THE DOUBLE-FRACTION PROBLEM—THE SUPREME COURT OF TEXAS REITERATES TEXANS' TALENT FOR MISCONCEPTION

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The Supreme Court of Texas has changed some important aspects of the analysis of double-fraction (e.g., 1/2 of 1/8) mineral and royalty conveyances and reservations. In the court's recent *Van Dyke v. Navigator Group*, 66 Tex. Sup. Ct. J. 333, 2023 WL 2053175 (Tex. Feb. 17, 2023), decision, the court has abandoned looking for the indicators of estate misconception and the legacy of the 1/8 royalty that had been a component of its analysis of instruments containing double or restated fractions in multiclause deeds and embraced a presumption of estate misconception. The change in this presumption will have far-ranging implications for those who transacted or paid proceeds on the basis of its prior decisions.

Prior to the *Van Dyke* case, Texas courts had moved toward a framework where the courts acknowledged that in instances where there were double fractions that conflicted with subsequent clauses, such conflict may have been the result of the parties mistakenly believing that, when under lease, the landowner was left with a 1/8 mineral interest and not a 1/8 royalty interest, together with a right of reverter under the lease, or mistakenly believing that the royalty in oil and gas leases would always be 1/8. The courts had thankfully taken an approach that emphasized harmonizing the divergent grants within the instruments and moved away from the Two-Grant Doctrine that had dominated such interpretations. That framework suggested by *Graham v. Prochaska*, 429 S.W.3d 650 (Tex. App.—San Antonio 2013, pet. denied), and *U.S. Shale Energy II, LLC v. Laborde Properties, L.P.*, 551 S.W.3d 148 (Tex. 2018), may be summarized as:

1. Evaluate whether the instrument contains multiclause granting or reserving language (e.g., primary granting clause, future lease clause, self-development clause) that appears to be inconsistent or conflicting by referencing 1/8.
2. If language in (1) is present, evaluate whether there is express language clearly indicating distinct estates were being described.
3. If not, or if there is merely a single double fraction in the granting or reservation language, presume that it was the intent of the parties to describe a single estate.
4. Evaluate the language within the four corners of the instrument for any indications that the reference to 1/8 may be a result of a misconception of the nature of the mineral estate when under a 1/8 lease or the result of a misunderstanding that the lease royalty would always be 1/8.
5. In the event there is language indicating such misconception or mistake, including conflicting or inconsistent descriptions of the interest, harmonize the inconsistent or conflicting language in favor of a description that is not limited by such reference to 1/8, or, in the instance of a single double fraction in the granting or reservation language, interpret as a floating interest or that 1/8 is a reference to the entire mineral estate.

6. In the event there is not language indicating such misconception or mistake, or any inconsistent or conflicting descriptions of the interest, follow the plain language and multiply the fractions.

Van Dyke appears to change the evaluation in point 4 above to a presumption that 1/8 is a reference to larger mineral or royalty estate, although it leaves the door open for language in the instrument to overcome that presumption.

The *Van Dyke* case centers on the interpretation of a 1924 deed in which George and Frances Mulkey conveyed their ranch and underlying minerals to G.R. White and G.W. Tom with the following reservation:

> It is understood and agreed that *one-half of one-eighth* of all minerals and mineral rights in said land are reserved in grantors, Geo. H. Mulkey and Frances E. Mulkey, and are not conveyed herein.

The court found the deed to be unambiguous and states it would find the meaning within the four corners of the deed, attempting to find the parties' intent by objectively giving words their fair meaning. Here "one-half of one-eighth" is not further defined within the instrument, and the court would give it its ordinary meaning. The court asks "whether there is some *objective* reason that the double fraction in the deed at issue meant something other than its arithmetical result," with the goal of such inquiry to "determine what a text could reasonably have meant to an informed but disinterested speaker at the time the text was written."

The court points out that one could use ordinary or perhaps even specialized or technical dictionaries from the time of a deed to look for what the ordinary meaning of a word was at the time of its use. To find objective meaning, the court refers to its analysis in *Hysaw v. Dawkins*, 483 S.W.3d 1 (Tex. 2016), of estate misconception theory and the use of 1/8 as the standard royalty rate.

Citing *Hysaw*, the court defines estate misconception as reflecting "the prevalent but, as it turns out, mistaken belief that, in entering into an oil and gas lease, a lessor retained only a 1/8 interest in the minerals rather than the entire mineral estate in fee simple determinable with the possibility of reverter of the entire estate." The court emphasizes the rampant prevalence of the misconception "so much so that courts have taken judicial notice of this widespread phenomenon." With respect to the special meaning that 1/8 gained by use as the standard royalty interest, the court asserts that the prevalence of 1/8 as a standard royalty led to pervasive misunderstanding that a lease royalty would always be 1/8.

