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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

Estate of LISA McNEAR LOMBARDI VAUGHAN, Deceased.	
BRUCE BICKEL, as Personal Representative, etc., Petitioner and Appellant, v. BUCKLEY CARLSON et al., Objectors and Respondents.	F077628 (Super. Ct. No. S1501PB62045) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Brett Myers, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Peter W. Beckman; McCormick, Barstow, Sheppard, Wayte & Carruth and Scott M. Reddie for Petitioner and Appellant.

Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball, Catherine E. Bennett, Nancy L. Oehler, Joseph D. Hughes and Kurt D. Van Sciver for Objectors and Respondents Buckley Carlson and Tucker Carlson.

Gay Columbel, in pro. per., for Objector and Respondent.

-ooOoo-

This appeal involves a dispute over who inherits oil and gas royalties. The issues involving the ownership of the royalties reach back to the 1990's and are too convoluted to describe in this introduction. The 2018 order being challenged in this appeal denied appellant's motion under Code of Civil Procedure section 473 to vacate a 2013 order determining the decedent's royalty interests should be distributed to her husband and two estranged sons in accordance with the rules of intestate succession.

The threshold legal question is whether the probate court's order denying the Code of Civil Procedure section 473 motion to vacate is appealable. The Probate Code does not expressly state such orders are appealable. Consequently, the general rule is that "no appeal will lie from an order in probate denying relief under section 473 of the Code of Civil Procedure." (*Estate of O'Dea* (1940) 15 Cal.2d 637, 639.) There are, however, exceptions to this general rule. The parties disagree about whether this appeal fits under one of those exceptions.

A probate "order is appealable, even if not mentioned in the Probate Code as appealable, if it has the same effect as an order the Probate Code expressly makes appealable." (*Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 755 (*Miramontes*).) The test for determining the legal effect of the denial of a motion to vacate a prior order is whether the denial either added to or took any force from the prior order. (*Estate of McCarty* (1915) 169 Cal. 708, 709.) Here, the denial of appellant's motion to vacate the order determining succession to the royalty interests did not grant or take away any rights, did not impose or remove any new obligations, and did not give any new directions to the parties. Therefore, we conclude the order denying appellant's motion to vacate is not appealable under the exception for orders that have the same legal effect as an expressly appealable order.

Another exception provides an "appeal is permitted from an order refusing to vacate a judgment or decree when, for reasons involving no fault of the appealing party, he has never been given an opportunity to appeal directly from the judgment or decree."

(*Estate of Baker* (1915) 170 Cal. 578, 582.) We will not extend this narrow exception to the unusual facts of this case because, when we look behind the formalities at who will benefit if the motion is granted, it is clear that the motion will further the interests of the decedent's husband. He had an opportunity to appeal directly from the 2013 order determining succession and possibly the 2015 order denying his motion to vacate the order determining succession. Accordingly, we will not extend the exception to a situation where, the practical effect of the appeal is to give a party to the proceeding another opportunity to appeal.

We therefore grant respondents' motion to dismiss this appeal.

FACTS

The Parties

This litigation arises out of the Kern County probate proceeding for the estate of Lisa McNear Lombardi Vaughan. Lisa's interest in the oil and gas royalties was distributed as though she died intestate—one-third to her husband Michael Vaughan and the remaining two-thirds split equally between her estranged sons from a prior marriage, respondents Tucker Carlson and Buckley Carlson (the Carlsons). After the order implementing that distribution was entered in 2013, Lisa's will leaving everything to Michael was discovered. This appeal, though not pursued directly by Michael, is part of his attempt to obtain ownership of all the oil and gas royalties once paid to Lisa. The Carlsons oppose Michael's efforts; they are respondents in this appeal.

The appellant is Attorney Bruce Bickel, in his capacity as the acting personal representative of the Estate of Mary Nickel James in a probate proceeding in Placer County. Appellant was appointed to that role in September 2016 as the result of a petition filed by Michael's daughter. Mary Nickel James, the mother of Lisa who once owned the oil and gas royalties involved in this case, passed away in 1993. Appellant claims the oil and gas royalties were never distributed by the Estate of Mary Nickel James and, therefore, never became the property of Lisa. Based on this theory, appellant

contends the probate court handling Lisa's estate had no jurisdiction over the royalties and its order of succession was void and could not pass any ownership of the royalties to the Carlsons.

Another respondent in this case is Gay Columbel, one of Lisa's sisters. Columbel contends all the property in her mother's estate was properly distributed to her and her three siblings. Columbel supports her contention by noting that she has received money due to the owners of the royalty interests for over two decades. In this opinion, we refer to the Carlsons and Columbel collectively as "respondents."

