IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ROSA MALITE, LOURDES M. RANGAMAR, ROMBERT M. SINOUNOU, AND JIMMY SABLAN (Heirs of Angel Maliti) in *In Re the Estate of Angel Maliti*, Civil Action No. 97-0369,
Petitioners,

v.

THE SUPERIOR COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Respondent,

Jesus C. Tudela, Administrator in *In Re the Estate of Angel Maliti, et al.*,
Respondents /Real Parties in Interest.

Supreme Court Appeal No. CV-06-0002-OA
Superior Court Civil Action Nos. 97-0369

OPINION

Cite as: ***Malite v. Tudela, et. al.,*** **2007 MP 3**

Argued and submitted on August 9, 2006
Saipan, Northern Mariana Islands

FOR PUBLICATION

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BEFORE: JOHN A. MANGLONA, Associate Justice; F. PHILIP CARBULLIDO, Justice *Pro Tempore;* and ROBERT J. TORRES, JR., Justice *Pro Tempore*

Per Curiam:

¶1 Petitioners request this Court to issue a writ of mandamus ordering the return of attorney fees paid to Antonio M. Atalig and Reynaldo O. Yana for services rendered to the estate in a civil action to recover estate property. We find that Petitioners have not met the *Tenorio* test and, therefore, we deny the request to issue the writ. However, we convert this mandamus action to an 8 CMC section 2206 interlocutory appeal and address the issues raised by Petitioners. Because the probate court abrogated its duties under our probate law and rules, we REVERSE and REMAND this matter to the probate court so that an accounting and approval of the requested attorney fees may take place pursuant to our Rules of Probate Procedure.

I.

¶2 The Estate of Angel Maliti entered probate in April 1997.[1] The record is sparse as to what transpired over the first few years of the Estate's administration, but it appears that at some point prior to November 2000, the Marianas Public Land Authority ("MPLA") agreed to pay the Estate $3,450,000 for a piece of land originally owned by

[1] Although the date of Angel Maliti's death is not clear from the record, it appears he died long before February 15, 1984, the effective date of our probate code. Section 2101 of our probate code states: "[t]he property of persons who die before February 15, 1984, shall pass according to title 13 of the Trust Territory Code and other applicable law." 8 CMC § 2101. Our prior opinions addressing section 2101 have dealt with the issue of property descent, and in that respect section 2101 clearly mandates the application of title 13 of the Trust Territory codeCode. *See, e.g., In re Estate of Cabrera*, 2 N.M.I. 195, 203-04 (1990); *In re Estate of Deleon Guerrero*, 1 N.M.I. 301, 305-07 (1991). However, neither the language of section 2101, our case law, or judicial economy favor reading section 2101 as requiring application of the Trust Territory Code beyond the specific issue of property descent. Thus, even if it is later shown that Angel Maliti died prior to February 15, 1984, the non-descent provisions of our current probate code would still apply to the extent they are not in conflict with the descent provisions of title 13 of the Trust Territory Code.

Angel Maliti. This amount was offered as a settlement of the Estate's condemnation action for land taken by the Trust Territory administration. Before the money was disbursed, however, on November 7, 2000, the Attorney General's Office ("AGO") brought a separate civil action to enjoin the payment of that $3,450,000 to the Estate. The Estate and MPLA were named as defendants.

¶3 In response to the AGO's request for an injunction, four of the Estate's 18 alleged heirs[2] signed a contingency fee agreement with attorney Antonio M. Atalig agreeing to pay him 33% of whatever amount he could secure from MPLA. Mr. Atalig was also representing the Estate's administrator, Jesus C. Tudela (the "Administrator"), in the Estate's probate. The Administrator did not sign the contingency fee agreement.

¶4 On February 28, 2006, a settlement was reached. The settlement was executed by the Commonwealth (through the Assistant Attorney General ("AAG")), the Department of Public Lands (the legal successor to MPLA, through the Acting Secretary), and the Estate (through the Administrator and Mr. Atalig as "Attorney for the Administrator of the Estate of Angel Maliti"). Additionally, attorney Stephen J. Nutting, separately representing four of the Estate's heirs ("the Heirs") who are the Petitioners herein, also signed the settlement. Section Four of the settlement reads:

> Upon the entry of judgment, the Land Compensation shall be paid into the Commonwealth Superior Court pursuant to rule 67 of the Commonwealth Rules of Civil Procedure until an order of distribution and the approval of attorney fees and costs is entered in [the Estate's probate] in accordance with the laws of the Commonwealth of the Northern Mariana Islands and the CNMI Rules of Probate Procedure.

