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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

Estate of WILLIAM HENRY  
CUMMING, Deceased.

DON C. MARSHALL, as Personal  
Representative, etc.,

Petitioner and Respondent,

v.

STEVEN ROBERTSON CUMMING,

Objector and Appellant.

E073139

(Super.Ct.No. PRRI1802509)

OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge.

Affirmed.

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

The Law Offices of Edward B. Fischel and Earl L. Roberts for Petitioner and Respondent.

Plaintiff and appellant Steven Robertson Cumming (Steven)<sup>1</sup> appeals from several probate orders made on April 29, 2019, concerning the Estate of William Henry Cumming. He contends the probate court erred in (1) striking his amended Probate Code<sup>2</sup> section 850 petition to determine the ownership of property, (2) finding Steven’s siblings were eligible for inclusion in the final distribution of the assets in their parents’ trust, and (3) refusing to consolidate this case with the probate case involving his parents’ trust. We conclude his claims lack merit and affirm.

### I. PROCEDURAL BACKGROUND AND FACTS<sup>3</sup>

William Henry Cumming died testate on August 8, 2018, in Riverside County. He had no spouse and no children. William and his siblings, Steven and Janet, are beneficiaries of the Robert Bruce Cumming and Lois Wielen Cumming Trust Dated July 6, 1985 (the trust). (See *Cumming III*, E070538.) Steven had served as a trustee of the

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<sup>1</sup> We refer to William, Steven, and Janet Cumming 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.)

<sup>2</sup> All further statutory references are to the Probate Code unless stated otherwise.

<sup>3</sup> On the court’s own motion and to compile a coherent narrative, we take judicial notice of our prior unpublished opinions in: *Cumming v. Cumming* (Sept. 7, 2017, E066569) [nonpub.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.)

trust; however, he was permanently removed for various breaches of duty and he was surcharged \$386,272 for the misappropriation of the trust assets. (See *Cumming I*, E066569.) Janet died testate on August 25, 2016. Her will expressly disinherited Steven and named William as her sole beneficiary; she had no spouse or children. A portion of William's estate includes distributions from the trust. Steven is a litigant and a party in the San Bernardino County action involving the trust. (See *Cumming I*, E066569; *Cumming II*, E069282; *Cumming III*, E070538.) He has lost at trial, in multiple motions in the trust litigation, and on appeal. (*Ibid.*) Because of his misappropriation of the trust assets, Steven received nothing from the trust. (*Ibid.*)

On August 15, 2018, Don C. Marshall (Marshall) filed a petition for probate of William's will and for appointment to act as administrator of William's estate. The petition was granted. On September 10, 2018, Steven moved to consolidate the probate of William's estate (Super. Ct. San Bernardino County, No. PRRI1802509) with the trust litigation (Super. Ct. San Bernardino County, No PROPS1301068) and the probate of Janet's estate (Super Ct. San Bernardino County, No. PROPS1601037). The motion was denied.

On January 8, 2019, Steven filed notice of an automatic stay of the probate proceedings based on his appeal of the May 10, 2018 orders in the trust litigation. (See *Cumming III*, E070538.) He also petitioned for the return of the trust assets, which he alleged were wrongfully distributed to William. He amended his section 850 petition on March 19. In the amended petition, Steven sought the return of the trust assets (in the amount of \$350,000), which were awarded to William in May 2018. The amended

petition attempted to relitigate issues previously litigated in the trust litigation. (See *Cumming I*, E066569; *Cumming II*, E069282; *Cumming III*, E070538.) Marshall objected to Steven’s amended section 850 petition on the grounds William had received trust assets “in his capacity as a beneficiary and as the executor of the estate of Janet Cumming (also a beneficiary of the Trust).” Marshall argued the decisions of the probate court, which we affirmed in *Cumming I*, E066569, conclusively established William’s right to the trust assets in his estate. On April 17, 2019, the probate court set an order to show cause hearing regarding Steven’s amended petition. The court requested briefing on whether the amended petition should be struck for lack of standing. Steven asserted standing based on the potential liability of William’s estate for Steven’s appellate costs in *Cumming I*, E066569.

On April 29, 2019, the probate court held a series of hearings. The court denied Steven’s first amended section 850 petition on the grounds it was “not properly before” the court and Steven lacked standing. The court also denied Steven’s original section 850 petition on the grounds “no notice was given” and it was not verified. At the same hearing, the court overruled Steven’s objection to the sale of William’s residence.

## II. DISCUSSION

### A. *Preliminary Observation.*

Steven’s opening brief is at times difficult to understand, and he often fails to support legal arguments with appropriate analysis that applies legal authority to the facts of his case. (See *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2 [“Moreover, [plaintiff] fails to provide any

analysis or argument in support of the assertion, which, for this additional reason, is not properly raised.”]; *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. . . . Error is never presumed. . . . “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.) Additionally, 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” and by supporting the “arguments with appropriate citations to the material facts in the record. If he fails to do so, the argument is forfeited.” (*Nielsen v. Gibson* (2009) 178 Cal.App.4th 318, 324 (*Nielsen*)).) Applying these principles to the present case, we consider Steven’s claims.

*B. The Probate Court Properly Denied Steven’s Amended Section 850 Petition to Determine Ownership of Property.*

Steven contends the probate court erred in striking his amended section 850 petition to determine the ownership of property because (1) no motion to strike was filed, (2) he had standing to file the amended petition, (3) notice was provided to Marshall, and (4) the amended petition was verified. Because we conclude the trial court correctly found Steven lacked standing, we need not address his remaining contentions.

