would have presumably made had they been able to see the future. The change in focus from "what the parties said" to "what the parties would have said" potentially affects the interpretation of a variety of writings, not just royalty deeds.

V. CASE STUDY—THE TEXAS SUPREME COURT'S DECREASING RELIANCE ON *LUCKEL* AND ITS PRINCIPLES AS DEMONSTRATED IN RECENT "FIXED VERSUS FLOATING" ROYALTY JURISPRUDENCE.

Two recent "fixed versus floating" royalty cases highlight the Texas Supreme Court's subtle shift from *Luckel*-driven interpretative principles. In both cases, the Court spills substantial ink opining not on "objective intent," "the plain meaning of words," or the "four corners" rule; instead, the Justices "reaffirm their commitment" to an "holistic" approach, highlighting the utility of surrounding facts and circumstances in divining the parties' intent. *U.S. Shale Energy II, LLC v. Laborde Props., L.P.*, 551 S.W.3d 148 (Tex. 2018); *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016).

The Texas Supreme Court unanimously held that the following language, taken together, described a "floating" 1/3 royalty in *Hysaw v. Dawkins*:

- "each of my [three] children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced from any of said lands, the same being a non-participating royalty interest."
- "the said [named child] shall receive one-third of one-eighth royalty, provided there is no royalty sold or conveyed by me covering the lands so willed to [the child]."
- "should there be any royalty sold during my lifetime then [the three children] shall each receive one-third of the remainder of the unsold royalty."

483 S.W.3d at 5. The Court held that the will devised each child a 1/3 floating royalty, rather than the asserted fixed 1/24. *Id*.

The Court's analysis is key, of course. First, the Court acknowledged the "guiding principle" as "to give effect to the testatrix's intent as expressed in the will's four corners." *Id*. at 4. The testatrix's intent, explained the Court, must be drawn from the will, rather than the will drawn from the intent. *Id*. at 7. Therefore, the Court must focus not on what she intended to write, but the meaning of the words actually used; however, the ultimate touchstone remains "the sense in which the words were used." *Id*. Next, the Court restated its duty to examine the document "holistically" and to "harmonize" any apparent conflicts or inconsistencies in the language. *Id*. at 4. When a term is susceptible to more than one construction, the court may consider the circumstances existing at the will's execution. *Id*. at 8. The Court rejected "bright-line rules," deeming them "arbitrary" and "inimical to an intent-focused inquiry."

Id. at 4. The Court shunned "mechanical" mathematical functions: "We therefore cannot embrace a mechanical approach requiring rote multiplication of double fractions whenever they exist." *Id*. at 4.

In sum, said the Court, the "over-all rule" is that there is no rule:

> Fundamentally, 'there are many rules of law surrounding the construction of a will but there is one overall rule, which is to the effect that there is no set rule that will fit the construction of every will, and therefore each case must stand under its own facts.'

Id. at 8. Like principles of construction apply to mineral conveyances beyond wills. *Id*.

The Court explored the history and consequence of the "historical assumption" that royalty would always be 1/8, explaining that it likely influenced the language chosen to memorialize the quantum of royalty conveyed. *Id*. at 10. The Court emphasized, however, that this assumption will not justify changing clear and unambiguous language that can otherwise be harmonized. *Id*. It cited *Luckel's* admonition that, because the historical assumption was 'equally consistent' with both a fixed and floating interpretation, courts err in favoring one construction over the other on the basis of that assumption. *Id*.

The Court then "harmonized" the multiple fractions, explaining away any inconsistency created by its holding: "[C]onsidering whether inconsistencies might exist and how they may be harmonized is part of the process for determining intent; it is not merely a cross-check method of validating an interpretation derived by segregating key terms and phrases. That is to say, meaning derived without reference to context is not confirmed merely because such a construction would not produce an inconsistency with another provision." *Id*. at 13.

Likewise, in a 5-3 decision, the Court held that "an undivided one-half (1/2) interest in and to the Oil Royalty, Gas Royalty and Royalty in other Minerals in and under or that may be produced or mined . . . the same being equal to one-sixteenth (1/16) of production" described a *floating* 1/2 royalty. *U.S. Shale Energy II, LLC v. Laborde Props., L.P.*, 551 S.W.3d 148 (Tex. 2018). The dissent—relying on the "historical assumption" upon which the majority's decision turned—would have held that "one-half of the royalty, "same being equal to one-sixteenth of production," described a fixed 1/16 royalty.

