Filed 9/5/19 Liebovich v. Tobin CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MATTHEW LIEBOVICH, et al., Plaintiffs and Appellants, v. DIANE TOBIN, et al., as Trustees, etc., Defendants and Respondents.	B292177 (Los Angeles County Super. Ct. Nos. BP138199, 17STPB10559)

APPEAL from an order of the Superior Court of Los Angeles County. Barbara R. Johnson, Judge. Dismissed in part; reversed and remanded in part.

Law Offices of Stewart Levin for Plaintiffs and Appellants.

Sacks, Glazier, Franklin & Lodise, Robert N. Sacks, and Matthew W. McMurtrey for Defendants and Respondents.

* * * * * *

Four beneficiaries of a trust brought a motion to vacate a 2013 order amending the terms of the trust, which had the effect of greatly reducing their inheritance. The beneficiaries argued that the order was void because neither they nor their grandmother received notice of the proceeding leading up to the 2013 order. The probate court rejected their argument, and the beneficiaries appeal. We conclude that we lack jurisdiction to consider the portion of their appeal dealing with voidness based on lack of notice *to the beneficiaries*, but conclude that we have jurisdiction to consider the portion of their appeal dealing with voidness based on lack of notice *to the grandmother*. We further conclude that the order is to that extent void, and accordingly reverse to permit the probate court to exercise its discretion whether to vacate the order on that basis.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *Family*

Theodore and Shirley Liebovich, each born in the 1920s, married and had four children—Diane Janice Tobin, Lori Gayle Robin, Stuart Jerome Liebovich, and Bruce Allen Liebovich.[1] Bruce had four children—Esther, Matthew, Andrew and Joshua.

B. *Initial estate planning—from 1984 through 2006*

In May 1984, Theodore and Shirley executed the Liebovich 1984 Trust (1984 Trust). Theodore and Shirley thereafter jointly executed multiple amendments to the 1984 Trust, the last of

---

1 Because many of the persons involved in this case share the same last name, we will use first names for clarity. We mean no disrespect.

which was the Sixth Amendment to and Complete Restatement of Trust (the Sixth Amendment).

Executed on July 28, 2006, the Sixth Amendment named Theodore and Shirley as both the trustors and the initial trustees. That amendment further provided that, although either spouse could on their own revoke the trust vis-à-vis their community property while both spouses were still living, the spouses could "alter, modify, or amend the trust" during their lifetimes only if they acted "jointly." The Sixth Amendment directed that after they both died, specified sums would be donated to various charities, with the remainder of the trust estate to be split "equal[ly]" between their four children (or, if a child died first, that child's children would get that child's share).

At the same time Theodore and Shirley executed the Sixth Amendment, Shirley executed a "Durable Power of Attorney (Limited)" (Power of Attorney). In the Power of Attorney, Shirley "appoint[ed] Theodore . . . as [her] true and lawful Attorney-in-fact" with regard to (1) "transfer[ing] assets to fund" the 1984 Trust (as amended); (2) "amend[ing], supplement[ing] and terminat[ing]" the 1984 Trust (as amended) "[t]o the extent permissible by law and by the instrument creating the same"; (3) "sign[ing] and deliver[ing] a valid disclaimer"; (4) "employ[ing] and pay[ing] for legal, accounting and financial counsel"; and (5) "mak[ing]," "sign[ing]," "verify[ing]" and "compromis[ing] any income, gift or other tax return, claim for refund" and "act[ing] on [her] behalf in all tax matters." The Power of Attorney did not expressly authorize Theodore to amend the beneficiaries of the 1984 Trust (as amended) or to waive notice to legal proceedings.

C. *Further amendments*

Signing for himself and, on the basis of the Power of Attorney, for Shirley, Theodore executed four more amendments to the trust (the Seventh through Tenth Amendments) in October 2006, April 2007, April 2010, and December 2011. Collectively, these amendments (1) acknowledged Bruce's death, and (2) modified the distribution of trust assets upon Theodore and Shirley's deaths to provide that, after specified sums were donated to various charities, (a) Stuart would receive a $500 monthly stipend, and more "if needed for [his] proper support, health, maintenance and education," (b) Diane and Lori would split the remainder "equally." So modified, Bruce's children received no inheritance.

