Introduction

There is always a need to take an interest in succession law and the instruments it provides for the *mortis causa* disposal of property when society undergoes changes.[1] Therefore, the development of succession law is not uniform. From time to time, events occur that intensify the changes in this area.[2] The political transformation in the Eastern European countries more than thirty years ago may serve as an example,[3] since it led to a different view of private property relations[4] and also to an increase in inheritance problems.[5] At that time, the legislators and practice of the individual states in this area saw a gradual increase in the number of cases involving problems that had not existed before. Similarly, one can try to assess the issue of individual technological revolutions and their impact on the availability and enforceability of individual legal inheritance instruments.[6] In recent years in particular, as a result of the very rapid development of various technologies, the phenomenon of so-called informal wills has appeared on a large scale in the practice of succession law.[7] These are wills made by testators who, when disposing of their assets in the event of their death, do

1 *Cf.* Anne Röthel, *Ist unser Erbrecht noch zeitgemäß?* (C H Beck 2010) 9 ff.

2 Germain Brière, 'Le projet de réforme du droit des successions' (1984) 15 Revue générale de droit 405, 406 ff.

3 Olivier Moreteau, 'A Summary Reflection on the Future of Civil Codes in Europe ' in P Apathy and others (eds), *Festschrift fur Helmut Koziol zum 70. Geburtstag* (2010) 1139–1149.

4 *Cf.* Peter Gardos, 'Recodification of the Hungarian Civil Law' (2007) 2007 European Review of Private Law 707.

5 Paul Terner, 'Perspectives of a European Law of Succession' (2007) 14 Maastricht Journal of European and Comparative Law 147.

6 Salvatore Patti, 'Il testamento olografo nell'era digitale' (2014) 2014 Rivistra di dirittio civile 992.

7 See, e.g.: Bruce H Mann, 'Formalities and Formalism in the Uniform Probate Code' (1994) 142 University of Pennsylvania Law Review 1033; Kevin White, 'Dispensing Powers. Validating Testamentary Intentions in the Absence of Formal Compliance' [2000] Law Society Journal 56; Ben Mceniery, 'Succession Law Keeping Pace with Changes in Technology and Community Expectations – Informal Wills' (2014) 12 Journal of New Business Ideas & Trends 1; Susan Gary, 'Harmless Error: History of the Doctrine and Recent Cases from the U.S. and Australia', *Oregon State Bar CLE seminar Advanced Estate Planning 2019* (Oregon State Bar 2019); Francois du Toit, 'Remedying Formal Irregularities in Wills: A Comparative Analy-

not make use of the forms of will provided for by the law or use them incorrectly. This is most often the result of ignorance or confusion as to the admissibility of a particular method of disposing of assets in the event of their death, and also reflects the needs of the testator who, in this instance, trusts other means of preserving his last intention than those provided for by the law.[8] Despite the testator's relatively obvious intentions, this type of legal act does not generally lead to the legal effects desired by the testator. In the light of the relevant provisions, at least from the perspective of most European countries, such a will is frequently invalid. Despite clear and convincing evidence and testation intentions, the testator's last will does not produce any legal effects regarding his estate, as it was expressed in a manner contrary to the law. The inappropriateness of this kind of solutions was shown, among others, during the COVID-19 pandemic, when the need for making last wills has increased significantly, and has rarely been executed in a manner consistent with the formalities.[9]

The functioning of such a solution in practice seems to be unsatisfactory for a number of reasons. Above all, it is a contradiction with a fundamental premise of modern succession law, i.e. the desire to reflect at all costs the last intentions of the deceased when determining the circle of beneficiaries of the succession estate.[10] Such an assumption is today not only at the heart of dispositions of property upon death, but is also, for example, the basic guideline for the drafting of the provisions on the statutory succession, where it is indicated that the aim is to shape it in such a way that the statutory succession reflects the statistical will of the hypothetical testator.[11] The influence of the last intent of the deceased on the succession law and its particular instruments is therefore considerable, so it seems that also the basic tools reflecting this intent, such as wills, should make it pos-

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sis of Testamentary Rescue in Canada and South Africa' (2020) 20 Oxford University Commonwealth Law Journal 139.

