“Can we just go the *Day v Harris* route?”

Families will often wish to avoid the expense and delay of an application to the Court of Protection where, to save Inheritance Tax, it is wished to make gifts, perhaps no more than can be covered out of income, from the estate of a person who has lost mental capacity. If there is in place a valid Enduring Power of Attorney (“EPA”), may the attorney make the gifs? What if gifts were already being made: can the attorney continue ? Can he actually increase them, over time, if the income will stand it? Does it make any difference if the money is in an account in the joint names of the donor of the EPA and the attorney? Is there any obligation on the attorney, in making gifts, to match the proportions in which the residue of the estate will eventually pass?

These issues, and many more, have been considered by the High Court and now by the Court of Appeal in the recent linked cases of *Day v Harris and Others* and *Day v the Royal College of Music and Others*. Both concerned the estate of Sir Malcolm Arnold, the composer well-known for his film scores who perhaps deserves to be better known for his more serious music. The second case concerned original manuscripts and is not the subject of this article.

Background

In June 1990 Sir Malcolm executed an EPA appointing Mr Day his attorney. Mr Day was well-known to him, having since 1984 worked as his carer, chauffer and housekeeper. At some point a bank account was opened in the joint names of Sir Malcolm and Mr Day to hold money received for Sir Malcolm on which, as a matter of convenience, Mr Day could sign cheques. In July 1990 Sir Malcolm made his Will appointing Mr Day as one of the executors and (after specific gifts) leaving one half of his estate to Mr Day and one quarter each to his daughter and one of his sons. Mr Day’s duties gradually extended and he became Sir Malcolm’s business manager. On the advice of accountants, a pattern of gifts was established: £3,000 per annum from 1994 onwards, increasing in 1999 to £6,000 and in 2005 to £9,000. Sir Malcolm died in 2006.

The EPA had been registered in February 2002 following advice from Sir Malcolm’s medical adviser. It was argued in court that, notwithstanding registration of the EPA which normally indicates loss of capacity, Sir Malcolm did actually retain some mental capacity after the registration of the EPA. The judge in the High Court accepted that point.

Sir Malcolm executed two other relevant documents. The first was a Codicil that appointed Mr Harris, the first Defendant in these proceedings (“D1”) to be an executor in the place of one of the people previously named. The second, a Codicil

that purported to remove D1, turned out not to have been properly executed and was therefore not admitted to probate.

The Inland Revenue Account was qualified, leaving the issue of the lifetime gifts open. The litigation arose initially from the concern of Mr Day that the enquiries of D1 were too intrusive. He sought: the removal of D1 as an executor; and an account and enquiry into various matters relating to lifetime transactions.

The court did not remove D1, in fact leaving him as the sole executor; but did order the account and enquiry. The account and enquiry litigation proceeded between Mr Day on the one hand, and the family of Sir Malcolm on the other hand. Various matters were disposed of by the High Court leaving outstanding only one issue, the subject of the appeal and of this article: the lifetime gifts that had been made by Mr Day (to himself) after the registration of the EPA.

What the case did not decide

It was common ground between the parties that an attorney cannot simply use his powers under an EPA to make gifts to save IHT. The powers of an attorney are limited even where (as here) the EPA itself contains no restrictions, by the Enduring Powers of Attorney Act 1985. ('EPAA 1985') Though that Act itself is repealed, it was relevant to the transactions because of the dates on which they occurred, and effectively parts of it remain in force: see Mental Capacity Act 2005, Schedule 4 which sets out provisions that apply to existing EPAs. The legislation considered by the Court of Appeal in *Day v Harris* is therefore still very much alive, not least because many people, fearing the complexity of the Lasting Power of Attorney regime, hastily executed EPAs whilst they still could.

All that an attorney may do is set out in EPAA 1985. Put briefly, an attorney under an EPA may make gifts of a seasonal nature; or gifts on the occasion of, or on an anniversary of, a birth; a marriage; or the formation of a civil partnership: to persons, including himself, who are related to or are connected with the donor. Further, he may make gifts to any charity to whom the donor made gifts or might be expected to make them. However, in each case the value of the gift must not be unreasonable, having regard to all the circumstances and in particular the size of the donor's estate.

Nothing in *Day v Harris* weakens that basic principle: an attorney, however well-intentioned, must seek the approval of the Court of Protection to make gifts, even of moderate amount, except where they fit the criteria just set out.