On March 13, 2006, the civil court accepted the settlement agreement and entered a judgment in accordance with it. The court specifically noted that Mr. Atalig executed the

[2] The status of some alleged heirs is still disputed.

agreement as "counsel for the Maliti Estate" and Mr. Nutting as "counsel for . . . the represented Heirs." The judgment also specifically cited and restated Section Four, even though the other settlement provisions were only incorporated by reference.

¶5 The next day, on March 14, 2006, Mr. Atalig, along with co-counsel in the civil action, Reynaldo O. Yana, filed a request in the civil court for attorney fees due in representing the Administrator "and other signatories to the contingency fee agreement . . . ." A hearing on the matter was set for April 18, 2006. No notice was given regarding this hearing or the request for attorney fees to the AAG who handled the injunction and the resulting settlement. Nevertheless, the AAG learned of the hearing and appeared in court. The AAG informed the court that she had not been served and requested the court to continue the matter so that she could be noticed and given full time to respond. The court granted her request, taking the matter off calendar and ordering Mr. Atalig to provide notice.

¶6 However, on May 12, 2006, without a hearing on the matter and apparently *sua sponte*, the civil court entered an order approving Mr. Atalig and Mr. Yana's 33% contingency fee. Noting "the absence of any evidence to the contrary," the court found the contingency agreement "appropriate compensation for civil cases." Additionally, in an attempt to salvage some vestige of due process, the court provided "the clients" ten days to file an opposition. The Administrator filed a waiver of objection to the fees on May 18, 2006. The AAG was never served with the order granting attorney fees. Nor were the Heirs or their attorneys served. Thus, no opposition was filed within the ten-day time period.

¶7 After learning of the civil court's attorney fees order, on June 1, 2006, the Heirs petitioned the probate court for a temporary restraining order, requesting the probate court to disgorge the attorney fees and vacate the civil court's order accepting them. A hearing on the matter occurred the same day. The Heirs argued they were denied due process because they were never noticed or heard regarding Mr. Atalig and Mr. Yana's request for attorney fees. Further, despite the fact the civil court's order accepting attorney fees granted "the clients" ten days to oppose the order, the Heirs were never served and had no opportunity to file an opposition. The probate court, in its order dated June 2, 2006, found against the Heirs, determining the Heirs had no standing *before the civil court* to challenge the attorney fees order since: (1) the attorney fees were granted in the civil action for an injunction (not in the probate case); (2) the Administrator was the only "client" of Mr. Atalig and he waived any objection to the attorney fees order; and (3) the Heirs' notice of appearance in the civil case did not vest them with standing.

¶8 On June 14, 2006, the Heirs filed a petition for a writ of mandamus. The Petition requested this Court require the probate court to order the Administrator and his attorneys to refund the attorney fees awarded by the civil court, and the probate court exercise its duty to conduct a proper review and accounting of the attorney fees and costs and the Administrator's fees and costs pursuant to the Probate Code and the Probate Rules.

II.

¶9 When deciding whether to issue a writ of mandamus, this Court looks to the five *Tenorio* factors. *See*, *e.g.*, *Commonwealth v. Pua*, 2006 MP 19 ¶ 19; *Kevin Int'l Corp. v. Superior Court*, 2006 MP 3 ¶ 14; *Commonwealth v. Superior Court (Ada)*, 2004 MP 14 ¶ 7; *Paulis v. Superior Court*, 2004 MP 10 ¶ 22. These are:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;
2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;
3. The lower court's order is clearly erroneous as a matter of law;
4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and
5. The lower court's order raises new and important problems, or issues of law of first impression.

Pua, 2006 MP 19 ¶ 19. We have noted that there will often be no bright-line distinction when applying this rule. *Tenorio v. Superior Court*, 1 N.M.I. 1, 10 (1989). Rather, *Tenorio* provides a balancing test; the factors are cumulative and require this Court to determine the degree to which each is implicated. *See id*. In the present case we cannot say that, on balance, the extraordinary remedy of mandamus is justified.