Finding no exceptional language indicating it was the parties' intent to merely multiply, the court relied on the presumptions it found in favor of applying estate misconception theory to find that the reservation of "one-half of one-eighth of all minerals" was a reservation of 1/2 of the entire mineral estate. After *Van Dyke* there now appears to be a three-part test for analyzing double fractions that are not a part of a multiclause description of interests:

1. Presume a reference to 1/8 is a reference to the entire mineral estate.
2. Look for evidence in the instrument that would rebut the presumption in (1).
3. If there is evidence that places doubt on the presumption but is insufficient to lead a reasonable reader to understand mere multiplication is intended, that ambiguity must be resolved by a factfinder.

The court's analysis does not explicitly overrule certain double-fraction cases in the court's past that appear to conflict with the outcome in *Van Dyke*, and the court's exploration of how a "1/8" term of art developed does not delve into how mineral specialists might have understood that term of art in the context of the court's prior decisions. In *Van Dyke* the court wrote that "[w]e are, frankly, not aware of double fractions including 1/8 that were aimed at simple multiplication rather than referencing the mineral estate as a whole. But that does not mean it could not have happened."

As an example of a conflicting disposition, on October 15, 1941, R.W. Kelley and wife Nora conveyed to Alice Williams a tract of land in Martin County, Texas, retaining a "*one-half of the one-eighth* of all of the oil, gas, and other minerals in and under said land," thereafter stripping out all mineral rights except the right to receive royalty. Later, W.E. Magee, successor to Alice Williams and all mineral rights except the Kelleys' reserved royalty, entered into an oil and gas lease with Erle Payne. Magee, together with R.W. Kelley, then entered into an "Agreement as to Royalty Interest" dated December 18, 1943, which recites that Magee's lessee, Erle Payne, desired that the "owners of the minerals . . . clarify and confirm their respective interests."

In that Agreement as to Royalty Interest, Magee and Kelley agreed to the calculation of the reserved royalty as follows, leaving Kelley with a fixed 1/16 royalty interest:

> Magee owns all of the oil and gas and other minerals . . . save and except one-half of all of the royalties to be paid under any oil and gas and other mineral lease which has been or may hereafter be executed . . . , wherein the leases provide for a one-eighth royalty to the owners of the minerals, *but if the lease provides for other than a one-eighth royalty, then in that event, W.E. Magee is entitled to all of the royalties except one-sixteenth* of the oil and gas and other minerals produced and saved . . . , and that R.W. Kelley owns a one-sixteenth . . . .

Kelley must be kicking himself that he was not under the prevalent misunderstanding that the lease royalty would always be 1/8. Erle Payne was sufficiently cautious given the court's guidance on double fractions in 1943 to request clarity from his payees. Before thinking that Magee clearly pulled one over on Kelley, it is worth looking at the state of the law when Magee and Kelley transacted to see what Kelley might have been thinking, and whether it is reasonable to think that estate misconception and the legacy of the 1/8 royalty is as prevalent as the court suggests.

Throughout its analysis in *Van Dyke* the court characterizes the use of 1/8 to refer to the entire mineral estate as a "term of art." That might surprise Kelley given the imprecision in the use of the term throughout the county records of Texas, as evidenced by the number of fixed versus floating royalty disputes that Texas courts have seen through the years, not to mention his own subjective understanding of the term as evidenced by the Agreement as to Royalty Interest. A term of art does not need always be used correctly, and perhaps Kelley was just wrong in his understanding. But, if Kelley watched the courts, he might have felt secure in his understanding when *Richardson v. Hart*, 185 S.W.2d 563 (Tex. 1945), was decided just a couple of years after Kelley entered into the Agreement as to Royalty Interest, in which "an undivided 1/16th of 1/8th interest in and to all of the oil, gas and other minerals in and under, and that may be produced" was interpreted by the court to be a 1/128 mineral interest. That is, "of 1/8" was not found by the court to be a reference to the entire mineral estate. How a "of 1/8" term of art developed to mean

the entire mineral estate after 1945 when the ultimate arbiter of the meaning of that term of art, the court, appeared to take the conflicting approach in *Richardson* is not addressed by the court.

How to apply the analysis of *Van Dyke* to certain other past cases is not apparent in the court's analysis. For instance, in *Allen v. Creighton*, 131 S.W.2d 47 (Tex. Civ. App—Beaumont 1939, writ ref'd), some granting language referred to an interest as a 1/8 of 1/8 royalty, while subsequent clauses referred to the interest as a 1/8 of 1/8 of the 1/8 royalty. The Beaumont court found this to be a 1/64 royalty. Although this outcome should not be changed by *Van Dyke*, *Allen* illustrates that sometimes in 1939, a 1/8 was just a 1/8, and sometimes you have to multiply double fractions.

The court may be right that its new preference for reading out "1/8" from double-fraction conveyances will reduce disputes, but let us pause to give our sympathy to Kelley and those parties who transacted on the basis of the court's prior decisions on double-fraction problems over the last 80 years, and others who were party to or relied on the cases that suggested a fixed royalty may be evident by the plain language of a deed or instrument. If rehearing in *Van Dyke* is granted, some guidance on how terms of art are made, even while there is conflicting guidance from Texas courts, would be helpful.