Summative assessment exercise - outline answer

Clause One

According to the common law rule against remoteness of vesting, the gift to the grandchildren is clearly void because it cannot be said that all the grandchildren of the testatrix will attain the age of 30, if they attain that age at all, within 21 years of the death of the last surviving life in being. This is because the testatrix's son might father another child, and all the lives in being might die immediately after that child's birth. (The *daughter* of the testatrix, on the other hand, will be presumed to be past the age of childbearing — Perpetuities and Accumulations Act 1964, s. 2.) This is clearly an especially harsh result from the point of view of the granddaughter who has already satisfied the contingency, and the two living grandsons who will shortly satisfy the contingency themselves. To lessen the hardship of the common law rule, the rule in *Andrews* v *Partington* will apply at common law to close the class immediately upon the testatrix's death (because one grandchild has already satisfied the contingency at that time) to include all grandchildren then living, i.e. the granddaughter aged 30 and the two grandsons aged 25 and 23 respectively.

The rule in *Andrews* v *Partington* does not, however, go far enough from the point of view of grandchildren who might be born after the date of the class closing. The gift to them will be void for remoteness at common law, even after the application of the rule in *Andrews* v *Partington*. Because the gift to them is void at common law it is permissible to turn to the 1964 Act. Under the Act the trustees are permitted to wait until the end of the perpetuity period to see how many grandchildren attain the age of 30. Statutory class closing and age reducing provisions also come into play. Thus if grandchildren born after the class has closed (for the purposes of the rule in *Andrews* v *Partington*) have only reached the age of, say, 28 by the end of the perpetuity period, the 1964 Act permits the class to be closed at the end of the perpetuity period to include all grandchildren then living who are aged 21 or over (Perpetuities and Accumulations Act 1964, s. 4). However, if at the end of the perpetuity period there are grandchildren alive who are under the age of 21, the class will be closed to exclude them from taking an interest.

Clause Two

Although a trust set up to defraud the settlor's creditors will generally be invalid, a trust set up to protect another person from their creditors will be valid if it takes the form of a 'protective trust' (see Trustee Act 1925, s. 33). Protective trusts will often defeat the interests of the spendthrift's creditors, but that to some extent is also the purpose of the insolvency legislation itself. The statutory scheme for distribution of the insolvent person's estate is designed to satisfy the creditors as far as is reasonably possible, but the statutory insolvency scheme is designed also to discharge the liabilities of the insolvent person and to allow them, eventually, to have a fresh start (Insolvency Act 1986).

Clause Three

In *Blathwayt* v *Baron Cawley* [1975] 3 All ER 625 Lord Wilberforce opined that: 'Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy.' In relation to religious discrimination, specifically, Lord Cross had this to say:

> it is true that it is widely thought nowadays that it is wrong for a government to treat some of its citizens less favourably than others because of differences in their religious beliefs; but it does not follow from that that it is against public policy for an adherent of one religion to distinguish in disposing of his property between adherents of his faith and those of another. So to hold would amount to saying that although it is in order for a man to have a mild preference for one religion as opposed to another it is disreputable for him to be convinced of the importance of holding true religious beliefs and of the fact that his religious beliefs are the true ones.

In *Blathwayt* a clause of a testator's will provided that, in the event that one of the beneficiaries under his will should 'be or become a Roman Catholic . . . the estate hereby limited to him shall cease and determine and be utterly void'. It later transpired that a life tenant had indeed become a Roman Catholic. The judge at first instance held that his estate should be forfeit, a judgment which was ultimately upheld in the House of Lords. It follows that clause three of the present will is valid and that the granddaughter's interest will be forfeit if she marries into Islam. As to the element of restricting freedom to marry. Whereas a general condition in restraint of marriage will be void for public policy (*Long* v *Dennis* (1767) 4 Burr 2052 at 2059), a specific restriction on marriage to particular individuals or classes of person will not be void (*Duggan* v *Kelly* (1848) 10 I Eq R 47).

The impact of the Human Rights Act 1998 (which received the Royal Assent on 9 November 1998) on this area of the law has yet to be established.