

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman John Vratil at 9:38 a.m. on January 30, 2003 in Room 123-S of the Capitol.

All members were present.

Committee staff present: Mike Heim, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:
Bill Fleming, Kansas Bar Association
Melissa Wangeman, Secretary of State's Office
Randy Hearrell, Kansas Judicial Council

Others attending: see attached list

The minutes of the January 27 meeting were approved on a motion by Senator Donovan, seconded by Senator Schmidt, and the motion carried.

SB 28 - professional corporation law of Kansas

Chairman Vratil opened the hearing on **SB 28**. Conferee Fleming testified that the main purpose of this bill was to update and modernize the Professional Corporation Code which regulates which professions can form professional corporations, operate them, who can own them, when they must divest themselves of the stock in the corporation, and other limitations placed on corporations. He stated that the proposed amendments do not attempt to change existing Kansas law with respect to which professions can practice in a professional corporation, which professions are required to practice in a professional corporation, or which professions are permitted to practice together in one professional corporation.

Mr. Fleming explained that the proposed amendments delete the separate list, and delegate to the licensing agencies the power to determine these questions. He said that if in the future any type of controversy created by this delegation of authority arises, the Legislature always can override the licensing agency decision and pass a separate statute. He added that the remaining substantive changes to the statute are primarily designed to expand the list of "qualified persons" who can own stock in a professional corporation to include another professional corporation, and provide rules for foreign professional corporations to follow. (Attachment 1)

Conferee Wangemann offered amendments to **SB 28** to correct some typing errors in the first two sections, and the third section was inadvertently left out of the bill draft. (Attachment 2)

After general questions and discussion by Committee members, the Chair closed the hearing on **SB 28**.

SB 29 - corporation code amendments

Chairman Vratil opened the hearing on **SB 29**, and reminded the Committee that they heard from Bob Alderson and Richard Hayse a couple of weeks ago at an informal hearing. He said that Mr. Alderson was present to answer any questions the Committee might have on the amendments.

Conferee Wangemann testified in support of **SB 29** covering the sections that related to the Secretary of State's Office. The amended sections concerned filing procedures, definition of "doing business" for foreign corporations, Annual Reports to reflect Delaware law resulting in slightly different reporting requirements, and franchise tax calculation. The Secretary of State believes the amendment regarding the franchise tax calculation promotes fairness and equity in taxing Kansas businesses, and eliminates the double franchise tax rate. Ms. Wangemann stated that this could be controversial due to fiscal concerns. She also pointed out that only Kansas and two other states base their corporate laws on Delaware, and the majority of states choose to follow the Model Business Corporations Act, promulgated by the American Bar Association. (Attachment 3)

CONTINUATION SHEET

MINUTES OF THE SENATE JUDICIARY COMMITTEE on January 30, 2003 in Room 123-S of the Capitol.

Chairman Vratil referred to the fiscal note distributed on **SB 29**, and noted that the Secretary of State's Office and Department of Revenue are unable to estimate the reduction of revenue as a result of the change in the franchise tax. (Attachment 4) Ms. Wangemann responded that neither office tracks parent and subsidiary relationships, and she was unable to give a dollar amount.

Following general questions and discussion, the Chair closed the hearing on **SB 29**.

SB 36 - membership and duties of the judicial council

Chairman Vratil opened the hearing on **SB 36**. Conferee Hearrell testified in support of **SB 36**, and offered amendments to the bill including technical changes submitted by the Kansas Judicial Council (KJC). The changes were explained in written comment form on the bill layout. (Attachment 5) The Chair pointed out that the change regarding fee fund money was especially important in this budget year because of the Governor's recommendation that no state general fund moneys would be appropriated for the Judicial Council. Mr. Hearrell expressed concern that the KJC had become a "man without a country" in regards to which branch of government they fall under, i.e. judicial, legislative or executive. He said it would be helpful to have an amendment designating the branch of government to which the Judicial Council is assigned, and this should have been done years ago.

Committee members expressed their appreciation for the service the KJC furnishes to the Legislature, and do not want to see its activities and work curtailed due to lack of appropriations. The Chair pointed out that when the Committee works this bill it needs to be thinking about which branch of government the KJC should fall under, i.e. Legislative or Judicial, but not Executive Branch.

Chairman Vratil closed the hearing on **SB 36**.

The minutes of the January 27 meeting were approved on a motion by Senator Donovan, seconded by Senator Schmidt, and the motion carried.

The meeting adjourned at 10:30 a.m. The next scheduled meeting is February 3, 2003.

PSI

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Jan. 30, 2003

NAME	REPRESENTING
Jerri Freed	KS Dental Bd.
Christina Collins	KNS
Melissa Wangemann	Sec of State
Mark Stafford	Healing Arts
Bill Fleming	Barber, Emerson
Bob Anderson	KBA
Gary Reser	Kan. Veterinary Med. Assn.
KEITH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Tommy Dougherty	Sen Umbarger
SCOTT SCHNEIDER	KADC
Blake Ferns	Intern Sen. Schmidt
Mary Beth Kedd	PGA
Kathy Olson	Kc Bankers Assn
Gary Rohls	KS Optometric Assn
Reynold M. Skarrell	KS Judicial Council
Pat Johnson	ISSBTP
Trudy ARON	Am Inst of Architects
ADAM GARDNER	SEN. ADKINS
Trisya Curzyello	KS Bus Assn

Professional Corporation Code Amendments
Current Code reference - K.S.A. 17-2706 et. seq.
Senate Bill 28
Written Testimony

Submitted by: William N. Fleming,
Barber, Emerson, Springer, Zinn & Murray, L.C.,
Lawrence, Kansas

A. **Committee Membership.** The first order of business is to recognize the valuable contributions of the persons who worked on the professional corporation code rewrite committee (the "PCC Committee"). Those persons are as follows:

1. Melissa Wangeman, Legal Counsel Office of the Kansas Secretary of State
2. Mark Stafford, Legal Counsel Kansas Board of Healing Arts
3. Stanley Andeel Foulston Siefkin, LLP, Wichita, Ks.
4. Justin Lacy Foulston Siefkin, LLP, Wichita, Ks.
5. Clayton Skaggs Barber, Emerson, Springer, Zinn & Murray, L.C., Lawrence, Ks.
6. Robert Alderson Alderson, Alderson, Weiler, Conklin, Burghart & Crow, L.L.C., Topeka, Ks.
7. Al Martin Shook, Hardy, & Bacon, L.L.P., Kansas City, Mo.

I would also like to recognize the contribution of Paul Davis, the KBA legislative liaison, who helped us guide the bill through the process, and the contribution of Randy Forbes, who reviewed the bill.

B. **Why Was the Committee Formed.** The PCC Committee was formed as a subcommittee of a group that was formed to update the Kansas Corporation Code. The PCC Committee was formed partly in response to a request by members of the Kansas Senate Judiciary Committee, who wanted to prevent future piecemeal amendments to the Professional Corporation Code with respect to the list of professions that are permitted to form professional corporations. The Professional Corporation Code was also badly in need of modernization to permit foreign professional corporations to practice in Kansas, so long as at least one shareholder was professionally licensed in Kansas, and to permit professional corporations to own shares in other professional corporations (i.e. a parent-subsidary legal structure).

C. **KBA Board of Govenors' Approval.** The Professional Corporation Code Amendments were presented to the KBA legislative subcommittee, which recommended to the full KBA Board of Governors approval of the proposed amendments. The KBA Board of Govenors approved the amendments at its meeting held December 6, 2002. There was only one dissenting vote cast at the KBA Board of Governors meeting which related to certain concerns

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Attachment 1-1

raised at the legislative subcommittee hearing that the proposed amendments might have the unintended consequence of changing existing law as it related to dentists and optometrists. After the date of this meeting, additional changes were proposed to K.S.A. 64-1425 and K.S.A. 65-1522 as set forth in the bill to address these concerns, and to clarify that there is no change in existing law with respect to these two professions.

D. **History of the Professional Corporation Code.** The first professional corporation code was enacted in Kansas in 1965. The code was passed in response to concerns expressed by Kansas professionals about the need to incorporate to obtain certain tax advantages from qualified retirement plans. The professional corporation code had the additional advantage of limiting the individual liability of a shareholder for negligent actions taken by other shareholders, although at the time this does not appear to be the motivating factor for the passage of the bill. Many of the tax reasons for establishment of a professional corporation disappeared when the United States Congress later liberalized the rules regarding qualified retirement plans so that they could also be established by self-employed individuals. The need remained, however, to protect professionals from liability created by other professionals practicing with them in their business, which has increased over time as our society has become more litigious.

The original provisions of the professional corporation code listed ten professions that were permitted to incorporate as professional corporations. Over the years, the Kansas legislature added to the list, so that by now there are over twenty-three professions that are listed. The existing code specifies not only which professions may practice as professional corporations, but which professions can practice together as professional corporations. Obviously, as the list grows, the potential confusion that exists with respect to which professions can practice together in the same professional corporation also grows exponentially.

