(5) Functional wills formalities. Proposal of a model solution based on testamentary intent

1. Introductory remarks

The considerations presented so far show that the traditional and formal approach to the issue of the form of a will is now a relict, with individual legislators tending to maintain the validity of the last will even if the manner of its expression does not meet formal requirements. Despite the different mechanisms, the functions of the provisions on the form of a will are still preserved and the medium of the last will has the primary role of proving that a testation has taken place. The presentation of current trends in the development of the law in the area of succession law, against the background of standards known in succession law for many years and consequences of failure to comply with the wills formalities, as long as the presentation of some "cures" to rescue an informal last will, both in theory and practice of functioning of these solutions, unequivocally indicates the need for a modern, informalized look at the process of testation. Having analysed the traditional view and meaning of the functions of the form of a will against the background of the modern, informal solutions which are appearing more and more boldly in selected legal systems and which aim to reflect the last intention at the expense of formal requirements,[788] it has become necessary to advocate the need to build succession law around these solutions. It is therefore now the time to consider whether it is possible to reconcile in a single legal instrument the seemingly extreme values of *strict compliance* and *substantial compliance* so that testamentary succession is based on the testator's actual intention, while at the same time satisfying the functions of these rules and allowing informal wills to remain in force.

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

788 Ronald J JR Scalise, 'Will Formalities in Louisiana: Yesterday, Today, and Tomorrow' (2020) 80 Louisiana Law Review 1334; Horton and Weisbord (n 52); Bridget J Crawford, Kelly Purser and Tina Cockburn, 'Post-Pandemic Wills' (2021) 2021 University of Chicago Legal Forum.

the legal system only a general definition of the form of wills and the associated minimum requirements for such a disposition (last will).[789] 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 estate.[790] 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 COVID-19 pandemic. Legislators place emphasis above all on the material element (medium), not on the way in which the last will is manifested.[791] 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.[792]

With this in mind, I will consider why a functional approach should replace strict formalism and will then analyse in detail the above proposal and justify how such a functional approach could work in the practice of succession law in different countries.

2. *Replacing strict formalism by a functional approach*

The discussion so far has shown that the practice of succession law has frequently had to deal with last wills that are informal in nature. This informality is a feature that is becoming increasingly common with the development of new technologies. Testators are generally unaware of the wording of the applicable rules of succession law but are happy to use technology to express their last will. They are unconcerned about the applicable

789 Załucki, 'Forma testamentu w perspektywie rekodyfikacji polskiego prawa spadkowego. Czas na rewolucję?' (n 35) 45.
790 ibid.
791 ibid.
792 Dubravka Klasiček (n 368) 45.

rules, wrongly believing that this is not necessary. We know of attempts to make a last will on a record player,[793] DVD,[794] by sending an e-mail[795] or a text message.[796] Probably still to come, or at least there is no case law available on this, wills in cloud computing, blockchain technology or other technological boons, not necessarily already known.[797] The law is unable to keep up with this kind of human activity. Past experience in individual countries has shown that it is necessary to preserve the testator's last will in order to be able to reconstruct it some time after the death of its author. However, legislators are not unanimous as to how this preservation should take place.[798] Some are still using purely traditional solutions, the models of which are over two thousand years old. Others try to find solutions that keep up with modern challenges and make relatively modern instruments available for the purpose of preserving the last will, based for example on digital technologies. Such innovations have had varying degrees of success; an unsuccessful example being the 2001 proposal by the US State of Nevada, the world's first statutorily defined form of electronic will which, however, failed to enjoy any popularity and had to be redesigned by the legislature.[799] Others have rejected modern forms of wills, such as the Florida once did,[800] another US state, on the grounds that it could lead to too much use of Florida's jurisdiction by people from other areas.[801] So there is no single coherent policy, no single pattern that would allow similar instruments to be used throughout the world.[802] Such solutions would, however, seem tempting.

In addition to the above, the question of the form of the will is an issue which is, however, at a different stage of development in the various legal systems.[803] While the traditional instruments are similar in many legal sys-

793 *Cf.* Estate of Robert G. Reed, [1981] 672 P.2d 829 (WY).
794 *Cf.* Mellino v. Wnuk, [2013] Queensland Supreme Court 336.
795 *Cf.* Mahlo v. Hehir. [2011] Queensland Supreme Court 243.
796 *Cf.* Nichol v. Nichol, [2017] Queensland Supreme Court 220.
797 Crawford (n 82); Shah and others (n 82) 407 ff.
798 Zimmermann (n 22) 471 ff.
799 Hirsch, 'Technology Adrift: In Search of a Role for Electronic Wills' (n 83) 846; Gerry W Beyer and Katherine V. Peters, 'Sign on the [Electronic] Dotted Line: The Rise of the Electronic Will' (2019) 1 Wills Trusts & Estates Law eJournal.
800 Na Crous, *A Comparative Study of the Legal Status of Electronic Wills* (North West University 2019) 35.
801 ibid. However, the law was finally enacted.
802 *Cf.* Sasso (n 30) 169 ff.
803 Reid, De Waal and Zimmermann (n 31) passim.

tems, some of the detailed solutions vary considerably.[804] This has been a significant problem in recent times. The divergence between the different systems of succession law has major practical consequences, particularly in connection with so-called cross-border successions.[805] This phenomenon occurs mainly where a testator holds his estate in several countries (jurisdictions).[806] This raises the question of which law (the law of which country) should be regarded as applicable to the succession, including for instance for the assessment of whether the last will has been drawn up correctly and will produce the intended legal effects, and therefore for the assessment of its formal and substantive validity.[807] As regards the formal validity of a will, it should be pointed out that it is theoretically possible, and frequently encountered in practice, for a testator to draw up a will in a form which is unknown in the legislation which will be applicable under private international law to his succession. There are at least several possible solutions to this situation.[808] Since these problems were recognised some time ago, they have led, among other things, to certain international instruments which attempt to remove the boundaries between the national systems of succession law.[809]

In this respect, it should be pointed out that on 5 October 1961 the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions was adopted. Its aim was to facilitate the maintenance of the validity of wills.[810] In order to be formally valid, a will had to be drawn up in a form which complied with the requirements of the internal law of the place where it was made, of the nationality of the testator at the time when the will was made or died, of the testator's domicile or habitual residence or of the location of immovable property (Article 1 of the Convention). The practical operation of the Convention has been and con-

804 Crawford (n 36) 270 ff.

805 Mariusz Załucki, 'The Future of Succession Law in the EU. A Proposal' in C Santos Botelho and F da Silva Veiga (eds), *Future Law* (2018) 582 ff.

