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SOLVING THE “PROBLEM” OF WILLS FORMALITIES IN THE MODERN POST-PANDEMIC SOCIETY: CAN THE ENDLESS DISCUSSION BE CONCLUDED?

Abstract

The last will as an instrument of succession law is one of the means of disposing property upon death. Around the world particular legal regulations of American, Australian, European or other countries generally provide for different specific formal requirements for the valid preparation of will. The inappropriateness of this kind of solutions was shown, among others, during the COVID-19 pandemic, when the need for making last wills has increased significantly and has rarely been executed in a manner consistent with the formalities. Reflecting the intent of a testator, often expressed informally, seems to be a more important value of the law of succession than respecting the formalities. This has already been noticed in some countries, especially in common

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law jurisdictions in Australia and America, where solutions based on *substantial compliance* doctrine or its variations, contrary to the pan-European strict compliance standard, were adopted. These solutions, however, do not take into consideration plenty of circumstances that may occur in the testation practice and are indifferent to new possible ways of making wills. Meanwhile, the range of mechanisms and proposals for statutory changes in the area of wills formalities is constantly growing. However, there are no proposals to cover all possible legislations in this area, as regards Anglo-American, European or other countries. Yet such a solution seems possible and desirable in order to reconcile the doctrines of *substantial compliance* and *strict compliance*. This proposal is the subject of this study.

KEYWORDS

will, testament, wills formalities, substantial compliance

SŁOWA KLUCZOWE

testament, forma testamentu, zgodność merytoryczna

INTRODUCTION

The issue of wills formalities is a problem that has appeared in legal literature once and again continually for decades. Various academics and, following them, various legislators have considered changes to solutions that had been known for a long time. Simplifying the system, tightening the system, introducing intermediary mechanisms – are just some of the proposals that have been made over the years. This discussion is not over and continues to appear. One of the signs of continuous interest of legal science in this area is the recent discussion held in the American and Australian literature, taking into consideration the possible new and flexible approach to wills formalities¹.

The scope of his discourse has subsequently widened, due to humanity's entry into the COVID-19 pandemic and the problems arising in practice with the drafting of valid wills at the time of the pandemic². However, only the American

¹ B. J. Crawford, *Wills Formalities in the Twenty-First Century*, “Wisconsin Law Review” 2019, Vol. 2; K. Purser, T. Cockburn, *Wills Formalities in the Twenty-First Century – Promoting Testamentary Intention in the Face of Societal Change and Advancements in Technology: An Australian Response to Professor Crawford*, “Wisconsin Law Review Forward” 2019, Vol. 4.

² K. Purser, T. Cockburn, B. J. Crawford, *Wills Formalities Beyond COVID-19: An Australian-United States Perspective*, “UNSW Law Journal Forum” 2020, Vol. 5; B. J. Crawford,

and Australian perspective was taken into account in this discussion, what can be understood to a certain extent: these are the systems that have developed the commonly known tools to “cure” innocent testator mistakes when drafting a will (based on the so-called *substantial compliance* doctrine and its variations)³, and have been a solid inspiration for other jurisdictions. This is why the comments contained there, on the future of changes to the law of succession, seem important. However, valuable remarks about the need for changes in this area need to be supplemented with a view from those legal systems in which the doctrine of *strict compliance* prevails, i.e. from the point of view of the European countries⁴. There is no doubt that the law of succession is changing, as well as its formalism which is undergoing certain transformations⁵. This can be seen especially in the area of wills formalities, where individual legislators are relaxing the requirements rather than tightening them⁶. Nevertheless, in the European countries, there is still in force a doctrine of *strict compliance*, according to which even slight shortcomings in the form of a will result in the will not being valid⁷. Such a situation requires changes and inspirations from other parts of the world, including the United States of America or Australia. The arguments raised there may constitute a valuable source, especially since the discussion in European doctrine often goes even further than the proposals of *common law*, put forward in the states based on the doctrine of *substantial compliance* and its variations⁸. However, the European doctrine can also be a valuable inspiration for the legal science in the United States of America or Australia. Therefore, in this statement referring to the claims expressed in the mentioned legal literature that “any change that makes estate planning more available to a greater number of people should be embraced and welcomed”⁹, I will present the state of legislation and science of the European countries. I will also consider whether the functions of the wills formalities have

K. Purser, T. Cockburn, *Post-Pandemic Wills*, University of Chicago Legal Forum 2021; D. Horton, R. K. Weisbord, *COVID-19 and Formal Wills*, “Stanford Law Review Online” 2020, No. 1.

³ Cf. J. H. Langbein, *Substantial Compliance with the Wills Act*, “Harvard Law Review” 1075, Vol. 88; J. H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia’s Tranquil Revolution in Probate Law*, “Columbia Law Review” 1987, Vol. 87; J. H. Langbein, *Absorbing South Australia’s Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion*, “Adelaide Law Review” 2017, Vol. 38.

⁴ Cf. e.g. I. Sasso, *Will Formalities in the Digital Age: Some Comparative Remarks*, “Italian Law Journal” 2018, Vol. 4.

⁵ A. Pabin, *Testament jako akt sformalizowany – uwagi w sprawie przyszłego kształtu regulacji dotyczących formy rozrządzeń testamentowych*, “Studia Prawnicze” 2016, Vol. 91.

⁶ A. J. Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, “Boston College Law Review” 2020, Vol. 61.

⁷ M. Załucki, *Forma testamentu w perspektywie rekodyfikacji polskiego prawa spadkowego. Czas na rewolucję?*, “Państwo i Prawo” 2017, Vol. 3; A. Röthel, *Testamentsformen*, “Juristische Ausbildung” 2014, Vol. 5, pp. 475, 481.

⁸ See *infra* Section IV.A.

⁹ B. J. Crawford, *Wills Formalities...*

lost their importance and whether the wills formalities is an area where further relaxation is possible, or as suggested in other Australian-American observation, “a transition away from formalities [isn’t a right] vehicle to achieve [the goal of wider access to succession planning tools]”¹⁰. As it can be argued, in the context of discussions on the future of the law of succession in the individual countries, the rules on the drafting of a will contrary to the provisions of the wills formalities are among those that need to be changed, not only in the United States of America or Australia. The period of increased interest in the law of succession, which is certainly the period of the COVID-19 pandemic, has highlighted numerous shortcomings in this area of law. In this context, I will also consider whether the changes proposed by some legislators are the appropriate direction for modernising wills formalities, or whether, in the future, legislators should decide to opt for other solutions that could operate in a post-pandemic society.