The Partnership

Henry Miller created and owned Miller and Lux, Inc., a land holding company that became one of the largest land holders in the State of California. In 1968, the heirs of Henry Miller formed B & N Minerals Partnership, a California general partnership. Miller and Lux, Inc. transferred to B & N Minerals Partnership the mineral interests it owned in 30,600 acres in Kern County, 23,800 acres in Merced County, 10,200 acres in Fresno County, and 3,400 acres in Madera County.

Royalty Interests

Mary Nickel James, her siblings, and her first cousins were Henry Miller's heirs. Each owned a one-eighth interest in the B & N Minerals Partnership. In the early 1980's, B & N Minerals Partnership severed 90 percent of the royalty interests (90% Royalty Interests) in all of the mineral interests owned by the partnership and transferred those royalty interests to the heirs of Henry Miller using royalty deeds. The royalty deeds were recorded in the four counties where the mineral interests were held. Accordingly, Mary Nickel James obtained royalty deeds for a one-eighth interest in the 90% Royalty Interests that had been severed from the mineral interests owned by the partnership.

Estate of Mary Nickel James

In 1990, Mary Nickel James adopted an estate plan by executing (1) a trust agreement establishing the Mary N. James Revocable Living Trust and (2) a pour-over

will. Schedule A to the trust agreement described the original assets of the trust as (1) $10 in cash, (2) all her tangible personal property, and (3) "Other Property: See attached." The copy of the trust agreement included in the appellate record does not include an attachment describing the "Other Property." No deeds or other documents were recorded showing Mary Nickel James had transferred her share of the 90% Royalty Interests from herself as settlor of her living trust to herself as trustee.[1]

The pour-over will did not explicitly refer to the 90% Royalty Interests, mineral rights, real property or real estate. However, the sixth article of the pour-over will gave her "residuary estate" to the trustee of her living trust, to become part of the trust estate and to be administered and distributed under the trust agreement. Mary Nickel James named herself as the initial trustee and named Bishop Trust Company Limited and her son, Peter Lombardi, as successor trustees. In general, her estate planning documents left her estate to her four children in equal shares.

In 1993, Mary Nickel James died in Hawaii, leaving as heirs: Peter Lombardi, Polly Lombardi O'Connor, Gay Lombardi Columbel, and Lisa McNear Lombardi Vaughan. In February 1993, a probate proceeding for her estate was opened in the First Circuit Court of Hawaii. A few months later, another proceeding was opened in the same

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[1] "In California, as in many states, real property can be transferred into a trust even though that transfer is not reflected in a recorded deed." (Maurer & Friedemann, Lending to Family Living Trusts (1998) 52 Consumer Fin. L.Q. Rep. 198, 205 [undisclosed trusts].) The same year Mary Nickel James died, the First District issued an opinion addressing the argument that "a written declaration of trust is insufficient, by itself, to create a revocable living trust in real property, and the decedent was required to have executed a grant deed transferring the property to himself as trustee of the Heggstad Family Trust." (*Estate of Heggstad* (1993) 16 Cal.App.4th 943, 947.) The court stated: "None of the authorities cited by appellant require a settlor, who also names himself as trustee of a revocable living trust, to convey his property to the trust by a separate deed." (*Ibid.*; see Prob. Code, § 15200, subd. (b); Rest.2d Trusts, § 17.)

Accordingly, it was possible for Mary Nickel James to cause her 90% Royalty Interests to become "trust property" (Prob. Code, § 15202) without executing and recording a deed from herself as settlor to herself as trustee for the living trust.

court to provide for certain reformations of her living trust. In October 1993, an ancillary probate proceeding was opened in Placer County, California, to address issues involving property located in California.

Settlement Agreement

It appears that some or all the children of Mary Nickel James got into disputes with certain fiduciaries and attorneys involved with her estate and living trust. In May 1995, the disputants executed a settlement agreement.

Termination of Probate

Section 3 of the settlement agreement stated the probate proceeding in Hawaii and the ancillary probate proceeding in Placer County "shall be terminated by distribution of all the remaining assets to the [Mary N. James Revocable Living] Trust." This provision is consistent with the sixth article of her pour-over will, which gave Mary Nickel James's "residuary estate" to the trustee of her living trust for distribution in accordance with the terms of the trust.

