

AM Essay 1 - Sample 1

1)

(1)

A court could use a reformation to correct the error in the trust, however while there is evidence of a mutual mistake, Wilma has a good defense of unclean hands and the court will not reform the trust. The issue is what legal action could be used to correct the error in the formation of the trust. Courts may act in equity to reform or rescind a trust if a legal remedy is inadequate, equitable relief is feasible, and there was some issue in formation that would justify rescinding or reforming the trust.

First, a legal remedy is inadequate in a number of situations, including when the subject matter is unique/rare, the person would be subject to multiple inconsistent liability, the other party is insolvent, damages are uncertain/speculative, or there would be irreparable harm that a legal remedy could not correct. Here, the subject matter is Lot 5, which is land. Land is unique/rare and damages are always speculative and uncertain. Thus, the first requirement for an equitable action will be met.

Second, equitable relief is feasible when a court has jurisdiction to enforce an order and the court has capacity to enforce the order. Here, a court with either in rem or personal jurisdiction over the land, trust, or parties could enforce an order. Further, a court would have capacity to enforce either through transferring the property to the trust (if there is in rem jurisdiction) or ordering transfer upon Wilma to transfer the trust (such as through an injunction). Since it would be a mandatory injunction, sometimes there are capacity issues relating to oversight, including significant supervision, undue hardship, and impossibility. There are no such issues here, so an equitable remedy is feasible.

Third, there must be shown a justification for rescission or reformation of the trust. Since Barney is seeking to enforce the trust (not have it set aside), there must be grounds for reformation. Such grounds include mutual mistake, unilateral mistake coupled with fraud, or a misrepresentation. However, here there is no evidence of a unilateral mistake coupled with fraud or a misrepresentation on the part of Wilma. Indeed, Fred and Wilma both signed a deed, as required since the property was owned as a tenancy by entirety as presumed under Missouri law when property is deeded to a husband and wife, that only described Lot 6. Additionally, the misrepresentation discussed in the facts, would be of a misrepresentation by Fred, not Wilma, so

is not applicable to any proposed reformation. However, there is evidence of a mutual mistake, as Wilma admits that she believed the trust was set up in order to convey both Lots 5 and 6 to her and her daughter upon Fred's death.

However, Wilma could try to assert a defense to rescission. Defenses include unclean hands, laches, impossibility, undue hardship, and restraint on first amendment rights. Here, the only relevant defense would be unclean hands. Unclean hands arise when the other party has done something in relation to the same transaction that the court would deem offensive. Here, Fred has lied to Wilma about the beneficiaries of the trust, thus he would have unclean hands and the court would not reform the trust in order to follow that intent.

(2)

A court could use a rescission of the deed so that no trust property would exist, and Wilma would own Lot 5 and Lot 6 upon Fred's death. The issue is whether Wilma can have the deed to the trust rescinded. For a rescission the same requirements of legal remedy is inadequate and equitable relief is feasible would be required, and satisfied here as discussed above. The third requirement however changes and there must be a showing of either mutual mistake of material fact, unilateral mistake that the other party knew of, misrepresentation of a material fact, or duress, incapacity, undue influence, or other formation defects. There are no relevant mistakes or any evidence of formation defects such as incapacity, undue influence at the time of formation. However, Wilma could assert a misrepresentation of a material fact since Fred had told her that this trust was set up so that if Fred died first, Wilma and then her daughter, Betty, would own lots 5 and 6. Since Wilma signature was required to deed over both properties (as previously noted both were tenancies by entireties under the Missouri presumption), then misrepresentation as to the beneficiaries would be material, and create grounds to rescind the trust. Further, there would be no good defenses here to rescinding the trust, so the court would act. Upon rescinding the trust, both Lot 5 and 6 will thus still be held as a tenancy by entireties by Fred and Wilma with a right of survivorship, because a person can not transfer even there proportionate interest in the property without consent from the other holder. Here, there would be no consent and if Fred dies first, Wilma with her right of survivorship will take the property.

AM Essay 1 - Sample 2

1)

1. At issue is whether a deed may be reformed for a when it contains a mistake as to the land that was intended to be granted. At issue is the standard for granting the remedy of reformation if one party objects.

In MO, a deed may be reformed when there is a mutual mistake contained within the document. For reformation, the mistake is not required to be on a material issue, but any mutual mistake will suffice. When examining whether or not there was a mutual mistake, the court will look at the intent of the parties as of the time of transacting. For reformation to be appropriate, there must first be an agreement. Then, the agreement is modified so that it conforms with the intent of the parties. Furthermore, a unilateral mistake can be the basis of a reformation action if one party is aware of the mistake and conceals the fact from the other party.

However, reformation is an equitable remedy. It will only be ordered when the legal remedy is inadequate and enforcement is feasible. Equitable remedies, like reformation, are wholly discretionary.

Here, legal remedies are inadequate. Land is considered unique. Monetary compensation to the trust instead of the actual parcel of land known as Lot 5. Furthermore, both parties and the land at issue are within the state of Missouri. Thus, Missouri has domicile jurisdiction over the parties and in rem jurisdiction over Lot 5. Thus, the court can enforce the reformation by ordering Wilma to sign the new deed or by simply changing the title to Lot 5 itself.

There is ample evidence that there was mutual mistake as to the extent of the land that should have been included in the deed to Fred's trust. Obviously, Barney, the trustee at the time of the transfer was under the impression that both lots were deeded to the trust. And, after learning that Lot 5 was not included, Wilma told him that she thought the trust was set up so that if Fred died first, then she, and then her daughter would own the land. Since she thought they would obtain ownership through the trust, this supports Barney's claim that the deed to the trust was intended to include both lots, Lot 5 and Lot 6.

