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

IN RE THE ESTATE OF
CHARLES PANGELINAN REYES, SR.,
DECEASED.

SUPREME COURT NO. 2010-SCC-0023-CIV
SUPERIOR COURT NO. 06-0544D

OPINION

Cite as: 2012 MP 13

Decided September 21, 2012

Matthew T. Gregory, Saipan, MP, for Appellant Gerald P. Reyes
Stephen J. Nutting, Saipan, MP, for Appellee Akieva C. Reyes

BEFORE: F. PHILIP CARBULLIDO, Justice Pro Tem; HERBERT D. SOLL, Justice Pro Tem; EDWARD MANIBUSAN, Justice Pro Tem.[1]

CARBULLIDO, J.P.T.:

¶ 1 Appellant Gerald P. Reyes ("Gerald") appeals the probate court's decision granting an easement by implication based on prior existing use to Appellee Akieva C. Reyes ("Akieva") over Gerald's property. On appeal, Gerald argues that: (1) the probate court, sitting in probate, had no jurisdiction to hear Akieva's claim to an easement; (2) determination of the easement issue in probate court, rather than through a full trial, violated Gerald's due process; and (3) the probate court erred in determining that Akieva was entitled to an easement by implication. For the reasons stated herein, we AFFIRM the probate court's decision in its entirety.

I

¶ 2 Decedent Charles P. Reyes, Sr. ("Decedent") died on September 15, 2006, survived by his children, including Gerald and Akieva. During his lifetime, Decedent acquired several properties in Chalan Laulau, Saipan, two of which are the subject of this appeal.

¶ 3 Decedent's father, Juan Ch. Reyes ("Juan"), acquired a large tract of land, originally designated Lot 1970NEW ("Lot 1970"), in Chalan Laulau, Saipan, fronting Beach Road. Decedent's brother, Pete P. Reyes ("Pete") owned Lot H-650, which was situated east of Lot 1970. In 1984, Juan subdivided Lot 1970 as follows: (1) sixteen small lots, designated 1970NEW-1 through 1970NEW-16; (2) one larger parcel designated Lot 1970NEW-R1; and (3) and two easements. The southern easement was designated Lot 1970NEW-R/W2 ("Lot R/W2"). This easement ran east from Beach Road and terminated at Lot 35-8.[2] Juan gifted a portion of the newly subdivided property to his son Pete, which included Lot 1970NEW-15 ("Lot 15"). Pete subdivided Lot H-650 into three smaller parcels designated Lots H-650-1, H-650-R1, and H-650-R2. Pete conveyed Lot H-650-R2 to the Decedent via a warranty deed.

¶ 4 Pete and his father Juan consolidated Lot 15, Lot H-650-1, H-650-R1, and Lot 35-8 and subdivided the combined lot into four different parcels, designated Lot 1970NEW-17-1 ("Lot 17-1" or "Apartment Lot"), Lot 1970NEW-17-2 ("Lot 17-2"), Lot 1970NEW-17-4 ("Lot 17-4"), and Lot 1970NEW-17-R1. At or around the time of Pete's subdivision, Lot H-650-R2 was renamed Lot 1970NEW-17-3 ("Lot 17-3").[3] Pete's subdivision also created an easement, designated Lot 1970NEW-

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[1] Justice Pro Tem Manibusan sat as a panel member at the time the appeal was heard and determined. Prior to the issuance of the Opinion, Justice Pro Tem Manibusan recused himself because he was elected an officer in a political party.

[2] Lot 35-8 sat between the eastern edge of Lot 1970 and Lot H-650. Lot 35-8 was public property until Pete acquired title to it in 1988.

[3] The record is unclear as to how or when Lot H-650-R2 was designated Lot 17-3. DLS Check No. 2116/88 approved on May 24, 1988 does not include lot H-650-2 among the lots consolidated and renamed. Even so, the DLS Check indicates that Lot 17-3 was created through Pete's subdivision since the DLS check stated that the

17-R/W ("Lot 17-R/W"), which formed a contiguous easement with Lot R/W2 to the west, ran east across the northern boundary of Lot 17-4, and terminated at the northwestern corner of Lot 17-3. Anyone living on the newly subdivided properties would have to drive west across Lot 17-R/W and then Lot R/W2 to reach Beach Road. At the time of the 1988 subdivision, all of the newly created lots were unimproved, except for a small concrete dwelling on Lot 17-4 that Pete used as a rental property.

