

## AM Essay 1, Sample 1

1)

1. Yes, Cary can enforce the easement against Andrew. The issue here is whether an express easement runs with the property to benefit a new owner to the dominant land. There are two main types of easements, appurtenant and gross. Appurtenant easements benefit the dominant property and burden the servient property. Here, Andrew's land is burdened by the walkway and Barbara's land is benefitted by allowing her more convenient access to the city park. Therefore, the easement is appurtenant. A valid easement can be either implicit, necessary, prescriptive or express. To comply with the statute of frauds, an express easement must be in writing and agreed on by the parties. There is no general requirement, however, that the easement be recorded. Andrew and Barbara's easement was explicitly negotiated between the two parties and in writing. It is, therefore, an express easement. Whenever the dominant land is sold to a 3rd party (i.e. Cary), a validly granted easement automatically runs with the property and is enforceable by the new owner.

2. No, Cary cannot enforce the easement against Dan. The issue here is whether the owner of the dominant land in an easement may enforce the easement against a new owner of the servient land. The answer depends on whether the dominant land owner is seeking an equitable remedy or damages. If the dominant landowner is seeking to enforce the right to use the easement (equitable relief), the easement runs with the land if 1) The easement touches and concerns the land, 2) The easement was intended to run with the land and 3) The new servient landowner had notice of the easement. To seek a legal remedy, the easement must 1) touch and concern the land, 2) be intended to run with the land and 3) the parties must be in privity (the easement must be recorded in the deed or with the recorded as an easement). To touch and concern the land, the easement must specifically relate to the use of the dominant land. Here, although the easement provides additional convenience for Barbara, the dominant land may access the park via car. Moreover, accessing a public park for personal enjoyment is a recreational purpose unrelated to use of the dominant land. Therefore, the easement does not touch and concern the land. It is somewhat unclear whether the easement was intended to run with the land. On one hand, the express agreement between Barbara and Andrew was of indefinite duration which would indicate both parties intended for the easement to benefit all future owners of the dominant land. On the other hand, neither party made any attempt to record the easement which indicates that the parties did not expect the easement to run with the land. Given the indefinite nature of the easement, it probably was intended to run with the land. The final issue is whether Dan had notice. Notice will be found if the easement was

recorded, discussed or is obvious. Here, although the easement was never recorded, a path had been worn down between the dominant and servient land. Therefore, Dan had constructive notice of the easement. If Cary were seeking damages, there would be an issue of horizontal privity. Because the easement was not recorded in the deed and not included in the deed to Dan, there is no horizontal privity, and damages cannot be sought. With regard to any remedy, because the easement does not touch and concern the land, it is not enforceable against Dan. If it did touch and concern the land, equitable relief would be appropriate, but legal relief would not be (no privity).

3. Yes, Cary's acquisition of the land affects the easement. An easement is deemed to terminate when the dominant landowner purchases the servient land. The easement merges with the fee simple absolute on the servient land. When Cary purchased the land from Dan in FSA, the easement on Dan's property merged with his FSA ownership of Dan's land and terminated the easement. This is true even though the original easement was an express easement.

4. Frank will not be able to successfully assert that an easement exists to access the park. The issue here is whether, after an easement has been merged, will resell of the dominant and servient land, recreate the easement. Once an express easement is merged, it terminates. In terminating, no future purchase of the property will be entitled to the easement unless separate grounds for the easement can be asserted. When Cary sold tract 1 to Edward and tract 2 to Frank in FSA, there is no indication that any express agreement existed between Edward and Frank to grant an easement. Without Edward's express consent, the only way Frank will be able to assert easement rights is if he can show that the easement is implied, necessary or prescriptive. A prescriptive easement requires continuous use for the statutory adverse possession period, open and notorious use and non-permissive use. Clearly, since the property was just purchased, the requirements for a prescriptive easement do not exist, since the statutory period has not been met. A necessary easement exists if 1) The dominant property was, at one time, part of the same tract of land as the servient property and 2) the dominant land is landlocked. Although the property was once part of the same tract of land, the dominant land is not landlocked. Even with regard to the park, there are other routes of access. Regardless, easements of necessity are normally only granted for issues directly related to the use of the land like powerlines or roadways. Finally, an implied easement requires 1) Before division, the tracts had common ownership, 2) A continuous quasi easement on the land before

the tracts were divided, 3) The use is apparent, and 4) The easement is reasonably necessary to the dominant land. Here, the tracts did have common ownership immediately before division since Cary owned both Tract 1 and Tract 2. For a continuous quasi easement to exist, Cary must have continued to use the path to the park to access the park from Tract 2. If Cary eliminated the path, for example, by planting grass on the path, no continuous quasi easement would exist. Assuming the path is still connecting tract 2 to the park, the path itself will probably constitute an apparent use. Since the path begins on tract 2 and runs to the park, objective people would recognize that the path was a more convenient method of accessing the park. It is unlikely that Frank could successfully argue that the easement is reasonably necessary to his property. As discussed above in subpoint 1, there is another route (by car) to access the park. Moreover, use of a park is not normally considered necessary to the normal use and enjoyment of property. Therefore, since the use is reasonably necessary to the dominant land, there is no implied easement.

