

# Tontine, PACS, change in matrimonial regime

## Which is the best for you?

*Inheritance law and taxation concerning property differ substantially in France compared to many other countries. It is therefore essential that you address these complicated issues with your 'notaire' before it becomes too late.*



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If you own property in France careful estate planning can help you to leave your property to the person of your choice. However, taxation is a different matter. Your *notaire* can give you a clear insight into the advantages and disadvantages of the various options available from both a civil and a tax point of view. Certain mechanisms must be put in place at the time of the sales deed, others not necessarily.

### Summary of French inheritance rules

French law governs the inheritance of immovable property situated in France, regardless of the deceased's

nationality or place of domicile at the time of death.

Any property which is governed by French inheritance law cannot be freely disposed of by will. There exist two classes of heir who possess an inalienable right to a proportion of the property (the *héritiers réservataires*):

- 1) the surviving descendants,
- 2) if there are no surviving descendants, the surviving spouse.

The proportion of the property which is inherited as of right by the *héritiers réservataires* is known as the *réserve légale*. The size of this reserved portion varies according to the number of heirs:

- if there is one surviving child it will amount to one-half of the estate; two-thirds of the estate if there are two surviving children; and three-quarters if there are three or more children.
- if there are no surviving children, it will amount to a quarter of the estate for the surviving spouse.

Once the size of the *réserve légale* has been established, the remainder of the estate, (the *quotité disponible*, or disposable portion) can be disposed of as the owner wishes, i.e. by will. Non-French purchasers in France often wish to avoid these restrictive French inheritance

rules. Various systems exist; the following are the most well known:

- *tontine* clause,
- French civil solidarity pact (PACS),
- an alteration of matrimonial regime - *communauté universelle*.

### 1) Tontine clause

The strict effect of the French laws of inheritance can be limited by including a *clause tontine* in the purchase deed; this must be done at the time of the purchase.

This is often recommended when the other options are not possible, i.e. unmarried couples, married couples with children from a previous marriage or relationship (see below).

A *clause tontine* creates a legal fiction whereby neither purchaser is considered to be the outright owner of his/her share in the property unless he or she survives the other, and both partners are considered to be the absolute owner of the whole of the property, provided he/she survives the other.

### Advantages of a tontine clause

Under French law, non-married couples do not inherit at all from each other. The *tontine* is a mechanism which ensures that where a property has been bought by two or more people, upon the death of any of the purchasers the property passes to the surviving others.

Although at the time of purchase, the property appears on the title deed to be acquired in joint names, the *tontine* clause operates retroactively so that upon the death of the first of the joint owners, it is as if the survivor(s) had always been the sole owner(s).

The main advantage of this mechanism is that it does not fall within the scope of the French inheritance law rules (and in particular, the forced heirship rules) applicable to the rest of the deceased's estate.

### Disadvantages of the tontine clause

One of the drawbacks to this solution is the adverse tax

consequences upon the death of one of the joint owners when they are not married. If the owners are not related, inheritance tax at 60% will have to be paid on the value of half of the property on the death of the first co-owner.

It is equally important to bear in mind that this clause is irrevocable. A clause of this nature cannot be unravelled, even by the courts, and the property cannot be transferred from one partner to the other in the event of divorce (or separation).

### 2) French civil solidarity pact (PACS)

Until recently, unmarried couples who wished to leave their half of their property to their surviving partner would have had to pay this 60% tax even with the *tontine* clause.

From now on, the French civil solidarity pact (PACS) provides the tax solution as regards this 60% liability due on the death of the first partner. Indeed, further to recent reforms, no inheritance tax is now due by the surviving partner of a couple having signed a PACS.

The French civil solidarity pact is a contract 'binding' two adults, in order to organise their common life; contractants may not be bound by another pact, by marriage, sibling or lineage.

Partners commit to mutual and material help; modalities of this

help are specified by the contract. They are jointly responsible for debts due to ordinary expenses for the household. A pact can be dissolved by a common statement of the partners at the court (or consulate), by the death or the marriage of one of the partners, or, after a three-month delay, at the simple request of one of the partners.

### 3) An alteration of matrimonial regime - *communauté universelle*

If the matrimonial regime of the spouses does not forbid them to do so, the spouses can avail themselves of the right granted to them by the Hague Convention of 14<sup>th</sup> March 1978, and submit their property relations deriving from their marriage to the French regime of *communauté universelle* (universal community of property). This will only concern their immovable property located in France. This deed includes a clause which stipulates that in case of the dissolution of the community by the death of one of them, all assets composing the community shall belong to the survivor, without exception or reservation. (This could be compared to the English 'joint tenancy' system.)

The surviving spouse shall benefit from this clause, whether or not there are children of the marriage. No tax is due upon the death of the first spouse.

But if there are children from a previous marriage, they would have legal remedy to prevent the transfer of their parent's share to the stepfather/mother. We therefore recommend that this option not be adopted if there are children from another marriage or relationship.

### Conclusion

From a civil and a tax point of view, getting married remains the most advantageous course of action. For unmarried people, signing a PACS and including a tontine clause in the deed would provide a suitable solution from both a tax and a legal point of view. Individual circumstances prevail and professional advice from a notaire is to be recommended insofar as they have extensive knowledge of both the civil and the tax implications in an international context. There may even be other solutions not mentioned in this article (setting up a French property owning company (SCI), for example).

As everyone knows, putting one's house in order will not make you die any sooner. ■

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