¶10 Factor 1 asks whether the petitioner has another less drastic remedy available. Clearly, a direct appeal is a less drastic alternative. Indeed, factor 1 specifically identifies it as such. Thus, if the Heirs could raise their current issues by means of an appeal, factor 1 weighs against granting the writ of mandamus.

¶11 Like many aspects of the proceedings below, the question of whether an appeal lies for the Heirs is complicated by the fact that the same judge presided over both the probate and the civil action, thus blurring the distinction between the two. The Heirs' grievance was caused by the civil court's awarding attorney fees in the civil action. An aggrieved party is usually able to protect their rights by way of an appeal. However, since their standing to appeal the civil court's decision was questionable, the Heirs instead chose to seek a TRO from the probate court. Although it would be sufficient here to confine our discussion to appealablity of the probate order denying the TRO, we also discuss appealability of the civil court's order awarding attorney fees in an effort to guide

future courts and litigants faced with similar issues. We find the Heirs could appeal either.

¶12 It is clear the Heirs could appeal the probate court's refusal to issue a TRO disgorging attorney fees. Section 2206 of Title 8 of the Commonwealth Code provides for an immediate interlocutory appeal in certain instances: "[a]n appeal may be taken from an order . . . directing or allowing the payment of a debt, claim, legacy, or attorney's fee . . . [or] refusing to make any [such] order . . . ." As will be discussed more fully below, the probate court's order amounted to an order allowing the payment of an estate claim, or in the alternative a refusal to make such an order[3]. It is, therefore, reviewable under section 2206.

¶13 The more complicated question is whether the Heirs had standing to appeal the civil court's attorney fees award. The probate court reasoned that the Heirs did not have standing to challenge the award of attorney fees because they were not named parties in the civil action and did not intervene. Generally, non-parties have no standing to appeal, but this rule is not without exception. Many federal circuits have held that non-parties have standing to appeal if certain criteria are met. The Fourth Circuit allows nonparties to appeal when they: (1) have an interest in the matter; and (2) have "participated in the proceedings actively enough to make [them] privy to the record . . . ." *Davis v. Scott*, 176 F.3d 805, 807 (4th Cir. 1999). The Third, Fifth, and Ninth Circuits have recognized this exception with an additional prong that the decision to allow the appeal is supported by weighing the equities. *See, e.g., Binker v. Commonwealth*, 977 F.2d 738, 745 (3rd Cir.

[3] The court's action in not undertaking a proper review and accounting of the attorneys' fees and costs and not providing notice and opportunity to the heirs to be heard on this issue may also be deemed to be a refusal by the court to make an order allowing payment of the debt or attorneys' fees albeit after payment has already been made.

1992); *EEOC v. Louisiana. Office of Community Servs.*, 47 F.3d 1438, 1442 (5th Cir. 1995); *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1504 (9th Cir. 1990); *but see Microsystems Software, Inc. v. Scandinavia Online AB*, 226 F.3d 35, 40 (1st Cir. 2000) (rejecting the nonparty appeal exception because "the better practice is for such a nonparty to seek intervention for purposes of appeal . . . ." Quoting *Marino v. Ortiz*, 484 U.S. 301, 304, 108 S.Ct. 586, 588, 98 L.Ed. 629 (1988)).

¶14 We find the reasoning underlying the non-party appeal exception persuasive, and adopt the three-prong version pioneered by the Ninth Circuit. Specifically, we hold that a non-party has standing to appeal when: (1) they participated in the proceedings at the trial court level; (2) they have an interest in the matter which is apparent from the record; and (3) a weighing of the equities supports hearing the appeal. The Heirs satisfy this test. The Heirs, through their counsel, have actively participated in the civil proceedings. Their counsel claims to have been the chief negotiator representing Estate interests in the settlement. He signed the settlement agreement, and he was specifically named by the civil court in its judgment accepting the settlement. Next, the Heirs clearly have an interest in the settlement money from which the attorney fees were taken. Although the settlement occurred in a separate civil action, the purpose of the settlement was to compensate the Maliti Estate – and thus the class to which the Heirs belong – for the taking of Estate property. Because the Heirs have an interest in the Estate, and because that interest is clear from the record, the second prong is satisfied. Finally, the third prong calls for a balancing of equities. Given the surreptitious manner in which the contingency fee was awarded, the equities favor permitting the Heirs to appeal.

