## (4) Functions of the wills formalities regulations in the light of mechanisms to relax its rigour

### *1. Introductory remarks*

The reality of applying the provisions of the law of succession, mistakes made by testators caused by an erroneous interpretation of the applicable legal norms as well as a lack of awareness of the requirements imposed on wills by legal regulations, have often led in practice to the declaration of invalidity of the will[564] and, as a consequence, to a statutory succession, incompatible with the intent of the testator.[565] In many cases, this has also led to the dissatisfaction of the public, whose legal awareness of the succession law is not, as may be assumed, high.[566] The conflict between the automatism of succession law formalism and flexible legal circulation needs is growing. It is for this reason, among others, that some legislators have decided to introduce into their legal systems solutions to keep the defective wills in force (as valid wills).

The practice of applying individual solutions in this area shows that in the vast majority of cases the testator's intention takes precedence over formalism.[567] However, the problem of unsatisfactory legislative solutions in the area of regulations on the form of wills still exists, as one might think. This can be seen especially in the context of the legal regulations of European countries where the principle of *strict compliance* continues to be respected.[568]

In this regard, and following the latest trends, it is important to mention the voices emphasizing that, wherever it is possible, there should be a complete abandonment of formalism, *inter alia*, in order to encourage people

564 *Cf.* Harry T Edwards, 'To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?' (1995) 70 New York University Law Review 1167.

565 *Cf.* Miller, 'How Harmless Is Harmless? An In-Depth Look Into the Harmless Error Rule' (n 472) 1 ff.

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

567 Horton, 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (n 261).

568 *Cf.* Vukotic (n 377) 473 ff; Aloy (n 17).

to make use of legal instruments that fall under the scope of the law of succession. In this sense, the transition away from formalities is a right vehicle to achieve the goal of wider access to succession planning tools.[569] This is why it can be asked whether the application of a solution based on the doctrine of *substantial compliance* or its variations distorts the meaning of the provisions on the form of wills, and whether the provisions on the form of wills are still necessary and play an important role in the succession law. As it is sometimes suggested, the only reason for these provisions to be introduced in the modern legislation is the need to authenticate the testator.[570] Therefore, it is important to answer the question whether it is really so, or does wills formalities perform other essential functions in this area of law. Therefore, before the analysis to identify a proper theoretical model of a tool allowing for reflecting the testator's last will in the maze of surrounding formalism, consideration should be given to determining what functions are currently performed by the provisions on the form of wills and whether these functions should continue to be performed by the provisions on wills formalities in the future. While the assessment of the current practice in the systems that allow for the mitigation of formal requirements seems, in principle, positive, it is necessary to consider whether formalism in general still has any real functions in succession law and what should be taken into account when shaping the theoretical model to reflect the testator's last will.

In this respect, it has to be reminded that the requirement to comply with a specific form for a legal transaction is not, of course, traditionally typical only of wills or other *mortis causa* acts. It is, however, particularly characteristic of continental Europe legislation.[571] German law, for example, points out that the purpose of coercion at the level of the form of legal acts is to protect legal transactions, since in some cases, the person making the declaration of intent should be protected against ill-considered or too hasty obligations because of the risks involved in the act.[572] The form of a legal transaction may also have an informative function, for example by providing reliable information about the rights and obligations obtained.[573] In exceptional cases, the provisions providing for the obligation to comply with the form may aim to ensure that the activity can be effec-

569 Crawford (n 36) 269 ff.
570 ibid 293.
571 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 167 ff.
572 Solzbach (n 60) 10 ff.
573 Zerres (n 200) 72 ff.

tively controlled by the authorities.[574] The same applies in other legal systems.[575] Dutch law states, for example, that the determination by the legislator of the form of a legal transaction may prevent uncertainty as to its validity.[576] French law indicates that such a provision is, for example, about proof of a given act.[577] In Poland, on the other hand, it is argued that the establishment of a specific form by the legislator serves to remove doubts as to whether a statement has been made, to facilitate evidence, to protect parties against ill-considered decisions, to make actions open to third parties, and to facilitate state control over the performance of legal actions.[578]

It has to be reminded that, as it is believed in the traditional view presented in the law of succession, where – as can be judged - the formalism of legal transactions has grown over the years to the fullest possible extent,[579] the functions of the provisions concerning the form of will are not only to authenticate the testator (as it has been suggested lately in the doctrine),[580] but also to provide reliable proof that the testator's action was intentional (testamentary intention),[581] that it was done without pressure from third parties,[582] and that the testator understood the seriousness of the action performed.[583] As it was already explained, this position gave grounds for distinguishing in the doctrine of succession law the four functions: 1) the evidentiary function, 2) the channelling function, 3) the cautionary function and 4) the protective function.[584] The importance of each

574 Jurgen Ellenberger, in *Palandt Bürgerliches Gesetzbuch Kommentar* (74th edn, CH Beck 2015) 109.
575 *Cf.* Samuel Fulli-Lemaire, 'Le formalisme en droit patrimonial de la famille: regard comparatiste' (2016) 17 Max Planck Private Law Research Paper 10 ff.
576 *Cf.* PHM Gerver, 'Het nieuwe erfrecht ingevoerd' [2003] Nederlands Juristenblad 72.
577 Henri Mazeaud, Leon Mazeaud and Jean Mazeaud, *Leçons de Droit Civil* (Editions Montchrestien 1999) 271.
578 Zbigniew Radwański (ed), *System prawa prywatnego, vol. 2, Prawo cywilne - część ogólna* (C H Beck 2008) 116.
579 *Cf.* Horton, 'Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism' (n 261).
580 Crawford (n 36) 293.
581 *Cf.* Beinke (n 194) passim.
582 *Cf.* Ronald J JR Scalise, 'Undue Influence and the Law of Wills. A Comparative Analysis' (2008) 19 Duke Journal of Comparative and Intenational Law 41, 1 ff.
583 *Cf.* Pietro Rescigno, 'Il testatore anziano e la forma del testamento' [2017] Jus civile 382, 382 ff.
584 Langbein, 'Substantial Compliance with the Wills Act' (n 10) 492 ff.

of these functions is different in specific legislations on succession law, as well as their perception in the legal doctrine.[585]

This is all the more important because any consideration of the formal requirements for any disposition of property upon death, as it is traditionally believed, should first answer the question of whether the specific solutions meet the standard of form for a legal transaction such as a will set by the doctrine and individual legislators. Therefore, below I will consider whether these functions are still (and shall be) of any importance in the modern succession law, is there a standard that should be applicable in this regard and whether this standard will be complied with when using mechanisms to relax the rigour of wills formalities.