Assuming that Wilma now objects to the reformation of the deed, Wilma is likely to fail. Because the court looks at the parties intent at the time of the contract was formed, later changes of mind are not taken into account.

Thus, Barney should bring an action to reform the deed which should be granted despite Wilma's objections.

2. At issue is whether a party to contract may cancel a deed because of a broken promise induced the land transaction.

Rescission is an equitable remedy that results in the cancellation of an otherwise valid contract or deed. Again, as an equitable remedy, at court has discretion to issue the remedy and will only do so if a legal remedy is inadequate and enforcement is feasible. The rationale behind this equitable remedy is that no valid agreement was ever made because there was no real "meeting of the minds." Mutual mistake regarding a material issue is grounds for recinding a contract or deed. Also, fraud or misrepresentation are valid reasons to recind a contract. However, unilateral mistake is not a valid grounds for rescission, absent fraud or misrepresentation, or if the other party knew of the mistake and took advantage of it.

Here, legal damages are inadequate. If Barney prevails, Wilma is stripped of here entire ownership of Lot 5. Land is deemed unique and monetary damages cannot compensate for such a loss. Furthermore, the court has personal jurisdiction over both parties and the land is contained within the state. Therefore, enforcement is feasible. The court could enjoin Barney from later bring a breach of contract suit against Wilma for the recinded agreement.

At the very least, it appears that Wilma was mistaken as to material issue in the contract to transfer the property to the trust. While there are not enough facts provided, it may very well be that she was mistaken because of fraud or misrepresentation. Regardless, it is apparent that she was mistaken, that there was not meeting of the minds and the contract should be recinded.

However, the court finds that her error was merely a unilateral one, with no fault on the part of any other parties, then the rescission should be denied. However, based on these facts, rescission should be granted.

AM Essay 1 - Sample 3

1)

1. Barney may use reformation. Reformation is an equitable remedy where a contract is rewritten to conform to the parties original intentions. For reformation, there must be a valid contract, adequate grounds and no defenses. Here, there is a valid contract because a deed is considered a contract. It requires that there is a transfer of one interest to another for some consideration. Barney will argue that the adequate grounds would be mutual mistake. Mutual mistake requires that both parties labored under a mistake about a basic assumption of the contract. Here the basic assumption would be that the deed was meant to include both lots 5 and 6. Normally, extrinsic evidence that contradicts a provision in a written contract is barred by the parol evidence rule. However, parol evidence is not barred in reformation cases because otherwise the parties will not be able to show that the contract does not adequately reflect the intention of the parties. In this case, Barney should be able to show a mistake because the trust document says that Wilma has a life estate in the residence. If the residence is only located on lot 5, this is evidence that the parties intended to include lot 5 in the trust and the court should reform the deed to meet the intentions of the parties.

If Wilma opposes, she could argue as for the no defense requirement that there is unclean hands. Unclean hands is an equitable defense where the person seeking an equitable remedy has not done something bad in the transaction. Here, if Wilma can show that Fred lied to her about the reason for the deed and what will happen when Fred dies, Wilma could be able to argue unclean hands. Barney will be subject to the unclean hands defense because the trustee is in privity with the settlor. Wilma could also argue fraud as a defense. Here, Wilma may be successful on the unclean hands approach if she can show that she did not know of the remainder conveyance. Barney will be subject to the defense because he is in privity with Fred as trustee. Wilma may win on the unclean hands argument unless she read the trust document. Reading the trust document would put her on notice that she would not get the property.

2. Yes, Wilma could cancel the deeds using using rescission under intentional misrepresentation or mutual or unilateral mistake. For rescission, the person must show that there are adequate grounds and that there are no defenses. The adequate grounds are intentional

misrepresentation, mutual or unilateral mistake. Intentional misrepresentation requires that there is a misrepresentation, done intentionally knowing that the statement is false or with knowledge that the speaker does not actually know the information, done with intent to induce reliance, that actually causes reliance, and that the reliance is justified. In this case, Wilma signed the deed because Barney told her that if he died first, all of the property would become Wilma's. This statement may have been fraudulent because Fred created a revocable inter vivos trust that named his son as the remainder. Further, Wilma and Fred deeded the property to the trust. This would show actual reliance from the statement. Further, Wilma should be justified in relying on a statement made by her husband during a marriage. Wilma may have a hard time proving that there is an actual misrepresentation or intent to induce. For this to occur, Fred must be aware of the remainder portion of the trust. The facts here are silent regarding whether this was an intentional remainder or if this was an attorney error. If Wilma can show that Fred was aware of the remainderman portion of his trust and that he made the statement with the intent to induce, then she should be successful in this action. For this to be a valid trust, Fred would have to have capacity. Capacity would require that he is aware of the dispositions that he is making. In this case, Fred should not be able to argue that he did not have knowledge that the disposition was wrong. This should satisfy the scienter element.

Mutual mistake requires that both parties have made a mistake to a basic assumption of the contract such that the contract does not reflect the parties' intention. Unilateral mistake requires that one side made a mistake and that the other side knew or should have known of the mistake. Here, the basic assumption would be who owned the lots upon the death of the first spouse. Mutual mistake would be harder to show because Wilma would have to show that Fred labored under the mistake as well. However, the Trust should dispell that notion because of the remainder which conveys all property to his son only. Unilateral mistake may be easier if Wilma has not read the trust document. She labored under the mistake that the surviving spouse would receive the property outright. If she had read the trust document, this would give her knowledge that this is not true. Also Fred would have had to know of the mistake or should have known of the mistake by Wilma.