806 Andrzej Mączyński, *Dziedziczenie testamentowe w prawie prywatnym międzynarodowym. Ustawowe i konwencyjne unormowanie problematyki formy* (Uniwersytet Jagielloński 1976) 16 ff.

807 Raventos (n 519).

808 *Cf.* Jeffrey Talpis, 'Freedom of Cross-Border Estate Planning: Anticipated Problems' (2016) 22 Trusts & Trustees 119, 119–131.

809 Mariusz Załucki, *Uniform European Inheritance Law. Myth, Dream or Reality of the Future* (AFM Publishing House 2015) 79 ff.

810 *Cf.* Donald G Casswell, 'The Conflict of Laws Rules Governing the Formal Validity of Wills: Past Developments and Suggested Reform' (1977) 15 Osgoode Hal Law Journal 165.

tinues to be extremely useful for testators with assets in more than one country, as it makes it possible to dispose of these assets by means of a single will.[811] However, the practical application of the Convention rules is complicated.

Another step towards an attempt to harmonise the issue of the form of a will was taken at an international conference held in 1973 in Washington. It adopted the Convention providing a Uniform Law on the form of international will. The Convention introduces a new form of will into the national law of the States Parties: the international will.[812] An international will is a written testament, written in any language by hand or by any other means, not necessarily by the testator, who, in the presence of two witnesses and a person empowered to act in connection with the drafting of the international will declares that the document presented is his will, and is then signed by the testator, the witnesses and the person empowered. Like the 1961 Hague Convention, the purpose of this convention is to ensure that the last wills of testators are respected as far as possible. The difference, however, lies in the fact that the Washington Convention provides for an additional form of will - the international will. The application of this form in specific cases makes it unnecessary to seek the law applicable to the assessment of the validity of the testator's last will. However, the effectiveness of this instrument is not great, as it is not particularly popular.[813]

Over the years there have also been various regional attempts to harmonise the various systems of succession law, including the issue of the form of a will. An example of this type of activity is the American *Uniform Probate Code* of 1969, which has been amended several times, introducing, *inter alia*, a proposal to unify provisions concerning the form of a will in the territory of the United States of America.[814] The current wording of § 2-502 of the *Uniform Probate Code* distinguishes between two forms of

811 Andrzej Maczynski, 'La revocation du testament ' a la lumiere de la loi sur le droit international prive et de la Convention de La Haye sur les conflits de lois en matiere de forme des dispositions testamentaires' 19 Polish Yearbook of International Law 85.

812 *Cf.* Jack N Sibley, 'Convention Poviding a Uniform Law on the Form on an International Will: Problems with State Probate Law' (1974) 4 Georgia Journal of International and Comparative Law 422.

813 Załucki, *Uniform European Inheritance Law. Myth, Dream or Reality of the Future* (n 809) 90.

814 *Cf.* Lawrence W Waggoner, 'The Revised Uniform Probate Code' (1994) 5 Trust & Estates 18.

wills: a written will executed in the presence of witnesses or a notary public and a holographic will.[815] This regulation, however, constitutes a kind of "background" to the legislation on succession law. Of particular importance is the provision of § 2-503 of the *Uniform Probate Code* introducing the so-called "*harmless error*" rule.[816] As the doctrine points out, the formal requirements imposed on wills since the time of this provision are therefore not of an essential nature; they are merely a guide.[817] According to this solution, the most important thing is the testamentary intention, regardless of its form.[818] Although not all state legislatures in the United States of America have chosen to adopt the solutions proposed in the *Uniform Probate Code*, they provide valuable comparative material, particularly in the context of a regulation which allows for the validity of a will which does not meet all the formal requirements of the law. The same can be said about other variations of the *substantial compliance* doctrine, however they are not widely harmonized. The existing differences raise many questions.

Attempts to harmonise succession law have also been made in the European Union.[819] Although initially the matter was considered to be outside the competence of the EU legislature, after the European Union set itself the objective of maintaining and developing an area of freedom, security and justice in which the free movement of persons is ensured (Art. 3 par. 2 TEU) it became necessary, in order for such an area to function properly, to adopt private law measures with cross-border implications.[820] This was necessary for the proper functioning of the common market, as the international conventions known so far did not solve the problems of cross-border succession. Work on a European instrument in matters of succession was therefore announced as early as 1998 in the so-called Vienna Action Plan, and the current result is the *EU Succession Regulation* No. 650/2012.[821]

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815 Mann (n 7).

816 Bonfield (n 260).

817 *Cf.* Miller, 'Reforming the Formal Requirements for the Execution of a Will' (n 90); Miller, 'How Harmless Is Harmless? An In-Depth Look Into the Harmless Error Rule' (n 472); Crawford (n 36).

818 Wendel, 'Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?' (n 122).

819 Alain-Laurent Verbeke and Yves-Henri Leleu, 'Harmonization of the Law of Succession in Europe' in AS Hartkamp and others (eds), *Towards a European Civil Code* (Kluwer Law International 2011) 459–479.

820 Elise Goossens and Alain-Laurent Verbeke, 'De Europese Erfrechtverordening' [2012] Themis 105.

821 Paul Lagarde, 'Les principes de base du nouveau du règlement européen sur les successions' [2012] Revue Critique de Droit International Privé 691.