I. FORM OF LEGAL ACTIONS

To begin with, I should remind that individual legal systems provide for regulations under which certain legal actions may be performed only within the framework of instruments designed by the legislator¹¹. 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 a legal action) is expressed outside. The provisions of private 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, must the declaration of will take the form indicated by it. Thus, there are such legal actions where the declaration of will cannot be made in whichever way one wishes, but must take one of the forms provided for by the law¹².

Such requirements apply, for example, to wills¹³ in which 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 other¹⁴. In the common perception of this doctrine, solutions providing for formal requirements of dispositions of property upon death create a “safe harbor”, thus allowing for the protection

¹⁰ K. Purser, T. Cockburn, *Wills Formalities...*, p. 64.

¹¹ S. Grzybowski (ed.), *System prawa cywilnego. Część ogólna*, Vol. I, Ossolineum 1985, p. 620.

¹² M. Załucki (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2019, p. 224 *et seq.*

¹³ J. Binder, *Bürgerliches Recht. Erbrecht*, Springer 1923, p. 15 *et seq.*

¹⁴ R. K. Weisbord, D. Horton, S. K. Urice, *Wills, Trusts and Estates. The Essentials*, Wolters Kluwer 2018, p. 113 *et seq.*

of succession property against the routine of applying legal mechanisms¹⁵. A law-maker, who wants to introduce the principle according to which 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 the individual legal systems there are regulations concerning the form of legal acts, including the form of a last will¹⁶.

However, the latter regulations are often controversial. This is because the current social needs are significantly ahead of the legislator when it comes to choosing the tools to be used¹⁷. The American and Australian authors quoted above highlight this. Legislation on the form of a will usually provides for the possibility to use one of the traditional instruments, while social needs are completely different¹⁸. If they already use dispositions of property upon death, testators rarely care about the rules concerning the form – most often due to a lack of legal knowledge – and upon their death perform acts in a form convenient to them¹⁹. However, most continental European legislations, as a result of such testators' conduct, provide for the invalidity of a will created contrary to the statutory requirements, the consequence of which would generally be a statutory (intestate) succession²⁰. Only a few legislators in Europe can 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 valid²¹. At the opposite pole there are solutions of some Anglo-American countries, about which the cited authors write, providing for detailed statutory mechanisms to keep the will of the testator valid. Thus, there are significant differences between the various solutions adopted 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* and its variations, on the basis of which a growing number of legislators base their solutions²². Another direction is the introduction of still newer and newer forms of will, which is to satisfy the needs

¹⁵ See J. H. Langbein, *Excusing Harmless...*, p. 4.

¹⁶ R. Zimmermann, *Testamentsformen: "Willkür" oder Ausdruck einer Rechtskultur?*, "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 2012, Vol. 76, p. 471.

¹⁷ Cf. e.g. P. Breitschmid, *Revision der Formvorschriften des Testaments – Bemerkungen zur Umsetzung der "Initiative Guinand"*, "Zeitschrift des Bernischen Juristenvereins" 1995, Vol. 3, p. 179.

¹⁸ J. Beckert, *The Longue Durée of Inheritance Law. Discourses and Institutional Development in France, Germany, and the United States since 1800*, "European Journal of Sociology" 2007, Vol. 48, p. 79.

¹⁹ J. B. Baron, *Irresolute Testators, Clear and Convincing Wills Law*, "Washington & Lee Law Review" 2016, Vol. 73, p. 3.

²⁰ M. Niedosiał, *Testament. Zagadnienia ogólne testamentu w polskim prawie cywilnym*, Kraków–Poznań 1993, pp. 9 *et seq.*

²¹ Cf. D. Heinrich, D. Schwab (eds.), *Familienerbrecht Und Testierfreiheit Im Europäischen Vergleich*, Verlag Giesecking 2001, *passim*.

²² J. H. Langbein, *Substantial Compliance...*, *passim*.

of society in connection with various transformations. At the very end there is another trend – proposals to abandon the provisions on the form of wills, based, among other things, on the assumption that the form of will serves only to authenticate the testator.

II. THE REQUIREMENT TO PRESERVE THE FORM OF A WILL

Further remarks should be made by recalling that the formal requirements of the law for the validity of a will are essential, which is not only the case in *civil law* countries, but also in *common law* countries. As it has already been said, one of the basic requirements imposed by the legislator on wills is that wills must be created in a specific manner described by the law²³. This leads to general acceptance of the position according to which a will is a formal legal act. This view is therefore accepted not only in *civil law* states, but also in *common law* systems²⁴. 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 legislator²⁵. 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 preserved, creating the legal act of last will. It is a certain set of formalities concerning the validity of the testator's declaration of last will provided for by the law of succession²⁶.

The testator's declaration of will can therefore not be made in whichever way they choose. It must adopt one of the forms provided for by the 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 that some forms of will are more common than others²⁷.

The multiplicity of forms of will provided by the law is intended to make it easier for the testator to create 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 an intention to create a last will (*cum animo testandi*)²⁸,

²³ Cf. R. Kerridge, A. Brierley, D. H. Parry, *Parry and Kerridge: The Law of Succession*, 13th edn., Sweet & Maxwell 2016; G. Miller, *The Machinery of Succession*, Dartmouth 1996.

²⁴ Cf. R. H. Sitkoff, J. Dukeminier, *Wills, Trusts and Estates*, 10th edn., Wolters Kluwer 2017.

²⁵ K. W. Lange, *Erbrecht*, C.H. Beck 2017, p. 43 *et seq.*

²⁶ K. G. C. Reid, M. J. De Waal, R. Zimmermann (eds.), *Comparative Succession Law. Testamentary Formalities*, Oxford University Press 2011.

²⁷ See also R. Pound, *The Role of the Will in Law*, “Harvard Law Review” 1954, Vol. 58.

²⁸ Cf. M. Glover, *The Therapeutic Function of Testamentary Formality*, “Kansas Law Review” 2012, Vol. 61, p. 139.

whether his intention has included the creation of a will with a given content, and whether his declaration has not been somehow flawed. It is therefore assumed that the testator's declaration of will must be preserved in such a way that its content can be communicated to others at the time of his death, often many years after it was made²⁹. The legal requirement to declare a last will in a certain form is therefore intended to ensure that the testator's declaration of will can be reproduced in the future³⁰.

