



PFAC LEGISLATIVE UPDATE

September 20, 2021

PFAC members are being served by PFAC's legislative committee, which is co-chaired by Marilyn Kriebel and Susanna Starcevic, and led by PFAC's legislative advocate, Jerry Desmond. Below is a brief overview of the key issues in which the legislative committee has been active and the status of each:

AB 465 - EDUCATION REQUIREMENTS IN PROFESSIONAL FIDUCIARIES ACT

Governor Newsom recently signed AB 465 [Nazarian] into law. AB 465 amends Section 6538 of the Business and Professions Code (Professional Fiduciaries Act), effective January 1, 2023, as follows:

AB 465 changes the ***pre-licensing education*** requirements to include, as part of the 15-hours of pre-licensing education requirement, one-hour of education in "cultural competency". Cultural competency is defined as "understanding and applying cultural and ethnic data to the process of care that includes, but is not limited to, information on the appropriate treatment of, and provision of care to, ethnic communities, religious communities, and lesbian, gay, bisexual, transgender, and intersex communities".

In addition, as part of continuing education required for ***annual license renewal***, AB 465 expands the topics which comply with the two-hours of ethics required annually to include education in "cultural competency" as defined above.

Background

As originally drafted, AB 465 sought to require that (a) Pre-licensing education include one-hour of instruction in cultural competency; and (b) education for license renewal require one-hour, per

three-year period, of instruction in cultural competency. Cultural competency was originally defined as “the process of care to the lesbian, gay, bisexual, transgender, and intersex communities”.

Though PFAC did not oppose the concept of cultural competency education, PFAC proposed that the definition of cultural competency be expanded to include ethnic and religious communities. In response, the author amended the definition of cultural competency to include ethnic and religious communities.

In response to concerns that the Professional Fiduciary Bureau would have an unreasonable and costly burden in tracking compliance with education requirements for license renewal (one-hour every three-years) PFAC and the author’s office agreed to language which would allow for education in cultural competency to be included as a choice/option as part of the two-hour annual ethics requirement.

Each of the amendments proposed by PFAC were adopted by the author and are reflected in the bill that has been signed into law by the Governor.

AB 826 – AMENDMENT TO QUALIFICATION REQUIRED FOR LICENSURE AS A PF

Governor Newsom recently signed AB 826 (Senate Business, Professions and Economic Development Committee) into law which makes technical changes to Business & Professions Code 6533 (Professional Fiduciaries Act). Specifically at subsections (2)(A), (2)(B), (3)(A) and (3)(B) experience serving as a personal representative of a decedent’s estate is added to the list of types of substantive fiduciary responsibilities that met qualification for licensure.

Background. PFAC had no objection to this technical change.

AB 1194 – PROFESSIONAL FIDUCIARIES ACT and PROBATE CODE GUARDIANSHIP & CONSERVATORSHIP LAW

AB 1194 has passed both the Senate and the Assembly and has made its way to the Governor’s desk for review and signature or veto. Of the twenty-six (26) sections of the bill, eight (8) sections directly relate to professional fiduciaries; one (1) section concerns a report to be provided by the Judicial Council; one (1) section authorizes a proposed conservatee, under certain circumstances, to select their own counsel; one (1) section relates to notices of hearing on a petition to terminate; three (3) sections relate to court procedures for a Limited Conservatorship; and twelve (12) sections concern additional Court Investigator duties however each of these sections is subject to the legislature providing funding to the court for these specific purposes which funding is not anticipated. A discussion of the eight (8) sections of AB 1194 which directly relate to professional fiduciaries follows.

Changes to the Professional Fiduciaries Act – AB 1194

Section 1: To be effective January 1, 2023, Section 6433 is added to the Business and Professions Code (Professional Fiduciaries Act) and will require a **licensed PF with a website** to post on their website a schedule or range of the licensee’s fees, including but not limited to hourly rates for services offered. **Licensed PF’s that do not maintain a website** are required to (a) prior to the execution of a contract for services, provide a prospective client with a schedule or range of the licensee’s fees; (b) in response to a request from a client for a fee schedule, provide the client with a fee schedule; and (c) in the instance of a conservatorship, provide all interested persons (as defined in PCS 1822) with a schedule/range of the licensee’s fees. (Note that “client” is not defined in the Section or the Act.)

Background. Prior to this final version, this section sought to impose a requirement on licensees to post or provide, not only their hourly rates, but an estimate of the fees typically charged in the context of a guardianship, conservatorship and trust. In PFAC’s efforts to have this requirement

eliminated, PFAC argued that (a) the requirement is duplicative in that a licensee's hourly rates are required to be included in guardianship/conservatorship pleadings; (b) hourly rates/fees, in court supervised matters, are subject to the court's discretion; and (c) actual fees charged/awarded are dependent on the circumstances presented on a case-by-case basis, thus any estimate posted or provided would be misleading to the public. Though the final version eliminated the need to post or provide estimated administration fees, the requirement to post a range of fees on websites, or provide as required, remained.

