(1) Development of provisions on the wills formalities in modern legal systems

1. Introductory remarks

Making dispositions of property, both *inter vivos* and *mortis causa*, is natural today. The freedom granted to an individual in this field, derived from the private law principle of the autonomy of the will of the law subjects,[25] has a long legal tradition and is now one of the attributes of an individual as an owner and holder of other rights of a proprietary nature.[26] The evolution of legislation in this area has resulted over the years in the development of at least several instruments for property dispositions, the effect of which occurs upon the death of the bequeather, who is the subject of these rights.[27] These instruments include, in particular, codicilles and last wills, succession agreements and trust constructions (characteristic in particular of Anglo-American legislation).[28] Therefore, a last will is one of the basic titles of succession, which has emerged over the years through development of the law in this field and is now believed to be the most popular of these instruments, most frequently used in practice.[29]

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25 Nicolas Coumaros, *Le rôle de la volonté dans l'acte juridique* (Librarie du Recueil Sirey 1931) 46; Marek Safjan, *System prawa prywatnego, vol. 1, Prawo cywilne - część ogólna* (Marek Safjan ed, C H Beck 2007) 237; Jan Schapp, *Methodenlehre und System des Rechts* (Mohr Siebeck 2009) 109.

26 In principle, it is the economic rights that are transferred to other persons as a result of the death of the subject of those rights. *Cf.* Józef Stanisław Piątowski and Bogudar Kordasiewicz, *Prawo spadkowe. Zarys wykładu* (Lexis Nexis 2011) 34; Hans Brox and Wolf-Dietrich Walker, *Erbrecht* (C H Beck 2018) 5 ff; Peter T Wendel, *Wills, Trusts, and Estates* (Wolters Kluwer 2018) 78 ff.

27 Shelly Kreiczer-Levy, 'The Mandatory Nature of Inheritance' (2008) 53 The American Journal of Jurisprudence 105; Mark Glover, 'A Social Welfare Theory of Inheritance Regulation' (2018) 2018 Utah Law Review 411; Maria Gigliola di Renzo Villata (ed), *Succession Law, Practice and Society in Europe across the Centuries* (Springer 2018) passim.

28 Thomas E Atkinson, *Handbook of the Law of Wills and Other Principles of Succession: Including Intestacy and Administration of Decedents' Estates* (West Academic Publishing 1953) passim.

29 It should be pointed out that in individual countries in the world there are no statistics on the popularity of specific mortis causa instruments. However, observation of the practice and analysis of some of the available statistics indicates that

In the world, the term "last will" (or briefly a "will" or a "testament" – in English all of these forms are used interchangeably) is not a uniformly understood concept.[30] It is true that, in general, doctrine consistently indicates some of its essential features, but it differs in the assessment of the legal nature of some of these features.[31] This is due to the fact that in different legal systems succession law was developing with varying intensity which was based on different patterns and because of that the current shape of the laws in this area is different in many countries. Regardless of these differences, the successful drafting of a last will depends on a number of factors, which in a given legal system are determined by statutory provisions. In general, the legislators provide for the validity of a last will that the testator must have testamentary capacity, make dispositions intentionally and freely, and must respect a certain statutory form and express his or her last will within this form.[32] The first two of these requirements can be referred to as substantive requirements for the validity of a last will, and the last two as formal requirements for the validity of a last will.[33]

Therefore, one of the basic requirements imposed by legislators on last wills is the necessity to prepare them in a special way, described in the law. This leads to general acceptance of the position, according to which a last will is a formal legal act.[34] This view is accepted not only in *civil law*

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it is necessary to recognise that last will (testament) is the main alternative to statutory inheritance.

30 *Cf.*, e.g.: Irma Sasso, 'Will Formalities in the Digital Age: Some Comparative Remarks' (2018) 4 Italian Law Journal 169.

31 *Cf.* Kenneth GC Reid, Marius J De Waal and Reinhard Zimmermann (eds), *Comparative Succession Law. Testamentary Formalities* (Oxford University Press 2011); Anna Pabin, 'Testament jako akt sformalizowany - uwagi w sprawie przyszłego kształtu regulacji dotyczących formy rozrządzeń testamentowych' (2016) 2016 Studia Prawnicze 91.

32 *Cf.* Michał Niedośpiał, *Testament. Zagadnienia ogólne testamentu w polskim prawie cywilnym* (Polski Dom Wydawniczy 'Ławica' 1993) 9 ff.

33 Mariusz Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (CH Beck 2018) 22–36.

34 Ashbell G Gulliver and Catherine J Tilson, 'Classification of Gratuitous Transfers' (1941) 51 Yale Law Journal 1, 5 ff.

states,[35] but also in *common law* countries.[36] Individual legal systems provide for regulations according to which the disposition of property upon death by a testator may take place only within the framework of instruments designed by the legislator.[37] These instruments are commonly referred to as the form of a last will, which should be understood as a form of a legal act (as such a last will should be considered, obviously in systems which separate such a theoretical construction), i.e. the way in which this act, and specifically the declaration of intent constituting it, is expressed externally.[38]

According to the classic view, which today can be described as rigorous, the testator's declaration of last will cannot therefore be made in any way, but must take one of the forms provided for by the law.[39] In this respect, the *numerus clausus* principle prevails in individual legal systems.[40] The range of possible solutions in this respect is wide, with the proviso, however, that some forms of last wills are more common than others.[41] It is emphasised that the formalism of a last will is intended to protect, on the one hand, the testator and, on the other, the security of legal transactions. According to the doctrine, solutions providing for formal requirements for dispositions of property upon death create a "safe harbour" allowing for the protection of succession property against the routine of applying legal mechanisms, also in exceptional circumstances.[42] A lawmaker who wants to introduce the principle that the intention of the person preparing a last will should be implemented to the fullest possible extent must seek to en-

35 Peter Breitschmid, 'Revision der Formvorschriften des Testaments – Bemerkungen zur Umsetzung der «Initiative Guinand»' (1995) 1995 Zeitschrift des Bernischen Juristenvereins 179; Zimmermann (n 22); Mariusz Załucki, 'Forma testamentu w perspektywie rekodyfikacji polskiego prawa spadkowego. Czas na rewolucję?' (2017) 72 Państwo i Prawo 31.

36 *Cf.* Mann (n 7); Bridget J Crawford, 'Wills Formalities in the Twenty-First Century' (2019) 2019 Wisconsin Law Review 269.

37 Robert H Sitkoff and Jesse Dukeminier, *Wills, Trusts and Estates* (10th edn, Wolters Kluwer 2017) 147; Dirk Olzen, *Erbrecht* (De Gruyter 2005) 73.

38 JK Maxton, *Formalities, Mistake and Construction in the Law of Wills* (Uniersity of Canterbury 1982) 9 ff.

39 Maura Tampieri, 'Formalismo testamentario e testamento olografo' (1998) 1998 Rivista del Notariato 119.

40 Sylwester Wójcik, *System prawa cywilnego, vol. IV, Prawo spadkowe* (Józef Stanisław Piątowski ed, Ossolineum 1986) 191.

41 Reid, De Waal and Zimmermann (n 31) 432–472.

42 John H Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) 87 Columbia Law Review 1, 4.

sure that only the real intention of that person is respected.[43] Therefore, in individual legal systems there are regulations on testamentary formalities.

The form of declarations in the event of death was already highlighted in Roman law, then in customary laws and first codifications.[44] This is how it has remained until today.