8 Mariusz Załucki, 'A Few Remarks about the Future of Provisions on Making a Will Contrary to the Testamentary Formalities Law' (2020) 13 Cadernos de Dereito Actual 20.

9 Kelly Purser, Tina Cockburn and Bridget J Crawford, 'Wills Formalities beyond COVID-19; An Australian-United States Perspective' (2020) 9 UNSW Law Journal Forum 1.

10 John H Langbein, 'Substantial Compliance with the Wills Act' (1975) 88 Harvard Law Review 489.

11 Susan Gary, 'Adapting Intestacy Laws to Changing Families' (2000) 18 Law & Inequality: A Journal of Theory and Practice 1.

sible to preserve this value and not be rigorously formal.[12] Reflecting the intent of a testator, sometimes expressed informally, seems to be more important value of the law of succession than respecting the formalities.

Such assumptions have already appeared in the succession law of some countries over the years. The voices of the doctrine,[13] the case-law[14] and, before that, the society,[15] have in some places brought about certain changes, including legislative changes, which today can be described as those on the side of a liberal approach to this issue. According to these solutions, fulfilling the intent of a testator at the expense of formalities is a "cure", and therefore it is possible to validate a last will and to respect testator's intentions despite the existence of certain formal defects in last wills.[16] However, there are also places in the world, and these places include most European countries, where the traditional approach to the formalities of succession law prevails, with the result that a testator's failure to comply with the statutory model during a testamentary act renders it invalid.[17] Time is moving inexorably on, however, and positive law is subject to constant change and development, which must also apply to the issue of last wills. For legal institutions come into being, change and disappear. Among other things, this is what links them to the fate of human beings, for when we come into the world, at some point we become aware of the inevitability of our passing. Then we can make a conscious choice to make a last will in the event of death or leave the order of succession and the de-

12 David Hayton, 'By-Passing Testamentary Formalities' (1987) 46 Cambridge Law Journal 215.

13 The most momentous text in this regard is that published by John H. Langbein back in 1975, a must-read for all reformers of this area of law. See: Langbein, 'Substantial Compliance with the Wills Act' (n 10).

14 Against this background, there have been many examples over the years of judgments referring to the problem of undue formal rigour. See: Mariusz Załucki, 'About the Need to Adjust the Regulations Regarding the Form of Will to the Modern Requirements' (2019) 6 The European Journal of Economics, Law and Politics 1.

15 It is difficult to present the views of the public in one place, especially as these are always diversified. Nevertheless, attention should be drawn to a number of statements on Internet forums, for example, indicating the need to modernise the law in this area. This can also be seen in the research of various scientific institutes. See, e.g.: British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (2006).

16 Anne Breuer, 'Pellegrini v. Breitenbach. Power to Reform Innocent Mistakes in Wills' (2012) 26 Quinnipac Probate Law Journal 46.

17 Antoni Vaquer Aloy, 'La relajación de las solemnidades del testamento' (2016) 3 Revista de Derecho Civil 9.

cision in this matter to the legislature.[18] But does today's law allow for a free and discretionary construction of the declaration of the last will and the shaping of legal relations *mortis causa*? Do the instruments available in this regard guarantee a proper reflection of the testator's instructions? How far should succession law remain from the often emerging and disappearing solutions based on devices used in everyday *inter vivos* practice? Is there a room in succession law for the Internet, social media, smart phones and other benefits of new technologies? Are existing forms of estate disposition coherent with the technological opportunities created by the emergence in recent years of a range of technological devices in almost every household? The answers to these questions are not the easiest ones and require taking into account a number of factors, both subjective and objective in nature. They can also affect and influence the shape of normative regulation in this area.

With this in mind, and observing the wide influence of technological innovation on various areas of legislation,[19] as well as noticing the potential vulnerability of succession law to this kind of interference, I decided to explore the tools used by the testator to dispose of property upon death. The current state of affairs, including the normative state of affairs in the various European countries has given rise to a need to search for an instrument which would make it possible to reconcile the traditional approach with the modern one, the current formalism with the increasingly frequent practice of preparing informal wills. I have therefore turned my attention to the question of the form of a will and its current and possible future image.