Termination of Living Trust

Section 4 of the settlement agreement addressed the termination of the living trust and the distribution of its property. Subsections (a) through (d) dealt with "tangible personal property." Subsection (e) stated:

> "All remaining *real property* shall be transferred to persons or entities selected by the Probate Judge for the First Circuit, State of Hawaii on May 26, 1995. Hawaiian Trust shall convey title by quitclaim deed to all remaining *real property* to such persons or entities. Such persons or entities shall not be any of the current Fiduciaries and/or Attorneys. All of the Beneficiaries hereby irrevocably authorize such persons or entities to list for sale, sell, convey and do any other act to sell such real property at their sole and complete discretion. After the *real property* is sold, such persons and entities shall pay all costs, fees and commissions related to the sale of the *real property*, distribute the net proceeds to the Beneficiaries in equal shares, and file a written report with the Probate Judge and simultaneously provide a filed copy to the Beneficiaries. Such persons and

> entities shall be paid from the proceeds of sale an hourly fee plus commission of 6% of the sales price for their services." (Italics added.)

We have italicized the term "real property" because the parties in this case dispute whether the parties to the agreement intended that term to include the 90% Royalty Interests. That dispute is described in further detail below. The last subsection of section 4 of the settlement agreement is also relevant to the dispute about how to trace the ownership of the 90% Royalty Interests. That subsection provides:

> "h. All remaining assets shall be distributed to the Beneficiaries equally within 30 days after May 26, 1995 except that Polly shall be distributed $25,000 more in cash than each of the other Beneficiaries. Such $25,000 additional cash distribution to Polly arises from the allocation of a portion of the benefit of the limitation of Hawaiian Trust's fees and reduction of Cades' fees as set forth below."

The parties to this appeal agree that Mary Nickel James's one-eighth interest in the B & N Mineral Partnership was distributed equally among her children pursuant to the settlement agreement. As partnership interests usually are characterized as *intangible* personal property (*Valentino v. Franchise Tax Bd.* (2001) 87 Cal.App.4th 1284, 1295), it appears the partnership interest was distributed under the provision for "[a]ll remaining assets" rather than the subsections that dealt with "tangible personal property."

Respondents' Version

Appellant and respondents disagree about how the 90% Royalty Interests were held, how those interests were handled in the administration of Mary Nickel James's probate estate, and whether ownership was ever transferred to her four children. First, we describe respondents' version of what happened.

Columbel's appellate briefing sets forth her understanding. In her view, the 90% Royalty Interests were among the assets of Mary Nickel James's probate estate and, upon the acceptance of a settlement agreement, these assets were distributed from the probate estate to the Mary N. James Revocable Living Trust. Next, in accordance with the settlement agreement, the 90% Royalty Interests were distributed from the Mary N.

James Revocable Living Trust to her children within 30 days of the acceptance of the settlement agreement. Columbel asserts that, for over 20 years, she has been receiving the income attributable to (1) her ownership interest in the B & N Minerals Partnership and (2) the 90% Royalty Interests that were distributed to her in the 1990's. To summarize the path described by Columbel, the 90% Royalty Interests went from the Mary Nickel James's probate estate to her living trust and from the living trust to her children.

Similarly, the Carlsons contend the settlement agreement provided that all assets of the Mary Nickel James estate would be transferred to her living trust, that certain real property (*excluding* the 90% Royalty Interests) would be sold, and that all remaining assets would be distributed equally among the four children. They note the settlement agreement was approved by the courts in Hawaii and Placer County. They contend: "The valid, binding settlement agreement and orders transferred the royalty interests' title to James' heirs, including Lisa Lombardi, in 1995." In their view, the transfer was valid despite the fact the settlement agreement and probate orders were not recorded in the real estate records of Kern, Fresno, Madera and Merced Counties.

Appellant's Version

Appellant presents a different view of what happened to the 90% Royalty Interests. He notes that Mary Nickel James's estate planning documents did not list or otherwise mention the 90% Royalty Interests. Appellant contends at the time of her death the interests "were held in her individual name, not in the name of her trust." He further contends her pour-over will devised the interests to her living trust upon her death. He contends paragraph 3 of the settlement agreement, like the pour-over will, provides for the 90% Royalty Interests to be distributed to the living trust. Appellant notes, however, the settlement agreement made no specific mention of the 90% Royalty Interests.

Appellant contends subsection (e) of section 4 of the settlement agreement, which addresses real property, controls the distribution of the 90% Royalty Interests from the living trust. That subsection states in part: "All remaining real property shall be transferred to persons or entities selected by the Probate Judge [and] Hawaiian Trust shall convey title by quitclaim deed to all remaining real property to such persons or entities."[2] Such persons or entities were authorized to sell such real property at their sole and complete discretion, to pay all costs associated with the sale, and to distribute the net proceeds to the beneficiaries in equal shares. In a judgment filed June 16, 1995, the Hawaiian court selected Clinton R. Ashford as the person to (1) receive the quitclaim deeds, (2) sell the properties, and (3) distribute the net proceeds to the four beneficiaries.