AM Essay 2 - Sample 1

2)

1. A Missouri court can properly exercise personal jurisdiction over Betty under its long-arm statute.

Personal jurisdiction is proper over someone who is not a Missouri resident if that person falls within the requirements of the Missouri Long-Arm Statute, and if the constitutional requirements for personal jurisdiction are met. First, The Missouri Long Arm Statute allows personal jurisdiction over an individual who has certain contacts with Missouri, despite the fact that the person is not a Missouri resident. Even a single contact is enough. However, the Missouri court will only have personal jurisdiction for causes of action that arise from that contact. One of the contacts that will give rise to long-arm jurisdiction is that the person committed a tort within the state of Missouri (others include owning real estate within the state, doing business within the state, or entering a contract within the state). Where the individual has committed a tort in the state of Missouri, Missouri courts will have personal jurisdiction over that individual for causes of action that arise from the tort. Here, Betty has committed a tort within the state of Missouri (or at least Alice is alleging this to be true in good faith); therefore, Missouri courts will have personal jurisdiction over Betty for any causes of action arising out of that tort so long as the constitutional requirements for personal jurisdiction are met.

The constitution, by the due process clause, requires that a state may only exercise personal jurisdiction over a non-resident where the non-resident has minimum contacts with the state such that they have notice that they could be subject to suit in the state, and such that personal jurisdiction would be fair. Minimum contacts requires that the individual have purposely availed herself of the rights and privileges accorded by state law, such that suing her in the state court would be fair and reasonable. A court will determine whether minimum contacts exist based upon the quality and quantity of contacts that the individual had with the state, as well as the state's interests in hearing the suit. Here, Betty has minimum contacts with Missouri. She purposely availed herself of the rights and privileges accorded by state law when she drove through Missouri; furthermore, her contacts include being involved in an accident within the state. These contacts are such that Betty should have had notice that she might be subject to suit

in Missouri for any torts she committed while driving through the state, and personal jurisdiction would therefore be fair and reasonable (especially considering that the plaintiff and a large amount of evidence are likely located within the state). Therefore, the constitutional requirements are satisfied, and a Missouri court - because of its long-arm jurisdiction and its satisfaction of the due process requirements - has proper personal jurisdiction over Betty.

2. Alice cannot take a default judgment over Betty, because Betty has not been properly served with notice of the lawsuit.

Default judgment is proper against a defendant who fails to respond to a properly filed and properly served petition, or against a defendant who - although responding to the petition in her answer - fails to appear before the court to defend the suit. However, Default judgment will not be proper where service was improper.

Several methods of service are proper in Missouri courts; among them is waiver service, however waiver service was not properly accomplished here. Waiver service allows the plaintiff to mail to the defendant a copy of the petition, as well as a waiver form, instead of using the more traditional service methods. If the defendant accepts the waiver service by returning the waiver form, then service has been properly accomplished; however, if the defendant does not accept waiver service or does not return the waiver form within the allotted time, then the service has failed and the plaintiff must serve the defendant by another method. Under no circumstances must a defendant accept waiver service. Here, Alice attempted waiver service when she sent the Petition and Summons by first class mail to Betty's residence in her home state; however, Betty did not accept service and send in a waiver form, but rather threw the service away (as she is entitled to do if she wishes). Furthermore, it is unclear whether Alice included with the service the proper paperwork for Betty to complete her waiver. As a result, service was not completed (and Betty is not in the wrong). Default judgment is therefore improper, because service has not been accomplished and default judgment is only proper where there has been proper service of the suit.

In order to remedy the service problem, Alice will need to attempt another method of service - most likely personal service (by delivering the Petition and Summons to Betty's person, at which point if she refuses to accept the Petition and Service, she will have been properly served) or abode service (by leaving the Summons and Petition at Betty's regular and last place of abode with a member of her family who is over 15, including a roommate or a live-in employee). If Betty fails to respond to these proper methods of service, then Alice may again ask for default judgment and will probably prevail.

3. Betty can bring a claim against Charlie in the same lawsuit by impleading Charlie as a third-party defendant.

A defendant may implead a third party to an already existing suit where - if the defendant was found liable in the suit at hand - that third party would be liable for indemnification or contribution because of the third party's actions. This arises where the defendant wants to claim that the third party was partially at fault, and serves economic purposes of limiting the number of times a similar case is heard on the merits. When a third party is joined, that third party is called a third-party defendant, and the original defendant is known as a third-party plaintiff. The original plaintiff may bring claims against the third-party defendant, and vice versa; and the court may order relief from the third party defendant because he is a party to the suit. Here, if Betty is found liable for Alice's injuries, Charlie may be liable to Betty for indemnification; Betty is claiming that the only reason she hit Alice's car (and therefore the only reason she injured Alice and is now possibly liable) is because Charlie swerved into her lane. In the event that Betty is found liable, she will likely seek indemnification from Charlie (if he is entirely or mostly at fault in the accident) or contribution from Charlie (if they are more or less equally at fault). As a result, Betty may properly implead Charlie as a third-party defendant, and the court may order Charlie to pay Alice if it finds that Charlie is at fault.

AM Essay 2 - Sample 2

2)

Part 1:

Missouri can exercise personal jurisdiction over Betty.

The issues are whether MO has personal jurisdiction over Betty under its long-arm statute and whether, in exercising jurisdiction, MO has violated Betty's Due Process rights.

