



# Business Succession Planning: Meeting the Ethical Duty of Continuous Care

ACUÑA ♦ REGLI

Estate Planning ♦ Administration ♦ Conservatorship ♦ Inheritance Litigation

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Mr. Acuña has taught a variety of tax and financial professionals and professional fiduciaries throughout the United States of America, including the California Society of Enrolled Agents, the National Association of Enrolled Agents, the American Institute of Certified Public Accountants, the National Tax Practice Institute, the National Guardianship Association, and the Professional Fiduciary Association of California. He was admitted to the State Bar of California during 1985.

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## The Issues:

- ❖ In most jurisdictions, only individuals or approved agencies can be appointed as professional guardians.
- ❖ Continuity of care is an important fiduciary duty.
  - ❖ Clients' needs are always the primary responsibility of a fiduciary.
- ❖ Corporations, Partnerships, LLC, LLPs, or any other business entity cannot be appointed as a guardian under current law.
- ❖ The challenge is to develop a professional practice, a plan, and procedures to insure continuity of care in light of the limitations on professional guardians.

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## The Duty of Continuous Care

(You Must Have a Succession Plan!)

- ❖ Various ethical standards and the common law recognize two "core" fiduciary duties:
  - ❖ Protection of the Person.
  - ❖ Continuous Care.
- ❖ Unfortunately, while the duty exists, there often are not authorizations for business entities to facilitate continuous care.
- ❖ On many cases, judicial appointments of guardians are, therefore, of individuals and not of businesses.
  - ❖ Exception: Banks/Trust Companies are explicitly and exclusively authorized.
  - ❖ Exception: Governmental or non-profit agencies.

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## Choosing the Right Entity

*(The "Trust Company" Problem)*

Example: In CA, Corporations or LLCs Cannot Be guardians!

- ❖ Corporations Code requires separate qualifications to serve as a "trust company":
  - ❖ "The purpose of this corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code."
  - ❖ Licensure as an independent trust company is administered through the California Department of Financial Protection and Innovation, not the Professional Fiduciaries Bureau
- ❖ Probate Code §300 specifically prohibits a "Trust Company" from being appointed as a Conservator of the Person

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## Choosing the Right Entity

*(A Question with No Good Answers)*

- ❖ Sole proprietorship.
  - ❖ No liability protection.
  - ❖ No planning for multiple principals or succession planning.
  - ❖ No opportunity to transfer liabilities to successor guardians.
- ❖ Partnerships.
  - ❖ Least favorite option of all!
  - ❖ As a matter of law, every partner is jointly and severally liable for the acts, error, and omissions of the others.
  - ❖ May provide for succession planning and for transferring liabilities.

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## Choosing the Right Entity (A Question with No Good Answers)

### ❖ Professional Corporations.

- ❖ Liability protection.
- ❖ Options for multiple principals and succession planning.
- ❖ May provide for succession planning and for transferring liabilities.
- ❖ Profits/Losses must be in proportion to ownership.

### ❖ Limited Liability Companies.

- ❖ Provides all the protection of Professional Corporations, but with less formalities required.
- ❖ May provide for succession planning and for transferring liabilities.
- ❖ May distribute profits and losses disproportionately.
- ❖ May provide for multiple owners, with only one owner as the manager.
- ❖ Remember: It is highly unlikely that courts or legislatures would support using an entity for liability protection; any authorizing statute would probably have "carve-outs" for professional guardians.

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## Choosing the Right Entity (A Question with No Good Answers)

### ❖ Limited Liability Partnerships

- ❖ Provides that each partner is responsible for their acts.
- ❖ Would permit individual partners to be named in the same manner as an "attorney of record"
- ❖ Provides limited protection from the acts or omissions of the other partners, but not from their own.
- ❖ May provide for succession planning and for transferring liabilities.
- ❖ May distribute profits and losses disproportionately.
- ❖ May provide for multiple owners, with only one owner as the managing partner.
- ❖ Reserved for "learned professions" with the highest professional duties owed to the public:
  - ❖ Attorneys
  - ❖ Accountants
  - ❖ Architects
  - ❖ Guardians?

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## Are There Solutions?

*(Cobbling Together a Succession Plan)*

- ❖ If possible in your jurisdiction, use business entities.
- ❖ Executors, Guardians, and Conservators should consider expanding their appointment orders:
  - ❖ Naming their successor as co-executor, co-guardian, or co-conservator, each with the power to continue to act as sole executor, guardian, or conservator in case one is disabled or has died.
  - ❖ Permitting the guardian to nominate a successor.
- ❖ Queries:
  - ❖ Can the guardian's estate representative nominate a successor?
  - ❖ Who pays for the Petition for Appointment of a successor?