This instrument primarily regulates issues of private international law, and in this context also concerns the forms of testamentary dispositions, but only written ones. The Regulation explicitly excludes its application to the formal validity of oral dispositions of property upon death (Article 1(2)(f)), while it regulates the form of dispositions of property upon death made in writing (Article 27).[822] The provision of Art. 27 of the Regulation provides that a disposition of property upon death made in writing shall be valid as regards form if its form complies with the law: a) of the State in which the disposition was made or the agreement as to succession concluded; b) of a State whose nationality the testator or at least one of the persons whose succession is concerned by an agreement as to succession possessed, either at the time when the disposition was made or the agreement concluded, or at the time of death; c) of a State in which the testator or at least one of the persons whose succession is concerned by an agreement as to succession had his domicile, either at the time when the disposition was made or the agreement concluded, or at the time of death; d) of the State in which the testator or at least one of the persons whose succession is concerned by the agreement as to succession had his habitual residence, either at the time when the disposition was made or the agreement concluded, or at the time of death; e) in so far as immovable property is concerned, of the State in which that property is located.[823] It should be added, however, that pursuant to Article 75 of the Regulation, the States Parties to the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions continue to apply the provisions of that Convention instead of Article 27 of the Regulation. So far, however, Regulation has not prompted any wider reflection, either academic or jurisprudential, in the context of wills formalities.

In addition to the above, European doctrine is beginning to discuss the need for a uniform substantive law of succession in the European Union, highlighting the ineffectiveness of harmonisation in the area of private international law alone.[824] One of the proposals in this debate is the adoption in future of a single law on succession for the countries of the Euro-

822 Tito Ballarino, 'Il nuovo regolamento europe sulle successioni' [2013] Rivista di Diritto Internazionale 1116.

823 Katarzyna Anna Dadańska and Krzysztof Kubasik, 'Forma rozrządzeń na wypadek śmierci po wejściu w życie Rozporządzenia Parlamentu Europejskiego i Rady (UE) nr 650/2012 z dnia 4 lipca 2012 roku' [2014] Problemy Prawa Prywatnego Międzynarodowego 9.

824 Laura-Dumitrana Rath-Boşca, Loredana Mirela Barmoş and Ioana Andreea Stănescu, 'The Need to Harmonize the Laws of the European Union Regarding

pean Union and, as part of this law, uniform rules on the form of a will based on the construction of a holographic will, an international will or any other.[825] Over the years, testamentary succession has thus evolved throughout the world according to the needs of society. This development is thought to be linked to an important worldwide trend. Namely, testamentary succession is the preferred means by which property passes to another person after the death of an individual.[826] The forms of wills and the rules governing them should make it possible, indeed encourage, an individual to make a last will. However, only legislation that is effective, forgiving of innocent mistakes, will be able to meet the needs of society. The degree of complexity of the various legal solutions, including doubts as to the applicability or otherwise of particular international conventions, is undoubtedly one of the stimuli for the further search for a solution that would make it possible to achieve the objective of increased use of the last will as an instrument of succession planning. Therefore, wills formalities regulations need modernisation.[827] Ideally, this modernisation should be of a universal nature, allowing the same approach in different legal systems. It seems that such a possibility exists.

As it has been argued so far, the provisions on the form of a last will have four basic functions. While preserving these functions, it is not only possible to take a rigorous approach, but also a flexible one which will still ensure that the provisions on the form of a last will achieve all their objectives. Reliable proof of the testator's intentions, acting without pressure from third parties and with a purpose, while at the same time the testator understands the seriousness of the act being performed, are values which should not be departed from when designing solutions for testamentary succession. However, in order for these values to function properly in practice and for the succession to be based on the testator's true will, it is necessary to create flexible rules which take account of the testator's state of knowledge and habits. If the testator wishes to use a particular method to record the last will and testator's intentions in such a way as to give effect

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the Succesion Law' [2016] Agora International Journal of Economical Sciences 35.

825 Załucki, *Uniform European Inheritance Law. Myth, Dream or Reality of the Future* (n 809) passim.

826 *Cf.* Harris (n 622).

827 Renzo E Saavedra Velazco, 'El Anteproyecto de Reforma al Código Civil y los negocios juridicos mortis causa' (2019) 64 Actualidad Civil 43; Załucki, 'About the Need to Adjust the Regulations Regarding the Form of Will to the Modern Requirements' (n 14).

to these values, the law should not limit it. In doing so, it encroaches upon the sphere of freedom of disposal of property, protected at the constitutional level, which, as is well known, means that the legislator must ensure such instruments that will allow the last will to be reflected after the testator's death.[828] Forcing the testator to use for this purpose only, for instance, the services of a notary seems to be an over-reaching restriction that certainly does not realise the principle of freedom of will. For this reason, legislators should seek instruments that implement the freedom of testation and, at the same time, all the values that guide testamentary succession. The way in which the testator's last will is recorded should be irrelevant and technologically indifferent, depending only on whether it allows the testator's last will to be preserved in a secure manner and whether it can be reconstructed after the testator's death. Whether this medium is a piece of paper or a computer cloud, and whether the testator's will is expressed orally or manually or in any other manner, should be irrelevant. Only then it is possible to speak of a desire on the part of the legislator to reflect the testator's real will and to create mechanisms enabling it to be carried out.[829] This is the route to be taken by the various systems of succession law.

In this context, it should also be noted that a testator who draws up a private will is usually convinced that he knows what he has done and thinks that he has done it in no uncertain terms[830]. Ironically, however, these supposedly clear formulations may be interpreted quite differently in the course of legal proceedings. On the other hand, a testator who entrusts the drafting of a will to a professional may - no matter how long individual provisions are explained to him - not be able to understand their meaning. Again, ironically, such a will cannot usually adequately express his desires as to how his estate should be distributed.[831] The relationship between words and intention thus appears to be one of the most significant problems of will interpretation.[832] In fact, it is a question of solving two differ-

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

829 *Cf.*, however: Roger Kerridge and others, *Making a Will* (Society of Legal Scholars 2017).

830 Mark Glover, 'A Taxonomy of Testamentary Intent' (2016) 23 George Mason Law Review 269.

831 Pierre Ciotola, 'Des principes usuels d'interprétation des testaments et les décisions rendues en 2007' (2018) 110 Revue du notariat 37.