To have personal jurisdiction of a non-Missouri-resident, the defendant must fall under the Missouri long-arm statute. This statute allows personal jurisdiction to be exercised if, while in MO, the defendant (1) was transacting business, (2) the defendant committed a tort, (3) entered or performed on a contract, (4) owned real estate, (5) insured a risk in MO, (6) engaged in acts of sex in MO, (7) or was married in MO. If the defendant has performed one of the prescribed actions in Missouri, the cause of action must be related to that contact with the state.

In this case, Betty arguably committed a tort in Missouri and will therefore fall under Missouri's long-arm statute. That is, she was allegedly negligent when she collided with Alice's car. All of these actions occurred in MO. Further, the current lawsuit is a tort action and is thus related to Betty's contacts with the state. Thus, under the long-arm statute, Missouri can properly exercise personal jurisdiction against Betty.

To properly exercised personal jurisdiction, the Missouri court must also abide by the federal Constitution. To do so, the defendant must have at least minimum contacts with the forum state before personal jurisdiction can be exercised. In other words, the traditional notions of fair play and substantial justice cannot be offended. Thus, defendant must have purposely availed herself the benefits and laws of the forum state. In other words, she must have been voluntarily acting with or within the state and could not have been unilaterally brought into the state by a 3d party. The cause of action must be related to the defendant's contacts with the forum state. Finally, the defendant must have notice of the lawsuit against her.

In this case, personal jurisdiction is proper under the Constitution. First, Betty was voluntarily driving through MO. While her purpose for being in Missouri were minor (she was just passing through) she purposedly availed herself of the laws of the state. Further, the cause of action relates to her contacts with the state. Finally, she had notice of the lawsuit because she received the petition. However, there is a problem with the requirements for proper service of the petition, but this does not offend the constitutional requirements.

As such, MO has personal jurisdiction over Betty.

Part 2:

Alice cannot take a default judgment against Betty, because Alice will not be able to show that Betty has been properly served.

The issue is whether Betty has been properly served under Missouri law. When a defendant is a non-resident of MO, the plaintiff must abide by special service requirements. Plaintiff's options for service are (1) obtain a special process server by order of the Missouri court and affect personal or abode service, (2) obtain a special process server from the defendant's homestate and affect personal or abode service, or (3) send acknowledgment service via first class mail. Under the acknowledgment service requirement, the defendant must sign the acknowledgment of service and send it back to the plaintiff. If this acknowledgment is returned, the plaintiff must serve the defendant under some other means.

In this case, no acknowledgement service was effective. While, Betty received the petition, she did not return an acknowledgment of service. As such, the mailing of the petition was not proper service. Further, there are no facts that Alice effectuated service via a special process server. As such Alice will not be able to show there was proper service.

While Alice might argue that Betty had knowledge of the suit, the court will probably not deem the mailing of the petition as proper. As such, a default judgment is not proper against Betty

because she has yet to be properly served with the petition.

Part 3:

Betty can implead Charlie because Charlie may be partially or completely liable for Alice's actions.

The issue is whether impleader of Charlie is proper under the facts. Under Missouri Rules of Civil Procedure, a defendant may file a claim against a third party if the third party could be completely or partially liable for the plaintiff's injuries. In such a case, the defendant can get indemnification from the 3d party defendant if the 3d party is completely responsible for the plaintiff's injuries or can get contribution for partial responsibility. However, to bring such an action, the court must have personal jurisdiction over the 3d party. Personal jurisdiction is explained in part 1 of this question, but essentially requires that the person at least fall under the long-arm statute and that his due process rights have not been violated.

In this case, MO has personal jurisdiction over Charlie because he is domiciled in the state. When a person is domiciled in the state, a person is subject to any action in that state. Further, when a person is domiciled in the forum state, his due process rights are not violated if he has proper notice of the suit.

Thus, because there is personal jurisdiction over Charlie and because Charlie was the person who started the accident, Betty may implead Charlie and seek contribution or indemnification.

AM Essay 2 - Sample 3

1. Betty likely is subject to personal jurisdiction in Missouri. At issue here is whether an out of state motorist is subject to personal jurisdiction in Missouri when she is involved in a motor vehicle accident in Missouri.

Personal jurisdiction is the power of a court to bring a person before it and properly exercise jurisdiction over that person. To have jurisdiction over a nonresident person, the court must comply with a long-arm statute and due process concerns under the Constitution (i.e. minimum contacts). Missouri's long-arm statute extends to nonresident motorists who commit a tort in Missouri. Thus, the long-arm statute will have been met here because while Betty is a nonresident, due to the accident, she committed a tort in Missouri. The due process concerns will also have been met because while Betty may have no other contacts with Missouri, the court will have specific personal jurisdiction over Betty. Because the accident created substantial contact with Missouri, Betty should have expected to be hauled into court in Missouri. Thus, Missouri will have personal jurisdiction over Betty.

2. Alice likely cannot take a default judgment against Betty until she has her personally served. At issue here is whether a default judgment can be entered against a nonresident when the nonresident does not respond to service by mail.

Service of process under a long-arm statute on a nonresident is done the same way as service in Missouri. A defendant can be served by first class mail, but service is really not complete until the defendant completes and returns an acknowledgment. If service can not be made by mail, the plaintiff can request an alias summons and serve by another method (likely personal service served by an officer of the court or sheriff/constable able to do so). A default judgment cannot be entered against a defendant unless the plaintiff can show the defendant was properly served, otherwise due process concerns arise.