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## Are There Solutions?

*(Cobbling Together a Succession Plan)*

- ❖ Trustees could insist upon language such as the following:
  - ❖ "[Trust Protector] shall have the power to appoint a licensed private guardian who is a member of the Professional Fiduciary Association of California as a Successor Trustee."
  - ❖ "My then-serving trustee shall have the power to appoint a licensed private guardian who is a member of the Professional Fiduciary Association of California as a Successor Trustee."
  - ❖ "Fiduciary Services, Inc. shall have the power to appoint a licensed private guardian who is a member of the Professional Fiduciary Association of California as a Successor Trustee, including a shareholder, director, or officer of Fiduciary Services, Inc."
  - ❖ "The managing partner of [Law Firm Name] or its successor firm shall have the power to appoint a licensed private guardian who is a member of the Professional Fiduciary Association of California as a Successor Trustee."
- ❖ Remember! Trustees are appointed. Executors, Administrators, Conservators, and Guardians are nominated.

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## Are There Solutions?

*(Cobbling Together a Succession Plan)*

- ❖ All guardians should have an emergency plan for continuous care.
  - ❖ Reciprocal agreements with other guardians.
  - ❖ Designating another guardian/firm as their agent in case of an emergency.
  - ❖ Nominations of successor trustees/conservators/executors/guardians.
- ❖ All guardians should have a succession plan and information sheet for their clients.
  - ❖ Informing them of any succession arrangements.
  - ❖ Disclosing that another guardian may view confidential client information if there is an interruption in services due to emergency/incapacity/death of the guardian.
  - ❖ Providing emergency contact numbers.

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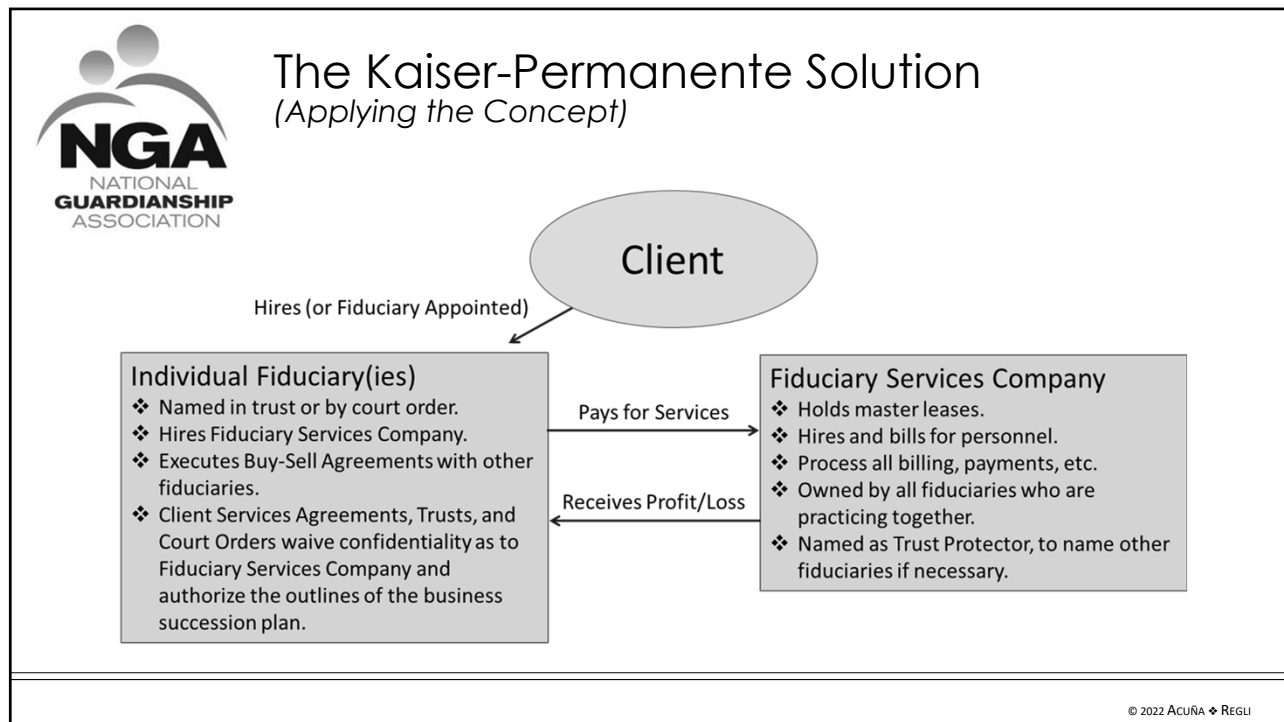
## The Kaiser-Permanente Solution

