

ADR for Estate Planning



By Brian Madigan LL.B.

This is not what you thought. I know you thought it was Alternative Dispute Resolution for estates. That's close, but by that time it's far too late.

In this context, ADR stands for:

- 1) Audited
- 2) Documented, and
- 3) Recorded.

It is designed to assist you in the estate planning process by properly recording your intentions so that your estate plan will be implemented and not contested. It will offer you “peace of mind”.

Audited

This quite simply is the independent third party witness to your estate plan. But, it's much more than the simple signature of a witness on a Will or Power of Attorney. This person will participate with you in the planning process. They will “hear” (audit) your intentions and later be in a position to confirm your true wishes.

Documented

The usual documents here are Wills, Powers of Attorney, Beneficiary Designations and Trust Documents. However, with the ADR approach, there are other documents that will focus on your overall estate plan and hopefully document any potential problems and issues in advance.

Recorded

All of your documents need to be placed in a location that is both safe and accessible. All interested parties need to know the location.

Recent Court Cases

The Supreme Court of Canada has recently place emphasis upon the intention of the deceased. Frequently, intention is not clear, so the court is left simply to examine the documents that were left behind. And, they may be inconsistent with one another. At least, they are in the opinion of one of the potential beneficiaries.

The ADR Estate Planning Approach

The ADR Estate Planning Approach will follow the three steps to ensure that your estate plan is incontrovertible and incontestable. You don't need more documents to simply "muddy the waters", you are searching for clarity, at a time when you will not be able to offer any explanation.

Your Advisors

Most individuals will rely upon an accountant, a lawyer a financial planner and an insurance broker. One of these parties may lead the estate planning team. However, there is certainly a risk of conflict among the documents when these advisors do not meet and do not coordinate their efforts or advice. The inevitable result is conflict among the documents, uncertainty as to your intention and the significant potential for litigation. Now, of course, the best way to avoid litigation, and this is absolutely guaranteed is to have nothing. Obviously, no one is going to sue. However, if you have an estate, even a small one, it's best to avoid both lawyers and the courts. They are very expensive estate planners!

Coordinated Approach

The coordinated approach is best. Select a team leader and go for it. The problem is there are no clear and set positions on the team, and it's not even clear whether you need a captain, a coach or a quarterback. So, it may fall back to you and you have to direct and coordinate all the team players. One little problem: you have never done it before and you really don't know what you are doing.

From time to time, certain law firms will be experienced in this type of process. Usually, it is available only to their most sophisticated (interpret well-off) clientele. Really, this type of service should generally be available to everyone.

Audit Process

This refers to hearing, authenticating and witnessing the intention of the testator. So, in part, this may involve several key witnesses, including:

- 1) A member of one's family (to confirm relationships)
- 2) A medical doctor to confirm testamentary capacity (mental capacity)
- 3) A lawyer to confirm the documents as executed clearly reflect the intention

In the meantime, someone might serve as the co-ordinator to ensure that these steps are taken in the process.

Documentation Process

In this regard, there are truly two levels of documents:

Formal documents including the Will, Powers of Attorney, Trust Documents, Directions, Escrow Agreements, Beneficiary Designations, Joint Tenancy documents (deeds, bank accounts etc.), and

Informal Documents including Statements of Intention, Letters, Directions, Requests in writing, legal opinions and so on. This group of documents might include minutes of family meetings, family agreements and acknowledgements. It might also include the written recommendations of various advisors including accounting, tax, legal and financial advice.

The informal documents are all to prove that the formal documents are indeed accurate and reflect the proper and true intentions of the testator. This could include a video tape of the testator's expression of wishes, and the consent of the beneficiaries. All of these additional precautions will safeguard the process of dividing up one's estate. This certainly is estate planning.

Recording Process

Once you have all the right documents in place, you need to be sure that they will be kept in a safe and secure place. A safety deposit box will not work. Consider a Trust company for this purpose or a sizeable law firm. There's not much point in having all these documents and safeguards, if no one is ever going to find them.

So, if you are intending to divide your estate, you may want to consider the ADR Estate Planning method.

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