

FAMILY PATRIMONY

A MATTER OF JUSTICE

A MESSAGE

FROM THE MINISTER FOR THE STATUS OF WOMEN AND MINISTER RESPONSIBLE FOR FAMILY POLICY

On June 21, 1989, the National Assembly unanimously adopted the Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses, which came into force on July 1 of that year. On June 22, 1990, legislative amendments were adopted to modify the Act.

The underlying premise of the Act is that marriage is an undertaking to which each partner contributes in different ways, in the interest of the family. The spouses must benefit from the fruits of their work, whether they are exercised inside or outside the home. Under the Act, the contribution of the spouses to the family patrimony is acknowledged and attributed to them when the marriage ends.

To underscore the association implicit in marriage, rules governing family law and succession law have been amended and new rules have been adopted applicable in the event of divorce, death, legal separation or annulment.

This document, a useful reference, outlines the main facets of the family patrimony, its scope, and its effect on current law. It reviews various questions and concerns brought to our attention in recent months. I would like to take advantage of this opportunity to encourage all couples to assess their personal situation in light of provisions respecting the family patrimony.



VIOLETTE
TRÉPANIÉR

The information presented in this document does not constitute a legal opinion.

Bill 146, the Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses (1989, chapter 55)

Bill 47, the Act to amend the Civil Code of Québec with respect to partition of the family patrimony and the Code of Civil Procedure (1990, chapter 18).

The texts of both acts can be obtained from bookstores which handle Publications du Québec titles.

Québec

TEST YOUR KNOWLEDGE

1. Paul and Susan have been married since 1985, under the regime of separation as to property. Both spouses believe that their marriage contract would become meaningless were they to divorce, in light of compulsory provisions respecting the family patrimony.

TRUE FALSE

2. John and Mary were married in 1982, Mary for the second time. The house they are living in belonged to Mary when they married and was fully paid for. Mary's parents believe that, should the couple divorce, Mary will have to relinquish half the value acquired by the house since the marriage.

TRUE FALSE

3. Peter and Jennifer have been married for 30 years. Their marriage contract contains a clause granting property to the last survivor which is, in effect, a will stipulating that the spouse who predeceases the other spouse will leave all his or her property to the survivor. Peter and Jennifer are afraid that the clause is no longer valid and that, in the event one of them should die, the children will automatically be entitled to half of the family patrimony.

TRUE FALSE

4. Fifteen years ago, before he married Grace, Fred wrote a will leaving all his property to a distant cousin. He believes that this will takes precedence over rules governing the family patrimony because it was written prior to July 1, 1989, when the legislation came into force.

TRUE FALSE

5. When Louise wrote her will in 1980, she bequeathed the family home to her husband, \$100 000 to her son and a rental property to her daughter, the younger of the two children. This was the only assets she owned at the time of her death in 1990. Her daughter believes

that she must share the rental property with her father because of provisions in family patrimony legislation.

TRUE FALSE

6. Maurice and Jeanine were married in July 1990. They believe that, should they ever divorce, it will be impossible for them to renounce the partition of the family patrimony because they were married after July 1, 1989.

TRUE FALSE

7. George's neighbours have just divorced. One of the spouses renounced the partition of the family patrimony by notarial deed, apparently under threat. When consulted about the matter, George felt it was impossible to override the renunciation.

TRUE FALSE

8. While married to Annette, Ernest accumulated \$60 000 in his employer-sponsored pension fund. When they divorced, the couple thought that Annette, aged 40, could freely dispose of \$30 000, following the partition of retirement credits.

TRUE FALSE

9. Linda started receiving a pension in 1980, after 35 years in the teaching profession. The following year she married Bill; the couple divorced in 1990. Bill's sister claims that her brother is entitled to half of Linda's pension as the retirement fund is part of the family patrimony.

TRUE FALSE

10. Louis and Rosalin have been living together for 30 years (they are not married). Both spouses believe that after five years of cohabitation they both enjoy the same rights as married couples and that, in the event of a separation, the partition of the family patrimony will apply.

TRUE FALSE

See answers, page 4.

If you answered "true" to any of the foregoing questions, it is in your interest to read the following information.