## AM Essay 1, Sample 2

1)

1. Cary can enforce the easement against Andrew. At issue is whether a subsequent owner of a property can enforce an easement.

An easement is an interest in land. When Andrew agreed to grant Barbara an easement permitting pedestrian access to the city park from Tract 2, this was an express easement. It is also an easement appurtenant. An easement appurtenant is one in which there is both benefitted land and burdened land, and therefore a dominant estate and a servient estate. Here, Tract 1 would be the burdened estate (the servient estate) and tract 2 would be the dominant estate (the benefitted estate). Here, the easement is running with the benefitted land (Tract 1) even though it is not recorded. An easement runs with the land if it touches and concerns the land. Here, the easement is for use of the land for walking to the city park, so it touches and concerns the land. Therefore, it will run with the land, and Cary will be able to enforce the easement against Andrew.

2. Cary can enforce the easement against Dan. At issue is whether an easement can be enforced against a subsequent purchaser of the servient estate.

An easement can be enforced against the servient estate if it runs with the land. An easement runs with the land if it touches and concerns the land. Here, the easement touches and concerns the land because it involves use of the land--a walking path across the land. Here, the easement was never recorded and when Andrew sells the land to Dan, he never mentions the easement, nor is it mentioned in the deed. As such, Dan is not put on actual notice of the easement nor constructive notice of the easement. However, Dan is put on inquiry notice of the easement because the facts indicate that a walking path was worn across the southeast corner of Tract 1. The walking path is therefore visible, and this gives Dan the opportunity to inquire regarding the walking path, which puts him on notice of a possible easement on the land. Therefore, Cary can enforce the easement against Dan.

3. This does effect the easement and the easement terminates by merger. When the dominant estate and the servient estate become one estate, an easement terminates by merger. This is because there is no longer land that is benefitted and burdened, and since the landowner (Cary) owns the entire tract of land (both tract 1 and tract 2), he can freely use his land as he wishes, and there is no longer a need for an easement. As such, since Cary

acquired the entire tract of land, the easement has been terminated by merger.

4. No, Frank cannot successfully assert an easement across Tract 1 to access the city park. At issue is whether after an easement terminates by merger, the easement can arise again when the estates are once again separated into two tracts.

After an easement terminates by merger, the easement cannot become effective again unless it is granted or created again. Therefore, in order for Frank to successfully assert an easement across Tract 1, he needs to get an express easement granted by Edward to use the path on Tract 1 or acquire a prescriptive easement (continuous use that is open and notorious and nonpermissive). There would also be no easement by necessity because Frank could access the city park by car.

However, Frank may try to argue that there is an implied easement. An implied easement is one that is created by implication. The tracts have to have been one tract of land at one point, and the easement must be visible. Here, the tract was one tract before Cary sold tract 1 to Edward and tract 2 to Frank. Moreover, the facts indicate that the walking path was worn across the southeast corner of Tract 1, so this shows the easement is visible. As such, Frank may have a valid argument that he has an implied easement to cross tract 1 to access the city park.

## AM Essay 1, Sample 3

1)

1. Cary can enforce the easment.

### Express Easement Created

Andrew (A) has created an express easement. Under Missouri law, one can create an easement expressly, impliedly, by prescription, or by necessity. To have an express easment, one must have a writing describing location and scope of the easement on the sevient land. The servient land is the land burdened by the easement (here, tract 1), and the dominant land is the land benefited by the easement (here, tract 2). Here, the easment is in writing, signed by the owner of the servient land, and it describes that the easement is for access across tract 1 for tract 2's access to the park. Therefore, there is a valid express easement.

### Cary (C) can enforce the easement against A (the original owner) because C and A are in privity

C can enforce the easement against A. Under Missouri law, a subsequent owner of land can enforce an easement if the easement was valid (i.e., enforceable against the owner of the servient land) and if there is horizontal privity between the prior owner of the dominant land and the new owner of the dominant land, if nothing has been done to destroy the easement. One may destroy an easement by merger (one owner acquires title to both the benefitted and burdened land), release (the easement owner executes a release discharging the servient land owner from the easement), or abandon (the easement owner intends to stop using the easement and does some affirmative act to show such intent). Here, as explained above, there is an express easement. The easement is enforceable againgt A. As well, none of the ways explained above that might terminate the easement have been shown. The fact that the easement does was not recorded does not matter as to enforcement against the original owner of the servient land. Therefore, Andrew can enfore the easement.

### 2. C can enforce the easement against Dan (D) because D had inquiry notice of the easement.

C can enforce the easement against Dan (D) because D had inquiry notice of the easement. Under Missouri law, an interest in land cannot be enforced against a subsequent purchaser for value (that is, a subsequent purchaser of the land) if the subsequent purchaser does not have notice of the interest. A subsequent purchaser for value means one who pays adequate consideration for the land. One may have inquiry notice (the appearance ofthe land would cause a reasonable person to inquire as to whether the interest exists), record notice (a document showing the interest filed with the county real estate office), or actual notice. Here,

Dan likely paid adequate consideration for the land. As well, although there was no document filed (and thus D had no record notice of the easement) and D had no actual notice of the easement, the worn path crossing tract 1, running from tract 2 to the park, should have put D on inquiry notice of the easement -- that is, a reasonable person would likely inquire as to the existence of the easement. Therefore, C can enforce the easement against D.