Appellant contends that, through inadvertence, the 90% Royalty Interests were never quitclaimed to Clinton R. Ashford and, thus, were never sold as contemplated by the settlement agreement and the court orders approving the settlement agreement. He argues that, "[a]s a result, the [90%] Royalty Interests remained property of the Mary James estate and, thus, subject to the jurisdiction of the Placer County Superior Court."

Summary of Dispute

The parties' versions conflict because they disagree on which provision of the settlement agreement covered the distribution of the 90% Royalty Interests. Appellant contends the 90% Royalty Interests are real property and, therefore, the only reasonable way to interpret and apply the settlement agreement is that they were to be distributed in accordance with the "[a]ll remaining real property" provision in subsection 4(e) of the settlement agreement.

In contrast, respondents contend the term "remaining real property" as used in subsection 4(e) of the settlement agreement is ambiguous and was not intended to cover

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[2] Hawaiian Trust Company, Limited, was the personal representative of the estate of Mary Nickel James and the trustee of her living trust.

the 90% Royalty Interests. Columbel contends the interest in the B & N Mineral Partnership and the 90% Royalty Interests were a family legacy that the heirs did not intend to sell and it is completely incorrect to say the 90% Royalty Interests were overlooked in the handling of her mother's estate. Instead, the 90% Royalty Interests were distributed in accordance with subsection 4(h) of the settlement agreement, which stated that "[a]ll remaining assets shall be distributed to the Beneficiaries equally within 30 days." She argues the mutual intention of the parties to the settlement agreement is clear based on the way they have treated the 90% Royalty Interests since 1995.

Lisa Lombardi Vaughan

One of Mary Nickel James's children was Lisa McNear Lombardi Vaughan, who was born in June 1945 in San Francisco and died in October 2011 in Cazac, France. Lisa was once married to Richard Carlson. Their two sons, Tucker McNear Carlson and Buckley Peck Carlson, were born in 1969 and 1971, respectively. Subsequently, Lisa and Richard divorced. He then married Patricia Swanson and she adopted both boys.

Lisa met Michael Vaughan in the spring of 1987. Michael, like Lisa, was an artist. He was born in 1938. They were married in February 1989, had no children together, and maintained homes in Beaufort County, South Carolina and Cazac, France. In 1995, they prepared and executed substantially similar wills, each leaving all their assets to the other. Lisa's will was a one-page handwritten document that stated: "I leave all of my earthly goods and possessions to my husband, Michael Erroll Vaughan. This includes but is not limited to; all of my shares of our jointly owned real estate, personal property, common stock, mutual fund shares, bank accounts, silver, paintings, jewelry and vehicles." Codicil #1 appeared immediately after her signature and stated: "I leave my sons Tucker Swanson McNear Carlson and Buckley Swanson Peck Carlson one dollar each; $1.00 each."

Michael's declaration states that, after Lisa's death in 2011, he was very distraught and had difficulty remembering things and making decisions. He states he is not sure

whether he remembered or not that Lisa had an existing will, or that the will could not be found.

In 2012, Attorney John Campbell was assisting Michael with the handling of his affairs and taking the steps needed to transfer Lisa's assets into Michael's name. At that time, an attorney representing the Carlsons contacted Michael's attorney and stated their intention to file a cooperative legal proceeding in California to distribute Lisa's California assets. Michael's declaration stated he believed the California assets consisted of various mineral interests of little value, the legal proceedings would be simple, his involvement would be limited to signing some paperwork, and he was entitled to receive a one-third interest with the remainder split equally between her sons.

PROCEEDINGS

In October 2012, the Carlsons initiated the case from which this appeal arises by filing a petition, signed under penalty of perjury by Michael and the Carlsons, to determine succession to real property using Judicial Council of California mandatory form DE-310 (rev. Jan. 1, 2012) with the Kern County Superior Court. Such a petition under Probate Code section 13151 is designed for estates of $150,000 or less. The petition identified Lisa as the decedent and stated she had no will. The inventory and appraisal attached to the petition valued (1) the cash in an account with the B & N Minerals Partnership at $37,684.46 and (2) Lisa's one-thirty-second ownership interest in B & N Minerals Partnership, which it described as "Mineral Rights in approximately 68,000 acres located in California in Kern, Merced & Fresno Counties" at $92,000. Another attachment to the petition stated, "The royalty deeds of B&N Minerals were recorded as follows:" and listed book and page numbers for county records in Kern and Merced and the number of a document recorded in Fresno.