Section 2: To be effective January 1, 2022, Section 6580 of the Business and Professions Code (Professional Fiduciaries Act) is amended to:

1. Identify specific types of licensee infractions for which the Fiduciary Bureau may impose sanctions to include: (a) breaching a legal duty which created financial, physical or mental harm to the client; (b) abusing a client as defined in Section 15610.07 of the Welfare and Institutions Code; and (c) violation of a statute or regulation related to Chapter 6 of the Professional Fiduciaries Act.
2. Though 6580 already authorizes the Bureau to undertake an investigation on their own or in response to a complaint from any person, Section 6580 expands the sources from which an investigation may arise to specifically include a report from a court indicating that the court has (a) imposed a penalty on a PF; (b) removed a PF as conservator or guardian for cause; or (c) determined that a PF has abused a conservatee (PCS 2112(a)).
3. Direct the Bureau to revoke a PF's license on a finding by the Bureau that the PF either (a) knowingly, intentionally or willfully breached a legal or fiduciary duty to an elder/dependent adult as defined in Section 15610.07 of the Welfare and Institutions Code; or (b) caused serious physical, mental or financial harm through gross negligence or gross incompetence.

Background:

Earlier versions of Section 2. directed the Bureau to immediately revoke a licensee's license in the event a court disciplined a licensee. And, more recently this section had been amended to authorize the Bureau to sanction a licensee in an amount equal to any economic loss incurred by a minor/conservatee as a result of the licensee having acted improperly. As drafted the Bureau's authority to sanction was irrespective of whether or not the accounting or issue giving rise to the sanctions had previously been adjudicated by the court or whether or not a court had previously sanctioned a PF for the act, and a statute of limitations was not applied to their authority to sanction. PFAC's efforts to have this section revised focused on (1) authorizing the bureau to begin an investigation in the event of a court disciplining a licensee (rather than immediate revocation) and taking disciplinary action as authorized under the Business & Professions Code; and (2) eliminating the Bureau's ability to unilaterally sanction a licensee based on financial loss to a ward/conservatee. In the final version of AB 1194 the direction to the Bureau to immediately revoke a license based on court discipline was replaced with the Bureau being authorized to initiate an investigation and authority for the Bureau to unilaterally sanction a licensee for financial loss was eliminated in its entirety.

Changes to the Probate Code – AB 1194

Section 17. Though it is important to note that the addition of Probate Code Section 2112 is subject to the legislature providing funding to the court for this specific purpose (which is not envisioned at this time), this new Probate Code Section directs the court to impose a fine of up to \$10,000 on a licensed PF in the event the court determines that the licensed PF has abused (as defined in Welfare and Institutions Code Section 15610.7) a conservatee. This fine would be payable to the conservatee's estate.

Background

Other than an attempt to reduce the maximum fine from \$10,000 to \$1,000, PFAC did not initiate an objection to this provision.

Section 21. Probate Code Section 2401 is amended to provide that a guardian or conservator cannot engage the services of or refer business to an entity in which the guardian or conservator has a financial interest defined as (1) ownership as a sole proprietor, partnership or closely held corporation; (2) ownership in excess of 1% of a publicly traded company; or (3) a corporation in which the guardian/conservator is an officer or director. Included as an exception is that a professional fiduciary, acting as guardian/conservator, may employ the services of their staff.

Background

As originally drafted this provision did not include an exception for a PF engaging the services of their staff. Thus, though PFAC did not have an objection to a guardian/conservator being prohibited from engaging the services of or referring business to an entity in which the guardian/conservator had a financial interest, we did ask that the provision be clarified to specially allow a licensee to utilize the services of their staff. In the final amended version, Probate Code Section 2401 specifically authorizes a licensee to engage the services of their staff, compensation for which is subject to court authorization as part of a licensee's fee request.

Section 22. Probate Code Section 2620, which authorizes a guardian or conservator to file electronic statements with accountings rather than original statements, is amended to eliminate the sub-section stating that PF's are also authorized to file electronic statements as this sub-section was determined to be superfluous.

Background

Authority for a guardian/conservator to file electronic (as opposed to original) statements was previously made part of Probate Section 2620 however a subsection of 2620 separately provided that a professional fiduciary could also file electronic statements. Because the terms "guardian" or "conservator" is inclusive of professional fiduciaries, unless specifically excluded, PFAC asked that the subsection be eliminated. The author of AB 1194 agreed and the sub-section was eliminated.

