(3) Practice of the wills formalities regulations in the context of mechanisms to relax its rigour

1. Introductory remarks

The models of solutions used in the selected legal systems, presented so far, aimed at deviating from formal requirements to reflect the testator's last will, are solutions which, in the opinion of many, are a route to follow for the legislators who would like to adapt the succession law to contemporary standards.[368] The possibility to reflect the testator's last will seems to prevail over the formal requirements and the legislators are beginning to notice that it is not the formal rigour that is the most important value of the law of succession.[369] Finally the whole mechanism of the testamentary succession is ultimately about taking into account the testator's last will and not the legislator's hypothetical assumptions.[370] For this reason, often despite criticism, ever new legal systems decide to adopt solutions that lead to the relaxation of the formal requirements of *mortis causa* dispositions.[371] More and more jurisdictions that issue decisions criticized within the society[372] consider this possibility[373] and look for a mechanism to restore the law of succession to its functionality.[374]

Due to the mentioned facts it seems like the law in this area continues to develop and the practice of applying this law presents further chal-

368 *Cf.*, e.g., most recently: Maciej Rzewuski, 'Wykładnia testamentu a okoliczności zewnętrzne towarzyszące testowaniu' (2015) 2015 Przegląd Sądowy 106; Aloy (n 17); Dubravka Klasiček, '21 St Century Wills' (2019) 35 Pravni vjesnik 29; Crawford (n 36).

369 This could have been observed for example in connection with the appearance of the COVID-19 pandemic, considering social distancing measures and the reaction of some legislators to facilitate the execution of wills. *Cf.* Załucki, 'Preparation of Wills in Times of COVID-19 Pandemic - Selected Observations' (n 52).

370 Eccher (n 57) 47 ff.

371 *Cf.* Horton, 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (n 261) 597.

372 *Cf.* Tucker (n 94).

373 *Cf.* Langbein, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' (n 94); Hedlund (n 46).

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

lenges.[375] In the end, it is in practice, and not at the desks of scientists or legislators, that needs arise to which it is possible and sometimes necessary to react. The area of testamentary succession, as it seems, is precisely such an area where, in countries where this has not yet been done, the time for change has come. The solutions well known from the past are not necessarily still adequately functional in a modern society benefiting from the advantages of new technologies and not considering the formalism of their actions.

The practice of inheritance law knows numerous cases of *mortis causa* actions, which at first sight do not comply with the statutory pattern for such actions. In this respect, an important dilemma often arises for authorities applying the law: to seek to reflect the testator's last will or to rely on formal requirements.[376] The first way is to try to keep the disposition in case of death in force at the expense of formal requirements. The latter means the invalidity of the disposition of the last will, not taking into account the bequeather's wishes. Therefore, after the presentation of possible statutory solutions in this respect so far, it is worthwhile to look at how the chosen mechanisms for maintaining the testator's last will are applied in practice, to determine what problems the courts faced and how they dealt with them. This will allow to consider whether the chosen mechanisms actually serve to reflect the testator's last will and whether, on their basis, it is possible to recommend a solution that could constitute a contemporary model system of taking into account the testator's wishes expressed informally.

2. *Selected case-law based on the substantial compliance approach*

The jurisprudence of succession law is faced with various dysfunctions of bequeathers on a daily basis.[377] However, the existing mechanisms are often not sufficient to achieve a satisfactory result. While for many, the effect of reflecting formal requirements is acceptable, the pursuit of such a result at all costs is no longer supported. In other words, the application of a favourable interpretation must have a legal basis for it to take place in prac-

375 Horton and Weisbord (n 52).
376 *Cf.* Brook (n 50).
377 Milos Vukotic, 'Importance of Will Execution Formalities in Serbian Law' in Bojan Milisavljevic, Tatjana Jevremovic Petrovic and Milos Zivkovic (eds), *Law and Transition* (University of Belgrade 2017) 473 ff.

tice. Modification of the sanction of invalidity should be based on the applicable law. This was the basis for the solution that emerged in Israel in 1965, which can be treated as the first *substantial compliance* source in action. It should be recalled that according to the Section 25 of the *Israeli Succession Law* (*חוק הירושה*)[378], valid until 2004, where the court had no doubt as to the genuineness of a will, it could have granted probate thereof notwithstanding any defect with regard to the signature of the testator or of the witnesses, the date of the will, the procedure of preparation of a will, or the capacity of the witnesses.

One of the widely commented cases examined under the this law was the case of *Koenig* v. *Cohen* decided in 1982.[379] This ruling was made against the background of the following facts. A woman who had been abused by her husband checked into a hotel room with her three year old daughter. She decided to jump out of the window with her daughter, and the fall killed them both. A series of unsigned and undated notes in the woman's handwriting were found in the hotel room, which instructed her husband not to attend her funeral, and that her estate should go to her brothers rather than to her husband.[380] Analysing the case, the court held that the statute could cure defective formalities, but not the complete omission of a will formality, as the court assessed the facts of the case. According to the court, complete lack of a signature or a date was not a kind of defect that could have been cured. Because the section 25 of the *Israeli Succession Law* (*חוק הירושה*) solely allowed – according to the court - only to cure a formality that was attempted but improperly executed, lack of a date and signature could have not been assessed as an attempted formality but should be treated as omitted formality. The omission, according to the court, could not have been cured, and this was why the husband inherited his wife's estate.[381]

On the background of this decision, that was evaluated in the doctrine as a wrong one,[382] it was suggested that in the Israeli law there is an important difference between defects and omissions that should be derived from the legislative history. According to this point of view, the drafters of the section 25 the *Israeli Succession Law* (*חוק הירושה*) intended to allow the dis-

378 Israeli Succession Law 5725-1965.
379 Koenig v. Cohen, [1982] 36(3) Israeli Supreme Court 701.
380 Flaks (n 203) 40.
381 Koenig v. Cohen, [1982] 36(3) Israeli Supreme Court 701.
382 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 49.

pensation of technical faults in the signature of the testator or of the witnesses but they did not intend to permit the probating of a will that completely lacked such elements.[383] This is why, according to the court in this case, the court cannot cure a document that lacks an "essential component" of a will.[384] According to this concept, not all the formal requirements of a will, despite the obvious intention of the testator, could be dispensed with in practice. The court found that there is a group of formalities that cannot be rescued. This was, as one might think, the inspiration for the subsequent statutory changes, which in Israel since 2004 have referred to the concept of "fundamental parts of a will". However, it can be assumed that this ruling was also initially assessed as inappropriate there, because before the changes in 2004, a change was made in 1985, and indicated that the courts may dispense with an "omission of a signature or date" in a holographic will.[385] Interestingly enough, omissions in formalities for attested and notarial wills were still fatal for such wills.[386]

In this regard, it was noted, that the enacted in 1965 solution did not meet the expectations, however, it did not lead the legislator to more liberal approach to formal requirements, but instead gave the impression of accepting section 25 of the *Israeli Succession Law* (חוק הירושה) as it stands now, distinguishing between significant and insignificant defects.[387]

The unsuccessful stage with a solution based on *substantial compliance* with wills formalities is also behind the Australian state of Queensland. It should be recalled that in its original form, the section 9(a) of the Queensland Succession Act (1981) was formulated as follows: the court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed [by the law] if the court is satisfied that the instrument expresses the testamentary intention of the testator. This provision was the basis for the decision in the three cases noticed all around the world (all decided in 1985). The first of the cases, *Grosert*, was made against the background of the following facts. The preparation of the will by the testator was followed by witnesses' signatures, however there was evidence that one of the witnesses attested the deceased's signature and then signed her own, but on an occasion when the other witness (who later signed) was not present. The court stated, that it had no doubt that the instru-

383 Flaks (n 203) 41.
384 Koenig v. Cohen, [1982] 36(3) Israeli Supreme Court 701, 708.
385 Succession Law (Amendment No. 7) 1985, (1985) SH 1140.
386 Flaks (n 203) 43.
387 Menashe (n 54).

ment expressed the testamentary intention of the testator, but held there was no "substantial compliance" because the signature of the testator was not subscribed in the presence of two or more witnesses and because it was unclear as to whether the signature of the testator was placed in the presence of either one of the witnesses.[388] This is why the court found that there had been insufficient compliance with the Succession Act formalities. The second case's facts, *Johnston*,[389] were similar. The court reached the same conclusion when the document had not been signed by the testator in the presence of any witness. The conclusion of the court is though interesting, since before the final verdict, the court said that "the alteration to the law effected by section 9 [of the Succession Act] was obviously to enable the rigid attitudes, that had been developed by the courts, to be departed from. It would be unfortunate if courts, by a series of decisions, returned to the old rigid attitudes, and I would expect a liberal approach be taken in applying the 'substantial compliance' provisions"[390].

