

Many de facto spouses firmly believe that, after a certain number of years of living together, they are entitled to the same rights and subject to the same obligations as married or civil union couples. Wrong! For civil law purposes, de facto spouses are considered to be total strangers to one another, regardless of how long they have been living together.

To offset the lack of legal provisions governing their status, de facto spouses can enter into a cohabitation contract. If you and your spouse agree to conclude such a contract, and if, despite the complexity of the undertaking, you decide to draft the conditions governing your cohabitation yourselves, an easy-to-use sample contract is provided for that purpose in this brochure.

Cohabitation Contract

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LES PUBLICATIONS DU QUÉBEC

1500D, rue Jean-Talon Nord, Sainte-Foy (Québec) G1N 2E5

SALES AND DISTRIBUTION

P.O. Box 1005, Québec (Québec) G1K 7B5

Telephone: (418) 643-5150, Toll free, 1 800 463-2100

Fax: (418) 643-6177, Toll free, 1 800 561-3479

Internet: www.publicationsduquebec.gouv.qc.ca

Canadian Cataloguing in Publication Data

Main entry under title:

Cohabitation contract [electronic ressource]

(La justice à votre portée)

Issued also in French under title: Contrat de vie commune.

ISBN 2-551-19757-0

1. Unmarried couples - Legal status, laws, etc. - Québec (Province). 2. Cohabitation agreements - Québec (Province). 3. Common law marriage - Québec (Province). I. Québec (Province). Ministère de la justice. Direction des communications. II. Québec (Province). Direction générale des services de justice. III. Series: Justice à votre portée.

KEQ253.C6613 2006

346.71401'6

C2006-942000-9

This brochure was prepared by the
Direction générale des services de justice
in collaboration with the
Direction des communications
du ministère de la Justice du Québec.

This edition was published by
Les Publications du Québec
1500 D, rue Jean-Talon Nord
Sainte-Foy (Québec)
G1N 2E5

Graphics
Lucie Pouliot, Les Publications du Québec

Translation
Service de la traduction
Les Publications du Québec

Legal deposit – 2002
Bibliothèque nationale du Québec
Bibliothèque nationale du Canada
ISBN 2-551-19587-X
ISBN 2-551-19757-0 (pdf)
© Gouvernement du Québec, 2002

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NOWADAYS MANY PEOPLE CHOOSE TO LIVE AS COUPLES OUTSIDE THE BONDS OF MARRIAGE OR CIVIL UNION. RECENT STATISTICS SHOW THAT NEARLY HALF OF TODAY'S COUPLES OPT FOR DE FACTO UNIONS.

MANY DE FACTO SPOUSES FIRMLY BELIEVE THAT, AFTER A CERTAIN NUMBER OF YEARS OF LIVING TOGETHER, THEY ARE ENTITLED TO THE SAME RIGHTS AND SUBJECT TO THE SAME OBLIGATIONS AS MARRIED OR CIVIL UNION COUPLES. WRONG! THE CIVIL CODE CONTAINS NO PROVISIONS GOVERNING DE FACTO UNIONS. THUS, FOR CIVIL LAW PURPOSES, YOU AND YOUR SPOUSE ARE CONSIDERED TO BE TOTAL STRANGERS TO ONE ANOTHER, REGARDLESS OF HOW LONG YOU HAVE BEEN LIVING TOGETHER.

De facto unions and the law

The *Civil Code of Québec* does not as a rule regulate de facto unions. As a result, if you live in a family residence that belongs exclusively to your spouse, the latter is free to dispose of the residence at will without your consent, even if your children (whether or not they are also your spouse's) also live under your roof. In the event of the breakdown of your union, you cannot ordinarily demand the partition of property acquired by your spouse, regardless of whether it is for family use. Nor are you entitled to support for yourself. Upon your spouse's death, you are not automatically the heir, unless you are clearly designated as such in your spouse's will.