D. *2013 petition to reform the Sixth Amendment and Power of Attorney*

1. *The petition*

In December 2012, Theodore filed a petition to modify and reform the Sixth Amendment and Shirley's Power of Attorney. Specifically, he sought (1) to amend the Sixth Amendment to add language that it "'may be modified or revoked by an attorney-in-fact under a power of attorney,'" (2) to amend the Power of Attorney to add language that "Theodore . . . shall have the authority as [Shirley's] attorney-in-fact to designate or change the designation of beneficiaries to receive any property, benefit, or contract right on [Shirley's] death," and (3) to make those amendments retroactive, thereby validating the Seventh through Tenth Amendments. The basis for the motion was scrivener's error: Shirley had "expressed" to the couple's estate planning lawyer, during a meeting outside Theodore's presence in June 2006, "an unequivocal desire" and "intent" "that Theodore be empowered to amend the Trust as her attorney-in-fact"; the

lawyer had intended to add language to the Sixth Amendment and Power of Attorney to effectuate Shirley's desire; but the lawyer "err[ed]" in omitting that language.

2. *Notice of the petition and hearing*

Theodore served his petition on Lori, Diane, Stuart and Bruce's four children. Theodore served the petition on Bruce's children by mailing notices to each of them at their mother's home address in Chatsworth. At that time, only Joshua lived at that address, and he was 14 years old. Theodore did not serve the petition on Shirley.

Theodore served the probate court's notice of hearing in the same manner.

3. *Waiver of notice of hearing*

Days before the hearing, Theodore executed a Waiver of Notice purporting to waive "notice of hearing" of his petition to Shirley; he signed the Waiver of Notice as Shirley's attorney-in-fact.

4. *Hearing and probate court's ruling*

A few days later, the probate court issued a tentative ruling. The ruling noted one "matter[] to clear"—namely, "30-day ntc/copy Shirley . . . —supp provides waiver of [notice] by [petitioner] as [attorney]-in-fact for Shirley—query whether court will deem [notice] required." The ruling also "quer[ied] whether court wishes to appoint independent [guardian ad litem] to represent interests of Shirley."

At the hearing, the court asked whether a guardian ad litem was necessary for Shirley. Theodore's counsel responded such an appointment "would not add" anything because, among other reasons, the "meetings" at which Shirley's intent vis-à-vis

the trust were discussed "are detailed in the declarations" before the court.

On April 10, 2013, the probate court issued a written order granting Theodore's petition reforming the Sixth Amendment and Power of Attorney as requested and retroactively validating the Seventh through Tenth Amendments (the 2013 order). The order also recited: "All notices have been given as required by law."

E. *Further amendments*

Relying on the Power of Attorney, Theodore executed four more amendments to the 1984 Trust (designated the Eleventh through the Fourteenth Amendments).

F. *Post-amendment events*

Theodore passed away on January 7, 2014.

After an exchange of correspondence between the successor trustees of the 1984 Trust—Diane, Lori and Marc Chopp, a family friend (collectively, trustees)—and an attorney representing Bruce's three oldest children, the trustees' attorney on March 28, 2014, sent the attorney representing Bruce's three oldest children copies of the Thirteenth and Fourteenth Amendments. The first page of each amendment expressly referred to the 2013 order, and referred to the docket number from that case.

Shirley passed away on April 17, 2017.

After Shirley's death, the trustees on August 23, 2017, sent each of Bruce's children a letter notifying them of Shirley's passing. Pursuant to the terms of the Fourteenth Amendment, each child was entitled to $25,000 if they signed a release agreeing not to contest the 1984 Trust; each child was also entitled to $5,000 to hire "skilled legal counsel to advise him or

her" whether to accept their inheritance in exchange for the release. The children each cashed the $5,000 checks, but declined to sign the release.

