Every month I summarize the most important probate cases in Michigan. Now I publish my summaries as a service to colleagues and friends. I hope you find these summaries useful and I am always interested in hearing thoughts and opinions on these cases.

PROBATE LAW CASE SUMMARY

BY: Alan A. May

Alan May is a shareholder who is sought after for his experience in guardianships, conservatorships, trusts, wills, forensic probate issues and probate. He has written, published and lectured extensively on these topics.

He was selected for inclusion in the 2007 through 2010 issues of *Michigan Super Lawyers* magazine featuring the top 5% of attorneys in Michigan and is listed in the 2011 compilation of *The Best Lawyers in America*. He has been called by courts as an expert witness on issues of fees and by both plaintiffs and defendants as an expert witness in the area of probate and trust law. He is listed by Martindale-Hubbell in the area of Probate Law among its Preeminent Lawyers.

He is a member of the Society of American Baseball Research (SABR).

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DT: June 30, 2011

RE: Conservatorship for KATHRYN M. TOWNSEND
STATE OF MICHIGAN COURT OF APPEALS

REVIEW OF CASE:

Reference Files: Grounds for Conservatorship
Meaning of Words "Such As"

MAJOR LEAGUE STATS:

With the injury of Albert Pujols I thought I would look into the number of injured players as of a date certain and see what position the teams were in the league. I looked to see if there was a macro correlation, between individual injury and team performance.

The following is a list of all the 30 teams, their winning average and there number of injured players there were.

My conclusion is that there is no relationship. If we look at .500 as a mean, the better teams actually have a higher injury ratio than the lower teams. I am most taken by the fact that the Yankees have the third best record and have, clear and above, the most number of injured players. I think we would have to look at situations on an ad hoc basis to determine the bench strength of teams, as well as the quality of the players injured before we made any meaningful determination.

Team	**Average**	**Number of Injured Players**
Phil Phillies	.618	4
Boston Red Sox	.595	8
New York Yankees	.589	12
Atlanta Braves	.566	4
Arizona Diamondbacks	.553	3
Cleveland Indians	.548	3
San Francisco Giants	.547	6
Tampa Bay Rays	.547	0
Milwaukee Brewers	.539	4
St. Louis Cardinals	.539	8
Detroit Tigers	.533	4
Texas Rangers	.526	8
Cincinnati Reds	.513	4
Washington Nationals	.507	8
Pittsburg Pirates	.500	9
Colorado Rockies	.500	4
New York Mets	.493	5
Seattle Mariners	.463	3
Chicago White Sox	.487	1
Los Angeles Angels	.487	4
Toronto Blue Jays	.480	4
Baltimore Orioles	.458	4
Los Angeles Dodgers	.447	5
Oakland As	.447	6
Florida Marlins	.440	6
Minnesota Twins	.438	6
San Diego Padres	.421	5
Kansas City Royals	.413	4
Chicago Cubs	.405	5
Houston Astros	.368	4

LAW CASE SUMMARY:

Appellee sought conservatorship for Appellant. Appellee alleged that because Appellant was giving away all her money, she was a "vulnerable adult." All agreed that none of the delineated grounds for the establishment of conservatorship were present in the instant case. Appellee

focused upon the language of EPIC, which allowed the appointment of a conservator of the one incapable of handling their affairs "for reasons such as…" The Lower Court ruled that the Appellant was a vulnerable adult because of her inability to say "no." The court granted conservatorship.

In a well reasoned and published Decision, which this reviewer believes to be necessary, the Court of Appeals reversed. This is the first published Appellant Decision regarding words "such as" in the Grounds section for the appointment of conservator that I can recall. The relevant section of EPIC says:

> "MCL 700.5401, which provides in pertinent part:
>
> (1) Upon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section.
>
> ***
>
> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
>
> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money."

The court then develops a logical construct.

