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# A few remarks about the future of provisions on making a will contrary to the testamentary formalities law

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**Summary:** 1. Introduction; 2. The requirement to preserve the form of a will; 3. The form of the will nowadays; 4. The consequences of failure to comply with the testamentary formalities; 5. Some conclusions; 6. Literature.

**Abstract**: The provisions on the form of a will are a group of those legal solutions which are generally imperative in a given system. In many cases, the range of solutions that a potential testator may choose is traditional and does not take into account the needs of society, especially in the world of new technologies. Failure to comply with the provisions on the form of a will traditionally leads to the invalidity of the will. In the text, the author presents the basic models related to this and wonders about the possible direction of evolution of the regulations in this area.

**Keywords**: will, testament, testamentary formalities, strict compliance, substantial compliance.

## 1. Introduction

Individual legal systems provide for regulations under which certain legal actions may be performed only within the framework of instruments designed by the legislator. These instruments are commonly referred to as the form of legal actions, i.e. the manner in which a legal action, and specifically the declaration of will creating it, is expressed outside. The provisions of civil law usually express the general principle of freedom of form of legal action. This means that declarations of will may be expressed by any behaviour of entities intending to perform a legal action, and only if the law (or the will of the parties) provides otherwise, the declaration of will must take the form indicated by it. Thus, there are such legal actions where the declaration of will cannot be made in any way, but must take one of the forms provided for by the law[2].

Such requirements apply, for example, to wills, where it is stressed, inter alia, that the formalism of a will is to protect the testator on the one hand and to protect the security of legal transactions on the other. In the common perception of doctrine, solutions providing for formal requirements of dispositions of property upon death create a "safe haven", thus allowing for the protection of succession property against

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[2] ZAŁUCKI, M., *Kodeks cywilny. Komentarz*, Warszawa 2019, p. 224 et seq.

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the routine of applying legal mechanisms, also in exceptional circumstances[3]. A lawmaker who wants to introduce the principle that the will of the person drawing up a legal act should be implemented to the fullest extent possible must seek to ensure that only the true will of that person is respected. Therefore, in individual legal systems there are regulations concerning the form of legal acts, including the form of a will[4].

However, the latter regulations are often controversial. This is because the modern legal system and social needs are significantly ahead of the legislator when it comes to choosing the tools to be used[5]. Legislation on the form of a will usually provides for the possibility to use one of the traditional instruments, while social needs are completely different. If they already use dispositions of property upon death, testators rarely care about the rules on form - most often due to a lack of legal knowledge - and perform acts upon death in a form convenient to them. However, most continental European legislation, as a result of such conduct, provides for the nullity of a will drawn up contrary to the statutory requirements, the consequence of which will generally be a statutory succession[6]. Only a few legislators in Europe see the need for a different view of the obligation to keep the form of a will, a view that will allow the last will to remain in force[7]. At a completely different pole, however, are the solutions of some Anglo-American countries that provide for specific statutory mechanisms to keep the testator's will in force. Thus, there are significant differences between the various solutions in the world. This raises the problem of further development of the law of succession and the question of the right paradigm of change. One such increasingly popular model is the Anglo-American doctrine of substantial compliance, on the basis of which an increasing number of legislators base their solutions[8].

Therefore, this statement will present selected regulations concerning the form of a will and will also discuss the consequences of drawing up a will contrary to the statutory framework of this legal action. In the latter context, two different views encountered in contemporary legal systems will be presented and an attempt will be made to outline further perspectives for the development of the law in this area. It may be assumed that within the framework of discussions on the future of succession law in individual European countries, the provisions on drafting a will contrary to the provisions on testamentary formalities are among those that need to be changed.

## 2. The requirement to preserve the form of a will

[3] LANGBEIN, J. H., "*Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law"*, Columbia Law Review 1987, No. 87, p. 4

[4] ZIMMERMANN, R., "*Testamentsformen: »Willkür« oder Ausdruck einer Rechtskultur*?", Rabels Zeitschrift für ausländisches und internationales Privatrecht 2012, p. 473 et seq.

[5] Cf., for example, BREITSCHMID, P., "*Revision der Formvorschriften des Testaments – Bemerkungen zur Umsetzung der 'Initiative Guinand'"*, Zeitschrift des Bernischen Juristenvereins 1995, No. 3, p. 179 et seq.