### 2. *The evidentiary function of the wills formalities regulations*

The risk of failure to preserve the testator's intentions, and therefore the impossibility of reconstructing it after his death, seems to support the need to construct legal norms to provide reliable evidence of the testator's intentions.[586] The reality in which the testator creates a will many years before his death is not unusual.[587] The passage of time does not serve to preserve certain events in human memory, therefore, in the vast majority of solutions found in the world, individual legislators decide to preserve the testator's will within a document, both private and public. The analysis of the existing variants in this respect *prima facie* indicates the necessity of existence of some kind of physical evidence of testation, which can be done

585 Some reflections on these functions have already been included in my recent book written in Polish: Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 169–195.

586 The broad analysis of this problem was already done by me in a different paper. *Cf.* Załucki, 'Evidentiary Function of the Provisions on the Form of Wills in the Contemporary Succession Law. Is the Complete Abandonment of Formalism Possible?' (n 45).

587 As an example, the results of research conducted in Poland on the files of inheritance cases can be shown, where the issues of making holographic wills were analysed. It was found that about 86% of wills were made by people over 60 years of age, and about 14% of wills were made by young adults. More than 7% of wills were made more than 3 years before the testator's death. See Liżyńska (n 59). Also, in the United States of America, a study conducted in the State of California found that, on average, wills were made about a decade before the testator's death. See Horton, 'Wills Law on the Ground' (n 59) 1129.

both during its execution and some time after.[588] As I have already observed, the legislators have noticed that any circumstance which, in the form prescribed by law, confirms facts related to an individual's *mortis causa* disposition may play an essential role in the sphere of cognition and establishment of facts relevant to the settlement of a given succession case.[589] For this reason, specific legal systems require a specific document to prove that the testation has occurred.[590] This requirement has different forms, ranging from the bequeather's handwriting of his last will in full, the bequeather's obligation to sign his last will or the public authority's obligation to draw up an appropriate protocol.[591] In principle, each of the forms of perpetuating the last will is primarily pursuing this - evidential - objective. Examples include the following data: French wills: holographic, official or mystical require a writing (Article 969 of the French *Code civil*).[592] The Dutch *Burgerlijk Wetboek* provides for the possibility of drawing up a will in the form of a notarial will or a holographic will deposited with a notary, and therefore also requires the existence of a written document (Article 4:94 of the *Burgerlijk Wetboek*).[593] The German *Bürgerliches Gesetzbuch* as part of the ordinary forms of will also lists notarial and holographic wills which obviously require a written document (§ 2232 and § 2247 of the *Bürgerliches Gesetzbuch*).[594] The English *Wills Act* 1837 provides for the existence of a writing for the validity of a will (Section 9 *Wills Act* 1837).[595] Similarly, under the *Probate Code* of the U.S. State of California, a will shall be in writing and signed (§ 6110 of the California Probate Code).[596] Even in the case of a special forms of will - an oral will - an appropriate

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

589 *Cf.* Rosalind F Croucher and Prue Vines, *Succession: Families, Property and Death* (Lexis Nexis 2018).

590 Mathias Schmoeckel and Gerhard Otte (eds), *Europäische Testamentsformen* (Nomos 2011) passim.

591 Lucia Ruggeri, Ivana Kunda and Sandra Winkler (eds), *Family Property and Succession in EU Member States. National Reports on the Collected Data* (Sveučilište u Rijeci 2019).

592 *Cf.* Georges Wiederkehr and others, *Code Civil* (Dalloz 2014) 1225 ff.

593 *Cf.* Alain-Laurent Verbeke, 'Het nieuwe erfrecht international gestitueerd' [2003] Weekblad voor Privaatrecht, Notariat en Registratie 20, 20 ff.

594 *Cf.* Dieter Leipold, *Erbrecht* (Mohr Siebeck 2014) 89 ff.

595 *Cf.* John G Ross Martyn and others, *Theobald on Wills* (Thomson Reuters 2010) 3 ff.

596 *Cf.* Horton, 'Partial Harmless Error For Wills: Evidence From California' (n 501).

protocol is required (e.g. Article 952 § 2 of the Polish *Kodeks cywilny*,[597] § 2250(3) of the *Bürgerliches Gesetzbuch*,[598] § 2107.60 of *Ohio Revised Code*).[599] Similar solutions are provided for in most other legal systems, therefore, regardless of the specific statutory solutions, the existing rule is that the testation activity is immortalized in writing. A document is created from the testation activity. In principle, such solutions cannot be surprising. As I have already suggested, after all, the contemporary use of a document is the basis for the functioning of all institutions, including those that have any competence in the area of succession law.[600] The need to make various types of statements on a document in writing, although today it can be considered as anachronistic, accompanies citizens in everyday life.[601] Therefore, it also accompanies the law of succession, enjoying the greatest preference among all means of evidence encountered in court proceedings. In principle, it is impossible to find a legal system in which a document is not used to register testamentary intention.[602] This is done for the possibility to recreate this intention, as well as the opportunity to confirm testator's identity. The use of a document makes it also possible to state that the testator had the testamentary intention and that the behaviour undertaken by the testator constituted the creation of the will and not a different legal action.[603]

It should be noted that a similar position should be taken in the context of the mechanisms to relax the rigour of wills formalities met in some jurisdictions. The Israeli solution should be indicated here, for example, where, as fundamental part of a handwritten will or an oral will the writ-

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597 *Cf.* Konrad Osajda, 'Sposoby stwierdzenia treści testamentu ustnego' [2013] Monitor Prawniczy 463.

598 *Cf.* Hubert Bartsch and Malte B Bartsch, *Das aktuelle Erbrecht* (Walhalla Fachverlag 2013).

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

600 ibid.

601 Łukasz Dyląg, 'Dokument a dokument a dokument elektroniczny w prawie cywilnym - pojęcie i istota desygnatu' [2011] Prawo Mediów Elektronicznych 8; Dariusz Szostek, *Nowe ujęcie dokumentu w polskim prawie prywatnym ze szczególnym uwzględnieniem dokumentu w postaci elektronicznej* (C H Beck 2012) passim.

602 *Cf.* Reid, De Waal and Zimmermann (n 31) passim.

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

ing is indicated (Section 25 of *Israeli Succession Law* חוק הירושה), and is included into the elements that are intended to reflect the content of the last will (referred to as *static formalities*).[604] Also the law of South Australia, where the Section 12(2) of *Wills Act* clearly states the need for a document to be in existence in order for the informal last will to be considered valid,[605] or the solution adopted in the Canadian province of Manitoba, in which Section 23 of *Manitoba Wills Act* requires the existence of a document or any writing on a document to be fully effective as thought it had been executed in compliance with all the formal requirements imposed by the law.[606] The same is true of other solutions of this kind. This can be also seen in the wills formalities case law. American case of *Estate of Castro* or Polish case dealing with the incorrect preparation of a protocol stating the existence of will can serve as examples. In the first one, the court has emphasized that a will shall be in writing, and one of the questions that it had to answer was whether testamentary intentions stored in an electronic document can constitute a writing.[607] In the latter, the protocol needed to be re-drawn up, and the court has considered its new version as the one that can cure a formal defect of the original document.[608] In each case, the existence of the document was investigated and only its existence entailed further actions in the pending proceedings in order to keep the will in force (as a valid will). There is no doubt, therefore, that regardless of whether the law of succession is formed in a world of *strict compliance* or in a world of *substantial compliance*, the requirement to preserve the last will appears to be necessary, and the medium used for this purpose is usually the document.