The probate court found that Steven’s amended petition involved issues concerning the ownership of the trust assets, and those issues were under the jurisdiction of the San Bernardino County probate court in the trust litigation. Steven does not challenge such finding. Rather, he contends the “court had jurisdiction and should have ordered the case transferred . . . in lieu of denying [him] due process.” Steven cites California Rules of Court, rule 3.500(h),<sup>4</sup> but offers no appropriate analysis that applies legal authority to the facts of his case. As such, his argument is forfeited. (*Nielsen, supra*, 178 Cal.App.4th at p. 324.)

Moreover, the probate court was not required to abate the amended petition until the conclusion of the trust litigation since Steven’s interest in the trust assets had been established finally in *Cumming I*, E066569. Our prior opinion is res judicata against him. (*Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 591 (*Lazzarone*) [The doctrine of res judicata is applicable in probate proceedings.]; *Grable v. Grable* (1960) 180 Cal.App.2d 353, 359-360 (*Grable*) [“[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.”].) Steven was no longer a beneficiary of the trust assets, and he was not a beneficiary of either Janet or William’s estates. (§ 24, subds. (b), (c) [“‘Beneficiary’ means a person to whom a donative transfer of

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<sup>4</sup> California Rules of Court, rule 3.500(h), in relevant part, provides: “If after considering the motion the judge determines that the action or actions pending in another court should not be transferred to the judge’s court but instead all the actions that are subject to the motion to transfer should be transferred and consolidated in another court, the judge may order the parties to prepare, serve, and file a motion to have the actions transferred to the appropriate court.”

property is made or that person's successor in interest, and: [¶] (b) As it relates to the testate estate of a decedent, means a devisee. [¶] (c) As it relates to a trust, means a person who has any present or future interest, vested or contingent.”].) Thus, he lacked standing to challenge the ownership of property in William's estate. However, to the extent Steven's petition sought the return of property not considered previously to be assets of the trust, the evidence shows he was provided the opportunity to recover such property but failed to do so.

*C. Steven Is Not Entitled to Either Janet's or William's Share of the Trust Assets.*

Next, Steven argues the probate court erred in finding William and Janet were eligible for inclusion in the final distribution of the trust assets. We disagree. Steven previously challenged the distribution of the trust assets to Janet following her death in *Cumming I*, E066569. The issue was decided against him, and our prior opinion is final and constitutes res judicata. (*Lazzarone, supra*, 181 Cal.App.3d at p. 591; *Grable, supra*, 180 Cal.App.2d at pp. 359-360.) The analysis we applied to Janet's interest in the trust assets equally applies to William's interest. The relevant portion of the trust states that, upon the death of the surviving trustor (Lois), “[t]he trustee shall divide the trust estate into as many equal shares as there are children of the trustors then living and children of the trustors then deceased leaving issue then living.” (*Cumming I*, E066569.) Thus, upon the death of the trust's settlor (Lois), it became irrevocable, and the beneficiaries' interest in the trust was vested. (*Estate of Giralдин* (2012) 55 Cal.4th 1058, 1062.) Since William was living at the time of Lois's death, his interest was vested at that time.

Accordingly, Steven did not succeed to either Janet's or William's share of the trust upon their deaths. (*Cumming I*, E066569.)

*D. The Probate Court Correctly Refused to Consolidate the Probate Cases.*

Steven also challenges the probate court's refusal to consolidate this case with the trust litigation and Janet's estate. As we explain, we reject his challenge. To begin with, we note Steven's motion to consolidate was denied without prejudice on September 17, 2018. However, he never refiled the motion. More importantly, there was no need to consolidate the three probate matters because Steven's issues depend on his interest in the trust assets, and his interest (or lack thereof) was established in *Cumming I*, E066569. Again, our prior opinion is res judicata against him. (*Lazzarone, supra*, 181 Cal.App.3d at p. 591; *Grable, supra*, 180 Cal.App.2d at pp. 359-360.)

*E. The Probate Court Correctly Overruled Steven's Objection to the Sale of William's Residence.*

Finally, in his opening brief, Steven points out that his objection to the sale of William's residence was overruled; however, he fails to challenge the ruling. To the extent Steven remedies this failure in his reply brief, "[f]airness militates against our consideration of arguments first raised in a reply brief." (*Employers Mutual Casualty Co. v. Philadelphia Indemnity Ins. Co.* (2008) 169 Cal.App.4th 340, 350.) Nonetheless, we note Steven's reply brief merely asserts the probate court erred in ruling and cites to

section 1310, subdivision (a),<sup>5</sup> but offers no legal argument with appropriate analysis that applies legal authority to the facts of his case. Thus, he has forfeited his argument.

(*Nielsen, supra*, 178 Cal.App.4th at p. 324.)

### III. DISPOSITION

The orders are affirmed.<sup>6</sup> Respondent may recover costs on appeal.

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McKINSTER  
Acting P. J.

We concur:

MILLER  
J.

SLOUGH  
J.

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<sup>5</sup> “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.” (§ 1310, subd. (a).)

<sup>6</sup> Steven requests judicial notice of the probate notes prepared for the hearings heard in this case because they were omitted from the clerk’s transcript. Prior to his request, on October 17, 2019, the clerk of the superior court filed a certificate with this court stating the probate notes were not included in the clerk’s transcript because they “are not filed or imaged documents in the court’s case management system and they were not submitted as exhibits to the trial court.” We, therefore, deny Steven’s request. (Evid. Code, § 452.) In any event, the probate notes were of no relevance to the probate court’s rulings or our opinion.