An additional complexity was created by the Kansas Supreme Court's decision in *Early Detection Center v. Wilson*, 248 K. 869, 811 P.2d 860 (1991). In that case, the Kansas Supreme Court refused to enforce the terms of a shareholder's agreement that prohibited competition by a physician with his existing general corporation, holding that the corporation was not valid (i.e. the corporation could only validly be formed as a professional corporation). This created a judicial "gloss" on the statute, because the Professional Corporation Code at that time stated that any business that could be formed as a professional corporation could also be formed as a general corporation. Accordingly, an additional issue was created that has rarely been specifically dealt with by the legislature as new professions are added. This question is can a profession that is listed in the Professional Corporation statute also practice in the form of a general corporation (i.e., can non-professionals own stock in the professional practice)? The question is an extremely important one because a general corporation can have non-professional shareholders, while a professional corporation can only be owned by licensed professionals, with certain limited exceptions.

E. **Summary of Current Law.** Under current Kansas law, whether professions can practice in a general corporation depends on the profession involved. The Technical Professions Act, K.S.A. 74-7036 (2000 Supp.), for example, permits practice in a corporate form for technical professions, which are defined as architects, engineers, landscape architects, land surveyors, and geologists, so long as certain requirements are met. Although the statute does not specifically refer to the term "general" or "professional" corporation, the statute implicitly permits non-professionals to own stock in a corporation practicing a technical profession, so long as the requirements are met. Certified Public Accountants are permitted by their ethical rules to be owned by non-licensed professionals (for example, H&R Block and other publicly-held companies own accounting firms in this state).

On the other hand, because of ethical rules involving fee splitting, lawyers do not practice in general corporations that are owned by non-lawyers. As discussed above, the Kansas legislature has passed specific statutes that prohibit the "corporate" practice of optometry and dentistry. Based on the Supreme Court's holding in *Early Detection Center*, presumably there are not any general corporations that are practicing medicine in the state. There are other professions that do not have a statute that explicitly prohibits practice in a general corporation, but that do have ethical rules barring fee splitting, so presumably these professions would not be permitted to practice in a general corporation that has non-professional shareholders.

F. **Summary of Proposed Amendments.** The proposed amendments do not attempt to change existing Kansas law with respect to which professions can practice in a professional corporation, which professions are required to practice in a professional corporation, or which professions are permitted to practice together in one professional corporation. The proposed amendments delete the separate list, and delegate to the licensing agencies the power to determine these questions. Section 13. provides a list of factors for the agencies to consider in determining these questions. If in the future there is any type of controversy created by this delegation of authority, the legislature always can override the licensing agency decision and pass a separate statute, similar to what it has done with respect to optometrists, dentists, and technical professions. The remaining substantial changes to the statute are primarily designed to expand the list of "qualified persons" who can own stock in a professional corporation to include another professional corporation, and provide rules for foreign professional corporations to follow. The remaining changes to each specific section are summarized in the "Comments" section that is attached to the comparewrite version of the bill that has been attached to this written summary.

Sec. 1. K.S.A. 17-2707. As used in this act, unless the context clearly indicates that a different meaning is intended:

(a) "Professional corporation" means a corporation organized under this act.

(b) "Professional service" means ~~the type of personal service rendered by a person duly licensed by this state as a member of any of the following professions, each paragraph constituting one type:~~

- ~~(1) A certified public accountant;~~
- ~~(2) An architect;~~
- ~~(3) An attorney at law;~~
- ~~(4) A chiropractor;~~
- ~~(5) A dentist;~~
- ~~(6) An engineer;~~
- ~~(7) An optometrist;~~
- ~~(8) An osteopathic physician or surgeon;~~
- ~~(9) A physician, surgeon or doctor of medicine;~~
- ~~(10) A veterinarian;~~
- ~~(11) A podiatrist;~~
- ~~(12) A pharmacist;~~
- ~~(13) A land surveyor;~~
- ~~(14) A licensed psychologist;~~
- ~~(15) A specialist in clinical social work;~~
- ~~(16) A registered physical therapist;~~
- ~~(17) A landscape architect;~~
- ~~(18) A registered professional nurse;~~
- ~~(19) A real estate broker or salesperson;~~
- ~~(20) A clinical professional counselor;~~
- ~~(21) A geologist;~~
- ~~(22) A clinical psychotherapist, and~~
- ~~(23) A clinical marriage and family therapist.~~

a personal service provided to the public that may lawfully be performed only by a natural person to whom the licensing agency has issued a license, registration, or certification.

(c) ~~"Regulating board" means the court, board or state agency which is charged with the licensing and regulation of the practice of the profession which the professional corporation is organized to render. "Licensing agency" means a court, board or agency of the State of Kansas having authority to issue a license, registration or certificate authorizing a natural person to provide a professional service or to use a designated title.~~

(d) "General corporation" means an entity formed or authorized to do business in the State of Kansas under the Kansas general corporation code, K.S.A. 17-6001, et seq.

(e) "Foreign professional corporation" means a corporation organized under the professional corporation laws of another jurisdiction.

~~(d)(f) "Qualified person" means (1) any natural person licensed to practice the same type of profession which any provide a professional service permitted by the articles of incorporation of the professional corporation is authorized to practice;~~

~~(2) the trustee of a trust which is a qualified trust under subsection (a) of section 401 of the federal internal revenue code as in effect January 1, 2001, or of a contribution plan which is a qualified employee stock ownership plan under subsection (a) of section 409A of the federal~~

~~internal revenue code as in effect on January 1, 2001; or the estate of any natural person licensed to provide a professional service permitted by the articles of incorporation of the professional corporation and such estate does not continue to hold title to professional corporation stock for more than two years following such natural person's death;~~

~~(3) the trustee of a revocable trust established by a natural person who is licensed to practice the type of profession which any provide a professional service permitted by the articles of incorporation of the professional corporation is authorized to practice, if the terms of such trust provide that the trust does not continue to hold title to the professional corporation stock for more than two years after the death of such natural person and that during the life of such person (i) such person is the principal beneficiary of the trust, and (ii) such person or another natural person licensed to provide a professional service permitted by the articles of incorporation of the professional corporation is a sole trustee of such trust having the sole power to make decisions concerning the professional corporation stock held by such trust. and such trust does not continue to hold title to professional corporation stock for more than two years following such natural person's death; for more than a reasonable period of time necessary to dispose of such stock. however, During the two year period following the death of the natural person who established the trust, the trustee need not be a licensed professional;~~

~~(4) A general partnership, limited liability company, professional corporation, or foreign corporation that is eligible under this act to own shares issued by a professional corporation not otherwise restricted. ; or A general partnership, limited partnership or limited liability partnership, if all partners thereof are authorized to provide a professional service permitted by the articles of incorporation of the issuing professional corporation and in which at least one partner is authorized by a licensing authority of this state to provide in this state a professional service permitted by the articles of incorporation of the corporation;~~

~~(5) A professional corporation which is validly organized in accordance with this act;~~

~~(6) A foreign professional corporation in which at least one shareholder is authorized by a licensing authority of this state to provide in this state a professional service permitted by the articles of incorporation of the corporation;~~

~~(7) A limited liability company, if the limited liability company is organized for a purpose consistent with subsection (c) of K.S.A. 17-7668 and meets the requirements of subsections (d) and (e) of K.S.A. 17-7668; or~~

~~(8) the trustee of a trust which is a qualified trust under subsection (a) of section 401 of the federal internal revenue code as in effect on January 1, 2002, or of a qualified trust which is a qualified employee stock ownership plan under subsection (e)(7) of section 4975 of the federal internal revenue code, as in effect on January 1, 2002, so long as the trustee is the professional corporation or a natural person licensed to provide a professional service permitted by the articles of incorporation of the professional corporation.~~

Comments

The definition of a professional service is deleted, at the suggestion of the legislature during the 2001 session. The licensing agency will be responsible for designating whether a professional service may be provided through a professional corporation, as stated in new section 13. The definition of "qualified person" is expanded to clarify that the estate of a deceased profession may continue to hold title for a reasonable period of time.

The April 2002 committee meeting decided to replace references to "regulatory" with the term "licensing". The definition of "qualified person" in subsection (e) was also amended at the

April meeting to clarify that a qualifying general partnership, limited liability company, professional corporation, or foreign professional corporation may be a qualified person and may own stock in a professional corporation.

The last clause of subsection (b) was deleted to leave open the possibility that a professional service may be performed through a general corporation, so long as the licensing agency has approved the performance of that service through a general corporation. As drafted, the definition of a "professional service" suggests that no professional service may be performed through a general corporation; rather, the licensing agency would have to conclude that a service is not a "professional service" before the service could be performed through a general corporation. The approach of the act, however, is to provide for the performance of professional services through a general corporation if the licensing agency approves. The definition of "professional service" is more consistent with this approach by deleting the last phrase.