In April 2013, a corrected inventory and appraisal and an amended petition to determine succession to real property was filed with the Kern County Superior Court. An attachment to the amended petition described the property owned by the decedent as (1) a

one-thirty-second general partnership interest in B & N Mineral Partnership and (2) "[n]inety percent (90%) of the royalties from one-thirty second (1/32) of the mineral interests owned by B&N Minerals Partnership" in land located in Kern, Fresno, Merced and Madera Counties. The attachment also provided specific information about the recording of the royalty deeds. The modified appraisal stated the value of the partnership interest was $37,684.46 and stated the value of Lisa's one-thirty-second of the 90% Royalty Interests were $41,400 (Kern), $13,800 (Fresno), $32,200 (Merced), and $4,600 (Madera).

In June 2013, a hearing on the amended petition to determine succession to real property was held before a commissioner. The commissioner granted the petition. Counsel for the Carlsons prepared an order determining succession to real property and personal property using Judicial Council of California mandatory form DE-315 (rev. Jul. 1, 2012). The order was filed on July 21, 2013. It distributed a one-third interest in the property to Michael and a one-third interest to each of the Carlsons. The order described the property as Lisa's one-thirty-second partnership interest in B & N Minerals Partnership and her one-thirty-second interest in the 90% Royalty Interests.

The previous year, the general partners of B & N Minerals Partnership formed B & N Minerals, LLC, a California limited liability company. Michael Vaughan signed the company's operating agreement on behalf of Lisa's estate. The partners intended to transfer all the assets and business of the partnership to the new limited liability company and to convey the 90% Royalty Interests to the new company. In effect, the partners were undoing the severance of the royalty interests that occurred in the early 1980's. Pursuant to this plan, in June 2013, Tucker Carlson, Buckley Carlson and Michael Vaughan executed royalty quitclaim deeds transferring each of their one-ninety-sixth interest in the 90% Royalty Interests to B & N Minerals, LLC.

In the fall of 2013, Isabell Vaughan, one of Michael's daughters from a prior marriage, discovered Lisa's handwritten will in Lisa's painting room and office in the

house in France.[3] In March 2014, Michael filed a petition for informal probate of Lisa's will and appointment of personal representative in Beaufort County, South Carolina. The Carlsons challenged the admission to probate of Lisa's will, contending (1) the will was a forgery and (2) Michael was collaterally estopped from asserting Lisa had a will by the documents he signed in the Kern County probate proceeding stating she died intestate.

In October 2014, a forensic document examiner rendered a professional opinion that it was highly probable that Lisa wrote the last will and testament submitted by Michael to the South Carolina court. In December 2014, the Carlsons filed a dismissal of will contest, with prejudice, in the South Carolina proceeding.

In March 2015, Michael filed a notice of motion to void and vacate the July 2013 order determining succession to real property entered by the probate court in Kern County. The notice stated the motion sought to vacate the July 21, 2013, order determining succession and was made under Code of Civil Procedure section 473, subdivisions (b) and (d), and the general equitable powers of the court. Michael argued the order determining succession was based on extrinsic mistake and was void for lack of subject matter jurisdiction.

On March 30, 2015, Victoria Vaughan, another of Michael's daughters, filed a petition for probate of Lisa's August 1, 1995, will in Kern County Superior Court. The petition estimated the value of the property in the estate at approximately $2.6 million. The petition stated Lisa's "Will and Codicil were duly proved and admitted to probate in Beaufort County, South Carolina Probate Court." The Carlsons filed an objection to the petition.

In November 2015, the Kern County Superior Court filed a ruling and order on Michael's motion to void and vacate the order determining succession. The court denied

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[3] Peter Lombardi, Lisa's brother, asserts this "discovery" of Lisa's will occurred when a new oil well in Kern County began pumping hundreds of barrels of oil at $100 per barrel.

the motion, concluding jurisdiction had been established and rejecting the claim of extrinsic fraud or mistake. The court stated Michael's mistake was an intrinsic one, leaving the court no power to grant relief. In February 2016, the court denied Michael's motion for reconsideration. Michael did not appeal these orders.

Appellant's Appointment

In May 2016, Victoria Vaughan, as the personal representative of Lisa's estate in the South Carolina probate proceeding, filed a petition in the ancillary probate proceeding in Placer County to compel the personal representative to act. After a series of hearings, the court removed the previous personal representative of the estate of Mary Nickel James and subsequently issued letters of administration appointing appellant, Attorney Bruce Bickel, as administrator of the estate. Appellant was given the authority to marshal the assets of the estate, if any, and complete any and all administration of the estate.

