GETTING MARRIED OR ENTERING INTO A PARTNERSHIP: THE PATRIMONIAL ISSUES OF CHOICE IN FRENCH LAW

CASARSE O UNIRSE: LAS CUESTIONES PATRIMONIALES DE LA ELECCIÓN EN EL DERECHO FRANCÉS

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ABSTRACT: In French law, there are only two models of couples between which a choice is really possible to organize their patrimonial relationships: partnership or marriage. But, if the couple intends to organize a transfer of assets between companions both during the union and in case of death, it is definitely marriage that offers more possibilities than partnership. Often, young French couples, who do not wish to marry, either not at the begining of their relationship or not at all, have the idea that, if marriage organizes a legal protection of the couple, the partners have the possibility to provide conventionally equivalent protection. In fact, this idea is wrong.

KEY WORDS: Marriage: partnership; transmission; legal protection; reserve.

RESUMEN: *En el Derecho francés, solo hay dos modelos de pareja entre los que realmente es posible elegir para organizar sus relaciones patrimoniales: la unión de hecho o el matrimonio. Pero, si la pareja pretende ordenar una transmisión patrimonial entre ellos, tanto durante la unión como en caso de fallecimiento, definitivamente es el matrimonio el que ofrece más posibilidades. A menudo, las parejas jóvenes, que no desean casarse, ya sea al principio de su relación o en ningún momento, tienen la idea de que, si el matrimonio ofrece una protección legal de la pareja, los unidos, tienen la posibilidad de proporcionar una protección convencional equivalente. De hecho, esta idea es incorrecta.*

PALABRAS CLAVE: *Matrimonio; unión de hecho; transmisión; protección legal; reserva.*

I. INTRODUCTION.

In French law, there are three possible models of couples: cohabitation[1], civil solidarity pact[2] and marriage[3]. However, cohabitation is not a true status of couple, it entails neither duty nor obligation nor right and, in the event of transmission due to death, the applicable taxation of sixty per cent[4] is a deterrent[5]. In the end, therefore, there are only two models of couples among which a choice is really possible in order to better organize their patrimonial relationships: partnership or marriage. Out of these two, partnership has the advantage of flexibility while marriage is more protective. The partnership is more flexible because it's easier to enter into a partnership than to marry[6]. It's also, obviously faster to get out of the partnership than to end the marriage through divorce[7]. Thus, globally speaking, a partnership is more flexible than marriage. But marriage is much more protective than a partnership. It is, above all, more protective than a partnership in the event of death, since the surviving spouse enjoys a true heir status, unlike the surviving partner. Furthermore, marriage is also more protective in the event of divorce, at least for those who have less income than their spouse[8]. Moreover, if the couple intends to organize a transfer of assets between companions both during the

1 Article 515-8 of the Civil code: "Concubinage is a union in fact, characterized by a life in common offering a character of stability and continuity, between two persons of different sexes or of the same sex, who live as a couple".

2 Article 515-1 of the Civil code: "A civil pact of solidarity (partnership) is a contract entered into by two natural persons of age, of different sexes or of the same sex, to organize their life in common".

3 Articles 143 to 226 of the Civil code. There is no definition of the marriage in the Code.

4 Article 777 of the General Tax Code.

5 On the contrary, the taxation applicable to gifts and inheritances is identical for married couples and partners. Both the surviving partner and spouse benefit from an absence of taxation on property inherited from their deceased companion.

6 There are two ways of contracting a partnership: to make a joint declaration of partnership to the officer of civil status (the partnership is then a private agreement) or to ask a notary to write an authentic agreement and register it (article 515-3 of the Civil code). To get married, the steps are longer.

7 The civil pact of solidarity can be dissolved by a joint declaration of the partners or the unilateral decision of one of them (article 551-7 of the Civil code). A marriage is dissolved by divorce that may be requested on the ground of mutual consent or acceptance of the principle of the breakdown of the marriage or definitive alteration of the bond of marriage or fault.

8 One of the spouses may be compelled to pay the other an allowance intended to compensate, as far as possible, for the disparity that the breakdown of the marriage creates in the respective ways of living (article 270 of the Civil code).