The presence problem was also the issue in the third of the cases, *Henderson.*[391]The court declared that it was satisfied that the instrument express the testamentary intention of the testator, however it did not apply the *substantial compliance* doctrine since the will was executed with only one witness present and *substantial compliance* was "cumulative to the requirements of testamentary intent".[392] This view was repeated in the second instance court, where it was argued that the attestation by two witnesses is a *substantial* requirement.[393]

As it was commented in the doctrine, the Queensland's *substantial compliance* approach was no longer a means of discerning testamentary intent, but it was rather a new formal requirement that must be established independently of testamentary intent.[394] The standard of this formality was estimated as essentially quantitative, so the *compliance* was not able to be *substantial* unless the defect was minimal.[395]

This is why, as can be seen, the first applications of regulations based on the doctrine of *substantial compliance*, at least in the above cases, have not

388 Grosert, [1985] 1 QR 513.
389 Johnston, [1985] 1 QR 516.
390 Johnston, [1985] 1 QR 516.
391 Henderson, [1985] QSC 611.
392 Henderson, [1985] QSC 611.
393 White v. Public Trustee & Blundell, [1986] 17 Leg. Rep. S.L. 4.
394 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 44.
395 ibid.

brought the expected result. However, this does not mean that the idea of this doctrine is completely inappropriate. An example is the ruling of a probate court in the US state of Pennsylvania.[396] This court, in 1981, examined the case of a will drawn up by a blind person who had signed a will contrary to the law in force there at the time. The attorney who prepared the will had the testator's name typed on the will in advance of the execution rather than during its preparation by the testator as the statute required. The court upheld the will, reasoning that the purposes of the particular formality had been achieved despite the formal breach.[397] The court said 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 law, the principal purpose of which is to make certain that the intent of a testator is effectuated".[398]

Similar effect was achieved in other Queensland case, decided in 1984. The facts of the case disclosed that there was a difference of opinion between the witnesses as to whether or not the testatrix signed the will in their joint presence.[399] The court said that it was unnecessary to resolve this dispute, since even assuming that only one witness had been present at the time of signature, the formal requirements of the law had been *substantially complied* with.[400]

Also, some South African cases with the court's condonation power as a tool similar in practice to the genuine *substantial compliance* mechanism can serve as a successful examples of the use of the *substantial compliance* doctrine. In *Macdonald*, a case decided in 2002, the deceased indicated in a note written shortly before he committed suicide that his will was to be found on his office computer.[401] The High Court, satisfied that the security measures with regard to the computer file were not breached and, therefore, that the unexecuted hard-copy version of the electronic document reflected the deceased's authentic testamentary dispositions, issued a condo-

396 It has to be stated, that the state of Pennsylvania did not adopt the *substantial compliance* doctrine into its legislation.
397 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 8.
398 Kajut, [1981] 2 Pa. Fiduc. 2d 197, 204.
399 Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42) 42.
400 McIlroy, [1984] QSC 375.
401 MacDonald v. The Master, [2002] South African Law Reports 64.

nation order.[402] Also, in the judgment of the *Van der Merwe* case decided in 2010[403] an unexecuted will, sent as an electronic document by email, was granted a condonation order (after the appeal).[404] The court said that the very object of the *substantial compliance* section in the wills act is to ameliorate the situation where the formalities have not been complied with but where the true intention of the drafter of a document is self-evident.[405] Both courts, before admitting the wills to probate, considered that the formal requirements are sufficiently fulfilled. Without meeting some of the requirements, such rulings would be impossible.

In the aforementioned circumstances, the interesting case resolved in South Africa is the case *Ex Parte Maurice* decided in 1985,[406] that explains the South African approach. In this case, the deceased forwarded a draft of his will in his own handwriting to a building society, along with a letter asking them to "knock this document into shape and finalise it in legal jargon." The question before the court was whether it should exercise its discretion to declare the will valid, even though it had not been signed by any witnesses. The court held that there are three requirements which must be fulfilled before condonation is given: 1) the document must be drafted or executed by a person; 2) who has since died; 3) and who intended the document to be his will. The court held that the document was merely a draft, not the final will of the deceased and did not declared it as a valid will. This standard (threshold requirements) is applied in the latter court decisions.

In the light of the above, the genuine *substantial compliance* seems to be a model solution that differs only little from the solutions that are based on the *favor testamenti* doctrine in continental European countries.[407] Wherever a generous approach to maintaining the testator's last will is possible, that is where it happens. However, if there is a doubt about one of the key requirements of a given form of a will, there, despite the lack of

402 Michael Cameron Wood-Bodley, 'MacDonald v. the Master: Computer Files and the Rescue Provision of the Wills Act' (2004) 121 South African Law Journal 34.
403 Van der Merwe v. Master of the High Court & Another, [2010] ZASCA 99.
404 Van der Merwe v. Master of the High Court & Another, [2010] ZASCA 99.
405 *Cf.* Sylvia Papadopoulos, 'Electronic Wills with an Aura of Authenticity: Van Der Merwe v Master of the High Court and Another' (2012) 24 South African Mercantile Law Journal 93.
406 Ex Parte Maurice, [1985] 2 SA 713.
407 Aloy (n 17) 9 ff.

doubt about the testator's intention, the will has no legal effect.[408] Against the background of the above experience, it can be noted that despite the concept of a softened approach to the formal requirements of wills, the doctrine of *substantial compliance* in its original version requires the emergence in practice of some essential positive formal requirements that cannot be dispensed with.[409] According to the practice that has occurred, not all the formal requirements can therefore be dispensed with. The threshold requirements are usually set in this concept. They are set at a lower level than the standard requirements for execution of a will, and often, as a minimum, a writing act is required. The court can evaluate then whether the essential requirements are met, or whether the testator had attempted to comply with those requirements. The assessment of which requirement should be regarded as essential is certainly another issue that requires broad discussion. Nevertheless, this model of relaxation of formal requirements is still a model where some requirements must be strictly observed and only some can be dispensed with.

This does not mean that the model has to be completely rejected. This model can be used primarily as an interpretative guideline for courts, in systems where there is no clear legal basis for maintaining a will that is not prepared according to formal requirements. The *favor testamenti* rule, in this sense, may find a different application than traditional ones. It should not only serve to make a generous interpretation of the content of the will and the intent expressed by the testator, but can also be applied to a generous interpretation of the binding law.[410] Wherever possible, a lenient and functional approach to the formal requirements for wills seems necessary, especially when there is no doubt about the testator's intention expressed in case of death. Examples of such benevolent interpretation can be multiplied: the bequeather's signature logically linked to the contents of his declaration does not necessarily have to be under this disposition; the date of drafting the will does not have to be indicated unless there are doubts as to the order of the will (if several wills have been drawn up); signatures do not have to be made simultaneously; signatures do not have to be made in the same place; the carrier of the declaration of last will does not have to

408 Maciej Rzewuski, 'Wykładnia słusznościowa testamentu' [2014] Białostockie Studia Prawnicze 227.

409 Miller, 'Reforming the Formal Requirements for the Execution of a Will' (n 90) 86.

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

be traditional; the contents of the declaration of last will do not have to be expressed in a conventional manner; it is possible to use means of distance communication; the requirement of the presence of witnesses can be met remotely, etc. With such an interpretation, a generous approach to the testator, will functionally be, within the limits of the applicable law.

The invalidity of a *mortis causa* disposition made contrary to the provisions of the law as a result of the testator acting with the testamentary intention, resulting directly from the law, cannot and does not mean that the provisions of the law must be read in a literal manner.[411] Not every action of the testator, but only the one that is irreconcilable with the formal requirement formulated, should lead to the invalidity of this disposition. Therefore, as a result of interpretation, wherever it seems possible to keep the will in force, this should happen. For example, a handwritten will prepared electronically on a tablet should not be considered automatically null and void simply because it has been drawn up on a non-traditional medium that does not allow the character of the testator's handwriting to be reflected unequivocally. On the other hand, one should look at, for example, an attempt to make a holographic will through a video recording. A video testament itself, without an attempt to make it with one's own hand, would not contain the necessary elements of a holographic will, which means that it could not be considered a valid holographic will, because in fact, it would be a different form of a will (which does not mean that it could not be the basis for the inheritance if the legislator knew such a form of will or modified the prerequisites for making a will with one's own hand in such a way that it would be sufficient). This is, as one might suppose, the tenor of the *substantial compliance* doctrine, and so - in the light of the applicable law, even if it is strict - it is possible to restore functionality to the law of succession, although of course this is not the answer to all the legal challenges in this area.

The application of this kind of thinking took place at least in one of the cases recognized in Poland (decided in 1982).[412] The will was drawn up in such a way that the testator, in the presence of two witnesses, declared her last will orally to the village leader (*sołtys*), what, in the opinion of the first instance court, made the will null and void, since it contains a declaration of the testator's last will made to an unauthorized person, not mentioned in the article 951 of the *Kodeks cywilny*. According to this provision, the be-

411 Załucki, 'Współczesne tendencje rozwoju ustawodawstwa testamentowego' (n 22).

412 III CZP 5/82, [1982] Legalis 23044.

queather may declare his last will orally only to the *voit* (mayor, president of a city), a *staroste*, a marshal of a voivodeship, a secretary of a *poviat* or *gmina* or a head of a civil register office. The village leader is not mentioned there. Meanwhile, the Supreme Court, while recognizing the legal issues that raised doubts presented to it by the court of second instance, came to the conclusion that the invalidity of the will provided for in article 951 of the *Kodeks cywilny*, due to the failure to observe the applicable law, may be considered a special circumstance within the meaning of article 952 § 1 of the *Kodeks cywilny*,[413] justifying the treatment of the testator's declaration of his last will as an oral will. Based on the instrument of conversion and the principle of *favor testamenti*, it has rendered the testamentary inheritance valid. This kind of tendency is known wider.

3. Selected case-law based on the dispensing power approach

A variant of the doctrine of *substantial compliance*, known primarily from the Australian state of South Australia, subsequently propagated in several other jurisdictions, is the *dispensing power* doctrine. More than forty years of applying the rules based on this doctrine in practice has led to interesting decisions many times. Therefore, it is worthwhile to trace the most important of them here. This will allow to evaluate this solution in comparison with other methods resulting in taking into account the intention of the testator at the expense of formal requirements.

The first examples of using the *dispensing power* mechanism are obviously coming from South Australia. The first case decided upon the South Australian *dispensing power* provision was the so-called case of *Graham* (in 1978).[414] In the facts of the case there was no attempt to comply with the formalities, since the will was not signed by the witnesses in the joint presence of them and the testatrix. The court has rejected a narrow interpretation of *dispensing power* provision and the argument that there had to be at least some attempted compliance with the formalities before section 12(2) of the South Australian *Wills Act* could be successfully invoked.[415] Thus, al-

413 Article 951 § 1 of the *Kodeks cywilny*: "If there is a probability of imminent death of the testator or if, due to extraordinary circumstances, the observance of the ordinary form of the testament is impossible or very difficult, the testator may declare his last will orally in the simultaneous presence of at least three witnesses."

414 Re Estate of Graham, [1978] 20 S.A. State Reports 198.

415 Miller, 'Substantial Compliance and the Execution of Wills' (n 276) 568.

ready in the first ruling of the *dispensing power* doctrine the difference between the idea of *substantial compliance* and the idea of *dispensing power* can be seen. The latter idea seems to be interpreted more flexibly, it is the testator's intention that plays the most important role. This can also be seen in other rulings from South Australia and other jurisdictions that have adopted this doctrine.

