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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

W. A. HLAVATY, as Trustee, etc.,

Plaintiff and Respondent,

v.

ALANA BURROWS,

Appellant,

LEE B. BURROWS et al.,

Objectors and Respondents.

D069287

(Super. Ct. No. RIP1200824)

APPEAL from a judgment of the Superior Court of Riverside County, Randall D.

White, Judge. Affirmed.

Best, Best & Krieger, Kira L. Klatchko and Irene S. Zurko; Lewis Brisbois  
Bisgaard & Smith and Kira L. Klatchko for Appellant.

Reynolds, Jenson & Swan and Barry R. Swan for Plaintiff and Respondent.

Law Offices of Lee E. Burrows and Lee Burrows for Objector and Respondent  
Lee E. Burrows.

Jeglin & Wright and Marvin H. Jeglin for Objector and Respondent Lynda  
Burrows.

This is an appeal by one of three beneficiaries of a family trust following a court trial and a judgment on the successor trustee's petition for instructions and the objections to the petition by the other two beneficiaries of the trust. The probate court ruled that the trust language at issue (concerning the funding and distribution of a subtrust created upon the death of the one of the settlors) was unambiguous and that the appealing beneficiary's proceeds from the distribution of her share of the new trust would be assessed \$106,666.66 and reallocated to the other two beneficiaries. Lee Burrows, Lynda Burrows and Alana Burrows are the beneficiaries, and a portion of Alana's proceeds from the trust were assessed and reallocated to Lee and Lynda.<sup>1</sup> Alana is the appellant in this appeal, and Lee, Lynda and the successor trustee are the respondents.<sup>2</sup>

We affirm the judgment.

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<sup>1</sup> At least six people involved with trusts at issue on appeal share the same last name of Burrows. Accordingly, after introducing each Burrows family member, for clarity and ease of reading we will refer to each by his or her first name; we intend no disrespect. (*Rands v. Rands* (2009) 178 Cal.App.4th 907, 909, fn. 1.)

<sup>2</sup> W. A. Hlavaty, in his capacity as the successor trustee to the family trust, takes no position as to the merits of the substantive arguments presented by Lee, Lynda and Alana.

## I.

### BACKGROUND FACTS AND PROCEDURE

Most, if not all, of the pertinent facts are undisputed, as set forth in the stipulated joint pretrial statement filed January 24, 2014.

#### A. *The Family Trust*

Leonard E. Burrows and Helen L. Burrows were husband and wife and the sole settlors and original trustees of the Burrows Family Revocable Living Trust dated September 12, 1990 (Family Trust). Larry Burrows was Leonard's son from a relationship prior to his marriage to Helen. Leonard and Helen had two daughters, Lynda and Alana. Larry, Lynda and Alana are the only children of Leonard; and Lynda and Alana are the only children of Helen. Larry died in 1991, and Lee is Larry's only child.<sup>3</sup> Leonard died in 1993.

Upon Leonard's death, the Family Trust (Art. V, § A.) provided that Helen, as trustee, divide all trust property into three shares, which are at times referred to as subtrusts:<sup>4</sup> (1) the Survivor's Trust, which was to consist of Helen's one-half interest in

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<sup>3</sup> There is no issue on appeal concerning Lee's entitlement to Larry's share of any distribution. Thus, when referring to Larry's share, we will substitute Lee's name without further explanation.

<sup>4</sup> The Family Trust uses generic titles such as "Deceased Settlor," "Surviving Spouse," "Surviving Settlor" and "Trustee." For ease of reading, where we are able, we will use the name of the person who, based on the real life events, ended up in the position of the title used in the Family Trust. For example, upon Leonard's death, he became the deceased settlor, and Helen became the surviving settlor, the surviving spouse and the trustee.

the community's estate, Helen's one-half interest in Leonard's quasi-community property, and Helen's separate or quasi-community property contributed by Helen; (2) the Marital Trust, which was to consist of enough of Leonard's separate, community or quasi-community property necessary to eliminate the federal estate tax liability imposed at the time of Leonard's death; and (3) the Credit Trust, which was to consist of the balance of Family Trust property. In dividing the Family Trust property pursuant to this provision after Leonard's death, in January 1994 Helen executed an assignment by which she allocated the property as follows: Helen's one-half interest in the community estate and Helen's quasi-community property and separate property were transferred to the Survivor's Trust; and Leonard's one-half interest in the community estate and Leonard's quasi-community property and separate property were transferred to the Marital Trust and the Credit Trust. Thus, as particularly relevant to the issues on appeal, the division of Family Trust property required in Article V, Section A. resulted in *the Credit Trust being comprised exclusively of Leonard's property*. As part of Leonard's property assigned to the Credit Trust, Helen transferred the following two parcels of Hawaii real estate: 3266 Lincoln Avenue, Honolulu, Hawaii (Lincoln Property); and 550 Maluniu Avenue, Kailua, Hawaii (Maluniu Property) (together Hawaii Properties).

After payment of the federal estate taxes from the property allocated to the Marital Trust, the Family Trust (Art. VI, § E., ¶ 1.) required any remaining property in the Marital Trust — all of which had been Leonard's — to be added to and become additional assets in the Credit Trust. The Trustee complied with this requirement.

Article VI, Section F., Paragraph 3. (Part VI(F)(3)) of the Family Trust deals with the *distribution of the Credit Trust upon Helen's death* and provides in relevant part:

"Apart from that which is specifically outlined in Helen L. Burrows's Will, all property remaining that was the Separate, Community, or Quasi-Community Property of Helen L. Burrows shall be distributed equally, after the specific gifts listed below, among the following two beneficiaries:

- "Lynda L. Burrows - daughter
- "Alana L. Burrows - daughter

"Specific Gifts:

"Waikiki, Honolulu, Hawaii, Olaa, County, Hawaii and Kalaoa, North Kona Hawaii properties to go to Alana L. Burrows.

"Apart from that which is specifically outlined in Leonard E. Burrows's Will, all property remaining that was the Separate, Community, or Quasi-Community Property of Leonard E. Burrows shall be distributed equally, after the specific gifts listed below, among the following three beneficiaries:

- "Larry E. Burrows [Len] - son [Larry's son]
- "Lynda L. Burrows - daughter
- "Alana L. Burrows - daughter"<sup>5</sup>

After the last line, there is no mention of specific gifts or an entry of any kind. The next line of the Family Trust is a new section of the document, Article VI, Section G., entitled "Family Sharing Trust."