¶15 Since we find the Heirs were able to appeal both the probate and the civil order, *Tenorio* factor 1 weighs against granting the writ. However, this is true only so far as the available appeal provides sufficient means to correct the wrong alleged by the Heirs. Factor 2 asks whether "petitioner will be damaged or prejudiced in a way not correctable on appeal." We conclude that an appeal provides the Heirs an adequate remedy.

¶16 It is questionable whether a writ of mandamus is *ever* justified when money damages are a sufficient remedy and when they would be available in a private action or on appeal. *See Levin v. Schremp*, 654 N.E.2d 1258, 1260 (Ohio 1995) ("mandamus may not ordinarily be employed as a substitute for an action at law to recover money.") We approached this question in *Kevin Int'l.*, 2006 MP 3, but we did not answer it definitively. There, we declined to grant a writ of mandamus ordering the trial court to issue a restraining order to prevent Respondent from shipping business assets out of the Commonwealth. *Id*. Petitioner argued that absent a restraining order, Respondent would remove all assets from this jurisdiction, thereby rendering himself judgment proof. *Id*. at ¶ 15. In denying the writ, we noted that money damages are an adequate means of relief, and "as a general rule, when a party is entitled to a remedy at law, no preliminary injunction should issue." *Id*. at ¶¶ 16-17. Despite this language, we left open the question of whether, and at what point, the uncertainty of recoverable money damages equates to irreparable harm, thus justifying mandamus. Id. at ¶ 18.

¶17 There is authority for the proposition that the likelihood of insolvency or non-payment amounts to irreparable harm. In *Kevin Int'l* we cited the Second Circuit decision *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245 (2d Cir. 1999), as supporting this position. *Kevin Int'l*, 2006 MP 3 at n.8. The Second Circuit stated:

> As a general matter, because monetary injury can be estimated and compensated, the likelihood of such injury usually does not constitute irreparable harm. However, a perhaps more accurate description of the circumstances that constitute irreparable harm is that where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.

Brenntag, 175 F.3d at 249. (citations omitted). Additionally, the Seventh Circuit held that an order to pay attorney fees, pursuant to a statute allowing a trial court to order such a payment to the prevailing party, may constitute irreparable harm if the recovery of those fees after a successful appeal is doubtful. *Palmer v. Chicago*, 806 F.2d 1316, 1319 (7th Cir. 1987). Although the Seventh Circuit was dealing with irreparable harm in the context of the collateral order doctrine, its reasoning is useful in the mandamus context as well. Judge Posner writes, "[t]o show irreparable harm it is enough to show that there was a danger . . . that the fees would disappear into insolvent hands." *Id*.

¶18 We need not decide today, however, whether and to what extent the likelihood of nonpayment equates to irreparable harm because we are not presented with any evidence the Administrator or his attorneys might be unable or unwilling to comply with an order to return the attorney fees. In *Kevin Int'l*, "we [found] no evidence that monetary damages will not be paid or that [Respondent] will not readily pay any monetary damages award." *Id*. at ¶ 25. This despite the fact that Respondent was in the process of relocating all its assets outside the Commonwealth. In the present case, the Heirs have presented no evidence tending to show they would be unable to recover money damages if an award is ordered. They only make sweeping charges that the attorneys might divert the money they receive in attorney fees. Nor do the Heirs allege that the Administrator will be insolvent, and thus unable to pay a potential breach of fiduciary duty judgment.

In the absence of any evidence demonstrating likely insolvency, we are unwilling to find an appeal will provide Petitioners an inadequate means of redress.

¶19 Because we find the first and second Tenorio factors wanting, we need not discuss the remaining factors. The Heirs have two immediately appealable judgments; the probate order through 8 CMC section 2206, and the civil court's attorney fees award because it is final and they have standing via the non-party appeal exception.

III.