[6] NIEDOŚPIAŁ, M., *Testament. Zagadnienia ogólne testamentu w polskim prawie cywilnym*, Kraków-Poznań 1993, p. 9 et seq.

[7] Cf. HENRICH, D., SCHWAB, D. (eds.), *Familienerbrecht und Testierfreiheit im europäischen Vergleich*, Bielefeld 2001, passim.

[8] LANGBEIN, J.H., "*Substantial Compliance with the Wills Act*", Harvard Law Review 1975, No. 3, pp. 489-531.

Further remarks should be made by recalling that the formal requirements of the law for the validity of a will are essential. As has already been said, one of the basic requirements imposed by the legislator on wills is that wills must be drawn up in a specific manner described in the law[9]. This leads to general acceptance of the position according to which a will is a formal legal act. This view is accepted not only in *civil law* states, but also in *common law* systems[10]. Individual legal systems provide for regulations according to which the disposition of property upon death by the testator may take place only within the framework of instruments designed by the legislator. The form of a will is therefore the way in which the testator's declaration of last will should be expressed externally, allowing for its contents to be recorded, building the legal act of testing. It is a certain set of formalities concerning the validity of the testator's declaration of last will provided for by the law of succession[11].

The testator's declaration of will can therefore not be made in any way. It must adopt one of the forms provided for by law. In this respect, the principle of *numerus clausus* is applied in individual legal systems. The range of possible solutions in this respect is wide, with the reservation, however, that some forms of will are more common than others[12].

The multiplicity of forms of will provided for by law is intended to make it easier for the testator to draw up an undefaulting will. In addition, strict adherence to the requirements of the form is an objective that can protect the will against forgery and preserve its authenticity. It can also make it easier to check whether the testator has acted with a will to test (*cum animo testandi*)[13], whether his will has included the drafting of a will for a given content and whether his declaration has not been sometimes flawed. It is therefore assumed that the testator's declaration of will must be preserved in such a way that its contents can be known to others at the time of his death, often many years after it was made[14]. The legal requirement to test in a certain form is therefore intended to ensure that the testator's declaration of will can be reproduced in the future[15].

The primary purpose of the will form regulations is therefore to give the testator's declaration of will a form in which the will survives until it is restored, i.e. sometime after the opening of the succession. The method of fixation depends on whether the testator's declaration of will is made by way of speech or otherwise. In the context of testamentary inheritance, the most popular is the use of a written document for this purpose, while the admissible method of fixing the testator's last

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[9] Cf. KERRIDGE, R., *Parry and Kerridge: The Law of Succession*, London 2016, p. 39 et seq.; MILLER, G., *The Machinery of Succession*, Aldershot–Brookfield–Singapore–Sydney 1996, pp. 12–13.

[10] Cf. DUKEMINIER, J., SITKOFF, R.H., Wills, Trusts and Estates, New York 2009, passim.

[11] REID, K.G.C., DE WAAL, M.J., ZIMMERMANN, R. (eds.), Testamentary Formalities. Comparative Succession Law, vol. 1, Oxford 2011, passim.

[12] See also POUND, R., "*The Role of the Will in Law"*, Harvard Law Review 1954, No. 1, p. 1 et seq.

[13] Cf. GLOVER, M., "*Therapeutic Function of Testamentary Formality"*, Kansas Law Review 2012, No. 61, p. 139 et seq.

[14] Cf. RUDNICKI, J., "*Rola formy testamentu. Uwagi na tle porównawczym"*, Forum Prawnicze 2013, No. 4, p. 35.

[15] Ibidem.

will depends on the current concept of a given legislator. In particular legal systems, detailed solutions differ from one another[16].

Failure to comply with the formal requirements of a will, and therefore failure to comply with the provisions on the form of will, generally leads to the invalidity of the relevant disposition. As we know, civil law is governed by the rule that if the act reserves a special form for a legal transaction, an action performed without this form is null and void. Despite its fairly common occurrence, in succession law, legislators usually decide to emphasize the importance of this rule by providing for a provision of the law expressing it. This was done, for example, by the Polish legislator, who in the content of the provision of art. 958 of the Civil Code explicitly indicates the invalidity of a will drawn up contrary to the formal requirements of the law[17]. However, the rigorism of the form resulting from the unilateral nature and the mortis causa character of the will is sometimes mitigated. Recently, in particular, some legal systems have developed certain solutions for maintaining the validity of wills despite their being drawn up in contravention of the provisions of the law on form, or providing only for the possibility of the optional annulment of the will at the request of a person having a legal interest in it.