From the date of Leonard's death in 1993 through January 19, 2007, Helen was the sole trustee of the Family Trust, during which time she administered each of the three subtrusts. In January 2007, Helen and all adult beneficiaries of the Family Trust agreed

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<sup>5</sup> The parties do not direct our attention to any evidence that either Leonard or Helen had a will that affected the distribution of the Credit Trust property.

to replace Helen with a professional trustee, David F. Doten. The probate court approved Doten as successor trustee in March 2007.

Helen died in May 2011.

Doten died in January 2013, and following the parties' stipulation the probate court appointed Hlavaty as successor trustee (Trustee) in February 2013.

B. *The Lincoln Mortgage Litigation*

In November 2004, Helen executed a special power of attorney appointing Alana as Helen's attorney in fact through June 2005.

Pursuant to the power of attorney, Alana entered into certain transactions affecting the Hawaii Properties. More specifically, Alana transferred title to the Lincoln Property from Helen, as trustee of the Credit Trust, to Helen, as an individual; Alana borrowed \$360,000 (Lincoln Property mortgage proceeds), the note for which was secured by the Lincoln Property; title to the Lincoln Property was transferred from Helen, as an individual, back to Helen, as trustee of the Credit Trust; with a portion of the Lincoln Property mortgage proceeds, Alana paid off the mortgage on the Maluniu Property;<sup>6</sup> Alana deposited \$179,116.37 of the Lincoln Property mortgage proceeds into a Credit Trust bank account; on the same day, Alana transferred \$175,116.37 of those funds into a bank account jointly held by Alana and Helen; Alana kept the \$4,000 difference; approximately four months later, Alana wrote a check from the joint account, payable to "Cash" in the amount of \$140,000 and deposited it into her personal bank account.

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<sup>6</sup> Alana lived at the Maluniu Property.

In May 2008, Helen initiated probate court proceedings against Alana in Riverside County Superior Court for recovery of a portion of the Lincoln Property mortgage proceeds.<sup>7</sup> Following an evidentiary hearing and further proceedings, in August 2012 (by which time Helen had died and Doten was the trustee) the probate court issued a judgment, finding in relevant part that Alana "acknowledged misappropriation of \$160,000" of the Lincoln Property mortgage proceeds.<sup>8</sup>

C. *The Underlying Proceedings*

In December 2012, Doten initiated the underlying proceedings by filing a petition for instructions pursuant to Probate Code section 17200.<sup>9</sup> After his appointment, the

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<sup>7</sup> Alana asks us to take judicial notice of four documents from that action — each of which could have been, but was not, presented to the probate court in the present matter in the first instance. The "general rule [is] that an appellate court should not take notice of matters not first presented to and considered by the trial court" — especially where, as here, "to do so would unfairly permit 'one side to press an issue or theory on appeal that was not raised below.'" (*People v. Sakarias* (2000) 22 Cal.4th 596, 636.) Accordingly, we deny Alana's motion for judicial notice. As a related procedure, we also disregard statements in Alana's briefs based on any of the four documents attached to Alana's motion to take judicial notice. (*Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625 ["'Statements of alleged fact in the briefs on appeal which are not contained in the record and were never called to the attention of the trial court will be disregarded by this court on appeal.'"].)

<sup>8</sup> The probate court's judgment did not require Alana to pay any damages, however, on the basis that, *as of that time*, the Family Trust had not suffered any damages: Overall, the Family Trust benefitted from the new loan and old mortgage payoff; and the possibility existed that, on final distribution, Alana could be awarded the Lincoln Property and its existing mortgage (which included the \$160,000 she misappropriated). The court also found that, in borrowing the \$360,000 and paying off the mortgage on the Maluniu Property, Alana did not breach her fiduciary duty or otherwise act in bad faith.

<sup>9</sup> As applicable here, Probate Code section 17200, subdivision (a) authorizes a trustee to petition the probate court concerning the internal affairs of a trust, and

Trustee filed his own petition in May 2013.<sup>10</sup> As pertinent to the issues on appeal, the Trustee sought the following guidance regarding the distribution of the assets in the Credit Trust pursuant to Part VI(F)(3) of the Family Trust: (1) whether Alana was entitled to be gifted the Hawaii Properties; and (2) whether the residue was to be divided evenly between Helen's children (Lynda and Alana) or evenly among Leonard's children (Lee, Lynda and Alana). The Trustee gave notice to Lee, Lynda and Alana — through respective counsel<sup>11</sup> — of a late June 2013 hearing on the petition.

Lee filed an objection to the petition, in which he asserted, as relevant to the issues on appeal, two independent arguments. First, in response to the Trustee's allegation in the petition, Lee contended that the language of the Family Trust was unambiguous in directing distribution of the Credit Trust: Because the Credit Trust was funded entirely with Leonard's property, Part VI(F)(3) of the Family Trust did not provide for any gifts, and the residue was to be divided equally among Lee, Lynda and Alana. Second, since Alana misappropriated \$160,000 of the Lincoln Property mortgage proceeds, her share of

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subdivision (b)(1), (4) and (6) allows proceedings, respectively, to determine questions of construction of the trust, to ascertain beneficiaries and determine to whom trust property shall pass upon final distribution, and to instruct the trustee.

Further undesignated statutory references are to the Probate Code.

<sup>10</sup> The Trustee was appointed in February 2013. On May 7, 2013, Doten's original petition was updated to add Alana as a petitioner. The Trustee's petition, filed one week later on May 14, 2015, does not include Alana as a petitioner; it identifies her only as one of the beneficiaries of the Credit Trust.

<sup>11</sup> Lee, who has represented himself throughout the probate and appellate court proceedings, is a licensed California lawyer.

the residue of the Credit Trust should be assessed in the amount of \$106,666.66 (two-thirds of \$160,000) and allocated equally to Lee and to Lynda (\$53,333.33 each), the other two beneficiaries.

Lynda also filed an objection to the Trustee's petition. She asserted essentially the same argument as Lee regarding the language of the Family Trust in directing the distribution of the Credit Trust: Part IV(F)(3) was unambiguous; no gifts were to be made; and the property was to be divided equally among Lee, Lynda and Alana.

At the late June 2013 hearing, the court reviewed the petition and the objections and set a September 2013 trial setting conference.

In July 2013, which was less than a month after notice of the trial setting conference and just over two months before the trial setting conference, Alana substituted herself in pro. per. in place of her attorney of record in the probate proceedings.<sup>12</sup>

At the trial setting conference, the probate court discussed its trial procedures, and the court and the parties — with the Trustee, Lee and Lynda represented by counsel, and Alana representing herself — agreed to a trial date of January 24, 2014.