In the light of the above, as I have already explained,[609] the importance of a document in the area of testamentary formalities is vital. The legal science indicates that the term document comes from the Latin *documentum* and has been used in many languages for several hundred years.[610] As it

604 Menashe (n 54).
605 Ken Mackie, *Principles of Australian Succession Law* (3rd edn, Lexis Nexis 2017) 131 ff.
606 Lefebvre (n 80) 420 ff.
607 Re Estate of Castro, [2014] 27 Quinnipiac Probate Law Journal 412.
608 V CSK 254/17, [2018] OSNC 3.
609 Załucki, 'Evidentiary Function of the Provisions on the Form of Wills in the Contemporary Succession Law. Is the Complete Abandonment of Formalism Possible?' (n 45).
610 *Cf.* Szostek (n 601).

can be judged today, it has many meanings and functions.[611] In the legal literature there are at least three concepts of a document mentioned. It can be understood as a material medium, as an expression of human thoughts recorded on a material medium, or, as a medium of evidence. In this sense, the meaning of a term "document" is not uniformed and unambiguous. The modern concepts of it include any object that expresses a certain thought to be a document, and it does not necessarily have to be a writing, what in the context of a contemporary view of private law, seems very attractive.[612] This view is accepted in many legal systems, therefore, as can be evaluated, today there is a much broader concept of the term "document" in the world than the one traditionally understood. This term no longer refers only to the paper form. Australian solutions can serve as an example. The provision of Section 38 of *Victoria's Interpretation of Legislation Act* 1984 defines this concept broadly: the word document includes, in addition to a document in writing: (a) any book, map, plan, graph or drawing; (b) any photograph; (c) any label, marking or other writing which identifies or describes anything of which it forms part, or to which it is attached by any means whatsoever; (d) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; (e) any film (including microfilm), negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom; and (f) anything whatsoever on which is marked any words, figures, letters or symbols which are capable of carrying a definite meaning to persons conversant with them. Similarly broad concept can also be seen in the EU law. For example, the Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the reuse of public sector information[613] in the content of Article 2 paragraph 3(a) provides that the term "document" means any content regardless of the medium used (written on paper or stored in electronic form or as a sound, visual or audiovisual recording). As indicated in the preamble, the Directive lays down a generic definition of the term "document", in line

611 GA Dvoenosova, 'The Functions of a Document' (2013) 40 Scientific and Technical Information Processing 17.

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

613 OJ L 345 of 31.12.2003.

with developments in the information society. It covers any representation of acts, facts or information - and any compilation of such acts, facts or information - whatever its medium (written on paper, or stored in electronic form or as a sound, visual or audiovisual recording), held by public sector bodies[614]. Therefore, as can be seen, the concept of a document is very broad today and includes, *inter alia*, also those documents which in the doctrine of continental Europe are traditionally called electronic documents.[615] As it can be judged, the traditional understanding of a term "document" is already redefined. Today a "document" is a mean for the appropriate preservation of any information, what is to be achieved by any medium enabling its restoration.[616] The form of this medium is indifferent, thus allowing for both paper document and other instruments, including electronic or cloud-based recording. Although documents, as it is believed, have many functions[617], the basic feature and at the same time the function of each document is to maintain the information, the disclosure of statement, long enough for it to be exposed, reproduced, duplicated or transferred to another medium in an unchanged state.[618] A document is intended to store the information so that it can be preserved in a way that is reproducible and possible to access.[619] Differences can relate to the way in which the information is stored, the medium, the way in which the author is identified or finally, the evidential value.[620] The latter is often crucial for resolving cases, what is associated with granting documents a special preference among all means of evidence in court proceedings. Documents usually have a certain stabilizing and limiting value, which limits misunderstandings about the content of legal actions. They are generally characterised by their durability and the possibility to reproduce their content, which is not characteristic of other means of evidence. This is why legislators generally recognise that a document is a method of effective and

614 See recital 11 of the preamble to Directive 2003/98/EC, OJ L 345, 31.12.2003.
615 *Cf.* Maja Maciejewska-Szałas, *Forma pisemna i elektroniczna czynności prawnych. Studium prawnoporównawcze* (CH Beck 2014) passim.
616 Ross Harvey, *Preserving Digital Materials* (Walter de Gruyter 2012).
617 Dvoenosova (n 611).
618 *Cf.* Wojciech Kocot, *Wpływ Internetu na prawo umów* (Lexis Nexis 2004) 334.
619 Ross Harvey (n 616).
620 Szostek (n 601) 23 ff.

durable storage of a specific content that is suitable for reproduction and reuse.[621]

These attributes of a document are commonly known in the various systems of succession law, what was highlighted above, and show that a document plays an important role being used as a medium preserving a disposition of property upon death, creating the embodiment of the testator's last will.[622] This makes it possible to assume that, in principle, for the evidentiary function of the provisions on the form of wills, the existence of a document is necessary. The regulations on the form of wills that have evolved over the years, including the provisions on the doctrine of *substantial compliance* and its variations or other mechanisms to relax the rigour of wills formalities, use the document as a medium of testamentary intent.

Regardless of the different wording of the regulations, the different forms of wills, or the different provisions concerning the "cure" of wills drawn up defectively, reference is usually made to some form of document in the applicable legislation.[623] The following can serve as examples: Art. 970 of the French *Code civil* provides that a holographic will is not valid unless "it is entirely handwritten, dated and signed by the testator",[624] while § 2247(1) of the *Bürgerliches Gesetzbuch* states this type of will to be "a declaration written and signed",[625] both obviously requiring the testamentary intent to be preserved by a document that allows to reflect testator's handwriting; Art. 952 § 2 of the Polish *Kodeks cywilny* says that "the content of an oral will may be established in such a way that one of the witnesses or a third party writes down the testator's declaration within a year of it being made, giving the place and date of the declaration and the place and date of the written instrument, and the instrument is then signed by the testator and two witnesses or all the witnesses",[626] while § 2107.60 of *Ohio Revised Code* states that a will "shall be valid in respect to

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

622 *Cf* Virgil M Harris, 'The Importance of the Last Will and Testament' (1908) 25 Banking Law Journal 377; Albery (n 64); Michał Niedośpiał, *Testament jako dokument prawny (zagadnienia dowodowe i procesowe testamentu)* (Biblioteka Jagiellońska 2019).