Sec. 2. K.S.A. 17-2708. (a) Except as otherwise provided, the Kansas general corporation code contained in K.S.A. 17-6001 *et seq.*, and amendments thereto, shall apply to a professional corporation organized pursuant to this chapter. Any provisions of the professional corporation law of Kansas shall take precedence over any provision of the Kansas general corporation code which conflicts with it. The provisions of the professional corporation law of Kansas shall take precedence over any law which prohibits a corporation from providing any type of professional service. ~~Any person authorized to form a professional corporation under K.S.A. 17-2701 *et seq.* and amendments thereto also may incorporate under the Kansas general corporation code contained in K.S.A. 17-6001 *et seq.*, and amendments thereto, or organize~~ (b) *A qualified person may form a limited liability company under the Kansas revised limited liability company act contained in K.S.A. 2001 Supp. 17-7662 *et seq.*, and amendments thereto, or organize as a limited partnership under the Kansas revised uniform limited partnership act contained in K.S.A. 56-1a101 *et seq.*, or organize as a limited liability partnership as defined under the Kansas uniform partnership act contained in K.S.A. 2001 Supp. 56a-101 *et seq.*, and amendments thereto. Any provision of this act shall take precedence over any provision of the Kansas revised limited liability company act, the Kansas revised uniform limited partnership act, or the Kansas uniform partnership act which conflicts with it.*

Comments

The first sentence in subsection (b) is stricken because it causes confusion for those professions that may not be practiced by a general corporation. A person who is a licensed professional may form a general corporation for some purposes, but the corporate purpose may not necessarily include the practice of the profession. That issue is established by individual licensing acts, some of which specify that the profession may be practiced in a general corporation, (see, e.g., K.S.A. 74-7036) or by regulations adopted pursuant to section 12. In place of the stricken language it is clarified that a qualified person has the option of forming a professional corporation, a professional LLC, LP, or LLP.

Subsection (b) was amended at the April 2002 committee meeting. The changes were technical in nature and intended to conform references to the LLC act and the uniform partnership act to the terminology used in those acts. For example, in sentence two of subsection (b) the term "professional limited liability company" was amended to refer only to a "limited liability company." The LLC act does not provide for the formation of a "professional" LLC; rather, an LLC may be formed for the purpose of providing professional services permitted

to be provided through a professional corporation pursuant to the professional corporation law. See K.S.A. § 17-7668(c). Other technical changes included changes to the names of the LLC act and the uniform partnership act.

Sec. 3. 17-2709. Same; incorporators; articles of incorporation; regulating boards to issue certificates, fees; application and recording fee. (a) One or more ~~natural persons, each of whom is licensed to render the same type of professional service within this state,~~ may incorporate a professional corporation to practice that same type of professional service by filing articles of incorporation with the secretary of state. *The initial directors shall be named in the articles of incorporation and the powers of the incorporator shall cease upon filing the articles of incorporation. A professional corporation may be incorporated to provide a professional service or to provide more than one professional service allowed by rules and regulations adopted by the licensing agency having jurisdiction over each professional service to be provided.* The articles of incorporation shall set forth as its purpose ~~the each~~ type of professional service to be practiced through the professional corporation and shall otherwise meet the requirements of the general corporation code of the state of Kansas. A certificate by ~~the regulating board of the profession~~ *each licensing agency* involved that each of the incorporators ~~initial director~~ is duly licensed to practice that profession, provide a professional service permitted by the articles of incorporation and that the proposed corporate name has been approved, shall be filed in the office of the secretary of state *at the time of filing the articles prior to issuance of the certificate of incorporation.* When two or more types of professions are to be rendered by such corporation, as shown in the articles of incorporation, a certificate of each ~~regulatory board~~ shall be required. Whenever an amendment is filed to change the name or purposes of any professional corporation, a certificate of each ~~regulatory board~~ *licensing agency* involved shall be required *to be filed with the secretary of state.*

(b) Each ~~regulating board~~ *licensing agency* is authorized and directed to issue the certificate required herein. Each ~~regulating board~~ *licensing agency* may charge and collect a fee ~~not to exceed two dollars (\$2) for each person so certified~~ *to recover the actual cost of providing the issued certificate.*

(c) At the time of filing its articles of incorporation, every professional corporation shall pay the fees required by ~~subsection (a) of K.S.A. 17-7502~~ *of a general corporation when filing articles of incorporation.*

(d) *The secretary of state shall maintain a list of professions that have been designated by a licensing agency to form a professional corporation. Until such time as the licensing agencies adopt the rules and regulations described in section 13, the law governing professional corporations in effect immediately prior to the effective date of this act shall apply for purposes of determining whether or under what circumstances professional services may be performed through a general corporation and whether two or more types of professional may provide professional services in the same professional corporation.*

(e) *Any validly formed professional corporation or general corporation lawfully providing professional services prior to the adoption of this act shall be considered duly organized and valid notwithstanding that rules and regulations adopted pursuant to this section do not permit the practice of the professional services provided by the professional corporation or general corporation.*

Comments

(a) *The requirement that the licensing board issue a certificate attesting to the incorporator's status as a licensed professional was eliminated, thus allowing any person to serve as incorporator. The licensing board must instead issue a certificate approving the directors and the PA name. The committee recommended that the incorporator's powers end upon filing the articles, which necessitated the naming of the directors in the articles of incorporation.*

(b) *The statute is amended to eliminate the \$2 cap on the fee charged by the regulatory board for issuing a certificate of good standing.*

(d) *New section directing the Secretary of State to maintain a list of professions that may form a professional corporation, which is derived from the rules/regulations enacted by the regulatory agencies pursuant to new section 13. Prior law will establish who may form a professional corporation until such time as the agency takes action.*

(e) *This new section serves as a grandfather clause, which was needed to protect professional corporations and general corporations organized prior to the act.*

Sec. 4. 17-2710. *Except as provided by rules and regulations adopted by the licensing agencies, a A professional corporation may be organized only for the purpose of rendering one type of professional service and service ancillary thereto and shall not engage in any other business; except that a single professional corporation may be organized to and render professional services under any two or more of the types set forth in items (2), (6), (13) and (17) or under any two or more of the types set forth in items (4), (5), (7), (8), (9), (11), (12), (14), (15), (16) or (18) of subsection (b) of K.S.A. 17-2707 but. A professional corporation shall be deemed to have the following purposes, whether or not authorized by its articles of incorporation:*

(a) *To purchase, receive, lease, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated;*

(b) *to purchase, receive, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge, or otherwise dispose of, and otherwise use and deal in and with, shares of other interests in, or obligations of, other domestic or foreign corporations, associations, partnerships or individuals, insurance or annuities in any form, or direct or indirect obligations of the United States or of any other government, state, territory, governmental district or municipality or of any instrumentality thereof;*

(c) *to pay pensions and establish pension plans, profit-sharing plans, stock bonus plans, stock option plans, deferred compensation plans, welfare benefit plans, and other retirement incentive plans for any or all of its directors, officers and employees;*

(d) *to do all things necessary or incidental to the practice of the profession or professions which the professional corporation is authorized to practice.*

Comments

(a) *Deletion of the stricken language is necessary because the list of professions now appearing at K.S.A. 2000 Supp. 17-2707(b) would be repealed. Determination of appropriate combinations is left to the licensing agency, as stated in new section 13. The committee amended the first clause of the first sentence to clarify that more than one licensing agency may provide rules or regulations that bear on the types of services a professional corporation may provide, because in certain circumstances a professional corporation may be organized to provide two or more professional services.*

(c) *References to deferred compensation plans and welfare benefit plans were added to (c)*

during the April 2002 meeting. The committee also concluded that "qualified" should be stricken from subsection (c) to clarify that a professional corporation has the power to establish and maintain both qualified and non-qualified retirement plans.

Sec. 5. 17-2711. The corporate name of a corporation organized and operating hereunder may be any name not contrary to law or the ethics of ~~the~~ *each* profession involved. Such name may include any name set forth in K.S.A. 17-6002 but in all cases the corporate name shall end with the word "chartered", ~~or~~ "professional association", *or professional corporation* or with the abbreviation "Chtd.", "P.A.", "P.C.", "Chtd", "PA", or "PC".

Comments

The committee believes that a professional corporation should be authorized to use the designation "P.C." Allowing foreign professional corporations to perform professional services in Kansas makes this expanded authority appropriate because many of the foreign entities will use the designation "P.C." The committee also clarified that corporate endings without periods are permitted, and substituted the word 'each' for "the" to accommodate multiple professions.