Despite the often unformalized legal circulation *inter vivos*, the *mortis causa* circulation often had and still has a much more stringent dimension. One could even say that over the years, the formalism of the *mortis causa* circuit has reached its limits.[45] Regardless of the needs of society, until recently, many countries still considered that the rules on the form of last wills should be observed very strictly.[46] For this reason, according to the various legal provisions, failure to comply with the formal requirements of last wills, and therefore failure to comply with the rules on the form of last wills, has generally (and often still does) lead to the invalidity of a will.[47]

Fortunately, the rigor of form resulting from the one-sidedness of last wills and its *mortis causa* nature is sometimes mitigated.[48] This is particularly noteworthy in recent times, as some legal systems have found few solutions to maintain a will in force (as a valid will) despite being prepared in contravention of the provisions of the law on testamentary formalities, or providing only for the possibility of the optional invalidation of a will at

43 Jan Gwiazdomorski, 'Formy testamentu' (1966) 22 Nowe Prawo 713.

44 *Cf.* Franciszek Longchamps de Bérier, *Law of Succession. Roman Legal Framework and Comparative Perspective* (Wolters Kluwer 2011) 151; Dieter Leipold, 'Europa und das Erbrecht' in Gerhard Köbler, Meinhard Heinze and Wolfgang Hromadka (eds), *Europas universale rechtsordnungspolitische Aufgabe im Recht des dritten Jahrtausends. Festschrift für A. Söllner zum 70. Geburtstag* (C H Beck 2000) 648.

45 Mariusz Załucki, 'Evidentiary Function of the Provisions on the Form of Wills in the Contemporary Succession Law. Is the Complete Abandonment of Formalism Possible?' (2020) 26 Trusts & Trustees 814.

46 Cf, e.g.: Aloy (n 17); Richard Hedlund, 'Introducing a Dispensing Power in English Succession Law' (2019) 25 Trusts & Trustees 722.

47 Załucki, 'Evidentiary Function of the Provisions on the Form of Wills in the Contemporary Succession Law. Is the Complete Abandonment of Formalism Possible?' (n 45).

48 Jesús Delgado Echeverría, '¿Qué reformas cabe esperar en el derecho de sucesiones del código civil? (Un ejercicio de prospectiva)' (2009) 3 El Cronista del Estado Social y Democrático de Derecho 26; Maciej Rzewuski, 'Formalisation of the Testament in the Light of the Favor Testamenti Principle' (2013) 2013 Miľníky Práva v Stredoeurópskom Priestore 978; Natalie M Banta, 'Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age' (2020) 71 Baylor Law Review 547.

the request of a person having a legal interest in it.[49] This is a model characteristic of the Anglo-American countries in particular[50], although it is probably too early to speak of a trend in all these countries towards easing the formal requirements of wills, but surely a lot has happened in this area over the last years. As one might think, a lot is still to come. The last can be mainly referred to the European countries, where, despite rather classic legal solutions, the need for a more liberal approach to the problems discussed here is becoming increasingly apparent.[51] The current solutions are criticised and changes are postulated, which sometimes become provisions of the new law. The last intensive activities of individual legislators in this respect took place in the initial phase of the COVID-19 pandemic, when some legislators decided to significantly ease the formal requirements for wills.[52] These issues still remain relevant.

The form of a last will, in the opinion of many, as a mechanism for ensuring the authenticity of a last will and its reflection, should undergo transformations. As it usually happens in such cases, the impulse for scientific discourse and the legislative action that follows it, is the practice of law. In many cases it is the unsatisfactory effects of the application of the law of succession that have become the source and driving force of change.[53] The classic approach to the problems of the form of a will has not worked for a long time.

The reasons for this should be sought precisely in the different shape of the needs of the practice and statutory regulations, which do not keep up with the former.[54] There is a reason to believe that a will, as an instrument to reflect the testator's intent, should be an instrument that is more flexi-

49 Załucki, 'About the Need to Adjust the Regulations Regarding the Form of Will to the Modern Requirements' (n 14); Crawford (n 36).

50 Juliet Brook, 'To Dispense or Not to Dispense? A Comparison of Dispensing Powers and Their Judicial Application' (2018) 2018 Private Client Business 205.

51 Aloy (n 17).

52 David Horton and Reid Kress Weisbord, 'COVID-19 and Formal Wills' [2020] Stanford Law Review Online 1; Mariusz Załucki, 'Preparation of Wills in Times of COVID-19 Pandemic - Selected Observations' (2020) 45 Journal of Modern Science 143, 143 ff.

53 Pierre Ciotola, 'Le testateur et son clone inavoué, le juge : clone difforme ou conforme dans la recherche des intentions du testateur : le juge et l'interprétation des volontés du testateur' (2005) 107 La Reveue du Notariat 239.

54 Doron Menashe, 'Relaxed Formalism: The Validation of Flawed Wills' (2007) 40 Israel Law Review 119.

ble than it is usually described.[55] It is therefore necessary to look at the current trends in the development of the law in this field, against the background of standards known in succession law for many years. Such an analysis may only allow for a further search for the optimal shape of the testamentary inheritance.

For this reason, before presenting possible solutions taking into account the needs of society in terms of the form of wills, it is necessary to recall the basic legal solutions functioning in the world in the area of disposing of property upon death by means of a last will and the objections against them, resulting primarily from the observation of the practice of applying the law of succession (in the area of testamentary formalities).

2. *Wills formalities and the evolution of legal regulations related to it*

Further consideration should begin with a reminder that it is the law that regulates *mortis causa* acts. This is not only the case in *civil law* systems, but also in *common law* states, where, as it is known, statutory regulations do not cover all types of legal relationships. *Mortis causa* actions, including last wills, are therefore those legal acts whose functioning is regulated by law and which must be executed in practice under this law.[56] It is in this area that the testator must operate, otherwise the legal act conducted by the testator may not have the intended legal effects, which, after all, are to occur only after his death.[57] For this reason alone, the issue of formal requirements for dispositions of property upon death seems to be exceptional.[58] The regulations should be shaped in such a way that it is possible to reconstruct the content of a declaration of last will made before the testator's death, which usually takes place within a relatively long time period, as the testator usually makes such a declaration many years before his death (ac-

55 Judy Martin, 'La pertinence de l'article 714 du Code civil du Québec ou le paradoxe d'un formalisme sujet à la libre interprétation des tribunaux' (2018) 113 Revue du notariat 431; Kelly Purser and Tina 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' (2019) 2019 Wisconsin Law Review Forward 46.

56 Marco Echeverria Esquivel and Mario Echeverria Acuna, *Derecho sucesoral* (Universidad Libre 2011) 35 ff.

57 Bernhard Eccher, *Erbrecht* (Verlag Österreich 2016) 47–93.

58 Reid K Weisbord, 'Wills for Everyone: Helping Individuals Opt Out of Intestacy' (2013) 53 Boston College Law Review 877.

cording to the available statistics, it can be assumed that a large part of last wills is made even about a decade before the death of their author).[59] For this reason, when designing regulations on the form of wills, individual legislators pay attention primarily to two issues: the manner of making a declaration of last will and the manner of preserving a declaration of last will. This is to guarantee the existence of the testator's real last will, its authenticity and freedom of undertaking, as well as to allow for the belief that the testator has acted with full awareness of the dispositions made.[60] The legislator must protect the testator's and his heirs' personal interests, but also the public interest, including in particular counteracting falsification of the testator's last will. If there are property incentives and succession matters are precisely such matters, there are many temptations which should be counteracted in the public interest. At the same time, assuming generally that a proper reflection of the testator's last will is the most important value of the succession law,[61] it is also necessary to create such mechanisms which will allow for this and consider the testator's last will as an important indication for shaping the succession order.[62] It is not without reason that the statutory succession, which is the main construction of inheritance acquisition in many countries, is considered to be nothing more than a hypothetical will of the bequeather.[63] This is why a testamentary succession, the main alternative to it,[64] should reflect this will but on

59 As an example, the results of research conducted in Poland on the records of succession cases covering the years 1984-2004 can be quoted, where the issues of making holographic wills were analysed and it was found that more than 7% of wills were made more than 3 years before the testator's death. On the other hand, a study conducted in the State of California in 2008-2009 found that, on average, wills were made about a decade before the testator's death. See: Katarzyna Liżyńska, *Badanie autentyczności testamentu holograficznego* (Cyfrowa Biblioteka Prawnicza 2008) 16–17; David Horton, 'Wills Law on the Ground' (2015) 62 UCLA Law Review 1094, 1129–1133.