3. When C acquired tract 1 from D, the easement was destroyed by merger.

When C acquired tract 1 from D, the easement was destroyed by merger. Under Missouri law, an easement is destroyed by merger when one owner acquires title to both the servient and dominant estates concurrently. Here, C owned the dominant estate (tract 2), and then C acquired the servient estate (tract 1). C had concurrent ownership of the servient and dominant estates. Therefore, the easement was destroyed by merger.

4. Frank (F) cannot assert the easement against Edward (E) because the easement was destroyed by merger.

Frank (F) cannot assert the easement against Edward (E) because the easement was destroyed by merger. Under Missouri law, an easement is terminated when one owner acquires title to both the servient and dominant estates. Here, as stated above, C terminated the easement when C acquired title to both the servient and dominant estates. Therefore, the easement is terminated and F cannot assert it against E. However, there could be an exception to this (please see next paragraph).

No new easement has been created, although F may have an argument that an implied easement has been created.

F cannot assert the easement because no new easement has been created, although there is an argument that an implied easement was created. Under Missouri law, one can create an easement expressly, impliedly, by prescription, or by necessity. An express easement requires a written document describing the scope and location of the easement on the dominant estate. This has not been created here. A prescriptive easement requires open, notorious, adverse use of the easement for 10 years. This has not been done here. An easement by necessity requires that the dominant estate be landlocked and that there be no other way for the dominant land owner to leave their land but by crossing the servient land. Here, this does not exist because there is another way for tract 2 owner to get to the park other than crossing tract 1. An implied easement requires that there be prior concurrent ownership and that the prior

owner used the easement on the servient land to benefit the dominant land (while the two were concurrently owned). Here, this may be true that C used the easement when she owned both land since she had used it before when she didn't own both and since it is the most convenient route to the park. (However, she may have started taking a new route when she bought tract 1.) Therefore, D can likely not enforce the easement against E, but may be able to as an implied easement.

## AM Essay 2, Sample 1

1. Danny may sue for compensatory damages, incidental damages, and consequential damages. Additionally, Danny should claim unjust enrichment, or restitution damages.

At issue is what damages a plaintiff may be rewarded upon a material breach of contract, and when the plaintiff has unjustly enriched the defendant.

The rule is that in a contract claim, a plaintiff may sue for 1) compensatory damages which will put the parties in the position as if the contract has been successfully carried out and any money damages incurred for breach of contract, 2) incidental damages to compensate for any incidentals or extra payments incurred by the plaintiff by defendant's breach, and 3) consequential damages to pay for any costs incurred by the plaintiff as a consequence of Defendant's actions. Consequential damages are foreseeable and reasonably ascertainable. Next, Danny may sue for restitution, or unjust enrichment. This remedy is available as the defendant benefitted from plaintiff's actions, and such actions were not to be gratuitous, and so the defendant is unjustly enriched by Plaintiff. Finally, Danny may sue for specific performance. This remedy is allowed if there was a valid contract between the parties, all conditions to the contract were met, and there is mutuality of remedies. Although specific performance is only allowed in a case where there is unique goods, money damages would not be adequate, and specific performance is feasible.

In this case, Danny may recover compensatory damages for the extra labor and work he did on the patio. Paul asked Danny to do extra work on the patio in exchange for extra money. In this way, Paul orally modified the contract. Modifications of a contract cannot be modified without consideration (unless they are under UCC Article 2). There was consideration in this case because Paul stated he would pay Danny extra money. Paul materially breached the contract by refusing to pay the extra money and by refusing to do the tax returns. This is a material breach because it was Danny's consideration for completing the work and it detrimentally affects Danny's interest. Although late, Danny did complete the patio, and Paul must pay him, and by not he is in breach and must pay Danny compensatory damages to put him in the place he would have been if the contract had been completed. The compensatory damages would also include the value of Paul performing Danny's tax returns.

The facts do not indicate any incidental or consequential damages. Although, if Danny did have consequential damages, he must prove they were foreseeable and ascertainable.

Next, Danny could also claim unjust enrichment if the contract was not validly modified. In unjust enrichment, Danny must prove that Paul was unjustly enriched by his extra labor and materials. In this case, Danny added value to Paul's patio, which Paul took the benefit of, and Danny's work was not meant to be gratuitous because he relied on Paul's statements that Paul would pay extra. Therefore, Danny should prevail on an unjust enrichment or restitution claim.

Danny would not win on a specific performance claim. Although there was a valid contract, all conditions, have been met, and there is a mutuality of remedies because Danny has performed and Paul, as accountant could perform Danny's taxes, the tax work is not a unique good. Further, monetary or legal damages would be adequate for Danny to pay another to do his taxes, and courts generally will not enforce personal service contracts.

2. No, Paul's lawsuit should not prevail. At issue is if the different color brick, as to amount as a material breach of contract, and if the color can be enforced as it is not stated in the contract.

The rule is that a material breach of contract occurs if one party has failed to complete their obligations under the contract or has done something to substantially, adversely affect an important interest of the other party under the contract. Further in a service contract, once a service provider has substantially performed all of the work, the other party cannot refuse to pay unless there has been a material breach.

