



## **Between the dating contract and the stable union: A legal and socio-cultural perspective**

### **Entre o contrato de namoro e a união estável: Uma perspectiva jurídica e sociocultural**

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#### **Anna Clara de Sousa Araújo**

Student of the Law Course at the Faculty of Technology of Teresina – CET

E-mail: anasousa1903@hotmail.com

#### **Jessielen Silva da Costa**

Student of the Law Course at the Faculty of Technology of Teresina – CET

E-mail: syellensilva@hotmail.com

#### **Thalita Furtado Mascarenhas Lustosa**

Specialist in Social Security Law from Estácio

Specialist in Constitutional and Administrative Law, UNINOVAFAPI University Center

E-mail: furtadothalita@gmail.com

#### **ABSTRACT**

Throughout history, the family institution has undergone significant transformations, adapting to the values and beliefs of different eras and social groups. This study focused on the analysis of the Dating Contract, an agreement established between two people involved in a romantic relationship, with the purpose of preventing the relationship from being characterized as a Stable Union. This contract is formalized through a notary's office, and its main objective is the resolution of patrimonial issues. In addition to addressing the patrimonial implications, this work delved into the definition of dating and its distinctions in relation to the Stable Union, exploring the essential elements present in contracts of this type. The importance of understanding the nuances that differentiate these relationship modalities was also highlighted, considering legal and social aspects. In summary, this study not only delved into the analysis of the Dating Contract and its patrimonial implications, but also sought to contextualize these practices within the broader panorama of transformations in the family institution, considering both legal and social perspectives.

**Keywords:** Dating contract, Family, Stable union.

#### **1 INTRODUCTION**

In the current scenario, affective and family relationships have undergone profound transformations, reflecting the social, cultural, and legal changes of contemporary society. In this context, a phenomenon emerges that challenges the traditional boundaries of family law: the complex intersection between the Dating Contract and the Stable Union. The dating contract,



although not a foreign figure to the legal system, gains new contours and relevance in the face of the dynamics of modern relationships.

This research proposes to explore this theme, shedding light on the legal and sociocultural aspects that permeate love relationships in an increasingly plural and multifaceted world. The distinction between dating and common-law marriage is not always clear, and the nuances between these types of relationships often generate questions and controversies in the legal sphere.

The careful analysis of these issues is essential not only for legal practitioners, but also for all those who seek to understand the different forms of loving coexistence in contemporary times. By addressing the theme, *Between the Dating Contract and the Stable Union: A Legal and Sociocultural Perspective*, this study aims not only to clarify the conceptual and normative distinctions between these two relationship modalities, but also to examine the social and cultural impacts arising from individual and collective choices in this context.

The in-depth analysis of these issues is crucial for the construction of a legal framework that is sensitive to the diversity of family arrangements, ensuring the protection of rights and the promotion of the well-being of the people involved.

Thus, by examining both the dating contract and common-law union, this research will make a valuable contribution to the academic and legal debate, as it will provide essential *insights* to understand the current dynamics of relationships and, at the same time, improve public policies and judicial practices that encompass family relationships.

## 2 THEORETICAL BACKGROUND

### 2.1 A JOURNEY THROUGH THE HISTORY AND EVOLUTION OF THE FAMILY

The family structure has gone through a variety of configurations throughout the ages, adapting to the traditions of different civilizations. Shaped by the values rooted in the religion, politics, and socio-cultural peculiarities of each era, the evolution of the family reflects the complexity of human societies. For example, in classical Roman law, family structure was based on marriage and blood ties, and was limited to spouses and their descendants. In the context of ancient Egypt, civil unions between siblings were accepted, a practice designed to preserve the pure lineage of pharaonic royalty. In contrast, in China, there was a comprehensive prohibition on marriages between members of the same family, applying to various levels of kinship (Dal Col, 2005, p. 11).

During the French Revolution, civil marriages gained prominence in the West. With the Industrial Revolution, there was a significant exodus to the growing cities, which sprang up around



industries. This movement led to the emergence of nuclear families and the strengthening of family ties, giving rise to smaller families (Oliveira, 2009, p. 12).

In the Islamic context, the practice of polygamy, known as polygyny, involves the union of men with two or more women. In addition, some theories contemplate polyandry, an arrangement in which a woman can have two or more husbands (Dal Col, 2005, p. 12).

In Brazilian culture and many Western societies, the family is generally defined as a group of people connected by blood ties or legal ties, such as marriage or adoption. In this context, the established pattern is to recognize only one marriage at a time, following the predominant monogamous model.

In ancient civilizations, union often took place through religious ceremonies, without state involvement. Among the marriage practices, there were three recognized types: Catholic religious marriage, de facto marriage (known as *usus romano*), and marriage by scripture. These institutes were repealed by Decree 181 of January 24, 1890, which established civil marriage, regulated by the State.