Here, Alice likely can not take default judgment until she shows that she properly served Betty. Alice should request an alias summons from the clerk and have a court officer/sheriff for the area of Betty's residence personally serve Betty (i.e. give the summons and petition directly to her or leave it at her residence with someone of proper age). Once Alice has the affidavit and return from this, if Betty still does not appear, Alice can take default judgment upon showing service was proper and her damages.

3. Betty can implead Charlie. At issue is whether a defendant can bring a claim against a possibly liable third party in the same lawsuit originally brought by the plaintiff.

If a third-party is possibly also at fault for the plaintiff's injuries or is liable to the defendant for contribution or indemnity, the defendant can join the third party as a third party defendant. This is called impleader. However, the third party must be subject to personal jurisdiction in the court.

Here, Betty will be able to implead Charlie because he may also be at fault for Alice's injuries and as a Missouri resident is subject to the court's personal jurisdiction.

AM Essay 3 - Sample 1

A trust is created when a settlor with capacity manifests an intent and delivers trust property to a trustee to hold legal title to the property for the benefit of beneficiaries. Delivery is not required in self-declared trusts. The sole beneficiary may not be the sole trustee. There must be an identifiable res or trust property so beneficiaries can hold Trustee accountable and there must be ascertainable beneficiaries.

In this situation, it is ok that there were interested witnesses who signed as trusts may be oral, or in writing and don't require witness. It is alright that Mark is Settlor and Co-trustee. It is also alright that the wife is a co-trustee and beneficiary since she is not the only sole trustee and beneficiary. Also the trust has ascertainable beneficiaries as Wife and descendants are acceptable descriptions (even if all descendants not yet living). However it is unclear whether there is a res to this trust. The res must be identifiable. The words "trust estate" don't really give us any indication of the property in this trust. If there is no identifiable trust property, the trust will fail. However if a court finds valid trust property (the cattle and farm machinery) then it will be valid, but probably not as this doc not in existence at time trust declared.

2. Yes. The will should be admitted to probate. In order for a will to be valid, the testator (T) must have had capacity, intent to create a will, the will must be in writing, and signed by T in the presence of 2 witnesses or later acknowledged to them (conscious presence test), T must publish his will to 2 witnesses who know they are signing a will, the witnesses must sign at the end of the will and must sign in T's presence although they need not sign in each other's presence.

Here, Mark had capacity and intent and he signed in the presence of 2 witnesses, his wife and son. The wife and son knew they were signing a will and they signed in T's presence and it appears as they probably signed at the end. So the will will be admitted to probate even if no self-proving affidavit as Son and Wife still living and will be able to testify as to due execution of the will. Also the will is valid even though both witnesses were valid. They will simply be purged of their gift if they were not T's heirs, or if they are T's heirs they will be able to take the lesser of either their gift or their intestate share.

3. Wife will not receive her gift in the will as she was an interested witness and since she was an heir she will be able to get her intestate share since this is smaller. Her intestate share is $\frac{1}{2}$ of the probate estate plus 20,000 since Mark also had a child. The rest of the will will end up with the probate estate after Wife's share going to Son. Property properly disposed of by trust passes outside the probate estate. So if the trust was valid it will pass the cattle and machinery to the wife for her life. But probably not valid as no identifiable trust prop at the time it was created so the trust items will pass by intestacy.

AM Essay 3 - Sample 2

3)

(1) Mark did not create a valid trust. To have a valid trust, there must be a transfer of title to a trustee to hold for the benefit of another for a valid purpose with intent to create a trust. Here, Mark intended to create a trust and have the trustee hold the estate for the benefit of his wife and daughter for a valid purpose. The issue here is whether there was a transfer of title to the res including valid delivery. A valid trust must include delivery of the res unless there is a self-declaration of trust. There is a valid self-declaration of trust if the settlor declares himself to be the trustee of property for another (it cannot be for himself in a self-declaration of trust). Here, he declared himself as co-trustee along with his wife. This is not a self-declaration of trust because of there being a co-trustee. A co-trustee has certain fiduciary duties owed to the beneficiaries of the trust that require that she hold the title to the res. The delivery requirement for res to be placed in trust is to actually sign over legal title and convey property to the trust. It is not sufficient to merely sign the trust agreement. Further, while delivery of property to the trust can be added at a later time, there must be some assets delivered to start the trust unless there is a proper pour-over clause included where the trust is funded as a beneficiary of a life insurance policy or under a provision of a will. Here, there was nothing to hold in trust as the facts indicate that nothing was signed to the trust until 2 years after it was formed when the cattle and farm machinery were included. The rest of the items were found unexecuted. Thus the res requirement was not properly met and the trust was invalid.

(2) The will should be admitted to probate. A valid will must be a writing of an 18 or older person, that is legally competent, signed by the testator in the presence of two witnesses (or acknowledged to the witnesses by the testator) and signed by two witnesses at the testator's direction and in his presence. The facts indicate that Mark was of proper age (he had an adult son) and competent and in writing. He signed the will in front of his adult son (a competent witness since he was an adult) and his wife. They signed in his presence. It is sufficient that all three parties watched each other sign, however, it is not required under the conscious presence test, in which they could have been aware of where each other was and what they were doing. Also, the witnesses need not sign in front of each other. It is implied that the witnesses sign at the testator's direction unless it's an unauthorized will, especially since he watched them sign (he

need not actually say anything to ask them to do it).