Some people maintain that the Act only remedies the situation of women 50 or over, married under the regime of separation as to property, who have devoted themselves to their families. This observation should be clarified. Here are some recent data concerning the economic situation of Québec women.

THAT:

DID YOU KNOW

- nearly half of married women are working more or less permanently in the home;

- women hold most part-time jobs;

- among full-time employees, for every dollar a married man earns, a married woman earns only 64.4 cents;

- only one-third of women 65 or over receive a pension from the Québec Pension Plan, compared with 90 percent of men in the same age group;

- women account for only 37 percent of contributors to supplementary pension plans;

- 29 percent of households headed by women own their dwellings, compared with 65 percent of households headed by men;

- women head nearly 85 percent of single-parent families and that poverty is more acute in such families;

[1964] THE ACT RESPECTING THE LEGAL CAPACITY OF MARRIED WOMEN

Women married under the regime of the community of property obtained the right to administer their own property, although the administration of common property remained the husband's responsibility.

Women married under the regime of separation as to property obtained the right to administer and dispose of their property.

Couples massively opted for the regime of separation as to property, the only system under which the wife was assured her full legal capacity.

[1968] FEDERAL DIVORCE ACT

Legal constraints preventing divorce were eliminated.

The institution of marriage lost its stability. More and more marriages were terminated before the death of either spouse.

QUÉBEC: DIVORCES PER 100 MARRIAGES

1969: 8.7

1979: 34.1

1987: 44.8

When a couple separates, the inequality of their patrimonies becomes evident, especially when the spouses were married under the regime of separation as to property. The spouse who assumed his or her responsibilities toward the marriage by ensuring that the children were educated and by working in the home may be put at an economic disadvantage in relation to the spouse who accumulated money and property through remunerated employment outside the home.

[1970] THE PARTNERSHIP OF ACQUESTS BECOMES A LEGAL MATRIMONIAL REGIME

Spouses who do not sign a marriage contract are automatically subject to the regime of partnership of acquests, intended to bolster

the positive aspects of the regime of the community of property and the regime of the separation as to property.

[1975] THE QUÉBEC CHARTER OF HUMAN RIGHTS AND FREEDOMS

The Charter recognizes the principle of the equality of the spouses during marriage.

[1977] AMENDMENTS TO THE CIVIL CODE

The notion of "parental authority" replaced that of "paternal authority".

[1980] REFORM OF FAMILY LAW

The legal equality of spouses in marriage was confirmed. Spouses enjoys the both same rights and duties.

Measures were introduced to protect the family residence.

A compensatory allowance was introduced, to enable one spouse to claim, upon the dissolution of the marriage, compensation for his or her contribution, in property or services, to the enrichment of the patrimony of the other spouse.

The 1980 reform did not have the anticipated effect. In some instances, at the time of divorce it even aggravated the situation of many women married under the regime of separation as to property.

To ensure the legal equality of the spouses, advantages were withdrawn from women even when such advantages were included in the marriage contract, for example, with regard to certain gifts which, at the time of divorce, were cancelled.

The interpretation of procedures governing the compensatory allowance proved to be restrictive, putting at a disadvantage the spouse who was unable to acquire a patrimony.

To strengthen the principle of economic equality between spouses, the government had to ensure that the acquisition of property whose value could be partitioned when the marriage was terminated became one of the consequences of marriage.

[1989] THE ACT TO AMEND THE CIVIL CODE OF QUÉBEC AND OTHER LEGISLATION IN ORDER TO FAVOUR ECONOMIC EQUALITY BETWEEN SPOUSES

A limited family patrimony was created, whose value is partitioned in equal portions when a marriage ends, by reason of death, divorce, legal separation or annulment.

[1990] THE ACT TO AMEND THE CIVIL CODE OF QUÉBEC WITH RESPECT TO PARTITION OF THE FAMILY PATRIMONY AND THE CODE OF CIVIL PROCEDURE

Amendments provide for certain deductions in establishing the value of the family patrimony which is subject to partition, and also to take account the value of property acquired to replace property owned by the spouses at the time of their marriage.



WHO SHARES WHAT?

ARE YOU AFFECTED?

If you are married, legislation respecting the family patrimony concerns you, regardless of your matrimonial regime.

