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(1) To probate the will and be appointed independent executor, Ann will need to file the will with the probate court in Real County and meet the statutory requirements as outlined below. At issue are the requirements and procedures for admitting a will to probate and serving as independent administrator of an estate.

Initially, the will will need to be filed with the probate court in order to begin probate proceedings. The proper venue is the county where the decedent resided at the time of death. Here, Zach resided in Real County at the time of death, and the will will need to be probated in Real County. Additionally, in order to admit the will to probate, Ann must present evidence to the court that Zach has died. This could be accomplished by presenting the court a copy of the death certificate.

To act as an independent administrator, Ann will need to satisfy statutory requirements. An independent administrator may be a person designated by the testator in a will or may be a person agreed upon by the heirs of the decedent. A person is strictly prohibited from acting as an independent executor if the person has an interest that is directly adverse to the decedent.

Courts favor independent administration because it permits the administrator to act in wrapping up an estate without the necessity of the court overseeing the administration. In order to serve as an independent administrator, the administrator will need to take an oath and have Letters of Administration issued. must ordinarily post a bond; however that requirement may be waived. Here, Zach specifically waived the bond requirement and Ann will not have to post a bond.

(2) Once the will is admitted to probate and Ann is designated as independent Executrix, she will have to perform the functions as outlined below. At issue are the obligations of an independent executor.

Once appointed, an independent executor is ordinarily required to pose a bond; however, that requirement may be waived. Here, Zach specifically waived the bond requirement and Ann will not have to post a bond. Additionally, an independent executor is required to publish notice in the newspaper of the appointment, file an inventory, collect the assets, pay claims, and provide an accounting.

Here, Ann will have to publish notice in a newspaper circulated in Real County of Zach's death. The publication is necessary so that potential claimants and/or heirs will have an opportunity to make any claims they have against the estate.

In regards to the house in Real County, although the house was Zach's separate property (property acquired before the marriage), the home was the couple's homestead. As such, Ann has a life estate in the home, subject to her sons' future interests.

In regards to the home furnishings, they will most likely pass under the terms of the will, one-half to Bob and one-half to Chad, unless Ann elects to assert a personal property exemption.

In regards to the life insurance policy, life insurance policies are non-probate assets and do not pass under the will. The terms of the insurance policy are governed, rather, by contract law. The policy named Ann as the beneficiary, and the proceeds will all go directly to Ann.

In regards to the retirement plan, retirement plans are likewise non-probate assets and are subject to the law of contracts. As such, the retirement plan names Ann as a beneficiary, and

Ann will receive all of the proceeds from the retirement plan.

As independent administrator of Zach's estate, Ann will be required to take steps to assure that the children receive the home furnishings. Ann will also be required to take the necessary steps to contact the insurance company and the retirement account holders and sign all necessary documentation to assure the funds are distributed appropriately.

END OF EXAM

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1. Ann has been identified in her father's will as the Independent Executor. She must take the will and probate the will in the County in which the testator resided. Because there is a will and because the will identifies the executor, the process is fairly simple in Texas. Ann must file a petition to probate the will and for appointment of independent executor. There is no reason whatsoever for a dependent probate proceeding. She must appear in Court on the Motion and give notice to the beneficiaries. The Court will then admit the will to probate and appoint an independent executor. Generally, if a Testator selects and identifies an executor, the Court will make that appointment absent the person declining the appointment or concerns of the court or concerns expressed to the Court about the person's ability to perform as the Executor.

2. Once the County Court signs an Order Admitting will to Texas Probate and Appointing Independent Executor, what are Ann's obligations under the law?

A. Once Ann is appointed as the Independent Executor, she has an immediate and important responsibility to the Estate and its creditors, if any. Because it is an independent probate matter, rather than a dependent probate matter presided over by the Court, it is much more informal with less procedural requirements. There are still requirements and obligations, however, with which Ann must comply as the independent executor. Ann must undertake to determine all of the assets and liabilities of the Estate. If there are any creditors, she must give them notice of the estate administration so that they may file their claims in order to preserve their rights. If there were creditors, she would have the responsibility to see that they are paid, if their claims are proper, to the extent the estate has assets to pay. She would also have to mind the statutory priority of the creditor's claims. In this matter, under the facts provided, there are no debts or creditors so this is not applicable. She must prepare an inventory of the assets and liabilities of the estate. Because this is an independent administration, she can then file an Affidavit regarding the inventory, rather than placing the inventory on public record. This helps maintain the privacy of the estate. As the executor of the estate, Ann is charged with fiduciary responsibilities to the estate and beneficiaries. She must act in good faith and in a reasonable manner in all dealings with the estate.