The issue here is whether the witnesses were fully competent. The son was competent as an adult. However, both witnesses were interested parties. The fact that 1 or more witnesses are interested parties does not invalidate a will. The court will merely make the interested party lose their interest in the will unless there are two disinterested witnesses or if the interested party would be an heir in intestacy in which case they receive the smaller amount of that in the will or their intestate share. In this case, both parties were interested parties as they both stood to receive a devise from the will. As stated, this would not invalidate the will, but it may change the amount each of them actually receives. Here the facts indicate that the will was valid and as such, should be admitted to probate.

(3) Because the trust will fail, the residue from the will goes to the residuary of the estate by resulting trust. Thus, it will be included as a residuary devise in the will. Thus it will be part of the probate estate of the will. Note: if the trust would be deemed valid for any reason, the cattle and farm machinery would be held in trust for the wife's benefit and then pass to son in full when she dies.

Because both parties were interested parties as discussed in (2), they would lose their interest in the will. When a devise fails in a will, it would fall to the residue if anti-lapse doesn't apply. Anti-lapse applies when a beneficiary predeceases a decedent and that beneficiary is a relative (not a spouse) of the decedent and has surviving issue. In that situation, the surviving issue would take. Here, Wife would not fall under the anti-lapse statute since she is a spouse and in any case, both parties would be deemed to have predeceased because of their being interested witnesses. Thus, the devise would fall to the residue to be divided.

When an interested witness is involved, they can take the lesser amount of their intestate share (if they would take under intestate share) or the will amount. The intestate share of a surviving spouse when there is children, all of whom are of the surviving spouse and decedent is that wife takes the first \$20,000 and then 1/2 of what's remaining. The children take the other 1/2

remaining equally. Here, the amount wife would take would be the \$20,000 and 1/2 of the estate from intestacy as that is less than the amount under the will. This would leave the other 1/2 for son as that's less the full amount he stood to take if wife ad predeceased (unless it's deemed more since she didn't predecease in which case he didn't receive anything and then he would take nothing and the other 1/2 would fall to the residue which would then fail since no residuary devise was indicated and would pass through intestacy).

AM Essay 3 - Sample 3

1. No, Mark did not create a valid trust. At issue is the satisfaction of the requirements to create a valid trust.

To create a valid trust, a settlor must have capacity, there must exist trust property (i.e. res), definite beneficiaries and a valid trust purpose.

Here, Mark had the capacity as he was fully competent (fact pattern says so). The requirement for definite beneficiaries is met i.e., Mark's wife and son are both ascertainable persons. There is a valid trust purpose because the trust was created to benefit Mark's wife upon his death and to benefit Son and any other descendants upon Wife's death.

However, the trust fails because the trust did not have any property in it at the time it was created. There must be a res at the time of creation for the trust to be valid. Here, Mark executed the trust a full year before the trust came into existence, i.e., the bill of sale (which is the trust property) until a year later. The bill of sale is not an instrument that operates as an empty trust. In an empty trust situation, the res is tied to the benefits of an insurance proceeds.

Note that had the res existed at the time the trust was created it would have been valid. Delivery would not have been a problem because Mark was the trustee. Also the trust would not have failed because Wife was a trustee as well as beneficiary since Mark was also a trustee (merger of title would not apply).

Since there was no res at the time of creation, the trust is invalid.

2. Admission of will into probate.

Yes, the will should be admitted into probate. At issue is whether the will is valid because of interested witnesses.

For there to be a valid will, the will must 1) be signed by the testator who is of sound mind and of age (i.e., 18) 2) it must be signed in front of or acknowledged to two witnesses, 3) the witnesses must understand that this is the testator's will, 4) the witnesses must sign the will at the request of the testator and in testator's presence but the witnesses are not required to sign in each others presence.

Here all the requirements have been met because Mark is competent (so says the fact pattern), he signed the will in front of his wife and son and both Wife and Son signed with Mark watching. However, since Wife and Son were also beneficiaries to the will, they are interested witnesses. Even though there interested witnesses, the will is valid but the provision to the interested witnesses is invalid except where as here, the interested witnesses would take under intestacy. However, the interested witnesses, i.e., Son and Wife will take the lesser of the two (between the will provision and intestacy share).

3. Distribution of assets

Mark's wife and son will take his assets.

Mark's wife: Under the will, she will take if her amount in the will is less than her intestate share which is 20000 plus half of Mark's estate:

Mark's son: Also will take the lesser of the amount. His intestate share is half of the estate.

The bill of sale: This will pass by intestacy to Wife and Son since it was not properly disposed of in the will.

AM Essay 4 - Sample 1

4)

(1) Which set of laws should be applied in the current case as between State A and State B must be determined. It should be noted that generally the laws of the jurisdiction in which the court sits regarding procedure are followed and only substantive laws of another jurisdiction are applied to the case. Determining whether a prenuptial agreement is valid or not is a substantive law and therefore the conflict of laws analysis that follows will determine whose should be used. In order to determine which State's law applies, Missouri follows the substantial connection test. This is a two part inquiry into both the factual connections between the state and the parties and the policy considerations of which State's law should apply. When a contract's validity is at issue, the first thing the courts will look to is to see if the contract contains a choice of law provision. The courts will enforce that provision so long as it is reasonable and bears some relation to the parties and the contract. In this case, there is no choice of law provision. A contract is at issue in this case and therefore there are special considerations including where the contract was executed, where it was negotiated, where it was performed, and where the subject matter (if any) of the contract is located. In this case, the contract was executed in State A, it was negotiated and drawn up in State A, it pertained to a marriage that was entered into in State A, and it concerned property situated in State A. Connections to State B include the that the contract is being sought to be enforced in State B, and the marriage is about to be dissolved in State B. The policy considerations include the fact that State B is going to be in charge of dissolving the marriage. However, the contract has many more contacts with State A and therefore State B should use State A's law regarding the Uniform Premarital Agreement Act.