In preparation for trial, the Trustee, Lee and Lynda filed a joint pretrial statement, pursuant to which they were able to agree to 43 numbered paragraphs of stipulated facts,

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<sup>12</sup> Because the procedural rules apply to self-represented parties the same as to counsel, Alana is not entitled to any special or lenient treatment based on what she did or did not do while representing herself. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.) Indeed, the notice Alana signed advised her immediately above her consent and signature: "Failure to take timely and appropriate action in this case may result in serious legal consequences."

to the authenticity and admissibility of 29 exhibits, to resolve two specifically identified issues and to submit for resolution three specifically identified issues (one of which was withdrawn at trial). In their stipulated statement, these parties explained that Alana "is a beneficiary of the Credit Trust but has not objected or otherwise responded to the Petition or to the Objections to the Petition filed and served by Lynda or Lee." The Trustee, Lee and Lynda also filed a joint witness list for trial. The Trustee, Lee and Lynda each filed a separate trial brief.

Lee filed three motions in limine, only one of which presents any issue on appeal. The probate court granted this motion, which Lee brought pursuant to Evidence Code section 777, subdivision (a), to exclude nonparty witnesses from the courtroom prior to testifying. Before the first witness testified, Lynda asked that Alana be excluded as a nonparty witness, and the court directed that she leave the courtroom.

Through respective counsel, the Trustee, Lee and Lynda introduced evidence in the form of uncontested facts, exhibits and testimony from the Trustee and Alana. Alana remained in the courtroom after her testimony. Lee and counsel for Lynda each summed up their respective positions based on the evidence and stipulated facts presented.

Lynda's position was consistent with her objection to the petition: The language in Part VI(F)(3) of the Family Trust, which provided for the distribution of the property in the Credit Trust after Helen's death (i.e., after both settlors had died), was unambiguous — no gifts were to be made, and the property was to be divided equally among Lee, Lynda and Alana. Likewise, Lee's position was consistent with his objection to the petition: He agreed with Lynda's argument regarding the distribution of the residue of

the Credit Trust; and Alana's share of the residue of the Credit Trust should be assessed in the amount of \$106,666.66 and allocated equally to Lee and to Lynda. The court denied Alana's request to speak and took the matter under submission.

By minute order and ultimately by judgment the probate court ruled as follows: The language of the Family Trust is unambiguous as to the funding and distribution of the Credit Trust; the Credit Trust was funded solely by Leonard's property; Leonard did not authorize any specific gifts from his property in the Credit Trust; the property in the Credit Trust is to be distributed equally among Lee, Lynda and Alana; the proceeds allocated to Alana are assessed the amount of \$106,666.66, which is to be reallocated equally between Lee and Lynda; and the Trustee is ordered to distribute the proceeds from the property in the Credit Trust accordingly.

Alana timely appealed from the judgment.

## II.

### DISCUSSION

We presume the probate court's judgment is correct, and Alana (as the appellant) has the burden of affirmatively demonstrating reversible error. (*Estate of Bonzi* (2013) 216 Cal.App.4th 1085, 1101 [appeal from probate court ruling on petition to confirm sale and objection to petition].)

Alana raises three arguments on appeal. First, Alana argues that the judgment is void, because the probate court lacked subject matter and personal jurisdiction and because she was wrongly precluded from participating at trial. Second, Alana argues that the probate court erred in interpreting the Family Trust; she contends that, upon

distribution of the property in the Credit Trust, she should have been gifted the Hawaii Properties, after which Helen's remaining property should have been divided equally between Helen's children (Lynda and Alana) and Leonard's property should have been divided equally among Leonard's children (Lee, Lynda and Alana). Finally, Alana argues that the record lacks substantial evidence to support the assessment and reallocation of the \$106,666.66. None of Alana's arguments has merit.

In addition to responding to Alana's arguments, Lee and Lynda contend that Alana lacks standing to bring the present appeal — a jurisdictional issue. (*United Investors Life Ins. Co. v. Waddell & Reed, Inc.* (2005) 125 Cal.App.4th 1300, 1304.) We disagree.

We will deal first with the parties' jurisdictional arguments and then discuss the other issues Alana raises.

A. *The Probate Court Had Jurisdiction to Hear the Matter and Enter Judgment, and Alana Has Standing to Appeal It*

Alana argues that the judgment is void, because she did not receive "proper[]" notice[]" of Lee's objection and because she was improperly excluded from participating in the trial. Lee and Lynda argue that Alana lacks standing to appeal, because she did not participate at trial.

1. *The Probate Court Had Subject Matter Jurisdiction and Personal Jurisdiction*

Alana argues that, because Lee's objection sought a transfer of trust property — i.e., the \$106,666.66 to Lee and Lynda — Lee in essence was asserting an affirmative claim to property of the Family Trust that exceeded the scope of the Trustee's petition. As such, Alana's argument continues, Lee was required to file a petition under

section 850, subdivision (a)(3), and serve the petition under section 851.<sup>13</sup> Without having been personally served with a section 850 petition (and related notice of hearing and summons), Alana contends the probate court lacked jurisdiction to hear Lee's objection.

We determine de novo whether the probate court lacked jurisdiction to consider and rule on Lee's objection. (*Estate of Kraus* (2010) 184 Cal.App.4th 103, 112 [subject matter jurisdiction § 850 petition]; *Harley-Davidson, Inc. v. Franchise Tax Bd.* (2015) 237 Cal.App.4th 193, 213 [personal jurisdiction].)

The rule is straightforward: Where the claimant seeks an order transferring funds to the trust or a third party, a section 850 petition is required; however, a section 850 petition is *not* required where the relief sought is an offset against a potential distribution. (*Mota v. Superior Court* (2007) 156 Cal.App.4th 351, 356-357 (*Mota*)). Given this standard and the claim in Lee's objection (which we set forth *post*), Lee was not required to proceed by way of a section 850 petition.

The problem with Alana's argument is that her premise is faulty. In his objection, Lee sought relief *in addition to* what Alana describes as a claim for or transfer of trust

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<sup>13</sup> Section 850, subdivision (a)(2) authorizes "any interested person" — which includes a trust beneficiary (§ 48, subd. (a)(1)) — to petition the probate court for an order where the interested person has a claim to trust property. Section 17200.1 broadens the application of section 850 by providing that "[a]ll proceedings concerning the transfer of property of the trust shall be conducted pursuant to the provisions of [section 850 et seq.]."