¶ 5 Pete transferred Lots 17-1 and 17-4 to the Decedent in exchange for Decedent's property in Chalan Piao. Decedent later constructed a six-unit apartment complex on Lot 17-1 and a private residence for himself on Lot 17-3. Although Decedent's property had been previously subdivided by Pete, Decedent paid little attention to the subdivision, particularly to the boundary between Lots 17-3 and 17-4. When Decedent constructed his residence on Lot 17-3, he built the carport roughly halfway down the lot and routinely drove across the northwest corner of Lot 17-4 to reach the right of way. Decedent built two other structures on the southern portion of Lot 17-3: a detached restroom encroaching on Lot 17-4 and a small storeroom. The southwestern corner of the residence on Lot 17-3 abuts the eastern edge of Lot 17-4.

¶ 6 In his will, Decedent stated that he intended to build a new residence spanning Lot 17-4 and an adjacent property, Lot 1970NEW-17-5 ("Lot 17-5").[4] If Decedent had constructed a new residence on Lots 17-4 and 17-5 at the time of his death, the will devised the new residence plus Lots 17-4 and 17-5 to Akieva. If, however, there was no new residence by the time of his death, the will devised the existing residence on Lot 17-3 to Akieva. The Decedent died without constructing a new residence on Lots 17-4 and 17-5. In November 2007, pursuant to the executor's request, the probate court made a partial distribution of the Decedent's estate in accordance with the will. Gerald received Lots 17-4 and 17-5. Akieva received Lot 17-3 along with the residence on that lot.

¶ 7 Immediately after the probate court's distribution, Gerald erected a chain-link fence along the outer boundary of Lots 17-4 and 17-5. The fence blocks most of the road leading east into the carport on Lot 17-3. The remaining roadway on Lot 17-3 does not lead directly into the carport. Gerald's fence also comes within inches of the southwestern corner of the residence on Lot 17-3, making it impossible for Akieva to reach the detached restroom or the storeroom situated on the southern portion of the property from the front yard of the house.

¶ 8 Akieva filed a request for a hearing on a motion to establish an easement by implication or prescription. Gerald retained counsel who appeared at the motion hearings and filed an opposition

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subdivision created "Lots 1970NEW-17-1 thru Lot 1970NEW-17-4." Excerpts of Record ("ER") at 136. The map accompanying DLS Check 2166/88 also shows that Lot H-650-R2 was re-designated Lot 17-3 on or before May 24, 1988.

[4] The record does not indicate the origin of Lot 17-5.

memorandum. The probate court held a full hearing on the motion where both Gerald and Akieva were allowed to call witnesses.

¶ 9 With the consent of all involved, the probate court conducted a site visit to the Chalan Laulau properties. After considering several easement proposals submitted by Gerald and Akieva, the probate court issued an order granting an easement by implication for the benefit of Lot 17-3. The probate court determined that Akieva's second alternative proposal, submitted on December 31, 2009, was "fair and reasonably necessary for the continued enjoyment of the family residence." ER at 11. Gerald filed a timely notice of appeal.

II

¶ 10 The Supreme Court has appellate jurisdiction over "orders, final decisions, [and] judgments of probate matters," 8 CMC § 2205, and over all other final judgments and orders of the Superior Court of the Commonwealth, 1 CMC § 3102(a).

III

A. Jurisdiction of Superior Courts Sitting in Probate

¶ 11 Gerald argues that the Superior Court sitting in probate erred in granting an easement because probate courts do not have jurisdiction over property that has already been distributed to the beneficiaries of a probate estate. The probate court held that 8 CMC § 2202(a) ("section 2202"), which gives the probate court jurisdiction "over all subject matter related to decedents[,]" allowed it to decide the easement issue. The probate court's jurisdiction is a question of law involving interpretation of statutory and common law, which is subject to de novo review. *Office of the Att'y Gen. v. Rivera*, 3 NMI 436, 441 (1993).