In defining "such as" the Court of Appeals cites a Michigan Supreme Court case, *Manuel v Gill*, 481 Mich 637, 650 (2008) to the effect that words grouped in a list should be given related meaning. (This would be premise A of the logical construct.) They call this a well established rule of statutory construction. The Court of Appeals then applies the rule to declare that the factor, which inhibits the management of the affairs, must be of "a similar nature and quality to the A conditions." (This would be logical premise B.) Therefore, "for reasons such as" equals reasons of a substantially similar phenomenon, listed in 1 through 8 of MCL 700.5401(3)(a).

The Court of Appeals then concludes that a vulnerable adult is substantially similar, but because the statutory definition of a vulnerable adult includes three factors which are ***in*** the delineated phenomenon 1 through 8, e.g. "mental or physical impairment, or because of advanced age" which, of course, were not established in the Lower Court there should be reversal.

By creating the logical construct, the court need not deal with the issue of lay testimony versus medical to one's handling of one's affairs.

This reviewer is old enough to have practiced under the 1939 probate code. Between 1939 and 1979 "spendthrift" was a delineated ground. In 1979 the spendthrift provision was struck. This reviewer tried to get the 1979 code amended to put it back in and failed. He was told that the "such as provision" governed that status. This case shows that I was led astray that time.

So what do you do with spendthrift? Under the law as it now stands you need treat it as a sequelae of the listed grounds and not a ground by itself. For instance, does the symptom of uninhibited spending emanate from a mental illness?

Two years ago I was able to prevail on a summary disposition when a petitioner argued that undue influence fell under the meaning "such as." I argued what is now the basis of *Townsend* successfully. This Decision supports the previous decision that I encountered and I definitely do not believe that the mere pleading of undue influence is by itself a ground for conservatorship.

AAM:jv:doc 691956v2
Attachment

STATE OF MICHIGAN

COURT OF APPEALS

In re Conservatorship for KATHRYN M. TOWNSEND.

LARRY D. TOWNSEND and DEAN JENSEN, Conservator,

Appellees,

v

KATHRYN M. TOWNSEND, a Protected Person,

Appellant.

FOR PUBLICATION
June 23, 2011
9:05 a.m.

No. 296358
Montcalm Probate Court
LC No. 2009-030504-CA

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Appellant Kathryn Townsend (Townsend) appeals as of right the probate court's order appointing a conservator over her estate. At issue in this case is whether a conservator may be appointed for a reason not listed in MCL 700.5401, specifically whether a conservator may be appointed for a "vulnerable adult," and, if so, whether the evidence supported the probate court's finding that Townsend is a vulnerable adult. We conclude that a probate court may appoint a conservator for a vulnerable adult, but that under a proper definition of vulnerable adult, the facts do not support the probate court's finding that Townsend is a vulnerable adult. Accordingly, we reverse.

In October 2009, Townsend's son, appellee Larry Townsend (appellee), petitioned the probate court for the appointment of a conservator for Townsend's estate. In his petition, appellee asserted that Townsend suffered from a diminished mental capacity and that without proper management her property will be wasted or dissipated. Appellee alleged that after the death of Townsend's husband in 2003 and the sale of real property, Townsend had assets totaling between $700,000 and $750,000, but that the subsequent "gratuitous spending" of Townsend's money by some of his siblings, Townsend's excessive debt accumulation, and the downturn in mutual fund share prices had left Townsend with less than $200,000. Appellee further alleged that he was concerned that the "considerable drain" on Townsend's finances would leave Townsend destitute.

At the hearing on the petition, Townsend admitted that she financially helped her children and grandchildren. When she loaned them money, she did not charge interest and allowed them to repay the loan as they were able, and she often accepted work in exchange for repayment of money. The testimony established that Townsend had provided financial assistance for the purchase of vehicles, wedding dresses, gas and tires, groceries, and trips, as well as in the payment of mortgage payments, property taxes, education expenses, attorney fees, and medical and dental fees. Townsend also acknowledged that she had accumulated a large amount of credit card debt and that she had been late on bill payments.

