

## Family news - winter: Mubarak v. Mubarak [2008] JRC 136

12 DECEMBER 2008

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**CATEGORY:**

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Mubarak v. Mubarak [2008] JRC 136 has been described as the longest running and most bitterly fought divorce case in England. During August the Jersey Royal court handed down judgment in relation to Mrs Mubarak's application, with the support of her children, to enforce an English High court Order to vary a Jersey trust.

Until this decision there had been uncertainty about the circumstances in which the Jersey court would enforce such an order. Although Jersey legislation had been introduced in 2006, similar to legislation already in force in other jurisdictions, designed to limit the circumstances in which Jersey trusts could be attacked; in previous reported decisions the Jersey Court seemed willing to enforce English divorce orders against Jersey trusts.

This judgment provides some welcome clarification on the issue of enforcing divorce orders against Jersey trusts. The Deputy Bailiff distinguished between the "variation" of a trust and its "alteration". Variations were changes within the powers of the trust and would usually be permitted.

Alterations were described as a change which cannot be carried out within the existing powers of the trustees. The Jersey Court will not normally give effect to an alteration to the trust which the trustees themselves have no power to make. The Court has no overriding power to change the terms of a trust. The Court's role in relation to trusts is essentially supervisory and concerned to ensure that a trust is given effect.

The powers that the Court does possess to alter a trust are strictly limited to specific circumstances such as to act in the interests of minor or unborn children.

In this case Mr Mubarak had exercised his powers under the trust as settlor to exclude Mrs Mubarak as a beneficiary. During the course of the English proceedings, and to ensure he was permitted to continue to participate in them, he revoked the letter of wishes excluding Mrs Mubarak.

The Jersey Court held that to give effect to the English order directing that sums be paid to Mrs Mubarak would amount to an alteration which the Court had no power to do. However, as all the adult beneficiaries had consented to the English judgment being given effect to in Jersey, the Court attached importance to written expressions of wishes in relation to the trust, and adopted a broad interpretation of the rule in *Saunders v Vautier* (1841) 4 Beav 115 by allowing the beneficiaries of a trust, acting together, to alter its terms.

Consequently, in this case the Jersey Court found a means of determining (on behalf of the minor and unborn beneficiaries) that Mrs Mubarak should receive the payment specified in the English Court Order on the basis that all the beneficiaries had consented. The next stage is implementation of the payments. Receivers have been appointed to gather in trust assets around the world.

The decision means that much more careful consideration of the terms of trusts will be required in divorce cases to establish what powers the trustees have and what divorce orders can be made that are within the trust structure. It cannot be assumed that the Jersey Court will enforce English divorce orders against Jersey trusts. It appears that only if the terms of the trust permit; if the trustees have submitted to the English Court's jurisdiction; or if all the beneficiaries consent, will the Jersey Court give effect to an English divorce order. It is quite possible that the decision of the Jersey Court in Mubarak may be followed in other offshore jurisdictions, making it more difficult than before for divorcing spouses to succeed on a variation of trust claim.

Trustees should always take specialist advice before responding to service of English Court proceedings or seeking to intervene.

In the light of this Judgment, family law Judges in England will need to reflect carefully on the enforceability of the Order that they are proposing to make if it affects a trust, and it may be necessary to involve the Court of the trust jurisdiction at a much earlier stage of the process.

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