II. Procedural Background

On March 22, 2018, Bruce's children (plaintiffs) filed a motion to vacate the 2013 order as void.[2] They named the trustees as the respondents. Along with the motion, plaintiffs filed declarations. Those declarations asserted that Theodore's service of process at their mother's house was improper because (1) the elder three did not live with the mother, (2) Theodore did not serve an additional copy upon minor Joshua's mother as his guardian, and (3) their mother would throw any mail not personally addressed to her on the ground or "burn it in the fireplace." They also asserted that none of them had previously objected to the 2013 order because they did not learn of it until

---

2 Plaintiffs had previously filed a Petition to Set Aside and Cancel the 2013 order. The probate court denied that petition without prejudice on the ground that it should have been filed in the same case as the 2013 order (the original case), but stayed its denial until May 2, 2018 to give plaintiffs the opportunity to refile in the original case. Plaintiffs then filed the motion to vacate at issue in this appeal in the original case. When the probate court denied that motion to vacate, it consolidated the two cases and lifted the earlier stay of the denial of the petition to set aside. The court entered its order to that effect on July 26, 2018. Because plaintiffs did not file a new or amended petition within 120 days of the July 2018 order, any filing at this point would be untimely (Prob. Code, § 16061.8), thereby rendering the denial of petition final and hence no longer interlocutory.

Shirley's death in 2017, when they heard that one of their cousins inherited money from Shirley.[3]

After further briefing and a hearing, the probate court denied the motion to vacate. More specifically, the court ruled that the 2013 order was not void because (1) "[plaintiffs] were not entitled to mandatory notice given the Trust was revocable," and (2) any deficiency in serving *Shirley* with notice of the 2013 proceedings was of no moment because "Shirley isn't the party" to the motion to vacate.[4]

Plaintiffs filed this timely appeal of the motion to vacate.[5]

---

3 The declarations also asserted each plaintiff's personal belief that (1) Lori and Diane manipulated Theodore and subsequently "hid" Shirley from them, and (2) it was "not [in] their [grandparents'] nature" to deny them their inheritance. Because the sole basis for these assertions is plaintiffs' belief in their truth, they are necessarily speculative and inadmissible. (*Crosier v. United Parcel Serv.* (1983) 150 Cal.App.3d 1132, 1139 ["suspicions of improper motives are primarily based on conjecture and speculation"], disapproved of on other grounds in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 688-689; *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582 [testimony "regarding the state of mind of another person" is inadmissible "speculation"].)

4 Plaintiffs filed a motion for reconsideration of the court's denial of the motion to vacate, but the court denied it and thereafter issued a corrected order.

5 Although plaintiffs' notice of appeal does not on its face distinguish between the denial of their motion to vacate, the denial of their motion for reconsideration and the denial of their petition to set aside without prejudice, plaintiffs' briefs only

DISCUSSION

Plaintiffs assert that the probate court erred in denying their motion to vacate because the 2013 order was void for two reasons: (1) plaintiffs did not receive notice of Theodore's petition seeking that order or notice of the hearing itself, and (2) Shirley did not receive such notice. The trustees respond that we lack jurisdiction to entertain plaintiffs' appeal. Because the question of appealability and the merits of plaintiffs' arguments are intertwined, we consider those intertwined issues together as to each asserted basis of voidness.

I. Voidness Based on Plaintiffs' Failure to Receive Notice

A. *Appealability under the Probate Code*

Because "this is an appeal in a trust dispute," whether plaintiffs may appeal turns on whether this appeal is authorized by any of the Probate Code sections authorizing an appeal. (*Kalenian v. Insen* (2014) 225 Cal.App.4th 569, 575-576 (*Kalenian*); see Prob. Code, §§ 1300-1304.)[6] These provisions are "exclusive" and, because they are designed to minimize "unreasonable delay[]" in probating trusts and estates, are "much

---

attack the denial of the motion to vacate. Accordingly, they have waived any challenges to the other orders. (*Telish v. State Personnel Bd.* (2015) 234 Cal.App.4th 1479, 1487, fn. 4 ["An appellant's failure to raise an argument in the opening brief waives the issue on appeal."].) Further, their notice of appeal identifies only the July 26, 2018 order as the order appealed from, and that is not the order denying their motion for reconsideration.

6 All further statutory references are to the Probate Code unless otherwise indicated.

narrower" than the statutes in the Civil Procedure Code authorizing appeals more generally. (*McDonald v. Structured Asset Sales, LLC* (2007) 154 Cal.App.4th 1068, 1072-1073; *Estate of Stoddart* (2004) 115 Cal.App.4th 1118, 1125-1126.) We review questions of appealability de novo. (See *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 818-820 (*Berg*) [independently reviewing issue of appealability]; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 556-561 [same] (*Lester*).)