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union and in case of death, it is definitely marriage that offers more possibilities than partnership. Often, young French couples, who don't wish to marry, either not at the beginning of their relationship or not at all, have the idea that, if marriage organizes a legal protection of the couple, the partners have the possibility to provide conventionally equivalent protection. In fact, this idea is wrong.

Hence, it is interesting to study the patrimonial stakes for a French couple linked to the choice of partnership or, conversely, marriage first of all during the course of the union, and then in the event of death.

II. IN THE PROCESS OF UNION.

It is not uncommon in France today to hear that partnership has become a quasi-marriage. Wrong, at least from a family level point of view, where only marriage produces effects[9]. However, from a financial point of view, there are some aspects of partnership that are close to marriage. Both models of couples have very similar effects in terms of living expenses. However, when it comes to choosing a matrimonial regime, spouses have far more options than partners.

1. Common Patrimonial Effects.

Married couples are all subject to common rules, regardless of their choice of a matrimonial regime, which constitute an obligatory primary regime[10]. Several of these rules have been reproduced identically for partners. Thus the spouses must contribute equitably to the expenses of everyday life[11]. Required to live together, spouses must pool some of their income to allow them to have the same lifestyle. This means that the spouse who has more income must contribute more to the payment of these living expenses than the spouse with a lower income. These expenses are those linked to rent, groceries, heating...but also, recently, the repayment of the loan financing the accommodation of the family[12].

9 First, marriage leads to the presumption of paternity ("a child conceived or born in wedlock has the husband as his/her father" article 312 of the Civil code) unlike the civil pact of solidarity. Secondly, adoption may be petitioned by two spouses (article 343 of the Civil code) but not by two partners and only the adoption of the spouse's child is allowed, not the adoption of the partner's child (currently, but these two rules may change, a reform on this is under discussion).

10 Articles 212 to 226 of the Civil code.

11 Article 214 of the Civil code: "If a marriage contract does not regulate the contributions of the spouses to the expenses of the marriage, they shall contribute to them in proportion to their respective means".

12 Cass. 1st civ., 15 May 2013, n° 11-26.933; Cass. 1st civ., 3 Oct. 2019, n° 18-20.828; Cass. 1st civ., 18 Nov. 2020, n° 19-15.353.

The partners, on the other hand, owe each other mutual and material help[13], which concerns the same expenses[14] and which, like the spouses, is distributed among them in proportion to their respective means[15].

Moreover, both spouses and partners are subject to the rule of household solidarity[16], which means that if a companion incurs an expenditure of daily living alone, and that it's not manifestly excessive, his or her companion is bound by it out of solidarity. The creditor then benefits from two solidary debtors: the two members of the couple, and can choose who to ask for payment.

However, the two couple statuses present differences regards to the fate of the accommodation of the family during the union. A spouse, even if he/she is the exclusive owner of this accommodation, cannot decide to sell it without obtaining the consent of his/her spouse[17]. The partner does not benefit from such protection[18].

2. The choice of a matrimonial regime.

If the partners are subject to fairly similar rules of patrimonial organization concerning daily expenses, as far as the choice of a patrimonial regime is concerned, their options are more restricted.

Married couples in France enjoy considerable freedom in choosing their matrimonial regime. They can choose a separatist regime, such as the separation of property regime[19] where their assets remain completely isolated from each other. Or a system of participation in acquets[20], by which each one of the spouses enjoy the same patrimonial autonomy during marriage but are entitled, at the end of the union, to participate by halves in value in the net acquets-found in the

13 "Partners bound by a civil pact of solidarity commit to a life in common and to material aid and to reciprocal assistance" (article 515-4 of the Civil code).

14 Even the repayment of the loan financing the accommodation of the partners: Cass. 1st civ., 27 janvier 2021, nº 19-26.140.

15 "If the partners do not provide otherwise, material aid is proportionate to their respective means" (article 515-4 of the Civil code).

16 "Each one of the spouses has the power to make alone contracts which objective is the support of the household or the education of children: any debt thus contracted by the one binds the other out of solidarity" (article 220 of the Civil code). "Partners are, out of solidarity, liable to third parties for debts incurred by one of them for the needs of daily live" (article 515-4 of the Civil code).