In the case *Estate of Clayton*,[416] the case decided in 1982, the deceased had written out his will on a will form and signed and dated it, but the printed attestation clause had not been completed and the will was not witnessed. There was evidence of statements by the testator indicating that he considered he had made a valid will. It appears that he intended, having signed the will, to have his signature witnessed, but was unaware of the requirements that the testator should make or acknowledge his signature in the joint presence of the witnesses, and that the witnesses should sign in the presence of the testator. The court said, that it was satisfied on the facts that there could be no reasonable doubt that the deceased intended the document to constitute his will and admitted it to probate.[417] In the case *Estate of Smith* (decided in 1985),[418] the testatrix made her will in her own handwriting on a printed will form, and signed and dated it. However, it was never witnessed, although the testatrix had some years earlier made a will which was executed in accordance with the formal requirements. After executing the later document, the testatrix told her relatives she had made her will. She kept the document with her important papers and took it to hospital with her. The court held that there was no reasonable doubt that the testatrix intended the document to be her will, and admitted it to probate.[419] In the case *Estate of Kelly* (decided in 1983),[420] a medical practitioner signed a will which also bore the signature of two witnesses. However, it subsequently appeared that the will had not been duly executed as the testator had not signed or acknowledged his signature in the joint presence of the witnesses. Between the date of that will and the practitioner's death he prepared several further testamentary documents none of which were duly executed. Shortly before his death he handed a notebook to a woman employed by him for office work, telling her to use the book for notes. The notebook remained in her possession until after his death when

416 Re Estate of Clayton, [1982] 31 S.A. State Reports 153.
417 ibid.
418 Re Estate of Smith, [1985] 38 S.A. State Reports 30.
419 ibid.
420 Re Estate of Kelly, [1983] 32 S.A. State Reports 413.

it was found to contain two sheets in the practitioner's handwriting, beginning: "My last will and testament", and signed and dated by the practitioner with the words added: "Written as I have considerable cardiac pain and irregularity at time", but the signature was not witnessed.[421] In the abovementioned facts, the court stated that there was no reasonable doubt that the testator intended the two sheets of paper in the notebook to constitute his will and accordingly ordered that the sheets be admitted to probate.[422] Similar thought can be met also in the recent South Australian case law. For example, in the case *Re Estate of Wilden*,[423] decided in 2015, the deceased left two items of a testamentary nature, a DVD containing a video recording of the deceased and a typed document signed by the deceased but not witnessed. The applicant's solicitors prepared a transcript of the words spoken by the deceased as recorded on the DVD. The transcript, *inter alia*, provides:

> "...this is ah somewhat of an official last will and testament as I don't have a written document anywhere at this stage. This is just um a fail safe until such time as I do get something like that done. Um. Um. My will is that everything that I own goes to my younger sister Sandra Carpenter and her husband Michael Carpenter and my two nephews Lachlan and Jacob. Um I don't have a wife or any children or anything like that at this stage so if anything should happen to me now or in the next few years or whatever um this is just so there is some kind of an official record of how things should be distributed. I don't want the rest of my family ie my other brothers and sisters to get anything... so um sell all my stuff, um um thousands of dollars worth of audio equipment um that should easily be sold off to go see my employer, he will probably buy it all off you...Um yeh keep what you want Sandra, sell what you want, enjoy, keep the money...".[424]

The second left document, in typed form, was signed by the deceased and provided:

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421 The facts of the case are fully presented in the Report on the adoption of the substantial compliance doctrine, *cf.*: The Law Reform Commission of Western Australia, *Report on Wills: Substantial Compliance* (1985) 26.

422 Re Estate of Kelly, [1983] 32 S.A. State Reports 413.

423 Re Estate of Wilden, [2015] 121 S.A. State Reports 516.

424 ibid.

> "Last will and testement [sic] Wayne Gregory Wilden.
>
> This is an official last will and testement [sic] for myself, Wayne Wilden. This is to add to my video of my last will and testement [sic] recorded on 11.5.05.
>
> I would like to officialy record that my will is that everything I own goes to my younger sister Sandra Carpender and her husband Michael Carpender and my two nephews [J] and [S].
>
> This includes my property at [address], all possessions, all my money in bank accounts and all superannuation payments as my next of kin.
>
> I do not want my other brothers and sisters or their families to receive anything".

The court has admitted the abovementioned documents to probate, stating that testamentary intentions are an expression of what a person intends to happen to his or her property upon death, and evaluating that both documents expressed testamentary intentions.[425] According to the court, their content makes it clear that the deceased intended that both documents were to constitute his will and together govern the disposition of his estate after his death. In the opinion of the court, it was possible to "take a more liberal approach" and extend the range of possible documents constituting wills to wills made in non-traditional forms or using non-traditional media, including by a recording in the form of a DVD, because it is consistent with the liberal construction that is to be accorded to remedial legislation, such as the section 12(2) of the South Australian *Wills Act.*[426]

This approach to the *dispensing power* in the circumstances of new technologies is nothing surprising. It has happened many times that a will was made not in accordance with the formalities, but in a manner that is reflecting the use of technology, and the court using the *dispensing power* has kept the will in force at the expense of formal requirements. For example, such an order was made in Queensland in 2013 (after the state has adopted the *dispensing power* instead of the genuine *substantial compliance*). In the case *Mellino v Wnuk*,[427] the court stated that it is satisfied that the document (the DVD) embodies or was meant to embody the testamentary intentions of the deceased, what was "clear from the fact that he has written

425 ibid.
426 ibid.
427 Mellino v Wnuk [2013] QSC 336.

'my will' on the DVD itself and also from the substance of what he says in the video recording on the DVD".[428] It has also appeared in New South Wales, in 2015 (*Re Estate of Wai Fun Chan*), where a dying woman sat in her kitchen and was delivering her last will to a video camera, and that will was, *inter alia*, to alter a written will signed two days earlier. The court said that the woman made a "series of short, and apparently well-considered, disciplined statement of intent (coupled with motherly exhorations in passing) that stand nearly with the will as an alteration of the primary document" and there was "no room for doubt" the will was voluntarily made, and because of this, has admitted the will to probate being satisfied with the requirements stated in the section 8 of the New South Wales *Succession Act.*[429] It is also an idea known in different jurisdictions. The use of new technologies in inheritance law is relatively frequent, hence such judgments cannot be surprising, and what is more, it is to be expected that in the future such cases will be much more significant. According to the above, it seems that the *dispensing power* doctrine is already prepared for this future. The informal nature of a will does not exclude it from being sufficient to represent the deceased's testamentary intentions.[430]

A similar situation, concerning new technologies, appeared in 1996 in one of the succession cases that took place in Canada (Quebec province). There, the testator left an envelope with a diskette inside on which he has written and signed that it was his will. The diskette consisted of an electronic file that contained *mortis causa* dispositions, reflecting the will of the testator. Although the disposition did not meet the formal requirements of the law, since *Civil Code of Quebec* required a notarized, holographic or witnessed form (Art. 712), the court considered the disposition to be valid by applying the rule based on the *dispensing power* doctrine contained in Art. 714 of the *Civil Code of Quebec*.[431] Already at that time, it was signalled in the doctrine, that in modern times, the will should not be regarded as a strict formal act, especially since technological developments force us to view the provisions of the will form as *ad probationem* rather than *ad solemnitatem*.[432] According to this view, the preservation of the form is to be the proof of the last will and not a constructional element of it.[433] It has also

428 ibid.
429 Re Estate of Wai Fun Chan, [2015] NSWSC 1107.
430 Re Estate of Nichol, [2017] QSC 220.
431 Rioux v. Coloumbe, [1998] 19 Estates and Trust Reports (2d) 201.
432 Nicholas Kasirer, 'From Written Record to Memory in the Law of Wills' (1998) 29 Ottawa Law Review 43.
433 ibid.

been noted that the times of electronic communication can bring about intensive changes in the law in this area, enabling the recording of human intent in a computer memory.[434] This assumptions came true quickly; it was only a matter of time when the technological need for the legislators, in the area of testamentary formalities, had arisen.[435]

The application of the *dispensing power* in practice often depends on one condition - that the testamentary intent can be identified. That is the case, for example, of the Manitoban law, where only a single requirement has to be satisfied in order for a court to exercise the dispensation power: the document in question must embody the deceased's testamentary intentions.[436] In one of the cases decided in 1997,[437] it was said that the *dispensing power* provision demands of a court to establish on a balance of probabilities that the document at issue contains the deceased's testamentary intentions, and the latter in this context mean that the deceased must have evinced his or her *animus testandi* as a "deliberate or fixed and final expression of intention as to the disposal of his/her property on death".[438] This was also emphasized in the case *Timm* v. *Rudolph*, decided in 2016,[439] where the court has stated that the deceased must have contemplated the document at issue as a testamentary document to be admitted to probate when the time came, and that the deceased must thus not have regarded it simply as a document that disclosed his or her distributive wishes at the time. If the court is satisfied that the document indeed embodies the deceased's testamentary intentions and the application that it be given full legal effect is unopposed, no practical hindrance precludes a judge from exercising the dispensation power.[440] According to the judiciary there, the testamentary intentions requirement can thus be treated as the core requirement of the *dispensing power* mechanism. However, the impact is also placed on the authenticity requirement, since the reasoning of judges suggest that the judicial exercise of the dispensation power is also dependent on a court being satisfied regarding the authenticity of the document at issue. Such an approach is consistent with, e.g., the case law of British Columbia, where the core requirement for the judicial exercise of the curative power is similar

434 ibid.
435 *Cf.* Hirsch, 'Technology Adrift: In Search of a Role for Electronic Wills' (n 83).
436 du Toit, 'Remedying Formal Irregularities in Wills: A Comparative Analysis of Testamentary Rescue in Canada and South Africa' (n 7).
437 George v Daily, [1997] 115 Manitoba Reports (2d) 27.
438 ibid.
439 Timm v Rudolph 2016 MBQB 123
440 ibid.

to the Manitoban one. It can be noticed, e.g., in the court's argumentation form the case decided in 2015, *Estate of Young*.[441]. The court has stated that it must be satisfied that a document represents the testamentary intentions of the deceased before granting an order that it is fully effective as a will, and before analysing that, it has to determine whether the document is authentic.[442]