1. *As to appeal of motion to vacate the portion of the 2013 order modifying the Sixth Amendment*

The Probate Code authorizes an appeal, with exceptions not applicable here, from "[a]ny final order" entered under section 17200. (§ 1304, subd. (a).) Because section 17200 authorizes a trustee to petition the court to "[a]pprov[e] or direct[] the modification . . . of [a] trust" (§ 17200, subd. (b)(13)), the probate court's 2013 order granting Theodore's petition to reform and modify the Sixth Amendment was appealable. What is more, an order denying a *motion to vacate* an appealable order is *itself* appealable if that underlying, appealable order was "entered ex parte with[out] . . . notice" to the party now seeking to appeal. (*Kalenian*, *supra*, 225 Cal.App.4th at p. 578; *Estate of Baker* (1915) 170 Cal. 578, 582-583 [so holding].) Critically, however, this extension of appellate jurisdiction to motions to vacate only applies if the prior order was entered ex parte—that is, entered without notice to a person that was, at that time*, entitled* to notice.

Plaintiffs were not entitled to notice of the proceedings that ripened into the 2013 order modifying the Sixth Amendment. As pertinent here, the Probate Code obligated Theodore to serve a notice of hearing on "[a]ll trustees" and "[a]ll beneficiaries."

(§ 17203, subds. (a)(1) & (a)(2).) In 2012 and 2013, plaintiffs were not "trustees." They were also not "beneficiaries" entitled to notice. That is because "notice that is to be given to a beneficiary shall be given to the person holding the power to revoke [a trust] and not to the beneficiary" "during the time that [the] trust is revocable." (§ 15802; see also § 15800, subd. (b) [while "a trust is revocable," "[t]he duties of the trustee are owed to the person holding the power to revoke"]; *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 408 (*Drake*) ["Under sections 17200 and 15800 a beneficiary lacks standing to challenge a trust so long as the 'trust is revocable and the person holding the power to revoke the trust is competent . . .'"], italics omitted.) Because Theodore and Shirley were both still alive in 2012 and 2013, the 1984 Trust (as amended) was still revocable. (*Aulisio v. Bancroft* (2014) 230 Cal.App.4th 1516, 1529 ["'A revocable trust is a trust that the person who creates it . . . can revoke during the person's lifetime.'"].) Consequently, Theodore was obligated to give notice to himself and Shirley (as the "person[s] holding the power to revoke"), but *not* to plaintiffs (as the "beneficiar[ies]"). (§ 15802.) Because plaintiffs were not entitled to notice, the 2013 order modifying the Sixth Amendment was not ex parte as to them and hence falls outside the doctrine allowing for appeals of motions to vacate orders entered ex parte.

2. *As to appeal of motion to vacate the portion of the 2013 order modifying the Power of Attorney*

Although the Probate Code has specific provisions governing the modification of powers of attorney (§§ 4500-4545), no provision of that Code authorizes an appeal from such an order—let alone from the denial of a motion to vacate such an order. (Cf. §§ 1300-1304.)

Even if we viewed plaintiffs' appeal as one arising from a denial of a motion to reform a contract under Civil Code section 3399 (and hence an appeal subject to the statutes governing appealability generally (Code Civ. Proc., § 904.1 et seq.)), plaintiffs would be entitled to appeal only if the order denying their motion to vacate the 2013 order as to the power of attorney fit within the general doctrine that "when [an] underlying judgment is void," "the order denying the motion to vacate is itself void and appealable because it gives effect to [the] void judgment." (*Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691 (*Carlson*); *Jackson v. Kaiser Foundation Hospitals, Inc.* (2019) 32 Cal.App.5th 166, 171 (*Jackson*).) It does not fit within this doctrine because the 2013 order was not void for lack of notice *to them*. (*OC Interior Services, LLC v. Nationstar Mortgage, LLC* (2017) 7 Cal.App.5th 1318, 1330 (*OC Interior*) [voidness includes "lack of authority over . . . the parties"].) That is because a party seeking to modify a power of attorney under the Probate Code is only required to notify (1) "the attorney-in-fact," and (2) "the principal." (§ 4544.) Plaintiffs fit into neither category, so were not entitled to notice of Theodore's motion to reform the power of attorney.