The primary purpose of the wills form regulations is therefore to give the testator's declaration of last will a form in which the last will survives until it is restored, i.e. some time after the death of the testator. The method of preservation depends on whether the testator's declaration of will is made orally or otherwise. In the context of testamentary succession, the most popular method is the use of a written document for this purpose, while the admissible method of preserving the testator's last will depends on the current imagination of a given legislator. In particular legal systems, detailed solutions differ from one another³¹.

Over the years, this has allowed four functions of the wills form regulations to be distinguished. These include the following functions: evidentiary function, channeling function, cautionary (ritual) function, and protective function³². The implementation of the first of these functions in the area of the wills formalities is aimed at providing reliable evidence of the testator's intentions and the circumstances in which the will was created. The channeling function of the provisions on the form, in turn, serves to unify the process of passing the inheritance estate to the heirs. The cautionary function is intended to make the testator aware of the seriousness of the action performed. The creation of a protection mechanism, on the other hand, is primarily aimed at protecting the testator from external pressures and enabling them to create a will freely³³. The significance of each of these functions is different, as is its place in individual countries' legislations on succession. The greatest criticism so far has been levelled at the protective function, which has been accused, among other things, of being difficult to justify in modern times³⁴. In general, the criticism did not mean the uselessness of

²⁹ Cf. J. Rudnicki, *Rola formy testamentu. Uwagi na tle porównawczym*, "Forum Prawnicze" 2013, Vol. 2, p. 35.

³⁰ *Ibidem*.

³¹ Cf. M. Schmoeckel, G. Otte (eds.), *Europäische Testamentsformen*, Nomos 2011.

³² A. G. Gulliver, C. J. Tilson, *Classification of Gratuitous Transfers*, "Yale Law Journal" 1941, Vol. 51; G. Ponath, *Die Beschränkungen der Testierfreiheit durch das Testamentsrecht*, Zerb Verlag 2006; S. Grundmann, *Favor Testamenti: Zu Formfreiheit und Formzwang bei privatschriftlichen Testamenten*, "Archiv Für Die Civilistische Praxis" 1987, Vol. 187, pp. 429, 442; M. Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii*, Warszawa 2018, pp. 167–196.

³³ A. G. Gulliver, C. J. Tilson, *Classification...*, *passim*.

³⁴ *Ibidem*, pp. 9–10; R. L. Brown, *The Holograph Problem: The Case Against Holographic Wills*, "Tennessee Law Review" 2005, Vol. 74, p. 93.

this function in practice, but rather a signal that deviations from formal rules in favour of the functionalism of the law of succession are possible and even desirable. This is because in the law of succession desirable are solutions that will allow the testator's will to be reconstructed after his death, while maintaining the safety of testation (i.e. counteracting the occurrence in practice of dispositions of uncertain origin, counteracting the dispositions made in unclear circumstances, and counteracting the dispositions with doubts as to their authorship). The task of the provisions on wills formalities is primarily to ensure that the testator's will is properly reflected (and preserved). This can also be the case for types of *mortis causa* dispositions which potentially jeopardise the realisation of this value. The conflict between the freedom of testation and its reflection *versus* the safety of legal circulation should be resolved with due respect taking into consideration that it is not a compliance with formal requirements but the execution of the testator's will that is important enough to pursue its realization, sometimes precisely against formal requirements³⁵.

III. THE FORM OF THE WILLS 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 countries³⁶. 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 Republic of 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

³⁵ A. Breuer, *Pellegrini v. Breitenbach. Power to Reform Innocent Mistakes in Wills*, “Quinnipac Probate Law Journal” 2012, Vol. 26, p. 46.

³⁶ K. G. C. Reid, M. J. De Waal, R. Zimmermann (eds.), *Comparative Succession Law...*, *passim*.

forms of wills are holographic wills, witnessed wills, and public wills, where the testator's last will is declared in the presence of an official³⁷.

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 states of the United States of 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, Article 7:15 et seq. of the Hungarian Civil Code or 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 preserved, is 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 Germany³⁸.

A will created 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, describes his intentions in a legal terminology. 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), Australia, South Africa or New Zealand. It also exists in the Polish law (Article 952 of the Civil Code)³⁹.

In contrast, wills created in the presence of an official person are primarily a characteristic form of legislation in which a notary plays an important role⁴⁰. 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

³⁷ Cf. M. Załucki, *Videotestament...*, pp. 56–66.

³⁸ K. G. C. Reid, M. J. De Waal, R. Zimmermann (eds.), *Comparative Succession Law...*, *passim*.

³⁹ *Ibidem*.

⁴⁰ A. Ripoll Soler, *Hacia Un Nuevo Modelo De Planificación Sucesoria Notarial: La Profesio Iuris*, "Revista de Derecho Civil" 2016, Vol. 3, p. 23.

(§ 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), Romanian law (Article 1043 of the Romanian Civil Code) or Polish law (Article 950 of the Civil Code). This form of will may also have two types. Firstly, it may consist of an oral declaration before the official, who then draws up the relevant document. Secondly, it can consist only of depositing a previously prepared document to 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 it is known, a will is a legal act that can only be created by a person who has the so-called "testamentary capacity". 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 the only possibility of drawing up a will is in front of a notary (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 somehow as a surprise, although it is precisely here that the rigour of the form is strongly mitigated, which will be discussed further⁴¹. It should be noted, however, that the notarial form has also 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. in Spain and the Netherlands)⁴².

In this context, it is also worth mentioning that in the European countries private wills, often described in Anglo-Saxon doctrine as "do-it-yourself" wills, play an important role. Therefore, holographic wills are most popular here. In *common law* countries, on the other hand, a culture of making wills has developed with the participation of a person who is specialised in this area. Such wills are the vast majority of wills created in the United States of America or in Australia.

However, these traditional forms of wills 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 fulfill their function today. The world has been discussing for some time the need to modernise the current forms of wills⁴³. It should be noted that a certain

⁴¹ See *infra* Section IV.A.

⁴² K. G. C. Reid, M. J. De Waal, R. Zimmermann (eds.), *Comparative Succession Law...*, *passim*.