The confusion surrounding the legal framework of de facto unions no doubt stems from the fact that, in a number of statutes of a social nature, both Québec and federal legislators recognize de facto spouses, regardless of their sexual orientation,¹ as having the same rights and obligations as married or civil union spouses. A number of specific laws—such as the Act respecting the Québec Pension Plan and the Old Age Security Act—grant de facto spouses, under certain conditions, a legal status similar to that of married or civil union spouses (see page 12 for a list of the principal statutes involved). From a fiscal standpoint as well, de facto spouses are assimilated to married or civil union spouses, as they are subject to the same obligations and entitled to the same benefits.

Social and fiscal laws must not, however, be confused with the *Civil Code*, which, it should be borne in mind, contains no provisions pertaining to de facto spouses and in no way regulates their relationship. In this way, the government respects the wish of those who choose to forgo marriage or a civil union for the express purpose of not being bound by the attendant legal framework.

1. Since the *Act to amend various legislative provisions concerning de facto spouses* (S.Q. 1999, c.14) came into force on June 16, 1999, all of the benefits and obligations recognized for heterosexual de facto spouses have applied to same-sex de facto spouses as well.

Exceptionally, however, the Civil Code grants the de facto spouse of a person who leased a dwelling the right to continue to live there following a separation or death. Under article 1938 of the Civil Code (see page 14), a person who has been living in a de facto union for at least six months may remain in the dwelling leased by his or her spouse and become the lessee if, at the time of the separation, the person continues to occupy the dwelling and so notifies the owner within two months. Similarly, upon the death of a de facto spouse who was the lessee of a dwelling, the surviving spouse may maintain occupancy and become the lessee, as long as he or she continues to occupy the dwelling and so notifies the owner within two months of the spouse's death.

Cohabitation contract

To offset the lack of legal provisions governing de facto spouse status, you and your spouse can enter into a cohabitation contract. Some couples may be tempted to draw up such a contract themselves to save on legal advisor fees. Beware! Drawing up a contract is a complex undertaking. Minor children, the extent of your or your spouse's assets, or any other specific factor should prompt you to consult a notary or lawyer. Having recourse to a legal advisor will ensure the clarity and legality of your contract. If you decide nonetheless to draw up the contract yourself, the contract will be valid once you and your spouse sign it. However, you should both sign in the presence of two witnesses who are not related to you, so that it is easier to prove the contract if it is contested.

You should also know that certain matters relating to the breakdown of a union—such as the custody of the children born of the union and the amount of child support payable—cannot be stipulated in such a contract. These issues can be dealt with only at the time of the breakdown and on the basis of specific legal rules.

Similarly, the consequences of the death or incapacity of either spouse cannot be validly established in such a contract. If you and your spouse wish to bequeath one another all or part of your respective property upon death, each of you must draw up a will. The Civil Code provides for three types of wills: notarial wills, holograph wills and wills made in the presence of witnesses. Notarial wills are fully executory upon the testator's death, contrary to the other two types of wills, which must be probated or homologated by the court or a notary.

Moreover, it is in your interest to foresee the eventuality that one of you may become incapable of managing your property or taking care of yourself following an accident, or due to age or illness. If you wish to designate your spouse as your mandatary, you must sign a mandate given in

anticipation of incapacity. Once this document is homologated by the court further to a special procedure set forth in the *Code of Civil Procedure*, the designated spouse will have the authority to make all decisions and take all action rendered impossible by the other spouse's state. The mandate may be given before a notary, by notarial act or by private writing, in the presence of two witnesses.

If you decide to prepare your own cohabitation contract, we suggest that you use the following model.

Sample cohabitation contract by private writing

and

WHO, in order to set certain terms of their cohabitation having begun on,

_____ agree to the following:

(Below are examples of the main headings you can include in your cohabitation contract.)

Family residence and other immovables held in undivided co-ownership

If both spouses signed the contract to purchase the family residence or any other immovable and, as a result, are co-owners thereof, they can establish the framework within which the immovables are to be administered, as well as the terms and conditions for disposing of their respective rights.

Contribution to household expenses

This section is for establishing the percentage of household expenses (mortgage or rent payments, food, electricity and heating, etc.) to be assumed by each spouse, along with terms and conditions for defraying them.

