Maciej Rzewuski

University of Warmia and Mazury in Olsztyn

"Electronic will"

ABSTRACT

Modernization of the current forms of wills would make the socially desired opportunity of easier, quicker and more reliable drawing up wills realistic. Since the current legal-civil turnover is simply saturated with technology, we are living in the times of e-courts, e-protocols, e-signatures etc., I believe there are no contraindications to introducing a new opportunity of drawing up an e-will. Certainly, works related to implementation of a new form of a will, or a new method of registering a will would have to be preceded with a more detailed debate in this regard, in a broader community. I believe that the very issue is significant enough to give it considerably more thought as part of an enhanced discussion with both law theoreticians and practitioners.

***Keywords**: inheritance, will, electronic will, formalising a will, animus testandi*

1. Introductory notes

Inheritance is an extremely significant issue both from a theoretical and a social perspective. Contrary to what one might expect, this is not an easy subject. The specialist literature puts forward some more or less legitimate suggestions: introducing new legal constructions such as a division in the will or a mystical regulation, supplementing titles of inheritance with inheritance contracts, including a donation *mortis causa* as well as correlation between the provisions of law of succession and the regulations of other normative acts concerning, among others, alimony or tax on inheritance and donations (T. Mróz, Przegląd Sądowy 2008, issue 1, p. 81 ff.; H. Witczak, A. Kawałko, 2008, p. 71).

Without disregarding the need to conduct a thorough reform of the Polish law of succession and harmonize it with the EU regulations, I am going to concentrate on succession according to the will and, more specifically, on the issue of electronic will. This concept has already met several analyses in the specialist literature, however, there are still many doubts remaining in that regard.

The powers to administer property rights in case of death is without doubt one of the basic privileges of a natural person, related to the constitutional and absolute ownership right. It is because the basic law guarantees citizens freedom of acquiring property rights, exercising them and disposal of them in *inter vivo* turnover. The society's increase in wealth caused by economic growth is one of the reasons why we attach increasing importance to the opportunity of managing our property in case of death, thus trying to discuss the need of constant improvement of legal mechanisms aiming at transferring ownership between generations (J. Turłukowski, 2009, p. 11; M. Załucki, Przegląd Sądowy 2008, issue 1, p. 95 ff.; M. Rzewuski, 2014, p. 18 ff.).

2. Formalising a will

In many European and global legal systems a will still constitutes a basic, if not only, alternative to inheritance *ex lege*. This instrument in most cases allow heirs to effectively manage their property *post mortem*. A will is, however, a formalised legal act (Cf. J. Gwiazdomorski, Nowe Prawo 1966, issue 6, p. 713 ff). There are at least several reasons of this situation. The most important ones include: striving to know the testator's will and guaranteeing the possibly highest degree of probability that the will reflects the bequeather's actual intentions (D. Horton, Georgetown Law Journal 2015, vol. 103, p. 605 ff.; E. Skowrońska-Bocian, 2004, p. 18; M. Załucki, 2010, p. 38 ff). With an aim of exercising these proposals, the Polish legislator has introduced provisions concerning the form of a will (art. 949–958 of the civil code), indicating at the same time in article 958 of the civil code that a will, which infringes these provisions shall not be valid.

Formalising a will does not mean the necessity to mark it with a name such as 'The Will'. What is necessary is an intention to draw it up, awareness of the legal importance of the conducted act and adherence to

the formal regulations provided for by the law. This issue looks different in legal regulations of the *common law*, in which there is a generally binding rule that an appropriate title needs to be included, such as *'Last Will and Testament'*, for the avoidance of doubt as to the actual intention of making a will (G. Boreman Bird, The Hastings Law Journal, 1980–1981, vol. 32, p. 605; E. Skowrońska, 1991, p. 28).

The doctrine assumes that formalising a will exercises many various functions. The most common ones include:

- evidence – it provides reliable evidence confirming the bequeather's actual intentions and circumstances of drawing up the will,
- standardization – it standardizes the procedure of transferring the succession property from the bequeather to the heirs,
- warning – it contributes to the bequeather's sense of seriousness and legal importance of the act conducted *mortis causa*,
- protection – it protects the bequeather from any pressure from the outside and allows them to freely express their will (More broadly: J.H. Langbein, Harvard Law Review 1975, vol. 3, p. 489 ff.; M. Niedośpiał, 1993, p. 29 ff.; F. Błahuta, 1972, p. 1868; M. Pazdan, 2000, p. 797; K. Osajda, 2013, p. 331).

