Summative assessment exercise - outline answer

Fatima is seeking to vary Abdul's Will Trust. In the first place she is seeking to vary the beneficial interests under the trusts by surrendering part of her interest and by postponing the vesting of her children's interests. In the second place she is seeking to export the administration of the trust to Guernsey.

First, the remoulding of the beneficial interests. In order to achieve this Fatima should apply for a variation under the Variation of Trusts Act 1958. Section 1 empowers the court to approve 'any arrangement . . . varying or revoking all or any of the trusts'. She should join the trustees of Abdul's Will Trust as defendants to the application and they should only consent to the proposed arrangement if they are satisfied that it would be for the benefit of Bashir and Dan. Bashir and Dan are too young to give their own consents to the arrangement and so the court may, if it thinks fit, consent on their behalf (s. 1(1)(a)). The court will only do so if satisfied that the proposed arrangement would be for their 'benefit'. The usual benefit of an arrangement is a financial one, but 'benefit' may extend to 'social or moral benefit' (per Megarry J in *Re Holt's Settlement* [1969] 1 Ch 100). There can be no doubt that Fatima's surrender of half her income entitlement will be for the financial benefit of the children, and so the crucial question is whether the proposed postponement of their interests until they reach 35 is also for their benefit. In *Re T's Settlement* [1963] 3 All ER 759, the court approved an arrangement whereby the vesting of an infant's interest was postponed from 21 to 30 and held upon protective trusts in the meantime. The perceived benefit of the variation was the protection of the infant from her own immaturity. It is unlikely, however, that similar reasoning could apply in the case of Bashir and Dan. They are surely too young for it to be said that a deferral will prove to be for their benefit. In any event, the postponement, as requested, is probably for too long. Fatima should be advised to apply for the proposed variation in about ten years time, when her children's personalities are more developed and when the court will be in a better position to judge whether the variation would be for their benefit. The court will even hear evidence from Bashir and Dan at that time, although their wishes will not, in themselves, determine the outcome of the hearing. Fatima should be further advised to reduce the postponed age to a more reasonable figure, perhaps 25. Fatima's health or age may be such that she

cannot risk waiting, or does not wish to wait, for ten years before making the application. She should be advised, however, that the court will be unlikely to vary the trust today on the terms of the proposed arrangement.

In the past courts have come to the view that if the proposed arrangement would change the whole 'substratum' of the trust, to the extent that it cannot properly be called a variation at all, such an arrangement will not be approved (see *Re Ball's Settlement* [1968] 2 All ER 438). However, the modern Court of Appeal has emphasised that the prime consideration of the court when exercising its discretion under the 1958 Act, should be the benefit to the beneficiaries (*Goulding* v *James*). This is the only consideration laid down by the Act, and should not be subordinated to consideration of the settlor's intentions. It might follow that the 'substratum' test will fall from favour, particularly if the 'substratum' equates to the settlor's fundamental intentions. In the present case, although the form of the trust would change considerably, it cannot be said that it would be unrecognisable in its new form. The root purpose of providing for the children would remain.

We turn now to consider the proposed export of the trust to Guernsey. What is being proposed is a change in the jurisdiction governing the operation of the trust. This will not involve a variation so much as a 'revocation' of the English trusts and their replacement by Guernsey trusts on similar terms. Such an arrangement was approved by Buckley J in *Re Seale's Marriage Settlement* [1961] 3 WLR 262 because the Variation of Trusts Act 1958 expressly authorises the court to approve arrangements 'varying or revoking' the trusts. In that case, however, the infant beneficiaries of the English settlement, and their parents, had lived in Canada (the new jurisdiction) for a number of years. In the present case there is no evidence that Bashir and Dan will ever leave England, nor that their mother intends to live in Guernsey in the long term. Consequently, there is little evidence that the export of the trust will be for the children's benefit. Short-term savings in administration costs will not be a 'benefit' sufficient to persuade the court to approve the proposed arrangement. In the absence of any suggestion that the trust property or the infant beneficiaries are to be based in Guernsey, there appears to be nothing on the facts of the present case which would justify the export of the trust. Fatima should be advised that this proposed arrangement is unlikely to be approved.