In the current context of the family, it is relevant to highlight its instrumental nature (Farias; Rosenvald *apud* Cabral, 2012, p. 49). This denotes that the basic unit of society should be seen as a space for the formation of affective bonds, facilitating human development and fulfillment, promoting the dignity of people as human beings.

### **2.1.1 The Foundation of Affectivity: The Essence of Family Bonds in Contemporary Times.**

The essence of forming a family or a love bond is anchored in the Principle of Affectivity. This principle is fundamental, because it is through affection that bonds between people are established and endure over time.

As indicated by Dias (2010, p. 70), the inclusion of the Stable Union in the Federal Constitution represented the recognition of affectivity as an important element. This positions affectivity as a tacit principle within the legal system, deserving special attention. According to Cabral, cited by Farias and Rosenvald (2012, p. 58), affectivity is the foundation on which the concept of family is based. Therefore, according to Cabral (2012, p. 59), "it is through affection that bonds are established, both in courtship and in Stable Union", and this is the point emphasized in the act of captivating.

People only really know those whom they have captivated and by whom they have been captivated, because it is in this interaction that interdependence develops, and people begin to have need for each other. It should be emphasized, a healthy need, capable of liberating and not of creating bonds, because where there is true love, there is freedom (CabraL, 2012, p. 59).



That is, the genuine affective bond between individuals is established when both are free and, even in this freedom, feel the emotional and affective need of each other.

## 2.2 EMERGENCE OF COMMON-LAW MARRIAGE – LAWS NO. 8,971/94 AND 9,278/96

The informal union between individuals of the opposite sex has ancestral roots, dating back to the beginnings of the family institution. Without legal regulation, couples shared their lives without the need for formalities. However, the belief that the structuring of the family should be made official, often motivated by religious reasons, led the partners to seek the consolidation of their union through marriage, conferring on it a socially accepted status.

Decree 181, issued on January 24, 1890, abolished the recognition of religious marriage, Catholic or Protestant, establishing only the civil model. Until 1977, Brazilian constitutions did not allow divorce, which contributed to the increase in informal unions.

With the promulgation of the Federal Constitution, the Stable Union was officially recognized as a family entity. The growing number of couples living informally demanded the regulation of these relationships, carried out through Law No. 8,971/94, known as the Partners Law, and Law No. 9,278/96, the Cohabitants Law. These laws were implemented to establish clear rights and responsibilities for couples who choose to live together without formalizing their marriage, guaranteeing them legal protection and recognition as a family entity under the law.

In 1988, the constituent legislator expanded the concept of family, recognizing not only marriage, but also stable unions and communities formed by parents and their descendants. Article 226, paragraph 3, of the Federal Constitution recognizes the stable union between a man and a woman as a family entity, and stipulates that the law must facilitate the conversion of this union into marriage. Regarding this provision, Dias (2010, p. 184) argues that "demanding judicial intervention does not mean facilitating, but rather bureaucratizing and making it more expensive".

Law No. 8,971, of December 29, 1994, popularly known as the Partners Law, composed of only five articles, recognized the right to alimony and participation in the inheritance for couples in a stable union. However, it established specific conditions for the formal recognition of this Stable Union, such as a minimum period of cohabitation of five years or the presence of children in common. In addition, it required that those involved be unimpeded, that is, they were single, legally separated, divorced or widowed, for the Stable Union to be valid before the law.



Article 1 of the legislation contemplates rights for the partner who lives with an individual for more than five years or has children with him/her. This right allows the use of Law No. 5,478, of July 25, 1968, as long as there is a proven need, as long as there is no new union.

The sole paragraph of the same article guarantees the same right and in the same circumstances for the partner of a woman who is single, legally separated, divorced or widowed. Article 2, on the other hand, stipulates the conditions for participation in the succession of the surviving partner, conferring usufruct of the assets left by the deceased. This varies according to the existence of descendants, ascendants or collaboration in the acquisition of assets, defining the portion of the inheritance to which the partner is entitled.

Law No. 9,278, of May 10, 1996, also known as the Law of Cohabitants, established in its eleven articles two fundamental aspects. Firstly, it recognised the right to share assets acquired for consideration during the common-law marriage. In addition, it introduced the right in rem of housing in the event of dissolution of the union by death. This right relates to the property intended for the family residence, allowing the survivor to live in the place while alive or without entering into a new union or marriage.

The first article of this legislation recognizes as a family entity the lasting, public and continuous coexistence between a man and a woman, with a view to establishing a family. With regard to cohabitants, the second article establishes equal rights and duties, including mutual respect, moral and material assistance between them, as well as co-responsibility for the custody, support and education of the children they may have in common.

