Probate and Trusts

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THIS Article reviews case law developments in the areas of wills, nontestamentary transfers, intestate succession, estate administration, guardianships, and trusts. The Survey period covers decisions published between October 1, 1997, and September 30, 1998.

I. WILLS

A. WILL CONTESTS

In Cobb v. Justice,1 the court found that evidence existed that the testator signed his will under undue influence.2 The testator, who could neither read nor write, relied for many years on his late wife's niece to handle his financial affairs. The testator executed a will that benefited his daughter and his wife's niece and later named his wife's niece as beneficiary of his life insurance policies. The testator developed terminal cancer and his doctor put him on morphine for pain approximately three days before his death. The testator also required oxygen for some days prior to his death. Two days before the testator's death, one of his nieces and some of her family and friends arrived at his house. This niece inquired about the contents of the testator's will, which she learned benefited the wife's niece, and she and her friends immediately began attempting to contact an attorney about changing the will. One of the testator's friends came by that afternoon and advised the niece that the testator had a friend who was an attorney and only then did the testator tell his niece that he had an attorney. The niece called the attorney and made an appointment for the testator to meet with the attorney that afternoon. The niece drove the testator to the attorney's office, but she did not take his oxygen tank. The testator changed his will to leave the bulk of his estate to his niece. Next the group took the testator to his insurance agent's office to change the beneficiary designation on his life insurance policies.3 The group then took the testator to the bank to close his account and withdraw all of his funds, only to learn that he no longer had the account. The testator was away from his oxygen tank approximately four hours, and his breathing difficulties became worse after the ordeal. The next

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1. 954 S.W.2d 162 (Tex. App.—Waco 1997, pet. denied).
2. See id. at 166.
3. For a discussion of issues related to the change in the beneficiary designations, see infra notes 30-33 and accompanying text.
day the testator went to the hospital and died early the next morning. His niece offered the new will for probate the day following the testator's death. The jury found that the niece exerted undue influence over the testator, but the trial court entered judgment n.o.v. in favor of the niece. The appeals court found that some evidence existed demonstrating that the niece exerted influence over the testator,\(^4\) that the testator's illness could have weakened him sufficiently to allow his niece to overpower or subvert his mind,\(^5\) and that the fact that the testator, so shortly before his death and while deprived of oxygen and in the company of a large group of people, changed the financial plans and arrangements that he had long had in place, indicated that undue influence existed.\(^6\)

In *Horton v. Horton*,\(^7\) the court found no evidence of lack of testamentary capacity and no evidence of undue influence in the execution of the will.\(^8\) The testator married his second wife in 1975, and he subsequently executed four different wills. Less than a month before his death and during his last illness, the testator executed his last will, which was a joint and contractual will with his wife, and provided that all of his property would pass to his wife if she survived him. The trial court admitted the will to probate and appointed the wife as independent executor. More than seven months later the testator's sons from his first marriage filed their first motion objecting to the will. Some sixteen months after the court admitted the will to probate the sons filed a will contest alleging undue influence and lack of testamentary capacity. The evidence presented to the jury consisted of the drafting attorney's testimony about why he suggested that the testator make a new will, facts about the execution the will provided by the witnesses, and testimony about the testator's state of mind around the time that he made the will. Several witnesses testified that the testator was strong-minded and did as he chose, not as others wished for him to do. The attorney read the will to the testator before the execution, and the testator asked questions about the will. Everyone present asserted that the testator was not under the influence of pain medication at the time of execution and that he appeared to understand the terms of the will. The appeals court examined all of the evidence presented to the jury and concluded that strong evidence existed that the testator had testamentary capacity on the date he signed the will and that no evidence existed that he was hallucinating or incapac-

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4. See *Cobb*, 954 S.W.2d at 162.
5. See *id.* The testator's doctor testified that the dosage of morphine could cause confusion, and other testimony suggested that the testator was uncomfortable around large groups of people.
6. See *id.* The court cited the rule noted in *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963) for determining whether undue influence existed and found that the evidence supported the jury's finding that influence existed, that the influence overpowered or subverted the testator's mind, and that the testator would not have changed his will except for the undue influence. See also *Cobb*, 954 S.W.2d at 165.
7. 965 S.W.2d 78 (Tex. App.—Fort Worth 1998, no pet.).
8. See *id.* at 86-88.
tated on that day.9 The court found that the testator's wife did not recommend the new will, but rather that the attorney made the recommendation.10 The court also found that thirteen witnesses testified that the testator would not sign anything that he did not wish to sign, which provided strong evidence that the testator did not sign the will under undue influence.11

In Brandes v. Rice Trust, Inc.,12 the court found no issue of material fact supporting a claim for tortious interference with inheritance rights and intentional infliction of emotional distress.13 The testator, a resident of New Mexico, gave Rice University municipal bonds worth approximately $4 million shortly before his death. The testator's will left his sister his tangible personal property and left the residue of his estate to Rice University. A New Mexico court admitted the will to probate, but the sister contested the will in New Mexico, alleging that Rice exerted undue influence over the testator. The New Mexico court entered summary judgment against the sister, who then filed suit against Rice for tortious interference with inheritance rights and intentional infliction of emotional distress in a Texas court. Rice filed a motion for summary judgment, which the trial court granted.14 In support of its motion for summary judgment, Rice submitted affidavits from the testator's accountant and from two Rice employees, as well as copies of the sister's will contest, the New Mexico court's summary judgment against the sister, and the sister's answers to interrogatories, which stated that she had not alleged in her will contest that Rice intentionally prevented the testator from benefiting his sister and her family under his will. The sister and her family alleged that the testator was not competent on the day of his death, when he transferred the bonds to Rice, and that Rice's actions deprived them of an inheritance they would otherwise have received. They offered no evidence other than their allegations. The appeals court found that the affidavits presented by Rice, with the copy of the testator's will attached, established that the testator approached Rice about making the gift of the bonds.15 The court noted that the will left the sister only the testator's tangible personal property, so she had no interest in the bonds, which were to pass as part of the residue to Rice, thus Rice proved that the sister and her children had no expectancy to receive the bonds and no inheritance rights.16 Since the sister and her children offered no

9. See id. at 86. The court held that the trial court correctly granted a judgment n.o.v. based upon the evidence.
10. See id. at 87. The court also found that the testator's decision to leave his estate to his wife of so many years was not an unnatural disposition. See id. at 88.
11. See id. at 88. The court found that the trial court erred in denying the wife's motion for judgment n.o.v. since no evidence existed to support the jury's finding of undue influence.
13. See id. at 149-50.
14. See id. at 146.
15. See id. at 149. The court also found that the New Mexico court had already adjudicated the issue of the testator's capacity.
16. See id.
evidence to controvert Rice's affidavits, the court found that the trial court properly granted summary judgment for Rice on the issue of tortious interference with inheritance rights. The court also found that the trial court properly granted summary judgment for Rice on the issue of intentional infliction of emotional distress since the representatives of Rice present at the time of the gift were present at the testator's request for the purpose of receiving his gift to Rice.