Section 851, subdivision (a) requires service of the section 850 petition and notice of hearing (on the trustee and any person claiming an interest in the trust property at issue in the petition) pursuant to Code of Civil Procedure section 413.10 et seq.

property. Lee first alleged that the Trustee's petition failed to request instructions regarding \$160,000 of the Lincoln Property mortgage proceeds that the probate court had previously determined were misappropriated by Alana — funds that were unaccounted for and otherwise would have been available for and subject to distribution under the terms of the Family Trust. With regard to the relief Lee sought in his objection, Lee pleaded *in the alternative*:

"[Lee] requests that the Court designate the \$160,000.00 at issue as Credit Trust residue for equal distribution *or* that Alana . . . be ordered to reimburse the Credit Trust in the amount of \$106,666.66 for distribution to the other beneficiaries *or* that Alana . . . be ordered to pay Lynda . . . and Lee each \$53,333.33 (which is equal to one-third (1/3) of the \$160,000.00). Further, if Alana . . . does not have the means to reimburse the Credit Trust . . . *or* to pay the other beneficiaries their share of these trust proceeds, [Lee] *respectfully requests that the Court re-allocate the Credit Trust residue such that Lynda . . . and Lee . . . receive equal shares of the misappropriated monies that Alana . . . already received.*" (Italics added.)

Indeed, by the time of trial, the Trustee, Lee and Lynda had narrowed and described the issue to be resolved by the court as follows:

"[T]he parties require the court to determine how the Lincoln Mortgage and the Lincoln [Property m]ortgage [p]roceeds are to be calculated and allocated between the beneficiaries by the [Trustee] as more fully set forth in the Petition and Objection of Lee."

Thus, the issue submitted to the probate court for determination was within the scope of the Trustee's section 17200 petition — allocation and distribution of the property in the Credit Trust. Consistent with the Trustee's petition, Lee's objection sought an offset to, and reallocation of, Alana's intended distribution based on her alleged misappropriation of Credit Trust property — i.e., a portion of the Lincoln Property mortgage proceeds. Lee's objection, as pleaded in part and as actually tried and decided,

did not assert a claim to or seek a transfer of trust property that would require a petition under section 850.

As such, the probate court properly considered Lee's objection along with the Trustee's petition. (*Mota, supra*, 156 Cal.App.4th at pp. 356-357.) The court did not lack jurisdiction, and the judgment is not void on such basis.

In passing, Alana also asserts that she did not receive proper notice of the hearing, relying on sections 851, 17203 and Code of Civil Procedure section 413.10, which together she contends require personal service of a section 850 petition. To the extent Alana intended to argue a lack of *personal* jurisdiction (see *Brown v. Williams* (2000) 78 Cal.App.4th 182, 186, fn. 4 [notice is one aspect of personal jurisdiction]), the argument fails. Initially, because Lee was not required to proceed by way of a section 850 petition, sections 851, 17203 and Code of Civil Procedure section 413.10 are inapplicable. In any event, Alana's general appearance in the probate court<sup>14</sup> "is equivalent to personal service of summons on such party." (Code Civ. Proc., § 410.50, subd. (a); see *Farmers etc. Nat. Bk. v. Superior Court* (1945) 25 Cal.2d 842, 846 [appearances without statutory notice by devisees in probate of will].)

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<sup>14</sup> Alana paid a first appearance fee in May 2013 at the time Doten's original petition was updated to add her as a petitioner. Alana filed at least three pleadings (through counsel) in February, May and July 2013. Alana participated at four hearings in February (through counsel), June (through counsel), September and December 2013 — including a trial setting conference and a discovery motion at which she was ordered to answer interrogatories. Alana appeared at trial in January 2014.

2. *The Probate Court Did Not Commit Reversible Error by Excluding Alana from the Trial*

Once the case was assigned to the trial department, the court was presented with: a joint pretrial statement on behalf of the Trustee, Lee and Lynda (which included stipulated facts, 29 exhibits with stipulations as to authenticity and admissibility, a statement of the resolved issues and a statement of the remaining issues to be resolved at trial); a joint witness list submitted on behalf of the Trustee, Lee and Lynda; separate trial briefs submitted on behalf of the Trustee, Lee and Lynda; and three motions in limine submitted on behalf of Lee. Not seeing Alana's name on these filings, the court inquired, "Why is Ms. Alana Burrows not a party to this action?" Lynda's attorney responded, "She's filed no pleadings of any kind. She's not joined the petition, nor has she filed an objection."

In response to the court's request for an explanation of the issues to be decided at trial, counsel for the Trustee provided a lengthy statement with occasional input from counsel for Lynda. When the court indicated its readiness to take testimony, Alana asked if she could make a statement also. Although the court allowed her to proceed, the court stopped her after a few sentences on the basis she was presenting argument.

With no opposition or argument, the court granted Lee's three motions in limine, one of which requested an order pursuant to Evidence Code section 777, subdivision (a) to exclude from the courtroom all nonparty witnesses prior to their testimony.<sup>15</sup>

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<sup>15</sup> "[T]he court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses." (Evid. Code, § 777, subd. (a).)

Later, immediately prior to calling the first witness, Lynda's counsel asked that Alana be excluded as a nonparty witness.<sup>16</sup> Neither the Trustee nor Lee took a position, and Alana replied, "I'm a party to the lawsuit, and it's a big part of my life. I think I should be here."<sup>17</sup> The court granted Lynda's request and excluded Alana from the courtroom on the basis that she had not filed any documents.

We are unaware of, and the parties have not cited us to, any reason to have excluded Alana from the courtroom other than pursuant to the order granting the motion in limine to exclude nonparty witnesses pursuant to Evidence Code section 777. We review for an abuse of discretion a trial court's ruling to exclude a witness under section 777. (*People v. Tully* (2012) 54 Cal.4th 952, 1004.)

Given that *a party to an action* may not be excluded under Evidence Code section 777 (*id.*, subd. (b)), the issue on appeal is whether, for purposes of the exclusion order, Alana was a party to the action. Although neither the Evidence Code nor the Probate Code defines "party" in this context, the Probate Code defines "interested person" to include a beneficiary of a trust — like Alana.<sup>18</sup> (§ 48, subd. (a)(1).) In addition, as a

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<sup>16</sup> In their joint pretrial statement, the Trustee, Lee and Lynda told the court that "Alana is not a party to the action pending before the Court."

<sup>17</sup> In her opening brief, Alana says she "was not a party to the proceedings below." Although Lee suggests that Alana has conceded her nonparty status, by her statement we understand Alana to mean that *because she was excluded from the courtroom*, she was not allowed to participate as a party.

<sup>18</sup> A trial court's determination whether someone is an interested person under section 48 is reviewed for an abuse of discretion. (*In re Estate of Prindle* (2009) 173

beneficiary with " ' "a property right in or claim against a trust estate . . . which may be affected by the proceeding," ' " Alana also had standing to participate in the probate court proceedings. (*Estate of Sobol* (2014) 225 Cal.App.4th 771, 782.)