1. Commonwealth Code

¶ 12 The Commonwealth's probate jurisdictional statute provides:

> (a) To the full extent permitted by the Northern Mariana Islands Constitution and the Schedule on Transitional Matters, the Commonwealth Trial Court shall have jurisdiction over *all subject matter relating to the estates of decedents*, including construction of wills and determination of heirs and successors of decedents.
> (b) The Commonwealth Trial 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.

8 CMC § 2202 (emphasis added). We note that Commonwealth probate law "shall be liberally construed and applied to promote its underlying purposes and policies." 8 CMC § 2104(a). These purposes include: "discover[ing] and mak[ing] effective the intent of a decedent in distribution of his property";

and "promot[ing] a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors . . . ." 8 CMC § 2104(b)(2)-(b)(3).[5]

¶ 13 The determinative issue is whether the term "all subject matter relating to the estates of decedents" in section 2202(a) grants the probate court jurisdiction to adjudicate a land dispute between distributees arising *after* the probate court distributed the assets to the heirs but before the probate case is closed. In examining section 2202, we turn to the basic canon of statutory construction that statutes should be construed according to their plain language. *N. Marianas Coll. v. Civil Serv. Comm'n*, 2007 MP 8 ¶ 9 ("[L]anguage must be given its plain meaning."). By its plain language, section 2202 provides probate courts with broad authority; the only limitation in the subsection is that the subject matter before the court must be "related" to an estate of a decedent. Section 2202 provides two demonstrative examples of subject matter over which the probate court has jurisdiction: (1) "construction of wills;" and (2) "determination of heirs and successors . . . ." 8 CMC § 2202(a). While not encompassed by either statutory example, the present easement dispute is related to the estate of the Decedent since the easement would run over Lot 17-4 and benefit Lot 17-3, which were both part of Decedent's estate prior to their distribution to Gerald and Akieva. Although this connection is somewhat tangential, the broad grant of authority in section 2202, read in conjunction with section 2104, suggests that the probate court had jurisdiction to decide this issue. Because the language of section 2202 is suggestive but not dispositive, we turn to an analysis of Commonwealth case law.

2. Commonwealth Case Law

¶ 14 Many of our prior opinions recognize the breadth of the probate courts' jurisdiction, but involved heirship determinations. *In re Estate of Rofag*, 2 NMI 18, 24 (1991); *In re Estate of DeLeon Guerrero*, 3 NMI 253, 260-263 (1992); *In re Estate of Tudela*, 4 NMI 1, 4-5 (1993). Since heirship determination is one of the two types of subject matter specifically identified in section 2202, these cases are not dispositive as to the question before us.

¶ 15 More useful to the present question are the related cases of *Malite v. Superior Court*, 2007 MP 3, and *In re Estate of Malite*, 2010 MP 20. In the first *Malite* opinion, the Court held that the probate court's

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[5] 8 CMC § 2104 reads:

(a) This law shall be liberally construed and applied to promote its underlying purposes and policies.
(b) The underlying purposes and policies of this law are:
  (1) To simplify and clarify the law and custom concerning the affairs of decedents and missing persons
  (2) To discover and make effective the intent of a decedent in distribution of his property.
  (3) To promote a speedy and efficient system for liquidating the estate of the decedent and making a distribution to his successors; and
  (4) To realize the compelling interest of the Northern Marianas Islands in preserving the historic traditions and culture of its citizens of Northern Marianas descent.

refusal to hear a challenge to the amount of attorney fees awarded to estate attorneys amounted to a denial of due process. *Malite*, 2007 MP 3 ¶¶ 30-31. On remand, the probate court disgorged the attorney fees it had previously awarded until "a proper and thorough review and accounting can be performed . . . ." *In re Estate of Malite*, 2010 MP 20 ¶ 10 n.7. After the probate court refused to grant the attorneys any attorney fees, the attorneys appealed and argued that the probate court did not have authority to disgorge the attorney fees because the disgorgement was beyond the scope of the Court's mandate in the 2007 *Malite* opinion. *Id.* ¶ 1. The Court, in rejecting the attorneys' argument, recognized the "broad powers afforded to the probate court[,]" and held that the probate court had the authority to disgorge the attorney fees. *Id.* ¶¶ 35-37.

