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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

NATALIE BLICKENSTAFF, as Trustee,
etc. et al.,

Plaintiffs and Respondents,

v.

STEVEN ROBERTSON CUMMING,

Defendant and Appellant.

E073007

(Super.Ct.No. PROPS1301068)

OPINION

APPEAL from the Superior Court of San Bernardino County. Stanford E.

Reichert, Judge. Affirmed.

Steven Robertson Cumming, in pro. per., for Defendant and Appellant.

The Law Offices of Edward B. Fischel and Earl L. Roberts for Plaintiffs and Respondents William Henry Cumming and Janet Anne Cumming.

The Law Office of Jennifer Daniel and Jennifer Daniel for Plaintiff and Respondent Natalie Blickenstaff.

Defendant and appellant Steven Robertson Cumming¹ (Steven) appeals from two probate court orders concerning the administration of the Robert Bruce Cumming and Lois Wielen Cumming Trust Dated July 6, 1985 (the trust). (See *Cumming III*, E070538.) On January 10, 2019, the probate court sanctioned Steven \$1,500 for failing to comply with a prior order mandating service of all documents by United States (U.S.) mail only (prohibiting electronic service). On May 7, 2019, the court approved the trustee’s request for payment from the trust for attorney fees and costs incurred in representing the trust on appeal. Steven contends: (1) the January 10, 2019 order “is null and void” because it is based on a prior order that was stayed as a result of his appeal; and (2) the May 7, 2019 order is “void for lack of subject matter jurisdiction.” We affirm.

¹ We refer to the Cumming family members by their first names to avoid confusion. We mean no disrespect in doing so. (*Estate of O’Connor* (2018) 26 Cal.App.5th 871, 875, fn. 2.)

I. PROCEDURAL BACKGROUND AND FACTS

A. *Appellate History.*²

This is the fourth appeal arising out of the ongoing litigation involving the trust. The first appeal covered the trial regarding the removal of Steven as trustee and the determination of whether he had committed neglect and financial elder abuse against Lois Cumming. (*Cumming I*, E066569.) In the second appeal, Steven challenged the order denying his petition to remove defendant and respondent Natalie Blickenstaff (Blickenstaff) as trustee. (*Cumming II*, E069282.) In the third appeal, Steven challenged, inter alia, the May 10, 2018 order requiring service of documents by U.S. mail only. (*Cumming III*, E070538.) In this appeal, we review the January 10 and May 7, 2019 orders.

² On the court's own motion and to compile a coherent narrative, we take judicial notice of our prior unpublished opinions in: *Cumming v. Cumming* (Sept. 7, 2017, E066569) [nonpub. opn.], mod. Sept. 28, 2017 (*Cumming I*, E066569); *Cumming v. Blickenstaff* (Aug. 16, 2019, E069282) [nonpub. opn.] (*Cumming II*, E069282); and *Blickenstaff v. Cumming* (Aug. 16, 2019, E070538) [nonpub. opn.] (*Cumming III*, E070538). (Evid. Code, § 452, subd. (d); Cal. Rules of Court, rule 8.1115(b)(1).) "It is well accepted that when courts take judicial notice of the existence of court documents, the legal effect of the results reached in orders and judgments may be established." (*Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 185.)

B. Factual History.

Robert and Lois had three children: Steven, Janet, and William. Following Robert's death in 1991, the trust provided Lois with income to support her while she was alive. The initial trustees were Lois and Steven. (See *Cumming III*, E070538.)

Lois died in April 2013, and on March 26, 2014, Blickenstaff was appointed as trustee pursuant to a petition filed by Janet and William. Ten months later, Janet and William filed a supplement to their petition, alleging Steven had committed neglect and financial elder abuse against Lois and should be disinherited. On June 24, 2016, the probate court entered judgment, finding Steven had breached his duties as trustee in many specified respects, was liable for neglecting his mother, and had acted recklessly and in bad faith. The court removed Steven as a trustee, deemed him to have predeceased Lois, and found that he was not entitled to "take further" under the will, the trust, or by intestate succession. The court also surcharged him a total of \$193,136, doubled to \$386,272 pursuant to Probate Code section 859.³ On appeal, we reversed in part and affirmed in part, finding the court did not award damages under Probate Code section 259⁴ and, thus, could not disinherit Steven. Otherwise, we upheld the court's

³ Probate Code section 859 provides for an award of double damages if the court finds that a person has in bad faith wrongfully taken property belonging to an elder or dependent adult, or has taken property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse.