623 Karen J Sneddon, 'Not Your Mother's Will: Gender, Language, and Wills' (2015) 98 Marquette Law Review 1537.

624 Malaurie and Brenner (n 21) 293 ff.

625 Röthel (n 113).

626 Witold Borysiak, *Funkcjonowanie w praktyce testamentu sporządzanego w formie ustnej (art. 952 k.c.)* (Instytut Wymiaru Sprawiedliwości 2014) 72 ff.

personal property if reduced to writing and subscribed by two competent disinterested witnesses within ten days after the speaking of the testamentary words",[627] both requiring of drawing up a document in order for an oral will to be valid; § 14-2518 *Arizona Revised Statutes* mandates an electronic will to "be created and maintained in an electronic record",[628] while Section 9(1)-(2) of the English *Wills Act* (1837) states that no will shall be valid "unless it is in writing and signed by the testator, or by some other person in his presence and by his direction",[629] and the presence "includes presence by means of videoconference or other visual transmission", what obviously comes down to the need for a document, although not necessarily a paper one; section 2(3) of the South African *Wills Act* provides that "if a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended (…) as a will, although it does not comply with all the formalities for the execution or amendment of wills",[630] while section 14(2) of New Zealand's *Wills Act* says that a court may validate a will, if "it is satisfied that the document expresses the deceased person's testamentary intentions",[631] both requiring the existence of a document to cure a flawed will. Regardless of the type and purpose of a given legal regulation, its scope or consequences for the succession, the legislators require the existence of a document whose role in today's succession law is unquestionable. Therefore, in the law of succession, it is possible to outline the principle according to which the existence of a document is a precondition for the effective making up of a declaration of last will, and the absence of such a document means that it is impossible to inherit under the will. Even where it is permitted to prepare wills orally, the consequence of making a declaration in this way is to draw up a document whose task is at least to archive the oral declaration of last will. As can be judged, these solution perform the

627 Joseph Mentrek, 'Estate Planning in a Digital World' [2009] Ohio Probate Law Journal 195.
628 Hirsch, 'Technology Adrift: In Search of a Role for Electronic Wills' (n 83).
629 Mariusz Załucki, 'Testament w prawie angielskim' in Piotr Kostański, Paweł Podrecki and Tomasz Targosz (eds), *Experentia docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple* (Wolters Kluwer 2017).
630 Francois du Toit, 'Testamentary Rescue: An Analysis of the Intention Requirement in Australia and South Africa' [2014] Australian Property Law Journal 56.
631 Peart and Kelly (n 98).

evidentiary function of form regulations, as it allows to identify the testator and his testamentary intentions after his death.[632]

In the light of the above, it may be considered that the evidentiary function that was traditionally recognized in the area of succession law still performs its role and still means the possibility and necessity of preserving the testator's intentions. It is essential that there is a possibility to reconstruct the testator's intentions as well as an opportunity to confirm his identity. The authority recognizing a given succession case should be able to state that the testator had the testamentary intention and that the behaviour undertaken by the testator constituted the creation of the will. The form of the will should therefore provide an opportunity to determine the bequeather's *animus testandi*.[633] The existence of the testamentary intention is, after all, an essential prerequisite for creating a will. The form of a will is therefore one of the possible instruments to assess that a given declaration of intent is the testator's final declaration. It is intended to provide evidence of the testator's intentions,[634] and this is sufficient argument to consider that such solutions in succession law are necessary. There is no other way today to achieve such a goal. The formalities are necessary to give evidence that a will was actually made, what is needed in order to protect the freedom of testation and reflect testamentary intentions. In the law of testamentary succession evidence of the testator's credible intentions plays the most important role. Without such evidence, it is difficult to assume that one is dealing with a last will, not to mention the absence of any *mortis causa* consequences.

What is important referring to the subject of this book, this can also be seen in those legal systems which allow for the effectiveness of the so-called informal wills, based on the doctrine of *substantial compliance* and its variations in the appearance of *harmless error* or *dispensing power*.[635] Generally, regardless of the content of specific legal norms on succession, the ba-

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

633 Wolak (n 535) 1 ff.

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

635 *Cf.* Miller, 'Substantial Compliance and the Execution of Wills' (n 276) 343–344; Johnson (n 262) 10–15; White (n 7) 56–60; Sherwin (n 364) 453–476; Leipold, 'Ist unser Erbrecht noch zeitgemäß?' (n 85) 802–811; Joan Marsal Guillamet, 'La Ineficàcia dels actes i disposicions d'última voluntat', *El Nou Dret successori del Codi Civil de Catalunya* (Documenta Universitaria 2012); du Toit, 'Tes-

sis for solutions reflecting the testator's intention is some kind of form of declaration of last will preserved by means of a document. Thus, even in those legal systems where the doctrine of *substantial compliance* or its variations is applied, the provisions of succession law provide for a certain minimum of formalities, primarily for evidentiary purposes carried out after the testator's death.[636] Demonstrating that the testator had the *animus testandi* and actually made a will is exactly a necessary minimum, the accomplishment of which may depend on the degree of formalities.[637] If the formalism of the regulation on the form of wills allows not only to identify the testator, but also to preserve his will and to reconstruct it after his death, the regulation on the form of wills is sufficient to achieve the objectives of the law of succession.[638] Consequently, the form of will should reflect the current needs and concepts prevailing in a given legal system, and the prerogatives of the evidentiary function of the wills form regulations. In other words, the accomplishment of evidential purposes by a given form of will should be a starting point for its possible design by the legislator. As I have indicated before,[639] this can be seen, *inter alia*, in recent legislative achievements in the field of wills formalities law in the world, including latest civil codes of Russia, Romania, or Hungary, the provisions enacted in some US states (Florida, Arizona) or the US Uniform Electronic Wills Act.[640] These laws, in the field of testamentary succession, are primarily aimed at the evidentiary function.[641] Even during the COVID-19 pandemic, when public expectations aimed at facilitating the drafting of

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tamentary Rescue: An Analysis of the Intention Requirement in Australia and South Africa' (n 630) 56–82; Paweł Janowski, 'Doktryna „substantial compliance" (merytorycznej zgodności) w anglosaskim prawie spadkowym, na przykładzie Australii i Nowej Zelandii' [2016] Ius et Administratio 73, 73–95; Langbein, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' (n 94) 1 ff.

636 Brook (n 50) 205–212; Tucker (n 94) 969–979; Horton, 'Partial Harmless Error For Wills: Evidence From California' (n 501) 2027 ff; Martin (n 55) 431 ff.

637 *Cf.* Flaks (n 203).