*(Getting Creative with Business Entities)*

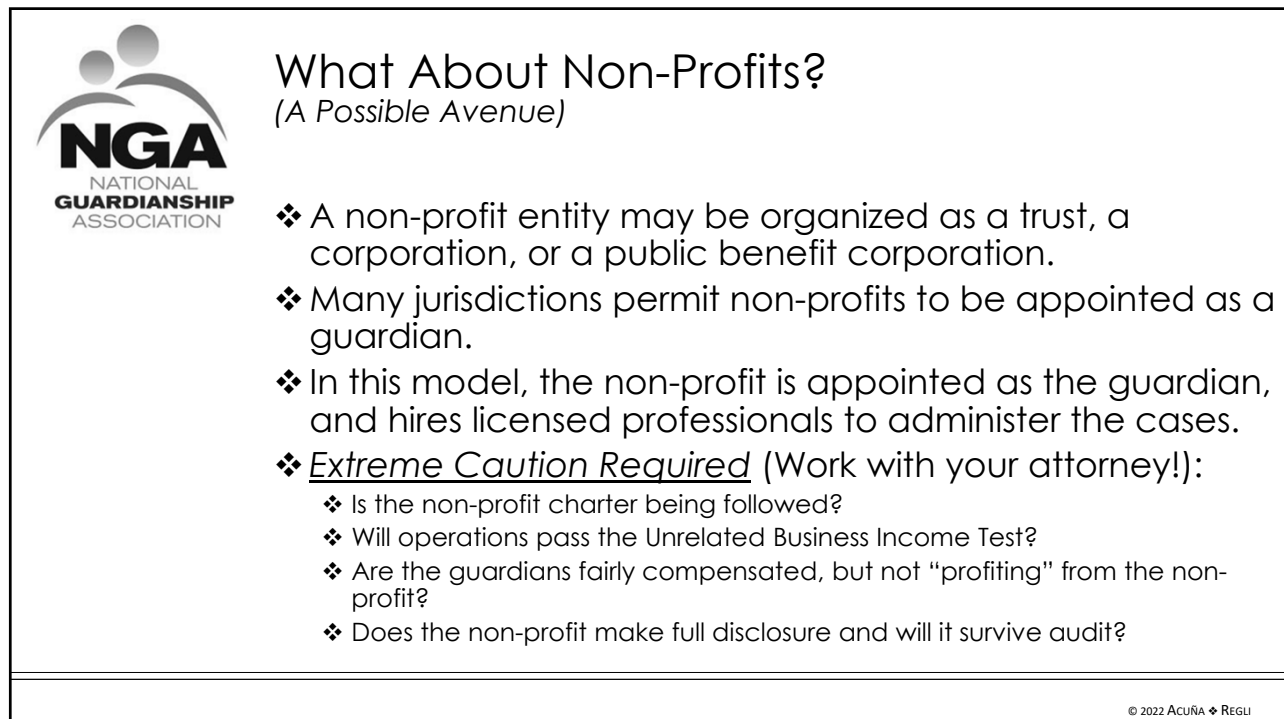
- ❖ Kaiser-Permanente is not a non-profit!
- ❖ Kaiser Foundation was a not-for-profit that owns and rents facilities, hires personnel, and does member services/billing.
  - ❖ Designed not to break even and not to show a profit.
  - ❖ Provides all of the "overhead" for the doctors.
- ❖ Permanente Medical Group is the doctors who render medical services.
  - ❖ Doctors are compensated with salary, bonuses, and "profit".
  - ❖ Permits differentiation in compensation and segregation of costs and risks.