Sec. 6. 17-2712. (a) A professional corporation may issue the shares of its capital stock only to a qualified person. A shareholder may voluntarily transfer ~~their~~ *the shareholder's* shares in a professional corporation to the corporation or to a qualified person with the prior written consent of the corporation unless the articles of incorporation *or a separate written agreement* otherwise provide. No shares may be transferred upon the books of the professional corporation, *except shares transferred to the corporation,* or issued by the professional corporation until there is presented to and filed with the corporation a certificate by the ~~regulating board~~ *licensing agency* stating that the person to whom the transfer is to be made or the shares issued is duly licensed to provide the same type of professional services as that for which the corporation was organized. No shareholder shall enter into any voting trust agreement, proxy, or any other type of agreement vesting another person, other than ~~another shareholder of the same corporation~~ *a natural person licensed to provide a professional service permitted by the articles of incorporation of the professional corporation,* with authority to exercise the voting power of any or all of ~~their~~ *the shareholder's* stock. The issuance or transfer of any shares and any proxy, voting trust or other agreement made in violation of this section shall be null and void. Every certificate of stock issued by a professional corporation shall contain substantially the following provision: "The ownership and transfer of this stock and the rights and obligations of stockholders are subject to the limitations and provisions of the professional corporation law of Kansas."

(b) The Kansas securities law as contained in article 12 of chapter 17 of the Kansas Statutes Annotated shall not be applicable to nor govern any transactions relating to any shares of a professional corporation.

~~(c) A general partnership, if all partners thereof are authorized to render a professional service permitted by the articles of incorporation of the issuing professional corporation and in which at least one partner is authorized by a licensing authority of this state to render in this state a professional service permitted by the articles of incorporation of the corporation, shall be deemed a qualified person for purposes of this section.~~

~~(d) A professional corporation or foreign professional corporation in which at least one shareholder is authorized by a licensing authority of this state to render in this state a~~

~~professional service permitted by the articles of incorporation of the corporation shall be deemed a qualified person for purposes of this section.~~

Comments

The revision to subsection (a) allows an option for the transfer of shares to be restricted by a separate document or the articles of incorporation.

The April 2002 committee meeting decided to move sections (c), (d) and (e) to K.S.A. 17-2707(e)'s definition of "qualified person."

At the June 2002 meeting, the committee decided to replace "regulating board" in the third sentence of subsection (a) with "licensing agency" to conform the language to the definition set forth in K.S.A. 17-2707. The committee also amended the fourth sentence of subsection (a) to clarify that a shareholder in a professional corporation may enter into an agreement affecting the shareholder's stock in the professional corporation, such as a trust agreement, with another person even though that person may not be a shareholder in the professional corporation, so long as the person is licensed to perform professional services authorized by the articles of incorporation of the professional corporation. This change coordinates with changes to the definition of a qualified person in K.S.A. 17-2707(e) that permit a revocable trust holding stock in a professional corporation to have a trustee other than the grantor, so long as the trustee with the power to vote the stock in the professional corporation is a person licensed to perform professional services authorized by the articles of incorporation of the professional corporation.

Sec. 7. 17-2713. ~~No person may be a director or officer, other than secretary, of a professional corporation unless he is a shareholder. Only a natural person who is also a qualified person as defined in this act shall serve as a director or officer, except the offices of secretary and treasurer shall not require a qualified person.~~ If the number of shareholders is less fewer than three the number of directors may likewise be less fewer than three, and the officers may be president, treasurer and secretary only, which offices may be combined in one or more persons.

Comments

The committee concluded these changes were appropriate to reflect the possibility that the shareholders, and thus the directors and officers, of a professional corporation may not be individuals. While there was uncertainty whether prior law permitted a holding company structure in which a partnership, limited liability company, professional corporation, or foreign professional corporation owned stock in a professional corporation, the revisions to 17-2707(e) and 17-2712 are intended to clarify that a holding company structure is now permitted, so long as the professional corporation is owned by one or more qualified persons, which may be qualifying partnerships, limited liability companies, professional corporations, or foreign professional corporations.

The committee decided to rewrite this section in the affirmative to state that officers and directors must be both natural persons and qualified persons.

Sec. 8. 17-2714. (a) If the articles of incorporation, ~~or~~ bylaws, or a separate written agreement of the shareholders of a corporation subject to this act fail to state a price or method of determining a price at which the corporation or its shareholders may purchase the shares of a deceased shareholder, or a shareholder no longer qualified to own shares in the corporation, then

the price for such shares shall be determined by arbitration pursuant to the rules of the American Arbitration Association. Unless request in writing is made for arbitration as provided in this section within 30 days after the death or disqualification of a shareholder, the fair value shall be determined by a district judge of the district court in which the principal place of business of the professional corporation is located. The election to incorporate under this act shall constitute a full and final waiver of the right of jury trial on all issues in respect to the price and fair value to be paid for such shares. ~~Upon the death or disqualification of the last shareholder qualifying to be shareholder of a professional corporation hereunder, such corporation shall not be dissolved but shall become a general business corporation.~~

(b) If any shareholder of a professional corporation ceases to be a qualified person such person shall immediately sever all ownership interests in the corporation unless the shareholder cures the disqualification within a reasonable period of time, but not to exceed six months. If the shareholder ceases to be a qualified shareholder due to the forfeiture of the shareholder's license, certification, or registration, and the shareholder has initiated action to restore the license, certificate or registration within six months of the disqualification, the requirement of this section is stayed until final determination that the person's license, certification or registration is forfeited. A corporation's failure to require a disqualified shareholder to sever all ownership interests in compliance with this section shall constitute grounds for forfeiture of its articles of incorporation. A written affidavit stating that the corporation has failed to comply with this provision shall be filed with the Secretary of State. The secretary of state shall forthwith notify the corporation of the secretary of state's intention to forfeit the corporation's articles of incorporation if the corporation does not comply with this provision within sixty days after notice is received. If such failure is cured within sixty days, an officer of the corporation shall state so in a written certificate executed and filed with the secretary of state pursuant to K.S.A. 17-6003. A copy of the certificate shall also be filed with any licensing agency that regulates the members of such professional corporation.

(c) If all stockholders of a professional corporation cease at any time and for any reason to be licensed, certified or registered in the particular profession for which such corporation was organized, the corporation shall file an amendment pursuant to K.S.A. 17-2717 to convert the professional corporation to a general corporation. The professional corporation shall send a copy of the filed amendment to the appropriate licensing agency.

(d) The successors in interest, including heirs, conservators, guardians, administrators, executors or trustees, to ~~such a~~ disqualified or deceased professional ~~shareholder~~ stockholder who was the only remaining qualified person in the corporation, shall have the authority to amend the articles of incorporation to provide that the corporation may function under and be governed by the Kansas general corporation code to collect its accounts receivable, pay its debts, otherwise wind up its affairs or conduct any business or activity which is permitted under the Kansas general corporation code, and the successors in interest of such ~~shareholder~~ stockholder also shall have the authority to elect new directors of the corporation.

Comments

(a) The revision allows greater flexibility in setting forth the method for determining the valuation method for the purchase of shares by the corporation. The stricken portion of the statute is now contained in subsection (c). Subsections (b) and (c) are based on Delaware law, sections 611 and 615, but were substantially altered by the committee.

Sec. 9. 17-2716. Nothing in this chapter restricts or limits in any manner the authority and duty of any ~~regulating board~~ *licensing agency* for the licensing of individual persons providing professional service or the practice of the profession which is within the jurisdiction of the ~~regulating~~ *licensing board*, notwithstanding that the person is an officer, director, shareholder or employee of a professional corporation and providing professional service or engaging in the practice of the profession through the professional corporation. Each ~~regulating board~~ *licensing agency* shall adopt and enforce, pursuant to law, any additional rules and regulations governing the practice of each profession as are necessary to enforce and comply with this chapter and the law applicable to each profession.

Comments

The amendment to this section is technical only, and is made to conform to the definitions used in this act.

Sec. 10. 17-2717. (a) ~~The~~ *A professional* corporation may elect, at any time, upon the vote of the owners of a majority of the issued and outstanding shares, to amend its articles of incorporation so as to prohibit its continued operation under this ~~chapter~~ *act* and to substitute therefor authority for the said corporation to function as a corporation under the general corporation laws, chapter 17, Kansas Statutes Annotated. If such election is made, a certificate of amendment shall be filed in the office of the secretary of state, setting forth the purposes for which the corporation shall continue in operation, together with any other amendments necessary to comply with the requirements of chapter 17 of the Kansas Statutes Annotated.

(b) A general corporation may elect, upon the vote of the owners of a majority of the issued and outstanding shares, to amend its articles of incorporation to provide authority for the corporation to function as a professional corporation under this act, so long as the corporation otherwise meets the requirements for functioning as a professional corporation under this act. If such election is made, a certificate of amendment shall be filed in the office of the secretary of state setting forth the purposes for which the corporation shall continue in operation, together with any other amendments necessary to comply with the requirements of this act. The certificate of amendment shall be accompanied by a certificate of each appropriate licensing agency involved that each director is a person who is licensed to provide a professional service permitted by the amended articles of incorporation of the corporation and that the corporate name has been approved.