(2) In order for a premarital agreement to be enforceable, the agreement must fully and fairly disclose the assets of the parties, the spouse signing it must have time and notice to adequately review or retain counsel regarding the agreement, the agreement must be fair and the parties must voluntarily consent to the agreement absent fraud or duress. In this case, the disclosure and time to review have been met by the fairness and voluntariness of the agreement are in question. There is a large disparity between Hal and Wendy's economic stability at the point of their marriage. However the agreement is having Wendy waive all property rights that are acquired in the first 5 years of marriage. This is a stark and harsh agreement to have Wendy acquiesce to.

Additionally, she is reluctant to refuse to sign because her wedding is looming near and she does not think she would have time to cancel it. She also signs the agreement reluctantly which a court would have to determine whether or not this vitiates the voluntary signature of Wendy. The fact that she did not retain independent counsel is important and does not bear on validity. As described below, child custody rights and child support obligations cannot be contracted for. The waiver of property rights agreement will be considered enforceable if it is considered reasonable and is part of an enforceable premartial agreement. In this case, the courts will not likely enforce the property agreement because it is harsh and goes completely against the entire property rights relating to marriage. The courts will be mindful of the agreement when determining property rights.

(3) Whether or not the premarital agreement is valid does not matter in regards to the child custody agreement. Provisions in a premarital agreement pertaining to child custody and child support are unenforceable. It is up to the court's discretion to determine what type of custody is proper based on the best interest of the child standard and the parenting plans that are submitted. Therefore this clause will be struck from the agreement.

(4) Property that is acquired during the marriage is considered marital property. Property acquired before the marriage or after a legal separation / dissolution is considered separate property and is not subject division. In the case of the songs that Wendy has written, if the premarital agreement is to be upheld only songs that are written in the 1 following the 5 year waiver of marital property rights will be considered marital property. If the premarital agreement is struck down, the income from the songs will be considered marital property since the songs were created during their marriage as part of Wendy's contribution to the marriage. The issue then is after dissolution of the marriage, what will happen to the songs. Intellectual / intangible property that produces royalties or income after the dissolution will be considered marital property and therefore the court will divide the interests in the separation agreement. Wendy wrote the songs during her physical separation from Hal, but since she did not have a legal separation, that property still would have been considered marital property until the divorce decree is filed. If Wendy had obtained a legal separation, the songs that she wrote after her

relocation back to State A would have been considered separate property not subject to division.

AM Essay 4 - Sample 2

4)

1. State A's law will govern the enforceability of the premarital agreement.

In Missouri, a court will determine a choice of law question based on the substantial relationship test. The court will apply the law that has the most substantial relationship to the cause of action. To make this determination, the court will look to the connecting facts and to certain policy considerations. In a contract case, the court will look to the following connecting facts: (1) where the contract was executed; (2) where the contract was negotiated; (3) where the parties resided at the time the contract was entered into; (4) where the contract was to be performed; (5) where the contract was breached; (6) the location of the subject matter of the contract.

Here, Hal and Wendy negotiated and executed the contract in State A. This is where they were married and where they discussed the terms of the contract, thought about the implications of the premarital agreement, spoke with families about the agreement; and ultimately signed the agreement (Hal's attorney's office was located in State A). The contract was performed in State A for 5 1/2 years, since they were married 6 years ago in State A and just moved to State B 6 months ago. The parties resided in State A when the contract was formed. However, now Wendy lives in State B and Hal lives in State A. When determining the state whose law will enforce the agreement, the most significant factor is where the agreement was executed. Here, the premarital agreement was executed in Hal's attorney's office in State A, so it is likely that a Missouri court will apply the laws of State A.

As for policy considerations: A court will look at the states' interest in the litigation and the fairness to the parties. Here, State A adopted the Uniform Premarital Agreement Act, while State B has not. This may persuade the court that State A's laws will be fair, since it is a uniform code. Additionally, State A has an interest in enforcing contracts made in its state.

Therefore, considering the connecting facts and the various policy considerations, it is likely that a Missouri court would apply the laws of State A to the enforceability of the premarital contract.

2. The waiver-of-property-rights provision is probably enforceable.

A premarital contract is enforceable if (a) it is in writing; (b) both parties knowingly and voluntarily consent; (c) the parties fully and fairly disclosed their assets to the other party; and (d) the agreement was fair at the time of execution.

Here, the agreement is in writing. Wendy was upset about entering into the agreement and the facts indicate that she did so "reluctantly" so there may be an argument that she did not knowingly and voluntarily consent. However, she had time to discuss the matters with others and Hal and his attorney even suggested she consult another attorney regarding the agreement. Although she did not take their advice, she did consult with family members about the provisions in the agreement. Then, she signed the day before their wedding. Since the facts indicate that she did not want to call off the wedding at such a late date, and they signed it the day before the wedding, there may be an inference of duress. However, Wendy had a choice and still signed the agreement after consulting with family and thinking about it, so a court will likely hold that she knowingly and voluntarily consented. Assuming that she actually read the agreement and understood its terms, she knowingly consented. Hal's attorney gave Wendy an accurate list of Hal's assets and even copies of Hal's tax returns for the past 3 years. Assuming that the list was really accurate, there is no issue of not fully or fairly disclosing each other's assets. Fairness is judged at the time of execution. Since Wendy was making only \$20,000 and Hal was making \$200,000 per year, it may be argued that waiving all claims to property acquired by the other during the first 5 years of marriage is unfair. If this argument is accepted by the court, the agreement will be invalidated regarding this provision only.