Because Alana was *an interested person with standing* to participate in the probate court proceedings, we will assume without deciding that, for purposes of Evidence Code section 777, Alana *was* a party at trial. Therefore, under subdivision (b), the court erred in excluding Alana from the courtroom.<sup>19</sup> However, that is not the end of our inquiry.

Trial court error alone does not entitle Alana to relief on appeal. Without a showing of prejudice (Code Civ. Proc., § 475) that resulted in a "miscarriage of justice" (Cal. Const., art. VI, § 13), Alana's erroneous exclusion from the trial does not require a reversal. (*Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.) A "miscarriage of justice" may be found on appeal " ' "only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of

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Cal.App.4th 119, 126.) To the extent the probate court's determination that Alana was not a party was also a ruling that she was not an interested person, the court abused its discretion by applying an incorrect legal standard. (*Conservatorship of Becerra* (2009) 175 Cal.App.4th 1474, 1482 [application of incorrect legal standard an abuse of discretion].)

<sup>19</sup> We are not saying that the court was required to allow Alana to fully participate in the trial. To the extent she failed to comply with pretrial rules and procedures, neither the court nor the other parties were required to try the contested matter differently to accommodate her noncompliance. Nonetheless, at the time she was excluded, Alana had not disrupted any proceedings, and Evidence Code section 777 does not provide a basis on which to exclude an interested person with standing from the courtroom at trial.

the error." ' ' ( *Ibid.*; accord, Code Civ. Proc., § 475.) Prejudice is not presumed (Code Civ. Proc., § 475), and the appellant bears the burden of establishing prejudice by explaining specifically how the error caused a miscarriage of justice — i.e., how it is reasonably probable that, but for the error, the appellant would have received a more favorable result. (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1073.)

Here, Alana made no effort to establish — and thus did not meet her burden of establishing — prejudice. She has not told us what she would have said or done had she not been excluded; more importantly, she has not attempted to explain how whatever she would have said or done might have resulted in a more favorable result. Accordingly, Alana has not met her burden of establishing reversible error.

### 3. *Alana Was Not Denied Due Process*

In closing, Alana argues that, because she did not receive proper notice of the claims by Lee and Lynda (since Alana contends the objections should have been petitions with a formal notice of hearing under §§ 850 & 851) and because she was not allowed to participate at trial, she was deprived of due process. However, since we have concluded that she *did* receive proper notice of the hearing (see pt. II.A.1., *ante*) and that she suffered *no prejudice* by being excluded from the trial proceedings given her lack of pretrial participation (see pt. II.A.2., *ante*), there was no cumulative prejudicial error amounting to a violation of due process.

4. *Alana Has Standing to Appeal the Judgment*

Relying on dictum in *Estate of Zabriskie* (1979) 96 Cal.App.3d 571 (*Zabriskie*), Lee argues that, by participating in the probate court proceedings *but not the trial preparation and trial*, Alana lacks standing on appeal. Lynda also contends Alana lacks standing on appeal — based on waiver, laches and obstructive tactics — given that she failed to respond to the petition or either objection and instead relied on the Trustee to assert her position. We disagree with Lee and Lynda. They conflate a litigant's standing to appeal with a litigant's forfeiture (or waiver) of an issue or argument in an appeal in which she has standing. Under *Zabriskie* and general appellate law, Alana has standing to prosecute this appeal.

In *Zabriskie*, the Court of Appeal looked beyond the beneficiary's failure to have participated in the probate court and held that an alternate beneficiary (entitled to the residue of the decedent's estate) that *first* appeared by filing a notice of appeal had standing to appeal from the judgment settling the final account in an estate. (*Zabriskie, supra*, 96 Cal.App.3d. at pp. 573-575.) In probate proceedings, standing requirements are applied leniently; the standard for determining whether an estate beneficiary has standing to appeal is whether she is "*aggrieved*" by the probate court judgment. (*Id.* at p. 575, italics added, citing Code Civ. Proc., § 902 ["[a]ny party aggrieved may appeal"].) In this context, a litigant is considered aggrieved when her "rights or interests are injuriously affected by the judgment," the adverse effect of which " ' ' ' must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the

judgment.' " " ( *Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1045.) Under these criteria, Alana is aggrieved.

Lee relies on a portion of the *Zabriskie* opinion in which the court distinguished the beneficiary in its case (who did not appear before filing its notice of appeal) from a different line of probate cases in which the beneficiaries appeared and participated in the trial court proceedings but failed to raise the issues they later raised on appeal. (*Zabriskie, supra*, 96 Cal.App.3d at pp. 575-576.) In those other cases, however, the issue was *not* whether the appellant had standing, but rather whether the appellant had forfeited (or waived) the right to raise a certain issue or argument on appeal by failing to have raised the issue or argument in the trial court.<sup>20</sup> (See *Zabriskie*, at pp. 575-576, citing *Estate of Westerman* (1968) 68 Cal.2d 267, 279 (*Westerman*) ["issues not raised in the trial court cannot be raised for the first time on appeal"]; *Estate of Randall* (1922) 188 Cal. 329, 334 [objections "waived" by not having been raised in trial court]; *Estate of Rohrer* (1911) 160 Cal. 574, 575-576 [objections not made in trial court cannot be urged on appeal]; *Estate of Levy* (1904) 141 Cal. 639, 643 [objections "waived" by failing to raise them in trial court]; *Estate of Cooper* (1970) 11 Cal.App.3d 1114, 1123 ["questions not raised in the court below may not be raised for the first time on appeal"]; *Estate of D'Avila* (1963) 217 Cal.App.2d 123, 126-127 ["questions not raised in the trial court will not be considered on appeal"; appellants "waived any objection thereto and [are]

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<sup>20</sup> Likewise, Lynda's arguments based on waiver, laches and obstructive tactics do not affect standing.

estopped to urge any error on appeal"]; *Estate of Dow* (1949) 91 Cal.App.2d 420, 432 [cannot raise objection for first time on appeal]; *Estate of Michels* (1936) 18 Cal.App.2d 201, 203 [failure to object in trial court precludes objection on appeal].) In each of these cases, the appellate court decided the appeal on its merits, invoking when necessary appellate procedure that precludes an appellate court from considering issues that could have and should have been presented first to the trial court.

Therefore, although Lee and Lynda frame their issue as one of standing, it is not; Alana has appellate standing. The issue presented by Lee and Lynda is whether Alana will be precluded from raising a specific theory or argument or objection for the first time on appeal. We will invoke appropriate remedies when necessary to ensure that all parties have complied with applicable appellate rules and procedures.