B. *Plaintiffs' arguments*

Plaintiffs make no effort to explain why we have jurisdiction over the appeal of the order denying their motion to vacate that portion of the 2013 order modifying the Power of Attorney. As to whether we have jurisdiction over the appeal of the order denying their motion to vacate that portion of the 2013 order modifying the Sixth Amendment, plaintiffs raise what boil down to three arguments.

First, they urge that jurisdiction is appropriate under the Probate Code statutes governing appealability. They cite the Probate Code provision authorizing an appeal of "the grant or refusal to grant" an order "[d]etermining heirship, succession, entitlement, or the persons to whom distribution should be made." (§ 1303, subd. (f).) However, this provision expressly applies only "[w]ith respect to a decedent's *estate*" (§ 1303), and is distinct from the provision authorizing the appeal of orders "[w]ith respect to a trust" (§ 1304). Because this case involves a trust, the provision plaintiffs cite is inapplicable. Plaintiffs also cite section 15804. However, that section spells out *how* to "sufficient[ly] compl[y]" with "notice" that is due to a "beneficiary" or "a person interested in the trust" (§ 15804, subd. (a)); it does not purport to define *to whom* such notice is due in the first place.

Second, plaintiffs contend that they had standing to sue—and, ostensibly, were entitled to notice—under *Estate of Giraldin* (2012) 55 Cal.4th 1058 (*Giraldin*). To be sure, *Giraldin* held that "the beneficiaries of a revocable trust" who would otherwise lack standing "may [still] challenge a trustee's breach of the fiduciary duty owed to the settlor to the extent that breach harmed the beneficiaries' interests." (*Id.* at p. 1068.) Critically, however, *Giraldin* involved a situation in which "the trustee . . . [was] someone other than the settlor." (*Id.* at p. 1062.) Neither *Giraldin*'s holding nor its logic apply where, as here, a husband and wife are both co-trustees and co-settlors because the harm at issue in *Giraldin*—namely, that "a third party trustee who owes a fiduciary duty to the settlor and whose breach of that duty could 'substantially harm the beneficiaries by reducing the trust's value against the settlor's wishes'"—cannot "happen" where "the trustees and settlors [are] one and the same" and thus "[can]not

have had any liability for 'fail[ing] to sufficiently preserve' the beneficiaries' interests." (*Babbitt v. Superior Court* (2016) 246 Cal.App.4th 1135, 1146-1147, citing *Giraldin*, at pp. 1062, 1071.) Here, Theodore and Shirley were both co-trustees and co-settlors in 2012 and 2013.

Third, plaintiffs assert that they are entitled to appeal under the general doctrine, noted above, that "when [an] underlying judgment is void," "the order denying the motion to vacate is itself void and appealable because it gives effect to [the] void judgment." (*Carlson*, *supra*, 54 Cal.App.4th at p. 691; *Jackson*, *supra*, 32 Cal.App.5th at p. 171.) This assertion does not assist plaintiffs for two reasons. To begin, these cases involve the *general* appealability statutes, not the Probate Code's narrower statutes. (*Carlson*, at pp. 690-691; *Jackson*, at p. 171.) More to the point, the question here is whether the 2013 order is void for lack of notice *to plaintiffs*. Because *they* were not entitled to notice, the failure to grant them notice does not render the 2013 order void.

For these reasons, plaintiffs' appeal of that portion of the probate court's order denying their motion to vacate due to lack of notice *to them* is not subject to appeal and must accordingly be dismissed.

II. Voidness Based on Shirley's Failure to Receive Notice

A. *Appealability*

As set forth above, we have jurisdiction to review an order denying a motion to vacate an order "modif[ying] . . . a trust" if that order was "entered ex parte with[out] . . . notice" to the party now seeking to appeal. (§ 17200, subd. (b)(13); *Kalenian*, *supra*, 225 Cal.App.4th at p. 578.) Also as set forth above, we have jurisdiction to review an order denying a motion to vacate an

order modifying a power of attorney if that "underlying [order] is void." (*Carlson*, *supra*, 54 Cal.App.4th at p. 691.) An order is "void" if, among other things, the court lacks personal jurisdiction over a party because "the statutory procedures for service of process" were not satisfied. (*OC Interior*, *supra*, 7 Cal.App.5th at pp. 1330-1331; *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1226.) And lastly as set forth above, these inquiries turn on whether the party seeking to vacate the order as void was entitled to notice of the prior proceedings. Thus, whether we have jurisdiction to entertain an appeal of the motion to vacate the 2013 order due to lack of notice to *Shirley* depends on whether *she* was entitled to notice of the proceedings leading up to that order. What is more, because it is *plaintiffs*—and not *Shirley*—who are claiming a lack of notice to Shirley, whether we have jurisdiction also turns on whether plaintiffs have standing to challenge the 2013 order. We confront each question separately. Because these are questions of appealability and voidness, our review is de novo. (*Berg*, *supra*, 131 Cal.App.4th at pp. 818-820; *Lester*, *supra*, 84 Cal.App.4th at pp. 556-561; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 496 (*Cruz*) [voidness].)