60 Judith Solzbach, *Formstrenge bei Testamenten im deutsch–US–amerikanischen Vergleich* (Friedrich-Alexander- Universität Erlangen-Nürnberg 2016) 146–152.

61 This is generally believed in the doctrine of succession law, *cf.*, e.g.: Stefan Grundmann, 'Favor Testamenti: Zu Formfreiheit und Formzwang bei bei privatschriftlichen Testamenten' (1987) 187 Archiv Für Die Civilistische Praxis 429, 429–476.

62 Rzewuski, 'Formalisation of the Testament in the Light of the Favor Testamenti Principle' (n 48).

63 Brigitte Keuk, *Der Erblasserwille post testamentum und die Auslegung des Testaments* (Röhrscheid 1965) 80.

64 Michael Albery, 'Coincidence and the Construction of Wills' (1963) 26 Modern Law Review 353, 357 ff.

an individualized basis.[65] Therefore, individual legislators, observing these phenomena and responding to different social transformations and needs, over the years of development of the law in this field, have developed different legal solutions in their legal systems to meet such needs and challenges.[66]

As it is known, some of the first last wills, known as early as in Roman times, were essentially simple, although often strongly formalised.[67] An example of this is the last will described as the *calatis comitis testament*, which was a solemn public act and could only be executed twice a year, during the people's assemblies in Rome,[68] or the evolved last will *par aes et libram*, made in the presence of five witnesses and a person watching over the ceremony of the formal transfer of property (*mancipatio*).[69] Already at that time the emphasis was placed on the observance of the ceremonial correctness of a last will,[70] and any omissions in this respect could have resulted in the invalidity of the disposition.[71] The law was shaped in a similar way in the pre-codification era, after the birth of the European legal science (12th century),[72] although it was then that the turn towards recognizing in the later science the competence of subjects to freely shape legal property relationships has started to occur, which in the context of last wills, resulted in the recognition that the regulations on the form of wills may have other functions than ceremonial ones.[73] In practice, this meant, among other things, noticing that e.g. the presence of witnesses at the act of testation does not have to be treated only as an element confirming the fact of testation, but may also be a source of proof of the testator's intentions. Such assumptions were, among others, the basis for the adoption by the

65 *Cf.* Solzbach (n 60) 187.
66 *Cf.* Mariusz Załucki, 'Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future' (2018) 103 Iowa Law Review 2318, 2319–2338.
67 Hans Wieling, *Testamentsauslegung im Römischen Recht* (C H Beck 1972) 7 ff.
68 Ulrike Babusiaux, *Römisches Erbrecht* (Böhlau Verlag 2015) 15 ff.
69 Carlos Sánchez-Moreno Ellart, 'The Late Roman Law of Inheritance: The Testament of Five or Seven Witnesses' in Béatrice Caseau and Sabine R Huebner (eds), *Inheritance, Law and Religions in the Ancient and Mediaeval Worlds* (Association des amis du Centre d'histoire et civilisation de Byzance 2014) 229–257.
70 Francois du Toit, 'The Impact of Social and Economic Factors on Freedom of Testation in Roman and Roman-Dutch Law' (1999) 10 Stellenbosch Law Review 232.
71 Yaakov Stern, 'The Testamentary Phenomenon in Ancient Rome' (2000) 49 Historia: Zeitschrift für Alte Geschichte 413, 413–428.
72 Bérier (n 44).
73 Rudolpf Huebner, *History of Germanic Private Law* (1918) 740 ff.

Parliament of the United Kingdom of the *Wills Act* (1837), where an important role for witnesses of the act of last will was provided for.[74]

The great codifications that emerged in the nineteenth and twentieth centuries, as well as the regulations of Anglo-American countries based on the *Wills Act* (1837), provided for specific legal solutions regulating the form of a will and became important inspirations for contemporary legal regulations. *Code civil des Français* (1804), *Allgemaines Bürgerliches Gesetzbuch* (1811), *Wills Act* (1837) *Bürgerliches Gesetzbuch* (1896) and *Zivilgesetzbuch* (1907) introduced or confirmed the possibility of making wills in several types of forms.[75] These include, in particular, wills made by handwriting (holographic wills), wills in the presence of witnesses and wills made in the presence of a public person,[76] which continue to operate in many legal systems in the world and which are still the most common legal constructions used in this area.[77] French, Austrian, British, German and Swiss legislations are the models for many other codifications,[78] whether in European countries, Asia, Australia or the Americas.[79] For many years, the development of the law in this field has been extremely traditional, and it was believed that the solutions developed over the centuries seem to be sufficient for the needs of society. It is only in the last few decades that the voices of the doctrine about the necessity to modernise the law of succession in the context of the form of a will have appeared.[80] First of all, solutions related to technological progress have been proposed,

74 George W Keeton and LCB Gower, 'Freedom of Testation in English Law' (1934) 20 Iowa Law Review 326.

75 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 51–56.

76 These laws also knew other forms, including those which could only be prepared under special conditions. Their practical role today, however, is not significant.

77 These forms are, of course, differently formulated in different national regulations, but in principle a common paradigm can be identified.

78 George A Pelletier Jr and Michael Roy Sonnenreich, 'A Comparative Analysis of Civil Law Succession' (1966) 11 Villanova Law Review 323.

79 *Cf.* Francois du Toit, 'Roman-Dutch Law in Modern South African Succession Law' (2014) 2014 Ars Aequi 278.

80 *Cf.*, e.g., Langbein, 'Substantial Compliance with the Wills Act' (n 10); Maxton (n 38); Grundmann (n 61); James Lindgren, 'The Fall of Formalism' (1992) 55 Albany Law Review 1009; Brigitte Lefebvre, 'L'accroissement du pouvoir discrétionnaire du juge en matière de validation d'un testament informe : les enseignements de la cour d'appel' in Brigitte Lefebvre (ed), *Mélanges Roger Comtois* (Éditions Thémis 2007); Karlheinz Muscheler, 'Das eigenhändige Testament – Gestern , Heute und Morgen' (2014) 2014 Successio – Zeitschrift für Erbrecht 24; Aloy (n 17); Załucki, 'About the Need to Adjust the Regulations Regarding the Form of Will to the Modern Requirements' (n 14).

including, among others, a videotestament or an electronic will.[81] The need to use blockchain technology in this area was also pointed out.[82] Some solutions even met with the recognition of legislators. For example, in the U.S. state of Nevada in 2001, for the first time in the world, the form of an electronic will was introduced into the provisions of the act (§ 133.085 *Nevada Revised Statutes*).[83] On the other hand, e.g. the Swiss legislature from 2016 is considering the possibility of introducing a videotestament (to change § 506 of *Zivilgesetzbuch*).[84] Other legislators have also taken initiatives to reform and modernise succession law.[85] Discussions in this area have taken place in many countries, essentially on all continents,