The recent *dispensing power* judgement that was widely commented around the world, and explains the abovementioned standard, is the case decided in 2019 in British Columbia, *Re Hubschi Estate*.[443] In the facts of the case it was found that the notation left on a computer by the deceased does not meet the formal requirements of the *Wills Estates and Succession Act*. The court has stated that the deceased's testamentary intention was present and since there is no minimum level of execution or other formality for a testamentary document to be found fully effective, it has found the will to be sufficient to be ordered as valid electronic will. The ruling is all the more important because the court stressed what the *dispensing power* doctrine standard looks like. According to the court, that testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. It has explained that the burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document. It has also reminded that while imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention.[444]

Interesting in the abovementioned model are also some cases decided in New Zealand. For example, in the case *Re Feron*,[445] decided in 2012, the deceased gave her instructions to the solicitor by the phone. The solicitor took detailed notes and confirmed the instructions in an email exchange

441 Re Estate of Young, [2015] BCSC 182.
442 ibid.
443 Re Hubschi Estate, [2019] BCSC 2040.
444 ibid.
445 Re Estate of Feron, [2012] 2 NZLR 551.

with the client. Due to the Christchurch earthquake, the solicitor was unable to prepare the will before testator's death. Then, the solicitor prepared a draft will based on the client's instructions and submitted the draft, the notes, and the emails to the court in support of an application for probate. The court rejected the draft, since it did not exist before the testator's death, but the court was satisfied that the solicitor's notes and the emails reflected the deceased's testamentary intentions and therefore granted probate. The court stated that it prefers "to approach the interpretation of the *Wills Act* 2007 in a manner that gives full vent to the ostensible purpose of section 14, namely to validate documents that plainly express the testamentary wishes of a deceased person".[446] According to the opinion expressed there, the New Zealand's succession law "confers a discretionary power to make a declaration on satisfaction that the document expresses the deceased person's intention".[447] In line with this position there was an observation that this law "is concerned with substance not form".[448] The court has also stressed that this provision is applicable "where the clear testamentary intentions of the deceased are deemed to outweigh any defects in form" and in contradistinction, the court has indicated that "where the courts have not been satisfied of testamentary intentions, the courts have refused to accept the notes or draft will".[449]

Similar approach was made in another New Zealand's case, decided in 2013, *McVicar*.[450] The court has dealt with a hand amended draft will signed by the will-maker and a single witness, lacking a signature of a second witness. The court said that is satisfied that the will meets the requirements for a will, since it truly represents the testamentary intention of the deceased and, in this case, this clearly outweighs the defect in form by the absence of a second witness. The court therefore concluded that the existence of the testamentary intent has a curative power for a defective will and evaluated such circumstances as a "robust consideration" to validate a will.[451] In this light, another and more recent decision from there is also interesting. A court in 2018 gave effect to an audio-will on the ground that a *post mortem* transcript of the audio recording qualified as a writing subject to the *dispensing power*.[452] According to the court, an audio recording

446 ibid. 553.
447 ibid.
448 ibid.
449 ibid.
450 Estate of McVicar, [2013] NZHC 2201.
451 ibid.
452 Pfaender v. Gregory [2018] NZHC 161.

of the deceased's will instructions did not qualify as a "document" (what is necessary in accordance to the law binding there), however, the written notes taken of his oral instructions were a document which the court could, and did, validate. The court also said that in the modern world, with "widespread use of smartphones and other personal devices", it is increasingly likely that people having important conversations will record their oral instructions. It was also suggested that while a recording itself might not qualify as a "document" which could be validated as a will, a transcript of such a recording might be validated.[453]

As it seems, the courts under the *dispensing power* do their best to keep the last will valid. The flexibility of this mechanism and the relatively broad framework of discretionary power of the courts allow for a benevolent approach, often resulting in the maintenance of a will that is blatantly contrary to formal requirements, often without even containing elements that could be described as "essential elements". This kind of approach seems to be appropriate, putting the testator's intention in the first place, without taking into account formal requirements, treating it as a mere indication, which is not obligatory. In assessing this approach, however, one must not forget the negative overtones of mild or minor formalities, which may be conducive to falsifying the testator's last will. It should be noted, however, that in practice it is not so that all cases analysed by the courts through the prism of the *dispensing power* mechanism end up with the recognition of an informal will as valid.

For example, in another New Zealand's case, *Fitzgibbons v Fitzmaurice*,[454] a suicide note addressed to the deceased's executor removing the deceased's only sister and leaving all his assets to the Salvation Army was not admitted to probate. The court was not satisfied that the evidence established that the deceased had testamentary capacity when the note was written. Because of that, the court was not satisfied that document expresses testator's testamentary intentions.[455]

The problem in assessing whether there is a will against the *dispensing power* doctrine may also be the issue of infinite wills or their drafts. Where a will is drafted but never signed, the court must be satisfied the will represents the final testator's intentions and that the testator did not delay signing because of rethinking the dispositions or changing his mind. These were, for example, the facts in the case *Re Estate of Bishop*, decided in 2014,

453 ibid.
454 *Fitzgibbons v Fitzmaurice, [2014] NZHC 710.*
455 ibid.

where a different reason for the delay was found,[456] or the facts in the case *Re Estate of Uruamo*, decided in 2017, where the court has found that the testatrix simply did not realise that the will required her signature.[457] By applying the *dispensing power* doctrine, the courts have thus dealt with a problem that can often be expected in practice.[458] The same has happened in one of the Australian cases, where the court was dealing with two informal wills and their changes in suspicious circumstances. In the case *Re Hobbs*,[459] decided in 2017, the court refused to probate two documents that contained very different provisions for the distribution of the estate (both with annotated changes), stating that there was significant doubt as to what really took place when the first and second documents were prepared and signed. According to the court, there was a significant risk that the testatrix was under exerted pressure or influence in order to obtain her writing and signature on the first and second documents and it was inherently unlikely that she conceived, wrote and signed additions and changes to the will on two separate occasions without assistance from someone else, and then held the two signed documents for over six years without telling anyone. The court was not persuaded to the requisite standard that either the first document or the second document should be admitted to probate. In the court's opinion, there were "simply too many factors and uncertainties which excite suspicion or mitigate against the admission to probate of either document".[460] It was "not satisfied that either the first document or the second document expresses or records the testamentary intentions"[461]of the testatrix, or "that either document was intended by her to be her last will".[462] Similar considerations were present, e.g., in the case decided in 2020, *Estate of Violet Filomena Cox.*[463] In this case, the testatrix made frequent changes to her expressed testamentary disposition, and the court considering her testamentary capacity has stated that it is not satisfied that her notes represent her final testamentary intention. Deciding the case, the court made a distinction between "musings" and testamentary dispositions. The changes in the documents were seen as her thoughts as to

456 Re Estate of Bishop, [2014] NZHC 3355.
457 Re Estate of Uruamo, [2017] NZHC 931.
458 McKenzie Rogers, 'If It Looks like a Will, There's a Way' (2017) 43 Lawtalk 32.
459 Re Estate of Hobbs, [2017] VSC 424.
460 ibid.
461 ibid.
462 ibid.
463 Re *Estate of Violet Filomena Cox, [2020] NZHC 1310.*

possible changes she might confirm rather than her actual testamentary intention.[464]

In the practice of the *dispensing power*, therefore, there is no desire to maintain the informal will at all costs, but only when it seems obvious to the court that there is an unquestionable last intention of the testator present in a given case. The practice, when confronted with different circumstances, seems to rationally assess different inclinations as to a possible falsification of the last will, or attempts to acquire an inheritance in a manner inconsistent with what seems fair. The basic factor determining whether a given will is considered valid is to convince the court of the existence of the testator's intent. This, of course, does not always work. However, it can be imagined that on this basis, for example, a will that is drawn up in the following circumstances can be considered as valid: unsigned drafts, a series of notes, an unsigned will prepared on a will kit form, a will in electronic format in the computer. Despite the lack of compliance with formal requirements, such *mortis causa* dispositions could be considered, according to the *dispensing power* standard, as valid if they contained the testator's final intention.

4. Selected case-law based on the harmless error approach

The doctrine of *harmless error*, a mirror image of the *dispensing power* doctrine, which in the common opinion differs primarily by the name used to describe it,[465] is a commodity known under US law.[466] As it is known, so far only some states have decided to adopt it, although the number is still growing.[467] Nevertheless, American case law is important in order to clarify the essence of the mechanism based on the primacy of the testamentary intent. This is primarily because in this country, solutions based on the concept discussed here were widely commented on. These comments continue to appear. This is particularly interesting because the individual states present the *harmless error* rule sometimes from a slightly different perspective.

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464 ibid.

465 *Cf.* Miller, 'Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism' (n 358) 187 ff.

466 Wendel, *Wills, Trusts, and Estates* (n 26) 150 ff.

467 *Cf.* Frerichs and Kovacevic (n 307).

This remarks can start with an observation that the first legislative adoptions of the *Uniform Probate Code*'s provision on the *harmless error* has happened in the early 1990s. For example, Montana's *harmless error* statute was enacted in 1993. The enacted § 72-2-523 of the *Montana Code Annotated* follows directly the *Uniform Probate Code*. In the case *Re Estate of Kuralt*,[468] decided in 2000, this provision was used to remedy a nonconforming codicil and alter an original will. The deceased who prepared a formal will earlier, has became suddenly ill and wrote a letter to his mistress that said:

> "I'll have the lawyer visit the hospital to be sure you inherit the rest of the place in MT. if it comes to that."

