

A141356

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION ONE

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**KATHLEEN A. STEARNS**

**Appellant**

**vs.**

**ROBERT A. MARTIN**

**Respondent**

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Appeal from an Order of the Superior Court of San Mateo  
No. FAM01128850

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**Motion for Involuntary Dismissal of Appeal**

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## MOTION TO DISMISS

### I.

#### INTRODUCTION

Dismissal is required because the order in question is not appealable.

### III.

#### STATEMENT OF FACTS

Notice of Appeal was filed March 24, 2014. The Appellant's Opening Brief (AOB) states that the appeal is from "an order allowing the respondent to withdraw funds from the enjoined Lockheed Martin 401k savings plan." (AOB, Argument, p. 9.) No final judgment has been entered. The record on appeal consists of a Clerk's Transcript and a Settled Statement.

### IV.

#### ARGUMENT

Pre-trial orders are not appealable except in limited circumstances; this is not one of those circumstances.

An opening brief must "explain why the order appealed from is appealable." (Cal. Rules of Ct., Rule 8.204, subd. (a)(2)(B).) Here, the

Statement of Appealability in the AOB merely states: “This appeal is from the order of the San Mateo County Superior Court and is authorized by the Code of Civil Procedure, section 904.1(a) (9) and 904.1(a)(10).” (AOB, Statement of Appealability, p. 6.) The two subdivisions cited in the AOB allow for an appeal from “an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made” [Code Civ. Proc., § 904.1, subd. (a)(9)], and for an appeal from “an order made appealable by the provisions of the Probate Code or the Family Code” [(*Id.*, subd. (a)(10)]. Neither one of those subdivisions applies here. There is no interlocutory judgment of partition, and Respondent is not aware of any Probate Code or Family Code section which makes the order appealable. The appeal should be dismissed because the AOB fails to explain why the order is appealable.

It is clear that the order is not appealable because there has been no final determination of the rights of the parties.

"In determining whether a particular decree is essentially interlocutory and nonappealable, or whether it is final and appealable . . . [i]t is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be

adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory."

(*Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1216.)

“[T]he policies underlying the final judgment rule [are as follows:] avoiding piecemeal dispositions and multiple appeals, reducing uncertainty or delay in the trial court, and obtaining a single complete and final resolution of the issues presented.” (*Id.*, at p. 1219.)

The financial issues between the parties in this case will be not be resolved until a final judgment is entered. The trial court order was only a preliminary step in the case. The order permitted the withdrawal of funds from one community asset (the retirement fund) so another community asset (the residence) could be saved from foreclosure. After trial, the court will render a final judgment which makes an overall equal division of the entire community estate. It is premature to take an appeal now.

Accordingly, there is no jurisdiction to entertain the appeal.

V.

CONCLUSION

Respondent requests that the appeal be dismissed because the order in question is not appealable. A proposed order is attached.

Dated: January 7, 2015

Respectfully submitted,

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WALZER & MELCHER LLP  
Christopher C. Melcher, Esq.

**STATEMENT AS TO LENGTH OF BRIEF**

This brief contains 816 words according to the program used to create this document.

Dated: January 7, 2015

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Christopher C. Melcher



**PROPOSED ORDER**

Good cause appearing, it is hereby ordered that the appeal filed March 24, 2014, shall be dismissed because the order in question is not appealable.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Presiding Justice