Regarding the assets acquired during the stable union, the fifth article defines that the movable and immovable assets obtained by one or both cohabitants, in a onerous manner during this period, are considered the result of the joint effort, becoming the property of both in condominium and equal shares, unless there is a different stipulation in a written contract. However, that presumption is annulled if the acquisition of property is carried out with resources originating from assets acquired before the start of the union.

The management of joint assets is the responsibility of both cohabitants, unless there is a different agreement recorded in a written contract, as determined by paragraph 2 of the same article. Regarding the dissolution of a common-law union, Article 7 establishes that, in the event of termination, one of the cohabitants must provide material support to the other, as stipulated in this legislation, as long as necessary, for sustenance, called maintenance. In the event of dissolution due to the death of one of the cohabitants, the survivor has the right in rem to inhabit the property



designated as the family residence, for as long as he or she lives or until he or she forms a new union or contracts marriage, as defined in the sole paragraph.

It is worth mentioning that the criteria established by the previous legislation, Law No. 8,971/94, such as the five-year period of cohabitation, the presence of children in common and the condition of unimpediment, are no longer present in the current legislation. The absence of mention of these criteria by the legislator resulted in the recognition of rights for individuals who were previously considered impeded. It is important to note that the time requirement has also been eliminated, which requires an individual analysis of each case to determine the rights in question.

### 2.3 DISTINCTION BETWEEN DATING CONTRACT AND COMMON-LAW MARRIAGE: UNDERSTANDING THE DIFFERENCES

The so-called 'Dating Contract' or declaration of courtship is used by people with considerable wealth to differentiate a casual love relationship from the configuration of a Stable Union. For some legal experts, such as Sílvia de Salvo Venosa (2011, p. 83), this contract is seen as an attempt to annul the legal provision related to the Stable Union.

Venosa (2011, p. 83-84) describes the purpose of Dating Contracts as a way to 'regulate love' for couples who have 'true fear of love'. He argues that these contracts often aim to protect the partner with assets to the detriment of the other, which, according to him, goes against the principles of human dignity and family law.

Nayara Sampaio (Leonel, 2010, p. 01) points out that several jurists oppose this type of contract, alleging the legal impossibility of the object or even arguing that the contract itself can establish the Stable Union. There are proponents of Dating Contracts, emphasizing the importance of the will expressed in these contracts and the freedom of the lovers not to form a family entity with legal consequences. In other words, they claim that a legal transaction is a manifestation of autonomous will and cannot be imposed.

Nayara Sampaio (Leonel, 2010, p. 01) points out that there is no legal impediment to the execution of these contracts. However, it questions the legal feasibility of these Dating Contracts, suggesting reflection on their reasonableness when two people wish to formalize an agreement of this type.

Lawyer Alessandra Abate (2008, p. 1), from the law firm Correia da Silva Advogados, criticizes Dating Contracts, considering them legally invalid. She points out that, according to the legislation, a Stable Union can be recognized by the simple fact that a man and a woman live



together publicly with the intention of forming a family, not to mention the need for a minimum period of relationship (Abate, 2008, p. 1).

According to lawyer Roberto Azevedo Andrade Júnior (p. 1), the dating contract has become popular among people with resources, celebrities and artists who want to maintain romantic relationships, but want to avoid responsibilities in the event of a relationship termination or a request for recognition of a stable union.

Andrade Júnior warns that this type of contract is null and void, since the Stable Union is regulated by precepts of public order, unavailable for contracts. Clauses that go against what is established by law, such as incommunicability of assets, right to alimony and custody of children, are not valid, as the right to contract is limited. He emphasizes that the legal figure of courtship is not relevant, and that it is the public, continuous and lasting coexistence that characterizes the stable union.

Sílvia de Salvo Venosa (2009, p. 84) agrees by stating that these contracts are null and void (art. 166, VI, of the Civil Code) and represent an affront to the principle of human dignity by protecting only the assets of one of the parties involved.

For Alessandra Abate (2008, p. 01), Stable Union, like marriage, is a legally recognized aspect of life, governed by public laws and not by the will of the parties. She argues that dating contracts that attempt to invalidate common-law marriage have no legal validity.

The Civil Code defines a Stable Union as the public, continuous and lasting coexistence between a man and a woman, with the intention of forming a family. According to Sílvia de Salvo Venosa (2011, p. 83), this coexistence entails mutual patrimonial consequences, which motivated the emergence of Dating Contracts in recent times, aiming to avoid interpretations that could configure a Stable Union.