He died two weeks later. She sought to probate the letter as a holographic codicil to the original will. The court found that the letter represented a valid holographic codicil. The court focused on the deceased testamentary intent and made specific reference to the word "inherit" in his letter and that he was very close to death when he wrote the letter. The court upheld the deceased testamentary wishes by looking at his intent.[469] This demonstrates how the *harmless error* provision function in Montana, where the courts are rather guided by the bedrock principle of honoring the intent of the testator.[470]

Similar thoughts can be found in some different US states that has adopted this doctrine, even if their approach to this doctrine is different. This is the case, for example, of the state of Colorado, where the *harmless error* statute was adopted in 1994. It expressly states that for *harmless error* to apply a testator's signature must be present, with an exception for swapped wills of spouses. According to the § 15-11-503 of the *Colorado Revised Statutes*:

> "(1) Although a document, or writing added upon a document, was not executed in compliance with [the law] the document or writing is treated as if it had been executed in compliance with [the law] if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:
> (a) The decedent's will;
> (b) A partial or complete revocation of the will;

468 Re Estate of Kuralt, [2000] MT 359.
469 ibid.
470 Sitkoff and Dukeminier (n 37) 213 ff.

(c) An addition to or an alteration of the will; or
(d) A partial or complete revival of the decedent's formerly revoked will or a formerly revoked portion of the will.
(2) Subsection (1) of this section shall apply only if the document is signed or acknowledged by the decedent as his or her will or if it is established by clear and convincing evidence that the decedent erroneously signed a document intended to be the will of the decedent's spouse".[471]

According to the doctrine, the application of the *harmless error* in Colorado has been very limited. It applies only when there are minor execution errors.[472] However, the main focus is placed on the testamentary intent, as shown in the case decided in 2000, *Fisher* v. *Barnes*[473] (the court found that because the will was not signed by the testatrix or represented to others that this was her will, there was not enough clear and convincing evidence of her intent),[474] or in the case *Re Estate of Wiltfong*,[475] decided in 2006 (the court found that there was not clear and convincing evidence that the letter was intended to be the deceased's will).[476]

Slightly different, more relaxed approach, can be observed, for example, in Michigan. The state of Michigan has enacted its version of the *Uniform Probate Code*'s *harmless error* provision in 2000 (§ 700.2503 of *Michigan Compiled Laws*):

"Although a document or writing added upon a document was not executed in compliance with [the law], the document or writing is treated as if it had been executed in compliance with [the law] if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:

(a) The decedent's will.
(b) A partial or complete revocation of the decedent's will.
(c) An addition to or an alteration of the decedent's will.

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471 § 15-11-503 of the *Colorado Revised Statutes.*
472 Daniel Miller, 'How Harmless Is Harmless? An In-Depth Look Into the Harmless Error Rule' [2013] ACTEC Foundation: Mary Moers Wenig Writing Competition Winners 1, 12.
473 Fisher v. Barnes, [2000] 13 P.3d 1231.
474 ibid.
475 Re Estate of Wiltfong, [2006] 148 P.3d 465.
476 ibid.

(d) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will".[477]

One of the published cases was decided by two instances in 2002 (*Re Estate of Smith*).[478] The deceased one day after executing her will met with her church pastor and executed a document, in the Korean language, which the parties has agreed is translated as follows:

"I want to donate $150,000 to God in order to build a church".

Following the testatrix' death, the church claimed this document was a codicil to her original will, while her family said that the document expressed her present intent to give the church money. The probate court identified the central issue as whether to admit the document into probate, rather than the construction of the document, and determined that for a document to be considered a will or codicil, testamentary intent must be apparent from the writing itself. The probate court concluded that, on its face, the document at issue was not a testamentary instrument because it made no reference to death, a prior will, its effective date, or the intent of the deceased that it became effective upon her death, nor was it physically attached to a will. Concluding that the document was not a testamentary instrument, the probate court denied its admission and granted summary disposition in favour of respondents. On appeal, petitioner argued, in essence, that the probate court erred in granting respondents' motion for summary disposition on the basis of its conclusion that extrinsic evidence is not permitted to establish the testamentary intent of a document.[479] The second-instance court has stated that intent that a document constitutes a testator's will can be established by extrinsic evidence, including, for a holographic will, portions of the document that are not in the testator's handwriting. According to this court, the burden of proof that the document constitutes a valid disposition upon death is to be shown by clear and convincing evidence that the decedent intended the document to constitute his will or codicil. In this case, by failing to allow for the admission of extrinsic evidence, the first-instance court deprived petitioner of the opportunity to make such a showing. This is why in sum, the first-instance court erred in granting summary disposition on the basis that the docu-

477 § 700.2503 of *Michigan Compiled Laws.*
478 Re Estate of Smith, [2002] 252 Michigan Appeals Reports 120.
479 ibid.

ment at issue failed to reflect testamentary intent. Thus, summary disposition, according to the second-instance court, was improper.[480]

Interesting were also the facts of the *Re Estate of Smoke* case, decided there (Michigan) in 2007.[481] The testator has created a will in 1977. The will left only $1,000 to the respondent, who was a young child when the will was made, and it left the remainder of deceased estate to his siblings. Respondent objected to the admission of the will to probate because he claimed to possess letters, written by the deceased, that purportedly expressed the deceased testamentary intent that, after his death, respondent should receive all property of the deceased. In one of the letters written in 2002, the deceased has written:

> "I mention this to you, as you are my only offspring (next of kin), should I die, or become unable to conduct my own affairs. At least you will have some idea of what assets are involved in court litigation, and can represent my legal interests, as my agent; if this should become necessary. You can present this letter to my lawyer(s) as proof of my intent that you should act as my agent in the above matters. Okay? So far, I am in good health, and able to conduct my own affairs."
> "So, if the land passes to you upon my death be smart, and don't cave into pressure to unload the land for peanuts."[482]

In another letter, directed to his sister and brother, he has written:

> "I feel that the property should be partitioned in 3 equal parcels of approximately 50± acres to resolve the issue of 'who owns what' and to resolve this legal impasse once and for all. I am getting older and I want to avoid any problems of being able to devise my share of the 152 acres to my son, Tim Smoke, if I should expire unexpectedly. Tim should not have to be concerned about getting involved in legal squabbles about who owns what part of the 152 acres when he is on active duty in the Army. I believe I would be remiss in my obligations as his father to leave him an expensive legal headache that can be avoided."[483]

480 ibid.
481 Re Estate of Smoke, [2007] Michigan Court of Appeals 273114.
482 ibid.
483 ibid.

The first-instance court rejected the letters as wills that has modified the 1977 will, finding that the letters do not meet the requirements of a formal will under the Michigan law, because they were not witnessed. The court has also noticed that it could have been treated as if it had been executed in compliance with the *harmless error* rule if the proponent of the document or writing established by clear and convincing evidence that the deceased intended the document or writing to constitute his will. The court determined that the purpose of the statute is to permit a probate court to overlook technical deficiencies in what clearly stands as a clear, accurate, written statement of the deceased's testamentary intent. However, to invoke the Michigan *harmless error* provision, the proponent of a document must demonstrate, by clear and convincing evidence, that the deceased intended the document to state the deceased's testamentary intent, whether through "a more recent will, or a partial or complete revocation, or an addition or alteration of the decedent's will, or a partial or complete revival of a formerly revoked will or a formerly revoked portion of a will." It has stated, that it is important to note that the proponent of the document must demonstrate that the document itself represents a valid and more recent testamentary instrument. In other words, it is not enough that a document reflects the deceased's intent to someday make changes to his will, or that it hints that the deceased has long abandoned the intent embodied and formalized in the will, or even that it expresses the deceased's regret about ever making the will in the first place. Here, the court placed substantial emphasis on the fact that the two letters with purported testamentary effect did not contain deceased's signature, so it was highly unlikely that either of them were intended to carry out the deceased's testamentary wishes. The court found that the lack of signature fatally undermined respondent's reliance on them as testamentary instruments, because the Michigan's *harmless error* provision was not intended to remedy such a glaring void in a will's formation.[484] This view was also accepted by the second-instance court.[485]

Widely commented was also the case decided in Michigan in 2018 (*Estate of Horton*)[486]. According to the facts of the case, the testator left behind a suicide note that included testamentary instructions which he typed, ending with a typed signature, on his cell phone. The court observed that an electronic note, which was unwitnessed and undated contrary to the re-

484 ibid.
485 ibid.
486 Re Estate of Horton, [2018] 925 N.W.2d 207.

quirements for holographic wills in Michigan, does not meet the formal requirements for a will. However, the will was admitted to probate by invoking the *harmless error* provision, assuming, *inter alia*, that a digital image can qualify as a writing, what is necessary in the Michigan's law for a will to be valid.[487]

These examples show a very interesting approach to the *harmless error* doctrine, finding the primacy of intent, and not searching for the faults of the will. This is an important guideline on how to reflect the testator's last wishes, and seems to be recognized somewhat differently from many other jurisdictions that apply the principle of *harmless error*.

Another US state that has adopted the *harmless error* rule is the state of New Jersey. It has happened in 2005 when the § 3B:3-3 of the *New Jersey Revised Statutes* came into force. According to this provision:

> "Although a document or writing added upon a document was not executed in compliance with [the law], the document or writing is treated as if it had been executed in compliance with [the law] if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:
> (1) the decedent's will;
> (2) a partial or complete revocation of the will;
> (3) an addition to or an alteration of the will; or
> (4) a partial or complete revival of his formerly revoked will or of a formerly revoked portion of the will".[488]

The first case published since the passage of the *harmless error* statute was the case *Re Probate of Will and Codicil of Macool*.[489] The deceased executed a will in 1995 through her attorney and named her husband as the sole beneficiary and his children, grandchildren and great-grandchildren as contingent beneficiaries. After her husband has died, she went to her attorney to change her will and brought a handwritten note that reflected her wish to add as a beneficiary her niece, and that her home be left in her family. After she left the attorney's office, he prepared a draft will based on their conversations, but before reviewing it, she has died. Her niece attempted to admit the draft will to probate despite there being no signature of the tes-

487 Hirsch, 'Technology Adrift: In Search of a Role for Electronic Wills' (n 83) 854 ff.
488 § 3B:3-3 of the *New Jersey Revised Statutes.*
489 Re Probate of Will and Codicil of Macool, [2010] 416 N.J. Superior Court 298.

tatrix or witnesses. She relied on the *harmless error* rule and argued that the deceased intended for the draft will to be her will. The first-instance court found that the will does not meet the statutory formalities, the deceased intended her niece to be included in her testamentary plan, however, the deceased did not intend the draft will to be her will and therefore the will could not be probated due to the *harmless error* rule. The court also held that a signature by a testator is necessary for the *harmless error* rule to apply. The second-instance court found that there was not clear and convincing evidence, that the deceased would have intended the draft will to be her will. The second-instance court ruled that for *harmless error* to be applied in this case, the proponent must have proved by "clear and convincing evidence that (1) the decedent actually reviewed the document in question and (2) thereafter gave her final assent on it". This was not met in the case. The second item the second-instance court focused on was the court's ruling that in order for *harmless error* to apply there needed to be a signature by the testator. The court has stated that the *harmless error* statute is to fix execution errors and that an execution error in signature should not prevent the *harmless error* rule from applying. Therefore, the second-instance court found that a will could be admitted to probate without the testator's signature through the *harmless error* rule as long as there is clear and convincing evidence of the testator's intent.[490] What's more interesting is that in the doctrine it was commented that since the court has established a broad understanding of the *harmless error* rule, the notes of the testatrix should have been approved as a holographic codicil through the *harmless error* rule, since it has reflected her intent.[491] However, this has not happened.