## 3. The form of the will nowadays

The regulations on the form of a will have evolved over the years since old Roman times. Nowadays, it is mainly French, German and Austrian legislation, as well as the English regulation, that has had a significant impact on the shape of legal acts of succession in other countries[18]. The French Civil Code was in force or was taken as a model in the development of its own codifications in many European countries, as well as in America, Africa or Asia. The German and Austrian regulations are a mandatory reading of all comparative studies on the shape of private law in many European systems; many legislators have long drawn on these models. The English solutions, on the other hand, have found their place in colonial areas, including the current area of the United States of America, and with some differences have also been adopted in other common law countries, especially Australia, New Zealand and South Africa. The picture that emerges from the analysis of the current solutions concerning the form of wills in many modern countries prima facie leads to the conclusion that most of the legislation has a very traditional approach to this issue. Despite a number of differences characterising specific statutory solutions, the most common forms of wills are holographic wills, witnesses' wills and public wills, where the testator's last will is declared in the presence of an official[19].

The holographic will still exists in France (Article 970 of the French Civil Code), Germany (§ 2231 of the German Civil Code) and Austria (§ 578 of the Austrian Civil Code), but also, for example, in Italy (Article 602 of the Italian Civil Code), Spain (Article 688 of the Spanish Civil Code), several state laws of the United States of

[16] Cf. SCHMOECKEL, M., OTTE, G. (eds.), Europäische Testamentsformen, Baden-Baden 2011, passim.

[17] ZAŁUCKI, M., *Kodeks cywilny.., op. cit.*, p. 1997.

[18] REID, K.G.C., DE WAAL, M.J., ZIMMERMANN, R. (eds.), Testamentary Formalities…, op. cit., passim.

[19] Cf. ZAŁUCKI, M., Vidoetestament. Prawo spadkowe wobec nowych technologii, Warszawa 2019, pp. 56-66.

America (§ 2-502 of the Uniform Probate Code), Central and Eastern European countries (Article 1041 of the Romanian Civil Code, § 1533 of the Czech Civil Code or Article 7:15 et seq. of the Hungarian Civil Code, Article 949 of the Polish Civil Code). The element characterising this form of will is the testator's handwriting and his signature. Usually the testator may draw up such a will in any language, including a secret code. It is also permitted for the testator to use a leg instead of a hand, or to write with a writing tool in his mouth. Neither the testator's tool nor the medium on which the disposition is fixed is more important. Increasingly, a will made in some part using mechanical means of writing is also considered valid. In many systems, holographic wills are moving towards written wills, i.e. wills where, in principle, only the testator's own handwritten signature appears to be a necessary requirement, although this is not so obvious at all. Over the years, there has been a tendency to mitigate the formal requirements of this will, which has been the case in various legal systems, such as the place and nature of the signature, the medium, the dating or the unitas actus principle. Liberalisation of the rules concerning handwriting and the testator's signature in a holographic will took place e.g. in Belgium and France, while the requirement of dating a handwritten will was abandoned in Germany[20].

A will drawn up in the presence of witnesses is, in turn, a form of will which consists of the testator declaring his will orally or confirming a disposition previously made in writing. It is often prepared by a person with legal knowledge who, having listened to the testator's will, gives his intentions the legally correct wording. A form based on this construction can currently be found in English law (§ 9 Wills Act 1837), some state laws of the United States of America (§ 2-502 Uniform Probate Code), Austria, South Africa or New Zealand. It is also known in the Polish law (art. 952 of the Civil Code)[21].