Partition of property

Under the contract, one spouse can give movable property (household furniture, money, etc.) as a gift to the other, to the extent that the property in question exists on the day the contract is signed and that possession is transferred to the donee without delay.

A notary must be consulted if the spouses wish to give each other real estate (e.g. the family residence or a share of it) as gifts, or property that they do not yet have in their possession at the time the contract is signed but that they have undertaken to acquire. Spouses cannot make any provisions whatsoever in their cohabitation contract for bequests or gifts in the event of death. Such provisions may be made only in a will.

Inventory of property

To avoid complications in determining ownership of property in the event of the breakdown of their union, the property belonging to each of the spouses on the date the contract is signed should be inventoried.

Support

Spouses can provide for the right to claim support from each other, in the event of the breakdown of their union or further to any other event specified by them, under the terms and conditions set forth here.

Representation

Each spouse can authorize the other, by power of attorney, to administer his or her property, and make all necessary decisions, in his or her absence. In some cases, however, it is preferable for power of attorney to be awarded in a separate document. This is so when special arrangements must be made regarding the administrative powers the spouses wish to give each other, or when the spouses want to ensure that persons who need to refer to their powers of representation (e.g. bank personnel) do not have access to their cohabitation contract.

Review and updating

Spouses can provide for a review of their contract after a certain number of years, to ensure that it still corresponds to their situation.

Mediation

Spouses can stipulate in their contract that, should a dispute arise over a consequence of the breakdown of their union, they must consult a mediator, in accordance with specific terms and conditions set by them, before initiating legal proceedings.

In witness whereof, the spouses have signed in

(Place where the contract was signed)

on this

(date of signing)

Spouse

Spouse

Witness 1

Witness 2

Principal statutes granting de facto spouses the same rights and obligations as married or civil union spouses

Québec statutes

- *Act respecting industrial accidents*
- *Act respecting industrial accidents and occupational diseases*
- *Act respecting financial assistance for education expenses*
- *Legal Aid Act*
- *Automobile Insurance Act*
- *Savings and Credit Unions Act*
- *Code of Civil Procedure*
- *Act respecting the conditions of employment and the pension plan of the Members of the National Assembly*
- *Cooperatives Act*
- *Act respecting duties on transfers of immovables*
- *Act respecting school election*
- *Act respecting insurance*
- *Taxation Act*
- *Act respecting labour standards*
- *Act respecting the Québec Pension Plan*
- *Act respecting the Pension Plan of Certain Teachers*
- *Act respecting the Pension Plan of Peace Officers in Correctional Services*
- *Act respecting the Pension Plan of Elected Municipal Officers*
- *Act respecting the Government Public Employees Retirement Plan*
- *Act respecting the Teachers Pension Plan*
- *Act respecting the Civil Service Superannuation Plan*
- *Supplemental Pension Plans Act*

- *Act respecting trust companies and savings companies*
- *Act respecting Québec sales tax*
- *Courts of Justice Act*
- *Automobile Insurance Act*
- *Act respecting assistance and compensation for victims of crime*
- *Act respecting income support, employment assistance and social solidarity*

Federal statutes

- *Canada Pension Plan*
- *Citizenship Act*
- *Employment Insurance Act*
- *Income Tax Act*
- *Old Age Security Act*
- *Pension Benefits Division Act*
- *Pension Fund Societies Act*
- *Public Service Employment Act*
- *Public Service Superannuation Act*
- *Special Retirement Arrangements Act*
- *Special Retirement Benefits Act*
- *War Veterans Allowance Act*

Relevant documentation and helpful addresses

The leaflets entitled Wills and Mandates, published in the “Your Rights at a Glance” collection by the ministère de la Justice du Québec, are worth consulting. We also suggest that you refer to the leaflet *My Mandate in Case of Incapacity*, published by the Public Curator of Québec