A very interesting example of the New Jersey's use of the provision on *harmless error* is also the case decided in 2012.[492] In this case, the deceased, a trust and estates attorney with fifty years of experience, passed away in 2009. His only next of kin were his deceased brother's three children, of whom he had a relationship only with one and told his friends that he was leaving the estate to him. Two month's after he died, a fourteen page will was found with no signatures by the decedent and no witnesses. On the cover page it was written:

> "Original mailed to H.W. Van Sciver, 5/20/2000".

490 ibid.

491 Miller, 'How Harmless Is Harmless ? An In-Depth Look Into the Harmless Error Rule' (n 472) 21.

492 Re Estate of Ehrlich, [2012] 427 N.J. Superior Court 64.

The will has named Sciver as the executor and one of his brother's children as a beneficiary of 75% of the estate. The original document was never found. The first-instance court found that the deceased created the will and although it was not executed correctly his writing on the first page demonstrated clear and convincing evidence that it was "final assent" that the document was his will and admitted it to probate. The second-instance court upheld the ruling. The court looked into the fact that the beneficiary was the only relative the deceased had a relationship with and that the will was prepared in a professional manner. It has looked into the final assent of the unexecuted will, and found that the deceased telling others that he made a will that would leave the majority of his estate to his relative was clear and convincing evidence of his final assent.[493] As commented in the doctrine, this case seems to be the broadest reading of the *harmless error* statute.[494]

Another example of the *harmless error* doctrine is the one from the state of California which has adopted the rule in 2009 (§ 6110 subsection 2 of *California Probate Code*). However, the California's *harmless error* statute does not follow the section 2-503 of the *Uniform Probate Code* word for word but allows errors to be fixed if the "proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will".[495]

The first widely reported case in California regarding *harmless error* was decided in 2011 (*Estate of Stoker*)[496]. In 1997, the decedent executed a will naming beneficiaries of his personal property and leaving the residue of his estate to the trustee of a trust he created that same day. In 2005, decedent executed a handwritten document that expressly revoked the 1997 trust. The will was not signed by any witnesses. The major issue in this case was that the 2005 will did not follow attestation rules because it was never signed by the two witnesses. It could not be considered a holographic will because it was not in the deceased's handwriting. The second-instance court found that the deceased had intent to revoke the 1997 will and that the 2005 will was to be probated because it was intended to be the deceased will, even though it was executed incorrectly. The court found that it was the legislative intent to not invalidate wills due to improper execu-

493 ibid.
494 Miller, 'How Harmless Is Harmless? An In-Depth Look Into the Harmless Error Rule' (n 472) 22.
495 § 6110(2) of *California Probate Code*.
496 Re Estate of Stoker, [2011] 122 California Reporter 3d 529.

tion and found that applying the *harmless error* rule would be following the legislative intent.[497]

Another interesting case decided in California, was the case *Re Estate of Richards*, that was filed in 2008, and finally decided in 2011.[498] There were two wills in question, the first had supposedly testator's signature but no witness signatures and the second will had two witness' signatures but not the signature of the testator. The court did not admit the documents into probate and highlighted that the *harmless error* rule should not apply due to lack of clear and convincing evidence of testator's intent. As noticed in the doctrine, the court looked at many different factors to determine that *harmless error* rule shouldn't apply to the case.[499] These factors were, *inter alia*, the age of the testator, the mistakes found in the drafting of the will, the pages not being stapled together, the witnesses not knowing who prepared the will, the expert testimony declaring that they were unable to tell who signed the will, and the improper execution.[500]

As estimated in the doctrine, the Californian solution can be named as a "partial" *harmless error* since a statute can only cure some deviations from the law, not all of them.[501] The language of the *harmless error* provision reveals that the rule only applies to instruments that do not comply with attestation defects.[502] California's version of the doctrine might salvage a would-be will that has one witness or that was signed by two people who were not "present at the same time", but it cannot cure problems related to the testator's signature.[503]

Other US states that has adopted the doctrine of *harmless error* has followed the section 2-503 of the *Uniform Probate Code*, certainly sometimes with changes. For example, the state of Ohio has not adopted the *Uniform Probate Code*'s *harmless error* doctrine in its entirety. Ohio's version of *harmless error* (*Ohio Revised Code* section 2107.24), provides as follows:

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497 ibid.
498 Re Estate of Richards, [2011] B226261.
499 Miller, 'How Harmless Is Harmless ? An In-Depth Look Into the Harmless Error Rule' (n 472) 9.
500 ibid.
501 David Horton, 'Partial Harmless Error For Wills: Evidence From California' (2018) 103 Iowa Law Review 2027.
502 Gökalp Y Güre, 'No Paper? No Problem: Ushering in Electronic Wills Through California's "Harmless Error" Provision' (2016) 49 University of California Davis Law Review 1955, 1957 ff.
503 Horton, 'Partial Harmless Error For Wills: Evidence From California' (n 501) 2048.

> "(A) If a document that is executed that purports to be a will is not executed in compliance with the requirements of [the law], 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 under division (A)(2) of this section in the conscious presence of two or more witnesses. As used in division (A)(3) of this section, 'conscious presence' means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication".[504]

This section was applied, for example, to validate an electronic will drafted on a tablet in 2013 (*Estate of Castro*).[505] In that case, the deceased was admitted to a hospital and advised that he would die without a blood transfusion. He declined the transfusion for religious reasons, and then began talking with his two brothers about his will. Neither of his brothers had a paper, pen or pencil, so one brother took notes on a tablet. The decedent dictated the will while his brother handwrote it after discussing it. The three and decedent's nephew all signed the will on the tablet. Decedent then died, and his brother held onto the tablet continuously and had a password to it since then. The court has admitted it to probate finding, by clear and convincing evidence that the deceased signed the will, that he intended the document to be his last will and that the will was signed in the presence of two or more witnesses.[506] It seems like the approach to the *harmless error* in Ohio is liberal, however, it is noted that the case was an uncontested proceeding, so there was no one arguing that it should not be admitted to probate.[507]

In light of the above, the American version of the *dispensing power* doctrine differs from the source not only in name but also in scope. The use of

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504 § 2107.24 of *Ohio Revised Code*.
505 Re Estate of Castro, [2014] 27 Quinnipiac Probate Law Journal 412.
506 ibid.
507 *Cf.* Jessica Uzcategui, 'Application of the Harmless Error Doctrine in California and Beyond' (2015) 21 California Trusts & Estates Quarterly 1, 3.

the so-called *harmless error* in individual states varies, it is not uniform. In general, the impression is given that not all defects in wills can be cured this way, but the basic indicator of this process is the clear and convincing evidence of testamentary intent.[508] In the American approach usually there is a search for some elements of the will that can be considered as the "essential elements". This is not, of course, the practice of each American state, but it is also possible to observe this kind of tendencies there. Of course, there are also systems such as New Jersey or Michigan, where the significance of formal defects is diminished by the testator's intent proven by means of clear and convincing evidence. This is an interesting model, because in individual states the functions performed by some wills formalities are viewed differently and their significance is also different.

5. Selected case-law based on the favor testamenti approach

When analysing solutions based on taking into account the testator's intent at the expense of formal requirements, it is still necessary to pay attention to those legal systems which, despite the existing regulations based on the *strict compliance* regulations, take a generous approach to the issue of the lack of wills formal requirements by applying the *favor testamenti* rule, commonly known worldwide as the rule of interpretation of the testator's will. As already suggested, this rule therefore begins to take on a second meaning at times, and serves to interpret not only the will, but also the rules that are to reflect that will.

According to the above, Spanish law can be presented as one of the examples of judicial tenets to mitigate formal requirements using the principle of *favor testamenti*. It has to be mentioned that the case law of that jurisdiction defines the formal requirements of the will as fundamental requirements for the protection of the testation process,[509] but this does not mean that their observance is rigorous in every case. Outside the area in which the exhaustion of formal rigorism is used as a guarantee of freedom of testation, a tendency to relax compliance with testamentary formalities can be affirmed when their strict observance would lead to the nullity of

508 *Cf.* Dorman (n 134); Horton, 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (n 261); Langbein, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' (n 94); Crawford (n 36).

509 STSJC Cataluña, 30.05.2016, [2016] STSJC 3774. *Cf.* Cossío (n 345).

the will, despite the fact that there is no doubt about the intent of the testator when drafting the last will provisions. In the recent case law, an inspiring thought can be found: "the nullity of a will cannot be exaggeratedly formalistic, so as not to damage the principle of the supreme sovereignty of the will of the testator".[510]

This seems to be a ground for the interpretation of wills formalities law[511] since, as the doctrine underlines, the requirement for a declaration of last will to comply with the testamentary formalities, present in Spanish law, has often been modulated by the courts in order to respect the freedom of testation.[512] The idea presented by the courts was best reflected in one of the judgements: "what cannot be admitted is that the trees of an extreme formalism prevent the forest of the testator's last will from being seen, or in other words, that the rigorous and reverential fulfilment of the testamentary forms, beyond what is strictly indispensable, hides the very essence of this type of *mortis causa* legal transactions, which is none other than the exercise of the right of a person to dispose of his estate after his death".[513] In this light, there is no doubt, therefore, that the Spanish case-law is trying to mitigate its excessive rigour of testamentary formalities by opening up an anti-formalistic interpretation line, as it is sometimes indicated, especially in those cases where the formality omitted is merely incidental and irrelevant.[514]

The abovementioned standard can be seen, for example, in the following cases. In the case decided in 2014, an 82-year-old illiterate testator prepared a will in such a way that he agreed on his last will with his daughter, who passed it on to a notary, and a notary after preparing a will has read it, after which the testator, accepting will provisions, nodded his head that he agreed. The court considered that "in this case, it is credited that the will was read in its entirety and aloud by the notary after the testator had waived the right to do so, and that it was also signed", this is why it was decided that "it meets the necessary requirements for validity".[515] All this has happened despite the fact that the law there (Article 697(2) of the *Código Civil*) provides for two witnesses to be present when the testator does not or cannot read the will himself, and the witnesses were not present. In

