CLASS OUTLINE 18 – ANSWERS

Problem 1bi.
The life estate in the class of A's children is good. A is not going to have any more children after s/he is dead. (At least that is what both the common law and modern law assume.) The remainder in A's grandchildren is void. A could have a child after the date of this grant which child could have a child long after all lives in being and 21 years have expired. Since one member of the class could become a class member after the perpetuities period, the entire gift to the class is void under the "all or nothing" rule.

Problem 1bii.
If the grant were a devise that would not help. The measuring lives are A's children, and A is presumed capable of having children even if D is dead.

Problem 1biii.
Limiting the remainder for life to A's children living at the effective date of the grant does not save the remainder in A's grandchildren, because the remainder goes to all of A's grandchildren, not just those who are the children of those of A's children living at the effective date of the grant. What will save the remainder is if it is limited to "the children of those children of A who are living at the effective date of this grant." Whether this is wise depends on how likely it is that A will have more children.

The life estate in the class of G's children is good. G is not going to have any children after he's dead. The remainder in the grandchildren is void. G could have a child after the date of this grant which child could have a child long after all lives in being have expired. Since one member of the class could become a class member after the perpetuities period, the entire gift to the class is void under the "all or nothing" rule.

The life estate in the class of D's children is good. The remainder in the grandchildren is also good. All of D's children are lives in being on the day of D's death.

Problem 2bi.
The life estates in A and that in her children are good. A cannot have any children after her death, and she is a "life in being." The remainder in the grandchildren is void. The law presumes that any person of whatever age, sex or physical condition is capable of having children. Hence A could have a child after the effective date of the grant, which child could have a child more than twenty-one years after A and all the living children and grandchildren of A are dead. Since one member of the class could become a class member after the perpetuities period, the entire gift to the class is void under the "all or nothing" rule.

Problem 2bii.
The life estate in A and his widow are good. A's widow will be identified at the time of A's death, and A is a life in being. But A's widow is not necessarily a life in being at the effective date of the grant. A's current wife could die, and A could marry a woman who is born after the effective date of the devise. Hence the widow's life may not be used as a measuring life for determining eligibility for membership in the class of remaindermen. Despite the fact that A's children will all be lives in being at A's death, there is no guarantee that they will fulfill or fail to fulfill the other condition for membership in the class (survival of both A and his widow) within twenty-one years of A's death. The whole remainder interest is therefore void.

Problem 2biii.
The lineal descendants of D alive at the date of his death are the measuring lives, but one of these descendants could have a child after D's death, which child could survive until the probate of D's will, while none of the other descendants alive at D's death so survive. The will *may* not be probated within twenty-one years after the death of every lineal descendant of A alive at his

death (it *ought* to be, but the Rule Against Perpetuities, unlike equity, does not treat as done what ought to be done). Therefore since the membership in the class is to be determined by an event which may take place more than twenty-one years after the death of any life in being at the effective date of the instrument, the gift fails.

Problem 2biv.
The remainder in A's grandchildren is void. The problem is not those members of the class who are alive at the death of the testator; they will reach 21 or fail to reach 21 within 21 years of his death. Nor is the problem those grandchildren of A born within 5 years of the testator's death of children of A who are alive at the testator's death. They will reach 21 or fail to reach 21 within 21 years of the death of lives in being (the children of A alive at the testator's death). The problem is those grandchildren of A born within five years of the testator's death of children of A who are not alive at the testator's death. Such grandchildren could qualify or fail to qualify for membership in the class more than 21 years after the expiration of all lives in being at the testator's death. The fact that in order for this to happen a child of A would have to have a child before s/he was 5 years of age is irrelevant in the wonderful world of perpetuities where all people can have children at any age. Because a member of the class could qualify for class membership beyond the perpetuities period, the entire gift to the class is invalidated. I suggested in class that remainder could be saved by reducing the final age condition to 16. I'm not sure that there is clear authority on this, but the logic certainly suggests that that is right. An even easier 'savings clause' would say "born within five years after my death of children of A who were alive at the time of my death." It is biologically impossible that such wording would not include all the grandchildren born within five years of the devisor's death.

Problem 2bv.
This case is not a joke, but no court has ever ruled on the situation presented. Because many of the "fantastic possibilities" which lead to invalidation of interests under the Rule are dependant on the presumption of fertility, a number of legislatures have passed statutes overruling the presumption. At the same time legislatures and courts have been holding that adopted children should be treated as natural children in interpreting instruments, unless the contrary intent is expressed. The point is that if you reform the Rule in a piecemeal fashion like this, you are likely to end up with no reform at all. Although A is by statute no longer presumed to be capable of having children at age 80, she could adopt one, and if you take a what-might-happen approach to the Rule, the remainder is still invalid as it was in Problem 2bi.

Problem 2bvi.
This case was originally a joke. It was designed to illustrate that in a world in which there are sperm banks, it is no longer possible to say that all of a man's children must be conceived by the time of his death. Hence, the simple and quite common devise in the example could be invalidated if (1) A were a man and (2) a court were prepared to hold that the availability of sperm banks makes it possible that a child of A could be conceived after his death. With the even more recent invention of egg banks, this "fantastic" possibility is now open to women as well. Indeed, it is best to say that neither the Rule Against Perpetuities nor the law of estates and trusts generally has come to grips with the possibility of high-tech procreation.

Problem 4a.
G retains the power to revoke during his lifetime, so the period of the Rule does not come into effect until his death. At that point the remainder in the grandchildren becomes like a devise to the grandchildren of a testator, classically a valid interest under the Rule

Problem 4a.
There is less authority on the applicability of the Rule to trusts where beneficiaries have the power to revoke it. The logic would, however, suggest that because the grandchildren have the power to withdraw their share of the corpus, the remainder in the great grandchildren is good. It

will only come into effect if they choose to leave the corpus in the trust. (The tax situation of this trust is complicated. You should wait for a trusts and estates course or one in estate taxation before you make up your mind whether something like this would be a good idea.)