Introducing detailed statutory regulations as regards the form of a will therefore has a precisely defined purpose, which constitutes the grounds for the succession law system.

According to the Polish legislator, there are two types of wills: ordinary and extraordinary ones. An ordinary will might be drawn up at any time freely chosen by the testator. On the other hand, drawing up an extraordinary will depends on occurrence of circumstances provided for by the law and its validity is limited in time (art. 955 of the civil code). Ordinary wills in Poland include: a manuscript of a will, a will in the form of a notary act and an allographic will. Extraordinary wills include: an orally communicated will, a will draw up on a Polish aircraft or ship and a military will.

It is important to note that Napoleon's Civil Code also made a distinction between two groups of wills, that is ordinary ones, that could be drawn up in everyday conditions and extraordinary wills allowed only during the times of war or plague and only to certain specific individuals. Ordinary

wills included: manuscripts of wills, official wills signed by notaries and secret wills also called mystical ones. Ordinary wills could be drawn up only in writing, pursuant to specific formal requirements provided for by the Code (E.J. Barwiński, 1938, p. 19).

Current legal systems govern the issue of forms of a will in various ways. The Italian legislator, for instance, provides only for two ordinary forms of dispositions in case of death, that is: a holographic will and a will signed by a notary. The latter, however, functions in two alternative forms – public and secret – art. 601 of the Italian civil code (More broadly: G.P. Cirillo, V. Cufaro, F. Roselli, 2006, p. 779–780; L. Ferroni, 2006, p. 738). The Dutch legislation, on the other hand, provides for three forms of dispositions in case of death, each of which requires the presence of a notary and two witnesses. They include: 1. an open (public) will draw up by a notary pursuant to the bequeather's declaration of last will, marked with signatures of the notary and witnesses; 2. a holographic will, handwritten by the testator, then deposited with a lawyer with the presence of two witnesses; 3. closed (secret) will that does not require hand-written form or the bequeather's signature, deposited with a notary in the same way as in the case of a holographic will. The presented list shows that drawing up a will pursuant to the Dutch law requires the presence of a public notary. Without the notary's presence a bequeather might only draw up a codicil, in which they indicate the executor for the issues related to the funeral and exercising bequests related to movable property (J. Pazdan, Rejent 2005, issue 3, p. 11; *Information from the Polish embassy in Hague concerning enforcement of wills in the Netherlands and the Dutch provisions concerning statutory inheritance and inheritance according to the will*, http://www.haga.polemb.net/files/wk/info_spadki_pl.pdf).

By way of derogation from analysing individual types of wills, which would go beyond the scope of this study, it is necessary to note that each of the ordinary forms of will has its defects: a manuscript of a will is subject to a high risk of hiding, destruction or falsifying by a third party, a notarial will is a paid disposition, whereas an allographic will frequently turns out to be invalid given the rather common situation, in which it is drawn up without the presence of a degree in law. The given circumstances significantly reduce the freedom of drawing up a will and sometimes even destroy the bequeather's actual intentions. Unfortunately, the opportunities

of remedying such risk are not guaranteed by extraordinary wills that might only be drawn up in precisely defined conditions, sometimes only by precisely defined entities and their legal force is always limited by time (Cf. B. Kordasiewicz, Państwo i Prawo 1975, book 5, p. 163).

It seems legitimate here to ask a question whether the Polish legal solutions concerning the forms of a will are adequate to the requirements of the contemporary world with its technology, digitalisation and virtual reality.

The global specialist literature indicates the need to use the new technologies in the law of succession. Many authors emphasize the need to introduce new forms of a will using electronic communication media to the domestic inheritance forms. The issue is not only to electronically record the last will of a bequeather, but also to be able to confirm their actual intentions.

Nowadays there is a computer in nearly every household. Most of us use smart phones, we send e-mails every day and use a broad range of websites. This entails a well-grounded temptation to use electronic for the purposes of the law of succession (G.W. Beyer, SSRN Electronic Journal 2014, vol. 4, item 1 ff.; M. Załucki, Wrocławskie Studia Sądowe 2014, No. 4, p. 234 ff).