#### 2.4 GUIDELINES AND REQUIREMENTS IN THE FORMALIZATION OF CONTRACTS

According to Carlos Roberto Gonçalves (2009, p. 3), a contract is a source of obligations. In the current Civil Code, twenty-three types of named contracts (art.: 481 to 853) are described, intended to establish obligations between the parties involved. Gonçalves (2009, p. 16) defines a contract as "an agreement of wills aimed at creating, modifying or extinguishing rights", highlighting its importance as one of the main bilateral legal transactions.

These contracts originate from two manifestations of will: the proposal (or offer) and the acceptance, which do not require a specific form (Gonçalves, 2009, p. 25). The proposal represents



the beginning of negotiations, marking the initial stage in which there is no definitive commitment established (Gonçalves, 2009, p. 25).

According to article 427 of the Civil Code, a proposal becomes binding if it is carried out in a serious and conscious manner, and its withdrawal may lead to compensation for any damages. On the other hand, acceptance refers to consent to the proposed terms. According to Carlos Roberto Gonçalves (2009, p. 26), it is this consent that is the basis for the conclusion of the contract.

#### 2.4.1 Requirements for the validity of contracts

According to Article 104 of the Civil Code, the legal validity of contracts is determined by three essential conditions:

1. **Capable Agent:** All parties involved must possess the legal capacity to enter into a contract.
2. **Lawful Object:** The object of the contract may not violate the law, morals or good customs. It must also be possible, specific or at least determinable.
3. **Prescribed Form or Non-Defense in Law:** The form of the contract must follow the legal requirements, otherwise, the contract may be considered invalid (Brasil, 2022).

Carlos Roberto Gonçalves (2009) highlights that the mutual agreement of wills as an additional special condition. He emphasizes the importance of the capacity of the contractors, pointing out that contracts can be annulled if one of the parties does not have adequate legal capacity. The Civil Code, in article 166, item I, declares null and void contracts entered by absolutely incapable persons. In cases of relative incapacity, the contract is voidable, according to article 171, item I.

In addition, it is emphasized that the object of the contract must be lawful, possible, and determinable, according to article 166, item II, of the Civil Code, which invalidates contracts whose object is illicit, impossible or indeterminable (Gonçalves, 2009, p. 6).

Regarding the form of the contract, it may vary, being written, public, private, or verbal, unless the legislation requires a specific form (Article 107 of the Civil Code). Mutual consent, or agreement of wills, must be free and voluntary, otherwise the contract will be affected by defects such as error, deceit, coercion, state of danger, injury or fraud.

The expression of will in contracts may be express or tacit, depending on the circumstances or practices authorized (Article 111 of the Civil Code). Regardless of its form, the manifestation of the will is a fundamental requirement in any type of contract.



### 3 FINAL THOUGHTS

The Dating Contract represents an instrument in which the parties define the terms that govern their affective relationship. To understand this practice, it is essential to consider the historical context of the family, which highlighted the Stable Union as a recent institution in the legal system, marking the recognition of the principle of affectivity. Social relationships, especially affective ones, were also impacted by legal protection. This, in part, is due to the influence of capitalist ideology, which promotes consumerism and affects relationships, leading some people to prioritize wealth gains over emotional ties.

The inclusion of the Stable Union in the Constitution eliminated discrimination against this form of affective union. However, most couples who opt for this type of relationship still do not formalize this union through a written document. Dating is characterized by involving less commitment than common-law marriage, although the dividing line between these concepts is subtle. The most evident difference between these institutes is the *animus* of forming a family, present in the Stable Union and absent in courtship.

Nowadays, it is common for two people to enter a contract declaring their dating relationship, with the purpose of satisfying superficial affective needs, getting to know each other and developing affinity, without the intention of forming a family.

There are disagreements in the legal community about the validity of this contract. Some scholars believe that the dating contract is effective, valuing the autonomy of the will of the parties and being an available right. However, many jurists and courts consider this practice ineffective, since it does not have the power to prevent the recognition of a Stable Union, regulated by requirements established in federal law and, therefore, cannot be annulled by a private contract.

In practice, the Dating Contract is used to avoid the patrimonial effects that may arise from a Stable Union, to avoid the configuration of this union. Some jurists argue that it is essential to emphasize the legal unfeasibility of this type of contract, since the Stable Union is a legal *fact* recognized by law, and it is not possible to validate an agreement that contradicts the rules established in articles 1,723 et seq. of the Civil Code of 2002. The Stable Union must be recognized whenever the legal requirements are met.

The legal community has differing opinions on the validity of this contract, with no clear consensus. Therefore, it is up to the courts to decide on its validity and effectiveness in specific cases presented. Most of the decisions conclude that it is impossible for the Dating Contract to take effect, since the Stable Union is derived from the constitutional norm itself and is protected by the legal system.



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