In his capacity as personal representative of the estate of Mary Nickel James, appellant reviewed documents and pleadings in the probate proceedings in Hawaii and Placer County. He reached the conclusion that the 90% Royalty Interests were not probated or distributed to Lisa and, therefore, they remained property of the estate of Mary Nickel James and subject to the jurisdiction of the Placer County Superior Court. He contends the March 1996 order of the Placer County probate court approving the settlement agreement includes a provision stating how later discovered property (such as the 90% Royalty Interests) are to be distributed. The provision of the order loops back to the settlement agreement by stating such property "shall be distributed in accordance with the terms of the Settlement Agreement."

Appellant's Motion to Void and Vacate

In October 2017, appellant filed a motion to void and vacate order determining succession to real property. The motion argued Lisa was not the owner of the 90% Royalty Interests, the estate of Mary Nickel James was the true owner, and the Kern County Superior Court that handled Lisa's estate lacked subject matter jurisdiction over

the 90% Royalty Interests. The Carlsons filed papers opposing the motion. Columbel filed a declaration in support of the opposition filed by the Carlsons. She filed a similar declaration on her own behalf.

On December 1, 2017, the probate court in Kern County held a hearing on the motion. Counsel for appellant and counsel for the Carlsons appeared. Columbel appeared by CourtCall. She was not sworn and did not present oral testimony. Columbel described how her mother's estate had been administered in accordance with the settlement agreement and how the heirs had "been receiving the income from our royalty interest continuously for twenty-two and a half years. They are our family legacy, and the parties [to the settlement agreement] always intended to keep them in our family." In closing she stated, "Michael Vaugh[a]n can sell his share and leave the rest of us alone."

During the hearing, the probate court described deeds it had located in the court file, provided them a copy of one of the deeds, and asked counsel to address their effect. After the hearing, the court took judicial notice of two recorded deeds and a recorded amended statement of partnership, raising issues that are discussed in part II of this opinion.

Order, Motion to Reconsider and Appeal

On February 28, 2018, the probate court issued a written ruling denying the motion to void and vacate the order determining succession to real property, stating the order was not obtained by fraud, extrinsic or intrinsic, and was not the product of an extrinsic mistake.

In March 2018, appellant filed a motion for reconsideration and clarification. The Carlsons opposed the motion for reconsideration and submitted objections to the evidence offered to support the motion. On April 12, 2018, a hearing on the motion to reconsider was held. The court directed counsel to submit letter briefs addressing the time for appeal.

Appellant filed his letter brief on April 23, 2018, which asserted the court had yet to issue a final decision and had whatever time it needed to issue its order on the motion to reconsider. The Carlsons filed their letter brief on May 14, 2018, asserting the time to file a notice of appeal would expire on July 13, 2018.

Notice of Appeal

On June 1, 2018, appellant filed a notice of appeal from the order denying his motion to void and vacate the order determining succession to real property. As a result, the trial court did not rule on the pending motion for reconsideration.

Motion to Dismiss Appeal

In November 2018, the Carlsons filed a motion to dismiss this appeal on the grounds that (1) the probate court's 2018 order denying appellant's Code of Civil Procedure section 473 motion to vacate was not an appealable order and (2) appellant was not an aggrieved party and, therefore, lacked standing to prosecute the appeal.

Appellant filed an opposition to the motion to dismiss. He argued the order denying his motion to vacate was appealable because, in substance, it was an order made appealable by the Probate Code. Alternatively, appellant requested this court to treat the appeal as a petition for extraordinary relief if it determined the order was not appealable. In addition, appellant argued he had standing because the 90% Royalty Interests remained property of the estate of Mary Nickel James, he was the properly appointed representative of the estate, and the order determining succession created a cloud on the title to the 90% Royalty Interests.

In December 2018, this court issued an order deferring consideration of the motion to dismiss pending consideration of the appeal on its merits.

Supplemental Briefing

In March 2019, this court requested supplemental letter briefing on issues related to the merits of the appeal and one question regarding the appealability of the order denying appellant's motion to vacate. Our eighth question asked the parties to address

whether the order was appealable under the rationale set forth in *Estate of Baker*, *supra*, 170 Cal. 578, taking into account the interpretation of that case given in *Estate of O'Dea*, *supra*, 15 Cal.2d 637.

