QUESTION 1

“When the Australian courts have considered testamentary powers of appointment in discretionary trusts the result has been confusing. This has occurred because the Australian High Court has placed great emphasis on early English authorities. If lower courts have a role to play in developing the law the problem could be overcome. The alternative solution is via legislation.’

How have the Australian courts dealt with the matter? Compare and contrast the situation in England and Australia. Is legislation the best solution to the problem?

TIPS FOR QUESTION 1:

This question involves a detailed consideration of Tatham v Huxtable (1950) 81 CLR 639. Other decisions include Re Mainstay’s Settlement [1974] Ch 17. Relevant statutory provision should also be discussed, including Wills Act 1968 (ACT) s 14A, Succession Act 2006 (NSW) s 44, Succession Act 1981 (Qld) s 33R and Wills Act 1997 (Vic) s 48.

QUESTION 2

‘Problems occur when attempting to distinguish between express, constructive and resulting trusts. It is possible for one set of circumstances to give rise to both constructive and resulting trusts, even though they are separate principles.’

Do you agree? Critically discuss this statement.
PROBLEM QUESTIONS

QUESTION 1

Bruce makes the following dispositions:

(a) I give my car to Mary, on the condition that she pays my debts to Susan.
(b) The sum of $50,000 is held on trust for my sister.
(c) I give my house to Glenis for life, who may, in her absolute discretion, give the property to Bill and Ben.

Discuss each of these dispositions and consider whether a trust has been created.

TIPS FOR QUESTION 1:

See Figure 6.1 – ‘The three certainties’ and ‘Other legal relationships’.

QUESTION 2

Mary, when talking on the telephone, informed her brother that she had decided to place her house on trust for him. The next day, on a scrap of paper, she wrote a note to remind herself and placed it in her diary.

Mary, wanting to make sure everything was done appropriately, contacted her solicitor. The solicitor told Mary that she would need to visit the office and sign the paperwork. On Monday, while travelling to the solicitor’s office, Mary was killed in a car accident.

Mary’s will makes no reference to the house and her brother seeks your advice.

TIPS FOR QUESTION 2:

This question involves a purported dealing with a proprietary interest. In particular the statutory requirements for writing. See Chapter 3 Dealings with Property in Equity – Figure 3.1 and Chapter 6 The Nature of Interests – Figure 6.1.