832 Karen J Sneddon, 'In the Name of God, Amen. Language in Last Wills and Testaments' (2011) 29 Quinnioac Law Review 665.

ent problems: the problem of discovering the testator's desires, that is to say of ascertaining the deceased's intention, and the problem of neutrally bringing them to fruition. The primary task of interpreting a will is to ascertain and give effect as fully as possible to the intention of the deceased.[833] The construction of provisions of the law of succession should make such interpretation possible. Where in a given case it is undoubtedly that the testator acted with *animus testandi*, it should be the task of the authority applying the law and settling the succession to reflect his wishes and not to emphasise the existence of formalism. The law must allow for this. Therefore, replacing strict formalism with a flexible approach is a necessary further development of succession law. Continuing to adhere strictly to formal requirements at the expense of the testator's true but informal intention appears to be incorrect. The development of new technologies will only reinforce the incorrectness of the formalistic approach to succession law. A flexible approach is needed, introducing a mechanism that will once and for all allow succession law to become predictable, technologically independent, regardless of the legislator's perception of the changes taking place, treating the last will as the main instrument for transferring property in the event of death. How to achieve it?

3. *Solution to reconcile functional approach and formalism*

On the basis of the initial assumptions that the statutory provision concerning the form of a will should be technologically irrelevant, serve to record the testator's last will, allow the last will to be reconstructed some time after the testator's death and fulfil the four basic functions of this type of provision (evidentiary, channelling, cautionary, protective), having due regard to the testator's intention, it is possible to formulate a proposal for a universal statutory provision that would reconcile the requirements and values indicated. The main problem in applying the law of succession in practice is the serious divergences between legal systems, which, in the case of a testator living in several jurisdictions, can be confusing in the context of the valid preparation of a disposition of property upon death. There is convincing evidence, supported by doctrine and case law and discussed so far, that the starting point for any instrument to reflect the testator's last will is a tool to convey the testator's actual last intention, irrespective of how it is recorded. Mechanisms based on the doctrine of *substantial compli-*

833 Joseph Warren, 'Interpretation of Wills' (1936) 49 Harvard Law Review 689.

ance and its variations, as well as other internationally known methods of mitigating formal requirements, are generally agreed to the effect that an essential element of the validity of a will is a recorded *animus testandi* with testator's declaration of intention. The same is also true for the *strict compliance* jurisdictions. Regardless of whether the testator made a will in Australia, New Zealand, Canada, South Africa, the United States of America, England, the Netherlands, France, Austria, Germany or Poland, the element which always appears as a legal requirement of a will is the testator's declaration of last will (intention) and its preservation. In view of the fact that a will is generally drawn up some considerable time before the testator's death, the form in which it is recorded must allow the last will to be reproduced some time after the testator's death. As a rule, all legal systems which regard the will as an instrument for disposing of property in the event of death place the emphasis on this part of testamentary succession. However, the implementation of the act of preservation varies from one legal system to another, although in many cases the differences are not fundamental. Nevertheless, current reality can and does lead to situations in which a will validly drawn up in one country is deemed invalid in another. This is due to the fact that different legislators have a different approach to the issue of form and some of them are more flexible than others. Such a state of affairs seems undesirable, particularly as the foundation of the legal arrangements for testamentary succession is the same everywhere. As a matter of principle, testamentary succession as a process does not differ, and one would think, should not differ, from the death of a testator in Europe or in America or Australia. There are, of course, differences in the process of acquiring succession to all the rights and obligations of the deceased, but these should not be decisive in matters as fundamental as wills. There can be no doubt, however, that the most appropriate solution for ensuring legal certainty in succession law would be a global uniformity of all succession procedures, but this is clearly not possible in the current state of affairs, both because of the different traditions and customs and simply because of the different needs of certain societies. This does not mean, however, that mechanisms cannot already be developed to bring such uniformity closer. In the context of testamentary succession this is possible because, in fact, the practice of *strict compliance* and *substantial compliance* has more and more in common. This is also recognised by the doctrine, which is increasingly bold in its search for solutions conducive to the maintenance of wills (as valid wills). Of course, this is also a consequence of the judicial activity of the courts, which, seeing the injustice of

certain normative solutions, are looking for various ways to resolve the resulting impasse.

One example of this is the law in the Canadian province of Ontario, where the need for a greater latitude in validating or rectifying an improperly prepared will was recently raised, and where a person making a will is formally required to meet all of the legislated formalities relating to the making of a will (*strict compliance*). Despite this state of affairs and the unambiguous wording of the provisions of the law (section 3-4 of the *Succession Law Reform Act*), the courts have tried to mitigate the effects of the law. For example, in *Sisson v. Park Street Baptist Church* the court has stated that "the absence of legislation on point should not stop the court from developing the *common law* where there has been *substantial compliance* given that the dangers which two witnesses are to guard against does not exist".[834] This view was recalled, *inter alia*, in the 2020 discussion about the future of the testamentary succession in this province, taking into consideration whether it is time for Ontario to change from *strict compliance* to a *substantial compliance* regime for wills legislation.[835] The discussion still continues and of course Ontario is not the only example of it. However, it is another incentive to think about comprehensive reform of wills formalities, and to take the needs of testators into account in designing the wills formalities law.[836] Thus, even in the countries that are already familiar with the doctrine of *substantial compliance*, there is a need for further legislative changes, and solutions based on the doctrine of *substantial compliance* and its variations are only one possibility.

Another possibility, which seems more reasonable at the moment, is to modify the current provisions on the form of the will in order to remove their characteristics as being dependent on any method of making and preserving the last will. The law should be flexible in this respect and require, in order for the will to be valid, that the last will be made and preserved in such a way as to enable it to be reproduced after the testator's death, but it should not prescribe a particular manner of making the declaration and

834 *Sisson v. Park Street Baptist Church*, [1998] 71 O.T.C. 35 (GD).

835 James Jacuta, 'Is Substantial Compliance in Ontario's Future?' (2020) <https://hullandhull.com/2020/08/is-substantial-compliance-in-ontarios-future/> accessed 21 January 2021.