However, the legislation does not apply if you requested a separation, divorce or annulment prior to May 15, 1989, nor does it apply if, prior to that date, you ceased to live together and settled your separation, even without a written document.

In the case of separation, it is important to be aware that, should the spouses resume living together, they will be subject to provisions governing the family patrimony, unless they withdraw from it prior to December 31, 1990.

CALCULATING THE PARTITION

It is first necessary to establish the net value of the family patrimony.

The net value is the difference between the market value of the property included in the family patrimony and the total of all debts contracted for the acquisition, improvement, upkeep or preservation of the property.

In principle, the net value is evaluated on the date on which legal proceedings are instituted or on the date of death. In exceptional circumstances, the net value of the family patrimony may be established on the date on which the spouses ceased to live together.



BIT OF HISTORY

The notion of the family patrimony in Québec law is not accidental. Numerous, striking social changes over the past 20 years have generated legal instruments tailored to such changes.

The value subject to partition must then be established.

This value is obtained by deducting from the net value of the family patrimony certain other values, such as the value of a house paid for prior to the marriage.

The value subject to partition must then be divided equally between the spouses or, as the case may be, between the spouse and the heirs.

Partition of the family patrimony can be effected by giving in payment or by payment in currency. In both instances, the spouses may agree to transfer property other than that included in the family patrimony.

As each case is different, it is advisable to consult an expert.

CASES WHERE EQUAL PARTITION IS UNJUST

In cases where equal partition of the family patrimony would be unjust, the court may order an unequal partition. The short duration of the marriage, the dilapidation of certain property by one of the spouses or his or her bad faith, for example, may justify such a decision.

IMPORTANT

What becomes of property in the family patrimony acquired prior to the marriage?

The value of property purchased and paid for in full prior to the marriage is not subject to partition. The value of such property that either spouse owned at the time of marriage and the increase in the value of the property during the marriage are deductible from the family patrimony. If the property was not entirely paid for at the time of marriage, a deduction is made proportionately to the part paid prior to the marriage.

What becomes of amounts invested in property included in the family patrimony when such funds were devolved by succession, legacy or gift?

Such amounts are deducted from the net value of the family patrimony insofar as they were used to acquire or improve such a property. The increase in value acquired by the property in proportion to the amounts invested is also deductible.

What happens when any part of the property is replaced during the marriage?

WHAT DOES THE FAMILY PATRIMONY INCLUDE?

The family patrimony includes various kinds of property. It is the value of this property and not the property itself which is subject to partition.

Such property includes:

- the principal residence and the secondary residence of the family;
- the household furniture used by the family to furnish or decorate them;
- the motor vehicles used for family transportation;
- the benefits accrued during the marriage under a retirement plan*;
- the registered earnings, during the marriage, of each spouse pursuant to the Act respecting the Québec Pension Plan or to similar plans*.

**In the event of death, funds accumulated in each pension fund governed by legislation which grants the surviving spouse the right to death benefits, the funds are excluded from the family patrimony.*

The following property is excluded:

- property which one of the spouses has acquired by inheritance or as a gift, prior to or during the marriage, and the increase in value of such property;
- other property belonging to the spouses which is not specifically included by legislation in the family patrimony, such as personal savings.

The replacement, during the marriage, of property included in the family patrimony acquired prior to the marriage or of property paid for from amounts devolved to the spouse by succession, legacy or gift is also subject to deduction.

AVOIDANCE

OR RENUNCIATION

Provision is made in the Act for spouses wishing to renounce, in whole or in part, their share of the family patrimony, or avoid, in whole or in part, enforcement of the Act.

GENERAL USE FOR ALL SPOUSES

Spouses may not renounce in advance their rights in the family patrimony. At the time of separation or death, once each spouse knows his or her share of the family patrimony, he or she may renounce such rights, in whole or in part, by notarial deed. The deed must be registered within one year of death, a judgment of divorce, separation from bed and board, or an annulment.

Either spouse may also renounce his or her rights, in whole or in part, while proceedings respecting separation, divorce or annulment are under way.