DISCUSSION

I. APPEALABILITY

A. Basic Principles

1. General Rule

As a general rule, there is no right to appeal from any orders in probate except those specified in the Probate Code. (*Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1126; *Conservatorship of Smith* (1970) 9 Cal.App.3d 324, 327 [one reason for restriction is to avoid unreasonably delaying estates].) Probate Code section 1300[4] provides a list of probate orders that are appealable and section 1303 supplements that general list by specifying orders with respect to a decedent's estate that are appealable. Of interest in this appeal is subdivision (f) of section 1303, which provides an order "[d]etermining heirship, succession, entitlement, or the persons to whom distribution should be made" is appealable.[5]

The appealable orders listed in sections 1300 and 1303 do not include an order on a motion to vacate brought under section 473 of the Code of Civil Procedure. In *Estate of O'Dea*, *supra*, 15 Cal.2d 637, our Supreme Court stated it had "on numerous occasions held that no appeal will lie from an order in probate denying relief under section 473 of the Code of Civil Procedure." (*Id*. at p. 639.) Acknowledging the foregoing statutes and

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4 All unlabeled statutory references are to the Probate Code.

5 Under this provision, the July 2013 order determining succession challenged by appellant's motion to vacate was appealable. No appeal was taken from the July 2013 order determining succession and, as a result, it became subject to section 13155, which states: "Upon becoming final, an order under this chapter determining that property is property passing to the petitioner is conclusive on all persons, whether or not they are in being."

case law, the parties dispute whether an exception to the general rule allows appellant to appeal from the order denying him relief under section 473 of the Code of Civil Procedure.

2. Exceptions

One exception provides that a probate "order is appealable, even if not mentioned in the Probate Code as appealable, if it has the same effect as an order the Probate Code expressly makes appealable." (*Miramontes*, *supra*, 118 Cal.App.4th at p. 755.) The rationale for this exception is that the appealability of a probate order is determined by its substance and legal effect, rather than its form. (*Ibid.*; *Estate of Martin* (1999) 72 Cal.App.4th 1438, 1442 [order denying request to void the sale of shares in family business was appealable].) In *Miramontes*, the wife of the decedent petitioned the probate court for an order setting aside the transfer of one-half of the funds in the bank account established by the decedent and payable upon his death to persons other than the wife. (*Miramontes*, *supra*, at p. 753.) The Fourth District stated the Probate Code did not list orders denying such a petition as appealable. (*Id*. at p. 755.) Nonetheless, the court concluded such orders were appealable because the challenged orders determined the distribution of the pay-on-death accounts and section 1303, subdivision (f) makes appealable the grant or refusal to grant an order determining the persons to whom distributions should be made. (*Miramontes*, *supra*, at p. 755.)

Another narrow exception to the general rule that an order denying a motion to vacate under Code of Civil Procedure section 473 is not appealable is discussed in *Title Ins. & Trust Co. v. Calif. etc. Co.* (1911) 159 Cal. 484 and *Estate of Baker*, *supra*, 170 Cal. 578. The exception applies where the appellant was not a party to the proceeding resulting in the original judgment or order and, as a result, did not have an opportunity to appeal. In *Estate of Baker*, the court stated an "appeal is permitted from an order refusing to vacate a judgment or decree when, for reasons involving no fault of the appealing

party, he has never been given an opportunity to appeal directly from the judgment or decree." (*Id*. at p. 582.)

B. Equivalent Effect Exception

Appellant contends the 2018 order denying his motion to vacate under section 473 of the Code of Civil Procedure had the legal effect of determining the persons to whom the 90% Royalty Interests would be distributed and, therefore, the order has the same effect as an order made appealable by section 1303, subdivision (f). He relies on *Miramontes* and the Supreme Court's decision in *Estate of Estrem* (1940) 16 Cal.2d 563, in which the court concluded an order denying a motion under section 473 of the Code of Civil Procedure to set aside the probate was appealable. (*Estate of Estrem, supra,* at p. 566.)

In *Estate of McCarty, supra,* 169 Cal. 708, our Supreme Court considered whether the denial of a motion to set aside a prior order had the same legal effect as an appealable order. In analyzing the legal effect of the denial, the court examined whether the denial of the motion to set aside either added to or took any force from the prior orders. (*Id*. at p. 709.) Stated another way, the court considered whether the denial of the motion to set aside disturbed rights created by the original order under attack. (*Ibid*.) Answering this question, the court concluded "no rights are granted or taken; no obligations are imposed or removed; and no new directions for or against the [previously ordered] sale or conveyance are given." (*Id*. at p. 710.) As a result, the court concluded the order refusing to set aside the prior orders relating to the sale of property was not appealable. (*Ibid*.)