1. *Did Shirley receive proper notice of the 2013 proceedings?*

Shirley was entitled to notice of the 2013 proceedings that produced the 2013 order. As noted above, a party seeking to modify a trust under the Probate Code must serve a notice of hearing upon "[a]ll trustees" and, when the settlors are alive, the "person[s] holding the power to revoke the trust." (§§ 17203, subds. (a)(1) & (a)(2), 15802.) In 2012 and 2013, both Theodore and Shirley were alive and, according to the explicit provisions of the 1984 Trust, Shirley was an initial trustee at this time and

held the power to revoke the trust. Also as noted above, a party seeking to modify a power of attorney must notify "the principal." (§ 4544.) Shirley was the principal of the Power of Attorney.

Shirley did not receive the notice required by the above cited statutes governing the service of process. The contemporaneously filed proofs of service show that Theodore did not serve Shirley with the notice of hearing. Theodore *did* file a Waiver of Notice as to the "notice of hearing." However, the Waiver of Notice was invalid. It was signed—not by Shirley herself—but by Theodore as her attorney-in-fact pursuant to the Power of Attorney. But it is well settled that where, as here, "a power of attorney grants limited authority to an attorney-in-fact," the attorney-in-fact possesses only that "authority granted in the power of attorney, as limited with respect to permissible actions, subjects, or purposes," as well as "[t]he authority incidental, necessary, or proper to carry out the granted authority." (§ 4262.) The power of attorney in this case was "limited" and did not purport to grant Theodore the power to waive notice on Shirley's behalf. As a result, Theodore lacked the power to execute the Waiver of Notice, and the Waiver of Notice is therefore invalid. The 2013 order is accordingly void due to the absence of notice to Shirley. (*OC Interior*, *supra*, 7 Cal.App.5th at pp. 1330-1331.)

In response, the trustees point to the probate court's proclamation in the 2013 order that "[a]ll notices have been given as required by law." This proclamation, the trustees continue, is by statute deemed to be conclusive. To be sure, section 1260 provides that, "[i]f it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court shall so find in its order" and further provides that this "finding . . ., when the order becomes

final, is conclusive on all persons." (§ 1260, subds. (b) & (c).) But the conclusiveness does not apply where, as here, not "all parties affected are actually or constructively before [the court] with an opportunity to assert their contentions and to appeal from an adverse ruling." (See *In re Estate of Estrem* (1940) 16 Cal.2d 563, 570 [a finding under Code of Civil Procedure section 473, while ordinarily "conclusive," is not so in above quoted circumstances]; *Estate of Robinson* (1942) 19 Cal.2d 534, 538-539 [same]; see cf., *In re Estate of Ivory* (1940) 37 Cal.App.2d 22, 28 [a finding regarding proper notice is conclusive where order is "not void on its face"]; *Buick v. Boyd* (1918) 37 Cal.App. 508, 512-513 [same].) Because Shirley was neither "actually [nor] constructively before" the court when it ruled she had notice, the court's declaration of proper notice is not conclusive.

2. *Do plaintiffs have standing to challenge the 2013 order due to lack of notice to Shirley?*

Because a void order is a "nullity" (*OC Interior*, *supra*, 7 Cal.App.5th at p. 1330), it may be set aside not only by "parties and their privies," but also by "strangers to the action." (*Mitchell v. Automobile Owners Indem. Underwriters* (1941) 19 Cal.2d 1, 7 (*Mitchell*); *Plaza Hollister Ltd Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 15-16 (*Plaza Hollister*).) To have standing to set aside a void judgment, however, a *stranger* to that action must point to "some right or interest . . . [that] would be affected by . . . enforcement" of the void order. (*Plaza Hollister*, at pp. 15-16; *Mitchell*, at p. 7; *People v. Silva* (1981) 114 Cal.App.3d 538, 547.)