3. The child-custody provision is not likely enforceable.

Generally, parties may not waive away their rights to children in a premarital agreement and a court will not be bound by such a provision. Although this agreement gave the parties joint physical and legal custody, it may be argued that they did not actually waive their legal rights to the children. However, if a court determines that one parent should obtain full legal or physical

custody, then this would be a waiver of rights and is therefore unenforceable.

4. The profits to be derived from Wendy's songs written after she left Hall are subject to division at divorce.

In Missouri, property acquired during the marriage is considered marital property and will be subject to division at divorce. These profits do not fall within the premarital agreement, since they were earned after the first 5 years of their marriage. Additionally, the Hal and Wendy are not legally separated, just de facto separated. Property acquired after legal separation is not considered marital property and will not be subject to division at divorce. However, Wendy just moved out, taking her Child with her. This is a de facto separation because there is no indication that the parties went to court to obtain a legal separation (required in Missouri). Thus, the property is still marital property and subject to division. Wendy may be able to claim that Hal's adultery does not permit him to get the profits, since Missouri is a modified default state. However, it is still **subject** to division at divorce since the parties did not obtain a legal separation prior to Wendy earning the profits.

AM Essay 4 - Sample 3

4)

1. State A's law will govern the enforceability of the premarital agreement between Hal and Wendy.

The issue here is which state's substantive law will apply to an agreement entered into and negotiated in one state, when the parties move to another state. Here, State A's substantive laws will apply. Under the majority test, the substantial relationship test from the second Restatement, a court will look at all of the connecting facts in a contract dispute and they will look at the policy considerations that each state would have in the outcome. They will use these considerations to determine which state's substantive law to apply. Here, under the substantial relationship test, the connecting facts support State A. The contract was entered into in State A, the contract was negotiated in State A, the contract was substantially performed in State A (since Hal and Wendy spent most of their marriage in State A). The contracting parties' common domicile was State A. State B's only connection to the premarital contract was that the parties spent the 3 months residing together in that state and Hal still resides in State B. The most significant fact is that the contract was entered into in State A, therefore State A's laws will govern the enforceability of the contract. Also, under the vested rights approach of the First Restatement, the court would come to the same conclusion, since State A is where the contract was entered into.

2. The waiver of property rights is enforceable.

The premarital contract is enforceable. Such a contract requires capable parties, knowing and voluntary consent, full and fair disclosure, and that it was fair at the time of execution. Wendy will argue that the agreement is not valid, because she didn't really have a choice since the wedding was so soon. However, this is probably not a good argument against knowing and voluntary consent. She was not under any requirement to marry Hal and she had the option to call it off. Even though Wendy was under stress of an impending wedding, it did not negate her consent. Also, all of Hal's assets were disclosed and she had a chance to look the agreement

over. There was full and fair disclosure of Hal's assets and property. Also, the agreement was fair at the time of execution. The agreement only restricted their property division during the first 5 years of the marriage. After that, the parties would accumulate marital property. Thus, the court will probably enforce the agreement.

The waiver of property rights is enforceable, because that is an acceptable agreement that parties can enter into in a prenuptial agreement. Here, the property division was specific and objectively fair at the time of execution, thus the court will enforce it.

3. The court is not under any obligation to enforce the child-custody provision.

The court does not have to abide by the parties' agreement as to child custody. Child custody is always determined based on the best interest of the child. The court is not bound by the parties agreement. If the court finds that joint physical and legal custody of the children is in the child's best interest, they will order such a division. But, any custody order will be based on the best interest, not the parties agreements. The court will look at the child's wishes, the stability that each parent could provide for the child, which parent would allow a meaningful relationship with the other parent, and other considerations in determining child custody. However, courts often prefer to grant joint legal and physical custody over children, since it is often in the child's best interest to be in the custody of both parents. So, this court might also make that determination, based on the child's best interest. The court is free to make its own determination.

4. Any profits from songs by Wendy before she and Hal are legally separated are marital property, and subject to division at divorce.

Missouri is a dual property state, meaning that parties to a marriage can accumulate marital property or separate property during the marriage. A court is allowed to divide marital property in a divorce, but the court is not allowed to divide separate property. Generally, marital property consists of all property accumulated by the spouses during the marriage. Separate

property is generally property held by the spouses before the marriage (that was not conveyed into the marriage), property that is acquired with separate property, and gifts and bequests to the individual spouse. Marital and separate property can be altered by agreement by the parties, as Hal and Wendy did with their prenuptial agreement. They agreed that the property accumulated during the first 5 years would be separate, instead of marital. After the 5 years specified by their agreement, Hal and Wendy would begin accumulating marital property. Wendy's song would probably be considered marital property, and be subject to division. Wendy is acquiring a property interest in the songs during the marriage. Just as wages from employment during a marriage is considered marital property, profits from songs written by Wendy during their marriage is also probably considered marital. The difficulty in this "property" is that it is a little uncertain when someone acquires a property interest in intangible intellectual property. However, if Wendy copyrighted the song, it would be fairly clear that she has a property interest in the song. However, it is probably sufficient that she has written and recorded the song to transform it into "property."

Parties will not stop accumulating marital property when one of them moves away. Marital property is accumulated until a divorce decree is entered or the parties are legally separated. Here, even though Wendy left Hal, they were still married and not legally separated. Therefore, all property that they continue to accumulate will be marital. As such, this property is subject to division by the court.