B. *The Probate Court Properly Interpreted the Family Trust*

Alana argues that the Family Trust is ambiguous and the probate court erred in ruling otherwise. Lee and Lynda contend the court correctly determined that the relevant language is unambiguous and results in only one interpretation — namely, that provided in the judgment. As we explain, we agree that the probate court did not err in interpreting the Family Trust.

1. *Summary of Issues*

In the petition, the Trustee asked for instructions to effect "the proper distribution of residue [of the Credit Trust] under [Part VI(F)(3) of the Family Trust]." More specifically, the Trustee asked (1) whether Part VI(F)(3) provided for a gift of the Hawaii Properties to Alana, and (2) how much, if any, of the residue was to be divided evenly

and distributed to Leonard's children (Lee, Lynda and Alana) and how much, if any, of the residue was to be divided evenly and distributed to Helen's children (Lynda and Alana).

Lee filed an objection, in which he contended first that the Family Trust was not ambiguous — more specifically, that there was no applicable provision for the distribution of the Hawaii Properties to Alana as a gift, and that the residue of the Credit Trust should be valued and distributed evenly among Lee, Lynda and Alana. Lee further contended that because the \$160,000 that Alana misappropriated are unaccounted for property of the Credit Trust, the proceeds of the Credit Trust allocated to Alana be assessed in the amount of \$106,666.66 (two-thirds of \$160,000) and reallocated equally between Lee and Lynda. In her objection, Lynda alleged that the Credit Trust did not provide for Alana to receive the Hawaii Properties as gifts and asked that the assets in the Credit Trust be divided equally among Lee, Lynda and Alana.

By the time of trial, the Trustee, Lee and Lynda had agreed on the specific issues to be resolved in their petition and two objections, describing them as follows in the stipulated joint pretrial statement:

"The issue as to whether Leonard specified any specific gifts to be made from the Credit Trust . . . requires the determination of the court as is more fully set forth in the Petition and Objections by Lee and Lynda."

"[If] the court determines that there are no specific gifts to be made from the Credit Trust, the parties require the court to determine how the Lincoln [Property m]ortgage [p]roceeds are to be calculated and allocated between the beneficiaries by the [Trustee] as more fully set forth in the Petition and Objection of Lee."

In its judgment, the probate court ruled that the language of the Family Trust is unambiguous as to the funding and distribution of the Credit Trust; that the applicable provision not authorize any specific gifts; that the property in the Credit Trust is to be distributed equally among Lee, Lynda and Alana; and that the proceeds allocated to Alana would be assessed the amount of \$106,666.66 and reallocated equally between Lee and Lynda.

2. *Applicable Law*

The law regarding interpretation of trust agreements in situations like the present one is well-settled.

The interpretation of a declaration of trust presents a question of law, unless the interpretation requires consideration of extrinsic evidence. (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73 (*Ike*)). Thus, we are not bound by the trial court's interpretation, but must independently construe the language at issue, taking into consideration the entire instrument. (*Ibid.*) In so doing, we are tasked with ascertaining and giving effect to the intent of the settlor(s). (*Estate of Russell* (1968) 69 Cal.2d 200, 205 (*Russell*); § 21102, subd. (a) ["The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument."].) Where the language of a trust is definite, certain, and unambiguous, the intent should be determined solely from the instrument itself. (See *Estate of Barnes* (1965) 63 Cal.2d 580, 582-583.)

In order to determine the clarity or ambiguity of the terms of the trust, we consider the circumstances under which the agreement was made so that, as best as possible, we are placed in the position of the settlor(s) whose language we are interpreting. (*Ike*,

*supra*, 61 Cal.App.4th at p. 73, citing *Russell, supra*, 69 Cal.2d at pp. 208-210.) An "ambiguity" exists when " 'the written language is fairly susceptible of two or more constructions.' " (*Russell*, at p. 211; *Ike*, at p. 74.) Extrinsic evidence of the circumstances under which the trust agreement was made is admissible to interpret the agreement — i.e., to explain a patent ambiguity or to resolve a latent ambiguity (*Russell*, at p. 206; *Estate of Duke* (2015) 61 Cal.4th 871, 879 [will]) — but *not* to give it a meaning to which it is not reasonably susceptible. (*Russell*, at p. 211; *Ike*, at p. 73.) Here, however, because the parties did not offer conflicting extrinsic evidence, the probate court did not consider any conflicting extrinsic evidence in ruling that the Family Trust was unambiguous with regard to the funding and distribution of the Credit Trust.

Accordingly, our determination of the settlors' intent as to the funding and distribution of the Credit Trust is entirely independent.

3. *The Language in the Family Trust as to the Funding and Distribution of the Credit Trust Is Unambiguous*

Alana contends the Family Trust is ambiguous in a number of regards. We disagree.

Alana argues first that, because schedules A, B and C to the Family Trust were left blank, the trust is ambiguous. Article I of the Family Trust identifies trust property, as follows: Section A. is entitled "Community Property" and provides in part that the property listed on the attached "Schedule 'A' " is community property under California law and shall remain community property after transfer to the trust; Section B. is entitled "Separate Property" and provides in part that any property listed on the attached

"Schedule 'B' " is separate property and shall remain the separate property after transfer to the trust; and Section C. is entitled "Quasi-Community Property" and provides in part that that the property listed on the attached "Schedule 'C' " is the quasi-community property of the settlor indicated on Schedule C and shall remain quasi-community property after transfer to the trust. Alana contends that, in the absence of the completed schedules, the Family Trust is ambiguous and the probate court could neither determine nor characterize the property in the Credit Trust.

Alana's argument fails, however, to take into consideration the language in the section of the Family Trust immediately following the three she cited. Article I, Section D. is entitled "Trust Property" and provides in full:

"Any reference in this Instrument to the 'Trust Property' shall refer to all the property initially transferred to this Trust, *and any other property subsequently transferred to this Trust by either or both Settlers.* Any property subsequently transferred to this Trust shall retain the character it had prior to its transfer to this Trust." (Italics added.)