¶20 Our recent decision in *Pua*, 2006 MP 19 ¶ 13, recognized the U.S. Supreme Court's "functional equivalent" test when judging the adequacy of filings under our appellate rules. In *Pua* we found that Petitioner met the pleading requirements for an application for a writ of mandamus even though Petitioner brought the action as an emergency criminal appeal. *Id*. at ¶ 15. This allowed us to convert the emergency criminal appeal to a mandamus action. *Id*. at ¶ 18. Similar reasoning guides us to hold that although the Heirs' application for a writ of mandamus fails, we may nevertheless address the issues by converting the application to an appeal.[4] *See, e.g., Clorox Co. v. U.S. Dist. Ct. for N. Dist. of Cal.*, 779 F.2d 517, 520 (9th Cir. 1985); *Kaplan v. Missouri Pac. R.R..Co.*, 629 F.2d 337 (5th Cir. 1980).

¶21 The Heirs seek review of a probate order denying their motion for a TRO to disgorge attorney fees and vacate the attorney fees award. We have jurisdiction to hear this interlocutory appeal by virtue of 8 CMC section 2206, which grants the Heirs a right of appeal from an order either "directing or allowing the payment of a debt, claim,

[4] Converting an application for a writ of mandamus into an appeal is purely a discretionary matter based on the individual facts of the case. This opinion should not be read as indicating this Court's willingness to regularly circumvent the normal appellate process through the use of applications for writs of mandamus.

legacy, or attorney's fee . . . [or] refusing to make [such an] order . . . ." The Heirs requested the lower court to issue the TRO to protect estate assets until such time as the Heirs had an opportunity to be heard on the matter of the attorney fees. The court denied their request. This amounts to an order "allowing the payment of a debt, claim . . . or attorney's fee," or, alternatively, a refusal to make such an order, thereby satisfying section 2206's prerequisites for immediate appeal.

¶22 Of course 8 CMC section 2206 is only implicated if the "debt, claim . . . or attorney's fee" was paid with funds which were part of the estate under the jurisdiction of the probate court. The civil court held that it had jurisdiction over the land compensation award, at least to the extent required to deduct the attorneys' contingency fee, before the proceeds passed into probate. The probate court agreed. We do not.

¶23 The question of jurisdiction over the land compensation award was dealt with by Section Four of the settlement agreement, which the civil court approved. Section Four reads:

> Upon the entry of judgment, the Land Compensation shall be paid into the Commonwealth Superior Court pursuant to rule 67 of the Commonwealth Rules of Civil Procedure until an order of distribution and the approval of attorney fees and costs is entered in [the Estate's probate] in accordance with the laws of the Commonwealth of the Northern Mariana Islands and the CNMI Rules of Probate Procedure.

Interpretation of contract terms, such as this settlement provision, is a question of law reviewable de novo.[5] *Pangelinan v. Itaman*, 1996 MP 16 ¶ 2, 5 N.M.I. 14, 15; *Camacho*

[5] We do not review the civil court's interpretation of this settlement provision, as that is not properly before this Court. Rather, we reach this provision by virtue of the probate court referencing it, *In re the Estate of Angel Maliti*, Civ. No. 97-0369 (N.M.I. Super. Ct. June 2, 2006) (Order Denying Movants' Objection to the Distribution of Attorneys' Fees in Civil Action No. 04-563 at 3 n.5), in reaching its conclusion that "[t]he transfer of the award in the Civil Action to the Estate in the probate case does not endow the heirs with standing in the Civil Action." *Id*. at 3.

v. L & T Int'l Corp., 4 N.M.I. 323, 326 (1996). Our reading leads us to find the probate court enjoyed jurisdiction over the entire settlement amount.

¶24 It is clear Section Four of the settlement agreement intended to transfer the entire $3,450,000 award to the probate court. Section Two of the agreement specifically defines "Land Compensation" to mean "the sum of Three Million Four Hundred Fifty Thousand Dollars ($3,450,000) . . . ." By replacing the term "Land Compensation" with "$3,450,000," Section Four reads: "the $3,450,000 shall be paid into the Commonwealth Superior Court . . . until an order of distribution and the approval of attorney fees and costs is entered in [the Estate's probate] in accordance with . . . the CNMI Rules of Probate Procedure." This language is precise and unambiguous. Its purpose is to ensure that the probate court retained control over the funds until such time as it saw fit to disburse them. The parties clearly intended the probate court, and the probate court alone, to disburse the entire award. Since the probate court had jurisdiction over the land compensation award, its order denying the Heirs' requested TRO vests this Court with interlocutory jurisdiction pursuant to 8 CMC section 2206.