In this case, Danny did substantially perform and in fact completed his obligations, and therefore Paul must fulfill his obligations under the contract. A slightly different shade of red brick is not a material breach because it was not stated what color brick was to be used in the contract and it does not substantially, adversely affect Paul's interest in the contract, and thus it is not a material breach. Paul's argument will not be successful.

3. Danny should make an argument that he completed the contract in a reasonable time, and under the parole evidence rule, Paul cannot submit evidence of the prior negotiation of the contract.

At issue is whether Paul can admit prior negotiations of the written contract under the parole evidence rule.

Under Missouri law, a contract is considered complete and fully integrated if it is complete on its face. If a contract is complete and integrated, then under the parole evidence rule, no evidence of prior negotiations is allowed. There are certain exceptions to this including fraud or duress evidence, evidence of subsequent agreements, and evidence of conditions to the contract.

In this case, the contract is complete and fully integrated because it states the intentions of the parties and the statement "that this is the entire agreement between the parties." Courts will usually find an agreement complete with this type of language. The discussion of the patio being done in six weeks was a prior negotiation, and because the contract is complete, the court should exclude it under the parole evidence rule.

## AM Essay 2, Sample 2

1. The general measure of damages in a contract action are expectancy and consequential damages. In order to succeed on a suit for damages Danny must prove that Paul breached the valid contract. A party breaches the contract when he violates a term of a valid contract. Danny has claims for breach. First, he can argue that Paul breached the contract by not agreeing to pay for the additional materials. Paul agreed to this orally and the issue is whether that oral agreement constituted a modification of the contract. Although generally, an integrated agreement (one that states the written document constitutes the "entire agreement" between the parties), as here, cannot be supplemented upon suit by oral agreements, that is not the case with later modifications. Oral modifications can modify an agreement and parol evidence can be used to prove them. This was an oral modification if it altered the terms of the K, such as the configuration and estimated costs of the K, for consideration (extra labor) Danny can recover the extra labor and materials as agreed. He might also seek this under a quasi - K theory. Reliance damages (value of labor and materials) are damages relied upon the improper assumption that a K existed. Danny can try to show this if the court finds parol evidence precludes the modification: (It should be noted that a modification requires, under common law, new consideration - which must be proved by Danny that he received some additional benefit in agreeing to the modification). He must show reliance and appeal to the court's sense of justice. He might also argue that Paul was unjustly enriched by the additions if he is not made to pay for the labor and costs, which if proven, gets Danny the fair market value of the improvements.

Danny can also seek the value of the 5-year tax return preparation, if he proves breach of a contract. A court will not require Paul to specifically perform the services because a court does not order specific performance of personal service contracts. Danny can, however, get the fair market value of those services if he can prove that value in addition to breach by Paul.

There was a valid contract here because offer (proposed written K) and acceptance (signing) for consideration (20000 + tax returns in exchange for services + materials).

In order to succeed, Danny must show that he did not materially breach the K.

2. The issue is whether the color of the brick was a material term of the K that, once violated, excuses Paul's performance under the contract. There are several impediments to Paul's success on this issue. First, the K did not definitively state what color brick should be used. Since it is an integrated agreement parol evidence is not allowed to prove additional terms of the K. However, extrinsic evidence is allowed to prove the meaning of the terms in the written agreement. Paul should argue that the attached brochure defines the term brick in the K and limits that to the advertised color. The court is likely to agree with Paul, particularly if color of brick is often not defined in contracts of this particular business nature. Paul also has to prove that the breach was material. A breach is material if it alters the K in such a manner that the parties would not have assented to the K if they knew of the breach @ the time they entered into it. If Paul can prove he would not have entered into the contract if he knew Danny would use this color brick then he will be successful.

Even if Paul proves breach the court will try to put the parties into the position they would have been in if the K had not existed. Thus under a quasi-K theory, Paul still has to pay for the materials & labor costs. Although he can offset those costs by the \$20,000.

3. Danny should argue that the written agreement does not state a date of completion and the parol evidence rule prohibits the court from considering Paul's oral statements into evidence. When a K states no date of completion the court will apply a reasonable amount of time to complete the K rule.

Danny should also argue that he never agreed to the term anyway b/c he never manifested assent in a reasonable manner: he only said "I think" "I believe" "doesn't think it will be a problem."

He can also argue that Paul contributed to the delay by modifying the configuration.

## AM Essay 2, Sample 3

2)

1) The common law of contracts would apply to this contract as it is a contract for services, and not the sale of goods. A party that wins on a breach of contract cause of action is generally awarded damages based on his expectation interest--in other words, placing him in as good of a position as if the contract had been performed. In order for Danny to be in as good of a position as had Paul performed on the contract he needs his taxes done for the next five years as well as the extra labor and materials above what was contemplated originally. Danny could seek money damages for the amount of extra labor and materials, which would be set at the market rate of materials at the time of breach as well as reasonable value of his services. Danny could also seek money damages for the amount that he will now have to pay an accountant to do his tax returns, as well as the incidental costs of going out and looking for one. The problem is that this part of the contract has not yet actually been breached. Danny could argue that Paul's anticipatory repudiation, his unequivocal assertion that he would not do the tax returns, allows Danny to sue for the entire amount right now. Of course, to recover the damages for the later work, Danny has to prove that Paul made the oral assurances to him or there would be no contract for the changes in configuration. These agreements would not be barred by the parol evidence rule because the parol evidence rule does not bar oral agreements after an integrated agreement.