81 *Cf.*, e.g.: Gerry W Beyer, 'Video Requiem: Thy Will Be Done' (1985) 7 Trust & Estates 24; JC Sonnekus, 'Videotestamente naas skriftelike testamente' (1990) 1990 Tydskrif vir die Suid-Afrikaanse Reg 114; Emily V. Sanchez, 'Are We Ready for Electronic Wills' (2006) 206 Notes on Business Education 1; Gerry W Beyer and Claire G Hargrove, 'Digital Wills: Has the Time Come for Wills to Join the Digital Revolution' (2007) 33 Ohio NUL Rev. 865; Silvia Barrera Ibañez and others, *Testamento digital* (Ricardo Oliva Leon and Sonsoles Valero Barcelo eds, Juristas con Futuro 2016); Paige Hall, 'Welcoming E-Wills into the Mainstream: The Digital Communication of Testamentary Intent' (2019) 20 Nevada Law Journal 339; Philippe Ropenga, 'Testament by SMS' (2020) 2020 Alacriter - blog - Insights into contracts, intenational law, trusts and estates 1; Banta (n 48).

82 Bridget J Crawford, 'Blockchain Wills' (2020) 95 Indiana Law Journal 735; Jainam Chirag Shah and others, 'Crypto-Wills: Transferring Digital Assets by Maintaining Wills on the Blockchain' in Jagdish Chand Bansal and others (eds), *Communication and Intelligent Systems* (Springer 2020) 407–416.

83 Adam J Hirsch, 'Technology Adrift: In Search of a Role for Electronic Wills' (2020) 61 Boston College Law Review 828.

84 Report: Bundesamt für Justiz BJ z 10.5.2017 r., Änderung des Zivilgesetzbuches (Erbrecht). Berichtüberdas Ergebnis des Vernehmlassungsverfahrens, https://www.bj.admin.ch/.

85 *Cf.*, e.g.: Brière (n 2); Dieter Leipold, 'Ist unser Erbrecht noch zeitgemäß?' (2010) 65 Juristen Zeitung 802; Antoni Vaquer Aloy, 'La protección del testador vulnerable' (2015) 68 Iuris Dictio 327; Załucki, 'About the Need to Adjust the Regulations Regarding the Form of Will to the Modern Requirements' (n 14).

including Europe (Germany,[86] Austria,[87] Switzerland,[88] France,[89] England,[90] Scotland,[91] Spain,[92] Poland[93]), North America (United States of

86 *Cf.* Grundmann (n 61); Röthel (n 1); Peter Breitschmid, 'Bericht zu den Konturen eines "zeitgemässen Erbrechts" zu Handen des Bundesamtes für Justiz zwecks Umsetzung der "Motion Gutzwiller"' (2014) Sonderheft Not@lex/succesio 7.

87 *Cf.* Martin Spitzer, 'Neues ze letzwilligen Verfügunen. Ein Beitrag zu Nottestament und Testierfähigkeit' (2006) 2006 Österreichische Notariats Zeitung 77, 77 ff; Rudolf Welser, 'Die Reform des österreichischen Erbrechts' (2012) 144 Österreichische Notariat Zeitung 249, 249 ff; Rudolf Welser, 'Reformbedarf bei den letztwilligen Verfügungen' in Reinhold Geime, Rolf A Schütze and Thomas Garber (eds), *Europäische und internationale Dimension des Rechts: Festschrift für Daphne-Ariane Simotta* (Lexis Nexis 2012) 669 ff.

88 *Cf.* Jean-Philippe Dunand, 'Le testament oral en droit suisse et dans l'ancien droit neuchâtelois' in Jean Kellerhals, Dominique Manaï and Robert Roth (eds), *Pour un droit pluriel: études offertes au professeur Jean-François Perrin* (Helbing & Lichtenhahn 2002) 33 ff; Michelle Cottier, 'Ein zeitgemässes Erbrecht für die Schweiz: Bericht zur Motion 10.3524 Gutzwiller "Für ein zeitgemässes Erbrecht" zuhanden des Bundesamtes für Justiz' (2014) Sonderheft Not@lex/succesio 29.

89 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.,* Jean-François Sagaut, 'Présentation de la loi réformant le droit français des liberalités et des successions' (2010) 14 Electron. J. Comp. Law 1; Henri D Richemont, *Projet de loi portant réforme des successions et des libéralités (Rapport No. 343)* (Sénat de la République Française 2006).

90 *Cf.* Gareth Miller, 'Reforming the Formal Requirements for the Execution of a Will' (1993) 8 Denning Law Journal 71, 71 ff; Steve Evans, 'Testators' Wishes; Dead or Alive: Is There a Difference?' (2013) 2013 Conveyance and Property Lawyer 481, 481 ff; Hedlund (n 46).

91 *Cf.* Fiona Burns, 'Surviving Spouses, Surviving Children and the Reform of Total Intestacy Law in England and Scotland: Past, Present and Future' (2013) 33 Legal Studies 85.

92 *Cf.* Echeverría (n 48); María Elena Cobas Cobiella and Christian de Joz Latorre, 'La modernización del derecho de sucesiones. Algunas propuestas' (2007) 7 Cuestiones de Interés Jurídico 1; F Ramón Fernández, 'El testamento y la futura reforma del código civil en materia de discapacidad: Algunas reflexiones' (2009) 10 Actualidad Jurídica Iberoamericana 346; J Silverio Sandoval, 'El testamento ológrafo en soporte digital y la firma biométrica' (2019) 2019 Boletín del Ministerio de Justicia 1.

93 Załucki, 'Współczesne tendencje rozwoju ustawodawstwa testamentowego' (n 22); Konrad Osajda, 'Prawo spadkowe (w) przyszłości. Perspektywy rozwoju prawa spadkowego' (2019) 2019 Monitor Prawniczy 66.

America,[94] Canada[95]), South America (Brazil[96]), Australia (Australia,[97] New Zealand[98]), Africa (Republic of South Africa[99]) or Asia (Japan, [100] China[101]). This process is still ongoing.

The multiplicity of types of will forms can and generally means the realization of the principle of freedom of testation, another important value

94 Beyer and Hargrove (n 81); Mann (n 7); John H Langbein, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' (2017) 38 Adelaide Law Review 1; Ryan M Tucker, 'How Substantial Is Substantial? Compliance with the Louisiana Civil Code' s Requirements for Notarial Testaments' (2018) 92 Tulane Law Review 969.

95 *Cf.* Averie Mc Nary, *The New Alberta Wills and Succession Act—What's In It?...And What's Out* (Legal Education Society of Alberta 2011); William 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); Katherine S Melnychuk, 'One Click Away: The Prospect of Electronic Wills in Saskatchewan' (2014) 77 Saskatchewan Law Review 27.

96 *Cf.* Zeno Veloso, 'Testamentos – Nocoes Gerais, Formas ordinarias' in Domingos Franciulli Netto, Gilmar Ferreira Mendes and Ives G da Silva Martins Filho (eds), *O novo Codigo Civil: Estudos em Homenagem ao Prof Miguel Reale* (LTr 2003); Reid, De Waal and Zimmermann (n 31).

97 *Cf.* Rosalind F Croucher, 'Statutory Wills and Testamentary Freedom – Imagining the Testator's Intention in Anglo-Australia Law' (2007) 7 Oxford University Commonwealth Law Journal 241; David Haines, 'Informal Wills and the Uniform Legislation', *The Law Society of South Australia Succession Law Conference 2007* (The Law Society of Australia 2007).