Applying the foregoing test for determining the legal effect of an order denying a motion to vacate an order is relatively straightforward in the present case. The 2018 order denying appellant's Code of Civil Procedure section 473 motion to void and vacate the 2013 order determining succession did not impose or remove any obligations, did not

grant or take any right, and did not provide any new directions as to the succession to property of Lisa's estate. Therefore, we conclude the legal effect of the denial of appellant's motion is not the same as the order determining succession. Consequently, we conclude the denial of appellant's Code of Civil Procedure section 473 motion is not appealable under the exception for orders having the same legal effect as an appealable order.

C. Exception for Nonparty to Prior Proceeding

Appellant also contends the denial of his motion to void and vacate the order determining succession is appealable under the exception described in *Estate of Baker*, *supra*, 170 Cal. 578 because he had no right or ability to appeal that probate order. We conclude appellant does not qualify for this exception and, therefore, he may not appeal the order denying his motion to vacate.

"It is an 'established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character.'" (*County of Kern v. T.C.E.F., Inc.* (2016) 246 Cal.App.4th 301, 320; see generally, Civ. Code, § 3528 ["The law respects form less than substance"].) This is an objective, pragmatic test applied to the totality of the circumstances—the test does not reach the subjective motivation or state of mind of appellant Bickel or Michael. Here, appellant occupies the formal role of court-appointed personal representative of the estate of Mary Nickel James pursuant to the 2016 letters of administration appointing him administrator of the estate. Although acting in this formal capacity, the record before us abundantly demonstrates the substance of appellant's action (i.e., its real character) is the pursuit of Michael's interests.

If appellant is successful, the result achieved will benefit Michael at the expense of the Carlsons—he will obtain all of the 90% Royalty Interests that appellant contends never were transferred to Lisa, or the proceeds from the sale of Lisa's share of those

interests. Lisa's three surviving siblings, the other three heirs of the estate represented by appellant, would receive no benefit from appellant's action. The lack of a benefit to them is clearly demonstrated by their active opposition to appellant's efforts.

The determination that appellant is pursuing Michael's interests is supported further by the fact that appellant was appointed as representative of the estate of Mary Nickel James pursuant to a petition filed by Victoria Vaughan, in her capacity as the personal representative of Lisa's estate in the South Carolina probate proceeding. Her actions in that capacity are, in practical effect, taken on behalf of Michael because Michael is the sole heir under the will admitted to probate in the South Carolina proceeding. Thus, as Lisa's heir, Michael will step into her shoes and receive any distribution from the estate of Mary Nickel James that would have gone to Lisa.

The fact that appellant is pursuing Michael's interests is also demonstrated by comparing the relief sought by appellant's October 2017 motion to void or vacate with the relief sought by Michael's March 2015 motion to void or vacate. Both motions requested the same thing—an order vacating the July 2013 order determining succession.

Accordingly, we conclude the substance or real character of the actions taken by appellant are for the benefit of Michael. Specifically, appellant's motion to void and vacate and his subsequent appeal of the denial of his motion were taken to further the interests of Michael. Based on the underlying character of appellant's motion and appeal, we conclude appellant does not qualify for the exception to the general rule that an order of a probate court denying a motion to vacate is not appealable. Although appellant was not formally a party to the prior probate court proceedings that resulted in the challenged order determining succession, the interests he now represents were represented by Michael's participation in that probate proceeding. It follows that appellant's attempt to appeal the denial of his motion is, in practical effect, an attempt to obtain a second or possible third opportunity for Michael to appeal. The purpose of the exception is to provide an opportunity to appeal to a nonparty who could not appeal the challenged

order. That purpose is not served here because Michael already had an opportunity to appeal.

Consequently, we will not extend the exception to the circumstances presented by this case. Based on a pragmatic evaluation of the circumstances, we conclude the order denying appellant's motion to void and vacate the order determining succession is not appealable.

II. PETITION FOR EXTRAORDINARY RELIEF

Appellant's opposition to the motion to dismiss the appeal asks this court to exercise its discretion and treat the appeal as a petition for extraordinary relief. (See *Olson v. Cory* (1983) 35 Cal.3d 390, 401 [in "unusual circumstances" reviewing court may treat the purported appeal as a petition for writ of mandate].) After weighing the circumstances of this case, we decline to treat the appeal as a petition for extraordinary relief. Doing so would be contrary to the public policy of avoiding delays and uncertainty in probate proceedings. Also, the practical effect would be to give Michael another opportunity to challenge the 2013 order determining succession.

DISPOSITION

Respondents' motion to dismiss the appeal, filed November 20, 2018, is granted. Respondents shall recover their costs on appeal.

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FRANSON, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
PEÑA, J.