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# Qualified dating and common-law marriage: A necessary differentiation

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**ABSTRACT**
In view of the numerous transformations faced by Family Law, over time, the stable union has been legally recognized as a family entity, and for this purpose, it is enough to fulfill its characterizing elements determined by the legislator. On the other hand, the institute of qualified dating has acquired new contours, becoming the target of jurisprudential and doctrinal discussions, which began to highlight the differences between stable union and the so-called qualified dating, mainly seeking to avoid the possible confusion of legal effects between such institutes. Thus, through the deductive method, a review of the specialized bibliography in Family Law related to the institutes of stable union and qualified dating was carried out, seeking to outline the main element responsible for differentiating them, that is, the animus familiae, in addition to pointing out the effects produced by them and discussing the validity of the dating contract.

**Keywords:** Common-law marriage, Qualified dating, *Animus familiae*.

## 1 INTRODUCTION

During the validity of the Civil Code of 1916 until the advent of the Federal Constitution of 1988, the family was eminently matrimonialized, only existing legally and socially when it originated from a valid and effective marriage. Any other existing family arrangement was socially marginalized.

Currently, with the constitutional backing, the single family model, constituted by marriage, has been replaced by a plurality of new configurations of coexistence, which has as an identifying element the affectivity and the appreciation of the dignity of its members.

In this sense, the Federal Constitution establishes that, in addition to matrimonial family entities, families constituted by stable unions and single-parent families will receive state protection. However, it is understood that the family models explained in the constitutional text are merely illustrative, without opposition to the recognition of new family arrangements.

We will be faced with a family entity, be it conjugal or parental, whenever affectivity is present, which can be externalized by the coexistence and care between the members; by the ostensiveness and continuity of relationships; and by the intention to form a family. In fact, this last subjective

requirement, i.e., *the animus familiae,* is responsible for the tenuous differentiation between a family entity constituted by a stable union and a relationship considered as qualified dating.

Thus, through the deductive method, a review of the specialized bibliography in Family Law regarding the institutes of stable union and qualified dating was carried out, seeking to differentiate them and point out the effects produced by them.

## 2 COMMON-LAW FAMILY

The Civil Code of 1916, to protect the family constituted by marriage, ignored the de facto family. In addition, until 1977, there was no divorce, so only with the possibility of divorce (which did not dissolve the marital bond) there was an impediment to the constitution of a new marriage. However, this impediment did not prevent the emergence of new affective relationships, which were identified with the name of concubinage.

Regarding the patrimonial effects resulting from the dissolution of these de facto unions, in which the partner was left helpless, the jurisprudence had the important task of preventing the injuries that became very recurrent. In view of this, the Federal Supreme Court (STF) issued precedent no. 380, allowing the division of the assets acquired in the constancy of the union: "once the existence of a de facto partnership between the concubines is proven, it is appropriate to dissolve it judicially with the division of the assets acquired by the common effort".

With the passage of time, extramarital unions ended up deserving the acceptance of society, leading the Federal Constitution to expand the concept of family, and other relationships, in addition to those constituted by marriage, deserve the special protection of the State. Thus, de facto unions were recognized as family entities, under the name of stable union.

According to the teachings of Carlos Alberto Dabus Maluf and Adriana Caldas do Rego Freitas Dabus Maluf (2016, p. 53), the generalization of the social fact led to the common-law union being legally recognized as a family entity. In view of article 226, paragraph 3, of the Federal Constitution, a stable union is the family entity established between a man and a woman, in a public, continuous and lasting manner, with the intention of forming a family. In addition, the Civil Code also regulates such a family institution, addressing stable unions in articles 1,723 to 1,727 and in other sparse provisions.

In addition, common-law marriage differs from concubinage, which is restricted to the relationship between people who are prevented from entering into marriage. In view of this, it is necessary, for the characterization of the stable union, as provided for in article 1,723, paragraph 1, of the Civil Code, to observe the impediments provided for in article 1,521 of the aforementioned law, in addition to the reciprocal duties between the cohabitants, present in article 1,724 of the Civil Code, namely, loyalty, respect, assistance, and custody, support and education of the children.

It is worth noting that the law does not require a minimum period for the configuration of a stable union, and the circumstances of the specific case must be analyzed to determine its existence or not. Thus, as part of the structure of the stable union, the beginning of cohabitation occurs without the observance of any formalities of celebration, resembling a de facto marriage, since the partners live as if they were spouses.