⁴ Probate Code section 259 restricts receipt of certain estate property and service as a fiduciary by a person who is liable for abuse of an elder or dependent adult decedent.

rulings and findings including the full surcharge. (See *Cumming I*, E066569; *Cumming III*, E070538.)

Janet died in August 2016; she expressly disinherited Steven and named William as her sole beneficiary. On December 7, 2017, Blickenstaff filed her second and final account (supplemented on Jan. 25, 2018) and petitioned for its settlement and orders of final distribution. The corpus of the trust, after expenses and beneficiary distributions, was \$563,771.45. If the beneficiary distributions ($\$397,250^5 + \$69,000^6 = \$466,250$) were added back into the trust, the total amount available would have been \$1,030,021.45 ($\$563,771.45 + \$466,250 = \$1,030,021.45$). One-third of that amount is \$343,340.48. Because Steven had been surcharged \$386,272, an amount that exceeds his one-third interest in the trust, he was not entitled to any further distribution. Steven objected to the second and final account. (See *Cumming II*, E069282; *Cumming III*, E070538.)

On May 10, 2018, inter alia, the probate court approved Blickenstaff's second and final account and ordered service of documents by U.S. mail only (prohibiting electronic service). In short, all rulings were against Steven, and the court authorized payment of \$350,000 to William, as well as all legal and trustee fees. Steven appealed, and in August 2019, this court affirmed the orders of the probate court, including the order prohibiting

⁵ The beneficiary distributions during the second accounting period totaled \$397,250. (See *Cumming III*, E070538.)

⁶ According to Blickenstaff's first account, she paid \$69,000 to the beneficiaries as follows: \$37,000 to Janet, \$24,000 to William, and \$8,000 to Steven. (See *Cumming III*, E070538.)

electronic service of documents and mandating service by U.S. mail only. (*Cumming III*, E070538.)

On August 8, 2018, while the appeal in *Cumming III*, E070538, was pending, William died. On September 10, 2018, Steven filed a motion to consolidate the probate cases (the trust, Janet’s estate, & William’s estate), followed by his declaration in support of the motion. Both the motion and Steven’s declaration were served electronically. On November 1, 2018, Jennifer Daniel, counsel for Blickenstaff, as the trustee of the trust, and Edward Fischel, counsel for Donald C. Marshall, the administrator and executor of William’s estate, objected to Steven’s motion on the grounds it was served electronically (a day before the hearing) and not by U.S. mail. The court set a hearing to address whether the documents were served by U.S. mail. The court informed Steven he must produce the person (C.B. Patel) who had signed the proof of service .

On December 13, 2018, C.B. Patel did not appear. Noting its May 10, 2018 order prohibiting electronic service, the court vacated “with prejudice the motion to consolidate the probate cases,” and set a hearing on January 10, 2019, for Steven “to show cause why the Court should not impose sanctions of \$1,500” under Code of Civil Procedure section 177.5.⁷ On January 10, 2019, the court found Steven had violated its prior order prohibiting electronic service without legal justification, sanctioned him \$1,500, and

⁷ Code of Civil Procedure section 177.5, in relevant part, provides: “A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars (\$ 1,500), . . . for any violation of a lawful court order by a person, done without good cause or substantial justification. . . . [¶] Sanctions pursuant to this section shall not be imposed except . . . on the court’s own motion, after notice and opportunity to be heard. . . .”

ordered his additional filings be subject to motions to vacate until he paid the sanctions in full.

On March 14, 2019, Blickenstaff filed a petition for disbursement from the trust to pay interim attorney fees and costs incurred in *Cumming III*, E070538. In response, Steven filed a declaration claiming Blickenstaff was in breach of the trust and in contempt of stays on appeal. According to the document, Blickenstaff's breach was based on her failure to administer the trust in the interest of "the sole surviving beneficiary." Steven further alleged it was "a conflict of interest to hire an attorney representing an opposing hostile party in another case, i.e., [Edward Fischel's firm (counsel for the executor of William's estate)], even though that firm no longer has any client as a party to this case." On May 7, 2019, the probate court inquired whether Steven had paid the \$1,500 in sanctions to the court. Steven stated that he had not. The court then vacated Steven's challenge to Blickenstaff's petition and entered an order granting it.