B. WILL CONSTRUCTION

In *May v. Walter*, the court held that a certificate of deposit is not tangible personal property. The testator made a specific bequest of a small safe and the tangible personal property contained within it to one of his nieces, with the residue of his estate passing to his three nieces. One of the items contained within the safe was a $100,000 certificate of deposit issued to the testator. The niece who received the bequest of the safe filed a declaratory judgment action, requesting the court to find that she should receive the certificate of deposit since it was tangible personal property located within the safe. The other two nieces sought a declaratory judgment that the certificate of deposit was part of the residuary estate. The trial court determined that the certificate of deposit passed to the niece who received the specific bequest of the safe, and the other nieces appealed. On appeal, the court held that the will was unambiguous and stated it should determine the testator's intent from the plain meaning of the words as used in the will. The court found that a certificate of deposit is a chose in action, which is intangible property. The court held that the certificate of deposit was a part of the testator's residuary estate, passing to the three nieces under the residuary clause of the will.

C. DISCLAIMERS

In *Parks v. Parker*, the court held that the trial court improperly refused to modify a turnover order relating to property that the debtor had

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17. See id. at 149-50.
18. See id. at 150. The family offered no evidence that the Rice officials acted improperly, so the court found that summary judgment was proper. See id.
20. See id. at 142.
21. See id. at 141.
22. See id. at 142. The court found that a certificate of deposit is in the nature of a promissory note, which is a chose in action, and which is intangible property. See id. The court also found that TEX. TAX CODE ANN. § 1.04(6) (Vernon 1992) classifies a certificate of deposit as intangible personal property, which bolstered the court's analysis of the nature of a certificate of deposit. See id.
23. See id. The court also held that the trial court did not err in awarding attorney's fees to the niece who sought to establish that the certificate of deposit was tangible personal property. See id.
24. 957 S.W.2d 666 (Tex. App.—Austin 1997, no pet.).
disclaimed.²⁵ The debtor’s ex-wife obtained a judgment against him early in 1996, prior to the death of the debtor’s mother. Approximately a year after the judgment, and after the debtor had qualified as executor of his mother’s will, the ex-wife requested the court to issue a turnover order against the debtor individually and as independent executor, seeking the debtor’s one-half interest in the estate. The court entered the order requiring the debtor, individually and as independent executor, to turn over his interest in some of the estate’s assets. Within nine months of his mother’s death, but after he received notice of the turnover order, the debtor executed and filed a partial disclaimer. The debtor testified that he never received any benefit from the estate’s assets, nor did he ever, in his individual capacity, take possession of the assets, but the trial court refused to modify the turnover order. The appeals court found that the debtor had followed the provisions of Texas Probate Code section 37A²⁶ and that the disclaimer was effective as of the date of the mother’s death.²⁷

II. NONTESTAMENTARY TRANSFERS

In Cobb v. Justice,²⁸ the court held that a person who was formerly a beneficiary of a life insurance policy may contest the change of the beneficiary on the basis of undue influence.²⁹ Less than two days before the decedent’s death, his niece arrived with several of her friends and family members and began questioning the decedent about his will and the beneficiaries of his life insurance policies. The decedent was taking morphine for pain and required oxygen from a tank. When the niece determined that the decedent had named his wife’s niece, who had taken care of him for years, as the beneficiary of his life insurance policies and as residual beneficiary of his will, the niece took the decedent to an attorney to change his will and to his life insurance agent to execute new beneficiary designations naming the niece as his beneficiary. The niece did not take the decedent’s oxygen supply with them, and she kept him out for about four hours. The next day the decedent lapsed into a coma and died shortly thereafter. The jury heard the evidence and determined that the niece secured the change in beneficiary by undue influence, but the trial court granted a judgment n.o.v. The appeals court found that evidence supported the jury’s finding of undue influence.³⁰ The court then ex-

²⁵ See id. at 670. The court further held that the trial court improperly applied the turnover order against the debtor in his capacity as independent executor of the decedent’s will, when the debt was personal to the debtor and the judgment was only against the debtor individually. See id. at 668-69.
²⁷ See Parks, 957 S.W.2d at 670. The court rejected the ex-wife’s argument that the debtor could not disclaim the assets after the date of the turnover order. See id. at 669.
²⁸ 954 S.W.2d 162 (Tex. App.—Waco 1997, pet. denied). See supra notes 1-6 and accompanying text for a discussion of undue influence in connection with the execution of the will.
²⁹ See id. at 168.
³⁰ See id. at 167.
amined the issue of whether the former beneficiary could contest the change in beneficiary designation based on undue influence and held that the former beneficiary had standing to contest the change in beneficiary based on undue influence.31

In *Allen v. Wachtendorf*,32 the court examined a signature card for a certificate of deposit and determined that the card created a joint tenancy with rights of survivorship.33 The decedent held a certificate of deposit jointly with one of her sons, whom she also named as the Independent Executor of her will. Both the decedent and her son signed the signature card for the certificate of deposit, and the decedent initialed the box designating that the account had survivorship rights. The signature card was a two-page document, which provided for signature and the selection of the type of account on the first page and which explained about the different types of accounts and survivorship rights on the second page. The bank customarily retained only the first page in its files and gave the customers the second page. The court admitted the decedent’s will to probate and appointed the son who also co-held the account as independent executor. On the same day, the decedent’s other son and step-daughter filed a petition for declaratory judgment requesting the court to find that the certificate of deposit was part of the decedent’s probate estate. The executor also filed a motion for summary judgment, contending that the evidence proved that the certificate of deposit was held as a joint tenancy with rights of survivorship and was not a part of the decedent’s probate estate. The trial court found that the account did not have survivorship rights. The appeals court examined both pages of the signature card and concluded that the decedent had the definition of survivorship rights available to her and that she must have understood her actions in initialing the block indicating that the certificate would have survivorship rights.34 The court found that Probate Code section 439A applied to signature card for the certificate of deposit and held that the language found on both pages of the signature card, taken together, was sufficient to cre-