Applying these standards, plaintiffs have standing to challenge the 2013 order due to lack of notice to Shirley. For the reasons set forth above, the 2013 order is void because Shirley did not receive proper notice of the proceedings leading up to that

order. And because the 2013 order validated the Seventh through Tenth Amendments to the 1984 Trust that reduced plaintiffs' inheritance from 25 percent of the trust's post-charitable-gift balance down to (at most) $100,000, plaintiffs have shown that their rights are affected by enforcement of the 2013 order.

We accordingly have jurisdiction over this appeal of the motion to vacate the 2013 order as void due to lack of notice to Shirley.

B. *Merits*

A court has the power to "set aside any void judgment or order." (Code Civ. Proc., § 473, subd. (d).) This power is limited by time: While a court may set aside a void judgment or order no matter how that voidness is proven within the first six months after the order issues, "[o]nce six months have elapsed . . ., 'a trial court may grant a motion to set aside that judgment [or order] as void only if the judgment [or order] is void on its face.' [Citation.]" (*Cruz*, *supra*, 146 Cal.App.4th at p. 496.) "'A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment-roll'" "or [the] court record without consideration of extrinsic evidence." (*Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441, quoting *Morgan v. Clapp* (1929) 207 Cal. 221, 224; *Pittman v. Beck Park Apartments Ltd.* (2018) 20 Cal.App.5th 1009, 1020-1021.) As Code of Civil Procedure section 473's use of the word "may" dictates (and, hence, contrary to plaintiffs' assertion at oral argument that courts have discretion only when voidness is proven by extrinsic evidence), the exercise of this power is discretionary. (*Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822 ["even if the trial court determines the

order of judgment was void, it still retains discretion to set the order aside or allow it to stand"].) As a result, our review of the probate court's order denying plaintiffs' motion to vacate the 2013 order due to lack of notice to Shirley turns on two questions: (1) Was that order void on its face due to lack of notice to Shirley and, if so, (2) Did the court properly exercise its discretion to deny the motion? We review the first question de novo, and the second for an abuse of discretion. (*Ibid.*)

For the reasons set forth above, the 2013 order was void due to lack of notice to Shirley. Although plaintiffs' motion to vacate was filed more than six months after the 2013 order was issued, the probate court nevertheless has the power to vacate the order because it is void on its face: Theodore's failure to serve Shirley is apparent from proofs of service for his petition and the notice of hearing. What is more, the invalidity of the Waiver of Notice as to the notice of hearing is apparent from the Waiver itself and the power of attorney which, on its face, does not empower Theodore to waive notice of process.

We cannot review the probate court's exercise of discretion, however, because the court never exercised that discretion; it merely held that notice was proper as to the plaintiffs and that plaintiffs did not have standing to assert the lack of notice as to Shirley. Where, as here, "the trial court failed to exercise its discretion in this regard, the case must be remanded to allow it do so." (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1249.) In exercising that discretion, the court should consider, among other relevant factors, (1) whether Shirley's participation in the proceedings regarding the petition to reform the Sixth Amendment and power of attorney would have led to a different result (see *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982

[requiring showing of "a meritorious case" to obtain equitable relief from a judgment under Code of Civil Procedure 473]), and (2) whether plaintiffs were diligent in bringing their motion to dismiss (*Dew v. Pavese* (1967) 256 Cal.App.2d 484, 487), which includes examining whether three of them had notice of the 2013 order from the copies of the Thirteenth and Fourteenth Amendments sent to them in 2014 and, if so, whether their delay in filing their motion until Shirley's death deprived the trustees of the readiest means of proving Shirley's intent (see *Drake*, *supra*, 217 Cal.App.4th at p. 409 [a party's "failure to bring the action until after [the settlor] had passed away was necessarily prejudicial" where case turned on settlor's intent]).

DISPOSITION

The probate court's order denying appellants' motion to vacate is reversed and remanded in part. It is reversed only to the extent that the 2013 order is void for lack of notice to Shirley. On remand, the probate court shall determine, in its discretion, whether to set aside the 2013 order on that basis. In all other respects, the appeal is dismissed for appellants' failure to challenge an appealable order. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
CHAVEZ