- Spouses married prior to July 1, 1989
- Spouses who have examined their marriage contracts and wills, calculated the value of all of their property, and reevaluated their situation in relation to the Act may conclude, once the value of the family patrimony has been

- established, that it is preferable to avoid provisions in the Act.
- However, in doing so, the spouses must realize that they are reaching a decision without knowing what their situation will be at the time of death or separation, when the Act would normally apply.
- Spouses wishing to avoid provisions in the Act may do so, in whole or in part, by notarial deed, before December 31, 1990.
- Spouses married after July 1, 1989
- Such spouses may not avoid provisions in the Act.

CONTRACTS AND WILLS

The freedom to enter into contracts and draw up wills is a fundamental tenet of our legal system. However, this freedom has always been subject to a number of rules. Public order imposes limitations on what individuals may agree upon between themselves.

As is the case in the **Consumer Protection Act or the Act respecting labour standards**, provisions in legislation governing the family patrimony reflect the concern in public interest legislation to limit the actions of individuals.

The provisions allow spouses to choose their matrimonial regime and dispose of their property through a will. Once the value of the family patrimony has been partitioned, provisions in contracts and wills apply.

PENSION PLANS

Amounts accumulated by both spouses in pension plans are included in the family patrimony.

WHAT PLANS ARE COVERED BY LEGISLATION?

Government pension plans

Québec wage earners are required to contribute to the Québec Pension Plan (QPP); elsewhere in Canada, the Canada Pension Plan (CPP) is the universal, compulsory plan. The earnings registered in government pension plans during the marriage on behalf of both spouses are part of the family patrimony.

Other pension plans

In addition to government pension plans, other types of plans are available. Accumulated credits in such plans during the marriage are also included in the family patrimony:

- private employer-sponsored plans governed by provincial or federal legislation;
- special plans established by legislation on behalf of provincial and federal government employees;
- Registered Retirement Savings Plans (RRSPs);
- any other retirement savings plan into which funds from any of the foregoing plans have been transferred.

WHY ARE THESE AMOUNTS INCLUDED IN THE FAMILY PATRIMONY?

Prior to July 1989, the **Act respecting the Québec Pension Plan** made provision for the partition of amounts accumulated in the QPP, following a divorce, at the request of one of the spouses.

The accumulation of funds in a pension or retirement plan deprives the family of a significant source of income during the marriage, with a view to ensuring the spouses' financial security when they retire. Moreover, the partition of these amounts acknowledges the equivalence of the spouses' contributions during the marriage, whether they work inside or outside the home.

OF PENSION PLANS

GOVERNMENT PENSION PLANS

A file is maintained on anyone who contributes to the Québec Pension Plan; it indicates annual employment earnings up to the established maximums.

• **Partition of earnings prior to retirement**

Upon receiving a judgment respecting divorce or separation submitted by a judicial district, the Régie des rentes du Québec undertakes the partition of earnings registered on behalf of each spouse for each year of the marriage. This information, combined with earnings registered prior to and after the marriage, will determine the amount of the pension paid.

• **Partition when pension benefits are being paid**

When pension benefits are already being paid at the time of the partition, the pension is recalculated to take into account the increase or decrease in each spouse's earnings following the partition.

• **Automatic nature of the partition**

Even when the former spouses have renounced the partition of property in the family patrimony, the Régie des rentes du Québec will automatically partition earnings subject to the Québec Pension Plan in the case of couples legally separated or divorced after July 1, 1989, unless the judgment contains a specific renunciation with regard to the QPP.

Persons who divorced prior to July 1, 1989 must submit a request within 36 months of the date on which the divorce came into effect.

De facto separation does not entitle the spouses to partition. Should they subsequently divorce or legally separate, all years of the marriage are subject to partition, unless the court decides otherwise.

• **Partition in the event of death**

Should one of the spouses die, earnings registered in the QPP are not subject to partition as the pension may be paid to the surviving spouse. For this reason, such earnings are excluded from the family patrimony at the time of death.

OTHER PENSION PLANS

Various rules govern the partition of other pension plans. It is essential to be familiar with specific plans.

While the rules governing these plans seem complex, the principle underlying all of them is quite straightforward: it is the years of participation in the plan during the marriage which count. Consequently, the amounts accumulated by both spouses in their pension plans during the marriage are subject to partition. The employee's and the employer's share are usually taken into account when the value of contributions is calculated.