31. See id. at 167-68. The court found only one Texas decision, *Goeke v. Baumgart*, 92 S.W.2d 1047, 1051 (Tex. Civ. App.—Beaumont 1936, no writ), that held that the former beneficiary could not contest the change, but found precedent that supported the former beneficiary’s standing to sue. See, e.g., *Westbrook v. Adams*, 17 S.W.2d 116, 120 (Tex. Civ. App.—Fort Worth 1929), aff’d on other grounds sub nom *Adams v. Bankers’ Life Co.*, 92 S.W.2d 182 (Tex. Comm’n App. 1931, holding approved) (former beneficiary had standing to contest change in beneficiary based on undue influence); *Manahan v. Meyer*, 862 S.W.2d 130, 138-39 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (former beneficiaries may assert claim of undue influence in change of beneficiary designation); *Cubine v. Morgan*, 288 S.W.2d 537, 540 (Tex. Civ. App.—Amarillo 1956, writ ref’d n.r.e.) (insured’s family had standing to sue named beneficiary alleging undue influence). The court also found that the Texas Supreme Court had held that a former beneficiary may contest a change based on incompetency in *Tomlinson v. Jones*, 677 S.W.2d 490, 492-93 (Tex. 1984).
32. 962 S.W.2d 279 (Tex. App.—Corpus Christi 1998, pet. denied).
33. See id. at 284.
34. See id. at 282.
ate a joint tenancy with rights of survivorship.\textsuperscript{35}

\section*{III. INTESTATE SUCCESSION}

In \textit{Spiers v. Maples},\textsuperscript{36} the court held that sufficient evidence existed to prove that the decedent, although she had no children of her own, adopted a child by estoppel, who became the decedent's sole heir at law.\textsuperscript{37} The decedent raised several children and treated them as her own children, although she never formally adopted any of the children. Following the decedent's death, her siblings filed an application for determination of heirship, alleging that the decedent was unmarried and had no children and that her only heirs were her siblings. One of the children the decedent raised also filed an application for heirship, alleging that two of the children the decedent raised were her natural or adopted children and were her only heirs. The trial court found that one of the children the decedent raised was the decedent's daughter by operation of adoption by estoppel and was the decedent's sole heir. The appeals court first determined that the pleadings, which alleged only that the two children were the decedent's natural or adopted children, covered adoption by estoppel.\textsuperscript{38} The court then examined the evidence presented at the trial and found that the evidence was both legally and factually sufficient to find adoption by estoppel.\textsuperscript{39} The court held that to prove adoption by estoppel the child must establish that an agreement to adopt existed and that the child performed under the agreement.\textsuperscript{40}

\textsuperscript{35} See id. at 283. The court held that TEX. PROB. CODE ANN. § 439A applied to documents executed on or after September 1, 1993, and found that the decedent executed her signature card on January 20, 1995. See id.

\textsuperscript{36} 970 S.W.2d 166 (Tex. App.—Fort Worth 1998, no pet. h.).

\textsuperscript{37} See id. at 172.

\textsuperscript{38} See id. at 168-69. The trial court had stated on the record that all parties understood that adoption by estoppel was the issue before the court and that it would allow a liberal trial amendment. The decedent's siblings did not specially except to the pleadings and the appeals court concluded, therefore, that trial court could construe the pleadings to include adoption by estoppel. See id. at 169.

\textsuperscript{39} See id. at 169-72.

\textsuperscript{40} See id. at 171. The court cited Cavanaugh v. Davis, 235 S.W.2d 972, 974 (Tex. 1951), for the proposition that acts of the parties can establish the agreement to adopt. See id. The court, citing Luna v. Estate of Rodriguez, 906 S.W.2d 576, 580 (Tex. App.—Austin 1995, no writ), held that the child may perform under the agreement through the natural love and affection that the child would show to her adoptive parent, even though the child was unaware of the agreement. See id. The court noted that the child only learned that the decedent was not her natural mother when she obtained her birth certificate in order to get married. The child testified that she and the decedent acted as a child and parent both before and after she discovered the identity of her natural mother. The child also introduced documents on which the decedent listed her as the decedent's daughter. The court thus held that the child presented legally and factually sufficient evidence to establish that the decedent adopted her by estoppel. See id.
IV. ESTATE ADMINISTRATION

A. Executors and Administrators

In *Wittner v. Scanlan*, the court held that an order granting attorneys' fees is final for purposes of appeal, even though administration of the estate continued. The court appointed the administrator of an estate in 1980. The administrator did not file the first accounting for the estate until 1994. As a part of the accounting, the administrator requested authorization for payment of attorneys' fees and costs. The court entered an order granting attorneys' fees and costs significantly less than those requested by the administrator, and the administrator appealed. The issue before the appeals court was whether it had jurisdiction to hear an appeal on the amount of attorneys' fees and costs granted by the trial court in an ongoing estate administration. The trial court argued that its order was interlocutory. The appeals court held that the order awarding attorneys' fees was final and appealable.

In *Estate of Vigen*, the court held that the trial court improperly failed to admit a will to probate and to terminate a temporary administration. Approximately two months after the testator's death, the testator's niece received letters of temporary administration. About a month later, a woman who had cared for the testator during the last years of his life filed a will executed about four years before the testator's death and applied for letters testamentary. The trial court determined that all necessary proof for probate of the will had been made, but the caretaker, who the will named as executor, was unsuitable to serve due to a conflict of interest between herself and the estate. The trial court did not admit the will to probate and ordered continuation of the temporary administration with the niece serving as temporary administrator. The appeals court first determined that the trial court's denial of letters testamentary to the caretaker was a final order subject to appeal, then the appeals court found that the trial court should have granted letters of administration with will annexed once it heard the proof necessary to probate the will.