On contrast, wills drawn up in the presence of an official person are primarily a form characteristic of legislation in which the notary plays an important role. This form of will is still found in French law (Article 971 of the French Civil Code), Austrian law (§ 581-583 of the Austrian Civil Code) and German law (§ 2232 of the German Civil Code), but also, for example, in Dutch law (Article 4:94 of the Dutch Civil Code), Hungarian law (§ 7:14 of the Hungarian Civil Code) or Polish law (Article 950 of the Civil Code). This form of will may also have two forms. First, it may consist in a declaration of will orally to the official, who then draws up the relevant minutes. Secondly, it can only consist in depositing a previously prepared document with the official. The presence of the official is first and foremost a guarantee of the authenticity of the will; however, it can also have a wider meaning. As we know, a will is a legal act that can only be drawn up by a person who has the so-called "capacity to test". The official person can therefore also ensure that the testator is aware of the importance of his or her action, which is not always possible with private wills. Particularly noteworthy in this respect is Dutch law, considered by many to be a model of modern legislation, where in principle only the possibility of drawing up a will before a notary is provided for (cf. Article 4:94 of the Dutch Civil Code) . In the context of the transformation of the law of succession in the world, the Dutch proposal, in force since 1 January 2003, may come as a bit of a surprise, although it is precisely here that the rigour of the lack of form is strongly mitigated, which will be discussed further. It should be noted, however, that the notarial form has also

[20] REID, K.G.C., DE WAAL, M.J., ZIMMERMANN, R. (eds.), Testamentary Formalities..., op. cit., passim.
[21] Ibidem.

evolved over the years towards a reduction of its rigour, which is related, for example, to the abolition of additional requirements for witnesses when drawing up notarial wills (e.g. Spain and the Netherlands)[22].

These traditional forms of will do not always go hand in hand with the needs of society. Legislators are slowly confronted with the problem of considering whether the mechanisms known back in Roman times can properly fulfil their function today. The world has been discussing for some time the need to modernise the current forms of wills[23]. It should be noted that a certain shift in the perception of testamentary successions occurred in the second half of the 20th century, particularly in common law states, where it has often been suggested that the strict formal requirements for dispositions of property upon death, applied in a literal manner, distorted the main purpose of the test - the transfer of property to persons indicated according to the will of the testator[24]. This trend, which is still valid to this day, has evolved over the years and has led to the introduction into some legislation of solutions allowing the maintenance of dispositions which do not meet all the statutory criteria, as well as forms of wills which meet the challenges of the times we live in[25]. In the latter area, the forms of wills are, among others, electronic wills (Nevada)[26] and non-rigid written wills (Australia, New Zealand, South Africa, among others)[27]. This paradigm has also appeared in other legal systems, and today it is the basis for discussions on the future shape of the law of succession in some jurisdictions. The legislative changes, however, are very slow, carefully made, without any undue haste. An example of this kind of twisted legislative work, in which, among other things, the current need to amend the law on the form of wills in the context of the requirements of modern times was widely analysed, is the Law Reform Commission of the Canadian province of Saskatchewan in 2004[28], the achievements of the Austrian Law Commission

[22] Ibidem.

**[23]** See, among others, the following statements: BREITSCHMID, P., "*Testament und Erbvertrag - Formprobleme: Die Einsatzmöglichkeiten für die Nachlassplanung im Lichte neuerer Rechtsentwicklungen"*, *Testament und Erbvertrag*, ed. Breitschmid, P., Bern-Stuttgart 1991, p. 27 et seq..; idem, "*Revision der Formvorschriften des Testaments - Bemerkungen zur Umsetzung der «Initiative Guinand»"*, Zeitschrift des Bernischen Juristenvereins 1995, No. 3, p. 179 et seq.; KENNEDY, D., "*From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'"*, Columbia Law Review 2000, No. 100, p. 94 et seq.; CHAMPINE, P.R., "*My Will Be Done: Accommodating the Erring and the Atypical Testator"*, Nebraska Law Review 2001, No. 3, p. 388; VAN ERP, S., "*New Developments in Succession Law"*, Electronic Journal of Comparative Law 2007, No. 3, pp. 12–13; SCALISE JR., R.J., "*New Developments in Succession Law: The U.S. Report"*, Electronic Journal of Comparative Law 2010, No. 2, p. 7 et seq.; ZIMMERMANN, R., "*Testamentsformen…*", op.cit., p. 473 et seq.; MUSCHELER K., *„Das eigenhändige Testament – gestern, heute und morgen*", Successio – Zeitschrift für Erbrecht 2014, No. 1, p. 24 et seq.