¶ 16 While not directly on point, the Court's recognition in *In re Estate of Malite* that probate courts have authority to disgorge attorney fees awarded to an estate's attorneys is instructive as to the breadth of the jurisdiction of the probate court. Unlike the Court's previous cases that addressed powers specifically delineated in section 2202 (i.e., heirship determinations), disgorgement of attorney fees is not explicitly identified as a type of subject matter within the jurisdiction of the probate court. Instead, the probate court's jurisdiction over this subject matter was implied by the broad grant of jurisdiction in the "all subject matter related to estates of decedents" clause of section 2202(a), as well as its authority from section 2202(b) to "take all other action necessary and proper to administer justice in the matters which come before it." *Malite* is, thus, instructive as a case where this Court determined that the jurisdiction of the probate court extends beyond the two types of subject matter explicitly listed in section 2202.

3. Probate Court Jurisdiction in Other States with Similar Jurisdictional Statutes

¶ 17 As noted in the Law Revision Commission comment to 8 CMC § 2101, the Legislature modeled the Commonwealth's probate code after the Uniform Probate Code ("UPC"), which the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved in 1969. 8 CMC § 2101 Law Revision Comm'n cmt. Section 2202 is virtually identical to section 1-302 of the UPC, which provides, in relevant part:

> (a) To the full extent permitted by the constitution, the Court has jurisdiction over all subject matter relating to (1) estates of decedents, including construction of wills and determination of heirs and successors of decedents . . . .
> (b) The Court has 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.

UPC § 1-302 (2008). A number of other United States jurisdictions have adopted some or all of the UPC. While this Court is not bound by the decisions of these other jurisdictions, it is useful to look to their interpretation of similar code provisions for guidance. *See In re Estate of Tudela*, 2009 MP 9 ¶¶ 8, 18 ("Because the Commonwealth's probate statute is largely based on the UPC, in the absence of expressed legislative intent to the contrary, the UPC reasoning should be given effect."); *see also Commonwealth v.*

Martinez, 4 NMI 18, 20 (1993) (seeking guidance from the Federal Rules of Appellate Procedure in interpreting analogous provision of the Commonwealth Rules of Appellate Procedure).

¶ 18 Cases in UPC jurisdictions that have analyzed UPC section 1-302 generally state that probate courts have broad jurisdiction regarding matters related to the estates of decedents. *Kopperud v. Reilly*, 453 N.W.2d 598, 600 (N.D. 1990) ("[A] probate court has jurisdiction to exercise all incidental powers necessary for the effective adjudication of those matters within its exclusive original jurisdiction." (internal quotation marks omitted)); *In re Estate of Fields*, 219 P.3d 995, 1006 (Alaska 2009) ("[W]hen exercising probate jurisdiction a superior court 'should continue to exercise its jurisdiction' to resolve 'questions ancillary' to the probate proceedings." (quoting *Briggs v. Estate of Briggs*, 500 P.2d 550, 554 (Alaska 1972)); *In re Estate of McLaughlin*, 754 P.2d 679, 683 (Utah Ct. App. 1988) ("The probate court has the powers granted by statute or reasonably implied from the statutory grant or reasonably necessary to effectuate the powers which are given."). Indeed, the Arizona Supreme Court has stated that the "Superior Court sitting in probate [has] its *full constitutional jurisdiction* in matters which might arise affecting estates." *Gonzalez v. Superior Court*, 570 P.2d 1077, 1079 (Ariz. 1977) (emphasis added).