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41. 959 S.W.2d 640 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
42. See id. at 642.
43. See id. The court cited Huston v. Fed. Deposit Ins. Corp., 800 S.W.2d 845, 848 (Tex. 1990), for the proposition that a probate order that finally adjudicates a substantial right is a final order. See id. The court also noted that the court in *Bergeron v. Session*, 554 S.W.2d 771, 775 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.) had held that an order approving fees to an accountant and a receiver was a final, appealable order. See id. The court concluded that unfairness would result in delaying the appeal of the award of attorney's fees until the close of administration. See id.
44. 970 S.W.2d 597 (Tex. App.—Corpus Christi 1998, no pet.).
45. See id. at 602.
46. See id. at 598 (citing TEX. PROF. CODE ANN. § 78(e) (Vernon Supp. 1998) ("[a] person whom the court finds unsuitable" is disqualified as serving as executor or administrator)).
47. See id. at 599.
48. See id. The court found that TEX. PROF. CODE ANN. § 83(c) (Vernon 1980) required the court to appoint an administrator with will annexed. See id. The pendency of an appeal did not change the court's responsibility to appoint the administrator with will.
court determined that the trial court did not abuse its discretion when it found that the caretaker had conflicts of interest with the estate and should not serve as administrator.\textsuperscript{49}

In \emph{Dean v. Getz},\textsuperscript{50} the court held that the trial court did not abuse its discretion when it declined to name one of the testator’s daughters as successor independent executor when the daughter had a conflict of interest between herself and the estate.\textsuperscript{51} The testator’s will left some of his real property outright to his spouse and some in a life estate, but some ambiguity existed about which property was subject to the outright gift. The will named the wife as independent executor, followed by the decedent’s only son. The wife declined to serve, and later became the ward in a guardianship. The court appointed the son as independent executor, but he later resigned due to the potential litigation between his mother, the estate, and the children over the title to the real property. The will provided that the testator’s oldest living child had next preference to become successor executor, and the oldest daughter applied to be appointed. The testator’s other two daughters applied to have an independent third party appointed as administrator. The court found that the testator’s children were estranged, that the personal representative of the testator’s estate might have to file suit against the children to clear title to the real property, that all of the testator’s children had a pecuniary interest in the estate, and that the personal representative would determine the amount of the pecuniary interest of each child.\textsuperscript{52} The court concluded that the oldest daughter was disqualified to serve as personal representative under Probate Code section 78(e).\textsuperscript{53} The daughter appealed, alleging that she had no conflict of interest and that the trial court should have appointed her under the terms of the will. The appeals court held that the trial court did not abuse its discretion in concluding that the daughter was unsuitable because of a conflict of interest.\textsuperscript{54}

\textsuperscript{49} See id. at 600. The court found that the evidence that the caretaker frequently wrote checks for the testator’s signature, that she wrote a check payable to herself on the date of the testator’s death, which the testator signed, and that the testator was elderly and dying at the time he signed the check all provided the trial court with adequate reasons for finding the caretaker unsuitable for serving as administrator of the estate. See id.

\textsuperscript{50} 970 S.W.2d 629 (Tex. App.—Tyler 1998, no pet. h.).

\textsuperscript{51} See id. at 635.

\textsuperscript{52} See id. at 632.

\textsuperscript{53} See id. (citing \textit{TEX. PROB. CODE ANN.} § 78(e) (Vernon Supp. 1998)).

\textsuperscript{54} See id. at 635. The court noted at least three reasons that supported the trial court’s conclusion: first, the daughter, as personal representative likely would have to sue her mother, her siblings, and herself to clear title to the property; second, since the personal representative had the power to select the assets allocated to the marital deduction gift, the daughter’s vested remainder interest in the estate would create an adverse interest; finally, the court noted that family discord had already led to litigation between family members over the estate and that more was likely to ensue if the court appointed the daughter as personal representative. See id. at 634-35.
B. STANDING, PARTIES, AND JURISDICTION

In Shepherd v. Ledford, the court held that a surviving common law spouse had standing to pursue a survival action in connection with the death of her husband, despite the statutory requirement that only a personal representative of an estate may pursue a survival action on behalf of the estate. In Nguyen v. Morales, the court held that an estate is not a claimant under the Texas Crime Victim's Compensation Act and cannot receive compensation. In Querner v. Rindfuss, the court held that claims that arise against third parties during an estate administration pass to the beneficiaries upon the final distribution of the estate. In Richardson v. Lake, the court held that when a plaintiff named an estate as the defendant, but requested that an administrator be appointed to receive service, the plaintiff's actions tolled the statute of limitations and allowed amendment of the pleadings to name the administrator to relate back to the time the plaintiff filed his original pleadings.

In Goodman v. Summit at West Rim, Ltd., the court held that the statutory probate court lost jurisdiction over claims against third party