For this reason I considered it necessary to examine whether it is possible to design provisions on the form of a will in such a way as to meet contemporary needs in the context of the dysfunctions of these provisions,[20] which emphasise the form rather than the content of a specific disposition in the event of death. In my view, it is the content of the will and not the manner in which it is preserved that should be decisive in the context of assessing whether, in a given case following the testator's death, there is an effectively made declaration of intent in the event of death that has an ef-

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18 Gerry W Beyer, *What If Your Parrot Outlives You? Preparing for Your Bird's Future* (Phoenix Landing Foundation 2020).

19 Ricardo Berti and Simone Zanetti, 'La trasmissione mortis causa del patrimonio e dell'identità digitale: strumenti giuridici, operativi e prospettive de iure condendo' [2016] Law and Media Working Paper Series 1.

20 *Cf.* Rudolf Welser, 'Die Reform des österreichischen Erbrechts', *Zivilrechtsgesetzgebung heute Festschrift Gerhard Hopf zum 65. Geburtstag* (Manz 2007).

fect on the deceased person's property interests. The form of a will, understood as the manner in which the declaration is made and the vehicle of its content,[21] should be merely a means of recording the testator's will, and not a mechanism conditioning its effectiveness. Without observance of any form, a testator's declaration of intent containing his instructions in the event of death could not survive until after his death and thus produce any legal effects. In my opinion, however, it does not matter whether the form is oral, written or any other,[22] as long as it is capable of recording the testator's last will in such a way that it can be reproduced some time after his death. Therefore, the main objective of this work is to design such a normative solution which could function in the provisions of succession law as one that constructs the legal figure of the form of a will, giving it characteristics enabling it to reflect the testator's last intention irrespective of the manner in which it was made and irrespective of the manner in which it was recorded. In my opinion, it is possible to dissociate the provisions on the form of a will from the indication of the specific manner in which the testator made his last will, just as it is possible to dissociate these provisions from the indication of the specific manner in which the testator's last will was recorded. This is why I present the functional model of effective testation for informal wills and propose its implementation by individual European legislators. After its introduction to the law, all the future wills will be formal.

In the light of this, my main objective is to demonstrate that it is possible, justified by the needs of the practice of drawing up wills, to give the provisions on the form of a will a wording which makes them technologically independent, allowing the testator's declaration of last intent, made in any manner whatsoever, recorded by means of any method enabling the testator's last intent to be reflected after his death, to produce legal effects *mortis causa*. For it is not in all the current formalities and methods of testation indicated by individual legislators, but in the reflection of the testator's intentions that the most important value underpinning modern succession law lies.[23]

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21 Instead of many, see: Philippe Malaurie and Claude Brenner, *Droit des successions et des libéralités* (8th edn, LGDJ Lextenso 2018) 241 ff.

22 Reinhard Zimmermann, 'Testamentsformen: »Willkür« oder Ausdruck einer Rechtskultur?' (2012) 76 Rabels Zeitschrift für ausländisches und internationales Privatrecht 471; Mariusz Załucki, 'Współczesne tendencje rozwoju ustawodawstwa testamentowego' (2012) 22 Roczniki Nauk Prawnych 23.

23 Francesca Cristiani, 'Nuove tecnologie e testamento: presente e futuro' [2013] Diritto dell'informazione e dell'informatica 559.

This thesis is accompanied by the hypothesis that one of the main tasks of modern succession law is to link the available legal constructions to the shape of property relations in society and to favour solutions ensuring the best possible use of the testator's estate after his death, which is achieved, among other things, by provisions on the form of a will. Moreover, the analysis of freedom of testation in the light of the existing legal basis for the disposition of property upon death in the face of increasing social expectations in the context of attempts to draw up wills in contravention of the provisions on the form (informal wills) also aims to discover the links between the social and technological changes that have taken place in recent years and their impact on the legal situation of the heir and the legal relationships *mortis causa*.[24] Carrying out the research tasks defined in this way allows, in my opinion, a critical assessment to be made of the legal instruments provided by the current law for the testator to dispose of his estate upon his death, particularly as regards the provisions concerning the form of a will. It also entitles to a theoretical explanation of the challenges posed by the changing reality to the law of succession, as well as to new theses and hypotheses in the context of the possibility of using more universal solutions for legal inheritance purposes.