IV.

¶25 The probate court erred by failing to recognize and exercise its jurisdiction over the entire land compensation award. This caused the probate court to abrogate its duties under our probate rules, which in turn caused the court to deny the Heirs due process.

¶26 The probate court denied the Heirs' requested TRO based on its conclusion that the Heirs lacked standing in the civil matter. This is plainly wrong. The issue of the Heirs' standing in civil court was not before the probate court and was irrelevant in determining whether the TRO should issue. Rather, the operative issue was whether the

Heirs had a right to be heard *in the probate matter* as to the propriety of the attorney fees requested in the civil case. We find that they did. Since Section Four of the settlement agreement placed the entire $3,450,000 under the jurisdiction of the probate court, the Administrator had an affirmative duty to seek and obtain the approval of the probate court before paying the requested attorney fees. Although the probate court may have determined not to require disgorgement of the attorney fees which had already been paid, it had an obligation to review and approve those fees and provide an opportunity for interested persons to be heard on the matter. Not only is this duty found in the language of Section Four itself, more importantly it is found in our Rules of Probate Procedure.

¶27 Our probate code states at 8 CMC section 2203 that "the Rules of Probate Procedure of the Commonwealth Trial Court shall govern . . . *all proceedings* under this law." (emphasis added). The Probate Rules place an affirmative duty on an estate's administrator to seek the consent of the probate court, and secure an order, before paying estate debts. According to Rule 10,[6] "[t]he executor shall pay debts of the decedent or the estate only after obtaining the [probate] Court's consent. No sale or other disposition of estate property will be done without Court order." The attorney fees request, which was based on services rendered to the estate in the civil case, is one example of an estate debt envisioned by Rule 10. Thus, pursuant to the plain language of Rule 10, the Administrator had an affirmative duty to obtain the probate court's consent before paying those attorney fees from the estate's land compensation award. By deferring to the civil court on this matter, without undertaking its own separate analysis and approval, the probate court abrogated its oversight duties under our probate rules.

[6] Since this is an intestacy proceeding, Rule 20 governs. However, since Rule 20 simply incorporates the duties listed in Rule 10, its counterpart which controls when probating wills, we refer only to Rule 10.

¶28 Although our decision is based entirely upon the plain language of Rule 10, we note that other courts have recognized the important policy of ensuring probate courts control the funds over which they are charged. In *In re Guardianship of Jadwisiak*, 593 N.E.2d 1379, 1383 (Ohio 1992), the Court held that a probate court had the authority to order an attorney to remit an entire settlement award, including what the attorney had separated out as his contingency fee, so that the probate court could ensure it met its statutory duties to oversee the settlement funds. The Court reasoned that the attorney "interfered with the probate court's function of controlling the ward's settlement proceeds by keeping over half of the proceeds as attorney fees and distributing the remainder to the guardian without the probate court's approval of the settlement." *Id*. In the present case, like in *Jadwisiak*, "the probate court was unable to perform its statutory duties since it never had the . . . total settlement proceeds in its possession." *Id*. at 1384. However, unlike *Jadwisiak*, the probate court here made no attempt at regaining control over the settlement funds.

¶29 In a case similar to *Jadwisiak*, the Georgia Supreme Court found:

> [T]he probate court's jurisdiction to approve the settlement of the malpractice claim and to protect the best interests of the incapacitated ward confers upon that court the authority to require that the attorneys pay into the registry of court such settlement funds as they disbursed to themselves, and to hold them in contempt for their refusal to do so.

Gnann v. Woodall, 511 S.E.2d 188, 189 (Ga. 1999). Both *Gnann* and *Jadwisiak* dealt with guardian proceedings rather than estate probates, but that makes little difference here. The major policy concern underpinning probate courts – safeguarding the interests of those who can't care for themselves – is equally implicated regardless of whether the probate court is protecting the interests of an incapacitated or a deceased and heirs.