It needs to be emphasized that in some legal systems judicial authorities have already needed to consider correlations between maintaining the form of a will and the need to reflect a bequeather's intentions expressed in an electronic form. As a general rule, such form of a disposition does not comply with the traditional formal requirements provided for in individual legal regulations. In spite of that, effective attempts to maintain such disposition in force have been undertaken in many cases. As regards Anglo-Saxon solutions, the majority of views state that diversity and unpredictability of certain circumstances cannot restrict the bequeather's right to manage their property in case of death (J.P. Hopkins, I.A. Lipin, Iowa Law Review Bulletin 2014, vol. 99, item 61 ff.; B. Kucia, Kwartalnik Prawa Prywatnego 2012, No. 2, p. 425 ff).

3. Electronic will – attempts to solve the problem

The need to change the current solutions regarding the form of a will has also been noticed under the Polish law. According to K. Osajda, it would be legitimate to primarily expand the provisions concerning the

hand-written will by way of supplementing the written form with two eligible forms such as a printed will and an electronic will. The first of these would be drawn up using a typewriter or a computer, then printed and marked with the bequeather's signature. The latter would constitute a reaction to the technological progress in the sense that the declaration of last will would have a virtual form instead of a paper form. An e-will, therefore, would be a file drawn up using a text editor, then recorded on an external carrier and signed using a secure electronic signature (K. Osajda, Rejent 2010, issue 5, p. 61 ff.).

The doctrine also includes a suggestion of supplementing the catalogue of dispositions in case of death with a will draw up at court. Such disposition could be drawn up not only in the presence of a judge, but also with a presence of a court referendary. Such person's task would consist in hearing the bequeather and collecting a declaration of last will from them. The benefits of introducing the presented form of disposition would include a sense of security that the testator's intentions are fully accomplished *post mortem*. Such sense would be a consequence of the fact that the bequeather's will would be declared before a court, in the presence of an entity that applies the law on an everyday basis. Certainly such security would be enhanced by an electronic protocol documenting the bequeather's declaration of will using audio and video registering equipment. An additional benefit related to introducing will at court to the civil code would consist in expanding the opportunity of applying the bequest to the form of *mortis causa* disposition. Since the institution might be used by drawing up a will before a notary, there are no grounded reasons to prevent a testator from the opportunity of declaring its last will before the court (More broadly: M. Rzewuski, Rejent 2013, issue 10, p. 122 ff.).

Another suggestion of modernizing the Polish legislation as regards the form of a will has been brought up by M. Załucki. The author suggests introducing the construct of a video-will to the civil code. He states that the opportunity of communicating last will in such form addressed to the close relatives would make the act of drawing up a will more personal than it is now. As regards the technical issues, it would be enough to register the image and sound (*audio-video*) with appropriate equipment to cause legal effects, if the quality of the record left no doubts as to the identity of the testator and their will. By communicating their last will

orally the bequeather would indicate the person appointed to inheritance or, potentially, make other dispositions (e.g. a bequest, an order or a disinheritance). By accurately presenting the act of preparing a will the described form would allow to clearly identify the bequeather's will (M. Załucki, Roczniki Nauk Prawnych 2012, issue 2, p. 44 ff).

The specialist literature increasingly frequently puts forward suggestions to make law of succession more flexible in order to allow the bodies applying the law to maintain wills in force provided that the *animus testandi* of the bequeather might be proven beyond doubt in spite of any formal irregularities.

The scholars putting forward this doctrine distinguish two methods of solving this problem. One of these suggests introducing a regulation to the civil code indicating the necessary elements of a will (at least, the bequeather's declaration of will recorded using audio-video recording equipment). Additionally, it would be necessary to expand the act with an interpretation rule based on the *substantial compliance* doctrine, which would allow to consider the testator's will in spite of certain formal irregularities in the will (Cf. S. Clowney, Trust & Estate Law Journal 2008, vol. 1, item 62; S.M. Johnson, J. Lindgren, R.H. Sitkoff, 2005, p. 236 ff). The other solution consists in introducing only a general definition of the form of a will and related minimal requirements of the disposition to the legal system. It would consist in the necessity of recording the testator's declaration of last will without indicating the specific form and method of recording it. In such case a statutory requirement of determining whether the given bequeather's representation constitutes a valid *mortis causa* disposition would have to be imposed on the body applying the law. Recording a testator's last will is one of the most important tasks of a regulation in the form of a will (M. Załucki, Państwo i Prawo 2017, z. 3, p. 45).