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55. 962 S.W.2d 28 (Tex. 1998).
56. See id. at 35. The court noted that the decedent's family, including his common law wife, had entered into a family settlement agreement as an alternative to probate and that no necessity for administration existed for the payment of debts. See id. at 33.
57. 962 S.W.2d 93 (Tex. App.-Houston [1st Dist.] 1997, no pet.).
58. TEX. CODE CRIM. PROC. ANN. art 56.31 (Vernon Supp. 1998).
59. See Nguyen, 962 S.W.2d at 95. The court based its opinion on the definition of "estate," and on other statutes that bar recovery for estates. See also Act of May 4, 1993, 73 Leg., R.S., ch. 268, § 6, 1993 Tex. Gen Laws 954 (amended 1995) (Wrongful Death Act); Act of May 4, 1993, 73rd Leg., R.S. ch. 268, § 6, 1993 Tex. Gen. Laws 954 (amended 1995) (Workers' Compensation Act). The court also held that naming the decedent's estate rather than the individual heirs as the plaintiff did not qualify as misjoinder of parties. See Nguyen, 962 S.W.2d at 95.
60. 966 S.W.2d 661 (Tex. App.-San Antonio 1998, pet. denied).
61. See id. at 666-67. The executor and her attorney allegedly acted to the detriment of the beneficiaries during the administration of the estate. The probate court entered a judgment against the executor for breach of duty and fraud, among other things. When the probate court later ordered distribution of the estate, the court distributed equally any claims the estate might have had against the attorney to the testator's children. The children later sued the attorney, but the attorney sought and obtained summary judgment. The appeal involved several issues, including attorney-client privilege between the attorney and the former executor, res judicata and collateral estoppel. The appeals court held that the testator's children had standing to sue since they received the estate's claims against the attorney in the distribution of the estate. See id.
62. 966 S.W.2d 681 (Tex. App.—San Antonio 1998, no pet.).
63. See id. at 683. The plaintiff noted in his pleadings that no administration of the decedent's estate had been undertaken and that the decedent's will had not been admitted to probate. The plaintiff filed his original pleadings forty-five days prior to the statute of limitations, and he requested appointment of a temporary administrator for purposes of service of citation. Shortly after the limitations period had expired, a probate court appointed an administrator in the decedent's estate who received service two days later. The administrator sought to dismiss the case because the estate was not a proper party. The plaintiff amended the pleadings to name the administrator as the defendant, but the court entered summary judgment for the administrator. On appeal the court found that the plaintiff clearly showed his intent to sue the proper party, rather than the estate, so the statute was tolled. See id.
64. 952 S.W.2d 930 (Tex. App.—Austin 1997, no pet.).
defendants once the probate court had dismissed all claims by and against the executor of the estate. The executor of an estate filed an action to clear title to property she claimed was part of the estate; the decedent had entered into a contract to sell the property prior to her death, but the purchaser had not accomplished all of the obligations he had to meet prior to the purchase. The purchaser counter-sued the executor and another owner of the property for specific performance, as well as filing a third-party action against the City of Austin for not issuing the approvals necessary for him to complete the purchase contract. The probate court exercised jurisdiction over all of the actions, including the third party claims according to its authority derived under Texas Probate Code section § 5A(d). The probate court later dismissed all claims by and against the estate and, after motion by the third-party defendants, determined that it had no remaining jurisdiction over the third-party claims and dismissed them. The probate court also purported to transfer the third-party claims to district court. The appeals court held that the probate court properly dismissed the third party claims because it lost subject-matter jurisdiction over those claims once all claims by and against the estate were dismissed. The court also held that the probate court improperly transferred the case to district court since the probate court had no statutory authority to transfer the matter and since the probate court retained no authority over the matter once it dismissed the claims for lack of jurisdiction.

C. Claims and Allowances

In Geary v. Texas Commerce Bank, the Texas Supreme Court held that federal res judicata applied to the estate of a bankrupt's co-obligor when the bankruptcy reorganization plan specifically included the personal interests of the co-obligor. An individual and a corporation, of which the individual was the sole shareholder, executed a promissory note in 1988. The individual died in 1991, and the probate court appointed an independent executor in his estate. The corporation filed for bankruptcy the next year and obtained a confirmed reorganization plan. The holder of the note received a partial payment under the plan and agreed not to pursue future claims against the corporation. The plan stated that it settled all obligations that the corporation had, including all obligations that the corporation and any individual had, to any entity. The holder of the note made no objection to the reorganization plan. The
holder of the note then sued the executor for the balance of the note. The trial court granted summary judgment for the executor on four bases, including the basis that the reorganization plan terminated the decedent's personal obligation under the note and that the plan was res judicata on the holder's claim against the estate. The court of appeals reversed the trial court on all four bases. The supreme court held that the court of appeals erred when it held that the executor of the shareholder's estate was not a party to the bankruptcy proceeding. The supreme court reversed the court of appeals and rendered judgment that the holder of the note take nothing.

In Walton v. First National Bank of Trenton, the court held that a probate court's approval of a secured claim was a final order that the administrator could not attack collaterally and that the secured creditor had a common law right to file a trespass to try title action against the administrator without following probate claims procedures. The decedent executed a promissory note secured by a vendor's lien and deed of trust on some real property. Following his death, the administrator of the decedent's estate gave notice of the administration to the holder of the note and the holder then presented an authenticated secured claim to the administrator and filed a copy with the probate clerk. The administrator took no action on the claim, so the probate court allowed the claim a month after filing. The probate court later transferred all contested probate matters to the district court. The holder refiled its authenticated, secured claim with the district court, and the administrator learned that the probate court had allowed the claim. The administrator filed a notice of rejection of the claim with the district court. The holder filed suit on its original claim, which the administrator rejected. The holder next filed a trespass to try title action based on the vendor's lien and the administrator's default in payment. The administrator sought to have the probate court's approval of the claim set aside by statutory and equitable bills of review.

The district court finally consolidated all actions and pleadings between the estate and the holder into one action, then entered judgment in favor of the holder and ordered the real property returned to the holder. The court also denied the administrator's requests for statutory and equitable bills of review. The appeals court first examined the issue of whether the

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73. See id. at 827.
75. See Geary, 967 S.W.2d at 837. The court found that the executor represented the deceased co-obligor's interests, pursuant to the Texas Probate Code section 37, and that the reorganization plan confirmed by the bankruptcy court addressed the co-obligor's interests, so res judicata applied. See id. at 839.
76. See id. at 840.
77. 956 S.W.2d 647 (Tex. App.—Texarkana 1997, pet. denied).
78. See id. at 650-53.
79. See id. at 647.
probate court's approval of the claim was void and determined that the order approving the claim was a final order that the administrator could have appealed, but which the administrator could not attack in a collateral proceeding. The court held that, since the holder of the note also had an express vendor's lien against the real property, the holder retained superior title to the real property not subject to the administration of the estate. The court found that because the holder of the note held a vendor's lien, the holder had three options of remedies, which are suit for payment, rescission of the contract and taking possession of the real property, or suit to recover possession and title. The court rejected the administrator's argument that the holder's only remedy was pursuing its claim under the claims procedures set forth in the Probate Code because the claim was not a claim for money, but was instead a claim for possession and title. Finally, the court held that the limitations period after rejection of the secured creditor's claim did not apply since the creditor did not have to submit a claim to the administrator before proceeding to recover the real property.