836 Andrea Hill and Turkstra Mazza, 'Strict versus Substantial Compliance with Statutory Formalities for Wills' (2020) <https://www.hamiltonlaw.on.ca/Web/About-the-HLA/HLA-Journal-Articles/Estates---Trusts-Journal-Artices/Estates_Law_News_Strict_versus_Substantial.aspx> accessed 21 January 2021.

the means of preserving it.[837] That should be irrelevant. Irrespective of whether a testator chooses to use the written or handwritten technique, to make a declaration of intent to an official person, to record the last will in the cloud or using blockchain technology, or in any other way, as long as it is possible to recreate the testator's last will after his death and such action allows the importance of the four essential functions of a will to be fully taken into account, such way of preparing a testator's disposition of property upon death, should be permitted.[838]

The main argument why this kind of proposal seems to be a more appropriate solution than the widespread adaptation of the doctrine of *substantial compliance* or variations thereof is linked to the fact that the latter solutions depend on the existence of various forms of will, or a certain form of will, which the testator is unable to satisfy by making a will, so they are made to rectify mistakes.[839] The idea behind this proposal, however, is to eliminate mistakes at the very first stage of drafting a will, when decisions are made on how to make a last will and how to preserve it. There is no convincing evidence that this has to be done in any of the ways indicated in the current legislation, which are usually by holographic means or with the participation of an official person or witnesses. Any other way is equally good, as long as the basic functions and values of dispositions upon death are reflected. Moreover, solutions based on the doctrine of *substantial compliance* usually serve to rescue only those forms that were the basis for the drafting of a will in Anglo-Saxon countries, and therefore aim primarily to remedy the shortcomings of writing or witnessing a will, which does not seem to be sufficient at present.[840] While the requirement to keep the form of a will shall continue to appear in the law, it is difficult to reduce it to a mere requirement of writing or witnessing a will, when any other form of preservation of a testamentary intent shall be sufficient, if it meets all the necessary standards. For this reason, a variation on the regulation of the form of a will may consist of a combination of both models: *strict compliance* and *substantial compliance*. On the one hand, certain

837 Załucki, 'Forma testamentu w perspektywie rekodyfikacji polskiego prawa spadkowego. Czas na rewolucję?' (n 35) 46–47.

838 However, see: Victoria J Haneman, 'The Disruptive Potential of Blockchain in the Law of Wills' [2020] Trust & Estates 2.

839 du Toit, 'Remedying Formal Irregularities in Wills: A Comparative Analysis of Testamentary Rescue in Canada and South Africa' (n 7).

840 See, for example, the abovementioned case law form the United States of America. *Cf.* Dorman (n 134); Horton, 'Partial Harmless Error For Wills: Evidence From California' (n 501).

minimum formalities should be required, while, on the other, the primary objective should be to reflect the testator's last intention,[841] as convincingly expressed. This can be done more easily and precisely than through the use of an additional, supplementary mechanism such as one of the mechanisms for rectifying wills based on the doctrine of *substantial compliance*.

In such a model of testamentary succession the emphasis would be differently distributed. 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, 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.[842]

It seems that the implementation of such model testamentary succession regulations would depend on the configuration of the proposed solution. If the future statutory regulation in this area were to be shaped in general terms, what seems necessary and appropriate, 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 any conduct which reveals his declaration of will sufficiently, and his declaration is preserved on any medium which makes it possible to reflect it in a way which allows the person making this declaration to be identified*".

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. In this case, there would be no need for further development of the provisions on form and no need to consider whether the current opportunities created for legislators should be supplemented in the light of technological change and the needs of society. This proposal reconciles the *strict compliance* doctrine with the *substantial compliance* doctrine, and causes that no other regulations concerning testamentary formalities shall be nec-

841 Crawford (n 36) 294.

842 This idea combines all the basic functions of the provisions on the form of a will, see: Gulliver and Tilson (n 34) 2 ff.

essary to ensure that the testator's intentions are carried out.[843] 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,[844] 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 based.[845] Such a change is part of the trend of an informal view of today's private law relations.[846] 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 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

843 *Cf.* Gray (n 130) 340 ff.
844 Szostek (n 601) 26 ff.
845 Dvoenosova (n 611).
846 Thomas Nachbar, 'Form and Formalism' (2018) 1 University of Virginia School of Law Public Law and Legal Theory Research Paper Series 36 ff.

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 protective function of the provisions on form, and it could be discussed whether the regulation designed in this way would perform also the chanelling 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. It may also be tempting to apply a solution known for example from Dutch law, which assumes that a will is invalidated by the action of a person having a legal interest in it, rather than being automatically invalid.

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* and testator's intent,[847] 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.[848] 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.[849]

It is therefore in this context and to this extent that changes to the law of succession should be called for. Legislation based on the concept of *strict compliance*, which customarily provides for a broad catalogue of possible

847 Langbein, 'Substantial Compliance with the Wills Act' (n 10) passim.
848 Aloy (n 17) 11 ff.
849 Purser, Cockburn and Crawford (n 9) 13 ff.

forms of will, would not need to give further consideration to the legitimacy of introducing electronic or blockchain-based wills.[850] The proposed solution would make it possible for wills to be drawn up in this way as well. In the first place, the proposed solution therefore has the advantage of making the provisions on the form of wills technologically neutral. Whether it is a handwritten will, a witnessed will, an official will or a video will, the proposed wording of the provisions on the form of wills would enable all of them to be validly drawn up. In principle, there is also no need to "cure" the declaration of last will, on the basis of the *substantial compliance* and similar solutions, as the proposal would introduce a high degree of discretion and neutrality in terms of the testator's actions to transfer his estate upon death. Such arrangements could also be dispensed with, thereby eliminating, among other things, the conflicts which can arise in some jurisdictions as a result of the application of such provisions. This can be seen, for example, in a case decided recently in the United States of America, where on December 16, 2020, the Supreme Court of Ohio's decision in the case *Estate of Shaffer*[851] reversed the Sixth District Court of Appeals and settled ambiguity pertaining to a witness's ability to inherit under a will. The ambiguity at issue was between the "interested-witness rule" (section 2107.15 of Ohio Revised Code) and the "*harmless error* rule" (section 2107.24 of Ohio Revised Code). The interested-witness rule voids any gift in a will made to a person who is one of the witnesses to the will.[852] The *Shaffer* decision addressed whether this rule applies to wills whose validity relies on the *harmless error* rule.[853] The probate court rejected the application to admit the will to probate. The second instance court reversed and found the will could be admitted to probate under the *harmless error* rule stating that the gift to the beneficiary-witness did not need to be voided by the interested-witness rule because the *harmless error* rule empowered the probate court to "evaluate the credibility of the interested witness and weigh the evidence." However, in reversing the appellate decision, the Supreme Court of Ohio held the interested-witness rule applies both to wills executed in compliance with section 2107.03 of Ohio Revised