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

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

640 Uniform Electronic Wills Act was approved by The National Conference of Commissioners in July 2019. *Cf.* Hirsch, 'Technology Adrift: In Search of a Role for Electronic Wills' (n 83).

641 *Cf.* Banta (n 48); Dubravka Klasiček (n 368).

wills[642], in legal systems that decided to make legislative changes, not all the formalities were abandoned, following the principle that complete abandonment of wills formalities is not possible.[643]Those of the formalities which were not affected during the changes also serve primarily the evidentiary function. The role of formalities is therefore still relevant, although it is possible to imagine more relaxed formalities in the future. However, a reform under which the provisions on the form of wills will cease to perform the evidentiary function does not seem possible. Provisions based on the doctrine of *substantial compliance* and its variations, as well as other mechanisms to relax the formal rigour of wills formalities, do not and will not change this state of affairs.

### 3. *The channelling function of the wills formalities regulations*

The recognition by individual legislators of the solution according to which testation should be formal over the years has developed, among others, certain tools in which bequeathers disposed of property in case of death.[644] The development of law in this field has led to the creation of a certain standard, a common criterion determining the most desirable characteristics of human behaviour during the act of testation.[645] This is one of the reasons why it is commonly accepted that while the final result of testation should be a carrier of the testator's intent, which is an expression of the evidentiary function of the provisions on the form of wills, the testation procedure should fall within a certain framework set by the provisions of the law, which means that the provisions on the form also perform a function referred to as standardization or channelling function.[646] Such a concept is found in both *civil law* and *common law* countries, where precedent law is known to be the primary source of law rather than the acts passed by parliaments. In the area of succession law, however, this is not the case and it is the provisions of the law that are only the starting point

642 *Cf.* Horton and Weisbord (n 52).
643 Załucki, 'Evidentiary Function of the Provisions on the Form of Wills in the Contemporary Succession Law. Is the Complete Abandonment of Formalism Possible?' (n 45).
644 *Cf.* Roscoe Pound, 'The Role of the Will in Law' (1954) 68 Harvard Law Review 1.
645 Roger Kerridge, *Hawkins on the Construction of Wills* (Sweet & Maxwell 2000) 19 ff.
646 Peart (n 98) 31 ff.

for court precedents. It is therefore the provisions of the law that provide the framework for the legal action of the will, modelling the tools that can be used by the testator to plan the fate of his estate after death. This is the case, for example, in France where the *Code civil* lists an enumerating catalogue of will forms (Art. 970-976),[647] this is the case of Switzerland where the legal system contain the catalogue of will forms provided for in the *Zivilgesetzbuch* (Art. 498),[648] this is the case in the Canadian province of British Columbia for which the catalogue of testamentary *mortis causa* dispositions is provided for in the *Wills, Estates and Succession Act* (Section 37-40),[649] or the law of the American State of Minnesota (Section 524.2-504 *Minnesota Statutes*).[650] This is also the case of almost all countries in the world. The main purpose of this is to ensure consistency between the content that the testator determined at the time of making his will and the content that will be reproduced after his death and have legal effect. Many believe that this is precisely what is needed to ensure, as far as possible, that the testation process is unified, so that the testator can use the instruments available to him routinely and quickly. In other words, the introduction of a specific model of *mortis causa* legal acts can provide an appropriate level of quality, safety and convenience.[651]

The formal requirements of a will can therefore serve to structure the testation procedure.[652] Individual legislators do not allow for arbitrary behaviour of testators; they require them to use forms of wills designed by the legislature. That is why the regulations concerning the form of a will are absolutely binding.[653] The rule in this respect is that any deviation from the requirements imposed by the provisions of the law, and thus formal defects, result in the invalidity of the disposition in case of death.[654] Although, as it is known and was already explained, individual legislators have been looking for intermediate solutions for some time, the vast ma-

647 Malaurie and Brenner (n 21) 287 ff.
648 Breitschmid, 'Testament und Erbvertrag - Formprobleme: Die Einsatzmöglichkeiten für die Nachlassplanung im Lichte neuerer Rechtsentwicklungen' (n 119) 274 ff.
649 Peter W Bogardus, Mary B Hamilton and Sadie L Wetzel, *Wills and Personal Planning Precedents. An Annotated Guide* (The Continuing Legal Education Society of British Columbia 2020) passim.
650 *Cf.* Frerichs and Kovacevic (n 307).
651 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 178.
652 Lois J MacLean, *Rectification and Validation of Wills and Codicils* (LESA 2015) 3.
653 Fernández (n 92).
654 Röthel (n 113).

jority of legal systems are "punishable" by nullity in the event that a disposition of property upon death is made in a manner that violates the rules on form (*ad solemnitatem*). This is typical, for example, of continental Europe.[655]

As I have already explained,[656] the requirements for the testation process related to the security of legal transactions might be seen as being in conflict with the private law principle of autonomy of will and independence of legal entities in making decisions. In the succession law however, the principle of autonomy of will is manifested in the principle of freedom to dispose of property in case of death, which includes, among others, the freedom of testation.[657] The doctrine indicates that the freedom of testation should be understood as the scope of the testator's powers to dispose of his estate in case of death.[658] This is a certain legally protected possibility of making effective dispositions of property upon death, a fragment of the autonomy of the will of legal entities that involves the freedom to make such a legal act as a last will and the possibility to include in there various dispositions of the testator's property effective at the time of his death.[659]

It has to be reminded that the freedom of testation, as well as the right to succession, is now guaranteed in individual states on a constitutional level.[660] Moreover, it should be regarded as a derivative of the public subjective law - the right to property.[661] It is in this context, among other things, that legislators decide to raise the principle of succession protection to constitutional status.[662] It is not merely a question of protecting the future heir, but rather the situation of the person who has the property or

655 Schmoeckel and Otte (n 590) passim.

656 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 179 ff.

657 Kevin Noble Maillard, 'The Color of Testamentary Freedom' (2014) 62 SMU Law Review 1783.

658 Eike Götz Hosemann, 'Protecting Freedom of Testation: A Proposal for Law Reform' (2014) 47 University of Michigan Journal of Law Reform 419.

659 Alberto Maria Benedetti, 'Notas sobre la prohibición del testamento conjunto: Sobre la validez de los mirror wills' [2015] Revista de Derecho Privado 59.

660 Jan Peter Schmidt, 'Grundlagen der Testierfähigkeit in Deutschland und Europa' (2012) 220 Rabels Zeitschrift für ausländisches und internationales Privatrecht 1022.