In Riley v. Riley the court held that the administrator of an estate, who was also the decedent's wife, could convey the decedent's separate real estate to herself for a community reimbursement claim. The decedent, who died intestate, was survived by his wife, who qualified as administrator of his estate, and three siblings. Following her appointment as administrator, the widow filed a claim for reimbursement of the community estate based on community payments for the decedent's separate debts, improvements to the decedent's separate property, and payment of taxes and insurance on the decedent's separate property. The probate court entered an order approving the claim, in the amount of almost $125,000, which the siblings appealed and lost. Almost two years later the widow filed an application requesting that the probate court approve the conveyance of the decedent's separate real estate to her in satisfaction of the community reimbursement claim. The court entered an order approving the conveyance, which the siblings appealed. The appeals court found that the lower court had authority under Probate Code sec-

80. See id. at 650. The court noted that the probate court approved the claim without following the procedure set forth in the Texas Probate Code section 312 but that the court's action was voidable, not void. See id. The court stated that the administrator's proper avenue for redress was appeal of the probate court's order approving the claim, which she did not appeal, and that the administrator could not attack the order in the district court once the probate court transferred the matter. See id. at 650-51.
81. See id. at 652. The court distinguished the vendor's lien and retention of superior title from a typical mortgage, which is subject to administration of the estate.
82. See id.
83. See id.
84. See id. at 653.
85. 972 S.W.2d 149 (Tex. App.—Texarkana 1998, no pet.h.).
86. See id. at 153.
87. See id. at 149.
tion 234(a)(1) to approve the conveyance. The court also held that the widow was entitled to claim up to 200 acres as her rural homestead, including part of one tract and all of a second, separate tract.

V. GUARDIANSHIPS

In *Maeberry v. Gayle* the court held that a minor ward's guardianship terminated when the ward attained eighteen years of age and that the guardian's fiduciary duty to the ward terminated when the ward attained eighteen years of age. The ward lived with his grandparents during his early life and, following the deaths of both grandparents, became the ward of his uncle. The grandfather's will left the ward his residence, furniture, vehicles, and the proceeds of life insurance policies payable to the estate. The grandfather created a testamentary trust to hold the assets passing to the ward, lasting until the ward turned eighteen, and naming the uncle as trustee; the grandfather also named the uncle as guardian of the minor. The uncle, in his application for letters of guardianship, recited the items left to the minor as assets of the minor. The guardian took ownership of all of the personal property individually rather than placing the property into the guardianship estate or into trust. Some six months following the ward's eighteenth birthday, but before filing the final account and closing the guardianship, the guardian took the ward to an attorney's office and had the ward sign a deed conveying the residence to the guardian. The ward testified that he did not understand that he was conveying the residence, that no one explained the situation to him, and that he had minimal reading skills. The trial court entered judgment against the uncle for fraud and breach of fiduciary duty. On appeal the guardian argued that he no longer owed a fiduciary duty to the ward, either as guardian or as trustee, once the ward attained age eighteen. The appeals court agreed with the guardian. The dissent would have held that the guardian's fiduciary duty continued until the probate court

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88. See Riley, 972 S.W.2d at 153. The court found that the lower court had no authority to approve the conveyance under the Texas Probate Code section 234(a)(4), which allows the administrator, with court approval, to compromise and settle disputes or litigation, since the existence and amount of the claim was no longer in dispute. See id.

89. See id. at 154. The court found that the surviving spouse can claim all of the homestead that the couple could have claimed during marriage. See id. The court then found that evidence existed that the couple used both properties in a manner that qualified them for homestead rights, so the widow could claim part of one tract and all of another as her homestead. See id. The court remanded the issue of whether the siblings should receive any royalty income from the estate. See id. at 156.

90. 955 S.W.2d 875 (Tex. App.—Corpus Christi 1997, no pet.).

91. See id. at 878-79.

92. See id. at 878. The court cited Texas Probate Code section 745 for the proposition that the guardianship estate terminated automatically when the ward reached eighteen years of age. See id. The court found that, although the guardian has an ongoing duty to make a final accounting to the court, the guardian has no further fiduciary duty to the ward after the ward reaches majority. See id. at 879. The court also held that the guardian, as trustee, had no further duty to the ward after the ward reached age eighteen since the trust terminated when the ward reached age eighteen. See id.
In *Estate of Glass*, the court held that the guardian must file a final accounting and close the guardianship estate when the ward dies. Following the ward’s death, the trial court ordered the guardian to file a final accounting and close the guardianship. The guardian asked for reconsideration, alleging that he needed to pay the estate’s creditors. The trial court denied reconsideration because it did not have jurisdiction to continue the guardianship. The guardian appealed alleging that the trial court erred in its conclusion that it did not have jurisdiction over any action other than the final accounting and termination of the guardianship. The appeals court determined that the administration of a ward’s estate is distinct from the administration of a deceased ward’s estate and held that the trial court did commit error in ordering the guardian to file the final account and close the guardianship estate.

In *Marshall Investigation & Security Agency v. Whitaker*, the court held that the trial court erred in assessing guardian ad litem fees against the prevailing party without stating good cause for doing so on the record. A mother filed suit, in her individual capacity and as next friend for her minor son, against her deceased husband’s employer for gross negligence in connection with her husband’s death. The trial court appointed an attorney ad litem to represent the son’s interests. The jury found no negligence on the part of the employer and the trial court entered judgment in favor of the employer but assessed more than $21,000 in ad litem fees against the employer. The appeals court examined the rules relating to payment of costs, as well as precedential cases, and determined that the trial court must state specific reasons for charging

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93. See id. at 883 (Rodriguez, J., dissenting). The dissent found that the majority failed to distinguish between the termination of the guardian’s ability to act on behalf the ward and the termination of the fiduciary duty the guardian owed the ward. See id. at 882-83.


95. See id. at 462.

96. See id. The court examined Texas Probate Code section 745(a)(2) (Vernon Supp. 1999) (providing that guardianship estate will be closed when the ward dies), section 747(a) (Vernon Supp. 1999) (guardian shall deliver guardianship assets to personal representative estate), section 749 (Vernon Supp. 1999) (guardian must file final account), and § 752(b) (Vernon Supp. 1999) (court, after approving final account, shall order delivery of guardianship assets to ward’s personal representative or others legally entitled to ward’s estate). See id.

97. 962 S.W.2d 62 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

98. See id. at 63.

99. The appeals court found that the trial court appointed the attorney as attorney ad litem, rather than guardian ad litem, which would have been the proper designation. See id.