[24] Cf. GULLIVER, A. G. , TILSON, J., "*Classification of Gratuitous Transfers*", Yale Law Journal 1941, No. 1, p. 1 et seq.; LANGBEIN, J.H., *"Substantial Compliance…",* op. cit., p. 489 et seq.

[25] WENDEL, P. T., "*Setting the Record Straight: The 'Flexible Strict Compliance' Approach to the Wills Act Formalities"*, Oregon Law Review 2016, No. 2, *passim*.

[26] Cf. GRANT, J. K., "*Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will"*, University of Michigan Journal of Law Reform 2008, No. 1, p. 105 et seq.

[27] See, for example, PEART N., "*New Zealand's Succession Law: Subverting Reasonable Expectations"*, Common Law World Review 2008, No. 4, p. 356 et seq.

[28] Law Reform Commission of Saskatchewan, *Report on Electronic Wills*, Saskatoon 2004.

announced in 2009[29], consultations conducted in the Australian state of Victoria in 2013[30] and the proposal of the Swiss Federal Office of Justice from 2016[31]. The conclusions of this work, as well as other sources, even if they do not contain ready-made legislative proposals, justify the need to take a new look at traditional instruments of succession law. This is currently a common trend, supported by the doctrine of many countries, including Germany, Austria, Switzerland, France, the United States of America, Canada, England, Scotland, Australia, South Africa, Spain and Poland[32]. Thus, the law of succession is currently undergoing transformations. These transformations are at different stages in individual countries.

## 4. The consequences of failure to comply with the testamentary formalities

The testator's failure to comply with formal requirements generally results in the invalidity of the disposition of the last will. This is a typical sanction found in

[29] WELSER, R. "*Die Reform des österreichischen Erbrechts; Gutachten", 17. Österreichischen Juristentages*, Wien 2009, passim.

[30] Victorian Law Reform Commission, *Succession Laws: Consultation Paper*, Melbourne 2013.

[31] *Vorentwurf und erläuternder Bericht zur Änderung des Zivilgesetzbuchs (Erbrecht)*, Bern 2016.

**[32]** GRUNDMANN S., *Favor Testamenti. Zu Formfreiheit und Formzwang bei bei privatschriftlichen Testamenten*, Archiv für die civilistische Praxis 1987, No. 4/5, s. 429-476; SPITZER, M. "*Neues ze letzwilligen Verfügunen. Ein Beitrag zu Nottestament und Testierfähigkeit"*, Österreichische Notariats Zeitung 2006, No. 14, p. 77 et seq; WELSER, R. "*Die Reform des österreichischen Erbrechts"*, *Zivilrechtsgesetzgebung heute : Festschrift Gerhard Hopf zum 65. Geburtstag*, Wien 2007, p. 249 et seq.; DUNAND, J.-P., "*Le testament oral en droit suisse et dans l'ancien droit neuchâtelois"*, *Pour un droit pluriel: études offertes au professeur Jean-François Perrin*, eds. KELLERHALS, J., MANAI,, S., ROTH, R., Basel 2002, p. 33 et seq.; BREITSCHMIDT, P., "*Bericht zu den Konturen eines 'zeitgemässen Erbrechts' zu Handen des Bundesamtes für Justiz zwecks Umsetzung der 'Motion Gutzwiller'"*, Not@lex/succesio 2014, pp. 7-27; COTTIER, M. "*Ein zeitgemässes Erbrecht für die Schweiz: Bericht zur Motion 10.3524 Gutzwiller 'Für ein zeitgemässes Erbrecht' zuhanden des Bundesamtes für Justiz",* Not@lex/succesio 2014, pp. 29-55; BEYER, G. W. , HARGROVE, C. G., "*Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?"*, Ohio Northern University Law Review 2007, No. 33, p. 865 et seq.; MC NARY, A. *The New Alberta Wills and Succession Act—What's In It?...and What's Out*, Edmonton 2011, p. et seq.; MILLER, G., "*Reforming the Formal Requirements for the Execution of a Will"*, Denning Law Journal 1993, No. 1, p. 71 et seq.; BURNS, F., "*Surviving Spouses, Surviving Children and the Reform of Total Intestacy Law in England and Scotland: Past, Present and Future",* Legal Studies 2013, No. 1, pp. 85-118; CROUCHER, R. F., "*Statutory Wills and Testamentary Freedom – Imagining the Testator's Intention in Anglo-Australia Law"*, Oxford University Commonwealth Law Journal 2007, No. 2, p. 241 et seq.; SONNEKUS, J.C., "*Videotestamente naas skriftelike testament"*, Tydskrif vir die Suid-Afrikaanse Reg 1990, No. 1, p. 114 et seq.; SNEIL, S., HALL, N., "*Electronic Wills in South Africa"*, Digital Evidence and Electronic Signature Law Review 2010, No. 7, p. 67; ECHEVERRÍA, J.D., "*¿Qué reformas cabe esperar en el Derecho de Sucesiones del Código Civil? (un ejercicio de prospectiva)*", El Cronista del Estado Social y Democrático de Derecho 2009, No. 3, pp. 26-35; COBIELLA, M.E.C., DE JOZ LATORRE, CH., "*La modernización del derecho de sucesiones. Algunas propuestas*", Cuestiones de Interés Jurídico 2017, No. 7, pp. 1-68; RAMÓN FERNÁNDEZ, F., "*El testamento y la futura reforma del código civil en materia de discapacidad: Algunas reflexiones*", Actualidad Jurídica Iberoamericana 2019, No. 10, pp. 346-373; SILVERIO SANDOVAL, J., "*El testamento ológrafo en soporte digital y la firma biométrica*", Boletín del Ministerio de Justicia 2019, No. 2222, pp. 1-60; ZAŁUCKI, M., "*Współczesne tendencje rozwoju dziedziczenia testamentowego – czyli nie tylko o potrzebie wprowadzenia wideotestamentu do nowego kodeksu cywilnego"*, Roczniki Nauk Prawnych 2012, No. 2, pp. 23-52.