850 Hirsch, 'Technology Adrift: In Search of a Role for Electronic Wills' (n 83) 846 ff; Röthel (n 1) 62 ff.

851 Re Estate of Shaffer, [2019] Supreme Court of Ohio 0364.

852 Adrian S McGee, 'Revisiting Ohio's Harmless Error Statute - Saving Grace or Unintended Loophole?' (2019) 29 Probate Journal of Ohio 233.

853 *Cf.* Matthew Hochstetler, 'Where There's a "Will," There's a Way: The Harmless-Error Rule, Interested-Witness Rule, and In Re Estate of Shaffer' (2020) 30 Ohio Probate Law Journal 202.

Code and those submitted pursuant to the *harmless error* rule. There are certainly many examples of similar doubts about the application of the doctrine of *substantial compliance* and its variations,[854] while the statutory solution shall be intended to simplify the system of testamentary succession, not to complicate it. A one-stage assessment of the validity of dispositions of property upon death would seem to be a more efficient solution, especially since in the Ohio's case it seems more desirable to keep the will in force as a valid will, since the purpose of the legislation is to reflect the will of the testator in the first place (and it seems that the approach of the second instance court leaving this matter to be assessed in the succession proceedings is a turn toward that direction).

The proposed solution should also not be regarded as a complete informalisation of the will. A total departure from formalism could lead to a blurring of the boundaries between valid and invalid wills, between a will and a draft or other document.[855] The proposed solution runs no such risk. The wording of the proposed provision, with its emphasis on the testator's expression of a testamentary intention manifested by his conduct, the possibility of identifying the testator and of reconstructing the last will after his death, as mandatory requirements in any will, should prove sufficient to establish with a degree of probability verging on certainty that there is a last will in the case in question. Comparing this solution with the provisions currently in force regarding, for example, the validity of oral or holographic wills, the proposal seems to entail no bigger risks than the provisions already in force.[856] It certainly brings a breath of fresh air to models based on ancient models. By means of the proposal, the possibility of seeking to uphold the testator's last will and testator's actual will appears wider. The drafting of wills would become simpler and formal obstacles would no longer constitute a barrier to the assessment of whether a will is valid in substance, i.e. made with the *animus testandi*. It is this last element that is the most important in a testamentary succession, just as the reflection of the testator's last will is the most important value of succession law to be pursued. Such a proposal also ensures the widest possible freedom of testation, enabling the testator to freely dispose of his property upon death.

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854 *Cf,* e.g.: Wendel, 'Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?' (n 122) 361–363.

855 Holmes (n 261).

856 Brown (n 107).

In assessing the reasons why the doctrine of *strict compliance* and its variations persists in the various jurisdictions rejecting the doctrine of *substantial compliance*, including the assumption that the formalities of execution ensure, *inter alia*, that the "will was executed by the person purporting to be the testator and prevents a ne'er-do-well from impersonating the testator or someone from forging the testator's signature",[857] it can be accepted that the presented solution will also counteract this risk. The basis for assessing whether there is a will would be to determine whether, in the particular case, the testator expressed his testamentary intention. A similar consideration can be given to the levelling of the threat of fraud, undue influence and coercion. Although, of course, such action cannot be ruled out in the case of certain methods of making a last will, this is also characteristic of current forms of will (e.g. holographic).[858] The obligation to express and preserve a last intent would also create the possibility of enhancing the testator's appreciation of the importance of the action being performed.

The testator's intention, as a result of the proposed amendment, would become a fundamental element of the testamentary process, the reflection of which would not be hindered by unnecessary formalism.[859] The conflict of intention v. formalism would be resolved in favour of intention, with the proviso that without a minimum of formality it would not be possible to recreate the intention. In such a case, i.e. without any formal successful attempt to preserve the intention, it would not be possible to speak of a will at all. In order to consider that there is a will in a given succession case the intention of the testator and the minimum formalities described as "revealing declaration of will sufficiently" and "preserving declaration of will on a medium which makes it possible to reflect".

In this light, the proposed solution would appear to be capable of becoming a stand-alone provision governing the form of a will, being a flexible approach to the wills formalities, taking into account the interests of society and performing all the functions which the law of succession envisages for the provisions on the form of a will. It has the ability to reconcile

857 *Cf.* Charles Wagner, 'Have Ontario's Courts Dispensed with Strict Compliance with the Formalities of Execution?' (2012) <https://www.wagnersidlofsky.com/have-ontarios-courts-dispensed-with-strict-compliance-with-the-formalities-of-execution> accessed 21 January 2021.

858 However, as may be thought, extrinsic evidence can help to solve these problems if they arise. These arrangements shall, to a large extent, depend on the active involvement of the parties to the proceedings concerned.

859 Marsal Guillamet (n 635) 2 ff.

two seemingly contradictory approaches, i.e. *strict compliance* and *substantial compliance*.