2) Probably not. The issue is whether the color of brick used is a material breach. It is likely not, because the color was only "slightly" different and Danny never said the brick would be exactly the same color as the brochure and Paul never asked for a certain color of brick. If anything, Paul would be liable for a lesser amount than originally agreed, but would not be completely relieved of liability under the contract because this was not a material breach. Paul could not be excused from his obligations under the contract for this minor breach.

3) First, under the parol evidence rule, oral agreements and negotiations that are made before a written contract is entered are not considered if the written agreement is completely integrated. Therefore, Danny would argue that the discussion between Paul and Danny, before the contract was entered into, would not be considered part of the agreement. If it is only a partially integrated agreement, however, the oral terms can just not contradict the written terms--and here they wouldn't because the contract was silent as to time for completion. The facts indicate this was "the entire agreement" between the parties--this is probably a partially integrated agreement because it does not say "the entire and exclusive agreement." Therefore,

Paul would probably prevail on this point.

Even if the discussion come into play, Danny could also argue that this was not a material breach--over half of the work was done, and it was only two weeks over the six-week period originally agreed upon. On the other hand, however, Danny was aware that the completion date was very important to Paul and repeatedly assured him that it would be done in time. This is a close call, but it would probably be a minor breach, for which Paul could seek damages, but not be excused completely from performance. Lastly, Danny could argue that the damages as a result of Paul not having the party were not foreseeable, and therefore, could not be awarded as consequential damages. This would also likely fail. Danny knew that Paul was having people over for a business meeting and having to rent out office space would be a foreseeable result of his breach in not completing in the agreed upon time.

## AM Essay 3, Sample 1

1. Assuming Mary did not file notice with the court of her intended move, John should file a motion with the court to modify the custody order. In order to modify a custody order, there must be a substantial change concerning the child or custodian and a new custody order would be in best interests of the child. Here John can argue that Mary's intended move is a substantial change that supports modifying the custody order.

If Mary filed her intention to move with the court, John should file an objection with the court. If no objection is filed, Mary will be permitted to move with her daughter 60 days after notice was given.

2. If John opposes her motion, Mary must prove the move is made in good faith, is in the best interests of the daughter and not made solely to interfere with John's time with the daughter. Here, Mary's move seems to be in good faith and not intended to deprive John of time with his daughter. She is moving to take care of her parents, the daughter's grandparents. Given the fact that John had visitation on alternate weekends, alternate holidays and 6 weeks in summer, the move will not interfere too much with his visitation rights. He can still spend alternate holidays and 6 weeks in summer with her. The only change will be the alternate weekends and the court may rule that Mary can move. Also the court may consider the fact that the daughter will be moving closer to her grandparents as another reason to allow the move. There are no facts suggesting traveling to Florida will be a hardship on John (or having daughter travel to MO).

3. The court order must address a new visitation schedule, the costs associated with the schedule including who will be paying the costs for the daughter to travel between MO and FL. The order should also address whether the joint legal and physical custody may change. The court may hold that Mary has sole legal custody because the daughter will be living with her (if the move is approved). However, MO courts prefer for both parents to share legal custody if there is a commonality of beliefs among the parents. Therefore, if John and Mary have a friendly relationship and it is not too inconvenient, the court may continue the joint legal custody. Joint physical custody will likely be maintained because the time does not have to be 50/50.

4. Marital property includes income earned during the marriage and therefore the stock likely is marital property if it is viewed as income. Marital property is divided during a divorce. Orders dividing marital property become final 30 days after they are entered. Omitted property can be divided upon motion filed with the court. The property is valued at the time of division, not at the time of the divorce. Because a year has passed since the award became final (assuming it is 2008), John's only option is to file an action in equity. Mary will be able to assert the defense of laches, an unreasonable delay that has been prejudicial to her. John can argue that he only learned of the stock recently and therefore the delay was not unreasonable.

The court may permit tracing the money Mary received from the sale if it determines that it is not too late to divide the property. The court cannot retrieve the stock shares because Mary is no longer the owner of the shares.

AM Essay 3, Sample 2

3)

1. John should object to the letter within 30 days of receiving it, and file a motion with the court that the move to Florida is so severe that not only is it not in the best interests of the Daughter, but would be harmful to her.

Assuming that Mary has not filed her petition in family court, as required for such a relocation (and requiring him to object within 30), he should file a petition on his own in family court that Mary's move to Florida is not only in the best interests of Daughter, but would be harmful to the daughter.

Under Missouri law, which has adopted the Uniform Child Custody Jurisdiction Act (UCCJA), child custody is determined under the best interests of the child standard, and any relocation that would substantially change the child custody arrangement would require the greater harmful to the child standard.

Here, John should argue that it is not in the best interests of Daughter that she move with Mary to Florida; in fact, it would be harmful to Daughter were she to move to Florida with Mary. This would disrupt ongoing and meaningful contact with John, and also disrupt her relationship with her brother, who may go or stay. Additionally, it may disrupt her adjustment to school and friends, having lived in Missouri for all her 11 years now.