¶ 19 Examples of somewhat tangential issues related to estates of decedents over which probate courts have exercised jurisdiction in other UPC states include: (1) rescission of a contract for the sale of estate property because the conservator of the estate wrongfully sold the property for less than market value, *Kopperud*, 453 N.W.2d at 600-01; (2) liquidation of an estate-owned business, *In re Estate of Harrington*, 5 P.3d 1070, 1072 (N.M. Ct. App. 2000); (3) consideration of a waste claim related to property distributed during probate, *Judy v. Judy*, 712 S.E.2d 408, 413 (S.C. 2011); and (4) determination of a claim of wrongful interference with a life estate created by a will, *In re Estate of Hodgkins*, 2002 ME 154, ¶ 14, 807 A.2d 626, 630 (Me. 2002). The last example merits greater attention as it shares similarities with the case at bar.

¶ 20 In *Hodgkins*, the decedent's will left his house to his partner for "as long as she wishes." 2002 ME 154 ¶ 2 (emphasis omitted). Thereafter, the decedent's brother performed various annoying actions that "ultimately made it intolerable for [the decedent's partner] to live in the house." *Id.* ¶ 3. In response to these actions, the decedent's partner filed a complaint in probate court to determine her property interest in the house and sought damages for what she alleged was a tortious interference with her life estate in the house. *Id.* ¶ 4. After the probate court found that the language in the will established a life estate for the benefit of the decedent's partner and that the decedent's brother had tortiously interfered with this life estate, the decedent's brother appealed. *Id.* ¶¶ 5-6.

¶ 21 On appeal, the decedent's brother claimed that the probate court lacked jurisdiction to hear the tortious interference claim because only the determination of the life estate was a matter relating to the settlement of the decedent's estate. He argued that once the probate court awarded the life estate, the

court should not have retained jurisdiction to decide the remaining tort claim. *Id.* ¶ 13. The Supreme Judicial Court of Maine rejected the brother's argument and held that the probate court had jurisdiction to decide the tort claim. *Id.* ¶ 14. The court first noted the breadth of the Maine probate court's jurisdictional statute, which gives the probate court jurisdiction over "all matters *relating to* the settlement of such [probate] estates . . . ." *Id.* ¶ 12 (emphasis added). In holding that the probate court's exercise of jurisdiction was proper, the court reasoned that because the tortious interference claim was dependent on the probate court's determination that the will granted the decedent's partner a life estate, the tort claim was "related to the settlement" of the decedent's estate. *Id.* ¶ 14.

¶ 22 With these persuasive authorities in mind, we turn now to the probate court's exercise of jurisdiction over Akieva's easement claim. Like the tortious interference claim from *Hodgkins*, Akieva's claim for an easement by implication was dependent on the probate court's interpretation of Decedent's will and distribution of Lot 17-3. Without the probate court's distribution of Lot 17-3 to Akieva pursuant to Decedent's will, Akieva would not have owned the dominant tenement for the easement that she claims over Lot 17-4. Because of the breadth of section 2202, the recognition of this breadth in our former opinions, and the interpretation of similar jurisdictional statutes by other UPC jurisdictions, we hold that Akieva's easement claim is "subject matter related to" Decedent's estate and that the probate court therefore properly exercised jurisdiction over the claim.[6]

B. Gerald's Due Process Claim

¶ 23 Gerald contends that he was denied procedural due process under the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment due process protections are made applicable in the Commonwealth through article I, section 5 of the Commonwealth Constitution and section 501(a) of the Covenant.[7] The Fourteenth Amendment requires that individuals be given notice and an opportunity to be heard prior to deprivation of life, liberty, or property. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

¶ 24 Though Gerald alleged that he was denied due process because he was not afforded discovery or a trial, several undisputed facts show that the probate court provided Gerald with ample notice and

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[6] While we hold that the probate court properly exercised jurisdiction in this case, the jurisdiction of the probate courts is not unbounded. We have previously upheld a probate court decision that section 2202 does not give the probate courts jurisdiction over challenges to the ownership of probate property when the party asserting the claim was not an heir of the probate estate. *Estate of Guerrero v. Quitugua*, 2000 MP 1 ¶ 18; *see also Zahnen v. Limtiaco*, 2008 Guam 5 ¶ 19 (holding that res judicata did not bar a quiet title action regarding estate property after final distribution brought by a party not in privity with the estate because "the probate court has no jurisdiction to determine adverse claims to the properties of an estate . . . when asserted by a stranger to said estate" (internal quotation marks and citation omitted)).