Townsend's personal physician, Dr. Danielsky, testified that Townsend scored "a perfect" 30 out of 30 on a mini mental status examination. According to Danielsky, Townsend's score meant that "she's not demented and that she's a normal human being as far as her thought goes." He believed that Townsend's mental capabilities were above average. Danielsky had no doubt that Townsend was able to manage her property and business affairs.

At the conclusion of the hearing, the probate court first addressed the "easier issue," whether Townsend had property that would be wasted or dissipated unless proper management was provided. According to the probate court, the answer was "clearly yes." It explained that Townsend only had $59,000, as she had burned through $440,000 in the past six years.[1] The probate court then addressed the "hard question," whether Townsend was in need of a conservator. Referring to the statutory criteria for appointment of a conservator, MCL 700.5401(3)(a), it noted that Townsend had not disappeared and was not confined or detained by a foreign power. It further noted that there was no evidence that Townsend suffered from a mental illness or deficiency, a physical illness or disability, or a chronic use of drugs or alcohol. Nonetheless, it held that the phrase "such as" in MCL 700.5401(3)(a) did not limit the reasons for the appointment of a conservator to those listed in the statute. The probate court then proceeded to hold that Townsend was a "vulnerable adult" because Townsend could not manage her own financial affairs; it was concerned with Townsend's inability to say "no." It explained that Townsend "will give money to any child who asks for it whether it is in her best interests or not."[2] Consequently, the probate court granted appellee's petition to appoint a conservator. This appeal ensued.

On appeal, Townsend argues that while the appointment of a conservator for a vulnerable adult may be appropriate in certain circumstances, the probate court erred in appointing a conservator for her on the basis that she was a vulnerable adult. We agree.

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[1] At the hearing, Townsend testified that after the death of her husband she had approximately $400,000 to $500,000. The probate court stated that at a minimum and by Townsend's own admission, Townsend had spent $440,000 in six years.

[2] The record shows that the parties themselves did not raise the issue whether a conservator may be appointed for a reason not listed in MCL 700.5401(3)(a), nor did appellee argue that Townsend was a vulnerable adult.

We review a probate court's factual findings under the clearly erroneous standard. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.* We review de novo issues of statutory interpretation. *Apsey v Mem Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007).

Resolution of the issue requires us to interpret MCL 700.5401, which provides in pertinent part:

> (1) Upon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section.
>
> * * *
>
> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:
>
> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.

The goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *Tevis v Amex Assurance Co*, 283 Mich App 76, 81; 770 NW2d 16 (2009). If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning clearly expressed, and a court must enforce the statute as written. *Ameritech Publishing, Inc v Dep't of Treasury*, 281 Mich App 132, 136; 761 NW2d 470 (2008). Words and phrases in a statute shall be construed and understood according to the common and approved usage of the language. *Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 600; ___ NW2d ___ (2010), quoting MCL 8.3a.

Pursuant to MCL 700.5401(3)(a), a court may appoint a conservator if "[t]he individual is unable to manage property and business affairs effectively." The statute further requires that the petitioning party establish that the individual's inability to manage his or her property and business affairs effectively is caused by a condition that the individual exhibits. In this regard, MCL 700.5401(3)(a) specifically identifies eight conditions that may affect an individual's ability to manage his or her property and business affairs effectively: "mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance."

However, as noted by the probate court, the phrase "for reasons such as" precedes the listing of these eight conditions. The phrase "for reasons such as" appears in only two statutes, MCL 700.5401(3)(a) and MCL 722.5401(1), and has never been construed by this Court. Applying the common usage and understanding of the phrase, *Henry Ford Health Sys*, 288 Mich App at 600, we hold that the phrase "for reasons such as" is one of enlargement, rather than limitation. In other words, the use of the phrase "for reasons such as" in MCL 700.5401(3)(a) does not limit the appointment of conservators to individuals who have disappeared, been detained by a foreign power or confined, or suffer from mental illness or deficiency, a physical illness or disability, or chronic use of drugs or alcohol. Consequently, in light of the statutory language, we agree with the probate court that the appointment of a conservator for an individual may be appropriate even if the individual does not suffer from one of the conditions listed in MCL 700.5401(3)(a).