These documents are available at most court-houses in Québec. You can also access them on the Website of the ministère de la Justice du Québec, at the following address:

www.justice.gouv.qc.ca

Helpful addresses

Barreau du Québec

La maison du Barreau
445, boul. Saint-Laurent
Montréal H2Y 3T8

Tel.: (514) 954-3400
1 800 361-8495

Chambre des notaires du Québec

Tour de la Bourse
800, Place-Victoria, bur. 700
C.P. 162
Montréal H4Z 1L8

Tel.: (514) 879-1793
1 800 263-1793

E-mail:
admin@cdnq.org

Excerpts from the *Civil Code of Québec*

Entitlement to maintain occupancy

1938

The spouse of a lessee or a person who has been living with a lessee for at least six months, being the concubinary or blood relative of the lessee or a person connected to him by marriage, is entitled to maintain occupancy if he continues to occupy the dwelling after the cessation of cohabitation and gives notice to that effect to the lessor within two months after the cessation of cohabitation. He becomes the lessee from that moment.

A person living with the lessee at the time of death of the lessee has the same right and becomes the lessee if he continues to occupy the dwelling and gives notice to that effect to the lessor within two months after the death. If the person does not avail himself of this right, the liquidator of the succession or, failing him, an heir may, in the month which follows the expiry of the period of two months, resiliate the lease by giving notice of one month to that effect to the lessor.

Wills

716

A notarial will is made before a notary, en minute, in the presence of a witness or, in certain cases, two witnesses.

The date and place of the making of the will shall be noted on the will.

717

A notarial will is read by the notary to the testator alone or, if the testator chooses, in the presence of a witness. Once the reading is done, the testator shall declare in the presence of the witness that the act read contains the expression of his last wishes.

The will, after being read, is signed by the testator, the witness or witnesses and the notary, in each other's presence.

726

A holograph will shall be written entirely by the testator and signed by him without the use of any mechanical process.

It is subject to no other formal requirement.

727

A will made in the presence of witnesses is written by the testator or by a third person.

After making the will, the testator declares in the presence of two witnesses of full age that the document he is presenting is his will. He need not divulge its contents. He signs it at the end or, if he has already signed it, acknowledges his signature; he may also cause a third person to sign it for him in his presence and according to his instructions.

The witnesses thereupon sign the will in the presence of the testator.

728

Where the will is written by a third person or by a mechanical process, the testator and the witnesses initial or sign each page of the act which does not bear their signature.

The absence of initials or a signature on each page does not prevent a will made before a notary that is not valid as a notarial will from being valid as a will made in the presence of witnesses, if the other formalities are observed.

772

A holograph will or a will made in the presence of witnesses is probated, on the demand of any interested person, in the manner prescribed in the Code of Civil Procedure.

The known heirs and successors shall be summoned to the probate of the will unless an exemption is granted by the court.

Mandate given in anticipation of the mandator's incapacity

2166

A mandate given by a person of full age in anticipation of his incapacity to take care of himself or to administer his property is made by a notarial act en minute or in the presence of witnesses.

The performance of the mandate is subordinate to the occurrence of the incapacity and to homologation by the court, at the request of the mandatary designated in the act.

2167

A mandate given in the presence of witnesses is written by the mandator or by a third person.

The mandator, in the presence of two witnesses who have no interest in the act and who are in a position to ascertain whether he is capable of acting, declares the nature of the act but need not disclose its contents. The mandator signs the act at the end or, if he has already signed it, recognizes his signature; he may also have a third person sign the writing for him in his presence and according to his instructions. The witnesses sign the mandate forthwith in the presence of the mandator.

In the same collection

Application for the Probate of a Will

My Will

My Mandate in Case of Incapacity

(Curateur public du Québec)

Upcoming topics in this collection

*Establishment of Custody
and Access Rights
and Fixation of Child Support*

*Temporary Measures or Variation
of Corollary Relief in a Divorce Case*

Printing completed
in October 2002
by Imprimerie Sociale Itée

Cohabitation Contract by Private Writing

Name

Occupation

Address

and

Name

Occupation

Address

WHO, in order to set certain terms
of their cohabitation having
begun on _____,
agree to the following:

**Family residence and other immovables
held in undivided co-ownership**

Contribution to household expenses

Partition of property

Inventory of property

Support

Representation

Review and Updating

Mediation

In witness whereof, the spouses have signed in

Place where the contract was signed)

on this

(date of signing)

Spouse

Spouse

Witness 1

Witness 2