Therefore, John should file a motion that it is in the best interests of Daughter she remain in Missouri, and seek perhaps sole physical custody, but the family court judge would ultimately decide the best interests of the child.

2. Mary must prove that it is in the best interests of the child that she moves with Mary to Florida.

Under the UCCJA, a relocation must filed with family court, with notice via written letter sent to all those with visitation rights 60 days before the proposed relocation. Additionally, the relocation notice must state the reason for the move, an explanation as to why it is in the best

interests of the child, show it is with good faith, give the new home address and phone number, along with a proposed new visitation schedule. If no one objects to the move within 30 days of receiving the notice, then the move may take place 60 days after filing.

Here, Mary must prove to the court, in addition to providing the court and John with her relocation information, that the move is in the best interests of Daughter, and done in good faith.

A court would likely rule that the move is not in the best interests of Daughter - it is in the best interests of her aging parents. As discussed above, this would disrupt Daughter's adjustment to Missouri, her friends, her school, her relationship with her brother, and ongoing and meaningful contact with her father who would be even more tied down to Missouri due to the recent birth of his twins.

Therefore, while Mary may try to prove in her petition, properly pled, that it is in the best interests of Daughter that she move with her mother to Florida, a court will likely find that it is not Daughter's best interest to move away from all she knows, for the sake of taking care of grandparents in a state she has no connections to otherwise.

3. The court must address the issues that it is in the best interests of the child for the agreed relocation, the new custodial arrangement as sole physical with joint legal custody, and a new visitation schedule.

Under the UCCJA, as addressed above, the court would have to do an analysis of the best interests of daughter. Additionally, the court would have to order a new custodial arrangement, changing it from joint legal and physical custody to joint legal and sole physical custody. Joint legal custody, Missouri's preference, requires that the major decisions regarding the child be made by the two parents, to the extent of their commonality of beliefs in raising the child. Joint physical custody occurs where both parents share significant, meaningful time with the child.

Here, joint legal custody can remain, as they agree that the relocation is in her best interests, and thus share a commonality of belief in raising Daughter. The court would have to

change the custody order from joint physical custody to sole physical custody, as it would be unlikely that John would be able to maintain the current visitation schedule to amount to significant time. Florida is far away from Missouri and John is tied down with his new twins. John may not use his new family as a sword to cut against Mary's rights in the child, but may use the family as a shield in protecting his rights with the child and with his new family.

Thus, as John's visitation schedule would logically be drastically changed, the court would have to come up with a new visitation schedule that would allow him to come as close as practically possible to his previous joint physical custody arrangement, always, always, in the best interests of Daughter.

4. No, John would not be able to get one-half the money from Mary's stock, but would be able to get the fair market value of the stock at the time of divorce.

Under Missouri law, a family court judge must divide marital property, must not divide separate property, and the resulting division must be just. Property divisions are final and not modifiable, unless omitted property is found within 30 day appeal time. If it is found thereafter, a court in equity may divide the omitted property as long as there no defense of laches - no unreasonable delay.

Here, there is no unreasonable delay as John just found out last week that the stock was omitted. Since the 30 day appeal time is up, he would have to maintain his petition in equity.

In Missouri, stock dividends are considered marital, so they are subject to division. John would be able to get half the fair market value at the time of divorce. It is not fair that he would be able to get a much higher amount simply due to an accidental omission of the stock. The sale of the stock just recently was not due to any marital contribution or efforts. It was simply Mary recently selling the stock, and John should not be able to profit from her solely separate sale.

Therefore, he is entitled to the stock, but only to the fair market value, justly divided, at the time of divorce.

## AM Essay 3, Sample 3

3)

1. John must object within 60 days of receiving Mary's notice of intention to move. The issue here is what John must do to try and block Mary's move to Florida. Under Missouri law, when a party (with children together) wishes to leave the state with the marital child(ren), he/she must notify the other party within 60 days and then wait 60 days for an possible objection to the move. If John does not wish for Mary to move the daughter to Florida, he must object to the move within 60 days of receiving notice of Mary's intention to move.

2. The court would probably not allow Mary to move the daughter to Florida. Under Missouri family law, if John objects Mary's request to move a custodial child, Mary must show the court that 1) The move is in the best interests of the child and 2) The move is being made in good faith. Missouri courts examine a host of issues when determining the best interests of the child. They will consider the child's wishes, the wishes of both biological parents, the relationship between the parents and the child, the willingness of each parent to ensure the child maintains a significant relationship with the other biological parent, the ability given the move for visitation to be maintained and any other relevant factor. To constitute good faith, the move must not be made to harm the relationship with the other parent or to avoid any obligations. Since Mary would like to move to Florida to care for her parents, her move does not seem to be made to harm the relationship with John or avoid any obligations. It seems to be in good faith. It is another issue altogether whether the court would deem this move to be in the best interest of the child. Strictly speaking, moving to care for Mary's parents would not directly benefit the minor child. Mary could argue that having close contact with the child's maternal grandparents would be a positive influence on the child. However, the court must also consider the amount of time such care will take away from attention to the minor child. Moreover, Missouri and Florida are several states apart. The court would need to consider whether visitation would become extremely difficult with the child. Although, presumably both parent's careers pay decent money, frequent trips to Florida or Missouri are unlikely. Finally, the court would need to examine the relationship with the minor child and both parents. In this case, the court would examine the child's relationship with John's new wife as well as the child's important interest in building a relationship with her two, new half brothers or sisters. Unless Mary could demonstrate something positive for the minor child in Florida, it is unlikely the court will deem this move in the best interest of the child.