4. Towards functional wills formalities

The considerations so far have shown that it is possible to design a single legal instrument which would have the effect of increasing the influence of the intent of the testator on the succession. This instrument would be technologically independent and essentially based on testamentary intent, a value of paramount importance in succession law.[860] There is no doubt that a solution such as the one proposed would allow a respite from the excessive formalism of the current statutory solutions dealing with wills formalities, while taking into account the hitherto known and acknowledged important functions of provisions of this kind. By introducing the proposed instrument, the legislator would strike a balance between formalism and intention, adapting the rules of succession law to the times and requirements of society.[861] Against this background, the problems of the place where the signature is affixed, where witnesses are revealed or where the last will is declared and around whom etc. would give way to an examination of whether, in a given case, we are dealing with the real last intention of the testator, expressed in a convincing manner. Such a solution seems desirable.

In order to make this kind of change to the succession law, it is worth considering whether it is possible on a wider scale, whether it has a universal dimension, or whether it is intended solely for one legal system. When analysing the issue of the form of a will against the background of selected legislations, it should be noted that it is being increasingly frequently argued that an important feature to be met by the regulations on form is to enable the testator's last will to be reproduced as accurately as possible. Hence, in some legal systems, a certain relaxation as regards form may already be observed, particularly in situations where the determination of the testator's will by evidence external to the will is beyond doubt. In this connection, it should be reminded that there is a general trend worldwide towards the informalisation of testamentary dispositions, as presented above. It is accepted that the reflection of the testator's last will, rather

860 Eccher (n 57) 47 ff; Wendel, *Wills, Trusts, and Estates* (n 26) 146 ff.

861 Anne Alstott, 'Family Values and the Law of Inheritance' (2009) 7 Socioeconomic Review 145.

than the requirements as to form, is one of the main priorities of modern succession law. In this direction, it should therefore be noted that testamentary dispositions are increasingly being made in such forms as to allow the testator's will to be carried out without raising doubts as to the authenticity of the *mortis causa* disposition in question, and only afterwards should the rigours concerning non-compliance with the form be formulated.[862] For this reason, the proposed amendment appears to be in line with this type of trend, both in *strict* and *substantial* compliance approaches. Therefore it seems like it is able to be accepted on a wider scale, not only in one legal system. The proposal is intended to be uniform and capable of implementation to any legal system. It is designed to be universal.

In assessing the scope of the required changes in the law of succession of any country, it appears sufficient to frame the provisions on the form of a will in such a way as to give them the shape proposed here, while dispensing with the other provisions on the form of a will which appear in the various legislations (i.e. the provisions on holographic wills, the provisions on official wills, etc.). As a model of provisions on the form of a will, the proposed solution is capable of replacing the existing solutions in this area. There is no need to place it alongside the current forms of will, as the proposal would allow wills to be validly drawn up in each of these forms. The proposal is self-sustaining. It is also intended to be used in any legal system that recognizes the idea of wills formalities and its functions.

The proposed solution is therefore not a rule proposed for an international instrument, but rather a model rule to be emulated, similar in nature to those used in some model legal systems, such as the *Uniform Probate Code* or an analogous act, in which it could be successfully introduced. In this respect, one would rather count on so-called spontaneous harmonisation in practice,[863] i.e. a situation in which one legislator decided on a revolution of this kind and others followed suit.[864] Looking at the current legislations in this area, it seems that this should be another step in adapting the law of succession to the requirements of modern times. A step that seems necessary and is able to revolutionize the current law on testamentary succession.

I therefore propose that the provisions on the form of a will, regardless of longitude and latitude, should be given the wording proposed here. The

862 du Toit (n 99) 159 ff.
863 *Cf.* Beckert (n 24).
864 Stefan Leible, *Wege zu einem Europäischen Privatrecht* (Universitat Bayreuth 2001) 19 ff.

model of the form of a will indicated and designed here can function independently in practice (or perhaps be supplemented by elements such as marking a disposition in time and space which I propose to settle in academic discussion). It would make inheritance law more socially friendly. The need is to reflect testators will as much as possible[865] and this seems a proper instrument to achieve this goal.

Under the new arrangements, the technical conditions of a will would become a solution based explicitly on testamentary intention. The testator, before drawing up the will, should decide on a medium preserving the declaration of his last will. Then, after the declaration is expressed, the testamentary act should end and the will stored in any medium should share the fate of the other forms already known, i.e. be preserved in some way. Such a will would enter normal legal circulation and would be subject to the same rules as those currently in force. It could therefore be revoked, modified or deposited etc.[866] One of the elements of the proceedings for the probate of the estate would be to reflect the contents of the will and, if this were possible, such a will would potentially be eligible for assessment as to whether it contained all the other necessary elements. There's no need for more formalities, since this model solution realize all the basic functions of the wills formalities regulations.

When considering the above, let's try to look at the proposed solution from the perspective of different legislations and decide whether it can fit into them. In this respect, of course, it would be extremely difficult to trace the fate of the proposed provision on a large scale, but it seems sufficient to focus on a few selected legal systems that approach the problems of wills formalities differently. Examples are the legislation of Poland and the legislation of the Canadian province of Ontario (variations of *strict compliance*) and the legislations of the American state of Ohio and the Australian state of New South Wales (variations of *substantial compliance*). From the perspective of these solutions, a will executed by a testator using a smartphone will be assessed,[867] assuming that it meets all other requirements for validity and that the only doubt concerns its form. The choice of this method of preparing a will seems to be all the more appropriate given that the smartphone is nowadays one of the most frequently used tools for

865 Cobas Cobiella and de Joz Latorre (n 92).
866 Rivers and Kerridge (n 753).
867 By a smartphone will I mean a will registered by means of this device, irrespective of the manner in which the testator makes his last will declaration (one can imagine it to be done by oral, textual, audio, video, etc. declaration).

interpersonal communication and one can imagine the desire to use it also for legal succession purposes.