[7] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. 48 U.S.C. § 1801 note; *J.G. Sablan Rock Quarry, Inc. v. Department of Public Lands*, 2012 MP 2 ¶ 3 n.6; Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 20 (1976).

abundant opportunities to be heard before the court granted an easement to Akieva. Akieva brought her first formal motion for determination of an easement by implication in August 2009. In early October, the probate court granted the motion, set a briefing schedule on the issue, and scheduled a hearing for late October. ER at 159. Akieva then filed a memorandum of law in support of her request. ER at 120-128. The court continued the initial hearing to ensure that Gerald received proper notice of the action. ER at 76. Thereafter, Gerald received proper service of all documents related to Akieva's motion and then filed a memorandum in opposition to Akieva's motion. ER at 77, 17-23. The court held a full hearing on the matter where Gerald appeared and was represented by counsel. ER at 4. The probate judge, with the consent of the parties and their attorneys, conducted an inspection of the site of the proposed easement. ER at 7 n.1. After the site inspection, and at the request of the court, Akieva filed an alternative proposal to establish an easement. ER at 10. Gerald filed his own alternative proposal in response to Akieva's proposal. *Id.* Finally, on May 25, 2010, the probate court granted Akieva's request for easement. Based on these undisputed facts, we hold that Gerald received adequate notice of Akieva's petition for an easement and had adequate opportunity to be heard before the probate court ruled against him.

C. Easement Implied from Prior Existing Use

¶ 25 Gerald challenges the probate court's decision awarding an easement to Akieva. Determination of the existence of an easement "is a question of law, but whether the facts necessary to the existence of the right have been proved is a question of fact." *Lizama v. Dep't of Pub. Works*, 2005 Guam 12 ¶ 12 (quoting *State Highway Comm'n v. Deal*, 233 P.2d 242, 251 (Or. 1951)). Mixed questions of law and fact are subject to de novo review on appeal. *Ito v. Macro Energy, Inc.*, 4 NMI 46, 54 (1993). While mixed questions of law and fact are reviewed de novo, we will not overturn the lower court's findings of fact unless we have a "definite and firm conviction" that the lower court's findings were clearly erroneous. *Rogolofoi v. Guerrero*, 2 NMI 468, 476 (1992).

¶ 26 Where a party seeks to obtain an easement by implication over a property where a means of access to the party's property exists but is claimed to be inadequate, courts in the United States follow two standards to determine whether to grant the easement. Michael A. DiSabatino, Annotation, *Way of necessity over another's land, where a means of access does exist, but is claimed to be inadequate, inconvenient, difficult, or costly*, 10 A.L.R.4th 447 § 2a (1981). Some jurisdictions follow a rule of strict necessity, requiring that the party seeking the easement show that there is a strict or absolute necessity for the easement. *See, e.g. Horowitz v. Noble*, 144 Cal. Rptr. 710, 718 (Cal. Ct. App. 1978) ("[A] right-of-way from necessity cannot exist in the absence of strict necessity.") Other jurisdictions are more lenient and will grant an easement upon a showing that the easement is reasonably necessary. *Anderson v. Lee*, 182 N.W. 380, 381 (Iowa 1921) (holding that right of owner to obtain "way to and from his premises implies the right to have a way which is reasonably sufficient for that purpose"). Since Commonwealth

law does not address this issue, we turn to "the rules of the common law, as expressed in the restatements of the law . . . ." 7 CMC § 3401; *Fusco v. Matsumoto*, 2011 MP 17 ¶ 45 (applying a rule from the Restatement (Second) of Torts in the absence of controlling precedent).