661 Renate Barbaix and Alain-Laurent Verbeke, *Beginselen erfrecht* (die Keure 2012) 15 ff.

662 Andrzej Mączyński, 'Prawo dziedziczenia i jego ochrona w świetle orzecznictwa Trybunału Konstytucyjnego' in Marek Zubik (ed), *Minikomentarz dla Maksiprofesora. Księga jubileuszowa profesora Leszka Garlickiego* (Wydawnictwo Sejmowe 2017) 322 ff.

other right of proprietary nature that can be inherited.[663] In this respect, it is doubtful whether the statutory requirement imposing on the testator the obligation to choose one of the statutory forms for drawing up the testation act, and thus breaking with the principle of freedom of form of legal acts, is constitutionally legitimate.

These considerations are all the more justified in that the possible denial of the form rules as violating the constitutional right of property would have to result in legislative changes in the area of wills formalities. Although there are opinions according to which the principle of freedom of form of legal acts is not a component of the principle of autonomy of will, but only a general rule of private law of a constructional nature, and due to this basis it is not possible to seek any relation between the two values in this respect, this opinions do not seem justified. In fact, it can be assumed that overly strict requirements as to form, making it impossible to make a will in practice, would unduly interfere with the principle of the testator's autonomy of will, without allowing the realization of his *mortis causa* intent.[664]

The constitutional understanding of the right to succession, expressed for obvious reasons primarily in the continental legal orders, against the background of such provisions as Articles 21 and 64 of the *Polish Constitution*,[665] Article 11 paragraph 1 of the *Czech Constitution*,[666] Article 14 paragraph 1 of the *German Constitution*[667] or Article 33 paragraph 1 of the *Spanish Constitution*,[668] is, among other things, an order to take into account the intent of the owner as the basic determining factor for the fate of the succession, where excessive interference by the legislature or other public authorities in the sovereignty of the last will is to be regarded as an infringement of the right to succession.[669] The jurisprudence of the Polish

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663 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 180.

664 ibid.

665 *Cf.* Andrzej Mączyński, 'Konstytucyjne prawo dziedziczenia' in Wojciech Popiołek, Maciej Szpunar and Leszek Ogiegło (eds), *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana* (Zakamycze 2005).

666 *Cf.* Katerina Ronovska, 'Civil Law in the Czech Republic : Tendencies of Development ( Some Notes on the Proposal of the New Civil Code )' [2008] European Review of Private Law 111.

667 Solzbach (n 60) 104 ff.

668 Antoni Vaquer Aloy, 'Freedom of Testation, Compulsory Share and Disinheritance Based on Lack of Family Relationship' in M Anderson and E Arroyo I Amayuelas (eds), *The Law of Succession: Testamentary Freedom. European Perspectives* (Europa Law Publishing 2009) 2 ff.

669 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 180.

Constitutional Tribunal can serve as an example. According to its view, the legislators should establish regulations subsidiary to the statutory succession, assuming at the same time a certain type of testamentary dispositions, create a mechanism taking into account the freedom to dispose of the *mortis causa* estate so that the intent of the testator is of primary importance, not the rules established by the legislator.[670]

In this light, when the provisions on the form of wills are treated as a kind of mechanism for the standardization of dispositions of property upon death, it is necessary to ensure that they can be a guarantee of the testator's last intent.[671] The certainty of circulation, as one of the reasons for the introduction of the obligation to observe the special form, may also serve to protect the execution of the testator's will.[672] Without a minimum of legal certainty, the will expressed by the testator could not be protected at all and could be exposed to the danger of distortion. Total freedom in this area could therefore lead to a situation in which the testator would not be certain to carry out his *mortis causa* disposition. It therefore seems desirable to maintain a certain standard of disposition in the event of death.[673] The paradox, therefore, is that the limitation of the autonomy of the will by the rules of form means at the same time a guarantee of the realization of that autonomy. The absence of a minimum standard for dispositions of property upon death in terms of legal certainty would increase the testator's freedom, but this freedom would prove useless in practice, due to the lack of protection.[674] Hence, on the one hand, legal certainty and security of legal transactions may be a limitation of the freedom of testation and, on the other hand, an instrument for the exercise of that freedom. Everything depends on a specific statutory solution. The legislator, when introducing the obligation to observe a form specific for testation activities, must propose such a solution which will appropriately combine the two above values: legal certainty of legal circulation and the bequeather's will autonomy. The wills formalities should be shaped in such a way that a statistical testator can easily use it, without the need for legal expertise.[675]

This approach, as one might think, is precisely the right one for the creators of the doctrine of *substantial compliance* and the solutions based on it,

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670 K 23/98, [1999] 2 OTK ZU 25.
671 Marsal Guillamet (n 635) passim.
672 Lon L Fuller, 'Consideration and Form' (1941) 1 Columbia Law Review 799, 799 ff.
673 Gulliver and Tilson (n 34) 5 ff.
674 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 181.
675 *Cf.* Ponath (n 105) 242 ff.

applied in practice. Those legislators who have decided to introduce one of the variations of the doctrine of *substantial compliance* are primarily concerned with ensuring that the will of the testator is properly reflected.[676] At the same time, they ensure that there is clear and convincing evidence of testation in the case of informal wills where the testator's fantasy or lack of knowledge has resulted in the testator's use of a medium which is not provided for this type of legal action by the law.[677] Solutions such as the *harmless error* or the *dispensing power* are predictable solutions, which are also based on a specific standard, which is implemented in practice by the courts. As a matter of principle, the *harmless error* and the *dispensing power* in determining whether a will has been prepared validly in a given case are based on a writing or its derivative, refer to essential elements of a form of a will. There is no room for absolute discretion, the court must rely on the existing standard, which, among other things, is developed in case law.[678]

Regulations are therefore designed to enable succession by way of an informal will, but not at any cost, but only if the other criteria provided by law are met. In the context of solutions created in Australia, Canada, the United States of America or South Africa, as well as some solutions observed in European countries, it has to be explained that they are based on the search mechanism for elements of a will provided by the law.[679] This search may indicate that the testator had a testamentary intent and wanted to make a will, but was unable to or couldn't do so. Finding such elements, such as the testator's own handwriting or an e-mail marked as his last will, may suggest a willingness to comply with the rules of form and lead to the will being considered valid.[680] If there were no specific standards for this legal action, if the legislator did not indicate what elements should be expected for this legal action, or what elements shape this legal action, then it would not be possible to determine whether such an action

676 *Cf.* John H Langbein, 'Defects of Form in the Execution of Wills: Australian and Other Experience with the Substantial Complicance Doctrine', *American/Australian/New Zealand Law: Parallels and Contrasts (Papers presented in Sydney, Australia, from 11-16 August 1980 at a meeting between the American Bar Association, Law Council of Australia, New Zealand Law Society, to commemorate the bicentenar* (1980).