An interesting solution has been put forward by M. Załucki. The author states that the future code regulation could be based on the following provision: 'the bequeather might draw up their will by expressing their last will by an act that makes it sufficiently clear and the representation is recorded on a carrier that allows to play it and identify the person making the representation'. According to the author, the remaining provisions of the civil code in the chapter related to the form of a will, aside from art. 958 of the civil code and, potentially, regulations concerning witnesses'

capabilities to participate in drawing up the will, should be revoked. In these circumstances a will would constitute a formalised legal act, but this formalism would not refer to a strictly defined form of a will – it would only require recording a declaration of last will in a way that allows to read it. Such regulation would refer to the image of the document adopted in Poland that presents it as communication of a person's will, with its intellectual content including a declaration of will that needs to be recorded in a way that allows for reading it after the date of opening the inheritance, irrespective of the type of carrier, on which it was recorded (Ibid., p. 46.).

Justification of the Author concept is as follows: 'the change in law of succession suggested above goes in line with the tendency to de-formalize the perspective on civil-law relations nowadays. A similar perspective could be taken in the case of a will, as the justification to the draft act on the document form indicates. In this context the content of a will could therefore be disclosed in a freely chosen way (orally, by graphic signs, sound or image) and it would need to be recorded, but also on a freely chosen carrier (paper, electronic data carrier) and using freely chosen means (a pen, a computer or a tablet). This neutrality, on the other hand, would be limited by the evidential function of the document that requires the method of recording the content to allow for storing and playing it. As the initiators of the document form act draft indicate, the information containing a declaration of will needs to be properly recorded on a carrier so as to be played. These two elements combined (that is, reproducible information and a carrier) constitute a document – in this case, a will. The very information, without a carrier, would therefore not constitute a will such as a carrier without the information. Such a suggested form of a will would therefore be a form less formalized than a manuscript or other presently known forms and it would not exclude using the holographic form and other present forms. Authorities applying the law could keep controlling whether a declaration of will submitted by a bequeather aims at producing legal effects with respect to inheritance (*animus testandi*) – this would guarantee the evidential and protective function of the provisions concerning the form. The obligation of recording a declaration of will would, in turn, constitute implementation of the preventive function of the provisions concerning the form. It might, on the other hand, require

discussion, whether such regulation would exercise its standardization function. As a rule, a transfer of property to heirs as a consequence of the bequeather's will would still occur according to the concept of a will as an alternative to legal succession. It would also be necessary to record the testator's last will, which at least indirectly exercises the indicated function' (Ibid., p. 47).

4. Final comments and conclusions

It seems that the forms of last will dispositions provided for by the Polish law do not fully comply with the practical needs, drifting away from the constantly changing social and economic conditions and indisputable technological progress.

It is also easy to imagine a situation, in which a given person is taken captive, kidnapped, lost in a climbing expedition, drifts in a sea as a ship survivor or simply feels unwell as a consequence of a nearing heart attack etc. The effective provisions of the civil code concerning the form of a will or, more broadly, the provisions related to succession seem not to consider this type of problems. For obvious reasons, including no access to a notary, in such cases a manuscript of a will or an orally communicated will would be applied, although the latter – given the necessity of witnesses' participation in the process of preparing a will – does not seem an effective solution of these issues.

Contrary to appearances, the problem might not be solved by the opportunity to draw up a manuscript of a will that the law provides for. It only requires three elements: a manuscript, a date and the bequeather's signature. One might ask: what happens in a situation when the bequeather has lost their capacity to write due to suffered injuries or other circumstances? Would they be deprived of the right to dispose of their property in case of death in this situation?

It is necessary to remember that the chance to determine the future lot of one's property *post mortem* constitutes one of the basic, constitutional and nearly natural rights of a natural person. This is one of the reasons why any attempts to limit one's opportunity of preparing a will such as increasing formal requirements as to the form of will dispositions should be deemed as ungrounded.