⁴³ See, among others, the following statements: P. Breitschmid, *Testament und Erbvertrag – Formprobleme: Die Einsatzmöglichkeiten für die Nachlassplanung im Lichte neuerer Rechtsentwicklungen*, (in:) P. Breitschmid (ed.), *Testament und Erbvertrag*, Haupt 1991, p. 27 *et seq.*; P. Breitschmid, *Revision der Formvorschriften...*, pp. 179 *et seq.*; D. Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, "Columbia Law Review" 2000, Vol. 100; S. van Erp, *New Developments in Succession Law*, "Electronic Journal of Comparative Law" 2007, No. 11, pp. 12–13; R. J. J. Scalise, *New Developments in United States Succession Law*, "The American Journal of Comparative Law" 2006; R. Zimmermann,

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 testation – the transfer of property to persons indicated according to the will of the testator⁴⁴. This trend, which is valid to this day, has evolved over the years and has led to the introduction of solutions allowing the rectification of dispositions which do not meet all the statutory criteria into some legislation, as well as forms of wills which meet the challenges of the times we live in⁴⁵. In the latter area, the forms of wills are, among others, electronic wills (Nevada, Florida, Arizona, Indiana)⁴⁶ and non-rigid written wills (Australia, New Zealand, South Africa, among others)⁴⁷. 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 2004⁴⁸, the achievements of the Austrian Law Commission announced in 2009⁴⁹, consultations conducted in the Australian state of Victoria in 2013⁵⁰ or the proposal of the Swiss Federal Office of Justice from 2016⁵¹. The conclusions of these documents, 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, basically on all continents, including

Testamentsformen...; K. Muscheler, *Das eigenhändige Testament – gestern, heute und morgen*, “Successio – Zeitschrift für Erbrecht” 2014, Vol. 1, p. 24.

⁴⁴ Cf. A. G. Gulliver, C. J. Tilson, *Classification...*, p. 1 et seq.; J. H. Langbein, *Substantial Compliance...*, p. 489 et seqq.

⁴⁵ P. T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, “Oregon Law Review” 2017, Vol. 95, pp. 337–396.

⁴⁶ Cf. J. K. Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, “University of Michigan Journal of Law Reform” 2008, Vol. 42, p. 105 et seq.

⁴⁷ See e.g. N. Peart, *New Zealand’s Succession Law: Subverting Reasonable Expectations*, “Common Law World Review” 2008, Vol. 37, p. 356.

⁴⁸ Law Reform Commission of Saskatchewan, *Report on Electronic Wills*, 2004.

⁴⁹ R. Welser, *Die Reform des österreichischen Erbrechts*, “Österreichische Notariat Zeitung” 2012, No. 144, p. 249.

⁵⁰ Victorian Law Reform Commission, *Succession Laws*, 2013.

⁵¹ Bundesamt für Justiz, *Vorentwurf und erläuternder Bericht zur Änderung des Zivilgesetzbuchs (Erbrecht)*, 2016.

Europe (Germany⁵², Austria⁵³, Switzerland⁵⁴, France⁵⁵, England⁵⁶, Scotland⁵⁷, Spain⁵⁸, Poland⁵⁹), North America (United States of America⁶⁰, Canada⁶¹), South

⁵² Cf. S. Grundmann, *Favor Testamenti*...; A. Röthel, *Ist unser Erbrecht noch zeitgemäß?*, C.H. Beck 2010; P. Breitschmid, *Bericht zu den Konturen eines “zeitgemässen Erbrechts” zu Handen des Bundesamtes für Justiz zwecks Umsetzung der “Motion Gutzwiler”*, Sonderheft Not@lex/succesio 2014, Nr 7.

⁵³ Cf. M. Spitzer, *Neues zu letztwilligen Verfügungen. Ein Beitrag zu Nottestament und Testierfähigkeit*, “Österreichische Notariats Zeitung” 2006, No. 14, p. 77 *et seq.*; R. Welsch, *Die Reform...*, p. 249 *et seq.*; R. Welsch, *Reformbedarf bei den letztwilligen Verfügungen*, (in:) R. Geime, R. A. Schütze, T. Garber (eds.), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta*, Lexis Nexis 2012, p. 669 *et seq.*

⁵⁴ Cf. J.-Ph. Dunand, *Le testament oral en droit suisse et dans l'ancien droit neuchâtelois*, (in:) J. Kellerhals, D. Manai, R. Roth (eds.), *Pour un droit pluriel: Études offertes au professeur Jean-François Perrin*, Helbing & Lichtenhahn 2002, p. 33 *et seq.*; M. Cottier, *Ein zeitgemässes Erbrecht für die Schweiz: Bericht zur Motion 10.3524 Gutzwiler “Für ein zeitgemässes Erbrecht” zuhanden des Bundesamtes für Justiz*, Sonderheft Not@lex/succesio 2014, p. 29.

⁵⁵ In France, this has led, among other things, to the adoption of a new law: *Loi n° 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures*. The law relaxes the requirements for drawing up a notarial will. Cf. e.g. J.-F. Sagaut, *Présentation de la loi réformant le droit français des libéralités et des successions*, “Electronic Journal of Comparative Law” 2010; H. D. Richemont, *Projet de loi portant réforme des successions et des libéralités. Rapport No. 343, Sénat de la République Française 2006*.

⁵⁶ Cf. G. Miller, *Reforming the Formal Requirements for the Execution of a Will*, “Denning Law Journal” 1993, Vol. 8, p. 71 *et seq.*; S. Evans, *Testators’ Wishes; Dead or Alive: Is There a Difference?*, “Conveyancer and Property Lawyer” 2013, p. 481 *et seq.*; R. Hedlund, *Introducing a Dispensing Power in English Succession Law*, “Trusts & Trustees” 2019, Vol. 25, p. 722.

⁵⁷ Cf. F. Burns, *Surviving Spouses, Surviving Children, and the Reform of Total Intestacy Law in England and Scotland: Past, Present and Future*, “Legal Studies” 2013, Vol. 1, p. 85.

⁵⁸ Cf. J. D. Echeverría, ¿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, p. 26; M. E. Cobas Cobiella, C. de Joz Latorre, *La modernización del derecho de sucesiones. Algunas propuestas*, “Cuestiones de Interés Jurídico” 2017; F. R. Fernández, *El testamento y la futura reforma del código civil en materia de discapacidad: Algunas reflexiones*, “Actualidad Jurídica Iberoamericana” 2009, Vol. 10, p. 346; J. S. Sandoval, *El testamento ológrafo en soporte digital y la firma biométrica* “Boletín del Ministerio de Justicia” 2019.