II. DISCUSSION

A. *Preliminary Observation.*

Steven asserts many alleged deficiencies in the probate court's proceedings, most of which appear to involve issues that were previously decided against him and affirmed by this court, namely: (1) he is not entitled to any distribution from the trust because he has been surcharged an amount that exceeds his one-third interest in the trust (*Cumming I*, E066569 & *Cumming II*, E069282); (2) Janet and William's interests in the trust's assets is vested (*Cumming III*, E070538); and (3) the probate court properly

ordered service of documents by U.S. mail only (prohibiting electronic service) (*Cumming III*, E070538).

Also, Steven often fails to support his legal arguments with appropriate analysis that applies legal authority to the facts of his case. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [“Each brief must [¶] . . . [¶] . . . support each point by argument and, if possible, by citation of authority.”]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116.) Although Steven represents himself, he has the same burden to demonstrate reversible error as he would if he were represented by counsel. “A fundamental principle of appellate practice is that an appellant “must affirmatively show error by an adequate record. . . . “A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent.””””” (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 639; see *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 [An appellant has the burden of overcoming the presumption that a judgment is correct by presenting “an analysis of the facts and legal authority on each point made”; failure to do so forfeits the argument.])

B. The January 10, 2019 Order Is Not Null and Void.

Steven contends the January 10, 2019 order “is null and void” because the probate court’s May 10, 2018 order prohibiting electronic service was automatically stayed by his appeal in *Cumming III*, E070538. (Prob. Code, § 1310, subd. (a) [“Except as provided in subdivisions (b), (c), (d), and (e), an appeal pursuant to Chapter 1 (commencing with Section 1300) stays the operation and effect of the judgment or order.”]; *Abelleira v.*

District Court of Appeal (1941) 17 Cal.2d 280, 288 [“Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.”]; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189 (*Varian*) [“Subject to certain exceptions not relevant here, ‘the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.’”].) In his reply brief, Steven further cites Probate Code section 1300, subdivision (c), which permits an appeal from an order “[a]uthorizing, instructing, or directing a fiduciary, or approving or confirming the acts of a fiduciary.” (*Ibid.*)

Steven’s contention is misplaced. “Appellate courts have jurisdiction over a direct appeal . . . only where there is an appealable order or judgment. [Citations.] ‘A trial court’s order is appealable when it is made so by statute.’” (*Katzenstein v. Chabad of Poway* (2015) 237 Cal.App.4th 759, 765-766.) None of the authorities cited by Steven authorize an appeal from an order mandating service of documents by U.S. mail only. (Prob. Code, §§ 1300-1304.) Such order is an ancillary or collateral matter, which does not affect the judgment or order on appeal and, therefore, is reviewable by writ proceedings. (*Varian, supra*, 35 Cal.4th at p. 191; *Estate of Hearst* (1977) 67 Cal.App.3d 777, 781 [“On the appeal, we note that the order appealed from represents an exercise of the court’s continuing probate jurisdiction over the testamentary trust of William Randolph Hearst. As such the order is not properly appealable [citation] but is

reviewable on certiorari.”].) Accordingly, the stay provision of Probate Code section 1310, subdivision (a), did not apply to the May 10, 2018 order, and Steven’s appeal of the order (included with his appeal of the second and final account) in *Cumming III*, E070358, was effectively treated as a writ proceeding. Because there was no automatic stay of the May 10 order, the probate court was authorized to sanction Steven pursuant to Code of Civil Procedure section 177.5.

Moreover, the probate court did not abuse its discretion in sanctioning Steven based on his violation of the court’s prior order (prohibiting electronic service of documents). (Code Civ. Proc., § 177.5; *People v. Hooper* (2019) 40 Cal.App.5th 685, 691-692.) Electronic service requires the consent of the party. (Code Civ. Proc., § 1010.6, subd. (a)(2)(A)(i) [“(a) A document may be served electronically in an action filed with the court as provided in this section, in accordance with rules adopted pursuant to subdivision (e). [¶] . . . [¶] (2)(A)(i) For cases filed on or before December 31, 2018, if a document may be served by mail, express mail, overnight delivery, or facsimile transmission, *electronic service of the document is not authorized unless a party or other person has agreed to accept electronic service in that specific action or the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d).*” (Italics added.)]; see Cal. Rules of Court, rule 2.251(a) [“When a document may be served by mail, express mail, overnight delivery, or fax transmission, the document may be served electronically under Code of Civil Procedure section 1010.6 and the rules in this chapter.”].) Here, Blickenstaff objected to electronic service, and the probate court ordered Steven to serve documents on Blickenstaff through her attorney, by