different legal systems. As an example, Polish law may be indicated here, where the provision of Article 958 of the Civil Code states that a will drawn up in violation of the provisions on form is invalid[33]. A similar path is followed by the Austrian law, which provides in § 601 of the Austrian Civil Code, if a mandatory formal requirement was not complied with when a final will was drawn up, the last will be invalid. A corresponding provision is also contained in the Spanish Civil Code: the will in whose execution the formalities respectively established have not been observed shall be null and void (Article 687 of the Spanish Civil Code). Also in German law, a will made contrary to the requirements of form is not valid (§ 125 of the German Civil Code). English law is also familiar with this type of solution (indicating in Section 9 of Wills Act: "no will shall be valid unless")[34]. Courts in these countries generally do not have the possibility to keep such wills in force. The only option is in principle the so-called conversion of wills, i.e. the recognition that an invalid will fulfils the statutory requirements of another form of will[35]. So if the testator made a will, e.g. in the form of a video recording, according to the above legal regulations, although his intention to make a will would be obvious and in the case we would have an indisputable proof of his action with *animus testandi*, such a will would most probably turn out to be void.

However, the world, as you would expect, is in the opposite direction. Formal requirements are being eased, and the testator's last will is being kept in force. This is manifested, among other things, in Dutch law, which as a rule provides for the nullity of wills drawn up in breach of statutory requirements, but this applies only to certain requirements (lack of the testator's or notary's signature), and in the case of the other requirements, failure to comply with the rules on the form of the will does not automatically result in the nullity of the will, it is only voidable (see Article 4:109.4 of the Dutch Civil Code). - "the non-observance of other formal requirements set by law for the validity of a last will makes the last will voidable")[36]. In this system, the aforementioned video will could remain in force. In some countries, however, the statutory solutions go much further. Examples of these solutions are, for example, the provision of Article 8 of the Succession Law of 2006 of the State of New South Wales, Australia ('The document, or part of the document, forms the deceased person's will, if the Court is satisfied that the person intended it to form his or her will')[37], the provision of Article 714 of the Quebec Civil Code ('A will that does not fully meet the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased')[38], or Section 2-503 of the Uniform Probate Code, a model act in the United States of America, According to which "although a document or writing added upon a document was not executed in compliance with Section 2-502 [witnessed or holographic wills], the document or writing is treated as if it had been

[33] ZAŁUCKI, M., *Kodeks cywilny.., op. cit.*, p. 1997.