However, a participant in a pension plan may pay what is owed the other spouse by offering property of equivalent value.

• **Pension plans subject to partition pursuant to legislation or regulations**

Regulations stipulate the manner in which the amounts accumulated in a number of pension plans are to be partitioned, for example, employer plans subject to the **Act respecting supplemental pension plans** (this includes most private plans). The same is true of provincial public sector plans, administered by the Commission administrative des régimes de retraite et d'assurances (CARRA). To establish the amounts due to them and carry out the partition, the spouses must contact the pension plan committee or CARRA, as the case may be.

Among the options open to the spouse benefiting from the partition, he or she may deposit the amounts due in a pension account which must be used to accumulate an annuity, called a frozen retirement account.

The **Pension Benefits Standards Act**, federal legislation adopted in 1985, also makes provision for partition. The Act governs employer pension plans in sectors such as interprovincial or international transport, broadcasting, telecommunications and banking.

• **Pension plans which do not make specific provision for partition, e.g. RRSPs**

In the event of disagreement between the parties, the court uses the general rules in the **Civil Code of Québec** to partition other property in the family patrimony. The courts or the spouses could also use rules governing other types of pension plans to effect the calculation.

• **Death of one of the spouses**

If legislation governing the pension plan provides for the payment of benefits to the surviving spouse, the pension plan is excluded from the family patrimony. Because the surviving spouse receives benefits under the plan, there is no reason to subject the plan to partition.

ANSWERS TO QUIZ

1: **False**

In the case of property included solely in the family patrimony, provisions in legislation take precedence over those in matrimonial regimes, regardless of which spouse owns the property.

Other property which Paul and Susan own is subject to the rules of the regime of separation as to property, which prevail when they separate.

2: **False**

The value of the property at the time of the second marriage and the increase in value during the marriage must be deducted from the value of the family patrimony. For this reason, the value of Mary's house is not subject to partition because it was purchased and paid for in full prior to her second marriage.

3: **False**

Peter and Jennifer have nothing to fear. The clause granting property to the last survivor is still valid. Given the spouses' desire to leave each other all of the property at the time of death, the surviving spouse will first receive the portion guaranteed by the partition of the family patrimony. The inheriting spouse will also receive the other portion of the family patrimony and all other property in the succession.

However, many marriage contracts stipulate that this clause is revocable, thus enabling each spouse to write another will.

4: **False**

Regardless of when Fred wrote his will, rules governing the family patrimony will apply when he dies.

If Fred wants Grace to inherit all of his property when he dies, he should rewrite his will, otherwise Grace will only be entitled to half the value of the family patrimony.

5: **False**

Louise's daughter need not worry. The rental property is not included in the family patrimony and its value does not have to be shared

with the surviving spouse who, under the circumstances, will receive all of the family patrimony, as the house is the only property included in it.

6: **False**

Maurice and Jeanine are wrong. The spouse to whom part of the family patrimony is due can renounce his or her rights at the time of a legal separation, a divorce, or an annulment, or when the other spouse dies.

7: **False**

George is wrong. Upon application to the court, a renunciation by notarial deed can be cancelled within two years for valid reasons, for example, when consent was obtained through threats.

8: **False**

The Act respecting supplemental pension plans stipulates that the amounts transferred to the spouse may only be used, unless otherwise indicated, to establish a life annuity. When she retires, Annette is entitled to receive a pension until she dies.

9: **False**

Linda's retirement credits were accumulated prior to her marriage to Bill. For this reason, they are not included in the family patrimony and are not subject to partition.

10: **False**

The effects of marriage contemplated in the Civil Code of Québec only apply to married people.

Unlike some social legislation which recognizes the rights and duties of de facto spouses, the latter can never benefit from the provisions governing the family patrimony as long as they are not married.

THE FAMILY PATRIMONY, A QUESTION OF COMMON SENSE!

TO OBTAIN FURTHER INFORMATION, PLEASE CONTACT:

Secrétariat à la condition féminine:

Québec City region (418) 643-9052

Elsewhere (toll free) 1-800-363-8275

Communication-Québec: See the blue pages in the telephone directory.