Sole account or joint account?

A particular feature of the *Day* case, which may often arise in practice, has already been mentioned: the bank account. Into it were paid dividends and royalties and

from it Mr Day paid the expenses of the business, housekeeping and similar expenses. Cheques were made out by the book-keeper and signed by Mr Day. Some of the payments were large: most of them were satisfactorily explained to D1 when he was making his enquiries as executor.

The question the Court of Appeal had to decide was whether, in signing cheques, Mr Day acted as an attorney – in which case he would be bound by statutory restrictions – or acted merely as one of the two joint account-holders. If he signed cheques, not in his capacity as an attorney but simply because he had the right to do because the account was partly in his name, was he free of the restrictions in EPAA 1985?

The majority judgment

The leading judgment is that of Lloyd LJ. He considered s7 EPAA 1985, which had been relied on for the argument that one effect of registration of an EPA was to take away from the donor of the power certain rights and in particular that, following registration, the donor of the power could not authorise gifts that were not authorised by the general scheme of EPAA 1985. Lloyd LJ considered EPAA 1985 in the context of the Law Commission Report that preceded it, quoting paragraph 4.70 of that Report, “It is no part of our proposals that the mere fact of registration should prevent the donor being able to run his own affairs to the extent that he is actually able to run them.”

This brief summary cannot do justice to all of the arguments advanced, but Lloyd LJ concluded, “In my judgment, it remained open to Mr Day to operate the bank account after registration of the EPA as he had done before such registration. He could not use it to benefit himself without the full, free and informed consent of Sir Malcolm but, if he had that consent, as the judge held he did, gifts made by drawing cheques on the joint account were not invalidated by the effect of section 7(1)(c) of the Act even though made after registration of the EPA.”

McFarlane LJ agreed with the interpretation of EPAA 1985 put forward by Lloyd LJ and noted the finding of the trial judge that, in relation to making the five disputed gifts, Sir Malcolm had the necessary mental capacity to authorise payment out of the bank account.

The dissenting judgment

Rix LJ took the opposite view. He considered the effect of registration on other possible sources of fiduciary authority and noted that “the premise of registration is that the donor is suffering actual or incipient mental incapacity. These are the very circumstances in which the common law contemplates the cessation of any existing authority of a donor’s agent.” He continued, “Nevertheless it seems to me to be implicit in the whole structure of the Act that the donor could not seek to create

another agency in the future or to give a new power of attorney, whether in the form contemplated by the Act, or in any other form."

Rix LJ noted the danger that an agent might take advantage of his principle, but did not say that Mr Day had taken advantage of Sir Malcolm. When considering he means by which the gifts were made he concluded, "Of course Mr Day was acting under the authority of Sir Malcolm and by means of the mechanism of the bank mandate: he needed both, but that is not to say that he was not acting as Sir Malcolm's attorney, and I do not regard the Judge's conclusion to the contrary as a finding of fact binding on this court. Indeed, following registration I do not see in what other capacity Mr Day could have been acting."

Who cares?

There has been considerable public interest.

HM Revenue & Customs take the line that, if a gift is invalid because the attorney had no power to make it, it will become impossible for the family to argue that it was an effective lifetime gift. It must be added back to the estate of the Deceased for IHT purposes: see for example *Curnock v IRC* [2003] STC (SCD) 283.

Banks will have an interest in this situation. The extent to which a bank should be aware of the existence of an EPA or of its registration were considered in argument in the Court of Appeal.

Attorneys, as stated in the introduction, will want to know how far they can go in making gifts without the formality of an application to the Court.

Personal representatives will wish to know how detailed their researches should be. HMRC expect bank statements to be examined for the period of seven years prior to death, but what level of analysis is required? In the early stages of *Day v Harris* it emerged that the family knew less about their father's finances than did Mr Day: that was understandable. D1, realising this, prepared schedules of transactions that seemed to warrant closer scrutiny but left that actual task to the family.

Supervision of deputies provides a framework which, if it had applied here, might have prevented the litigation. Mr Day kept proper trading accounts for tax purposes but did not see the need for, nor was he ever asked in Sir Malcolm's lifetime to produce, any "stewardship" accounts. It would probably be too onerous to force deputy-style supervision and accounts on every attorney who registers an EPA, but it might have saved litigation costs here.

Toby Harris is a member of STEP Norfolk and Norwich branch. He was DI in this litigation.