Comment

This revision expands section 17-2717 to clarify that a general corporation otherwise qualifying to function as a professional corporation may convert automatically to a professional corporation, rather than reorganizing as a professional corporation by merger into a new professional corporation or otherwise. This revision formalizes current practices of certain state agencies, which will permit a qualifying general corporation to convert to a professional corporation by amending its articles of incorporation.

The first two sentences of new subsection (b) parallel the language in subsection (a). The third sentence of new subsection (b) is intended to parallel the requirements in 17-2709(a) for filing original articles of incorporation. 17-2709(a) requires a certificate from each appropriate licensing agency that the initial directors are licensed professionals, and new subsection (b) parallels this requirement by requiring a certificate that the directors serving at the time the

corporation becomes a professional corporation are licensed professionals. New subsection (b) is not intended, however, to create a requirement that a professional corporation provide a certificate concerning its directors each time it amends its articles of incorporation. The requirement in new subsection (b) that the licensing agency approve the name of the corporation also parallels 17-2709(a).

Sec. 11. 17-2718. (a) Each professional corporation, ~~organized under the laws of this state whether domestic or foreign~~, shall file with the secretary of state an annual report in writing ~~and a copy or duplicate thereof~~, stating the prescribed information concerning the corporation at the close of business on the last day of its tax period next preceding the date of filing, but if any such corporation's tax period is other than the calendar year it shall give notice thereof to the secretary of state prior to December 31 of the year it commences such tax period. The report shall be filed at the time prescribed by law for filing the corporation's annual Kansas income tax return, except that such corporation may apply to the secretary of state not more than 90 days after the due date of its annual report for an extension of the time for filing the report, and an extension shall be granted for a period of time corresponding to that granted under the internal revenue code or K.S.A. 79-3221, and amendments thereto. The report shall be made on a form provided by the secretary of state, containing the following information:

(1) The names and ~~residence~~ addresses of all officers, directors and shareholders of the professional corporation;

(2) *if a domestic professional corporation*, a statement that each ~~officer, director and shareholder, and officer, except secretary and treasurer~~, is ~~or is not~~ a qualified person as defined in K.S.A. 17-2707, and amendments thereto, and setting forth the date on which any shares of the corporation were no longer owned by a qualified person; and

(3) *if a foreign professional corporation*, a statement that each person performing professional services in this state is duly licensed or registered by the licensing agency.

~~(3) the amount of capital stock issued. (4) the names and addresses of shareholders owning at least 5% of the shares of the corporation.~~

(b) The report shall be signed by its president, secretary, treasurer or other officer duly authorized so to act, or by any two of its directors, or by an incorporator in the event its board of directors shall not have been elected ~~executed and filed in accordance with K.S.A. 17-6003~~. The fact that an individual's name is signed on such report shall be prima facie evidence that such individual is authorized to sign the report on behalf of the corporation; however, the official title or position of the individual signing the report shall be designated. This report will be dated and subscribed by the person as true, under penalty of perjury. The copy of the annual report or the ~~duplicate original copy of the annual report~~ shall be forwarded to the regulatory board which licenses the shareholders described in the report. At the time of filing its annual report, each professional corporation shall pay the annual franchise tax prescribed by K.S.A. 17-7503, and amendments thereto.

(c) A licensing agency may request that the secretary of state provide to it copies of the annual reports for all professional corporations that include stockholders licensed by the licensing agency at no cost to the agency.

Comments

The statute requiring annual reports is amended to include foreign professional corporations, which must register with the Secretary of State pursuant to new section 13.

- (a)(1) The reporting of the residential address for officers, directors and shareholders is deleted.*
(a)(2) A reference to the exception of the office of secretary as given in K.S.A. 17-2713 is added.
(a)(3) Reporting by foreign professional corporations is added to the annual report.
(b) The general statute on executing documents, 17-6003, is referenced instead of specifically designated signing parties.
(c) The duty of the Secretary of State to supply duplicate reports to all regulatory bodies is amended to allow for copies only upon request as not all regulatory bodies want copies of the annual reports.

Sec. 12. 17-2719. ~~The certificate of incorporation of any corporation organized under this chapter shall be automatically forfeited as of the last day of December in any year the corporation fails to file the certificate required under this section, or the certificate filed reflects that any shares of the corporation have been owned by an unqualified person for more than one year preceding the date of the certificate and that no action as required herein has been timely instituted to fix the fair value of such shares. In the event of any such forfeiture, all the powers, privileges and franchises conferred upon such corporation by its certificate of incorporation shall be subject to rescission, and the secretary of state shall notify the corporation by mail, addressed to its registered office, as disclosed by the records of his office, that its corporate existence and rights in this state have been forfeited and canceled, and the corporation dissolved subject to rescission as provided in chapter 17, Kansas Statutes Annotated.~~ *(a) The failure of any professional corporation to file the annual report in accordance with the provisions of this act or to pay the annual franchise tax within 90 days of the time for filing and paying the same shall work the forfeiture of the professional corporation. Within 60 days after the date such annual report and franchise taxes are due, the secretary of state shall notify any corporation that has failed to submit such report and taxes when due that its articles of incorporation shall be forfeited unless the annual report is filed and the franchise taxes thereon are paid within 90 days from the date such report and taxes were due.*

(b) The provisions of K.S.A. 17-7509, and amendments thereto, relating to penalties for failure to file an annual report or pay the required franchise tax shall be applicable to any professional corporation organized under this act.

(c) When the articles of incorporation of a professional corporation are forfeited for failure to file an annual report or to pay the required franchise tax, the professional corporation may be reinstated by filing a certificate of reinstatement in the manner and form to be prescribed by the secretary of state and paying to the secretary of state all fees and franchise taxes, including any penalties thereon, due the state. The fee for filing a certificate of reinstatement shall be the same as that prescribed by K.S.A. 17-7506, and amendments thereto. When reinstatement is effective, it relates back to and takes effect as of the effective date of the forfeiture and the corporation may resume its business as if the forfeiture had never occurred.

(d) The directors and officers in office when any such forfeiture occurs shall be the trustees of the corporation, shall have full authority to wind up its business and affairs, sell and liquidate its property and assets, pay its debts and obligations and to distribute the net assets among the shareholders. The trustees as such directors and officers shall have power to sue for and recover the debts and property due to the corporation, describing it by its corporate name, and may be sued as such. The trustees shall be jointly and severally responsible to the creditors and shareholders of the corporation to the extent of its property and effects that shall have come into their hands.

Comments

- (a) *Antiquated references are eliminated, along with the requirement of forfeiture for any ownership by an unqualified person.*
- (b) *General provisions for forfeiture and penalties for failure to file the annual report or pay the franchise tax are copied from general corporate code.*
- (c) *The right of reinstatement is added.*
- (d) *References to trustees are replaced with references to officers and directors. Reference to joint/several liability is deleted in accordance with recommendation contained in Clayton's 11/6/01 memo, section II.*

*New Sec. 13. (a) Subject to K.S.A. 17-2709(e) **and other applicable law**, each licensing agency shall adopt rules and regulations to determine whether or under what circumstances professional services that the agency regulates may or may not be performed through a general corporation. In determining whether the corporate practice of a profession should be permitted or prohibited, the agency shall consider:*

- (1) *The effect on competition;*
- (2) *whether the practice of the profession is governed by ethical rules prohibiting fee splitting or restricting ownership of an entity solely to licensed or registered members of the profession;*
- (3) *whether the corporate practice of the profession is consistent with grounds for revocation, suspension or limitation of the professional license;*
- (4) *whether implementing corporate policy by persons who are not licensed to engage in the profession unduly interferes with independent professional judgment;*
- (5) *whether prohibiting or limiting the corporate practice of the profession is desirable in order to protect the public health, safety and welfare;*
- (6) *whether prior decisions by the Kansas appellate courts prohibit or limit the corporate practice of the profession; and*
- (7) *whether the practice of the profession through a general corporation has customarily and historically been lawful.*

*(b) Subject to K.S.A. 17-2709(e), a licensing agency may adopt rules and regulations allowing professional services to be performed through a professional corporation, limited liability company, limited partnership, or limited liability partnership as provided by this act, and allowing two or more types of professions to provide professional services in the same professional business organization. **If a licensing agency determines that professional services shall not be performed through a general corporation pursuant to (a), such professional services may be performed in a professional corporation, regardless of whether the licensing agency enacts rules and regulations pursuant to this subsection.***

Comments

The committee believes that there should be a definite statement as to whether there is a prohibition against the general corporate practice for each profession. This determination should be made by the licensing agency or by a statute in the licensing act. Standards for making that determination are provided so that there is not an unlawful delegation of legislative authority.

References to KSA 17-2709(e) were added to clarify that professional associations and general corporations created prior to this act are unaffected by the new rules/regulations.

LPs were added to the list of business entities allowed to provide professional services.