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

678 Langbein, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' (n 94) 3 ff.

679 Purser and Cockburn (n 55) 46 ff.

680 Załucki, 'About the Need to Adjust the Regulations Regarding the Form of Will to the Modern Requirements' (n 14) 3 ff.

was a last will in practice. Therefore, even where the formal requirements of wills are treated relatively mildly, and are not based on the beliefs of *strict compliance*, some paradigm of a last will is necessary, to which the authority applying the law, and earlier the testator, could refer.[681] This is why, for example, in the Israeli law the court searches for "static formalities" of a will (Section 25 of the *Israeli Succession Law* (*חוק הירושה*)),[682] in South Australia the court examines if a document is a will with "no reasonable doubt" (Section 12(2) of the *Wills Act*),[683] and in New Zealand it looks for the document to express the deceased intentions (Section 14 of the *Wills Act*).[684] In this sense, standardisation is indispensable.

The above can be seen in the case law of individual countries. The channelling function was described, for example in one of the judgements of Manitoba's court. It was stated there that the main purpose or function of the formality requirements of the law is, *inter alia*, the channelling function in which the formal requirements result in a degree of uniformity in the organization, language and content of most wills.[685] This view is shared by other courts, deciding on the validity of certain documents executed contrary to the legal requirements. As it is known, there are number of requirements for a will to be valid and where the requirements are not all met, there is an opportunity to challenge the will.[686] The standards resulting from the provisions of the law allow, among others, to determine whether the testator acted with sufficient discernment and willingness to make a will (*animus testandi*).[687] Testamentary intent, or "*animus testandi*", is a key ingredient in any testamentary document. The court, when the will is challenged, has to determine it, and the closer to the statutory standard by a certain disposition, the bigger chances for it to be validated.[688] This was outlined, for example, in the recent case from British Columbia, where the court has emphasized that the best evidence of whether a writing was intended to be a testamentary act is the document itself.[689] As can be seen, in this sense the formalities mean that a will provides a well-de-

681 *Cf.* Melanie B Leslie, 'Frustration of Intent in the Wealth Transmission Process' (2014) 2 Oñati Socio-Legal Series 283.
682 Menashe (n 54).
683 Lester (n 230).
684 Peart and Kelly (n 98).
685 George v. Daily, [1997] 15 E.T.R. (2) 1.
686 Barret v. Bem, [20120 EWCA 52.
687 Costa v Public Trustee [2007] NSWSC 1271.
688 Estate of Thomas S. Souther, [2012] 25 Quinnipiac Probate Law Journal 161.
689 Quinn Estate v. Rydland, [2019] BCCA 91.

fined means of passing property on death and testators are channelled towards a well-understood, standard method of accomplishing their ends.[690]

The next goal of standardizing the forms of will, as can be judged, is to prevent the testator's last will from being distorted, to prevent its falsification.[691] Establishing by the legislator the requirement of observing the special form of a will in the form specified by the legislator is to guarantee the authenticity of the will, allow for identification of the testator and reconstruction of his last will.[692] In this respect, the standardization function of the provisions on the form of testamentary dispositions largely coincides with the evidentiary function. These functions complement each other. Legislators should therefore avoid such forms that do not allow the testator's intentions to be reconstructed in a way that borders on the certainty that the will revealed in a given case belongs to the testator.[693] Certainly, this requirement may be fulfilled by the necessity of the testator's own handwritten signature or the participation in testation of third parties, especially those performing official functions, which may be encountered under certain statutory solutions. It is also these requirements that are emphasized in systems that know the solution based on the doctrine of *substantial compliance*. Some variations of this doctrine require strict existence of such elements of the will (as the Colorado's approach),[694] without which it is impossible to consider informal wills valid. The requirements of "clear and convincing evidence"[695] or "beyond reasonable doubt"[696] and the search for "essential elements"[697] should also be considered as fulfilling the objective of reconstructing the testator's last will.

One of the purposes of legislators' use of the construction of forms of will may also be the desire to define a standard of wording used in such activities. Over the years of using various forms of testamentation, a specific language has developed, a terminology that is basically only suitable for

690 Law Commission, *Making a Will. Consultation Paper 231* (The Law Commission 2017) 74.
691 Gwiazdomorski (n 43).
692 Grundmann (n 61) 442 ff.
693 Ponath (n 105) 158 ff.
694 Miller, 'How Harmless Is Harmless ? An In-Depth Look Into the Harmless Error Rule' (n 472) 12.
695 Sherwin (n 364).
696 Johnson (n 262) 10 ff.
697 Maxton (n 38) 94 ff.

*mortis causa* legal acts.[698] The style of dispositions of property upon death is fundamentally different from that of other legal acts.[699] The availability of specific normative models results in practice in a relatively high similarity of the statements of individual testators, their official-legal style or even an attempt to imitate statutory formulations.[700] The content of individual wills drawn up in practice very often contains formulas such as: "I declare that I want to appoint upon my death", "this is my last will" or "in the event of my death, I will transfer my property", etc.[701] For this reason, it is argued, among other things, that one of the objectives pursued by the channelling function of the regulations on the form of wills is a linguistic objective, which is related, for example, to facilitating the demonstration of the testator's intention in a given case because of the testator's use of typical words appropriate for *mortis causa* dispositions.[702] It should be added that in the doctrine there are voices about the possibility of performing the channelling function of testation by reducing testation activities to filling in a generally available form, prepared by the legislator and attached e.g. to annual tax returns. This is supposed to simplify the making of wills in practice, increase the number of people using *mortis causa* instruments or facilitate possible changes in the testator's last will. Already today, there are various websites offering specific forms suggesting that filling them out may allow the testator to more properly implement his will in case of death. And although their status is unclear, perhaps this is one of the ways that could be used in the future to ensure the realization of the intent expressed *mortis causa*.[703] Undoubtedly, most of the mechanisms based on the concept of *substantial compliance* also touch upon the problem of increasing public interest in the mechanisms of succession law, or even the

698 Scott T Jarboe, 'Interpreting a Testator's Intent from the Language of Her Will: A Descriptive Linguistic Approach' (2002) 80 Washington University Law Quarterly 1365.

699 Karen J Sneddon, 'Speaking For the Dead: Voice in Last Wills and Testaments' (2011) 85 St. John's Law Review 684.

700 *Cf.* Paola Fontana and others, 'Handwriting as a Gauge of Cognitive Status: A Novel Forensic Tool for Posthumous Evaluation of Testamentary Capacity' (2008) 29 Neurological Sciences 257; Mark Glover, 'Minimizing Probate-Error Risk' (2016) 49 University of Michigan Journal of Law Reform 335.

701 Champine (n 132); Adam J Hirsch, 'Incomplete Wills' (2013) 111 Michigan Law Review 1423; Anna Koziczak, 'Oznaki emocji w testamencie a jego autentyczność' (2012) 277 Problemy Kryminalistyki 30 ff.