3. The issue here is what deference the court will give to an agreement reached between

the parties regarding the minor child. Even if an agreement is reached between the parties, the court must still evaluate whether the best interest of the child are served by such an agreement. Like settlement agreements, the court has no obligation to defer to the agreement of the parties when interests related to a minor child are involved. Therefore, all of the analysis listed above in question 2 must still be evaluated. Additionally, the court will have to work out new visitation schedules as well as financial arrangements to ensure adequate visitation. The court may, at its discretion, require one party to pay for the flights for visitation. In the alternative, the court may require one party of the other to deliver the child to the other parent for scheduled visitation. Given the difficulty in holding visitation every other weekend, on certain holidays and 6 weeks in the summer, the court may decide John is entitled to the daughter all summer and on regularly scheduled school breaks with some visitation during these times for Mary.

4. Yes, John can get a "just division" of the current value of the stock. At issue here is whether a party may request the division of property mistakenly excluded from the original decree. Depending on whether the time for appeal had run or not, would determine John's course of action. If the time for appeal has not run, John is required to ask the trial court to include the property in the division. If, on the other hand, the time for appeal has run, John would required to petition the court in equity seeking division of the property. Since the divorce was completed in 2005, the time for appeal has certainly run. Therefore, John must petition the trial court for in equity for division of the property. In a petition for equity, the court cannot re-divide previous property, but it take the original division into account in dividing the excluded property. Under a petition for equity, John would be entitled to part of the stock if it was marital property. Marital property includes any compensation received during the marriage including, compensation bonuses. Since the bonus was received the year before the divorce, it is subject to division. John may not, ultimately, get 1/2 of the stock, though. Missouri divides marital property through a just division. A just division is not always equal. Moreover, as mentioned above, the previous division will be taken into account. Therefore, if John received more than mary in the original decree, he may not receive half of the stock. In any event, John is entitled to a just division of the stock.

## AM Essay 4, Sample 1

Friend has breached the duty of loyalty, duty of care, duty to invest and grow stocks.

Duty of Loyalty: Friend has breached this duty of loyalty to the trust. One element of the duty of loyalty is to avoid self dealing. Self-dealing arises when the trustee uses the trust property to benefit himself. In this case, Friend individually own 70% of the common stock of Corp A. Using the trust res to purchase shares of preferred stock in a corporation that the trustee owns a controlling interest is a breach of the trustee's duty of loyalty.

Also, there may be an argument for a breach of the duty of loyalty for investing in a closely held corp that will not payout for 10 years when the trustee owns 70%. It is almost like a loan to the trustee, or using trust res to further his own company.

Duty of Care: A trustee has a duty of care to the beneficiary to invest the trust res in such a way that follows the requirements of the trust. Here, trustee invested the property in such a way that prevents James, the beneficiary, from being able to withdraw 5% of the trust's principal each year because the 90% of principal is tied up in two closely held corporations, with transfer restrictions, and restrictions on payment of dividends.

Duty to Invest/Grow the Principal: Under the prudent investor rule, a trustee must invest the trust res prudently - (reasonably) to make the trust property produce income and grow. Friend has violated this duty by investing in corporations that were start ups while not diversifying. If Trustee had not invested 90% of the property in two closely held corps, but invested a much smaller percentage of trust res, he might not have breached this duty.

Further, Friend failed to diversify. This failure puts the success/growth of the trust on two, unproven, start up companies.

The Friend's/Trustee's honest belief that the preferred stock was a safe investment does not relieve him from liability on his breach of duty. The prudent investor is not a subjective standard, but requires objective comparison to what reasonable investors would do.

Friend may also have breached his duty because the stocks cannot be sold. While liquidity is not required in prudent investments, placing 90% of trust property that cannot be sold for 10 years was a mistake. The prudent investor must/should attempt to balance the % of assets that are long term investments and those that can be easily converted into cash.

The Friend may also have done the trust a disservice by investing in closely held corporation in the first place. Closely held corps have restrictions that publically traded stocks do not.

The trustee may have to pay the trust back for his breach of duty.

## AM Essay 4, Sample 2

At issue in this question is whether Friend, as a trustee has breached any fiduciary duties. Trustee owes the beneficiaries of their trusts including the duty of care and the duty of loyalty. The duty of care encompasses certain sub-duties, including, but not limited to, the trustee must exercise reasonable care in investing (reasonably prudent investor) and act in good faith. Further, under the duty of loyalty, the trustee must not engage in self-dealing, meaning using trust funds to gain an individual pecuniary benefit.