New Sec. 14. (a) No foreign professional corporation shall perform professional services in this state unless:

- (1) the corporation is in good standing in the jurisdiction in which it is incorporated;*
- (2) the corporation is organized for purposes consistent with this act and rules and regulations adopted by the licensing agency;*
- (3) at least one of the corporation's shareholders is licensed or registered by the licensing agency to perform professional services in this state;*
- (4) each person performing professional services through the foreign corporation in this state is duly licensed or registered by the licensing agency in this state;*
- (5) the corporate name complies with this act unless a different name is required by the jurisdiction in which the corporation is incorporated; and*
- (6) each shareholder is licensed in at least one state to practice the profession for which the corporation is organized.*

(b) No foreign professional corporation shall perform a professional service in this state through any means until it has filed in the office of the secretary of state of this state an application for authority to engage in business in the state as a foreign professional corporation. Each application to do business as a foreign professional corporation in this state shall be filed in accordance with K.S.A. 17-6003 and amendments thereto, and shall include:

- (1) all of the items required in subsection (b) of K.S.A. 17-7301;*
- (2) a certificate from the licensing agency stating the name of the foreign professional corporation, that the corporate name proposed for use in this state has been approved, and that at least one shareholder of the foreign professional corporation is duly licensed to practice that profession in this state; and*
- (3) a statement that each person performing professional services in this state through the foreign professional corporation is duly licensed or registered by the licensing agency in this state.*

(d) Each foreign professional corporation, its directors, officers, shareholders, employees and agents, shall be deemed to submit to the authority of the licensing agency in this state.

(e) This section shall not be construed to prohibit any foreign professional corporation that does not meet the requirements of paragraph (b)(3) from doing business not constituting the performance of a professional service if the foreign professional corporation is otherwise authorized to do business in this state.

(f) A limited liability company, limited partnership, or limited liability partnership organized under the laws of another state to perform professional services and that otherwise meets the applicable requirements of this section and the provisions relating to foreign entities of the Kansas revised limited liability company act, the Kansas revised uniform limited partnership act, or the Kansas uniform partnership act, may file an application with the secretary of state for authority to engage in business in this state and shall be governed in the same manner as a foreign professional corporation.

Comments

In recent years several professional corporations organized in other states have registered to do business in Kansas. The new section would allow the foreign professional corporation to do business in Kansas if appropriate conditions are met.

This new section also allows a foreign LLC, LP or LLP to perform professional services in this state.

New Sec. 15. (a) When any professional corporation which files an annual report with the secretary of state in accordance with the provisions of K.S.A. 17-2036, and amendments thereto, shall apply for an extension of time for filing its annual income tax return from the internal revenue service, the time for filing the annual report with the secretary of state shall be extended, correspondingly, upon filing with the secretary of state, prior to the due date of its annual report, a copy of the application to income tax authorities. All such copies of applications for extension of the time for filing income tax returns filed on or after December 31, 1978, shall be maintained by the secretary of state in a confidential file and shall not be disclosed to any person except as authorized pursuant to the provisions of K.S.A. 79-3234 and amendments thereto and subsection (c) of this section. All copies of such applications shall be preserved for one year and thereafter until the secretary of state orders that they be destroyed.

(b) Except in accordance with subsection (c) of this section or a proper judicial order, it shall be unlawful for the secretary of state or any other officer, employee, former officer or former employee of this state to disclose any information contained in copies of federal extensions of income tax returns. Nothing in this section shall be deemed to prohibit the secretary of state or any officer or employee of the office of secretary of state from issuing any of the corporate documents described in K.S.A. 17-7506.

(c) All copies of such applications shall be open to inspection by or disclosure to: (1) any person designated by resolution of the corporation's board of directors or other similar governing body; (2) any officer or employee of such corporation upon written request signed by any principal officer and attested to by the secretary or other officer; or (3) any bona fide shareholder of record owning 1% or more of the outstanding stock of such corporation.

Comments

The general corporate code, specifically K.S.A. 17-7514, addresses extensions for professional corporations as well as general corporations. The provision relating to professional corporations was cut from the general corporate code and added to this act by addition of this statute.

*Sec. 16. 17-7668. * * * (e) As used in this section, "qualified person," means:*

(1) any natural person licensed to provide a professional service permitted by the articles of organization of the limited liability company;

(2) the estate of any natural person licensed to provide a professional service permitted by the articles of organization of the limited liability company and such estate does not continue to hold title to a membership interest in the limited liability company for more than two years following such natural person's death;

(3) the trustee of a revocable living trust established by a natural person who is licensed to provide a professional service permitted by the articles of organization of the limited liability company, if the terms of such trust provide (i) that such natural person is the principal beneficiary of such trust, and (ii) that such natural person, or a special independent trustee

licensed to provide a professional service permitted by the articles of organization of the limited liability company, is a trustee of such trust having the sole power to make decisions concerning the membership interest held by such trust and such trust does not continue to hold title to a membership interest in the limited liability company for more than two years following such natural person's death;

(4) A general partnership, limited partnership, or limited liability partnership if all partners thereof are authorized to provide a professional service permitted by the articles of organization of the issuing limited liability company and in which at least one partner is authorized by a licensing authority of this state to provide in this state a professional service permitted by the articles of organization of the limited liability company;

(5) A professional corporation which is validly organized in accordance with the professional corporation law of Kansas;

(6) A foreign professional corporation in which at least one shareholder is authorized by a licensing authority of this state to provide in this state a professional service permitted by the articles of organization of the limited liability company;

(7) A limited liability company, if all the members thereof are authorized to provide a professional service permitted by the articles of organization of the issuing limited liability company and in which at least one member is authorized by a licensing authority of this state to provide in this state a professional service permitted by the articles of organization of the issuing limited liability company; or

(8) the trustee of a trust which is a qualified trust under subsection (a) of section 401 of the federal internal revenue code as in effect on January 1, 2002 or of a contribution plan which is a qualified employee stock ownership plan under subsection (a) of section 409 of the federal internal revenue code as in effect on January 1, 2002, so long as the trustee is the limited liability company or a natural person licensed to provide a professional service permitted by the articles of organization of the limited liability company.

Comments

K.S.A. § 17-7668 authorizes organization of a limited liability company to exercise the powers of a Kansas professional corporation. 17-7668(e) defines a "qualified person" for purposes of determining the persons (natural or judicial) that may be members of an LLC formed for a professional purpose. The current definition parallels the current definition of a qualified person contained in section 17-2707(e) of the professional corporation law. Because 17-2707(e) would be amended significantly by this act, 17-7668(e) should be amended to make corresponding changes. Otherwise it may be unclear whether persons meeting the definition of a qualified person for purposes of the professional corporation law also meet the definition of a qualified person for purposes of the LLC act.

K.S.A. 65-1522. (a) A licensee may practice optometry ~~under the name of~~ **only as** a professional corporation, **if** authorized by ~~K.S.A. 17-2706~~ **section 13** and amendments thereto, or a limited liability company authorized by K.S.A. 2001 Supp. 17-7668 and amendments thereto. Such professional corporate name or limited liability company name may contain a trade name or assumed name approved by the board.

(b) A licensee may practice as a sole practitioner or may associate with other licensees or health care providers licensed under the laws of the state of Kansas and may practice optometry as a sole practitioner or in such associations under a trade or assumed name approved by the board.

(c) A licensee may practice in a medical facility, medical care facility or a governmental institution or agency.

(d) A licensee shall not be limited in the number of locations from which the licensee may engage in the practice of optometry pursuant to subsections (a), (b) and (c).

(e) In all office locations a licensee shall:

(1) Provide adequate staff during the hours of its operation and shall provide the necessary optometric equipment to enable a licensee to provide adequate optometric care on the premises; and

(2) provide that there shall be present at the office location a person licensed by optometry law when optometric practice acts requiring a license are performed at the office location.

(f) Nothing herein contained shall be construed to permit the franchised practice of optometry except that a licensee may purchase a franchise to engage in the business of optical dispensing separate and apart from any of the licensee's offices for the practice of optometry so long as the terms of the franchise agreement do not violate the optometry law.

K.S.A. 65-1524. Nothing contained herein shall be construed to allow a corporation except as provided in K.S.A. 17-2706 and amendments thereto or a limited liability company except as provided in K.S.A. 2001 Supp. 17-7668 and amendments thereto to practice, offer, or undertake to practice or hold itself out as practicing optometry. *No change – included this statute to demonstrate that prohibition against general corporate practice of optometry already exists.*

K.S.A. 65-1425. ~~Except as provided in K.S.A. 17-2706 et seq.,~~ No corporation shall practice, offer, or undertake to practice or hold itself out as practicing dentistry, ***except a licensee may practice dentistry as a professional corporation if authorized by section 13 and amendments thereto, or a limited liability company authorized by K.S.A. 17-7668 and amendments thereto.*** Every person practicing dentistry as an employee of another shall cause his name to be conspicuously displayed and kept in a conspicuous place at the entrance of the place where such practice is conducted: *Provided, however,* That nothing herein contained, shall prohibit a licensed dentist from practicing dentistry as the agent or employee of another licensed dentist in this state, or from practicing dentistry as the agent or employee of any state hospital or state institution where his only remuneration is from the state, or from any corporation which provides dental service for its employees at no profit to the corporation.