98 *Cf.* Nicola Peart, 'Where There Is a Will, There Is a Way - A New Wills Act for New Zealand' (2007) 15 Waikato Law Review 26; Nicola Peart and Greg Kelly, 'The Scope of the Validation Power in the Wills Act 2007' (2013) 2013 New Zealand Law Review 73.

99 *Cf.* Sonnekus (n 81); Sizwe Snail and Nicholas Hall, 'Electronic Wills in South Africa' (2010) 7 Digital Evidence and Electronic Signature Law Review 67; Francois Du Toit, 'Testamentary Condonation in South Africa: A Pyrrhic Victory for Private Autonomy over Mandatory Formalism in the Law of Wills?' in Alain-Laurent Verbeke and others (eds), *Confronting the Frontiers of Family and Succession Law. Liber Amicorum Walter Pintens* (Intersentia 2012).

100 *Cf.* Masayuki Tamaruya, 'Japanese Wealth Management and the Transformation of the Law of Trusts and Succession' (2019) 33 Trust Law International 147.

101 *Cf.* Hao Wang, Michael W Galligan and Jeffrey B Kolodny, 'Modern Inheritance Develops in China' (2013) 2013 New York Law Journal 2; Frances H Foster, 'Dark Side of Trusts: Challenges to Chinese Inheritance Law, The' (2003) 2 Washington University Global Studies Law Review 151.

formed over the years of development of law in this field.[102] Today it is expressed in principle in all democratic countries. A kind of guardians of this principle are precisely the regulations on the form of wills, which, apart from the public interest, are supposed to secure the possibility of preparing a valid act of last will by a testator. 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 persists until it is restored, i.e. sometime after the death of a testator. The method of preservation depends on whether the testator's declaration of will is made orally or otherwise.[103] In the context of testamentary succession, it may be tempted to assess that the most popular method is the use of a written document for this purpose,[104] while the admissible method of preserving the testator's last will depend on the current imagination of a given legislator.

This approach, over the years, has led the doctrine to believe that the wills formalities regulations have four functions: evidentiary function, channeling function, cautionary (ritual) function, protective function.[105] 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 him/her to create a last will freely.[106] Traditionally, it is claimed that it is precisely these functions that the regulations on wills formalities are designed to fulfil. However, the significance of each of these functions is

102 du Toit, 'The Impact of Social and Economic Factors on Freedom of Testation in Roman and Roman-Dutch Law' (n 70); Frances Hannah and Myles Mcgregor-Lowndes, *From Testamentary Freedom to Testamentary Duty : Finding the Balance* (Queensland University of Technology 2008); Erik Jayme, 'Party Autonomy in International Succession and Family Law: New Tendencies' (2009) 11 Yearbook of Private International Law 1.

103 Reid, De Waal and Zimmermann (n 31).

104 Tampieri (n 39); Patti (n 6); Carolos Espino Bermell, *El testamento ológrafo. La importancia de la escritura y la firma del testador. El cotejo pericial de letras (La prueba caligráfica)* (Universidad de Córdoba 2016).

105 Gulliver and Tilson (n 34) 1–39; Gerrit Ponath, *Die Beschränkungen der Testierfreiheit durch das Testamentsrecht* (Zerb Verlag 2006) 442; Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 167–196.

106 Gulliver and Tilson (n 34).

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 times.[107] In general, the criticism did not mean the uselessness of 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, 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) are desirable. The task of the provisions on wills formalities, as may be believed, 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 requirements.[108]

The above indicates an important problem that individual legislators have been struggling with for many years. The need to strictly comply with the provisions on the form of wills has often led to the invalidation of wills executed against the provisions on the form of wills.[109] For this reason, it has already been stressed many times that a flexible approach to formal requirements in this area is necessary in order to keep the *mortis causa* disposition valid after the death of a testator. However, such views have been and still are received with varying degrees of enthusiasm. However, in order to take a closer look at them, it is first necessary to present the consequences of the testator's failure to comply with the wills form requirements when making a last will. Only then it will be possible to illustrate the problem outlined here.

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107 ibid 9–10; Richard Lewis Brown, 'The Holograph Problem - The Case Against Holographic Wills' (2005) 74 Tennessee Law Review 93, 93–128.

108 Breuer (n 16).

109 *Cf.* Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42).

3. The consequences of failure to comply with wills formalities

The requirement for a testator to comply with wills formalities, which is common in all democratic legal systems of today, is a requirement which, if not complied with, generally results in the sanction of invalidity of the will. This means that the execution of a will in a manner incompatible with legal formalities will not result in legal effect desired by the testator and that such a will cannot constitute a succession title.[110] Such a rule was developed over the years, was present in Roman law, has reached the great codifications and is still present today.[111] Its classic approach, which today can be called rigorous, means that any failure to comply with the regulations on the form of a will is a failure that results in no legal effect of such legal act.[112] Therefore, while in private law the principle of freedom of form of legal transactions is usually applied, in the law of succession it can be said that there is an obligation to keep the form of legal acts performed *mortis causa*.[113]

The reason for the introduction of such measures by individual legislators is the care for the public and private interest, which is manifested as already mentioned, and can be supplemented in detail by an indication that this is also demonstrated, among others, in such elements as abolition of doubts as to the submission of a declaration of last will, facilitation of evidence, protection against ill-considered decisions, or the possibility of subsequent control.[114]

The requirement of compliance with form for legal acts is, of course, known not only in succession law.[115] As it is known, there are generally three types of rigors of form restriction for a given legal act: *ad solimnitatem*, *ad probationem*, *ad eventum*.[116] The first of these rigours means restriction of form under order of invalidity, the second one means the existence of evidentiary limitations to prove the content of a given legal act,

110 Sitkoff and Dukeminier (n 37).
111 Zimmermann (n 22).
112 Alexander Wingerter, *Die eigenhändige letztwillige Verfügung im Spannungsverhältnis zwischen Form und der Verwirklichung des Erblasserwillens* (Bayerischen Julius-Maximilians-Universität 1998) 135 ff.
113 Anne Röthel, 'Testamentsformen' (2014) 5 Juristische Ausbildung 475.
114 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 29 ff.
115 Stephen Darwall, 'The Value of Autonomy and Autonomy of the Will' (2006) 2006 Ethics 263.
116 Mateusz Grochowski, *Skutki braku zachowania formy szczególnej oświadczenia woli* (C H Beck 2017) 85 ff.

while the third one means that failure to comply with the form is connected with the lack of certain legal effects of a given legal act.[117] In succession law, the rigour of form is generally restricted *ad solemnitatem*, although there are also other solutions aimed at restricting the form of a will only *ad probationem*.[118] However, the rule is a restriction made *ad solemnitatem*. This rigour can, in turn, have two sanctions under all circumstances: absolute invalidity and relative invalidity (voidability). The sanction of absolute invalidity is typical for the regulations on the form of wills.[119] In principle, therefore, over the years of development of the law in this area, the sanction of absolute invalidity has developed as a sanction of the testator's failure to observe the provisions on the form of wills. Therefore, according to this concept, a will prepared contrary to the provisions on the form of wills is absolutely null and void.[120] It has no legal effect. Therefore, the concepts of the law of succession of these states which apply such solutions are referred to as "*strict compliance*" because of the strict observance of testamentary formal requirements.[121]