100. See id. at 62.

101. Tex. R. Civ. P. 131 allows the successful party to recover costs unless an exception applies. Tex. R. Crv. P. 141 allows the court to adjudge costs differently if the court finds good cause and states the cause on the record.

costs against the successful party.103

VI. TRUSTS

A. TRUSTS AND TRUSTEES

In Shearer v. Holley,104 the court held that the remainder interest in a trust vested in the remainder beneficiary at the time the grantors created the trust and the remainder beneficiary could dispose of the remainder interest in his will.105 A husband and wife created a trust for their benefit and the benefit of their three children. Two trust deeds transferred property to the trustee and contained the provisions of the trust, which was administered as one trust at all times. The trust provided that it would terminate upon the death of the second to die of the grantors and the real property held in the trust would be distributed in specified tracts to the grantors’ three children. The grantors’ son served as trustee and was to receive the tract on which he and his wife lived following the deaths of both his parents. The son died prior to termination of the trust. The son’s will left all of his probate estate to his wife. The trust terminated approximately a year after the son’s death, upon the second grantor’s death, and the successor trustee could not determine if the son’s interest passed to his wife under the terms of the will or to his children from a prior marriage since he did not survive until termination of the trust. The successor trustee filed an action for declaratory judgment, requesting the court to determine if the language in the trust deeds created a vested or contingent remainder for the son. The trial court determined that the language created a contingent remainder and that the property reverted to the father’s estate, then passed to the son’s children since the son did not survive until termination of the trust. The appeals court examined the language contained in the trust deeds and determined that the language had no survivorship conditions.106 The interest therefore, vested at the time the grantors created the trust.107

In Wilkinson v. Wilkinson,108 the court held that the joint managing conservator of a beneficiary of a trust had standing to obtain an accounting of the trust.109 The child’s paternal grandmother created a trust for the child’s benefit and named the child’s father as trustee of the trust. The child’s parents later divorced and the divorce court named the parents as joint managing conservators of the child. The trust provided that

103. See Marshall, 962 S.W.2d at 62-63. The court remanded the case to the trial court for entry of judgment stating the specific reasons for charging costs against the employer. See id. at 63. The court also suggested that the trial court consider the different responsibilities of a guardian ad litem and attorney ad litem in its review of the attorney’s time to ensure that the court only award compensable fees for the attorney’s efforts as a guardian ad litem. See id.
104. 952 S.W.2d 74 (Tex. App.—San Antonio 1997, no writ).
105. See id. at 78-79.
106. See id. at 76-77.
107. See id. at 78.
108. 956 S.W.2d 821 (Tex. App.—Houston [1st Dist.] 1997, no pet.).
109. See id. at 823.
the trustee could make only discretionary distributions to or for the child's benefit until the child attained age twenty-five. The child's mother filed suit, on behalf of the child, for an accounting of trust assets and income. The trial court ordered the father to provide an accounting and the father appealed, alleging that the mother had no standing to request an accounting on behalf of the child. The appeals court found that the divorce decree granted both parents, as joint managing conservators, the right to bring legal actions on behalf of the child and that the action requesting an accounting was a legal action. The court held, therefore, that the mother, as joint managing conservator, had standing to bring suit for an accounting on behalf of her child.

In *Ridgell v. Ridgell,* the court held that income received from a separate property trust in which the beneficiary has a vested interest is community property. A couple created a series of living and testamentary trusts for the benefit of their daughter. During the daughter's second marriage, she created a grantor trust for herself, using assets that were her separate property assets. The daughter owned one residence prior to marrying her second husband, and she acquired various other properties during the marriage, including a stable purchased with funds held in the grantor trust. The daughter and her second husband divorced after some eighteen years of marriage, and the husband claimed that the income distributed from the trusts during marriage were community property. The husband also claimed some ownership interest in the properties his wife bought with trust income distributions during the marriage. The trial court awarded most of the real property acquired during the marriage to the daughter as her separate property and awarded all trust income to the daughter as her separate property. The trial court concluded that the income from the trusts and the real estate acquired with down payments and payments from trust sources were the daughter's separate property. The appeals court analyzed the nature of separate and community assets and the language creating the trusts. The court determined that, because the daughter received all of the net income from two of the trusts and would receive the principal of those trusts at specified times, the income of those trusts were community property. The court, however, determined that the trial court properly characterized the assets held in the grantor trust as the daughter's separate property. The court also held that the real property that the daughter purchased and repaid from

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110. See id. at 822.
111. See id. at 823.
112. 960 S.W.2d 144 (Tex. App.—Corpus Christi 1997, no pet.).
113. See id. at 148-49.
114. See id. at 148.
115. See id. at 148-49. The court cited *In re Marriage of Long,* 542 S.W.2d 712, 718 (Tex. Civ. App.—Texarkana 1976, no writ), for the proposition that income received from trust principal to which the beneficiary is entitled or will become entitled is community property. See id. The court also stated that it found no instruction in the trust documents that specified that distributions of income would be separate property. See id. at 149.
116. See id. at 149-50.
trust sources prior to distribution was the daughter's separate property.\textsuperscript{117}

In \textit{Tomlinson v. Tomlinson}\textsuperscript{118} the court held that a decedent created a valid trust through a life insurance beneficiary designation.\textsuperscript{119} The decedent had named his wife as beneficiary of certain employer-provided life insurance during his marriage, but, following divorce, he revised his beneficiary designation to name his two sons as beneficiaries, followed by his brother, designated as trustee. The decedent never created another trust instrument prior to his death. Following the decedent's death the brother claimed that the beneficiary designation created a trust for the benefit of the decedent's two children, of which he was the trustee. The decedent's ex-wife, who was the children's mother, claimed that the beneficiary designation was insufficient to create a trust and that she should receive the insurance proceeds for the benefit of the children as provided in the employer's plan. The trial court entered summary judgment that the beneficiary designation was insufficient to create a trust. The appeals court found that the decedent evidenced his intent to create a trust when he named his brother as trustee for the two children and that the trust corpus consisted of the contractual right to receive the death benefits under the employer's plan.\textsuperscript{120}

The court then found that the decedent did not have to state specific duties of the trustee since the Texas Trust Code\textsuperscript{121} provides guidance for investments and distributions.\textsuperscript{122} The court held that the beneficiary designation demonstrated the decedent's intent to create a trust and that the lack of direction provided to the trustee in the beneficiary designation did not invalidate the trust.\textsuperscript{123}

In \textit{Southwest Guaranty Trust Co. v. Providence Trust Co.},\textsuperscript{124} the court held that the trustee of a court-created trust had no judicial immunity for its actions when the trust agreement gave the trustee a great deal of discretion in purchasing an annuity for the beneficiary.\textsuperscript{125} The ad litem representing the minor plaintiffs suggested that Providence Trust Company be named as trustee and the court appointed Providence Trust Company based on the recommendation. The ad litem also suggested that a portion of the settlement proceeds should be used for the purchase of annuities

\textsuperscript{117} See \textit{id.} at 150-51. The court found that the trustee lent money to the daughter for purchase of the real property and that the trustee withheld payments on the notes prior to making income distributions to the daughter. The court concluded that the daughter acquired the real property with her separate property so that the real property was separate. See \textit{id.} at 150-51.