AMENDMENTS TO SB 28

Section 1(b): "Professional service" means . . . a personal service provided to the public that may lawfully be performed only by a natural person to whom the licensing agency has issued a license, ~~regulation~~ registration or certification.

Section 1(f)(3): the trustee of a revocable living trust established by a natural person who is licensed to . . . provide a professional service permitted by the articles of incorporation of the professional corporation, if the terms of such trust provide that the trust does not continue to hold title to the professional corporation stock for more than two years after the death of such natural person. . .

New Section. (a) When any professional corporation which files an annual report with the secretary of state in accordance with the provisions of K.S.A. 17-2718, and amendments thereto, shall apply for an extension of time for filing its annual income tax return from the internal revenue service, the time for filing the annual report with the secretary of state shall be extended, correspondingly, upon filing with the secretary of state, prior to the due date of its annual report, a copy of the application to income tax authorities. All such copies of applications for extension of the time for filing income tax returns filed on or after December 31, 1978, shall be maintained by the secretary of state in a confidential file and shall not be disclosed to any person except as authorized pursuant to the provisions of K.S.A. 79-3234 and amendments thereto and subsection (c) of this section. All copies of such applications shall be preserved for one year and thereafter until the secretary of state orders that they be destroyed.

(b) Except in accordance with subsection (c) of this section or a proper judicial order, it shall be unlawful for the secretary of state or any other officer, employee, former officer or former employee of this state to disclose any information contained in copies of federal extensions of income tax returns. Nothing in this section shall be deemed to prohibit the secretary of state or any officer or employee of the office of secretary of state from issuing any of the corporate documents described in K.S.A. 17-7506.

(c) All copies of such applications shall be open to inspection by or disclosure to: (1) any person designated by resolution of the corporation's board of directors or other similar governing body; (2) any officer or employee of such corporation upon written request signed by any principal officer and attested to by the secretary or other officer; or (3) any bona fide shareholder of record owning 1% or more of the outstanding stock of such corporation.

Senate Judiciary

Jan. 30, 2003
Attachment 2-1

RON THORNBURGH
Secretary of State



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TESTIMONY OF THE SECRETARY OF STATE
TO THE SENATE JUDICIARY COMMITTEE
ON SB 29

JANUARY 30, 2003

Mr. Chairman and Members of the Committee:

The Secretary of State appreciates the opportunity to appear in support of SB 29, the Kansas Bar Association's bill revising the Kansas corporate code. The Secretary of State participated as a member of the KBA drafting committee, and most of the sections of the bill affecting our office were drafted by us. Therefore my testimony will focus on those sections relating to the Secretary of State's Office and will not address substantive law issues.

1. **Filing Procedures.** The Secretary of State adopted an imaging system in 2000, which replaced our paper filing system. All documents are indexed and maintained on the imaging system and therefore retention of paper documents is no longer necessary. The proposed bill directs the Secretary of State to image the paper document filed by the customer and to return it to the customer as a certified copy. This new procedure reduces our storage needs while providing the customer evidence of the document that was recorded in our office. Our office has checked with the Historical Society and they are satisfied that the Secretary of State's imaging system will adequately preserve our records.

2. **Definition of "doing business" for Foreign Corporations.** The corporate code defines when an out-of-state corporation is "doing business" in our state, which determines if the corporation must register with the Secretary of State. The current definition is vague and confusing, generating many phone calls from customers to the Secretary of State's Office for help interpreting the provision. The proposed definition given in the bill is based on Delaware law and the Kansas Revised Uniform Partnership Act. It is much more specific and easier to understand.

3. **Annual Reports.** The statutes governing annual reports filed by corporations have been amended to reflect Delaware law, resulting in slightly different reporting requirements, especially information relating to stock. The reporting of agricultural land also has been limited to disclosure of the county where the land is located instead of listing the township, section and range. Customers frequently fail to complete this information, or list inaccurate information, and therefore the reliability of this information is questionable. This amendment was discussed with Raney Gilliland of Legislative Research before its inclusion in the bill and he was satisfied that the changes would not impede the public's ability to monitor agricultural entities.

Senate Judiciary
Jan 30, 2003
Attachment 3-1

4. **Franchise Tax Calculation.** Corporations pay a franchise tax at the time they file their annual report with our office. The franchise tax is calculated based on net worth; \$2 for each \$1,000 in net worth. Parent entities that own net worth in subsidiaries are therefore taxed twice. The proposed bill would allow a parent entity to subtract any net worth reported by the subsidiary entity before computing its franchise tax, thereby eliminating the double taxation. A subsidiary entity is defined as ownership of over 50%, based on recommendations from the Department of Revenue.

This amendment will have a fiscal impact on state general funds, and therefore the committee should carefully consider this provision of the bill. Last year the Kansas legislature increased the franchise tax by changing the formula from \$1 per \$1,000 of net worth to \$2 per \$1,000 of net worth.

The Secretary of State believes the amendment promotes fairness and equity in taxing Kansas businesses, and is even more appropriate now, given the doubled franchise tax rate. However, we would understand if the committee decides to eliminate this provision of the bill due to fiscal concerns.

Finally, I want to offer an observation about the KBA committee's decision to continue to use Delaware law as the basis for the Kansas Corporations Act. It should be noted that only Kansas and two other states base their corporate laws on Delaware.¹ The majority of states—currently 31—choose to follow the Model Business Corporations Act, promulgated by the American Bar Association.²

I appreciate the opportunity to appear today on the corporate rewrite bill and would be happy to answer questions.

Melissa A. Wangemann, Legal Counsel
Deputy Assistant Secretary of State

¹ Nevada and Oklahoma are the two other states that model their corporate laws after Delaware.

² Twenty-five states have enacted all or substantially all of the MBCA: AL, AZ, AR, CT, FL, GA, ID, IN, IA, KY, ME, MS, MT, NE, NH, NC, OR, SC, TN, UT, VT, VA, WA, WI, WY. Six states follow the 1969 version of the MBCA: AK, DC, HI, NM, RI, SD. MA is currently considering enactment. Source: Professor Michael Dooley, University of Virginia School of Law, Reporter to the MBCA.



KANSAS

DIVISION OF THE BUDGET
DUANE A. GOOSSEN, DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

January 30, 2003

The Honorable John Vratil, Chairperson
Senate Committee on Judiciary
Statehouse, Room 255-E
Topeka, Kansas 66612

Dear Senator Vratil:

SUBJECT: Fiscal Note for SB 29 by Senate Committee on Judiciary

In accordance with KSA 75-3715a, the following fiscal note concerning SB 29 is respectfully submitted to your committee.

SB 29 would amend the Kansas Corporate Code to bring it into compliance with the Delaware Code, as the Kansas Code was originally based on the Delaware law. The amendments would affect the Secretary of State's duties as follows:

1. Require the Office of Secretary of State to record corporate documents in an electronic imaging system and return the original paper document to the customer.
2. Allow new filings, such as a certificate of termination or certificate of amendment, to a transaction.
3. Allow the Secretary of State to set filing and copying fees, as well as other services fees with caps as provided in the bill.
4. Allow a parent corporation to subtract the net worth of a subsidiary corporation prior to calculating the franchise tax, which is paid to the Secretary of State and deposited in the State General Fund.

The bill would also increase the penalty the district courts may charge in the event of disobedience of a court order from \$5,000 to \$50,000. In addition, the bill would modify the appraisal rights and the process for petitioning a court to make a shareholder value determination for merged or consolidated corporations.

Senate Judiciary

Jan. 30, 2003
Attachment 47

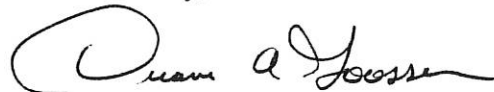
The Office of Secretary of State states that the bill could be implemented with existing resources. The agency anticipates a decrease in storage needs, as the bill would allow the Office to record corporate documents in electronic forms, which would result in less paperwork. However, the administrative savings could not be determined, as it is not possible to estimate the number of boxes of paperwork that would be eliminated.

The agency further states that the bill would give the Office the authority to raise filing fees. Therefore it would likely increase the filing fees for the for-profit corporation and the not-for-profit corporations from \$75 to \$150, and \$20 to \$50, respectively. Based on the number of filings in 2001, the increase in state revenue would be approximately \$334,800 annually: (\$75 increase in for-profit filing fees x 4,184 filings) + (\$30 increase in not-for-profit filing fees x 700 filings).

The agency indicates that the provision allowing a parent corporation to subtract the net worth of a subsidiary corporation would decrease franchise taxes received and therefore reduce State General Fund receipts. However, the agency is unable to calculate the decrease in state revenues, as it does not track corporations by parent and subsidiary relationship. The Department of Revenue is also unable to provide an estimate.