¶30 Further, although the *Gnann* and *Jadwisiak* courts relied on their own jurisdiction's statutory scheme, the policy they stand for – favoring a strong regulatory role for probate courts – is equally implicated by our own probate law and procedure. Rule 10's requirement that the payment of all estate debts be approved by the probate court is evidence of this policy, as is the language found at 8 CMC section 2926(c), which states: "[i]n establishing reasonable attorney's fees . . . the personal representative and the court shall account for the services rendered during probate . . . ." Further evidence of the probate court's broad mandate is found at 8 CMC section 2202(a), which grants the probate court jurisdiction "[t]o the full extent permitted by the [N.M.I.] Constitution and the Schedule on Transitional Matters . . . over all subject matter relating to estates of decedents . . . ." Section 2202(b) states that the probate court "shall have full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it." Such broad authority is necessary to ensure that the probate court is able to effectuate the "efficient probate of an estate . . . [and] a fair and proper distribution . . . ." Com. R. Pro., Rule 1.

¶31 Since Administrator failed to carry out his duty to seek the probate court's approval before paying the requested attorney fees, the Heirs requested the probate court to disgorge the fees until such time as they had been heard on the matter. The probate court's refusal to permit the heirs to be heard on the reasonableness of the attorneys fees amounts to a denial of the Heirs' due process rights.[7]

[7] "Federal due process guarantees are applicable in the Commonwealth pursuant to Covenant § 501." COVENANT TO ESTABLISH A COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS IN POLITICAL UNION WITH THE UNITED STATES OF AMERICA § 501; *Office of the Attorney General v. Honrado*, 1996 MP 15, ¶15, 5 N.M.I. 8, 10. "Moreover, the protections of Article I, §5 of the Commonwealth Constitution are coextensive with the due process clauses of the U.S. Constitution." *Honrado*, 1996 MP 15 at ¶15, 5 N.M.I. 8, 10.

¶32 One of the most basic requirements of procedural due process is the right to be heard before one is deprived of life, liberty, or property. *See Office of the Attorney General v. Honrado*, 1996 MP 15, 5 N.M.I. 8, 10 at n.5. It is undisputed that the Heirs were not provided a forum in which to voice their concerns with the attorney fees request, either before approval by the civil court or later by the probate court. However, this is only a violation of the Heirs' due process rights if the Heirs meet the requirements necessary for such due process rights to attach. The probate court concluded that the Heirs lacked standing in the civil action to challenge the fee award. As we stated above, the issue of standing before the civil court is irrelevant. We express no opinion on it here. However, standing in the probate matter is a necessary prerequisite to the Heirs enjoying due process rights in the probate proceeding.

¶33 We have defined standing in previous decisions as "a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court." *Falcon v. McCue*, 2005 MP 7 ¶ 34; *Commonwealth v. Anglo*, 1999 MP 6 ¶ 8, 5 N.M.I. 228, 230; *Borja v. Rangamar*, 1 N.M.I. 347, 360 (1990). "The essential element of standing is that a plaintiff personally has suffered either actual injury or threat of injury as a result of defendant's conduct." *Falcon*, 2005 MP 7 ¶ 34. "Moreover, the plaintiff must show that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Id.*

¶34 In the absence of statutory language to the contrary, heirs in law generally have a right to appeal adverse probate court decisions based on their status as aggrieved parties, provided such orders are final or appealable interlocutory orders. *See In re Estate of Kelly*, 547 A.2d 284, 287 (N.H. 1988); *In re Edwards' Estate*, 210 A.2d 17, 21-22 (Me.

1965), *overruled on other grounds in Herzog v. Irace*, 594 A.2d 1106, 1108 (Me. 1991); *Gabel v. Ferodowill*, 95 N.W.2d 101, 108 (Minn. 1959); *Ciglar v. Finkelstone*, 114 A.2d 925, 926-27 (Conn. 1955); *In re Miller's Estate*, 264 N.W. 338, 340 (Mich. 1936); *In re Toomey's Estate*, 31 P.2d 729, 731 (Mont. 1934); *In re Thompson's Will*, 101 S.E. 107, 108 (N.C. 1919).