Another question arises therefore: does the applicable legal regulation concerning Polish wills correspond with the practical requirements?

I believe a negative answer should be given to such questions. Any methods alternative to a manuscript of a will always require presence of third parties who hear the testator, then draw up a protocol, which means that they register the bequeather's oral declaration of will. I believe that the indicated registration, given the technological progress of the previous fifty years could as well take a different, more modern form, while respecting the principle of freedom of preparing a will and the bequeather's *animus testandi*.

It cannot be ignored that the methods of communication covered by making a declaration of knowledge and will are at present increasingly refined and frequently saturated with electronics. These circumstances were certainly not taken into account by the legislator at the moment of implementing the civil code in 1964. On the other hand, it seems that there are no rational reasons why a bequeather could not draw up a will today using such mechanical (electronic) devices. Their declaration of will in case of death could be recorded using an audio-video recorder. A nearly general access to computers, smart phones, tablets and other devices able of audio and video recording is clearly visible today. Would recording a bequeather's speech using such equipment not provide equally – if not more – reliable proofs confirming the actual *animus testandi* of a bequeather as a protocol handwritten by a third party witnessing oral communication of a will?

Certainly, some might object that such electronic will would be charged with a high risk of destruction – more specifically, destruction of the carrier or the recorded material. However, the same risk occurs in case of any manuscript of a will as well as a protocol of a testator's orally communicated will. Moreover, a witness preparing a traditional will might simply destroy a previously written document, lose it or distort its contents in their own favour, mostly in cases, in which the legislator does not require that the witness reads the contents of the written document.

It is worthwhile to mention here that in such situations a sole oral declaration of the testator's last will should be deemed as a formal will and a recording of such speech would constitute a method of determining its content and, consequently, learning the bequeather actual intentions.

Moreover, in many cases the legal force of the recording could be additionally confirmed by statements of persons who have been present during the testator's declaration *mortis causa* and might confirm its contents, which, in fact, could also be registered using electronic equipment.

5. Summary

Modernization of the current forms of wills would make the socially desired opportunity of easier, quicker and more reliable drawing up wills realistic. Since the current legal-civil turnover is simply saturated with technology, we are living in the times of e-courts, e-protocols, e-signatures etc., I believe there are no contraindications to introducing a new opportunity of drawing up an e-will. Certainly, works related to implementation of a new form of a will, or a new method of registering a will would have to be preceded with a more detailed debate in this regard, in a broader community. I believe that the very issue is significant enough to give it considerably more thought as part of an enhanced discussion with both law theoreticians and practitioners.

Bibliography

Barwiński E.J., *Prawo spadkowe obowiązujące w byłym Królestwie Kongresowym w zarysie* (An outline of succession law effective in the former Congress Kingdom), Warszawa 1938

Beyer G.W., *Estate Planning in the Digital Age*, SSRN Electronic Journal 2014, vol. 4, item 1

Błahuta F., [w:] *Kodeks cywilny. Komentarz. Księga czwarta – spadki* (The civil code. A comment. Book 4 – inheritance), edited by J. Pietrzykowski, Warszawa 1972

Boreman Bird G., *Sleight of Handwriting: The Holographic Will in California*, The Hastings Law Journal, vol. 32, 1980-1981

Cirillo G.P., Cufaro V., Roselli F., *Codice civile a cura di Pietro Rescigno. Le fonti del diritto italiano. I testi fondamentali commentati con la dottrina e annotati con la giurisprudenza. Tomo I. Libri I-IV*, Sesta Edizione, Milano 2006

Clowney S., *In Their Own Hand. An analysis of Holographic Wills and Homemade Willmaking*, Trust & Estate Law Journal 2008, vol. 1, item 62

Ferroni L., *Codice civile. Annotato con la giurisprudenza. Volume Primo, Libri I–IV, Artt. 1–2059* , Co-curatori: Valerio Donato e Geremia Romano, Milano 2006

Gwiazdomorski J., *Formy testamentu* (Forms of a will), Nowe Prawo 1966, issue 6

Hopkins J.P., Lipin I.A., *Viable Solutions to the Digital Estate Planning Dilemma*, Iowa Law Review Bulletin 2014, vol. 99, item 61

Horton D., *In Partial Defense of Probate: Evidence from Alameda County, California*, Georgetown Law Journal 2015, vol. 103

Information from the Polish embassy in Hague concerning enforcement of wills in the Netherlands and the Dutch provisions concerning statutory inheritance and inheritance according to the will, http://www.haga.polemb.net/files/wk/info_spadki_pl.pdf [dostęp z: 01.07.2013].

