CIBC PRIVATE WEALTH

CIBC FAMILY OFFICE

DOMESTIC AGREEMENTS

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Richard provides ultra-high-net-worth client families structures, strategies and tools to help them perpetuate the purpose for their family, their wealth, and their legacy for generations to come. He advises families in the areas of wealth and enterprise planning including business succession, family governance and legacy planning, strategic philanthropy, and risk management. Richard works closely with other advisors in the family's multidisciplinary advisory team to deliver an exceptional family office experience.

With over 37 years' experience in the financial services industry, Richard is an accredited financial practitioner who has held various positions in banking, private banking and financial planning. Richard holds the Canadian Investment Manager (CIM), the Certified Financial Planner (CFP), the Chartered Financial Analyst Charter, and the Trust and Estate Practioner (TEP) designations. Most recently in 2020, he achieved the Family Enterprise Advisor (FEA) designation.

Executive Summary

Domestic agreements prepare couples for the unexpected—potentially sparing you and your partner a lot of financial and emotional grief down the road. Some see having a legal agreement in a personal relationship as implying distrust or suspicion of their partner. In reality, domestic agreements are powerful tools that can free you from the stress of implicit, unclear, or family-tied financial arrangements.

Briefly speaking, a domestic agreement which includes a prenuptial (prenup), cohabitation (cohab), marriage, or postnuptial (postnup) agreement—is a legal contract between two people in a marriage or marriage-like relationship. Outlining rights and responsibilities during the relationship, these agreements can protect you from the financial messiness that can happen if or when your relationship comes to an end. This is particularly useful if you and your partner have differing levels of wealth, debt, business assets and real estate now and potentially in the future. It's also handy if you and your partner want to safeguard personal digital assets, heirlooms, pet custody, and other unique property. Approaching this conversation proactively can help you set the stage for healthy and honest discussions about money, financial management, shared goals and expectations.

Please note that the content of this article does not apply to the province of Quebec.

Prenups, postnups and cohabs – demystifying domestic agreements

Believe it or not, if you're married or in a common-law relationship you already have an implied domestic agreement. Why? Because provincial and territorial, and even international family law legislation applies to couples entering such relationships. The rights and responsibilities may vary, largely depending on the nature of the relationship and the jurisdiction(s) where you reside as a couple. Other legal factors may also come into play. Given the potential complexity and risk of financial loss, professional family law advice is a must and, in many circumstances, a requirement when dealing with domestic agreements.

What is a domestic agreement?

A domestic agreement is a legal agreement between two people contemplating, or in a marriage or marriage-like relationship which outlines their rights and responsibilities during the relationship if or when the relationship comes to an end. The rights and responsibilities you choose to include are usually different than the current applicable legislation, unless you're looking to "lock-in" current legislation.

What are the different types of domestic agreements?

Domestic contracts include:

- Prenups - marriage contracts entered into prior to marriage
- postnups - marriage contracts entered into after marriage
- Cohabitation agreements for couples choosing to live together in a marriage-like relationship
- Separation agreements setting forth the terms relating to division of property/property value accrued during the marriage, child support, and spousal support at the end of a relationship

Prenups

The most common form of domestic agreement found in North American vernacular and portrayed in popular culture is the prenup. In the past, prenups were most often used by children of wealthy families and for those entering second, third or later marriages. While prenups commonly carry negative stereotypes, these agreements are powerful tools that insulate you and your partner from the messiness of a potential breakup.

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New trends in prenups

In spite of the negative stereotypes, millennials have surprisingly created an uptick in demand for prenups. Reasons cited by the *Wall Street Journal* note that millennials have an evolved view of marriage as a negotiable financial transaction, and a desire for more fiscal separation. Millennials are also getting married later in life. Later marriages usually mean that more assets could be at risk, and a high probability the parties already have experienced divorce through their 'boomer' parents, other family, or friends. New clauses that lawyers now tend to include in prenups are:

- Custody of pets
- Social media use and digital privacy
- Digital assets
- New intellectual property
- Division of property/property value
- Management and payment of household expenses
- Embryo ownership

What are the formal requirements of enforceable domestic agreements?