¶35 In *In re Estate of Tudela*, 3 N.M.I. 316, 318 (1992), we similarly determined that appellants who had been refused heir status by the probate court had standing to appeal that decision. Based on appellants' speculative future pecuniary interest in the estate if the appeal was resolved in their favor – thus deeming them legal heirs – we found that appellants sufficiently demonstrated an "interest that will be affected by the outcome of [the] case." *Id*. at 318, *see also Estate of De Leon Guerro v. Quitugua*, 2000 MP 1 ¶ 1, 6 N.M.I. 67, 68. In the present case, the Heirs' interest in the Estate is not speculative. Their right to take through intestacy had been established, thus vesting their interest in the Estate. A vested interest being stronger than a speculative one, our reasoning in *Tudela* renders the Heirs sufficiently affected by the probate court's abrogation of its duties under our probate code. *See also Del Rosario v. Camacho*, 2001 MP 3 ¶ 4, 6 N.M.I. 213, 219 (finding, but not discussing, jurisdiction pursuant to 8 CMC section 2206 to hear an appeal of a probate order by estate heir acting in his individual capacity).

¶36 The language of our probate code admits of no other outcome.[8] Section 2107 of Title 8 of the Commonwealth Code defines "interested persons" to "include[] heirs,

[8] In denying the motion for the TRO, the probate court indicated that the administrator was the only party representing the Estate and to allow any number of individuals to enter into a case and claim a denial of due process would work chaos. Since the Heirs seek to disgorge the attorney fees granted by the civil court, their petition for a TRO may be deemed to be an action seeking to recover estate property from a third party. We agree this type of action is generally reserved for the estate's administrator, as heirs are usually barred from taking independent action on the estate's behalf. *Rummens v. Guaranty Trust Co.*, 92 P.2d 228, 232 (Wash. 1939); *McQuaide v. Perot*, 119 N.E. 230, 231-32 (N.Y. 1918); *Rine v. Rine*, 135 N.W.

devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against the estate of a decedent which may be affected by the proceeding." Further, section 2206 of Title 8 makes clear that the legislature intended to provide heirs standing to appeal from an order directing or allowing for the payment of a debt or an attorney's fee. The statute makes such orders (or the refusal to make such orders) immediately appealable. Although the Probate Law and Procedure found in Division 2 of Title 8 and the Rules of Probate Procedures do not specifically require a hearing or notice to heirs or interested parties prior to the entry of such an order, it is axiomatic that the heirs or interested parties must be notified of the motion seeking the order and given an opportunity to be heard. The lower court erred in failing to provide such notice and hearing.

V.

¶37 We find that the Heirs have not met their burden under *Tenorio* for a writ of mandamus. However, we address the issues the Heirs present by converting their request for a writ of mandamus into an 8 CMC section 2206 interlocutory appeal. Having done so, we find the probate court erred in failing to conduct an independent review of the attorney fees awarded by the civil court. We further find that the probate court erred in failing to provide notice and hearing to the Heirs regarding the attorney fees award. For

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1051, 1053 (Neb. 1912); *Buchanan v. Buchanan*, 71 A. 745, 746 (N.J. 1909) (tracing this rule back to 1737 in the English case of *Bickley v. Donington*, 2 Eq. Cas. Abr. 253). ¶39 However, this rule is also not without exception. *Owens v. Owens*, 292 N.W. 89, 92 (Minn. 1940) ("As a general rule those beneficially interested may maintain the action only where the conduct of the representative makes it necessary for them to sue for the protection of their interests."); *Rummens v. Guaranty Trust Co.*, 92 P.2d 228, 232 (Wash. 1939); *McQuaide v. Perot*, 119 N.E. 230, 232 (N.Y. 1918); *Rine v. Rine*, 135 N.W. 1051, 1053 (Neb. 1912). More importantly, the Heirs were merely seeking to be provided notice and opportunity to be heard on a motion the Administrator was required by law to bring before the probate court in the first instance.

these reasons we REVERSE and REMAND this matter to the probate court for a hearing on the propriety of the attorney fees which should be awarded in the civil proceeding.

¶38 SO ORDERED this 16th day of February, 2007.

/s/ John A. Manglona
JOHN A. MANGLONA
Associate Justice

/s/ F. Philip Carbullido
F. PHILIP CARBULLIDO
Justice *Pro Tempore*

/s/ Robert J. Torres, Jr.
ROBERT J. TORRES, JR.
Justice *Pro Tempore*