510 STS, 20.03.2013, [2013] STS 4755.
511 *Cf.* Sergio Cámara Lapuente, 'New Developments in the Spanish Law of Succession' (2007) 2007 InDret 2, 20 ff.
512 Aloy (n 17) 12 ff.
513 SAP Girona, 17.03.2003, [2003] AC 756.
514 Aloy (n 17) 13.
515 SAP Valencia, 15.12.2004, [2014] SAP 1202.

another case, decided in 2004, where the validity of the holographic will was concerned, a will that was partially typed was treated as meeting the formal requirements, even though the law requires for its validity to be handwritten. The court stated that it took into consideration that "the nucleus device was written autographically, with the date also handwritten, while the typed words act as a template with suspension points on which the testator writes, basically her personal data, so that correctly the essential solemnities were considered to have been fulfilled".[516] A very interesting reasoning was also the base for the case decided in Spain in 2011,[517] concerning the significance of the testator's signature. According to the facts of the case, the testator being at the age of 96 has prepared his eighteenth will and signed it differently than the previous wills. When deciding on the matter, it was pointed out that it is not so much the use of a particular style or modality that identifies the author that is important, but rather the existence of the intention to create a particular act. The decisive factor is that the signature is intended to emphasise the unquestionable will of the signatory, whether he does so using his traditional form of signature or otherwise.[518]

There are many other examples of case law there where the formal requirements were not looked at very strictly. As the doctrine there indicates, all this is the result of the fact that the principle of *favor testamenti*[519] has been taken into account in interpreting the rules in force, reducing the formalistic approach to a minimum.[520] However, according to the doctrine there, this does not mean that all the formalities for drawing up a will can be waived.[521] According to this opinion, the relaxation of formalism must be based on the functions carried out by the rules on the form of wills,[522] which – as it has been said - are primarily intended to guarantee the testator's freedom to express and preserve his will.[523] This means that the formalities relating to the authenticity of the will are necessary and formal relaxation is only possible if there is no doubt as to the intent of the testator.

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516 AP Baleares, 17.10.2004, [2005] JUR 21892.
517 STS, 5.5.2011, [2012] STS 1101.
518 Aloy (n 17) 22 ff.
519 Lidia Arnau Raventos, 'The Formal Validity Of The Mortis Causa Provisions In The Regulations 650/2012 (EU): An Article on Spanish Law' (2016) 22 ILSA Journal of International & Comparative Law 515, 525.
520 Aloy (n 17) 28 ff.
521 ibid 29.
522 Merlini (n 348).
523 Aloy (n 17) 29.

To this effect, the changes to the form of the will, regardless of the current wording of the form rules, are to be aimed at, as this is the spirit of the times in this area.[524] This is why it is emphasised that the law should take into account and follow technological and social requirements of the wills law.[525]

The mechanism based on the principle of respect for the testator's last will is also known, for example, in Polish law. The most characteristic feature of this is its use within the framework of the so-called conversion of wills, which is the result of the courts' judicial activity. The basis for providing judgements in this respect has always been the need to reflect the testator's actual intentions, hence in specific cases the testator's *animus testandi* has been referred to as a premise leading to the maintenance of the will decision, albeit in a different form than that originally chosen by the testator.[526]

One of the most frequently quoted rulings based on this mechanism in the Polish literature is the ruling of the Supreme Court decided in 1981,[527] where it was definitively acknowledged that from the point of view of a will conversion, it is possible to maintain the testator's declaration of last will, regardless of whether the will's invalidity is the result of the testator's failure to comply with the formal rigours provided for in this type of disposition, or for other reasons (e.g. participation of a person not authorised to withdraw the declaration of will), if only the testator's *mortis causa* declaration as a legal action achieves the intended effect in another legal form provided for. The content of this ruling, moreover, emphasises that "there is no doubt that social considerations play a significant role, namely the desire to respect the testator's last will",[528] which prompted the court to seek the possibility of keeping the defective will in force. This view was recalled, for example, in the judgement of second-instance court from 2017.[529] The court has stated, that it is assumed in the judicature that the invalidity of the will referred to in Article 951 of the *Kodeks cywilny* (will made before an official) due to the testator's mistaken idea that he declares

524 Cobas Cobiella and de Joz Latorre (n 92) 62 ff.
525 Marta Otero Crespo, 'La sucesión en los «bienes digitales». La respuesta plurilegislativa española' (2019) 6 Revista de Derecho Civil 89, 89 ff.
526 Maciej Rzewuski, 'Konwersja testamentu' in Piotr Stec and Mariusz Załucki (eds), *50 lat kodeksu cywilnego. Perspektywy rekodyfikacji* (Wolters Kluwer 2015) 412 ff.
527 III CZP 68/80, [1981] OSNCP 6.
528 ibid.
529 III Ca 645/16, [2017] Legalis 2053415.

his last will towards a person entitled to accept such declarations in accordance with Article 951 § 1 of the *Kodeks cywilny* may be considered - in a specific case - as a special circumstance within the meaning of Article 952 § 1 of the *Kodeks cywilny* (oral will), as a result of which it is impossible or very difficult to maintain the ordinary form of the will, and due to this, such a will under conversion can be accepted as a valid extraordinary will (as an oral will). In this regard, it should be made clear that the Polish law provides for the content of Article 952 of the *Kodeks cywilny* that, if there is a probability of imminent death of the testator or if, due to extraordinary circumstances, the observance of the ordinary form of the testament is impossible or very difficult, the testator may declare his last will orally in the simultaneous presence of at least three witnesses.[530] This is why, flawed ordinary will, in the mentioned circumstances, can be converted into the extraordinary will (oral will), certainly only if the requirements for such a will are met.

The use of the '*favor testamenti*' rule can also be seen in Polish law in another example, not related to the institution of conversion. This was the case, to mention just one example, in the situation of an oral will, where the protocol for making it up was incorrectly prepared. The question was whether it was possible to re-draw up such a protocol when the first one is faulty. The court deciding this case has stated that taking into account the trend represented in the case law based on the principle of *favor testamenti*, "which requires that the testator's intent be kept as much as possible", has stated that the possibility of re-drafting the protocol referred to in Article 952(2) of the *Kodeks cywilny* should also be allowed in the case of a formal defect of the original document if the time limit indicated in that provision has not yet expired.[531] As the court has evaluated, it is a consequence of "the theory of the will and the resulting principle of '*favor testamenti*', which applies not only to the interpretation of wills, but also to the interpretation of the rules on the form of wills".[532]

Polish jurisprudence has repeatedly pointed out the demand for such an interpretation of the provisions on the form of wills,[533] which provides the furthest possible guarantees that the order of succession will be shaped in

530 Jan Gwiazdomorski and Andrzej Mączyński, *Prawo spadkowe w zarysie* (Państwowe Wydawnictwo Naukowe 1985) 100 ff.
531 V CSK 254/17, [2018] OSNC 3.
532 ibid.
533 *Cf.*, e.g.: Jacek Wierciński, 'Uwagi o zamiarze testowania (animus testandi)' (2012) 2012 Przegląd Sądowy 132.

accordance with the testator's real will.[534] It has been stressed that an equitable interpretation is extremely important, and the purpose it serves - to reflect the testator's last will as closely as possible - is very important from the point of view of the function of succession law.[535] The courts have set an example of this on many occasions when applying the law. It can therefore be assumed that, despite the relatively strict wording of the regulations in force in Poland (Art. 958 of the *Kodeks cywilny*: A testament made with the infringement of the provisions of [the law] shall be null and void), the practice finds the need to mitigate the effects of formal rigour, although Polish law in this area does not provide for any mechanism allowing this in the substantive law. The easing of formalism is therefore part of a generous interpretation of the law.

It should be added that Polish law also knows the statutory mechanism, the application of which is similar to that of genuine *substantial compliance*, however – due to the binding law - it concerns only holographic wills. In this light it has to be reminded that according to the Art. 949(1) of the *Kodeks cywilny*, a holographic will must be, *inter alia*, dated by the testator. However, according to the Art. 949(2) of the *Kodeks cywilny*, lack of a date shall not result in the invalidity of a hand-written testament if it does not raise doubts as to the testator's capacity to draw up a testament, contents of the testament and the mutual relationships among several testaments. Based on that, a flawed holographic will can be treated as valid. This was the case, for example, in the judgement decided in 1992, where the court has stated that the law entails wills' invalidity only if the court proceedings do not lead to the removal of the doubts referred to in Art. 949(2) of the *Kodeks cywilny*.[536] What is more interesting is that, despite the wording of the law, courts are trying to use this mechanism to different forms of wills. This was, for example, the background of the case decided in 1977,[537] where it was stated that an undated will made before an official may be valid despite the fact that the provision of Art. 951(2) of the *Kodeks cywilny* does not contain a mechanism similar to the one included in the Art. 949(2) of the *Kodeks cywilny.* According to the court, the legislator generally regulates typical situations, and such a situation may be

534 *Cf.* Rzewuski, 'Wykładnia testamentu a okoliczności zewnętrzne towarzyszące testowaniu' (n 368) 231 ff.

535 Grzegorz Wolak, 'Animus testandi na tle orzecznictwa Sądu Najwyższego' (2015) 2015 Rejent 1, 1 ff.

536 III CZP 90/92, [1993] OSNCP 1-2.

537 IV CR 494/77, [1978] OSNCP 11.

the omission of a date in a will drawn up by a citizen who is not always aware of the criteria for the validity of his legal acts. On the other hand, the omission of a date by an official (notary, commune head and other appointed persons), who has the required knowledge of these criteria, constitutes a pathological phenomenon - as evidenced by the uniqueness of this case - which does not need to be regulated directly in the act. In the opinion of this court, a correct interpretation of the binding law cannot justify the conclusion that the consequences of the lack of a date are to be more detrimental to the effectiveness of the testator's last will if, in an attempt to ensure such effectiveness, he chose the form of an official will rather than if he had only made use of his handwritten will.[538]

There is no doubt, therefore, that Polish case-law, using in practice the principle of a generous interpretation of the existing legal regulations, has often sought to maintain the testator's last intent, even when it appeared *prima facie* to be in conflict with the regulations in force.[539] Despite the lack of a clear legal basis for such an action, the *favor testamenti* principle expressed in Polish law as a standard for the interpretation of the content of wills (Art. 948 of the *Kodeks cywilny*: A testament must be interpreted so as to ensure the possibly fullest compliance with the testator's will) has on many occasions been a rescue for defective wills (drawn up against the regulations on form). Some of the flaws in such wills, certainly those of little importance, can therefore be cured in such way. It is, however, quite widely accepted in the doctrine that the current regulation on the form of wills is unsatisfactory, which for some commentators is just the beginning of a reflection on changes to this state of affairs,[540] including the introduction of a rule based on the doctrine of *substantial compliance* or its variations.