17 Article 215 al 3 of the Civil code: "the spouses may not, separately, dispose of the rights whereby the lodging of the family is ensured, or of the movable furnishings with which it is garnished. The one of the two who did not consent to the transaction may ask that it be annulled: the action in nullity is open to the spouse within the year from the day when he became aware of the transaction, without it being possible for this action to be instituted more than one year after the matrimonial regime was dissolved".

18 It is only if the couple's accommodation is rented that the partners benefit from protection equivalent to that of the spouses: article 1751 of the Civil code.

19 Articles 1536 to 1543 of the Civil code.

20 Articles 1569 to 1581 of the Civil code.

patrimony of the other. In these two regimes, each one of the spouses keeps the administration, enjoyment and free disposition of his or her personal assets[21] and remains alone liable for his own debts, before or during marriage[22].

Spouses may also choose a Community regime. By default, they are subject to the Community of acquets regime[23] where their income and all property acquired during the marriage are common[24]. However, the items of property the spouses owned on the day of the celebration of the marriage, or which they acquire, during the marriage, through succession, donation, or legacy[25] remain separate property. Each spouse has the administration and enjoyment of his/her separate property and has the power to administer alone the common property and to dispose of it. However,[26] the spouses cannot, one without the other, perform certain serious acts on the common property[27]. On the passive side, the regime of community is less protective than separatist regimes: the payment of debts which either spouse owes, for whatever reason, during the community, can always be enforced on community property[28] and on the separate property of the debtor[29].

The spouses can finally choose a larger, universal community[30] that includes all their assets, movables and immovable, present and future[31] and can stipulate the allocation of the entire community for the case of survival, for the benefit of whichever one survives[32]. This stipulation is not deemed to be donation[33] or succession right but an effect of the matrimonial regime[34].

Beyond this choice between four conventional regimes, spouses have a great freedom to adapt these different regimes depending on their needs[35].

21 Article 1536 and 1569 of the Civil code.

22 Article 1536 and 1569 of the Civil code.

23 Articles 1400 to 1491 of the Civil code.

24 Article 1401 of the Civil code.

25 Article 1405 of the Civil code.

26 Article 1421 of the Civil code.

27 Articles 1422 to 1425 of the Civil code. Thus, the spouses cannot, one without the other, dispose *inter vivos*, by gratuitous title, of assets in the community or alienate with real rights the immovables, business assets, and exploitations depending from the community.

28 Article 1413 of the Civil code with the exception of the earnings and wages of a spouse that cannot be attached by the creditors of his/her spouse (article 1414).

29 But not on the separate property of the other spouse: article 1418 of the Civil code.

30 Articles 1526 and 1527 of the Civil code.

31 Article 1526 of the Civil code.

32 Article 1524 of the Civil code.

33 Article 1525 of the Civil code.

34 Thus only the children not born of both spouses can demand the reduction of a matrimonial advantage that exceeds the disposable portion between spouses: article 1527 of the Civil code.

35 Article 1497 of the Civil code.

On the contrary, the partners have only the choice between two regimes. By default, they are subject to a regime equivalent to the separation of property of the spouses[36]. Otherwise, they may opt for a regime of undivided co-ownership of property[37] even if it's not advisable because this regime is not defined well enough. In addition, it seems that the partners, having this very limited choice, don't have the possibility to adapt these regimes according to their wishes. In fact, their only reasonable choice is the adoption of the regime of the separation of property, which entails no transfer of patrimony between companions.

The patrimonial organization of their relationship is, therefore, more limited in terms of partnership than in the context of marriage. In addition, in the event of the death of a partner, the protection of the survivor is also very different depending on whether the couple was married or had entered into a partnership.

III. IN THE EVENT OF DEATH.

The married spouse enjoys important legal protection, unlike the partner who can only be protected by voluntary provisions.