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## The Bottom Line on Entities

*(Things to Remember)*

- ❖ Corporations, Partnerships, LLC, LLPs, or any other business entity cannot be appointed as a guardian.
  - ❖ Under current law, entities cannot be used for “liability reduction”.
- ❖ Entities could be used for non-liability purposes:
  - ❖ Organizing a group of individual guardians
  - ❖ Cost-sharing
  - ❖ Acting as a trust protector to appoint successor trustees
  - ❖ Client documents which give the entity the power to nominate executors or conservators

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## Selling a Practice

*(Strategies)*

- ❖ For succession or sale, build up cases that will result in long term assignments.
- ❖ Practice Mix:
  - ❖ Probate cases = higher dollars, 15–18 month “pipeline”, no continuing value unless power to nominate successor.
  - ❖ Conservatorship = higher dollars, longer pipeline, no continuing value unless power to nominate successor.
  - ❖ Short term trust administration = quick dollars, but no lasting value.
  - ❖ Long term trusts = highest dollars, highest value if power to nominate successor.
- ❖ All require appropriate language to transfer.
- ❖ *Keep good records for all cases in which you are named, immediately or upon some future event!*

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## Selling a Practice (Potential Buyers)

- ❖ Look for a “junior partner”.
  - ❖ 15 to 20 year age spread.
  - ❖ Allows you time to “wire in” the next generation.
  - ❖ Use equity ownership and ownership agreements to protect your interest.
- ❖ Consider strategic alliances.
  - ❖ Refer cases to, and partner with, firms who would be good candidates to purchase your practice.
- ❖ Do Not Underestimate Firm Culture!

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## Selling a Practice (Balancing Guardian/Client Needs)

- ❖ Beneficiaries' needs must continue to be met during the sales process.
- ❖ Require documentation of purchaser's references and qualifications to serve as professional guardian.
- ❖ Conflict check to make sure no interests adverse to beneficiaries.
- ❖ Sale price for the practice must not be the sole consideration in selecting a purchaser.
  - ❖ Due diligence re qualifications and fitness.
- ❖ Must provide written notice of the proposed sale to all affected courts, beneficiaries, and interested parties even if not required by state statutes.
- ❖ Consideration should be given to requesting appointment of a guardian ad litem to protect interests of minors.

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## Ethical Considerations

*(Consider These If Selling/Transferring)*

- ❖ All parties to the sale shall take steps to ensure continuity of care and protection during sale and transfer of ownership.
- ❖ A professional guardian shall not disclose confidential information for the purpose of inducing a sale.
- ❖ Fees charged to existing matters shall not be increased by the purchaser solely for the purpose of financing the purchase.

❖ Adapted from NGA Standard 25 – Sale or Purchase of Guardianship Practice

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## Estate Planning Essentials

*(Don't Be a Doofus!)*

- ❖ Make sure you have a living trust and documents to enable business succession.
  - ❖ Bill of Sale.
  - ❖ Assignment.
  - ❖ Stock Power.
- ❖ Consider naming a licensed professional guardian as special agent under a power of attorney and living trust to take control of guardian records and to notify affected persons:
  - ❖ This avoids the problem of an estate representative who is not bound by the same duties viewing a client's private personal information.
- ❖ Every adult needs a Durable Power of Attorney in case of incapacity.
- ❖ Develop an Internal or External Buy-Sell Agreement.
  - ❖ Consider a mandatory sale age, at which time you become a salaried and bonused employee, but not an owner.
  - ❖ This incentivizes your "up and comer" and is an incredible marketing statement!

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## What Next? (Planning for the Inevitable)

- ❖ Evaluate accurately and objectively . . .
  - ❖ Personal goals, financial needs, value, practice value drivers, marketability, obstacles, taxes, gaps, your best exit option(s).
- ❖ Assemble transition team.
- ❖ Develop/revise business plan.
  - ❖ Goals, Strategies, Specific/measurable actions
- ❖ Commit resources and implement.
  - ❖ Practices with the best procedures and job descriptions are worth the most!
- ❖ Have a contingency plan.
- ❖ At a predetermined point, pull the trigger.

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## What Are The Take-Aways? (Things to Remember and Best Practices)

- ❖ Corporations, Partnerships, LLC, LLPs, or any other business entity might not be appointed as a guardian.
  - ❖ Check with your jurisdiction
  - ❖ In most jurisdictions, entities cannot be used for "liability reduction".
- ❖ Entities could be used for non-liability purposes:
  - ❖ Organizing a group of individual guardians
  - ❖ Cost-sharing
  - ❖ Acting as a trust protector to appoint successor trustees
  - ❖ Client documents which give the entity the power to nominate executors or conservators
- ❖ Individuals named as trustees could be given the power to appoint their successors
- ❖ Best Practices:
  - ❖ Ask for documents which provide nomination/appointment powers.
  - ❖ Communicate clearly with clients and family members.
  - ❖ Plan in advance for retirement and emergency events.
  - ❖ Make arrangements with other licensed professional guardians.

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## Questions?



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