¶ 27 The Restatement (Third) of Property: Servitudes describes four categories of implied servitudes[8]: (1) servitudes implied by prior existing use; (2) servitudes implied from map or boundary references; (3) servitudes implied from a general plan; and (4) servitudes implied by necessity. Restatement (Third) of Prop.: Servitudes (2000) §§ 2.12-2.15. Akieva's claim is based on Decedent's prior use of Lot 17-4 to access Lot 17-3. As such, she claims an easement by implication based on this prior existing use. In order to establish an easement implied by prior existing use, the Restatement provides:

> Unless a contrary intent is expressed or implied, the circumstance that prior to a conveyance severing the ownership of land into two or more parts, a use was made of one part for the benefit of another, implies that a servitude was created to continue the prior use if, at the time of the severance, the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use.
>
> The following factors tend to establish that the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use:
>
> (1) the prior use was not merely temporary or casual; and
> (2) continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use, and
> (3) existence of the prior use was apparent or known to the parties, or
> (4) the prior use was for underground utilities serving either parcel.

Restatement (Third) of Prop.: Servitudes § 2.12 (2000).

¶ 28 Gerald advances two arguments in support of his contention that the probate court erred when it granted Akieva an easement by implication. First, Gerald argues that the Decedent expressed an intent not to grant an easement to Akieva because the Decedent and his predecessors in interest provided access to Lot 17-3 via Lot R/W2 and Lot 17-R/W during the Decedent's lifetime. Gerald Opening Br. at 7. Next, Gerald argues that the easement sought by Akieva is solely for her convenience and that the facts adduced by the probate court did not show that an easement by implication was "reasonably necessary" to Akieva's use and enjoyment of Lot 17-3. *Id.* at 10.

1. The Probate Court's Holding that Decedent had No Contrary Intent

¶ 29 Gerald argues that the Decedent showed clear intent not to create an easement by implication because there were already two easements, designated Lot R/W2 and Lot 17-R/W, serving Lot 17-3. Gerald asserts that "[w]e are not in a situation where the Decedent died without thinking about and planning for access to each of the subdivided lots in question." Gerald Opening Br. at 8. The

[8] "A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land." Restatement (Third) of Prop.: Servitudes § 1.1(1) (2000). For purposes of the Restatement (Third) of Property: Servitudes, an easement is a type of servitude. *Id.* at 1.1(2).

Restatement provides that a precondition to an easement implied from prior use is that the grantor cannot express or imply intent not to create an easement. Restatement (Third) Prop.: Servitudes § 2.12 (2000). The record rebuts Gerald's assertion that the Decedent exhibited any intent not to create an implied easement over Lot 17-3. Juan Ch. Reyes, the Decedent's father, created the easement on Lot R/W2 and Pete P. Reyes, the Decedent's brother, created the easement on Lot 17-R/W. In other words, the creation of Lot R/W2 and Lot 17-R/W had nothing to do with the Decedent. The Decedent's intent cannot be inferred from actions he did not take.

¶ 30 Gerald additionally argues that the Decedent lacked intent to create an easement by implication because he attempted to dedicate Lot R/W2 for public use. Gerald points to a "Dedication of Easement" signed by the Decedent and several of the Decedent's family members, which transferred Lot R/W2 to the Commonwealth government in perpetuity in exchange for maintenance and improvements to the easement. In response, Akieva presented a declaration by Akieva's mother, Maria Candado ("Maria"), stating that the Decedent signed the Dedication of Easement because he thought he could get the Commonwealth government to pay for the improvements to the existing roadway on Lot R/W2. Maria additionally stated that once it became clear that the Commonwealth government was not going to improve Lot R/W2, the Decedent acted to rescind the Dedication of Easement in 2006. Maria's declaration is supported by other evidence in the record, including a memorandum to the Attorney General's office stating that the Decedent wished to revoke the Dedication of Easement. These facts, in addition to those surrounding the creation of Lot R/W2 and Lot 17-R/W, support the probate court's implicit finding that the Decedent did not manifest any intent that was inconsistent with creation of an easement over part of Lot 17-4. Thus, we hold that the probate court's finding that Decedent had no intent contrary to the establishment of an easement was not clearly erroneous.