Thus, the failure of Leonard and Helen to list property on the schedules is not an ambiguity. The Family Trust expressly took into consideration that property could be transferred to the trust at a later date — retaining the character the property had prior to transfer. Therefore, the fact that the record does not indicate the character or treatment of the Hawaii Properties prior to Helen assigning them to the Credit Trust in January 1994<sup>21</sup> does not render any provision in the Family Trust ambiguous. Rather, the assignment necessarily established that the Hawaii Properties had been Leonard's

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<sup>21</sup> The assignment acknowledged that the "[a]ctual division" of the trust assets into the three subtrusts occurred upon Leonard's death on March 4, 1993.

separate (or share of quasi-community or community) property, because the assignment of property to the Credit Trust was effected *only after Helen had assigned all of her separate property (and her share of quasi-community and community property) to the Survivor's Trust.*<sup>22</sup> In short, in not first assigning the Hawaii Properties to the Survivor's Trust (set up to hold *all of Helen's property at the time of Leonard's death*), instead later assigning them to the Credit Trust (set up to hold *only Leonard's property at the time of his death*), Helen was saying essentially that she had no interest in the Hawaii Properties at the time of Leonard's death.

As a related argument, Alana contends that Helen's assignment of the Hawaii Properties to the Credit Trust (indicating Helen's belief that they were Leonard's property) is evidence of ambiguity in the Family Trust, because at Part VI(F)(3) Helen indicated her intent to gift the Hawaii Properties to Alana in the event *her* property had funded the Credit Trust:

"Apart from that which is specifically outlined in Helen L. Burrows's Will, all property remaining that was the Separate, Community, or Quasi-Community Property of Helen L. Burrows shall be distributed equally, after the specific gifts listed below, among the following two beneficiaries:

"Lynda L. Burrows	-	daughter
"Alana L. Burrows	-	daughter

"Specific Gifts:

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<sup>22</sup> The assignment of property to the Credit Trust was also effected after assignment of property to the Marital Trust and consisted exclusively of Leonard's separate property and his share of quasi-community and community property.

*"Waikiki, Honolulu, Hawaii, Oloo, County, Hawaii and Kalaoa, North Kona Hawaii properties to go to Alana L. Burrows.*

"Apart from that which is specifically outlined in Leonard E. Burrows's Will, all property remaining that was the Separate, Community, or Quasi-Community Property of Leonard E. Burrows shall be distributed equally, after the specific gifts listed below, among the following three beneficiaries:

"Larry E. Burrows [Len]	-	son [Larry's son]
"Lynda L. Burrows	-	daughter
"Alana L. Burrows	-	daughter"

(Italics added.) We disagree.

While the gifting language (indicating that Helen believed the Hawaii Properties were hers to give to Alana) and the assignment (indicating that the Hawaii Properties were Leonard's) may suggest an inconsistency, they do not render the gifting language ambiguous.<sup>23</sup> Any such inconsistencies do not affect our determination of the settlors' intent or the interpretation of the Family Trust. The Family Trust required that Helen fund the Credit Trust exclusively with Leonard's separate property and share of quasi-community or community property; and the issues at trial — based on the Trustee's, Lee's and Lynda's compliance with the pretrial rules and procedures as evidenced in their joint pretrial statement, joint witness list and trial briefs — did not include *the characterization*

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<sup>23</sup> The absence of any gifting language by Leonard at the end of Part IV(F)(3) unambiguously communicates that Leonard did not intend to make any gifts. Given the record on appeal, Alana's argument to the contrary is speculative and would require us to rewrite Part IV(F)(3), which we may not do under any circumstances. (*Floyd v. Davis* (1893) 98 Cal. 591, 601 [court "can neither create nor substitute provisions" of trust agreement].)

*of the Hawaii Properties prior to their transfer to the Credit Trust.* There are possible explanations for this inconsistency,<sup>24</sup> but they all involve potentially disputed factual issues dealing with how to characterize the Hawaii Properties *prior to their transfer to the Credit Trust*, an issue not presented to the trial court for resolution. Accordingly, Alana is precluded from raising such fact-based issues for the first time on appeal. (*Westerman, supra*, 68 Cal.2d at pp. 278-279 ["issues not raised in the trial court cannot be raised for the first time on appeal"]; *Estate of Lira* (2012) 212 Cal.App.4th 1368, 1373, fn. 6 (*Lira*) [same].)<sup>25</sup> The same analysis applies to — and results in our rejection of — any other arguments Alana asserts based on her appellate challenge to the character of the Hawaii Properties.

To the extent Alana contends that the Family Trust is necessarily ambiguous *because* the probate court considered the assignment in determining the intent of the settlors, Alana mischaracterizes the court's use of the assignment. The assignment was *not* extrinsic evidence used to interpret, or to determine the parties' intent in drafting, the Family Trust; the assignment was merely evidence of *how the Hawaii Properties were*

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<sup>24</sup> For example, and not by way of limitation, when Helen executed the assignment, she may have been mistaken in believing that only Leonard had an interest in the Hawaii Properties.

<sup>25</sup> The trial court's erroneous exclusion of Alana from the trial does not affect our application of this basic appellate principle. Alana had not participated in the pretrial proceedings, and neither the joint pretrial statement nor the trial briefs described any issue related to characterizing the Hawaii Properties prior to their transfer to the Credit Trust. This same reasoning applies to the other instances, discussed in the text *post*, in which Alana forfeited appellate review due to her failure to have presented an issue or argument to the probate court in the first instance.

*held* after their assignment — namely, in the Credit Trust. The court used that evidence to determine the distribution of the property in the Credit Trust,<sup>26</sup> an issue expressly reserved for resolution at trial.

Alana asks us to consider certain extrinsic evidence that she contends "clarif[ies] the Assignment or Settlor's intent." The extrinsic evidence consists of two documents; each is entitled "Addendum to the Burrows Family Revocable Living Trust" and attempts to amend the Family Trust by purporting to express both Leonard's intent and Helen's intent at the time Leonard and Helen established the Family Trust in 1993. An initial problem with this argument is that the trial court was not asked to consider this extrinsic evidence in its determination whether the Family Trust was ambiguous; thus, Alana is precluded from raising it on appeal. (*Westerman, supra*, 68 Cal.2d at p. 279; *Lira, supra*, 212 Cal.App.4th at p. 1373, fn. 6.) In any event, the language of the Family Trust expressly precludes our consideration of these documents: The trust provides that "[u]pon the death of either Settlor, this Trust may not be amended by the surviving Settlor[,]" yet the addenda were the surviving settlor's attempts to amend the trust in December 2002 and October 2003, *more than nine and 10 years, respectively, after Leonard's death*.