In modern private law such solutions have become a standard. They have existed in great codifications, and nowadays they exist in most of the law on successions.[122] The regulations are generally designed in such a way that the law on successions contains a rule according to which deviations from the form known by the law, when making a will, mean its invalidity. As an example, Polish law may be indicated here, where the provision of Article 958 of *Kodeks cywilny* states that a will prepared in violation of the provisions on form is invalid.[123] A similar path is followed by, for example, the Austrian law, which provides in § 601 of the *Zivilgesetzbuch*, if a mandatory formal requirement was not complied with when a final will was drawn up, the last will is invalid. A corresponding provision is also contained in the Spanish *Código Civil*: the will in whose execution the formali-

117 Katarzyna Górska, *Zachowanie zwykłej formy pisemnej czynności prawnych* (C H Beck 2007).

118 Załucki, 'About the Need to Adjust the Regulations Regarding the Form of Will to the Modern Requirements' (n 14) 5.

119 Peter Breitschmid, 'Testament und Erbvertrag - Formprobleme: Die Einsatzmöglichkeiten für die Nachlassplanung im Lichte neuerer Rechtsentwicklungen' in Peter Breitschmid (ed), *Testament und Erbvertrag* (Haupt 1991).

120 Sasso (n 30) 177.

121 *Cf.*, e.g.: Mark Glover, 'The Therapeutic Function of Testamentary Formality' (2012) 185 Kansas Law Review 139.

122 Peter T Wendel, 'Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?' (2017) 95 Oregon Law Review 339.

123 Mariusz Załucki (ed), *Kodeks cywilny. Komentarz* (C H Beck 2019) 1996.

ties respectively established have not been observed shall be null and void (Article 687 of the *Código Civil*). Also in German law, a will made contrary to the requirements of form is not valid (§ 125 of the *Bürgerliches Gesetzbuch*). This kind of solution is also known in English law (it indicates in the content of Section 9 of *Wills Act* (1837): "no will shall be valid unless"), American (e.g. the Indiana Code indicates several times in the content of § 29-1-5-3 what is necessary for a will to be considered as "a valid will") or Australian (e.g. it indicates in Section 8 of South Australia *Wills Act* (1936) "no will is valid unless"). Other legal systems also contain similar solutions.[124] However, there are also solutions which provide only for the will to be declared invalid (voidability). This approach is known, for example, from Italian law, which differentiates between sanctions of nullity. In the case of some defects the will is completely invalid, in the case of others only voidable (Article 606 of the *Codice Civile*).[125] The idea of voidability of testamentary formal errors also occurs, for example, in Hungary.[126]

As can be assumed, in the course of the evolution of the law in this field, the dilemma that arises against the background of two conflicting values has been repeatedly resolved: the rigor of formal wills and the reflection of the testator's last will made in the event of a *mortis causa* disposition prepared contrary to the regulations on the formalities.[127] Certainly the practice of making wills has developed differently in different countries, but it is worth recalling that private wills, especially holographic wills, have played an important role in the European tradition and so far are still very popular.[128] In principle, only in some countries has it been customary to consult a lawyer when drawing up such wills, which must have had an im-

124 Reid, De Waal and Zimmermann (n 31).

125 *Cf.* Carlo Cicala, 'Il formalismo testamentario. Il documento' in Giovanni Bonilini (ed), *Trattato di diritto delle successioni e delle donazioni. La successione testamentaria* (Giuffrè 2009) 1235; Pietro Rescigno, 'Ultime volontà e volontà della forma' (1987) 38 Vita Notarile 17.

126 *Cf.* Reid, De Waal and Zimmermann (n 31) 267. However, these are not remedies based on a search for testamentary intent as the primary factor in recognising the validity of a will and shall therefore not be further discussed.

127 Kelly A Hardin, 'An Analysis of The Virginia Wills Act Formalities and The Need For a Dispensing Power Statute in Virginia' (1993) 50 Washington & Lee Law Review 1145.

128 Reginald Parker, 'History of the Holograph Testament in the Civil Law' (1943) 3 Jurist 1; Patti (n 6).

pact on their content and the problems of interpretation associated with it.[129] This was and still is a completely different issue in Anglo-American countries, where there is a well-established practice of using legal professional knowledge in the design of dispositions of property upon death.[130] This does not mean, however, that in the practice of these countries wills made contrary to the rules on the form do not exist.[131] Succession courts have had to deal with imperfections of *mortis causa* dispositions made in practice on many occasions and have repeatedly declared them invalid.[132] This has often led to misunderstandings in society, even though the testator's will expressed in case of death was clear and legible. This must have given rise to and, of course, raised doubts about the practical aspects of applying the provisions on the form of wills.[133] It was noted that strict adherence to the formal requirements (*strict compliance*) is not always fair and can lead to harm of the heirs.[134] It has certainly also led to the order of the succession against the will expressed by the testator. For this reason, the search for an instrument that would mitigate this formal rigor has begun.

4. Criticism of legal regulations concerning the wills formalities

In the light of the above, it is not surprising that in individual legal systems there have been relatively frequent calls for consideration to be given to the legitimacy of the functioning of the provisions on the form of wills which are strictly observed (*strict compliance*). It has been argued many times, among others, that the current formal rigour does not correspond to modern times, not even taking into account the opportunities created by new technologies, which has been stressed especially in recent years.

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129 Brown (n 107); Stephen Clowney, 'In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking' (2008) 43 Real Property, Probate and Trust Journal 27.

130 Albery (n 64); Thomas Gray, 'Succession Law: Reflections and Directions' (2019) 40 Adelaide Law Review 331.

131 Jane B Baron, 'Irresolute Testators, Clear and Convincing Wills Law' (2016) 73 Washington & Lee Law Review 3.

132 Pamela R Champine, 'My Will Be Done : Accommodating the Erring and the Atypical Testator' (2014) 80 Nebraska Law Review 388.

133 Weisbord (n 58).

134 Jeffrey A Dorman, 'Stop Frustrating the Testator's Intent: Why the Connecticut Legislature Should Adopt the Harmless Error Rule' (2016) 30 Quinnipiac Probate Law Journal 36.

The imperfection of this system can be seen, for example, in the case of a handwritten will, where it is rather commonly accepted that this type of will must be preserved on a durable medium, which in the opinion of the vast majority of the debaters (at least in the countries of continental Europe, where the form of a will is generally treated rigorously) makes it impossible to consider a will written on a tablet as valid will.[135] In a place where succession law is entering the digital world, there are, moreover, a number of doubts, and traditional instruments from this area are not able to meet today's requirements.[136] These are not only observations of today when attempts are made to make an act of last will by means of SMS (text) messages,[137] leaving a file in the memory of a computer,[138] sending an e-mail[139] or using a webcam for this purpose,[140] but also known examples found in succession law textbooks, including an attempt to make a will by means of recording on a gramophone record, [141] cassette tape,[142] floppy disk[143] or DVD, [144] most of which ended negatively for the testator and did not have legal effects after his death. This state of affairs seemed and still seems unsatisfactory to many.

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135 *Cf.*, e.g.: Sylwester Wójcik and Fryderyk Zoll, 'Testament' (2006) 2006 Studia Prawa Prywatnego 83. However, see: Kyle B Gee, 'Beyond Castro's Tablet Will: Exploring Electronic Will Cases Around the World and Re-Visiting Ohio's Harmless Error Statute' (2016) 26 Probate Journal of Ohio 149, 149.

136 Thomas Hoeren, 'Der Tod und das Internet. Rechtliche Fragen zur Verwendung von E-Mail- und WWW-Acounts nach dem Tode des Inhabers' (2005) 2005 Neue Juristische Wochenschrift 2113.