[34] REID, K.G.C., DE WAAL, M.J., ZIMMERMANN, R. (eds.), Testamentary Formalities..., op. cit., passim.

[35] However, conversion is not a mechanism known in all legal systems.

[36] REID, K.G.C., DE WAAL, M.J., ZIMMERMANN, R. (eds.), Testamentary Formalities..., op. cit., passim.

[37] Cf. LANGBEIN. J. H., "*Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion*", Adelaide Law Review 2017, No. 38, pp. 1-11.

[38] VAN ERP, S., "*New Developments..",* op. cit., p. 13.

executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute: (1) the decedent's will, (2) a partial or complete revocation of the will, (3) an addition to or an alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will[39]. In applying the above provisions, there would rather be no doubt as to the validity of a will drawn up in video form. The expectations of society would also seem to be the same.

In this light, it should be noted that many jurisdictions will admit a document into probate if it is in substantial compliance with the wills act formalities. To satisfy the substantial compliance standard: 1. there must be clear and convincing evidence that the testator intended the document to be his last will and testament, and 2. the will substantially complies with the wills act formalities. Similar doctrine, called the harmless error doctrine, gives the courts even more leeway to change a will by only requiring that the testator intended the document to be his last will and testament. It does not require that the document be in substantial compliance with the wills act formalities. This is also called the dispensing power because it allows the courts to dispense with the strict wills act formalities as long as there is clear and convincing evidence for the remedy[40]. Whereas previous departures focused on whether the document in question was in "substantial compliance" with will formalities, the harmless error doctrine focuses on the decedent's intent. For example, California's Probate Code Section 6110(c)(2), provides as follows: "If the will was not executed in compliance with paragraph (1) [, the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will". It seems that there is no turning back from this kind of trend in the law of succession.

## 5. Some conclusions

In the light of the above, it should be noted that there is a fundamental conviction in civil law science that attempts to liberalise the formal requirements for wills should be made with great caution. Traditionally, two extreme positions can be distinguished in this regard. On the one hand, legislators base their solutions on the doctrine called "*strict compliance*", which is characterized by strict formalism. In particular, the argument is raised that the invalidity of the decisions made as a result of the application of the rules on the form of wills does not constitute an obstacle against a strict interpretation of these rules. It is generally up to the testator to ensure that his last will is fulfilled by strict compliance with the rules governing the form of wills. One of the objectives of the regulations on form is to ensure that declarations which do not comply with the provisions of the law do not have legal effects, which is to justify the necessity to declare invalid any dispositions made contrary to the regulations on form. On the other hand, regulations rooted in the doctrine described as "*substantial compliance*" can be found more and more

[39] WIESBROD, R.K., HORTON, D., URICE, S. K., Wills, Trusts and Estates. The Essentials, New York 2018, p. 152.

[40] UZCATEGUI J., "*Application of the Harmless Error Doctrine in California and Beyond*", Sacks, Glazier, Franklin & Lodise Newsletter, https://www.trustlitigation.la/Harmless-Error-T-E-Quarterly-FINAL.pdf (23.03.2020).

frequently. According to this doctrine, the fulfilment of the testator's will is of the utmost importance, and therefore, it is necessary to strive to respect the testator's wishes and intentions, despite the existence of certain formal defects in the will. There are also indirect solutions which, as a rule, underline the testator's obligation to observe the form of the will, but which introduce certain mechanisms that allow the mortis causa disposition to be upheld when it does not meet all the formal requirements of the law. This is the direction taken, for example, by the well-known institution in many systems of conversion of wills, which converts an invalid disposition of property upon death into a replacement but valid disposition, the purpose of which is, inter alia, to protect persons who are not properly aware of the statutory requirements of carrying out a particular legal act. The reference to *animus testandi* as the basis for the normative constructions leading to the maintenance of a testamentary disposition is nowadays a trend that can be observed in different legal systems. The use of the *favor testamenti* rule has therefore been gaining in importance in succession law for some time. It is no longer just a question of interpreting the will in such a way as to give the disposition a reasonable content, but also of providing a broader interpretation to keep the testator's disposition in force against the rules on form. This trend will be difficult to reverse in the coming years. In fact, an increasingly widespread liberalisation of the rules is to be expected.

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