2. Whether an Implied Easement is Reasonably Necessary for Akieva's Use and Enjoyment of Lot 17-3

¶ 31 Gerald challenges the probate court's finding that an easement over Lot 17-4 was reasonably necessary for Akieva's use and enjoyment of Lot 17-3. As stated above, one factor in determining whether there were reasonable grounds to expect that a prior use would continue following a conveyance is whether "continuance of the prior use was reasonably necessary to enjoyment of the parcel, estate, or interest previously benefited by the use . . . ." Restatement (Third) of Prop.: Servitudes § 2.12 (2000). Gerald urges the Court to construe the phrase "reasonably necessary" to mean that "the right or privilege must be necessary or essential to the proper enjoyment of the estate granted." Appellant's Opening Br. at 10 (quoting *Jarvis v. Seele Milling Co.*, 50 N.E. 1044, 1045 (Ill. 1898)). Such construction would essentially mean adoption of a "strict necessity" standard for determination of easements implied by prior existing use.

¶ 32 In support of his argument urging this Court to conflate the "reasonably necessary" standard with the "strict necessity" standard, Gerald points to a footnote in *Sonoda v. Villagomez*, 4 NMI 34 (1993), where this Court stated that "[e]asement by 'necessity' as used here is synonymous with easement by 'implication'; the terms are interchangeable." *Id.* at 37 n.6. Gerald's reliance on this vague footnote is misplaced because the easement at issue in *Sonoda* was implied based on prior existing use rather than strict necessity and this Court affirmed the probate court's establishment of the easement based on a standard similar to that of Restatement (Third) of Property: Servitudes section 2.12 (2000). *See id.* at 37 n.5 (affirming probate court's finding of an easement by implication when two properties were originally owned by a single person who subsequently conveyed an interest in the servient tenement to another but continued using a road over that tenement). We decline the opportunity to conflate the strict necessity and reasonable necessity standards because such a construction would lead to unnecessary confusion.

¶ 33 What constitutes a "reasonably necessary" use does not have a precise definition; "strict necessity need not be proven, . . . [but] mere inconvenience is not enough." *Nichols v. City of Evansdale*, 687 N.W.2d 562, 570 (Iowa 2004) (quoting *Schwob v. Green*, 215 N.W. 240, 244 (Iowa 1974)). One court attempted to explain the "reasonably necessary" requirement as follows:

> physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same extent which his grantor had used it, because such use was reasonably necessary to the fair, full, convenient and comfortable enjoyment of his property.

Smith v. Moore, 118 S.E.2d 436, 438-39 (N.C. 1961) (internal quotation marks and citations omitted).

¶ 34 Gerald argues that photographs showing cars parked in each parking space in the carport on Lot 17-3 show that an easement over Lot 17-4 is not reasonably necessary for Akieva's use and enjoyment of Lot 17-3. The probate court found that Gerald's chain-link fence now encloses a substantial portion of the roadway originally used by occupants on Lot 17-3. As a result, cars entering Lot 17-3 must make a sharp ninety-degree turn from the roadway and then carefully maneuver into the carport. Further, the probate court found that cars exiting Lot 17-3 required use of another adjacent lot (Lot 17-2) in order to exit the carport. Maria Candado, a resident on Lot 17-3, noted in her declaration that if the owner of Lot 17-2 ever closed off access to Lot 17-2, cars would be unable to use the carport on Lot 17-3. Gerald does not dispute these facts. Moreover, the probate court, with the consent of all involved, viewed Lots 17-3 and 17-4 before making any factual determinations. Based on the foregoing, we hold that the probate court's decision, which found that an easement over Lot 17-4 was reasonably necessary to Akieva's use and enjoyment of Lot 17-3, was not clearly erroneous.

IV

¶ 35 For the foregoing reasons, we AFFIRM the probate court's holdings that: (1) the probate court had jurisdiction over Akieva's easement claim; (2) Gerald's due process rights were satisfied; and (3) Akieva was entitled to an easement based on prior existing use over Lot 17-4 for the benefit of Lot 17-3.

SO ORDERED this 21st day of September, 2012.

/s/
F. PHILIP CARBULLIDO
Justice Pro Tem

/s/
HERBERT D. SOLL
Justice Pro Tem