But not any condition suffered by an individual will justify the appointment of a conservator. "It is a familiar principle of statutory construction that words grouped in a list should be given related meaning." *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008) (quotations marks and citations omitted). Based on this well-established rule of statutory construction, we also hold that any circumstance, which is not listed in MCL 700.5401(3)(a), that prohibits an individual from effectively managing his or her property and business affairs must be of a similar nature and quality to the eight conditions listed in the statute to justify the appointment of a conservator.

Here, the probate court found that, although there was no evidence to suggest that Townsend suffered from any of the eight conditions listed in MCL 700.5401(3)(a), Townsend was unable to manage her property and business affairs because she was a "vulnerable adult." It concluded that Townsend was a vulnerable adult because of her inability to say no, she would give money to any child who asked for it regardless of her best interests. Having construed MCL 700.5401 to allow additional conditions, the question before us in this case is whether Townsend's condition of being a vulnerable adult, as found by the probate court, is a condition of a similar nature or quality to the eight conditions listed in MCL 700.5401(3)(a).

Having conceded that MCL 700.5401's list of conditions can be enlarged to include similar conditions, Townsend argues that when considered under a proper definition, the probate court erred in finding that she is a vulnerable adult. In making this argument, she urges us to adopt the definition of vulnerable adult found in the Social Welfare Act (SWA), MCL 400.1 *et seq.*, and claims that under the SWA definition, she is not a vulnerable adult because the evidence did not establish that she has a mental, physical, or age-related condition that causes her to be unable to manage her property and business affairs effectively.[3]

[3] At oral argument, appellee urged us to adopt a dictionary definition of "vulnerable" and argued that the facts supported the probate court's decision if such a definition was controlling. *Random House Webster's College Dictionary* (1992) defines vulnerable, in part, as "capable of or susceptible to being wounded . . . ." Even if we assume that Townsend was vulnerable under this definition, we conclude that the definition does not provide a proper basis for the appointment of

The SWA uses the term "vulnerable adult"[4] and it defines those words. "Vulnerable" is defined as "a condition in which an adult is unable to protect himself or herself from abuse, neglect, or exploitation because of a mental or physical impairment or because of advanced age." MCL 400.11(f). "Adult" is defined as "a vulnerable person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited." MCL 400.11(b). And exploitation is defined as "an action that involves the misuse of an adult's funds, property, or personal dignity by another person." MCL 400.11(c). We conclude that the condition of being a vulnerable adult under the SWA is a condition that is of a similar nature and quality to those listed in MCL 700.5401(3)(a). In particular, to establish vulnerability under the SWA, the individual must have a mental, physical, or advanced age-related impairment. These components of vulnerability are sufficiently similar to the mental and physical conditions listed in MCL 700.5401(3)(a) to allow the SWA definition of vulnerable adult to be categorized as being of a similar nature or quality. Consequently, we will use the SWA definition to determine whether the probate court properly found that Townsend was a vulnerable adult in need of a conservator.

Appellee argues that under the SWA definition Townsend was a vulnerable adult because, as found by the probate court, other family members exploited her inability to say no. But even assuming that the evidence supported a finding of exploitation, the evidence does not show that Townsend was vulnerable because, as found by the probate court, she did not have a mental or physical impairment and there was no evidence from which to conclude that her inability to say no was related to her age. Consequently, for the same reasons the probate court did not find grounds for appointment of a conservator under the conditions listed in MCL 700.5401(3), there are no grounds to find that Townsend is a "vulnerable adult" as defined by the SWA.[5] Accordingly, we reverse the probate court's order appointing a conservator over Townsend's estate.

Reversed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

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a conservator because it does not require a condition that is of a similar nature or quality to the conditions listed in MCL 700.5401(3)(a).

[4] The SWA permits a county family independence agency to petition for the appointment of a conservator for a vulnerable adult. MCL 400.11b(6).

[5] Because of this conclusion, we need not address Townsend's argument that the probate court clearly erred in finding that she has property that will be wasted or dissipated.