Sections 23, 24, and 25. Probate Code Sections 2623, 2640, and 2641 are amended to provide that fees shall not be awarded to a guardian/conservator in connection with their (a) unsuccessful defense of their fee request; (b) unsuccessful objections to a petition; or (c) any unsuccessful request or action brought by the guardian/conservator. However, the **court may award fees** for these "unsuccessful" acts provided the court determines that the fee request defense, action brought but denied, or objections to a petition was made in good faith, was based on the best interest of the ward/conservatee and did not harm the ward/conservatee.

Background

As originally drafted, AB 1194 stated that, where the court either *reduced or denied* a fee request, the court's discretion to award fees in connection with a guardian/conservator's defense of that fee request was eliminated. In addition, the court was prohibited from awarding fees to a guardian/conservator associated with the guardian/conservator's unsuccessful efforts in either bringing or objecting to an action, regardless of its merit. As the court has complete discretion as to hourly rates, this would in theory eliminate the court's ability to award fees associated with a fee request defense where the court has allowed all hours of service alleged in the fee request but has reduced the hourly rate. PFAC's efforts, which are recognized in the current version of AB 1194, restores the court's ability to award fees where warranted regardless of whether or not a fee request defense or a petition for relief or objection to a petition were successful.

Section 26. Though it is important to note that the amendment to Probate Code Section 2653 is subject to the legislature providing funding to the court for this specific purpose (which is not

envisions at this time), the amended section of PCS 2653 directs the court to inform the Fiduciary Bureau on each occasion that the court removes a professional fiduciary as guardian/conservator for cause.

Background

PFAC had no objection to the amendment to Probate Code Section 2653.

AB 1062 – DISPOSAL OF VALUELESS PROPERTY

AB 1062 (Mathis) would amend Probate Code Section 2465 to require a guardian or conservator to give 15-days written notice of their intention to dispose of/abandon valueless property and allows those who receive such notice to petition the court to resolve any dispute concerning the disposal of such property.

PFAC Concerns/Actions: Valueless property is not defined. The proposed notice requirements would potentially delay the ability to move a ward/conservatee out of a residence/sell a residence which could create a financial burden to the ward/conservatee. In theory this change in the law would create the potential for conflict between those who do not yet, and may never, have the right to succeed to the ward/conservatee's property and may lead to the filing of petitions disputing rights to the valueless property which would create an otherwise avoidable expense to the conservatee. PFAC has opposed this measure and has referred the author to existing law/California Rules of Court which address the disposal of personal property. Specifically Rule 7.1059(b)(17) provides that a conservator of the estate must “[w]hen disposing of the conservatee's tangible personal property, inform the conservatee's family members in advance and give them an opportunity to acquire the property, with approval or confirmation of the court.”; and Rule 7.1059 (b)(18) - provides a ten-factor test to evaluate whether disposal of the items is in the best interest of the conservatee.

AB 1062 also proposes to add Section 2465.5 to the Probate Code which would require that where a guardian or conservator becomes successor trustee of a trust established for or by a minor/conservatee, such trust would be under the continuing jurisdiction and supervision of the court.

AB 1062 is not moving forward this year but could be considered next year.

CLIENT NOTIFICATION REGULATIONS

The Professional Fiduciaries Bureau has proposed additions to Title 16 of the California Code of Regulations that would require licensed fiduciaries, at the inception of a matter and included as part of any and all communications with “interested persons”, to provide a specific written notice that the licensee is licensed by the Bureau, along with the Bureau's contact information, and to maintain a record of all notices given.

PFAC has submitted written comments with requested revisions to the proposed regulations, has testified in support of its desired changes, and has advocated its position directly with the Bureau. The Bureau is reviewing the submitted comments to determine if it will make any changes to the draft before moving forward with the next step in the rulemaking process.

PFAC Concerns/Actions:

1. Definition of “interested persons”: As currently drafted, the Bureau has defined “interested persons” quite broadly to include any person who is interested in a fiduciary's performance in a particular matter. PFAC has submitted comments indicating that this definition is overly broad and would put an undue burden on licensees to comply in that licensees would have difficulty identifying all persons who might be interested in the licensee's actions.

2. Requirement to include notice in any and all communications and to maintain records of notices given: As currently drafted licensee's would be required to including notice of licensure and the bureau's contact information in ANY and ALL "official" correspondence with consumers and/or "interested persons". PFAC has suggested that the requirement to provide such notice be limited to (a) notice at the inception of a matter; and (b) inclusion of such notice as part of accountings and that such notice be given to those entitled to notice under the Probate Code.

PFAC Legislative Committee *with support from*
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