

Brazil's constitutional court changes matrimonial property rules for persons over 70

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In its first full bench session of 2024, Brazil's constitutional court, the Supreme Federal Court (*STF – Supremo Tribunal Federal*), concluded its decision in appeal ARE 1.309.642/SP, and issued the following ruling, which is binding on all lower courts (General Repercussion Ruling 1236): "In marriages and stable unions involving a person over 70 years of age, the regime of separation of property provided for in article 1641(II) of the Civil Code may be set aside by the express consent of the parties, set out in a public instrument."

To avoid creating uncertainty as to property rights in past marriages and stable unions, the STF decided that its ruling will apply only prospectively. However, persons of 70 can change their matrimonial regime by applying to the courts for authorization (if married) or by public instrument (if they are in a registered stable union).

Justice Luís Roberto Barroso, who wrote the lead opinion, took the position that mandatory separation of property due to age prevents persons who are legally competent from deciding which matrimonial property regime they consider the most suitable, contrary to their right of self-determination and the prohibition against discrimination based on age under article 3(IV) of the Federal Constitution. He also observed that it is not uncommon for heirs to exploit the rule in article 1641(II) in their own interest, which also goes contrary to the current trend in the law to prioritizing personal rights over property rights.

Some scholars have argued that the rule under article 1641(II) is unconstitutional since the Civil Code came into force at the beginning of 2003. Statement 125, approved at the 1st Civil Law Symposium in 2003, recommended repealing the provision, because "it introduces the preconceived idea that older people, simply because they are past a certain age, are subject to a presumption of absolute incapacity in some acts of civil life."

In fact, General Repercussion Ruling 1236 aligns with recommendations made by the commission of jurists appointed to reform the Civil Code. The sub-commission on Family Law, for example, has proposed the repeal of article 1641, which "discriminates against persons with respect to their discernment, simply because they are more than 70 years of age."

The sub-commission on Succession and Inheritance Law recommends excluding the reference to mandatory separation of property in article 1829, in order to exclude spouses and life partners from the list of heirs who are entitled to a share of the "légitime", or the portion of the estate that is reserved, by law, to certain heirs. Instead, a new paragraph would be added to article 1829, specifying that "the deceased's spouse or life partner is

entitled only to a share of community marital property.”

The Contract Law sub-commission, for its part, has suggested including a new paragraph in article 496, which makes the sale of assets by an ascendant to a descendant voidable unless the sale is made with the consent of the other descendants and the seller’s spouse or life partner. The new paragraph would provide that the spouse’s or partner’s consent is not required where the couple’s matrimonial property regime is separation of property.

The STF and the Civil Code Reform commission thus seem to be thinking in the same direction – that restrictions on older adults’ autonomy, and specifically the mandatory separation of property for those who marry or form a stable union after 70, should be removed.

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