⁵⁹ Cf. M. Załucki, *Współczesne tendencje rozwoju ustawodawstwa testamentowego*, “Roczniki Nauk Prawnych” 2012, Vol. 2, p. 23; K. Osajda, *Prawo spadkowe (w) przyszłości. Perspektywy rozwoju prawa spadkowego*, “Monitor Prawniczy” 2019, Vol. 2, pp. 66–75.

⁶⁰ Cf. G. W. Beyer, C. G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, “Ohio NUL Review” 2007, Vol. 33, p. 865; B. H. Mann, *Formalities and Formalism in the Uniform Probate Code*, “University of Pennsylvania Law Review” 1994, Vol. 142, p. 1033; J. H. Langbein, *Absorbing South Australia’s...*; R. M. Tucker, *How Substantial Is Substantial? Compliance with the Louisiana Civil Code’s Requirements for Notarial Testaments*, “Tulane Law Review” 2018, Vol. 92, p. 969.

⁶¹ Cf. A. McNary, *The New Alberta Wills and Succession Act – What’s In It?... And What’s Out*, Legal Education Society of Alberta 2011; W. H. Hurlburt, *Electronic Wills and Powers of Attorney: Has Their Day Come?*, The Uniform Law Conference of Canada, Proceedings of 83rd Annual Meeting, The Uniform Law Conference of Canada 2001; K. S. Melnychuk, *One Click*

America (Brazil⁶²), Australia (Australia⁶³, New Zealand⁶⁴), Africa (Republic of South Africa⁶⁵) or Asia (Japan⁶⁶, China⁶⁷). It can therefore be stated with the utmost firmness that the law of succession is currently undergoing a transformation.

One example of such a transformation were the *ad hoc* changes made by some legislators in connection with the emergence of the COVID-19 pandemic, and the reaction to the problems of social isolation as well as the difficulty of using the mechanisms of succession law⁶⁸. The statutory changes to this area of law was an option chosen, for example, by New Zealand. The government there has made a law change to modify the requirements for signing and witnessing wills under the New Zealand's Wills Act of 2007. Epidemic Preparedness (Wills Act 2007 – Signing and Witnessing of Wills) Immediate Modification Order 2020 introduced the principle according to which during the pandemic wills could have been signed and witnessed using audiovisual links (modification of Section 11(3)-11(6) of Wills Act of 2007). The change allowed wills to be done by Zoom, Skype, Facetime, Google Meet etc. The same has happened, for instance, in Australia⁶⁹. For example in Queensland, as of 15 May 2020, according to COVID-19 Emergency Response – Wills and Enduring Documents Regulation 2020, video

Away: *The Prospect of Electronic Wills in Saskatchewan*, "Saskatchewan Law Review" 2014, Vol. 77, p. 27.

⁶² Cf. Z. Veloso, *Testamentos – Nocoês Gerais, Formas ordinarias*, (in:) D. Franciulli Netto, G. F. Mende, I. G. da Silva Martins Filho (eds.), *O novo Código Civil: Estudos em Homenagem ao Prof Miguel Reale*, São Paulo LTR 2003; K. G. C. Reid, M. J. De Waal, R. Zimmermann (eds.), *Comparative Succession Law...*

⁶³ Cf. R. F. Croucher, *Statutory Wills and Testamentary Freedom – Imagining the Testator's Intention in Anglo-Australia Law*, "Oxford University Commonwealth Law Journal" 2007, Vol. 7, p. 241; D. Haines, *Informal Wills and the Uniform Legislation*, The Law Society of South Australia Succession Law Conference 2007, The Law Society of Australia 2007.

⁶⁴ Cf. N. Peart, *Where There Is a Will, There Is a Way – A New Wills Act for New Zealand*, "Waikato Law Review" 2007, Vol. 15, p. 26; N. Peart, G. Kelly, *The Scope of the Validation Power in the Wills Act 2007*, "New Zealand Law Review" 2013, Vol. 73.

⁶⁵ Cf. J. C. Sonnekus, *Videotestamente naas skriftelike testamente*, "Tydskrif vir die Suid-Afrikaanse Reg" 1990; S. Snail, N. Hall, *Electronic Wills in South Africa*, "Digital Evidence and Electronic Signature Law Review" 2010, Vol. 7; F. Du Toit, *Testamentary Condonation in South Africa: A Pyrrhic Victory for Private Autonomy over Mandatory Formalism in the Law of Wills?*, (in:) A.-L. Verbeke [et al.] (eds.), *Confronting the Frontiers of Family and Succession Law. Liber Amicorum Walter Pintens*, Intersentia 2012.

⁶⁶ Cf. M. Tamaruya, *Japanese Wealth Management and the Transformation of the Law of Trusts and Succession*, "Trust Law International" 2019, Vol. 33, p. 147.

⁶⁷ Cf. H. Wang, M. W. Galligan, J. B. Kolodny, *Modern Inheritance Develops in China*, "New York Law Journal" 2013, Vol. 2; F. H. Foster, *Dark Side of Trusts: Challenges to Chinese Inheritance Law*, "The Washington University Global Studies Law Review" 2003, Vol. 2, p. 151.

⁶⁸ J. Slingo, *Coronavirus: Demand for Wills Jumps by 76%*, "The Law Society Gazette", 31 March 2020.

⁶⁹ J. Newbould, *Demand for Wills on the Rise as Coronavirus Fears Set in for Australians*, "Money Magazine", 8 April 2020.

conferencing technology was admitted to be used for having important end of life legal documents witnessed (Section 7 of the Regulation). Also, certain Canadian provinces have taken some steps to allow individuals to witness a will through videoconferencing technology. The changes have also affected notarial wills. According to the new Quebec’s pandemic regulation (Order 2020-010 of the Minister of Health and Social Services), as of 1 April 2020, notarial wills were admitted to be signed remotely. Similar solutions have also been introduced in other legal systems. The pandemic has therefore caused amendments of formal requirements for wills. The vast majority of the statutory changes consisted in making it simpler to draw up wills, modernising or loosening formal requirements. However, many legislators have only adopted the new regulations temporarily – until the end of the COVID-19 pandemic. After this period, everything is to return to the state it was before the pandemic⁷⁰. Old fashioned wills formalities will return.