B. With respect to the specific assets, Ann's responsibilities as executor are to distribute them in accordance with the terms of the will. In this matter, the will named Bob and Chad as the devisees of the estate. Both Bob and Chad are alive. Thus, they take the entire estate and they share it equally. Certain assets, however, are not within the Estate as discussed more fully below. In particular, the testator's distributions are impacted by the fact that he has a surviving spouse and her rights in community property.

1. The house

The house which the parties lived in was Zach's separate property as he inherited it from his parents. We are not advised as to how the house is titled. Assuming that Zach kept title in his name and did not bequeath it in any way to his wife or the community estate, it remains separate property. If it was at some point bequeathed to his wife or to them jointly by Zach's action, then wife would take full ownership of the real property, unless otherwise indicated in the deed. Assuming it retained its separate property characterization, per the terms of the will, it would go to Bob and Chad. However, because the house was the marital homestead, Bob and Chad would take the house subject to a life estate in their mother Jill.

2. Home furnishings

Jill will take all of the home furnishings (valued at \$30,000) as the surviving spouse as community property. This amount falls within the statutory limits on exempt personal property for the surviving spouse.

3. Life insurance policy

The life insurance policy does not go through the Estate Administration whatsoever. The life insurance policy names Ann as the beneficiary and will be paid directly to her by and through the insurance company. A life insurance policy is a separate contractual relationship which is not subject to probate in Texas and the beneficiary is as designated on the policy regardless of the terms of the will.

4. Zach's retirement plan

Zach's retirement plan valued at \$1M and naming Jill as beneficiary does not go through probate either. It is also a separate contractual arrangement and the designation on the policy holds and will not be changed even if the will designates a different beneficiary.

Thus, Ann will only need to distribute the real property which is the homestead through the estate and the home furnishings. The home furnishings will go to her mother Jill and the homestead will go to Bob and Chad subject to the life estate in their mother Jill. As executor, Ann will need to change title to the home and can do so by filing the will and the deed and getting a diminutive title deed or the estate can execute a deed, conveying that which could be conveyed by the testator. Jill could apply to the executor, as the surviving spouse, for a living allowance for one year, but it does not appear that there are assets to do so.

END OF EXAM

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(1) Ann must timely file the application for probate with the original will, and does not need to provide witness testimony to prove up the will or post bond. One who has been appointed independent executor must file an application for probate of the will in the county the testator resided in at the time of his death, as well as file the original will. When the will is validly attested and self-proving, there is no need to put on testimony from witnesses as to the validity of the signatures in the will because the will operates to prove its own validity. In the absence of a complicating factor such as competing wills being filed or someone contesting the will, the court will then sign an order admitting the will to probate and appointing that person as independent executor. When the testator's will provides for independent administration, the court must grant it. If the will has waived bond, the independent executor is not required to post bond.

Ann must file an application in Real County, since that is where Zach resided at the time of his death, to probate the will as an independent administration, and file a copy of Zach's original will with the Court. Since the will was validly attested and self-proven, Ann does not need to have any witnesses testify as to the validity of the signatures of Zach and the witnesses who signed the will. The court will then sign the order admitting the will to probate and appointing her as the independent executor. The court does not have discretion to not order an independent administration, even if the court feels that would be in the best interest of the estate, because Zach's will explicitly provided for independent administration. Additionally, since Zach's will waived bond, Ann does not have to post bond. Thus, once Ann files the will with the application to probate it, she has taken all the necessary steps to be appointed independent administrator.