The above assumptions shape the layout of the work. The work consists of five chapters. The first chapter consist of recalling the basic legal solutions functioning in the world in the area of disposing of property upon death by means of a last will and the objections against them, resulting primarily from the observation of the practice of applying the law of succession (in the area of testamentary formalities). This must be the starting point for all critical analyses of the current state of affairs, without which further comments would be detached from the actual normative state and its basic solutions. Hence, this chapter serves as an introduction to further discussion. That is why I am presenting the evolution of legal regulations related to wills formalities, the actual consequences of failure to comply with wills formalities and the search for legal mechanisms whose task was to relax the rigour of the wills formalities regulations.

Chapter two of the book is devoted to present the ideas for validation of wills executed against the regulations on the wills formalities. A will as a tool to reflect the testator's real intention proved not to be foolproof, as it happened many times in practice that the testator was not able to effective-

24 Jens Beckert, 'The Longue Durée of Inheritance Law. Discourses and Institutional Development in France, Germany, and the United States since 1800' (2007) 48 European Journal of Sociology 79.

ly prepare a will according to the formal expectations of the legislator. For a long time it has been recognised that strict observance of the formal requirements of wills may lead to the harm of testamentary heirs and challenge the testator's freedom to dispose of his estate upon death. This became the basis for the theories that mitigated the formal rigor of dispositions made in the event of death. They then became the basis for legislative changes or changes in the practice of law in some countries. Before analysing how these theories work in practice, it is necessary to present their foundations. This is what I do in this chapter.

The chapter three of the book is therefore a presentation of the practice. 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. The exploration concerns four basic current models of relaxing the formal rigours of a will: the *substantial compliance* approach, the *dispensing power* approach, the *harmless error* approach and the *favor testamenti* approach. This path allows for an analysis of current solutions and their possibilities, and provides a basis for further discussion. This further discussion takes place in the chapter four of the book, where I consider the functions that are performed by the provisions on the form of wills, including in the context of mechanisms relaxing formal rigour. It is only through such an analysis that we can properly understand what the point of the legislation on wills formalities is, whether it is an area susceptible to change, and what the objectives of the legislation in this area should be in concrete cases.

Against this background, in the chapter five of the book I consider the need for changes to the current normative situation, consider the desired structure of the provisions on the form of a will and present my own proposal of the functional model of effective testation for informal wills. The proposed model is designed so that it can be implemented in the succession laws of the various countries as a universal model. This is why, in this part of the book, I also justify this proposal and reflect on the future of succession law taking this proposal into account. The book ends with conclusions and recommendations, which are a synthesis of the most important findings of my research.

The book is based on the basic scientific tools used in legal studies, i.e. dogmatic analysis, the comparative law method and the analysis of case law. Due to the rather specific subject matter of the need to make succession law more flexible and a certain restraint on the part of individual legislators, my deliberations were directed primarily at those legislators who have so far faced this type of challenges. Therefore, I have referred not only

to the universally acknowledged canons of civil law (I am focusing mainly on German, French, Spanish, Austrian and Dutch law), but I have also devoted a number of comments to solutions being part of the *common law* system (especially Australia, the United States of America, New Zealand and Canada), where the flexibility of particular solutions and possibilities for intervention in the judicial application of law to respect the principle of *favor testamenti* are much greater than in continental Europe. Since it is not possible to analyse all legal systems in one book, my focus is aimed at those legal systems that usually serve as a paradigm for changes. This is why I do not analyse the legislation of all European countries. I have also made a number of references to Polish law, which is close to me. The work has, however, a universal character and should not be treated as a dogmatic analysis of one legal order.

These methods allowed me to obtain research material which made it possible to formulate theoretical and legal conclusions relating to the private law regulations governing the disposal of property upon death (wills formalities), to evaluate the practice against the background of these regulations in the light of the tendencies prevailing in the legal science and to draw *de lege ferenda* conclusions relating to the *mortis causa* disposal of property by a testator in the face of current and future challenges.

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