IV. 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 individual legal systems. As an example, Polish law may be cited here, where the provision of Article 958 of the Civil Code states that a will created in violation of the provisions on wills formalities is invalid⁷¹. A comparable solution appears in the Romanian Civil Code (Article 1041 of the Romanian Civil Code mentions “absolute invalidity”)⁷². A similar path is followed by the Austrian law, which provides in § 601 of the Austrian Civil Code that the last will is invalid if a mandatory formal requirement was not complied with when a final will was drawn up⁷³. A corresponding provision is also contained in the Spanish Civil Code: the will in which execution of the formalities respectively established have not been observed shall be null and void (Article 687 of the Spanish Civil Code)⁷⁴. Also in German law, a will made contrary to the requirements of form is not valid (§ 125 of the German Civil Code)⁷⁵. This kind of solution is also known in English

⁷⁰ Cf. M. Załucki, *Preparation of Wills in Times of COVID-19 Pandemic-Selected Observations*, “Journal of Modern Science” 2020, Vol. 45, p. 143.

⁷¹ M. Załucki, *Kodeks cywilny. Komentarz...*, p. 1997.

⁷² M. M. Tudorașcu, *The Testament under Romanian Civil Law Provisions*, “AGORA International Journal of Juridical Sciences” 2016, Vol. 53.

⁷³ H. Heiss, *Formmängel und ihre Sanktionen: Eine privatrechtsvergleichende Untersuchung*, Mohr Siebeck 1999, p. 22.

⁷⁴ O. Robleda SJ, *La nulidad del acto jurídico*, Rome 1964, p. 111.

⁷⁵ D. Giesen, *BGB Allgemeiner Teil: Rechtsgeschäftslehre*, De Gruyter 1995.

law (it indicates in the content of Section 9 of Wills Act: “no will shall be valid unless”⁷⁶). Courts in these countries generally do not have the power to maintain such wills unless they are familiar with the mechanism of the so-called conversion of wills, i.e. the recognition that an invalid will fulfils the statutory requirements of another form of will⁷⁷. Therefore, the concepts of the law of succession of these states are referred to as *strict compliance* because of the strict observance of the testamentary formal requirements.

Thus, if the testator made a will, e.g. in the form of a video recording, which, for example, during the period of the pandemic, according to some sources⁷⁸, happened repeatedly, according to the above legal regulations, although his intention to make a will was obvious and in the case we would have an indisputable proof of his action with *animus testandi*, such a will – without the use of special mechanisms such as conversion or friendly interpretation based on the doctrine of *substantial compliance* – would most likely turn out to be invalid.

A. RELAXATION OF TESTAMENTARY FORMALITIES

However, the world, as some would expect, is going toward the opposite direction. Formal requirements are being eased, and the testator’s last will is kept valid. This is demonstrated, for example, by the solutions mentioned above, which were implemented during the pandemic on the American and Australian continents. A manifestation of such a solution in Europe is, among others, Dutch law, which as a rule provides for the nullity of wills created 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 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”⁷⁹. This solution applies regardless of the pandemic and in this system the aforementioned video will could remain valid. In some other countries the statutory solutions would allow to achieve similar effect, also regardless of the temporary solutions introduced in connection with the pandemic. Examples of these solutions are the provision of Section 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

⁷⁶ K. G. C. Reid, M. J. De Waal, R. Zimmermann (eds.), *Comparative Succession Law...*, *passim*.

⁷⁷ However, conversion is not a mechanism known in all legal systems.

⁷⁸ H. Siddique, *Video Witnessing of Wills to Be Made Legal in England and Wales during Pandemic*, “The Guardian”, 25 July 2020.

⁷⁹ K. G. C. Reid, M. J. De Waal, R. Zimmermann (eds.), *Comparative Succession Law...*, *passim*.

that the person intended it to form his or her will”)⁸⁰, 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”)⁸¹, 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 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”⁸². In applying the above provisions, there would rather be no doubt as to the validity of a will created in video form contrary to the testamentary formal requirements. The expectations of society would also seem to be the same. As can be judged, a last will expressed informally, that appears to contain testator’s last wishes, shall remain in force even if it was made contrary to the wills formalities requirements, as long as it is preserved in a manner that allows the wishes of the testator to be restored after his death.

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 their last will and testament, and (2) the will substantially complies with the wills act formalities. A 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. It does not require the document to 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 remedy⁸³. 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

⁸⁰ Cf. J. H. Langbein, *Absorbing South Australia’s...*, pp. 1–11.

⁸¹ Cf. S. van Erp, *New Developments...*, p. 13.

⁸² R. K. Weisbord, D. Horton, S. K. Urice, *Wills, Trusts and Estates...*, p. 152.

⁸³ J. Uzcategui, *Application of the Harmless Error Doctrine in California and Beyond*, “California Trusts & Estates Quarterly” 2015, Vol. 21, p. 1 *et seq.*

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.

Therefore, do the provisions on the form of wills still make sense if the succession law provides for solutions where the testator's failure to comply with the statutory formal requirements does not lead to the will's invalidity? Is an American professor right when she writes that the rules on the form of wills are solely about the testator's authentication?⁸⁴ Therefore, are further proposals for the development of the wills formalities and the introduction of the possibility to create a will in the form of a video or in electronic form, when confronted with regulations based on the doctrine of substantial compliance, needed, since an error as to how to make a declaration of last will in their light does not play a major role? Therefore, does the legislature's pursuit of the testator's intention lead to a loss of practical significance of the wills formalities, reducing the importance of the functions of the wills formalities law, or is it necessary to preserve the wills formalities law? Can the absence of the wills formalities law be very costly, as some Australian scholars claim?⁸⁵ All these issues need to be considered, as their importance and influence are universal and do not only concern the United States of America, Australia or some European countries.

B. SUBSTANTIAL COMPLIANCE AND THE FUNCTIONS OF TESTAMENTARY FORMALITIES

According to the above, it should first be considered whether solutions based on the doctrine of *substantial compliance* violate the essence of the functions of the wills formalities, whether they result in the loss of the provision of credible evidence of testator's intent and circumstances of creating a will (evidentiary function), whether they counteract the unification of the process of passing the inheritance estate to the heirs (channeling function), whether they are in opposition to the task of making the testator aware of the seriousness of his action (cautionary function) or whether they pose a threat to the protective mechanism aimed at protecting the testator from external pressure and enabling him to free testation (protective function). Analysing some examples of the application of the doctrine of *substantial compliance* to wills created in practice in accordance with technological development, and contrary to the regulations on form (e.g. recent cases from Australia: *In the Estate of Socrates Paschalidis*⁸⁶, *Re Nichol*⁸⁷, *Willis*

⁸⁴ B. J. Crawford, *Wills Formalities...*, p. 43 et seq.