Again, the Court's analytical process is interesting. The Court noted that neither party alleged ambiguity, although they obviously disagreed as to the deed's meaning. It acknowledged that intent must be divined from harmonizing *all* of the language within the four corners of the document. The Court quoted *Luckel*: "We attempt to harmonize provisions that 'appear contradictory or inconsistent' so as 'to give effect to all of its provisions.'" "We consider the words used in light of 'the facts and circumstances surrounding the [instrument's] execution. *We may consider such circumstances to the extent they 'inform, rather than vary from or contradict, the [instrument's] text*. *U.S. Shale*, 551 S.W.3d at 151 (emphasis supplied). Notably absent from the Court's analysis is perhaps the most basic canon of construction: that the Court determines the intent of the parties from the words expressed in the document. Unlike previous cases, the opinion in *U.S. Shale* does not expressly acknowledge what we've always expected—that the Court assumes that the parties said what they meant and meant what they said.

Turning to the language before it, the Court held as follows:

> We cannot conclude, consistent with our rule of construction mandating that no language be rendered meaningless, that 'the same being equal to one-sixteenth (1/6) somehow modifies the plain meaning of the first clause. *To that end, if a lease agreement provides for any royalty rate other than 1/8 (such as the 1/5 royalty currently In effect), in order for the reserved royalty interest to remain consistent with 1/16 of production, that interest would necessarily deviate from 1/2 , rendering the 1/2 interest clause meaningless.* The only reasonable way to reconcile these clauses is to read the second clause, "the same being equal to one-sixteenth (1/16) of production," to clarify, as an *incidental factual matter*, what a 1/2 interest in the royalty amounted to when the deed was executed.

Id. at 153-154 (emphasis supplied). The Court "harmonized" the clauses by deeming one merely "incidental," just as the San Antonio deemed the qualifying clause in *Graham* a "mistake." Even more interesting was the Court's concluding statement: "The possibility that the parties were operating under the assumption that future royalties would remain 1/8 *will not alter clear and unambiguous language* that can otherwise be harmonized."

The dissent, relying on the same "historical assumption," would have held to the contrary. It believed the Court ignored the deed's plain language: "The deed expressly and unambiguously states the grants' intent to reserve a royalty equal to '1/16 of production'." *Id*. at 160. Nothing in the deed, said the dissent, indicated that an increased royalty going forward would change the royalty fraction. *Id*. Construing the language to reserve a floating 1/2, rather

than the plainly stated 1/16 fraction, "required that the parenthetical phrase be ignored." *Id*. Such was contrary to the Court's mandate to examine the deed as a whole.

VI. CONCLUSION

Hysaw and *U.S. Shale* ably demonstrate the tension between the Court's "reaffirmation" of construction principles, and its increasing focus on facts and circumstances beyond the document to support its interpretation. The shift is unmistakable and cannot be ignored.

Are we on the brink of another *Alford/Luckel*-like sea-change in the Court's interpretive process? The dissenting judges in another recent case seem to think so. Although in a slightly different context—there, the Court considered whether an EPA administrative proceeding was a "suit" for purposes of a 1970 CGL policy. In dissenting from the majority's conclusion that had the parties contemplated an administrative proceeding of the character with which McGinnes was faced, they would have intended it be encompassed in the term "suit," four justices wrote:

> If you do not like your insurance policy, the Supreme Court of Texas can now change it for you. Never mind all those times the Court has said, "we may neither rewrite the parties' contract nor add to its language." Forget that we have repeatedly said 'if an insurance contract uses unambiguous language, we will enforce it as written.' Ignore our former commitment to interpreting insurance policies by relying on the 'ordinary, everyday meaning of its words to the general public. Disregard our prior conviction that a contract's language is the best representation of what the parties mutually intended. Those are just rules of construction, and we have only followed them because they support freedom of contract, promote transactional stability and predictability, and facilitate industry and commerce. As it turns out, those objectives are now provisional, and like a contract, the Court's precedential opinions are just words on paper, so you cannot assume we really meant what we chose to say.

McGinnes Industrial Maintenance Corp. v. Phoenix Ins. Co., 477 S.W.3d 786, 794-96 (Tex. 2015) (Boyd, J., dissenting). The dissent described the majority's analysis in *McGinnis*, and arguably in other recent interpretive cases, "the Court demonstrates that it can and will rewrite your insurance policy if it wants to. *We may look beyond the policy's words to decide what we think you must (or should) have meant*." *Id*. at 796 (emphasis supplied).

As practitioners and advocates, we must recognize that for better or worse, there is change afoot. And we must adjust accordingly.