

Date of Hearing: April 7, 2014

ASSEMBLY COMMITTEE ON BANKING AND FINANCE

Roger Dickinson, Chair

AB 1859 (Maienschein) – As Amended: April 1, 2014

SUBJECT: Professional fiduciaries: professional corporations.

SUMMARY: Provides for the formation of licensed professional fiduciary corporations (fiduciary corporations). Specifically, this bill:

- 1) Provides that a fiduciary corporation is a corporation that is authorized to render professional services if that corporation and its shareholders, officers, directors and employees rendering professional services who are licensed professional fiduciaries are in compliance with the Moscone-Knox Professional Corporation Act (Moscone-Knox Act).
- 2) States that it is unprofessional conduct and a violation of proposed provisions of this bill for any licensed person to violate or attempt to violate various provisions of the Moscone-Knox Act.
- 3) Prohibits a fiduciary corporation from committing or omitting any act that would constitute unprofessional conduct under any statute or regulation.
- 4) Requires that the name of a fiduciary corporation shall contain the words "professional fiduciary."
- 5) Mandates that each director, shareholder, and officer must be a licensed professional fiduciary.
- 6) States that the income of a fiduciary corporation attributable to professional services rendered while a shareholder is a disqualified person shall not accrue to the benefit of the shareholder.
- 7) Provides that the Professional Fiduciaries Bureau (Bureau) within the Department of Consumer Affairs may adopt and enforce regulations, including the following:
 - a) A regulation that requires the bylaws of a fiduciary corporation to include a provision that requires the capital stock of the corporation owned by a disqualified person to be sold to the corporation or the remaining shareholders within a time specified by the regulation.
 - b) A regulation that requires the fiduciary corporation to provide adequate security by insurance or otherwise for claims against the corporation by its customers arising out of the rendering of professional services.
- 8) Allows each shareholder, officer, director, or employee of the corporation to exercise the powers and duties of a personal representative, a trustee, guardian or conservator if the fiduciary corporation is appointed to act in those capacities.

EXISTING LAW

- 1) Provides for the licensure and regulation of professional fiduciaries (Business & Professions Code Section 6500 et seq.).
- 2) Under the Moscone-Knox Act allows the formation and operation of professional corporations (Corporations Code, Section 13400 et seq.).
- 3) Defines a "professional corporation" as a corporation organized under the general corporation law, as specified, or a corporation that is engaged in rendering professional services in a single profession (Corporations Code, Section 13401).
- 4) Allows a professional corporation to lawfully render professional services, but only through employees that are licensed persons. The corporation may employ non-licensed persons but they may not perform any professional services requiring licensure (Corporations Code, Section 13405).

FISCAL EFFECT: Unknown

COMMENTS:

Need for the bill.

According to the sponsor, Professional Fiduciary Association of California (PFAC), this bill is necessary for the following reasons:

Fiduciaries serve by court appointment as guardians, conservators and personal representatives of estates. They also serve by agreement as trustees, representative payees or as agents under powers of attorney.

Authorizing professional fiduciaries to be organized as professional corporations will enable these businesses to better serve the needs of the individuals they serve including those who are elderly, disabled or impaired.

Many clients of licensed professional fiduciaries live for an extended period of time, and the organization of the business of the fiduciaries as professional corporations would enable a continuity of care for the clients as the entities would then be able to have several licensed individuals who can care for a client.

The professional corporation structure would allow for numerous skill sets to serve the clients. For example, one fiduciary could have skill regarding medical needs, the other fiduciary could have the skill of financial and tax needs, another could be knowledgeable in property management.

If formed as professional corporations, several licensed fiduciaries would be able to work together and to ensure that a knowledgeable, licensed fiduciary is available to meet the needs of the individual.

Licensed fiduciaries organized as professional corporations would obtain certain benefits of the corporate form of doing business, such as protection of assets from liability for claims not involving malpractice, favorable tax benefits for the payment of health insurance premiums, and possible protection of assets for qualified retirement plans belonging to a corporation.

Fiduciaries can serve by court appointment or by private agreement. Court appointed fiduciaries are known as guardians or conservators. Fiduciaries serve by agreement as daily money managers, trustees, representative payees, or as agents under financial or health care powers of attorney. A fiduciary can be an individual or a corporate entity like a bank's trust department.

Professional fiduciary services range from those that are less restrictive to those that essentially have the fiduciary take control of most of the affairs of the incapacitated person.

The least restrictive type of professional fiduciary is the daily money manager. They handle day-to-day finances and can be retained by the person who needs the assistance or by a family member serving as Agent under a Power of Attorney. Daily money manager often serve as the eyes, ears, hands and feet of the older adult, allowing them to retain maximum control of their own affairs.

Next along the continuum are professionals who serve as Agent under a Power of Attorney or Health Care Surrogate document, or who serve as trustee under a trust. These arrangements must be made in writing while an individual has the legal capacity to make such an appointment, even if the services of the fiduciary will not begin until the individual lacks capacity. There are restrictions (which vary by state) regarding who may serve as a professional agent or trustee. The responsibility of the fiduciary in these situations is to carry out the instructions in any written documents (e.g., trust, POA, Advance Health Care Directive, etc.) or, where appropriate and allowed by law, to use substituted judgment or the best interest standards to handle the incapacitated person's affairs.

The most restrictive fiduciary arrangement is conservatorship or guardianship. Conservatorship is a legal tool to provide management for the financial and/or personal affairs of individuals deemed by the court to be physically or mentally incapacitated. The conservator is legally appointed to manage the incapacitated person (or ward's) property and/or person and all aspects of the guardianship are overseen by the court.

Clarification needed.

Section 2, 3 and 4 of the bill provide that if the fiduciary corporation is appointed as a guardian or conservator, personal representative, or trustee then each shareholder, officer, director, or employee can individually exercise the powers and duties appointed. The committee recommends that the author, sponsor and other stakeholders work out some language that clarifies that should an individual in some way violate the duties when the corporation has been appointed that the fiduciary corporation ultimately has liability for those acts. A straightforward interpretation would indicate that if a court appoints a corporation to fulfill these duties then a violation of these responsibilities would bring liability upon the corporation. However, this needs clarification and clearer delineation of legal liabilities and responsibilities in these specific circumstances.

This bill is double referred to Assembly Business & Professions Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Professional Fiduciary Association of California (Sponsor)

Opposition

None on file.

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