In this sense, Paulo Lôbo (2008, p. 152) classifies common-law unions as a "legal act-fact", which does not depend on formalities or solemnities, such as marriage, which, in turn, is a formal and complex "legal act". Therefore, a stable union is established when the requirements of public, lasting and continuous coexistence and with the intention of forming a family are met.

Regarding the requirement of heterosexuality, present in the constitutional text and in the civil text, this characteristic came to be exempted, according to the position of the Federal Supreme Court welcoming homosexual relationships as a stable union:

> ALLEGATION OF NON-COMPLIANCE WITH A FUNDAMENTAL PRECEPT (ADPF). PARTIAL LOSS OF OBJECT. RECEIVED, IN THE REMAINING PART, AS A DIRECT ACTION OF UNCONSTITUTIONALITY. *SAME-SEX UNION* AND ITS RECOGNITION AS A LEGAL INSTITUTE. CONVERGENCE OF OBJECTS BETWEEN ACTIONS OF AN ABSTRACT NATURE. JOINT JUDGMENT. [...] PROHIBITION OF DISCRIMINATION AGAINST PERSONS ON THE BASIS OF SEX, WHETHER IN TERMS OF THE DICHOTOMY BETWEEN MEN AND WOMEN (GENDER) OR IN TERMS OF THE SEXUAL ORIENTATION OF EACH OF THEM. THE PROHIBITION OF PREJUDICE AS A CHAPTER OF FRATERNAL CONSTITUTIONALISM. HOMAGE TO PLURALISM AS A SOCIO-POLITICAL-CULTURAL VALUE. FREEDOM TO DISPOSE OF ONE'S OWN SEXUALITY, INSERTED IN THE CATEGORY OF THE FUNDAMENTAL RIGHTS OF THE INDIVIDUAL, AN EXPRESSION OF AUTONOMY OF WILL. RIGHT TO INTIMACY AND PRIVATE LIFE. STONY CLAUSE. [...] INTERPRETATION OF ARTICLE 1,723 OF THE CIVIL CODE IN ACCORDANCE WITH THE FEDERAL CONSTITUTION ("CONFORMING INTERPRETATION" TECHNIQUE). RECOGNITION OF *SAME-SEX UNIONS* AS A FAMILY. MERITS OF THE ACTIONS. Faced with the possibility of interpreting article 1,723 of the Civil Code in a prejudiced or discriminatory sense, which cannot be resolved in the light of the Civil Code itself, it is necessary to use the technique of "interpretation in accordance with the Constitution". This is in order to exclude from the provision in question any meaning that would prevent the recognition *of the* continuous, public and lasting union between persons of the same sex as a family. This recognition must be made according to the same rules and with the same consequences as *heteroaffective stable unions (BRASIL, 2011).*

Finally, it is worth noting that, although the common-law union is recognized as a family entity in Brazil, numerous legal systems do not attribute legal effects to this institute, such as the United States, in which, among its fifty American states, only nine and the District of Columbia still recognize the common-law union. The arguments for the extinction of legal recognition for this type of family refer to the results produced by it, which are unpredictable and often troubled (MELO, 2019).

## 3 QUALIFIED DATING AND COMMON-LAW MARRIAGE: A DIFFERENTIATION

Since the regulation of common-law marriage, there have been statements that simple courtship could entail patrimonial obligations between the couple of lovers, as occurs between partners. Faced

with such a situation, doctrine and jurisprudence have sought to draw a differentiation between these institutes. However, as professors Carlos Alberto Dabus Maluf and Adriana Caldas do Rego Freitas Dabus Maluf (2016, p. 57) teach, this is not always easy, especially when it comes to the so-called qualified dating.

> Unlike common-law marriage, which has a constitutional provision in article 226, paragraph 3, and is regulated by the Civil Code, in articles 1,723 to 1,727, dating is not conceptualized by law. Therefore, there are no requirements to be observed for its formation, except the moral requirements, imposed by society itself and customs.

Thus, initially, it is necessary to differentiate between simple dating and qualified dating. Simple dating is easily differentiated from common-law marriage, as it does not have one or more of the basic requirements, and can be, for example, a secret dating, an occasional courtship, or even an open relationship. On the other hand, qualified dating presents most of the requirements also present in the constitution of the stable union, that is, public relationship (in the sense of notoriety, which cannot be hidden or clandestine), continuous (without interruptions, without comings and goings), and lasting (prolonged in time). For this reason, it is so difficult, in practice, to find the differences between common-law marriage and qualified dating.

It should be noted that dating, whether simple or qualified, is not considered a family entity and, therefore, does not produce legal effects of an existential and patrimonial nature. Thus, in the absence of legal rights and duties, there is no need to talk about alimony, death pension, property regime, partition and inheritance rights.