(2a) After the court signs the order admitting the will to probate and appointing her independent executor, Ann's requirements under the Texas Probate Code (now the Texas Estates Code) are that she must take her oath as independent administrator within 20 days, publish notice to the estate's creditors in a Real County newspaper and at the courthouse within 1 month, within 60 days give notice to the beneficiaries of the estate, and within 90 days certify to the court that she gave the beneficiaries the required notice (or they waived it) and return the inventory or affidavit in lieu of inventory. Even when independent executors are not required to post bond, they must still take the oath. Independent executors are required to publish notice to the estate's creditors in a newspaper in the county of administration as well as post at the courthouse within one month of appointment. Within 60 days of appointment, independent administrators must notify the estate's beneficiaries. Within 90 days of appointment, independent administrators must certify to the court that they have given the beneficiaries proper notice. Additionally within 90 days, the independent administrator must either file an inventory of the estate's contents, or file a notice in lieu of affidavit. The notice in lieu of affidavit allows the independent administrator to keep the details of the inventory of the estate out of the public records, but it does not release the independent executor from the obligation to complete an inventory. The independent executor must still complete the inventory and give a copy to all beneficiaries who have not either waived their right to an inventory, already received their distribution from the estate, or who are due to receive only \$2,000 or less from the estate.

(2b) Ann's obligations generally with respect to the estate's specific probate property are to insure the assets if a reasonably prudent person would until they can be transferred to the will's beneficiaries, set aside the homestead or the \$45,000 allowance in lieu of homestead, set aside the amount of exempt personal property allowed for a surviving spouse or the \$30,000 allowance in lieu of exempt personal property, set aside the amount for a family allowance if applicable, pay off the estate's creditors if any, and distribute the remaining property pursuant to the will. No obligations arise for Ann as independent executor of the estate in regards to nonprobate property that passes outside the will, except to the extent there are community property concerns or that the passing of the nonprobate property triggers a need to file or pay gift or estate tax returns. As administrator she has an obligation to administer the entire community property estate, not just the half that passes via Zach's will, because she has to

settle the entire community including its debts, not just pass Zach's share of the property. Additionally, as administrator, she is obligated to file the necessary returns and pay the necessary gift and estate taxes triggered by both probate and nonprobate assets. She must also prepare, file, and pay if necessary Zach's final income taxes.

As to the house specifically, since Zach and his surviving spouse Jill lived there at the time of his death, Jill can claim a probate homestead right to exclusive rent-free occupancy of the house until she dies or as long as she continues to live there. Since Zach inherited the house from his parents, the house was his separate property. Ann has an obligation to ensure title is properly passed to Bob and Chad, subject to Jill's homestead right.

As to the home furnishings, these qualify for the exempt personal property set-aside. The exempt personal-property set aside in favor of the surviving spouse covers personal property of the decedent up to \$100,000, and home furnishings can be included in this. Since Jill is Zach's surviving spouse, she is entitled to the home furnishings as part of the exempt personal set-aside. Ann has an obligation to set the furnishings aside as part of the exempt personal property set-aside Jill is entitled to as surviving spouse. The property remains set-aside for a year if the estate is solvent, or permanently if the estate is insolvent. On these facts we know nothing about Zach's debts and liabilities, so it is impossible to say for sure whether Jill gets the furniture permanently set-aside for her, or if it passes pursuant to the will after 1 year to Bob and Chad.

Ann has an obligation as executor to determine if the life insurance policy was paid for with Zach's separate funds or community funds, and include the necessary amounts on Zach's income, gift, and estate tax returns accordingly. If the policy was paid for solely with Zach's separate funds, there are no community property issues. This is just a gift of the life insurance policy proceeds to Ann in her own personal capacity, not as independent administrator. She is responsible for filing any gift tax returns necessary as administrator, but even if this benefit to Ann triggers the need to file a gift tax return, unless Zach has already made more than 5.2 million in gifts during his life, triggering the estate tax with this \$250,000 gift, Ann shouldn't have obligation as independent administrator to pay any estate taxes. Even if no estate or gift taxes are owed, she still has to file the appropriate returns. If the policy was paid with community funds, then only half of the payment is a gift to Ann from Zach included in Zach's gross income on his final income tax return that Ann has to file. The other half is considered the property of Jill, and thus the other half of the insurance policy proceeds Ann receives are counted as a gift from Jill (at least as to the \$111,000 of the half that is considered Jill's property gifted to Ann beyond the \$14,000 per donee annual exclusion), not Zach, and Jill is responsible for dealing with the gift tax implications to Jill.

As to Zach's retirement plan, this is a nonprobate asset that Ann is only obligated to determine how much, if any, gift and/or estate tax the passing of this asset will trigger. Since this asset passes entirely to Zach's surviving spouse, there is no gift tax triggered. There is an unlimited exemption from gift tax for gifts to spouses, regardless of how much is gifted to the recipient spouse or whether the donee spouse is already over the lifetime \$5.45 million exclusion amount.

END OF EXAM