137 Nichol v. Nichol, [2017] Queensland Supreme Court 220.

138 MacDonald v. The Master, [2002] South African Law Reports 64.

139 Mahlo v. Hehir. [2011] Queensland Supreme Court 243.

140 Estate of Sheron Jude Ladduhetti, Supreme Court of Victoria, 20.9.2013, unreported.

141 In its judgment of 18.7.1935, the German Reich Supreme Court, in the context of a will recorded on a gramophone record, ruled that even if the authenticity of a declaration of intent made in this way was not in doubt, the will could not be prepared by means of other media, because only by the legislature itself and only the legislature could make a different decision.*Cf.* Deutsche Juristenzeitung 1935, 78.

142 The Supreme Court of Wyoming, in a judgment of 12.1.1983, held that the possible use of such recordings for the purposes of succession law is a decision that belongs to the legislature and not to the court, which cannot go beyond the applicable law and thus create new forms of will. *Cf.* Estate of Robert G. Reed, [1981] 672 P.2d 829 (WY).

143 Rioux v. Coulombe, [1998] 19 Estates and Trust Reports (2d) 201.

144 Mellino v. Wnuk, [2013] Queensland Supreme Court 336.

In applying the law of succession, the courts have repeatedly stressed the need for a different approach than formalistic one. As early as 1853, in the USA, the Supreme Court of Victoria, when examining an informal will, justified its ruling: "Upon the whole, there had been a reasonable substantial, if not a literal, compliance with the requirements of the statute shown in this case, sufficient for all practical purposes, and which in favor of the testamentary right ought to be sustained. To reject the will, would be, to sacrifice substance to form, and this ends of justice to the means by which they are to be accomplished."[145] In an another well-known case, in 1924, the Supreme Court of Pennsylvania held that the letter written to decedent's sons that conclude with dispositions of his property "IF ENNY THING HAPPENS" exhibited testamentary intent and ordered it to probate as a holographic will, assuming that the will of the testator should be taken into account and not the exact formalities.[146] A similar position, although many years later (1981), was taken by Pennsylvania first-instance court, who, in assessing a will drawn up without a proper signature, has indicated that "the intent of the testator was plain", and "no useful purpose can be served by destroying the will he created by a technical adherence to the *Wills Ac*t, the principal purpose of which is to make certain that the intent of a testator is effectuated."[147] The same views were also stressed on other continents.

This happened for example in Germany, among others, where LG Hamburg (in 1938) pointed to the need to respect the will of the testator by accepting the validity of the last will despite the fact that under the holographic form the place and date had not been inserted by hand but were imprinted on the letterhead[148] (however, the decision was eventually overturned on appeal and the last will was declared void.)[149] This informal trend was also the case, for example, in South Africa, where the court in 2010 admitting an informal will has stated, that "failure to comply with the formalities prescribed by the act should not frustrate or defeat the gen-

145 Sturdivant v. Birchett, [1853] 51 Virginia Supreme Court (10 Gratt.) 67.
146 Kimmel's Estate, [1924] 278 Pa. 435.
147 Kajut, [1981] 2 Pa. Fiduc. 2d 197, 204.
148 LG Hamburg, 27.11.1937, [1938] Deutsche Juristenzeitung 199.
149 KG, 3.2.1938, [1938] Deutsche Juristenzeitung 428. According to some, it even became the cause of the German law reform. *Cf.* Burkhard Hess, *Intertemporales Privatrecht* (Mohr Siebeck 1998) 101; Lothar Gruchmann, 'Die Entstehung des Testamentss-gesetzes vom 31. Juli 1938. Nationalsozialistische „Rechtserneuerung" und Reformkontinuität' (1985) 7 Zeitschrift für Neuere Rechtsgeschichte 53.

uine intention of testators".[150] It also happened many times in Australia, for example in the case decided in 2018 by the Supreme Court of Victoria, in which the court wondered about the validity of the, so-called, do-it-yourself will, a part of a "will kit", and have accepted that "the court can give effect to the testator's true testamentary intentions, despite the fact that a will has not been validly executed".[151] Similar situations and problems have occurred in many other countries. The court rulings have repeatedly drawn attention to the problem of the current regulations and have also advocated changes. That was, for example, the case in Spain. The judiciary there has invoked the principle of *favor testament* and postulated "the reduction to the essential minimum of the requirement of testamentary formalities that cannot be governed", and emphasized "a clear tendency of simplification of formalities".[152]

However, there are also a number of court rulings where, despite clear and convincing testator's intention evidence, the courts have denied the validity of the will. The following can serve as an example. In 1971 in Israel the court has refused as a valid will an unsigned and undated writing found among the decedent's papers after his death, even though the writing said: "In the case of death my brother inherits from me."[153] In another case, also the Israeli court in 1982 refused to probate a purported holographic will that lacked the testator's signature and date, even though a series of unsigned and undated notes in the woman's handwriting were found with a disposition that her estate should go to her brothers rather than to her husband.[154] Of course this has occurred also in other countries. For example in Australia (Queensland), in the case decided in 1985, where the testator had his daughter-in-law attest his will when the two of them were alone, hence not in the joint presence of the second witness, the court said that "since presence is most important .... it is difficult therefore to say that... there has been substantial compliance with the formalities."[155] In Poland, the Supreme Court in 2005 has ruled that a notarial will does not meet the formal requirements if the testator presents the future contents of the will (draft) to a notary, and then another notary using this draft has started the procedure of preparation of the will from reading this

150 Van der Merwe v. Master of the High Court & Another, [2010] ZASCA 99.
151 Willis v. McKenzie, [2018] VSC 325.
152 STSJ Cataluña, 4.9.2006 [2007] RJ 6176.
153 *Gitah*, Estate 39/70, [1971] 76 P.M. 156 (Dist. Ct.).
154 Koenig v. Cohen, [1982] 36(3) Israeli Supreme Court 701.
155 McIlroy, [1985] 1 Queensland Reports 514.

draft and then the last will was only confirmed by the testator (and not declared before this second notary). The court has explained that "in consideration of the importance of this act, which is a formalised act, it does not comply with the provisions on the form of wills, which are of a mandatory nature, and therefore the will is invalid."[156]

Such judgements have been made many times in the US, as for example, in one of the rulings made by the Supreme Court of New Jersey in 1987, where the will was declared invalid because the witness who signed the will was not present when the testator himself signed this will.[157] Similar were the circumstances of the invalidation of the will in England, where the frequently quoted old case law recalls a judgement from 1902, when one of the witnesses of the last will was distracted by another person, and therefore did not see the testator signing the will and did not sign the last will at the same time as the testator did (he added his signature later).[158] This has also happened more frequently, for example in the case decided in England in 2011, where the claimant has successfully challenged the validity of the will, saying that it had not been validly attested because the two witnesses were not being present at the same time despite the attestation clause saying they had been.[159]In 2013 a case from Sweden was reported, where one of the Swedish courts of appeal has invalidated a will send by SMS-messages, "because the SMS was not signed by the testator".[160] Certainly there are also many other examples of such judgements cited in the literature. As many may think, such rulings seems doubtful.