An example of a legal system where a generous interpretation of the law applies alongside a generous interpretation of a testator's last will is the German law. The doctrine there assumes, among other things, that the purpose of an interpretation of a will is to reveal a testator's intent and the form of a will is a condition for its effectiveness, hence sometimes a distinction is made between the construction of a will and the form of a will. The problem of interpretation of a last will and the problem of the form is therefore dealt with in two separate stages. The first step is to determine the testator's intent, while only later - as it is indicated - should it be clari-

538 ibid.
539 *Cf.* Wójcik (n 40) 190 ff.
540 Konrad Osajda, 'Wpływ rozwoju techniki na uregulowanie formy testamentu - rozważania de lege ferenda' (2010) 2010 Rejent 50, 51 ff.

fied whether the testator's intent has been declared in a proper form.[541] In this respect, it is believed, among other things, that private wills in particular, including holographic wills, are an instrument where there is plenty of room for interpretation, as the testator's intent is usually expressed there in an incomplete or unclear manner. Extrinsic evidence to the content of the will can also be used for interpretation.[542] This also applies to the completion of the will. However, the doctrine sometimes raises the contradiction of such reasoning with the purpose of the provisions on the form of wills.[543]

In this regard a very interesting is the judgement done there already in the 1935. One of the cases described in the literature was an attempt to validate a will recorded on a gramophone[544]. It is worth mentioning since it was considered there that although the authenticity of the will declared in that way raises no doubts, in accordance with the binding *Bürgerliches Gesetzbuch* provisions the will may not be declared with the use of other media except for one's own handwriting, and only the legislator could decide otherwise. Despite the attempt to qualify such will as a holographic one, declared finally as invalid (what was further slightly criticised by the doctrine), interesting reasoning is worth mentioning, namely the indication that the requirement of one's own handwriting should not be treated literally, and a voice recording may be practically treated as a one fulfilling the requirement of handwriting.[545] This reasoning shows that the need to reflect the intent of the testator was already being considered at the time, although it has not yet been successful. This was not the case a few decades later, in a judgment of the German Supreme Court that is, according to many, significant for the interpretation of the German law.[546] According to the facts of this case, the testatrix drew up her will in such a way that on the top and first inside of the folded sheet of paper she made her declaration of her last will, which she signed at the end of it (on the first inside of the folded sheet). She then observed that she had forgotten one disposition, which she had placed on the unsigned pages, as the previous pages no longer contained any space. She did not sign that disposition. The court pointed out that it is not the position of the signature that should decide

541 Solzbach (n 60) 183 ff.
542 ibid.
543 Knut Werner Lange, *Erbrecht* (C H Beck 2017) 79 ff.
544 Reichsgericht judgement of 18 July 1935, Deutsche Juristenzeitung 1935, p. 78.
545 See *G. Ponath*, *Die Beschränkungen der Testierfreiheit durch das Testamentsrecht*, Frankfurt-Mannheim 2006, s. 251.
546 *Cf.* Grundmann (n 61) 434 ff.

here, but the intent of the testator, and in its opinion, by adding something to the will, the testator usually has the intent to change the disposition, and such additions include *animus testandi*.[547] Another ruling of this court refers to the question of the will's hand-writing, which remained only as a tracing paper (a carbon copy) of a declaration of last will, the original of which was never found. In this case, too, the court, guided by the rule to keep the last will in force, recognised the admissibility of such a will.[548]According to the court, a carbon copy disclosed the individual characteristics of the testator's handwriting sufficiently and accurately to warrant the conclusion that it had been the testator himself who had wanted to make a disposition *mortis causa*.[549] Both decisions were widely commented and accepted in the German doctrine.[550] Of course, there are also other court decisions that follow the same approach. In general, even if there are voices in Germany to reform the binding law on testamentary formalities, there are also opinions that dispensation with some formalities may occur by the generous interpretation of the binding rules.[551]

The *favor testamenti* approach is a usual approach for continental European countries. In general, continental European countries are to be marked as strict compliance systems, where strict observance of the binding law shall apply. However, because of the social expectations and some other factors, the courts consider generous approach to testamentary intent as an important mean to solve succession cases. This could be seen, for example, in the Swedish law, in a case decided in 2012.[552] In this case a last will was transmitted to one of the beneficiaries by the text message sent on a smart phone. The first-instance court, analysing if the will can constitute a valid holographic will, has stated that since the introduction of the Swedish law on testamentary formalities (1958) society has undergone technological development that is unprecedented and that, in the facts of the case, the deceased wanted the text message to constitute his last will. Due to the unprecedented technological development and the impact of this development on the way people communicate, it should, in the opinion of the first-instance court, be possible in this way to declare one's will. In the light of the *favor testamenti* approach, which was never highlighted

547 BGH, 20.3.1974, [1974] NJW 1083.
548 BGH, 3.2.1967, [1967] BGHZ 47.
549 ibid.
550 *Cf.*, instead of many, Reinhard Zimmemann *in* Reid, De Waal and Zimmermann (n 31) 199.
551 Grundmann (n 61) 475 ff.
552 Tingsrätt, 16.11.2012, [2012] T5746-11

by the court, the text message shall be deemed to meet the requirements of a self-written and signed act. This is why, according to the first-instance court, the will was declared valid. However, the second-instance court has reversed this decision in 2013, declaring an obligation to strict interpretation of the Swedish law.[553] According to the court, the law permits no exception from the requirements of wills formalities.[554] But what is interesting about this case, is that the second-instance court was widely criticized by the doctrine.[555] There were voices that the legal formalities are "old-fashioned" and should be modernized.[556] It seems like more lenient approach to the formalities is postulated there.[557] Such approach can be seen, for example, in France, where courts are sometimes more flexible with the statutory requirements,[558] or in Hungary, where formal defects are not automatically void (only an interested party can object an informal will) and the courts emphasize the principle of *favor testamenti* to discover and fully implement the true intentions of the testator.[559]

In order to complete the picture of such an approach to formal requirements, it is also necessary to mention the *constructive trust* construction found in the case law of the American State of Florida.[560] It is an equitable device with dual objectives: to restore property to the rightful owner and to prevent unjust enrichment. This measure was first applied to informal wills in 1993. In the case of the *Estate of Tolin*,[561] the testator drew up an effective will. After a few years, he established an effective codicil, appointing another person as his heir, thereby changing his will. Later on, the testator wanted to withdraw the codicil and thus bring about the original

553 Hovrätt, 13.06.2013, [2013] T11306-12.
554 ibid.
555 See, for example, the statement of Margareta Brattström, who indicated the law to be "ancient". (in "SMS not a valid last will and testament" (2014) The Local of 24.02.2014, https://www.thelocal.se/20140224/sms-not-valid-last-will-and-testament-court.
556 *Cf.* Britta Olsson, *Handläggning av testamente - från upprättande till skifte* (Stockholms Universitet 2014) 15 ff.
557 *Cf.*, w.g.: Tatjana Westman, *Tolking av testamente* (Stockholms Universitet 2013) 41 ff.
558 For example the courts are accepting undated wills even though a date is a legal obligatory requirement. *Cf.* Cour de Cassation, 10.05.2007, [2007] Répertoire du Notariat Defrénois 1432.
559 *Cf.* Lajos Vékás *in* Reid, De Waal and Zimmermann (n 31) 269.
560 Elena Marty-Nelson and others, *Florida Wills, Trusts, and Estates. Cases and Materials* (Carolina Academic Press 2016) 815 ff.
561 Re Estate of Tolin, [1993] 622 So. 2d 988.

regulation of the will. He showed the codicil to his friend's lawyer and tore it up on his advice. The testator assumed that he had torn the original. After the testator's death, however, it turned out that he only destroyed the photocopy of the codicil. The Supreme Court of Florida stated that, in order to invalidate the codicil under the Florida Statute, the testator would have to break the original document, therefore in this case the codicil remained in force. However, there was to be *constructive trust* in the original will. The court found that the testator had the intent to annul the codicil and was only exposed to an error as to the originality of the deed during its execution. Without *constructive trust*, the codicil heir would have benefited from the testator's mistake at the expense of the person originally intended.[562] This construction was applied certainly also in different cases.[563]

In this light, there is little doubt that the quest to reflect the last will is not just the domain of the doctrine of *substantial compliance* and its variations. It is a much broader approach, taking into account modern technological solutions and the needs of society. Despite some criticism, there are many signs (in principle, all over the world) that a formalistic approach to succession law is no longer necessary. Rational, functional, subdued consideration of the testator's last intent, without prejudice to legal transactions, is a thought that is increasingly emerging in the systems of succession law, including those that think about the wills formalities in terms of the need for a *strict compliance*. For this reason, it is precisely in these countries, and therefore specifically in Continental Europe, that there is room for a tool that could, to a greater extent than before, reflect the testator's last will in the case of wills drawn up informally. However, the scope of the formalities that could be involved here requires some discussion. In the light of the solutions presented above, it is worth considering how far such a mechanism could reach and whether it would allow the objectives of the provisions on the form of wills to be fulfilled in the various systems. This requires further considerations, which, in order to determine whether some or all of the formalities for making wills should be dispensed with, are to consider the functions which those formalities may be performing.

562 ibid.

563 John CP Goldberg and Robert H Sitkoff, 'Torts and Estates: Remedying Wrongful Interference with Inheritance' (2013) 65 Stanford Law Review 335, 349 ff.