Johnson S.M., Lindgren J., Sitkoff R.H., *Wills, Trusts and Estates*, New York 2005

Kordasiewicz B., *Glosa do postanowienia SN z dnia 25 października 1973 r., III CRN 241/73* (Note to the provision of the Supreme Court of October 25th 1972), Państwo i Prawo 1975, book 5

Kucia B., *Forma testamentu w prawie amerykańskim* (Form of will in the American law), Kwartalnik Prawa Prywatnego 2012, No. 2

Langbein J.H., *Substantial Compliance with the Wills Act*, Harvard Law Review 1975, vol. 3

Mróz T., *O potrzebie i kierunkach zmian przepisów prawa spadkowego* (On the need for and directions of changes in the provisions of law of succession), Przegląd Sądowy 2008, issue 1

Niedośpiał M., *Testament. Zagadnienia ogólne testamentu w polskim prawie cywilnym* (The will. General issues concerning the will in the Polish civil law), Kraków-Poznań 1993

Osajda K., [w:] *Kodeks cywilny. Komentarz Spadki*, (The civil code. A comment. Inheritance), vol. 2, edited by K. Osajda, Warszawa 2013

Osajda K., *Wpływ rozwoju techniki na uregulowanie formy testamentu – rozważania de lege ferenda* (Influence of technical development on regulating the form of a will – considerations de lege ferenda), Rejent 2010, issue 5

Pazdan J., *Ku jednolitemu międzynarodowemu prawu spadkowemu* (Towards a uniform international law of succession), Rejent 2005, issue 3

Pazdan M., [w:] *Kodeks cywilny. Komentarz* (The civil code. A comment), vol. 2, edited by K. Pietrzykowski, Warszawa 2000

Rzewuski M., *Podpis spadkodawcy na testamencie własnoręcznym* (Signature of a bequeather on a manuscript of a will), Warszawa 2014

Rzewuski M., *Testament sądowy – propozycja nowej formy rozrządzenia mortis causa* (Will at court – a suggestion of a new form of mortis causa disposition), Rejent 2013, issue 10

Skowrońska E., *Forma testamentu w prawie polskim* (Form of will in the Polish law), Warszawa 1991

Skowrońska-Bocian E., *Testament w prawie polskim* (A will pursuant to the Polish law), Warszawa 2004

Turłukowski J., *Sporządzenie testamentu w praktyce* (Drawing up a will in practice), Warszawa 2009

Witczak H., Kawałko A., *Prawo spadkowe (Law of succession)*, Warszawa 2008

Załucki M., *Facebook, Twitter, My Space...wirtualny świat serwisów społecznościowych mortis causa. Zarys problematyki (Załucki, Facebook, Twitter, My Space... the virtual world of social media mortis causa. An outline of the issues)*, Wrocławskie Studia Sądowe 2014, No. 4

Załucki M., *Krąg spadkobierców ustawowych de lege lata i de lege ferenda* (A circle of statutory heirs de lege lata and de lege ferenda), Przegląd Sądowy 2008, issue 1

Załucki M., *Współczesne tendencje rozwoju dziedziczenia testamentowego – czyli nie tylko o potrzebie wprowadzenia wideotestamentu do nowego kodeksu cywilnego* (Contemporary tendencies in development of inheritance according to will – not only on the need to introduce video-wills to the new civil code), Roczniki Nauk Prawnych 2012, issue 2

Załucki M., *Wydziedziczenie w prawie polskim na tle porównawczym* (Disinheritance in the Polish law from the comparative perspective), Warszawa 2010

Załucki M., *Forma testamentu w perspektywie rekodyfikacji polskiego prawa spadkowego. Czas na rewolucję? (Form of will from the perspective of recodifying the Polish law of succession. Is it the time for a revolution?)*, Państwo i Prawo 2017, z. 3