The Office of Judicial Administration states that it is not possible to determine the exact fiscal effect that increasing contempt penalties would have on district courts. The Office of Judicial Administration further states that the changes in appraisal rights and process would not impose a fiscal burden on the courts. Any fiscal effect resulting from this bill would be in addition to amounts included in *The FY 2004 Governor's Budget Report*.

Sincerely,



Duane A. Goossen
Director of the Budget

cc: Christy Harvey, Secretary of State's Office

SENATE BILL No. 36

By Committee on Judiciary

1-21

AN ACT concerning courts; relating to the judicial council; amending K.S.A. 20-2201, 20-2202, 20-2203, 20-2204 and 20-2206 and K.S.A. 2002 Supp. 20-2207 and repealing the existing sections; also repealing K.S.A. 20-2205.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 20-2201 is hereby amended to read as follows: 20-2201. A judicial council is hereby established and created which shall be composed of one justice of the supreme court, one judge of the court of appeals, two district judges of different judicial districts, four resident lawyers, the chairperson of the judiciary committee of the house of representatives, the chairperson of the corrections and juvenile justice committee of the house of representatives and the chairperson of the judiciary committee of the senate. All members except the chairpersons of the senate and house judiciary committees and the house corrections and juvenile justice committee shall be appointed by the chief justice of the supreme court for a term of four years and until a successor shall have been appointed and qualified.

The terms of the chairpersons of the senate and house judiciary committees and the house corrections and juvenile justice committee, and all other members, shall terminate upon such member ceasing to belong to the class from which such member was appointed. All vacancies except those of chairpersons of the senate and house judiciary committees and the house corrections and juvenile justice committee shall be filled by appointment by the chief justice for the unexpired term. Upon vacancy, the places of the chairpersons of the senate and house judiciary committees and the house corrections and juvenile justice committee shall be filled by their successors as such chairpersons.

Sec. 2. K.S.A. 20-2202 is hereby amended to read as follows: 20-2202. The judicial council shall select one of its the council's members as chairman chairperson for such period as it the council may choose, and. The judicial council shall meet semiannually and more frequently, if necessary, upon call of the chairman chairperson.

Sec. 3. K.S.A. 20-2203 is hereby amended to read as follows: 20-2203. It shall be the continuous duty of the judicial council to survey and

Comment

It is the opinion of the Judicial Council that the chair of newly created House Corrections and Juvenile Justice Committee should be a member of the Council. The Council often conducts studies and recommends legislation in the criminal and juvenile areas. With the addition of the new member, the Council will have four judges, four lawyers and three legislators as members.

Comment

This change is technical.

Senate Judiciary

Jan 30 2003
Attachment 5-1

1 study the judicial department *branch* of the state, the volume and con-
 2 dition of business in the courts, whether of record or not, the methods
 3 and rules of procedure therein, the time elapsing between the initiation
 4 of litigation and the conclusion thereof, and the condition of dockets as
 5 to finished business at the closing of terms, to receive and consider sug-
 6 gestions from judges, members of the bar, public officials and citizens
 7 concerning faults in the administration of justice, and remedial rules and
 8 practice, to recommend methods of simplifying civil and criminal pro-
 9 cedure, expediting the transaction of judicial business and eliminating
 10 unnecessary delays therein and correcting faults in the administration of
 11 justice, to submit from time to time to the courts or judges thereof sug-
 12 gestions as to change in rules and methods of civil and criminal procedure
 13 as may be deemed by the council to be beneficial. *and recommend im-*
 14 *provements in the administration of justice. The judicial council shall re-*
 15 *ceive and consider suggestions from judges, lawyers, public officials and*
 16 *citizens concerning suggested improvements to the administration of jus-*
 17 *tice. The judicial council may undertake studies in any area of law for the*
 18 *purpose of improving the administration of justice and, may accept as-*
 19 *signments from the legislature or the supreme court.*

20 Sec. 4. K.S.A. 20-2204 is hereby amended to read as follows: 20-
 21 2204. The council shall report on the work of the council, the facts as-
 22 certained, the conditions of business in the courts, conditions found to
 23 be defeating or deferring the administration of justice, with recommen-
 24 dations concerning needed changes in the organization of the judicial
 25 department, in rules and methods in civil and criminal procedure and
 26 pertinent legislation. Such reports shall be printed by the director of
 27 printing. Copies shall be distributed by the council to the legislature pur-
 28 suant to K.S.A. 46-1212c, justices of the supreme court, judges of the
 29 district courts, court of appeals and municipal courts, clerks of the district
 30 courts, and attorneys registered pursuant to supreme court rule 200. Cop-
 31 ies may be distributed to other persons or agencies that demonstrate a
 32 need therefor *and the council's recommendations for improvement in the*
 33 *administration of criminal justice by providing such information on the*
 34 *council's website and in any other manner the council deems appropriate.*

35 Sec. 5. K.S.A. 20-2206 is hereby amended to read as follows: 20-
 36 2206. All members of the council except judicial members shall receive
 37 compensation and travel expenses and subsistence expenses or allowances
 38 as provided in K.S.A. 75-3212, *and amendments thereto.* Reimbursement
 39 for travel expenses and subsistence expenses or allowances of judicial
 40 members shall be paid as provided in K.S.A. 75-3212, *and amendments*
 41 *thereto.*

42 All bills and accounts of the council shall be approved by the ~~chairman~~
 43 *chairperson* and shall be audited and paid as other claims against the state,

5-2
 Comment

The proposed amendment modernizes language relating to the duties of the Judicial Council and is more descriptive of what the duties of the Council have evolved to include.

Comment

During the time the Council published the *Bulletin* it was unique in that it was the only publication that was sent to every lawyer. Once court days were repealed and the statistics were gathered by the OJA, two of its uses disappeared.

In the 1980's, the Legislature quit funding the *Kansas Judicial Council Bulletin* which was the tool the Council used to meet the reporting requirement. Since that time the Council has kept the legislature informed and furnished information to those who were interested or requested the information by other means.

Comment

The changes are technical.

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1 authorized by law. Regularly appointed members of ~~special advisory~~ com-
2 mittees of the council who are not members of the council shall be paid
3 compensation and travel expenses and subsistence expenses or allowances
4 as provided in K.S.A. 75-3212, *and amendments thereto*.

5 Sec. 6. K.S.A. 2002 Supp. 20-2207 is hereby amended to read as
6 follows: 20-2207. (a) The judicial council may fix, charge and collect fees
7 for sale and distribution of legal publications in order to recover direct
8 and indirect costs incurred for preparation, publication and distribution
9 of legal publications. The judicial council may request and accept gifts,
10 grants and donations from any person, firm, association or corporation or
11 from the federal government or any agency thereof for preparation, pub-
12 lication or distribution of legal publications.

13 (b) The publications fee fund of the judicial council which was estab-
14 lished in the state treasury pursuant to appropriation acts is hereby con-
15 tinued in existence and shall be administered by the judicial council. Rev-
16 enue from the following sources shall be deposited in the state treasury
17 and credited to such fund:

18 (1) All moneys received by or for the judicial council from fees col-
19 lected under this section; and

20 (2) all moneys received as gifts, grants or donations for preparation,
21 publication or distribution of legal publications.

22 (c) Moneys deposited in the publications fee fund of the judicial
23 council shall be expended ~~only~~ for operating expenditures related to prep-
24 aration, publication and distribution of legal publications of the judicial
25 council.

26 (d) All expenditures from the publications fee fund shall be made in
27 accordance with appropriation acts upon warrants of the director of ac-
28 counts and reports issued pursuant to vouchers approved by the chair-
29 person of the judicial council or the chairperson's designee.

30 Sec. 7. K.S.A. 20-2201, 20-2202, 20-2203, 20-2204, 20-2205 and 20-
31 2206 and K.S.A. 2002 Supp. 20-2207 are hereby repealed.

32 Sec. 8. This act shall take effect and be in force from and after its
33 publication in the statute book.

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Comment

In subsection (c) the word "only" is stricken to allow publication fee fund monies to be used for other than publications. Since the passage of this statute, the legislature has passed yearly provisos which allow the statute to not apply. This amendment removes the necessity for those provisos.

REPEAL

1 20-2205. Collection of information on the operation of state court system; duties of court clerks,
2 sheriffs and police officers.

3 ~~The judicial council and the judicial administrator, in cooperation, shall collect, correlate and~~
4 ~~disseminate information and statistics concerning the operations of the state court system. On~~
5 ~~request of the judicial council or the judicial administrator, the clerks of the various courts in this~~
6 ~~state, and sheriffs and police officers, shall furnish without charge such information relating to~~
7 ~~rules, methods and procedure applicable in their respective courts, and the condition of legal~~
8 ~~business therein as may be deemed necessary by the council or the judicial administrator.~~

9 **History:** L. 1927, ch. 187, § 5; L. 1976, ch. 146, § 8; Jan. 10, 1977.

10 **Comment**

11 This section should be repealed because the transition from the Judicial Council to the OJA
12 gathering court statistics has been completed for more than 20 years.