The doctrine of succession law, in connection with these and similar decisions, has repeatedly pointed out the need for a different approach to the problems of wills formalities.[161] A large part of the statements advocated reducing the formal requirements, which, among other things, could be

156 Supreme Court, 13.1.2005, IV CK 428/04, [2005] Legalis 84460.
157 In re Estate of Peters, [1987] 107 N. J. 263, 526 A.d2 1005.
158 Brown v. Skirrow, [1902] P 3.
159 Re Singh, [2011] EWHC 2907.
160 T 11306-12.
161 *Cf.*, e.g.: Melissa Essary, 'Wich v. Fleming The Dilemma of a Harmless Defect in a Will' (1983) 35 Baylor Law Review 903; Michael W McCrum, 'Wills – Execution – Witnesses' Signatures Located Only after Self-Proving Affidavit Do Not Satisfy Attestation Requirements' (1983) 15 St. Mary's Law Journal 219; Mary Ann Glendon, 'Fixed Rules and Discretion in Contemporary Family Law and Succession Law' (1986) 60 Tulane Law Review 1165.

achieved through a rational interpretation of the applicable laws.[162] These statements often criticised the case-law following the principle of *strict compliance*, indicating the invalidation of the testator's last will despite convincing evidence of this will. It was argued that it is necessary to take into account the testator's intention. However, the discussion also included the opposite voices, emphasizing the need to leave the wills formalities unchanged.[163]

The legislators observing it, although not all of them, have over the years tried various types of legislative solutions to solve the above mentioned problem. At least two trends can be observed in this respect. The first one consists in mitigating, in some legal systems, the formal requirements for wills. The second one is an attempt to adjust the law of succession through the introduction of solutions whose effect is to keep a wills' disposition incompatible with formal requirements in force (as valid wills). The first of these solutions, i.e. easing the formal requirements for *mortis causa* dispositions, is not at all exceptional and extraordinary. In world literature, the discussion of this subject on a wider scale has been going on for more than eighty years.[164] The first legislative proposals have also appeared. For example, as early as 1969 the *Uniform Probate Code* proposed a solution which primary objective was to keep the will "wherever possible" which has reduced the formal requirements of a holographic will to the "necessary minimum".[165] A trend of this kind can therefore be seen in later years in individual state legislations. It is also not unfamiliar to the *civil law* systems. It manifests itself on many different levels. One of the most important measures in this direction is the German regulation, i.e. § 2232 in conjunction with § 2233 of *Bürgerliches Gesetzbuch*, according to which an illiterate person may express his will in any way that is acceptable, as long as

162 *Cf.*, e.g.: Jane B Baron, 'Gifts, Bargains, and Form' (1998) 64 Indiana Law Journal 155; James Lindgren, 'Abolishing the Attestation Requirement for Wills' (1990) 68 North Carolina Law Review 541.

163 *Cf.*, e.g.: Lawrence S Friedmann, 'The Law Of The Living, The Law Of the Dead: Property, Succession, And Society' (1966) 1966 Wisconsin Law Review 340; Lloyd Bonfield, 'Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past' (1996) 70 Tulane Law Review 1893; John V. Orth, 'Wills Act Formalities: How Much Compliance Is Enough?' (2008) 43 Real Property, Probate and Trust Journal 73.

164 Gulliver and Tilson (n 34) 3–13.

165 Opinion of the Uniform Law Commission contained in the commentary to § 2-502 of the Uniform Probate Code 1969 according to which: "formalities for a written and attested will are kept to a minimum".

this is understood by the notary drawing up the will.[166] As far as the validity of decisions that do not meet the formal criteria is concerned, the provision of Article 714 of the *Civil Code of Quebec*, for example, is interesting. According to it, a holographic or witnessed will that does not meet all the formal requirements is valid if it satisfies the essential requirements and unquestionably and unequivocally contains the last wishes of the deceased.[167] Similar solutions are also found in the laws of European countries, including, for example, Italy[168] and Hungary,[169] as already mentioned. Although this is not a common direction, and even the opposite solutions do happen, such as the new regulations of the Dutch *Burgerlijk Wetboek* on the form of wills, often pointed out in the literature as very strict, due to - and this should be recalled - the construction providing only for the notarial form of wills (Article 4:94 of the *Burgerlijk Wetboek*),[170] the problem of unsatisfactory legislative solutions in the area of regulations concerning the form of wills exists. This is a simple relationship. The less formal requirements there are in the regulations of individual acts, the less final will decisions that are invalid for purely technical reasons.[171] More liberal forms of wills to a greater extent guarantee the possibility of testation until the last days of the testator's life, but at the same time, due to the greater ease of falsifying or distorting their content, they may pose a greater threat to the certainty of legal transactions.[172] The requirements of the security of legal circulation are best met by those legal acts for which restrictive requirements are provided. Excessive formalism may, however, make testation impossible.[173]

With this in mind, it should also be pointed out that an important direction that can be observed in individual legal systems, which is the implementation of the second of the above mentioned trends, is the search for solutions allowing to keep in force the *mortis causa* disposition, which, although it does not meet all the requirements for this type of legal actions,

166 Martin Avenarius, *BGB Kommentar* (Hans Prütting, Gerhard Wegen and Gerd Weinreich eds, Wolters Kluwer 2010) para 2233.
167 Martin (n 55).
168 Reid, De Waal and Zimmermann (n 31) paras 128–138.
169 ibid 267.
170 Johan Du Mongh, 'Het erfrecht van de langstlevende echtgenoot: de "Wet-Valkeniers" van 22 April 2003' (2004) 2004 Rechtskundig Weekblad 1521.
171 Baron (n 131) 12.
172 Jan Rudnicki, 'Rola formy testamentu. Uwagi na tle porównawczym' (2013) 2 Forum Prawnicze 35, 36.
173 Rudnicki (n 172).

is - as one may think in the given circumstances - disposition of the testator in case of death. It is connected with the acceptance of the principle of protecting the testator's intention as one of the most important, if not the most important, value protected by the law of succession. Thus, the doctrine of "*strict compliance*" (characterised by a strict formalism) is increasingly often abandoned in favour of the doctrine of "*substantial compliance*" and its variations, according to which the fulfilment of the testator's last will is the most important, and therefore the testator's wishes and intentions must be respected despite certain formal errors in the will. This concept, based on observations of jurisprudence and some normative solutions of selected countries was extensively presented in the doctrine of succession law in 1975 by John H. Langbein.[174] It now appears in some legal systems as a basis for normative solutions to protect the testator's last will, which significantly allows for its fuller reflection. It is at its basis that selected legislators refer to the construction of a "*harmless error*" of the testator or "clear and convincing evidence" of testation.[175] These solutions oscillate around the intentions of the testator, who wanted to dispose of the estate in case of his death, but was unable to do so in a manner dictated by the provisions of the applicable law. Such constructions occur primarily in *common law* systems, which is most probably due to the fact that until recently the various legislations in this circle approached the formal requirements of wills very rigorously, as well as perhaps because these systems are based on a wide discretionary power of the judge, which makes it somewhat easier to implement them in such realities.[176] The law of succession is also familiar with other constructions whose effect is similar. As one may think, individual legislators have not yet said the last word in this respect.

This means that over the years the regulations on the form of a will have undergone some evolution. Today's view of succession law through this prism indicates at least a few interesting mechanisms that have been or are still in use and whose main task was to counteract the excessive formalism of *mortis causa* dispositions. In order to consider the legitimacy of their application it is necessary to take a closer look at these solutions and determine what was the direct cause of their appearance in the legal space. It is necessary not so much to further outline the problem of excessive formalism in succession law, but to indicate the instruments whose task was and is to reflect the testator's last will. This will be the subject of further considerations.

174 Langbein, 'Substantial Compliance with the Wills Act' (n 10).
175 Horton, 'Wills Law on the Ground' (n 59).
176 Baron (n 131).