⁸⁵ K. Purser, T. Cockburn, *Wills Formalities...*, p. 64.

⁸⁶ [2018] ACTSC 122 – (typed and dated document, signed only by one witness).

⁸⁷ [2017] QSC 220 – (unsent text message found on the phone of the deceased, not signed or witnessed).

v. *Mckenzie*⁸⁸; recent cases from the United States of America: *In re Estate of Castro*⁸⁹, *In re Estate of Horton*⁹⁰; recent case from Canada: *Re Hubschi Estate*⁹¹; or recent case from New Zealand: *Re Feron*⁹²), it can be easily concluded that no infringement of the evidentiary function or cautionary function has occurred. In practice, these solutions became possible when the court came to the conclusion, on the basis of clear and convincing evidence, that it was dealing with a declaration of the testator's intention, and a testator who understood the circumstances in which he disposed of his estate *mortis causa*. It also seems that there was no breach of the protective function, after all, the court assessed, among other things, whether the testator had *animus testandi*, the intention to make a will. The only disturbance concerns the channelling function, or at least this can be considered *prima facie*, since each of the *mortis causa* dispositions had a different character. However, if one were to consider that each disposition contained a statement of the testator's final intention, which was preserved by the testator in a way that could be later reflected, the basis of the channeling function also seems to have been maintained. One cannot, therefore, agree with the assertion that the application of a solution based on the doctrine of substantial compliance distorts the meaning of the provisions on the form of wills. It only introduces an element of flexibility, a generous interpretation, where in the law it seems necessary to achieve the objective of the rules of succession law, which is to reflect the testator's last will.

In this context, provisions on the form of wills are still necessary and play an important role in the testation act. It is not only a question of authenticating the testator, but also of providing reliable evidence of the testator's intentions and the circumstances in which the will was created, making the testator aware of the seriousness of the action he is conducting, protecting the testator from external pressure and enabling him to act freely, as well as harmonising the process of passing the inheritance estate to the heirs. In this context, despite the legitimacy of the opinion that “any change that makes estate planning more available to a greater number of people should be embraced and welcomed”⁹³, the position that “a transition away from formalities [isn't a right] vehicle to achieve [the goal of wider access to succession planning tools]”⁹⁴ is more convincing. But is it possible to reconcile both points of view?

⁸⁸ [2018] VSC 325 – (homemade will appearing to be part of a ‘will kit’, signed only by one witness).

⁸⁹ 27 Quinnipac Prob. L.J. 412 (2014) – (the testator composed his will on a tablet computer).

⁹⁰ 925 N.W. 2d 207 (Mich. Ct. App. 2018) – (testator left behind a suicide note that included testamentary instructions which he typed on his cell phone).

⁹¹ 52 E.T.R. 4th 216 (Can. B.C. Sup. Ct. 2019) – (document stored on the testator's home computer).

⁹² [2012] NZCH 44 – (decedent's e-mail directed to her drafting attorney).

⁹³ B. J. Crawford, *Wills Formalities...*, p. 43 et seq.

⁹⁴ K. Purser, T. Cockburn, *Wills Formalities...*, p. 64.

C. PROPOSAL TO SOLVE THE “PROBLEM” OF WILLS FORMALITIES

It may be argued that a way to solve the problem of the inadequacy of the rules on the form of wills to modern times, allowing for the flexibility of these rules while preserving their functions, may be introducing into the legal system only a general definition of the form of wills and the associated minimum requirements for such a disposition (last will)⁹⁵. The latter could consist only of the necessity to preserve the testator's declaration of will, but without indicating a specific type of form and manner of preservation, while at the same time obliging the authority applying the law (court) to determine whether a given testator's declaration includes the testator's disposition *mortis causa* of his estate⁹⁶. This is because the preservation of the testator's last will and its reflection, and not his authentication, is the most important task of the regulations on the form of the wills; without preservation of the testator's will, there will be no will after his death. The way in which this will is preserved is of secondary importance, as evidenced, for example, by the diversity of regulations on form in different legal systems or loosening of rules in connection with the pandemic. Legislators place emphasis above all on the material element (medium), not on the way in which the last will is manifested⁹⁷. Under such an assumption, the problems concerning the forms of wills currently existing in individual legal systems would no longer play a significant role; the facts whether the testator makes a declaration of last will in the presence of an official, notary or witnesses, just as whether he makes a declaration orally or in writing would become essentially irrelevant.

The burden of proof that we are dealing with a testament would be transferred to another dimension. Assuming that such a solution would continue to perform the functions indicated for the forms of wills, [i.e.: evidentiary function, channeling function, cautionary (ritual) function, and protective function]⁹⁸, the question arises about the possibility of constructing a model of testamentary succession in such a way as to enable free testation while providing reliable evidence of the testator's intentions and circumstances of creating a will, unifying the process of passing the inheritance estate to the heirs, making the testator aware of the seriousness of the action he is performing and protecting him against external pressures, while being at the same time a flexible solution and taking into account the needs of the changing society.

It seems that the implementation of such model testamentary succession regulations would depend on the configuration of the proposed solution. If the future

⁹⁵ M. Załucki, *supra* note 7 at 45.

⁹⁶ *Ibidem*.

⁹⁷ *Ibidem*.

⁹⁸ *See supra* Section I.

statutory regulation in this area were to be shaped in general terms, the provision on the obligation to comply with the form of a wills could read as follows:

The testator may create a will in such a way that he expresses his testamentary intention by conduct which reveals his declaration of will sufficiently, and his declaration is preserved on a medium which makes it possible to reflect it in a way which allows the person making this declaration to be identified⁹⁹.

Then, in principle, the other provisions contained in the individual laws on the form of wills (providing for types of wills form) would be redundant. This proposal reconciles the *strict compliance* doctrine with the *substantial compliance* doctrine, and causes that no other regulations concerning testamentary formalities shall be necessary to ensure that the testator's intentions are carried out. The evaluation of the testator's performance would become a one-stage assessment. After such a change, a will would still be a formalised legal act, although this formalism would not refer to any particular type of testamentary form, but would allow for the testator's freedom of choice in this regard, requiring only the preservation of a declaration of will in virtually any way. It may be a solution that enables the last will, which, under many circumstances, should be regarded as having been expressed unequivocally but in contravention of the law, and therefore often invalid under the current rules.