The requirements of enforceable domestic agreements can be different depending on the province. For example, in British Columbia:

- They must be in writing, signed, witnessed, and determine the jurisdiction that applies in case of a dispute

When may a court set aside a domestic agreement?

The reasons a court may set aside a domestic agreement may differ depending on the province. For example, in Ontario if:

- There's a failure to fully disclose significant assets, debts, and liabilities
- There's misrepresentation
- Coercion is employed
- There's undue pressure (for example, due to time)
- The agreement is unconscionable or heavily one-sided
- No independent legal advice was obtained by each party to the agreement and/or a party did not understand the nature or consequences of the domestic contract

The impact of changing jurisdictions

Domestic agreements that originate in a jurisdiction other than your current jurisdiction of residence may have different requirements and formalities. This means the original domestic agreement may no longer be valid where you live now. For example, under the Family Law Act of Ontario, common-law couples don't have property rights if they split up, but in British Columbia, they do. It's critical to obtain appropriate legal advice for all personal legal matters when moving to a different jurisdiction—whether you have a domestic agreement or not.

> Domestic agreements can set the stage for healthy and open discussions about money, financial management, shared goals and commitments.

The best practices of domestic agreements

- Be proactive and intentional when it comes to planning for your family's future
- Parents—well before your children become involved in serious relationships—speak with them about the family wealth and express your desire to protect it for the benefit of future generations
- Children—engage with your parents and openly express your interest in the family wealth, including the family values associated with that wealth. Ask them about their hopes and concerns for the family wealth for future generations.
- Incorporate prenups and cohabitation agreements into relationship discussions, making the topic impersonal, allowing domestic agreements to be addressed as a risk-management strategy
- If you're in a relationship that may evolve into a marriage or a marriage-like relationship–do take stock of your personal and financial situation
- Take time to understand the family laws in your jurisdiction
- Have discussions with your partner early in the relationship. Present domestic agreements as a risk-management strategy that can protect the interests of you and your broader families in the event the relationship ends
- Provide adequate time for each of you to go through the process—but the sooner the better
- Each party should seek independent legal advice
- Follow all of the legal requirements and formalities of your jurisdiction to ensure that your agreement is valid and can't be set aside
- If you're moving from one jurisdiction to another, seek proper legal advice prior to your move

When to consider a domestic agreement

- When you are the beneficiary of a family trust
- When you are purchasing real property with your partner and contributing different amounts to the purchase price
- When the provisions of the family laws in your jurisdiction don't adequately address your unique needs or the unique needs of your partner
- When you want to 'lock-in' the current legislation
- When your family has investment, business, real estate, or valuable unique assets that they'd like to preserve for future generations
- When your relationship creates a blended family and you want to protect and provide for beneficiaries from a previous relationship or causes outside of that relationship
- When you want to manage your finances separately and manage assets that typically aren't covered in family law regimes (such as digital assets, social media, pets, reproductive property)

A tool for preserving wealth for future generations

Property is treated differently on relationship breakdown if it was acquired before or after a marriage (including family inheritances). A domestic agreement can address and change how property division/property value division is treated, including which assets should be set aside for future generations. An agreement may also address and determine spousal support.

Important family property considerations where legal advice should be sought to ensure appropriate steps are taken to protect a family business and to align with the family's intention are:

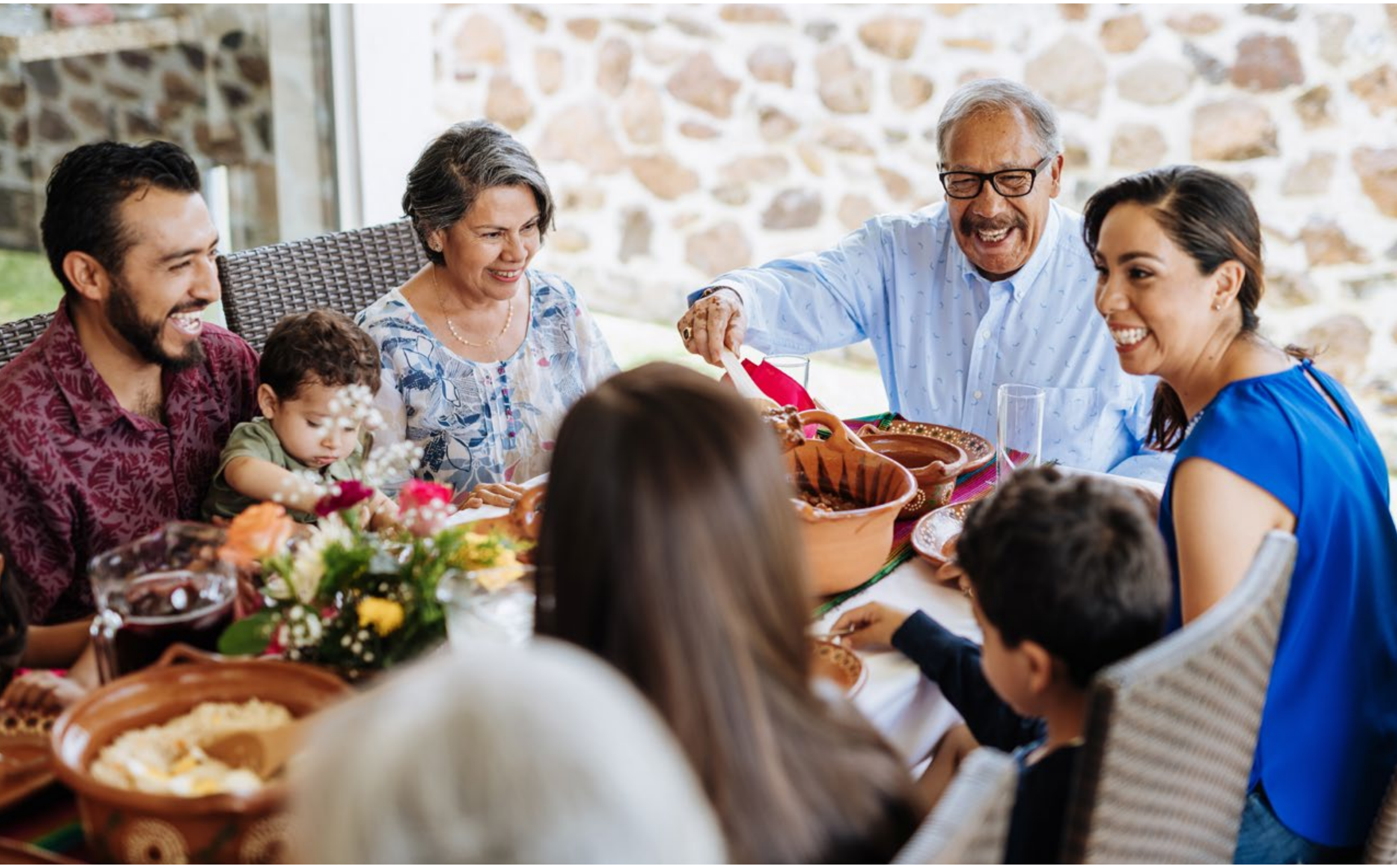
- Family businesses in which children have an interest either through direct shareholdings or indirectly through trusts
- Families which have in place or are contemplating inter-vivos trusts to benefit future generations
- Gifts/inheritances