Starting with the Polish law, it should be noted that this form of a will is not covered by the current legal regime, as it is not a holographic will (Article 949 of the *Kodeks cywilny*), a notarial will (Article 950 of the *Kodeks cywilny*) or an allographic will (Article 951 *Kodeks cywilny*), nor does it come under the heading of specific wills (Articles 952-954 of the *Kodeks cywilny*). In the current state of normative law, the preparation of such a will (smartphone will) would lead to its invalidity (art. 958 of the *Kodeks cywilny*).[868] After the introduction into Polish law of the provision that should replace the provisions indicated above: "*The testator may create a will in such a way that he expresses his testamentary intention by any conduct which reveals his declaration of will sufficiently, and his declaration is preserved on any medium which makes it possible to reflect it in a way which allows the person making this declaration to be identified*", the situation would change. What would be assessed under this provision would be primarily the manner of expression of the testamentary intention and the possibility of its reflection after the testator's death. This expression could take a variety of forms (e.g. oral, textual, video). In this respect, there would be no obstacle to considering such a will made on a smartphone, irrespective of the manner in which the last will was expressed, as valid.

Similarly, under current Canadian Ontario law, a smartphone will would be considered invalid. According to the Section 3 of the *Succession Law Reform Act* 1990 (Chapter 26), a will is valid only when it is in writing. It can be either attested by witnesses (Section 4) or holograph (Section 6).[869] Against this background, making a will on a smartphone does not appear to be sufficient to meet the validity requirement. It is only with the introduction of the new provision in the proposed wording would a will made on a smartphone be capable of being upheld.

According to the Ohio's law, except oral wills, every will to be valid shall be in writing and attested, but may be handwritten or typewritten (*Ohio Revised Code* section 2107.03). Also, an oral will, made in the last sickness, shall be valid in respect to personal property if reduced to writing and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words (*Ohio Revised Code* section 2107.60).[870] Against this background, it would seem that a will made on a smartphone

868 *Cf.* Gwiazdomorski and Mączyński (n 530) 113.
869 *Cf.* Jacuta (n 835).
870 *Cf.* McGee (n 852).

would also be invalid. Nevertheless, Ohio's law has a solution based on the *harmless error* rule whereby if a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following: (1) The decedent prepared the document or caused the document to be prepared; (2) The decedent signed the document and intended the document to constitute the decedent's will; (3) The decedent signed the document in the conscious presence of two or more witnesses (*Ohio Revised Code* section 2107.60).[871] Here too, however, doubts would arise as to whether witnesses were present at the time of the testamentary act, which the example does not assume, and which would therefore most likely result in the invalidity of the will prepared on a smartphone. Only if the proposed solution were incorporated into local law would the outcome of the case be different and the will prepared on a smartphone be deemed valid.

The *Succession Act* 2006 of the Australian state of New South Wales provides for wills to be valid that it is made in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time and at least two of those witnesses attest and sign the will in the presence of the testator (Section 6 of the *Succession Act* 2006). Against this background, it is difficult to make a positive assessment of the validity of a will made on a smartphone. However, the document, or part of the document, may form the deceased person's will if the court is satisfied that the person intended it to form his or her will (according to the *dispensing power* solution known to the New South Wales law – Section 8 of the *Succession Act* 2006).[872] By making such an assessment against the background of a will made on a smartphone, the possibility of it being considered validly made will arise, one would think. Finally, there is a document stored on a smartphone. To this end, the court would have to determine whether the document found contains the testator's intentions, whether it was prepared in compliance with the requirements and whether the testator intended to dispose of his estate on death in this way. A similar result could also be achieved by in-

871 ibid.
872 *Cf.* White (n 7).

troducing the solution proposed here into the New South Wales law. It could then replace the provisions relating to the form of wills and their "rescue" mechanism under section 8 of the *Succession Act* 2006. The procedure for ascertaining the estate under the smartphone will, however, would be easier under the proposed provision and would end with the same result. Indeed, the assessment of the validity of the will would be a one-step procedure.

With the above in mind, when analysing the exemplary way in which a will might be prepared, in the light of the legal solutions currently in force around the world, a number of conclusions can be drawn. Firstly, in order to reflect such and similar needs of society, changes to the law would be necessary, which would have to consist in introducing technology-neutral solutions into the law of succession. Secondly, legislators would have to abandon the provisions currently in force, which exemplify the forms of wills currently allowed. Thirdly, solutions to "cure" informal wills based on the doctrine of *substantial compliance* and its variations would lose their relevance. Fourthly, the assessment in each case of whether a testator has made a valid will would become independent of the manner in which the testator has expressed his last intention. Fifthly, each assessment of whether the testator has made a valid will would become independent of the manner in which the last will was preserved. This alone shows that the proposed amendment is rather fundamental and would require a flexible approach to the problems of the form of a will. Some values would have to be reprioritised and testamentary intent, rather than formalism, put first. But this is what the future might look like, which could be judged by many as a revolution. In this "revolution" I am convinced that wills created on a smartphone should be admitted, as long as any other clear and convincing attempts made by a testator to preserve his last intention.

The revolution would exist in the fact that the manner in which the declaration of the last will was made and its preservation would now depend on the technological possibilities available and the imagination of the testator. Of course, to this extent, we should not expect testators to suddenly start using unknown solutions. Rather, the proposed provision is intended to maintain existing standards, but also to allow for the possibility of unusual solutions. Non-typicality is hardly a characteristic to be feared.[873] A testator who genuinely wants his will to be found and reconstructed after his death will tend to use traditional instruments. Tradition in this case, however, does not mean traditional instruments of succession law, but

873 Sneddon, 'Speaking For the Dead: Voice in Last Wills and Testaments' (n 699).

rather traditional instruments of communication. These, as we know, can vary and definitely do vary in practice.

Therefore, is the proposed solution really a revolution and, despite the fact that it may appear to be so at first glance, does it have a chance of success in practice? Everything in this regard depends on the objectives pursued by the specific law of succession. If the legislator considers it an indispensable element of the succession that the last will of the testator be reflected as fully as possible, this is the solution that meets this objective, while performing the basic functions inherent in a testate succession. In doing so, it recognises the same values on which the systems using the doctrine of *substantial compliance* and its variations or the systems using the doctrine of *strict compliance* are based, although it emphasises slightly different elements. The main objective of the law of succession, according to the solution proposed here, would be to base the testamentary succession unequivocally on testamentary intention. Would this really be a revolution?