Here, the trustee has likely breached its duty of care. Trustees are allowed to modify the principal (res of the trust/property in it) by reinvesting that principal. When so doing, the trustee is bound to invest under a certain standard of care: meaning that of a reasonably prudent investor. Trustees are not bound to always reinvest in a profitable way. An investment is not imprudent or unreasonable merely by the fact that it actually loses money. The test is objective and in foresight, not subjective and result driven. The important thing is that the actions in investing were, in and of themselves reasonable. Here, Friend sold the corpus of the trust (the publicly traded securities). 10% of the funds from that were reinvested in other publicly traded securities. There is likely no problem with this because publicly traded securities (at least absent any additional facts indicating unreasonableness) are reasonably prudent investments. 95% of the funds were then invested in each of Company A and Company B stock. These companies were newly organized and cash poor. Both preferred stocks guaranteed a 5% annual dividend. This is a reasonable rate of return, and would not by itself violate the reasonable investor standard. However, three factors indicate that these were unreasonable investments. First, the companies were competitors in a market to create a very specific product (cell phone pen). It is possible that a reasonable investor would not deem an investment in two separate fledgling companies vying for market share of a discrete and insular market as a reasonably prudent investment. Second, the terms of the trust enabled the beneficiary to obtain 5% of the principle annually. Here, because both stocks paid dividends after 10 years and were unalienable, the beneficiary would have to rely on the 10% invested elsewhere to get the annual 5% optional payment. Since, in the absence of extremely unlikely rates of return, this 10% would be depleted in two years, this may have been unreasonable. Third, since these companies were both cash poor and were competing for a very specific market, it is likely that at least one will not be able to pay its dividend at the end of 10 years. This assumes that the guaranteed payment was not secured by collateral other than that owned by the companies. For these reasons, i.e. the unlikelihood of success of the competitors and the lack of availability of principal, the trustee like violated his duty of care by investing not as a reasonably prudent investor.

The duty of loyalty was probably also violated. Here the trustee acted against the spoken terms of the trust by investing in a manner which made it highly unlikely that the beneficiary could realize its option of an annual 5% principle withdrawal.

Further, the investment in A preferred stock may have been self dealing. It is not relevant that the trustee owned only common stock in A and invested trust funds in preferred. If the trustee did this in order to increase the value of his own stock it is self dealing (i.e. by increasing A value) and is a breach of duty of loyalty.

## AM Essay 4, Sample 3

4)

Friend may have breached his duty of loyalty (through self dealing), his duty to administer the trust and his duty of care (to ensure the trust is properly invested and managed). The duty of loyalty by a trustee specifically prohibits the trustee from engaging in any personal deals with the trust for which he is administering. Since friend individually owned 70% of common stock of Company A (a majority position), it could be argued that he breached his duty of loyalty by purchasing preferred stock in the same company. Although common stock and preferred stock certainly differ in important management and economic respects, they both represent a stake in the outcome and financial success of the company. From friend's perspective, if company A raised additional capital via any valid method, including selling preferred stock, then Company A would potentially have a better chance of successfully funding prototypes. With 70% of Company A's common stock, Friend had a tremendous personal stake in the success of Company A. If the Company developed successful prototypes, his stock value would increase. In short, a majority shareholder in Company A has a huge stake in selling as many shares of stock as possible. Therefore, buying the preferred stock from, in essence, friend's own company, violated his duty to avoid self dealing.

Trustee's have a duty to administer the trust according to the express wishes of the settlor. When the settler funded this trust (6 years ago), she expressly instructed Friend that James (the beneficiary) may withdraw up to 5% of the trust's principal during the first ten years of the trust. When Friend bought investments that alienated both transfer of the stock and the receipt of dividends for 10 years. There are a couple of major problems with the way Friend administered the trust with regard to these investments. First, the 5% dividends on the stocks did not vest for 10 years. In other words, for 10 years, the stocks had no liquidity. Without liquidity, Friend would have been unable to allow James to withdraw his allotted percentage. The second major problem is that these companies were not financially sound. The issue will be more thoroughly discussed below, but, for this purpose alone, a financially weak company offers no guarantee of a preferred dividend. Even without the restraints on the dividends, the financial weakness of the companies made liquidity an issue. Moreover, companies are generally not required to issue dividends (even for preferred shares). If the company was unable to (or chose not to), offer a dividend, Friend would not be able to allow James to withdraw. The illiquidity of this stock made administering the express wishes of the settlor impossible. Therefore, the duty to administer the trust was breached.

Finally, trustees have a duty of care in administering a trust. The duty requires the trustee to invest the trust prudently and seek advice from competent professionals when needed. As indicated above, there are numerous problems with investing in Company A and Company B's preferred stock. The first issue is liquidity which was discussed extensively above. The second issue is the financial condition of the companies. Also indicated above, neither company had even developed a prototype of their product. In investment terms, these stocks were extremely volatile. The third issue is that these stocks restrict transfer for 10 years. Regardless of whether the restraint on alienation is valid (which the facts say it is), when Friend locked the trust into two stocks for 10 years, he greatly restricted the ability of the trust to ensure solid gains. If the stock of A or B had decreased, friend would have been unable to sell the stock. Instead, the trust would have been required to take a loss (for up to ten years). Fourth, Friend probably should have sought the competent advice of a financial advisor. The advisor probably would have informed Friend that investing in only 2, highly risky companies, ran contrary to modern portfolio theory regarding diversification. The advisor could probably also have told advisor that the companies were not a solid investment. Given the above reasons, friend breached his duty of care in ensuring the financial soundness of the trust was properly maintained.