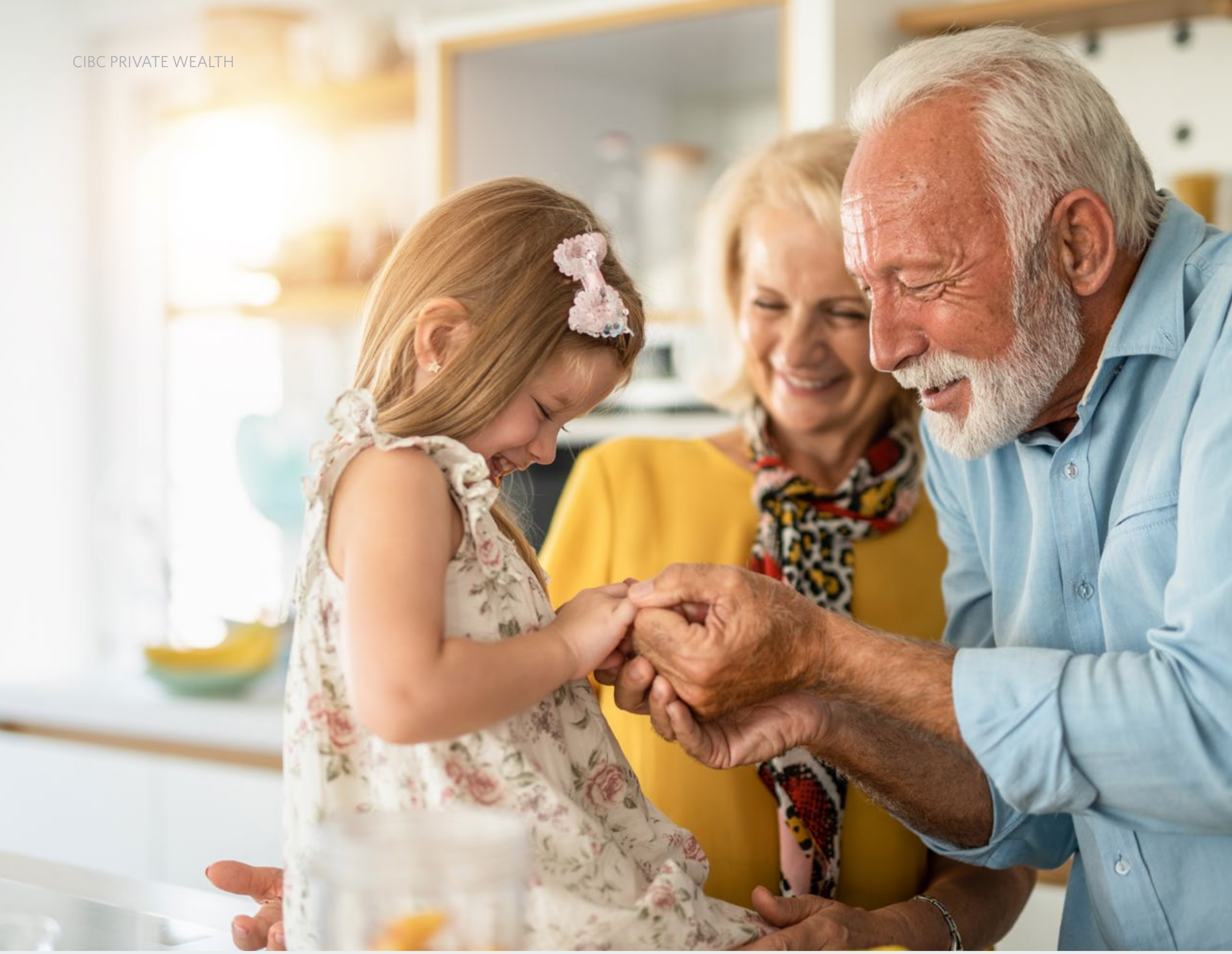
A well-drafted domestic agreement and shareholder's agreement for business families can help govern how the value of the business and/or trust interest would be considered if there is a marital breakdown. This can help avoid any potential disruptions to business operations, liquidity concerns and unintended division of other assets needed to compensate for the value of the business.

Where families have or are putting inter-vivos trusts in place, or are making distributions through inter-vivos trusts, they are well advised to ensure domestic contracts are in place to ensure that the appropriate steps are taken to align with the family's intention.

Similarly, where parents are considering making a substantial lifetime gift to children who are married/contemplating marriage (or in a marriage-like relationship), consideration should be given as to how the gift would be dealt with in the event of a marital breakdown.

Domestic agreements can set the stage for healthy and open discussions about money, financial management, shared goals and commitments. A couple that can openly discuss and resolve differences surrounding money will likely (and often) be far ahead of the generations that precede them. As with all legal matters, individuals should seek appropriate professional legal advice for their situation.





CIBC Family Office helps you and your family manage the complexities of multi-generational wealth. Working with our clients to help them organize and understand the intricacies of wealth ownership, we develop a plan that is tailored to each individual family, responsive to the needs of each member and reflects the family's current and future vision.

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