Finally, Alana argues that the Family Trust is ambiguous in its handling of the "Family Sharing Trust" described at Article VI, Section G. First, she focuses on the

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<sup>26</sup> Alana acknowledges that "[t]he only evidence of what assets were allocated to the Credit Trust is contained in the Assignment."

condition for activating it, found at Part VI(F)(3), immediately after the provision directing the combination of the Marital Trust and the Credit Trust for administration and distribution: "It is intended that the Family Sharing Trust [set forth at Article VI, Section G.] only be activated if percentages are not stated after the name or names of all or any particular beneficiary(ies) who is/are otherwise eligible to share in this particular Trust." What follows in Part IV(F)(3) is the language, quoted *ante*, dealing with the gifts and ultimate distributions from the Credit Trust. Although Leonard and Helen did not list "percentages" after the potential beneficiaries' names, Leonard stated that if the property in the Credit Trust was his, he wanted the residue "distributed equally" among Lee, Lynda and Alana, and Helen stated that if the property in the Credit Trust was hers, she wanted the residue "distributed equally" between Lynda and Alana. In this context, the failure to have used actual percentages is not ambiguous; if the property in the Credit Trust was Leonard's, then the percentages are 33 $\frac{1}{3}$  percent to each beneficiary, and if the property in the Credit Trust was Helen's, then the percentages are 50 percent to each beneficiary.

Second, Alana claims the language in Article VI, Section G. regarding the Family Sharing Trust is ambiguous on the basis that Paragraphs 5. and 8. are not only inconsistent but are also "seemingly contradicted by" Paragraphs 7. and 9. Because the condition for the activation of the Family Sharing Trust was not present, however, any alleged ambiguity is irrelevant. Indeed, other than attempting to argue that an ambiguity exists, Alana does not suggest how *either* of the alleged ambiguities related to the Family

Sharing Trust affects our consideration of the settlors' intent in the funding and distribution of the Credit Trust — the issue tried by the probate court and on appeal here.

C. *Substantial Evidence Supports the \$106,666.66 Assessment and Reallocation*

The probate court assessed Alana's share of the Credit Trust \$106,666.66 and reallocated it equally to the shares of Lee and Lynda (\$53,333.33 each). Although Alana states that the court "lacked a factual or legal basis to 'assess' Alana's share of the Credit Trust," the actual argument in her opening brief is that the record does not contain substantial evidence to support the assessment. More specifically, Alana argues that the court erred in relying on the factual finding in the Lincoln Property judgment that Alana "acknowledged misappropriation of \$160,000" from the Lincoln Property mortgage proceeds.<sup>27</sup>

Our consideration of whether the judgment here is supported by substantial evidence is governed by a well-established standard of review:

" 'In reviewing the evidence . . . all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary . . . principle of law, that when a [judgment] is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' " (*Estate of Bristol* (1943) 23 Cal.2d 221, 223.)

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<sup>27</sup> To the extent Alana asks us to consider her entitlement to a credit (i.e., a further reallocation) based on how her efforts may have *benefitted* the Credit Trust, she forfeited the issue by not having presented it to the probate court for resolution in the first instance. (*Westerman, supra*, 68 Cal.2d at p. 279; *Lira, supra*, 212 Cal.App.4th at p. 1373, fn. 6.)

We "look at the entire record on appeal." (*In re Estate of Young* (2008) 160 Cal.App.4th 62, 76.) If there is substantial evidence, "[i]t is of no consequence that believing other evidence, and drawing different inferences, the court might have reached a contrary conclusion." (*Estate of Wilson* (1980) 111 Cal.App.3d 242, 249 (*Wilson*)). We "' ' 'must presume that the record contains evidence to support every finding of fact[,] ' ' ' and " [i]t is the appellant's burden . . . to identify and establish deficiencies in the evidence.' " (*Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1326.)

In attempting to meet her burden, Alana contends that the Lincoln Property judgment cannot be considered substantial evidence, "because the judgment did not reach th[e] conclusion" that the Credit Trust was damaged. Ignoring the probate court's finding in the Lincoln Property judgment that she acknowledged misappropriating \$160,000, Alana focuses on only that part of the judgment in which the court found that *as of that time* the Family Trust had not suffered any damages. The court explained that *if* Alana is ultimately awarded the Lincoln Property and its existing mortgage (which included the \$160,000 she misappropriated) upon final distribution, *then* the Credit Trust would not be damaged.

Initially, since Alana was not awarded the Lincoln Property and its mortgage, the probate court here could have inferred that the Credit Trust ultimately did suffer damages. In any event, regardless whether the Credit Trust suffered a loss, the finding in the Lincoln Property judgment that Alana acknowledged misappropriating \$160,000 is nonetheless substantial evidence to support the \$106,666.66 assessment (two-thirds of the \$160,000). Further, on cross-examination Alana provided additional substantial evidence

in support of the probate court's assessment: Alana testified that she deposited the net proceeds (approximately \$179,000 after paying off the Maluniu Property mortgage) from the Lincoln Property mortgage proceeds (\$360,000) in her own accounts; that Helen (both personally and through counsel) demanded return of the net proceeds; that she (Alana) never returned any of those funds; and that she knew the Lincoln Property (the collateral for the Lincoln Property mortgage) was an asset of the Credit Trust.<sup>28</sup>

To the extent Alana asks us to consider *other* evidence from the Lincoln Property judgment that arguably supports a different finding (e.g., the Credit Trust had not yet suffered any damages), we are unable to do so. We consider *only* the evidence in support of the judgment and determine whether it is substantial; we disregard all *other* evidence that might support a different result. (*Wilson, supra*, 111 Cal.App.3d at p. 249.)

Without referencing specific evidence, Alana argues that any testimony "solicited to contradict the [Lincoln Property] judgment . . . should have been excluded based on res judicata principles." However, because Alana has not directed us to a trial court ruling on a timely evidentiary objection to or motion to strike the (unidentified) testimony at the time it was elicited, the issue was not preserved for appellate review. (Evid. Code, § 353, subd. (a); *Estate of Silverstein* (1984) 159 Cal.App.3d 221, 225.)

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<sup>28</sup> In failing to cite and discuss this evidence, Alana "ignores a fundamental rule of appellate practice obligating [her] to completely and fairly summarize the evidence supporting the court's findings and judgment." (*Pacific Corporate Group Holdings, LLC v. Keck* (2014) 232 Cal.App.4th 294, 313, fn. 16.) Alana's failure to acknowledge this evidence (and attempt to establish that it does not support the judgment) may be deemed Alana's abandonment of her substantial evidence argument (*ibid.*), though we exercise our discretion to consider it on its merits.

For these reasons, Alana did not meet her burden of establishing a lack of substantial evidence to support the \$106,666.66 assessment to her share of the Credit Trust benefits.

#### DISPOSITION

The judgment of the probate court is affirmed. The Trustee, Lee and Lynda are awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(4).)

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

McDONALD, J.