As mentioned, although it is not easy to distinguish between common-law union and dating, given the similarities between both institutes, what differentiates them is the main objective of forming a family (*animus familiae*), present in common-law marriage and absent in qualified dating. With this understanding, the following is a judgment of the Superior Court of Justice, whose rapporteur was Justice Nancy Andrighi:

> In the qualified dating relationship, the lovers do not assume the condition of cohabitants because they do not wish to do so, they are free and unimpeded, but they do not intend, at that moment or with that person, to form a family entity. That doesn't mean they want to remain refugees, since they look for each other's company for parties and trips, they even end up getting to know each other's families, posing for photographs at parties, staying overnight at each other's houses frequently, that is, they maintain a true love relationship, however, without the objective of forming a family (BRASIL, 2012).

Thus, for the constitution of a stable union, the couple must manifest their desire to start a family, living, in this sense, as if they were married. This means that there must be unrestricted reciprocal moral and material assistance, a joint effort to realize common dreams, and real participation in the problems and desires of the other.

On the other hand, in qualified dating, although there may be a future goal of starting a family, there is not yet this communion of lives. Lovers protect their personal lives, their particular interests are not confused in the present, and reciprocal moral and material assistance is not totally unrestricted.

In this sense, it follows a judgment of the Superior Court of Justice, in which it was discussed whether there was, between the disputing parties, a stable union or mere qualified dating, and, according to the decision, the division of an apartment acquired only in the name of the defendant would be made or not. It was unanimously recognized that there was, in fact, a qualified courtship:

> [...] The purpose of forming a family, raised by the governing law as an essential requirement for the constitution of a stable union [...] does not constitute a mere proclamation, for the future, of the intention to form a family. It's more comprehensive. This must appear to be present throughout the coexistence, based on the effective sharing of lives, with unrestricted moral and material support among the companions [...] (BRAZIL, 2015).

Furthermore, seeking to differentiate the two institutes, José Fernando Simão (2018) teaches that:

> If there is a future project of starting a family, we are facing dating. If there is a family already constituted, with or without children, that is, if it already exists in the present, there is a stable union. In order to establish the existence of such a family at present, the criteria of reputation and treatment must be taken into account, which can be demonstrated by all means of evidence, such as witnesses and documents.

Thus, in order to establish the intention to form a family, it is necessary to demonstrate the way in which the partners treat each other *(tractatus*), as well as the social recognition of their status (*reputatio*). Thus, the classic criteria for the configuration of the possession of married status are used to prove the stable union (TARTUCE, 2018, p. 1).

## 4 NAMORO'S CONTRACT

Faced with the situation of insecurity caused by the difficulty of distinguishing between qualified dating and stable union, in order to avoid risks and losses that may arise from a lawsuit with requests of a patrimonial nature, alleging the existence of a stable union, when, in fact, there was only dating, couples in love felt the need to sign contracts to ensure the absence of reciprocal commitment and the incommunicability of present and future assets.

This is the so-called dating contract, which consists of a bilateral declaration in which people of legal age, capable, in good faith, with freedom, without pressure, coercion or inducement, confess that they are involved in a loving relationship, without any intention of forming a family, and this courtship, by itself, does not have any effect of a patrimonial nature, or economic content (VELOSO, 2017, p. 21). With regard to the execution of such contracts, there is no prohibition under Brazilian law. Thus, dating contracts can be drawn up, either publicly or privately.

However, it is important to note that article 1,723 of the Civil Code is considered a rule of public order. Thus, it is not possible for the couple to waive any of the requirements for the formation of a stable union, even if there is a consensus. This means that the dating contract will not be valid to avoid the configuration of a stable union, which will be constituted with or without a pact, as long as its requirements are met (MALUF, MALUF, 2016, p. 62).

Seeking a solution for couples who wish to enter into a dating contract without running the risk of it being considered null and void, João Henrique Catan (2013) argues for the possibility of inserting an evolution clause in such contracts. Thus, there would be a provision that, if there is an evolution, in fact, in the dating relationship, starting to configure a stable union, the parties freely decide to adopt a certain property regime that they understand to be more appropriate for the future.

In this way, a hybrid contract can be made, setting the initial term of the dating relationship, and providing for patrimonial obligations conditioned to a future and uncertain event of stable union, when the couple, by maturity and will, automatically begins to live together in a stable way. Such a form of contracting does not prohibit or attempt to prevent the recognition of the stable union, and the partners have all the rights and duties that emanate from this family entity enshrined by the legislator.