\textsuperscript{118} 960 S.W. 2d 337 (Tex. App.—Corpus Christi 1997, pet. denied).

\textsuperscript{119} See \textit{id.} at 339.

\textsuperscript{120} See \textit{id.} at 338.

\textsuperscript{121} \textit{TEX. PROP. CODE ANN.} §§ 113.002, 113.006, 113.021, 113.024, 113.056, and 114.001 (Vernon 1989) provide guidance to the trustee in the absence of express instructions from the grantor. \textit{TEX. PROP. CODE ANN.} § 113.051 (Vernon 1989) provides that the Texas Trust Code will apply in the absence of express instructions in the governing instrument.

\textsuperscript{122} See \textit{Tomlinson}, 960 S.W.2d at 338.

\textsuperscript{123} See \textit{id.} at 339.

\textsuperscript{124} 970 S.W.2d 777 (Tex. App.—Austin 1998, pet. denied).

\textsuperscript{125} See \textit{id.} at 783. Toxic tort litigation resulted in a settlement and the creation of court-created trusts under Property Code section 142.005.
for the minors. The trust agreements presented to the court for approval contained a provision directing Providence to purchase the annuities. Some dispute existed as to whether Providence had approved the trust agreements and agreed to purchase the annuities prior to appointment by the court. The order appointing Providence as trustee authorized Providence to purchase the annuities, but directed Providence to use discretion in negotiating the terms and conditions of the annuities, including the payments under the contracts. Providence, apparently at the recommendation of the ad litem, purchased annuities that the beneficiaries could not withdraw before age fifty-nine and one-half without incurring a substantial penalty. In addition, the interest earned on the annuities was taxable, rather than non-taxable.

Following the purchase of the annuities, many of the beneficiaries needed trust distributions in excess of the amount retained in the trusts, and they had no available access to additional funds without incurring both income tax and a penalty for withdrawing funds from the annuities. While Providence served as trustee, the Texas banking commissioner closed Providence and ordered its liquidation. The successor trustee investigated the annuities purchased and sued Providence for breach of fiduciary duty, negligence, and breach of the duty of good faith and fair dealing. Providence filed a motion for summary judgment, in which it claimed that it had derived judicial immunity since the trusts were court-created, and asserted the additional defenses of judicial and equitable estoppel, collateral estoppel, and res judicata.

The trial court granted the motion for summary judgment, but did not state the basis for granting the motion. The appeals court noted that Providence followed the direction of the court when it purchased the annuities, but found that the court granted Providence a great deal of discretion in determining the best structure of the annuities and instructed Providence to consider several factors including the beneficiary's age, market conditions, and the distribution of payments. The court found that factual issues existed about the purchase of the annuities and that the trial court improperly granted summary judgment on the issue of derived judicial immunity. The court then held that the trust agreements did not provide immunity to Providence for its discretionary actions, that judicial and equitable estoppel did not apply to the case as a matter of law, and that neither res judicata nor collateral estoppel were grounds

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126. See Southwest Guar. Trust Co., 970 S.W.2d at 782-83.
127. See id. at 783.
128. See id. The trust agreements provided some protection from liability for Providence when it relied in good faith on a court order. The trust agreements also provided, however, that Providence exercise its discretion and consider facts and circumstances when negotiating and purchasing the annuities. Because of the discretionary authority granted Providence in the trust agreements, the court found that the agreements did not protect Providence from liability in exercising its discretion.
129. See id. at 784. The court found that the trust agreements and the order of the court when it created the trusts did not establish as a matter of law that Providence had no discretion in its purchase of the annuities. See id.
B. Resulting Trusts

In Amador v. Berrospe the court held that no evidence existed to rebut the presumption of a gift of a house from a daughter and son-in-law to her parents, so no resulting trust arose. A daughter and her husband, using community funds, bought a house and had the warranty deed prepared showing the owners as the daughter and her father. The parents lived in the house until their deaths. Both of the parents died intestate and the father's one-half of the house vested in his four children upon his death. The daughter, who owned one-half of the house in her name and who acquired an additional one-eighth of the house from her father, died intestate several years later. Her only son deeded his interest in the residence to his father, and one of the daughter's brothers and her sister deeded their one-eighth interests in the house to the husband. The other brother refused to deed his interest in the house to the husband. The husband sued the brother who retained an interest, alleging that he actually owned the one-eighth interest that the brother claimed. The trial court found that the husband owned all interests in the house as a beneficiary of a resulting trust. The appeals court found that a resulting trust may arise when someone other than the person who obtains title to the property pays for the property. The court noted, however, that an exception to the theory of resulting trust may be found whenever the purchaser intended a gift, such as when a child purchases a property for a parent and has title placed in the parent's name. The court found that a presumption of a gift of one-half of the house arose when the daughter and her husband bought the house but had title placed in the father and daughter's names. The court found that no evidence existed that the daughter and her husband meant anything other than a gift when they purchased the house.

130. See id. The court found that the same parties and the same claims did not exist in the litigation that created the trusts as in the litigation based on the purchase of the annuities, so res judicata did not apply. The court finally found that collateral estoppel did not apply since the issues concerning the purchase of the annuities was not litigated in the toxic tort litigation, the issues concerning the purchase of the annuities were not a part of the prior litigation, and the parties were not adversaries in the prior litigation. See id. (citing Eagle Properties, Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990); see also Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 814, 818 (Tex. 1984).
132. See id. at 208.
133. See id. at 207. The court noted that the intent of the parties can be determined from facts and circumstances surrounding the purchase. See id.
134. See id. The presumption of a gift may be rebutted, but no resulting trust arises until rebuttal of the gift presumption occurs.
135. See id. The court found that clear and convincing evidence could rebut the presumption of a gift and a resulting trust would then arise. See id. at 208.
136. See id. The court also held that no evidence of adverse possession by the husband existed. See id. at 208-09.