U.S. mail. Nonetheless, Steven disregarded Blickenstaff’s objection and refused to follow the court’s order. Under these facts, we conclude the court’s decision to sanction Steven did not exceed the bounds of reason.⁸

C. The May 7, 2019 Order Is Not Void for Lack of Subject Matter Jurisdiction.

Steven contends the May 7, 2019 order is “void for lack of subject matter jurisdiction” since the appeal in *Cumming III*, E070538, was pending. We disagree.

Although the appeal in *Cumming III*, E070538, was pending, the probate court was not divested of all jurisdiction. (*Estate of Kennedy* (1948) 87 Cal.App.2d 795, 797-798 [An appeal from orders confirming a special administrator’s sale of estate property did not deprive the probate court of jurisdiction to determine a will contest.]; Prob. Code, § 1310, subd. (b) [“Notwithstanding that an appeal is taken from the judgment or order, for the purpose of preventing injury or loss to a person or property, the trial court may direct the exercise of the powers of the fiduciary, . . . from time to time, as if no appeal were pending. All acts of the fiduciary pursuant to the directions of the court made under this subdivision are valid, irrespective of the result of the appeal. An appeal of the directions made by the court under this subdivision shall not stay these directions.”].)

⁸ In his reply brief, Steven requests this court recall our remittitur in *Cumming III*, E070538, “and reverse the 05/10/2018 order on service of documents as an abuse of discretion.” His request is denied. Steven’s challenge to the May 10, 2018 order was raised and decided against him in his prior appeal. (See *Cumming III*, E070538.) Our prior opinion is final and res judicata against him. (*Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 591 [The doctrine of res judicata is applicable in probate proceedings.]; *Grable v. Grable* (1960) 180 Cal.App.2d 353, 359-360 [“[T]he decision of an appellate court . . . falls within the purview of the doctrine of res judicata and is conclusive of the issues and matters determined by the appellate court.”].)

During the administration of the estate, the probate court “is authorized to determine the validity of wills and of creditors’ claims, the rights of rival heirs, the necessity of sales and other incidents of winding up an estate. Each act of the court is an independent step in the administration. A decision as to one is not an adjudication of the others and does not divest the court of the power to hear and determine problems that are collateral to the proceeding in which an appealed order has been rendered. [Citations.] An appeal from a prior order made in the course of administration of an estate does not suspend the powers of the probate court to make further orders. [Citation.] A statute that would prohibit the probate court from administering an estate pending the appeal of an order made in due course would be intolerable.” (*Estate of Kennedy*, at p. 798; see *Estate of Thayer* (1905) 1 Cal.App. 104, 106 [lower court had jurisdiction to settle the final account during pendency of an appeal of the order of partial distribution].)

Steven mischaracterizes Blickenstaff’s petition for disbursement from the trust to pay interim attorney fees and costs incurred in *Cumming III*, E070538, as “prematurely petition[ing] the court for costs on appeal.” Blickenstaff was not seeking an award of costs on appeal, nor were costs on appeal awarded by the probate court. Rather, her petition sought payment of the legal expenses incurred by the trust to aid the trust in *Cumming III*, E070538. “[T]he attorneys hired by a trustee to aid the trust are entitled to reasonable fees paid from the trust assets. [Citation.] This includes attorney fees incidental to litigation that benefits the trust.” (*Rudnick v. Rudnick* (2009) 179 Cal.App.4th 1328, 1333.) Therefore, the attorney fees and costs incurred by

Blickenstaff in defending Steven’s appellate challenge to her actions are chargeable to trust assets.

III. DISPOSITION

The orders are affirmed. Respondents are awarded costs on appeal.⁹

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

SLOUGH
J.

⁹ For the benefit of the probate court (Cal. Rules of Court, rule 8.278(c), (d)) we note that the appellate briefs filed on behalf of the trust and William’s estate are nearly “word-for-word” identical. Although respondents are awarded costs, they are not entitled to double recovery (whether it be costs or attorney fees) when it appears they submitted the same brief for two different parties.