1. For the spouses.

The surviving spouse has benefited from numerous protections since 2001[38]. First of all, he or she is a legal heir of the deceased, with a fairly extensive legal vocation. Thus, if he or she is in competition with children of the deceased who are also all his or her own, he or she can choose to benefit from the usufruct of the entire estate of the deceased[39]. Moreover, in the absence of descendants, the spouse is a forced heir. He or she cannot then be deprived of his or her reserved portion, which is a quarter of the deceased's estate[40]. Finally, the spouse benefits from rights allowing him or her to remain in the couple's former home. In all cases, he or she has, by operation of law, during one year, the gratuitous enjoyment of

36 Article 515-5 of the Civil code.

37 Article 515-5-1 of the Civil code.

38 The law of 3 December 2001, which came into force on 1 July 2002, improved the status of the surviving spouse.

39 Articles 756 to 768 of the Civil code. The surviving spouse receives, if the deceased leaves descendants, one quarter of the assets (article 757 of the Civil code) or, at his/her choice, the usufruct of the totality of the assets if there are no descendants who are not of both spouses. In the absence of descendant, if the deceased leaves his/her father and mother, the surviving spouse receives one-half of the assets. If there is either his/her father or mother, the surviving spouse receives three-fourths of the assets (article 757-1 of the Civil code). In the absence of children or descendants of the deceased and of his/her father and mother, the surviving spouse receives the whole succession (article 757-2 of the Civil code).

40 Article 914-1 of the Civil code: "Liberalities, by acts *inter vivos* or testamentary, may not exceed three-fourths of the assets if, in the absence of a descendant, the deceased leaves a surviving spouse, not divorced".

the accommodation [41]. In addition, a surviving spouse who in fact occupied, at the time of the death, as his/her principal habitation, an accommodation belonging to the spouse or forming a part, in its entirety, of the succession, has until his/her death, a right of habitation in this accommodation[42].

Beyond these legal rights, even if a spouse leaves children or descendants, he/she can dispose in favor of his surviving spouse either in ownership that he/she may leave to an outsider, or one-fourth of his assets in ownership and the other three-fourths in usufruct, or else the totality of his/her assets in usufruct only[43]. The surviving partner is less well protected.

2. For the partners.

The surviving partner is not a legal heir of the deceased. In the absence of a will in his or her favor, he or she can only claim during one year the gratuitous enjoyment of the accommodation [44], unless there are contrary provision. However, partners often seek to establish by will the equivalent of the legal protection enjoyed by the spouse, to grant him or her the totality of accommodation assets in usufruct, or the accommodation in usufruct. However, as long as the accommodation constitutes an important part of his/her assets, the surviving partner is not assured of the effectiveness of this provision. Because, unlike the spouse, the partner cannot benefit from a usufruct on the children's reserve, if the usufruct granted to the surviving partner exceeds the disposable portion, the heirs for whom the legislation establishes a reserve may claim to obtain it free of charges and prevent the partner from benefiting from the usufruct promised[45]. Simply because the surviving partner, unlike the surviving spouse, does not have a special disposable portion and, therefore, cannot be granted usufruct rights on the reserve.

Often, the partners are very surprised to discover this solution. It's not certain that this will change in the short term because a recent report on the future of the reserved portion seems very attached to maintaining a real difference in status between marriage and partnership, mainly with regard to their rights of succession[46].

41 Whether his/her housing was secured through a lease for rent or through a lodging belonging in an undivided part to the deceased: article 763 of the Civil code.

42 Article 764 of the Civil code.

43 Article 1094-1 of the Civil code.

44 Article 515-6 of the Civil code.

45 Article 917 of the Civil code: if a disposition by act *inter vivos* or by testament is of a usufruct or of a lifetime annuity whose value exceeds the disposable portion, the heirs for whose benefit legislation establishes a reserve have the option, either to execute that disposition or to abandon ownership of the disposable portion.

46 Reserved portion Report, 13rd December of 2019, established under the direction of Cecile Pérès and Philippe Potentier: http://www.justice.gouv.fr/publications-10047/rapports-thematiques-10049/la-reserve-hereditaire-32881.html.

Thus, if a couple wants a real association and patrimonial protection, marriage remains, at present, a much better option than partnership.