Chapter 5: The constitution requirement for a valid trust

1) ‘Requirements of law governing transfers of property and which reflect the nature of property in English law have evolved in order to protect property from so-called secret dealings, and the role which can be played by equity in these circumstances in turn also reflects this rationale’.

Discuss this statement in the light of your understanding of transfers of property in furtherance of making a gift and also creating a trust.

2) ‘As a matter of theory distinguishing attempts to create a trust on the part of an owner of property from ones being made to transfer property to an intended recipient should not create difficulties, but this is not necessarily apparent within key case law’.

Discuss this statement, illustrating your response where appropriate and providing support for your views.

Brief guidance notes:

Both these questions are designed to draw out the similarities and differences subsisting between the trust and the gift as mechanisms by which an owner of property can ensure that another can benefit and receive enjoyment from property belonging to the former. In the case of a gift this is achieved by an outright transfer of ownership (manifested in legal title) to the intended recipient which does expose the key difference between a trust and a gift (considered in question 2). Question 1 is focused on the requirements at law which must be met for a person to achieve a transfer of his property to another by way of a gift (a transfer which is not one for value), and the way in which so called “transfer formalities” required depend on the nature of the property concerned. Centrally it explores the role of equity in circumstances where, for some reason, formality requirements have not been met. It also requires consideration of how discerning when equity is prepared to intervene and “effect” or complete the transfer can be seen as a reflection of equity’s concern with protecting property as well as preventing injustice. Question 2 explores the similarities and differences between trust and gift requiring understanding that whereas a gift is achieved by outright transfer of ownership from the owner of property to the intended recipient, when property is settled on trust, enjoyment for the latter is achieved through the simultaneous existence of two types of ownership of what becomes ‘trust property’. Its premise is that given this fundamental difference, it should be easy to distinguish attempts to create a trust from ones seeking to make a gift.
However, as the discussion of the leading cases in chapter 5 suggests, there are a number of complexities in the case law, and this question requires reflection on why this might be the case.

3) 'Clarke LJ was clearly quite correct in Pennington v Waine [2002] when he remarked that equity could not be regarded as intervening only where the donor has done all that he can because there are seldom situations in which the donor cannot possibly do anything further - because “there is almost always something more which the donor could have done”.

Discuss.

4) ‘The decision of the Court of Appeal in Pennington v Waine [2002] represents a logical development of the approach to incomplete property transfers set out in Milroy v Lord [1862], and one which has a much greater degree of regard to the interests of justice’.

Discuss this statement, indicating whether you agree, and providing support for your views.

5) ‘Lord Browne-Wilkinson’s remark in Choithram v Pagarani [2001], that “[a]lthough equity will not aid a volunteer, it will not strive officiously to defeat a gift” is a testament to the way in which the maxim that ‘equity will not perfect an imperfect gift’ has become diluted to the point that it can no longer properly be regarded as a ‘maxim’ at all.

Discuss.

6) ‘The approach adopted by the courts for ascertaining whether an owner of property can be taken to have declared himself a trustee of property once belonging to him is ambiguous and in need of further clarification. It also requires a much more considered assessment of the realities of finding that an owner of property is now in fact a settlor and trustee of it’.

Discuss this statement, indicating whether you agree, and providing support for your views.
Brief guidance notes:

All these questions are ‘takes’ on the significance of the requirement that in order to be valid a trust must be fully constituted. This must be explained at the outset, clarifying what actually is meant by constitution, and how constitution is achieved, drawing attention to the significance of Milroy v Lord [1862]. Then the focus of the response shifts to critical appraisal of the case law relating to constitution, looking at approaches adopted by the courts, and particularly on whether there is clarity and principle, and even consistency within. Ultimately the questions are seeking an assessment of whether, in current policy, the courts are having sufficient regard to all the considerations and interests arising in relation to the creation of trusts. This requires explaining where appropriate the ‘last act’ doctrine, and the way in which an owner of property is permitted to declare himself trustee - with reference to the interests of a potential recipient, and the donor himself, and the significance of incomplete gifts in this context. Also, considering whether or not it is the case that some considerations are being given greater significance than others, having regard of course to the recent Court of Appeal decision in Zeital v Kaye [2010] and its significance.

7) ‘Many text books speak of “exceptions to the rule that equity will not assist a volunteer”, but donatio mortis causa and the ‘rule in Strong v Bird’ might equally be regarded as additional methods by which a trust can be constituted’. Discuss.

Brief guidance notes:

In essence this question calls for a fairly standard account of the principles and operation of donatio mortis causa and the ‘rule in Strong v Bird’. This will not be difficult to do following the structure of the chapter, and the text does very much lean towards the analysis that although this alternative reading is possible, that they are indeed most commonly regarded and treated as exceptions to the rule that equity will not assist a volunteer, and even that this is how they are most appropriately regarded. It is also perhaps worth drawing attention to the way in which the text book chapter noted that these mechanisms for passing property are extremely rare, and that no settlor would actually deliberately invoke them- and that they are most appropriately regarded as an ex post facto method of helping to resolve competing claims to a deceased person’s property.