Such a regulation, which requires the documenting of a declaration of testamentary intention in order for it to have certain legal effects, would refer to the approach found in some legal systems, to treating a document as a message of human will, which feature is to be its intellectual content, i.e. the content (information) including the declaration of will, which must be preserved in such a way that it can be reflected after the testator's death, regardless of the type of medium on which the preservation is based¹⁰⁰. Such a change is part of the trend of an informal view of today's private law relations. In this light, the content of a will could therefore be freely disclosed (verbally, with graphic signs, sound, image), but it would have to be preserved, on any medium (paper, electronic information carrier) and by any means (pen, computer, tablet). However, the limit of this neutrality would be set by the evidential function of the document, which requires that the way in which the content is stored should allow it to be preserved and reflected.

In order for the information containing the declaration of testamentary intention (“content”) to be reflected, it must be properly stored in the medium. Only the two elements together, i.e. the reflectable information and the medium, constitute a document, in this case a will. Thus, information without a medium alone

⁹⁹ See detailed justification for this proposal M. Załucki, *Wills Formalities versus Testator's Intention. Functional Model of Effective Testation for Informal Wills*, Nomos 2021, p. 156 ff.

¹⁰⁰ G. A. Dvoenosa, *The Functions of a Document*, “Scientific and Technical Information Processing” 2013, Vol. 40, p. 17.

would not be a testament, just like an information-less medium. Thus, the form of wills proposed in this way would be a form with a lower degree of formalisation than the handwritten form or other forms known at present, but it does not exclude the use of the holographic form, as well as other current forms. The courts could still monitor whether the testator's declaration of will is intended to create legal effects in the area of succession (*animus testandi*), thus ensuring the evidentiary and protective function of the regulations on form. The obligation to preserve the declaration of will would, in turn, constitute the execution of the warning function of the provisions on form, and it could be discussed whether the regulation designed in this way would perform also the channelling function. As a rule, the transfer of assets to the heirs as a result of the testator's will would still take place according to the concept of will as an alternative to statutory inheritance or other instruments known under the succession law; there would also be an obligation to preserve the testator's last will, which at least indirectly performs the indicated function. Even if this was not the case, it does not seem that the unification of the process of passing the estate to the heirs – which is the task of the form regulations in this case – would be such a strong obstacle that the proposed solution should be rejected immediately. After all, the proposed norm could be complemented by further provisions, such as the obligation to mark the testator's declaration of testamentary intention in time or space, as well as – even if a third party preserves the declaration of will (if such a solution is allowed) – by provisions concerning the suitability of witnesses to participate in creating the will or possible requirements for other persons. This would, I think, minimize the negative effects of informalisation of current solutions, and reconcile the strict and the substantial concepts of wills formalities. The most important value in succession law would still be to reflect the will of the testator, to graciously refer to *animus testandi*, while preserving all the functions of the wills formalities regulations and using the unquestionable *favor testamenti* rule as a tool to reflect the last will. This would achieve the goal of increasing the availability of succession planning tools. This availability will be independent of pandemics or other unforeseeable external circumstances that may occur in the future.

V. THE IMPACT OF THE PROPOSED CHANGES ON WILLS FORMALITIES

The above proposal is obviously not yet a ready-made solution and requires further discussion. The problems that arise against its background include the marking of wills in time and space, the question of the authenticity of the will, the possible participation of third parties in testation activities (e.g. for the purposes of registering a declaration of will) or the resolution of interpretation doubts

that may arise (e.g. whether we are dealing with a draft will or a final will), including the legitimacy of using extrinsic evidence (in relation to a disposition) in the procedure for establishing the acquisition of inheritance rights (known as probate in *common law* countries). Liberalising the law of succession in this area would argue for a relatively relaxed approach to these issues too. But are legislators ready for such a revolution? Can this be a new opening for wills formalities in the modern post-pandemic society?

Without making categorical assessments, it can be argued that both in European countries based on the standard of *strict compliance* and in Anglo-American countries familiar with the doctrine of *substantial compliance* or its variations, the above proposal for statutory changes could apply. The proposed amendment would take into account the interests of those testators who, for various reasons, are unable or cannot meet the statutory criteria as to the form of the will currently required by the law. This is a solution that can therefore be implemented not only in European countries, but also in Anglo-American systems, including Australia or the United States of America. Therefore, for example, in the US State of California, in the Australian State of New South Wales as well as in the German Civil Code, a similar mechanism to reflect the intent of the testator as a matter of priority could be introduced. Any further statutory provisions, whether in terms of testamentary capacity, its limitations or otherwise, would continue to be a matter for individual legislators. The amendment would allow for the validity of wills in which the testamentary intention is obvious and which, in the current reality, loses out to different formal requirements. The wills formalities regulations would be unified in this way, would become more general, and would allow for a wide range of possibilities, regardless of the surrounding reality, pandemic or other circumstances unforeseeable during the framing of the legislation. The law would become simpler and more sensitive to society's expectations. The law would solve the “problem” of wills formalities.

VI. SOME CONCLUSIONS

In the light of the above, it should be noted that there is a fundamental conviction in the legal sciences that attempts to liberalise the formal requirements for wills have to be made with great caution. While sharing this view, however, one cannot ignore the sensible demands to make succession planning tools more accessible to the public. For this reason it seems necessary to reconcile two *prima facie* conflicting concepts: *strict compliance* and *substantial compliance*.

As it may be argued that the reference to *animus testandi* as the basis for the normative constructions leading to the validity of a will is currently a trend that can be observed in different legal systems, it seems necessary to introduce

changes based on this value into the provisions on the form of wills. This will make the will more widely available as a basic tool for succession planning and constitute another element of the liberalisation of this area of law. This trend has continued for several decades and will be difficult to reverse in the coming years. In fact, the opposite will happen. It is to be expected that the provisions of the law of succession will be liberalised more and more widely. However, the formal requirements, although loose, will not be abolished. This is why “any change that makes estate planning more available to a greater number of people should be embraced and welcomed”, as long as it is not a complete “transition away from formalities”.

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