## 5 FINAL THOUGHTS

The difference in legal treatment between the institutes of stable union and qualified dating is clear, given that the stabilized union can cause the formation of a family entity with various legal consequences – property regime, alimony, succession, social security – while dating, as a rule, will not generate any legal effect.

In addition, the rules that govern the common-law union are of public order, so once the legal requirements are configured – public, continuous, lasting coexistence and with the intention of forming a family – there will be a family entity constituted by the common-law union, regardless of the will of the parties.

In this sense, even if there is an express declaration aimed at excluding the common-law union, such a declaration should not prevail if the requirements of the common-law union are verified in the factual situation.

Finally, it is concluded that the differentiation between stable union and qualified dating will reside *in the animus familiae, and in the former*, the animus of forming a family must be current – today the cohabitants already form *a family -, while, in the latter, such animus* will be future – the couple of lovers wishes to be a family in the future, and may be, even, bride and groom.

## REFERENCES


BRASIL. Superior Tribunal de Justiça. Recurso Especial 1.263.015/RN, Relator: Ministra Nancy Andrighi - Terceira Turma. Julgado em 19 jun. 2012. Diário de Justiça Eletrônico, Brasília, 26 jun. 2012. Disponível em: https://jurisprudencia.s3.amazonaws.com/STJ/IT/RESP_1263015_RN_1346415832491.pdf?Signature=oosxItZejvQ2GMyf90J9VD%2B%2BZ50%3D&Expires=1593107862&AWSAccessKeyId=AKIARMMD5JEAO765VPOG&response-content-type=application/pdf&x-amz-meta-md5-hash=bdf86dfbaf13ef0bbbdad44a9fb493dd. Acesso em: 20 jun. 2023.

BRASIL. Superior Tribunal de Justiça. Recurso Especial 1.454.643/RJ, Relator Ministro. Marco Aurélio Bellizze, Terceira Turma, Julgado em 3 mar. 2015, Diário de Justiça Eletrônico, Brasília, 10 mar. 2015. Disponível em: https://stj.jusbrasil.com.br/jurisprudencia/178417344/recurso-especial-resp-1454643-rj-2014-0067781-5/relatorio-e-voto-178417366. Acesso em: 20 jun. 2023.

BRASIL. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade nº. 4277 DF, Relator Min. Ayres Britto, Dj 05/05/2011, Tribunal Pleno, Dje-198 13/10/2011. Disponível em: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628635. Acesso em: 19 out. 2023.

CATAN, João Henrique Miranda Soares. O réquiem dos contratos de namoro e a possibilidade da instituição da cláusula darwiniana, 2013. Disponível em: http://www.ibdfam.org.br/artigos/890/O+r%C3%A9quiem+dos+contratos+de+namoro+e+a+possibilidade+da+institui%C3%A7%C3%A3o+da+cl%C3%A1usula+darwiniana. Acesso em: 8 jun. 2023.

LÔBO, Paulo. Famílias. São Paulo: Saraiva, 2008.

MALUF, Carlos Aberto Dabus; MALUF, Adriana Caldas do Rego Freitas Dabus. A união estável e o namoro qualificado: uma diferenciação, Revista de Direito de Família e das Sucessões, ano 3, vol. 9, jul./set., 2016. Disponível em: RDFAS – EDIÇÃO 9 – ADFAS :: Associação de Direito de Família e das Sucessões. Acesso em: 21 abr. 2023.

MELO, João Ozorio de. Estados Unidos está perto de acabar com a união estável. Revista Consultor Jurídico, 4 ago. 2019. Disponível em: https://www.conjur.com.br/2019-ago-04/estados-unidos-perto-acabar-uniao-estavel. Acesso em: 21 jun. 2023.

SIMÃO, José Fernando. Aulas. Direito das Sucessões: diálogos. Curso de Pós-graduação em Direito, Faculdade de Direito da Universidade de São Paulo. São Paulo, 2018.

TARTUCE, Flávio. União estável e namoro qualificado, 2018. Disponível em: http://www.ibdfam.org.br/artigos/1265/Uni%C3%A3o+est%C3%A1vel+e+namoro+qualificado. Acesso em: 22 abr. 2023.

VELOSO, Zeno. É namoro ou união estável? In: PEREIRA, Rodrigo da Cunha (Coord.); GRISARD FILHO, Waldyr; BURGUER, Marcelo Luiz Francisco (orgs.). Direito das famílias e sucessões: concurso de artigos. Belo Horizonte: IBDFAM, 2017.