702 Peter T Wendel, 'Setting the Record Straight: The "Flexible Strict Compliance" Approach to the Wills Act Formalities' (2016) 95 Oregon Law Review 50 ff.

703 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 183.

validity of wills already drawn up in such an unusual way. Certainly these are also steps towards simplifying the standards of drafting wills.

The doctrine of succession law also argues that the standardization of dispositions of property upon death may be relevant in circumstances where the legal awareness of society is not high. Then, the use of instruments that are more or less similar to each other makes it possible to standardize the testation of individual persons who, without specific legal knowledge, will refer to already used instruments or, more likely, use the knowledge of persons with such knowledge.[704] This is also certainly the way to simplify the practice, which otherwise would have to deal with an unlimited number of problems, which would be very difficult to solve. Certain minimum formal requirements make it possible to determine whether a given activity was intended to be the testator's will, i.e. whether it contains a declaration of last will expressed upon death.[705] Therefore, such a minimum standard of wills formalities is desirable and is currently being implemented in practice. While legislators require specific ways of making wills, it is increasingly accepted that a deviation from those specific ways of making wills should be effective if it contains evidence that the testator acted with the testamentary intention. The possibility of stating such circumstances therefore detaches the declaration of will from a particular way of expressing it, makes the declaration independent, and allows the estate to be passed on based on it, which, however, would not be possible if there was no standard of wills formalities.[706]

In the above contexts the provisions on the form of will and the solution to relax the rigour of wills formalities realize a standardization function. Without the existence of a standard in this respect, there would be no free testation understood as the testator's unrestricted act of determining his successors in title.[707] Consequently, the channelling function of wills formalities regulations, traditionally recognized in succession law, plays an important role even today. The provisions on the form of a will, complemented by solutions based on the doctrine of *substantial compliance* and its variations, or other mechanisms to mitigate the rigour of formal requirements, do not deviate from standardization despite the technological

704 *Cf.* Patti (n 6).
705 Langbein, 'Substantial Compliance with the Wills Act' (n 10) 494 ff.
706 *Cf.* Iris J Goodwin, 'Access to Justice: What to Do about the Law of Wills' [2016] Wisconsin Law Review 947, 947 ff.
707 *Cf.* Susanna Blumenthal, 'The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America' (2006) 119 Harvard Law Review 959, 963 ff.

changes that have emerged over the years. This function complements the evidentiary function of form regulations, and its implementation in the law of succession allows to search for the existence of the testator's intention based on elements which can be called essential elements of wills formalities.[708] The lack of a standard in the succession law that would specify the basis of a will as a legal act allowing to dispose of property upon death would make it impossible to use this legal instrument. The indication of the *essentialia negotii* of a last will in the law makes it possible to dispose of property in case of death by means of this instrument, putting aside the issue of whether the testator has actually drawn up a will in a given case, not to mention the issue of validity of such an activity.[709] It is only the actual existence of an instrument drawn up for the purpose of disposing of the estate in the event of death based on a statutory model that may give rise to further reflection on the practical implications of such an instrument, including its validity. The provisions around the statutory model of a will may provide for who may use this instrument and under what circumstances.[710] Without a statutory model of a last will, it would not make sense to have such provisions, and a will could not be an alternative to other titles of succession in case of death.[711] Such solutions should therefore also exist in the future.

### *4. The cautionary function of the wills formalities regulations*

One of the most important elements of testation activities is the intent and awareness of testation.[712] As constitutive components of this activity they influence its validity.[713] The testator must be aware and willing to make a disposition in case of death, and demonstrate that the behaviour he undertakes constitutes the drawing up of a will.[714] The legal science, defining *animus testandi*, indicates that the lack of this element in the testator's statement must lead to the conclusion that the testator's conduct does not con-

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708 Patricia Critchley, 'Privileged Wills and Testamentary Formalities: A Time to Die ?' (1999) 58 Cambridge Law Journal 49, 52 ff.
709 *Cf.* Niedośpiał (n 622) 177 ff.
710 *Cf.* Hirsch, 'Incomplete Wills' (n 701) 1443 ff.
711 *Cf.* Croucher (n 97).
712 Reid K Weisbord, David Horton and Stephen K Urice, *Wills, Trusts and Estates. The Essentials* (Wolters Kluwer 2018) passim.
713 Esquivel and Acuna (n 56) 194 ff.
714 Franz Gschnitzer, *Erbrecht* (Springer 1964) 22 ff.

stitute a will.[715] Therefore, also in this area, the regulations on the form of a will play an important role. Their task is also to make the testator aware of the seriousness of the action being performed. It is not a question of the testator's intention to draw up an act of last will in a particular form, but rather, in general, of his intention to cause the *mortis causa* effects of his disposition.[716] This can be seen not only in the *strict compliance* countries,[717] but also in the *substantial compliance* model,[718] as well as in other countries familiar with mechanisms to relax the rigour of wills formalities. *Harmless error*, *dispensing power*, *favor testamenti* - all of these doctrines are based on the intention of a testator as one of the most important factors in determining whether a document constitutes a valid will.

The testamentary intention is an element of the act of testation that many consider the cornerstone of *mortis causa* dispositions.[719] The lack of *animus testandi* leads to the invalidity of *mortis causa* dispositions.[720] This intention must be distinguished from the capacity to make a will, which may be a subject to certain limitations, especially of a mental nature.[721] In the case of *animus testandi*, it is the bequeather's desire that his decisions regarding the fate of his estate become effective upon his death.[722] The two elements complement each other. The testator must not only have the intent to dispose of his estate in case of death, but must also be able to express his intent in a way that is consistent with his desires and understandable to his surroundings. The regulations on the form of a will may therefore also serve to make arrangements of this kind. This can be seen, for example, in the South Australian approach, as well as in the provisions of the *Civil Code of Quebec*. The first example shows a need for a search by the court of the testamentary intentions of the deceased person to satisfy the court that there can be no reasonable doubt that the deceased intended the document to constitute a will (Section 12(2) of the South Australia *Wills*

715 Bernhard Eccher, *Bürgerliches Recht. Band VI. Erbrecht* (Springer 2010) 50 ff.
716 Piotr Stec and Mariusz Załucki, *Podstawy prawa cywilnego z umowami w administracji* (Difin 2011) 349 ff.
717 Eccher (n 57) 52.
718 Sitkoff and Dukeminier (n 37) passim.
719 Atkinson (n 28) passim.
720 Renate Barbaix and Alain-Laurent Verbeke, *Kernbegrippen erfrecht en giften* (Intersentia 2013) 134 ff.
721 Stephen Lynch, 'Wills and Estates: Succession Law and Testamentry Capacity' in RG Beran (ed), *Legal and Forensic Medicine* (Springer 2013) 1473 ff.
722 Lynch (n 721).

*Act*).[723] The second example requires for a will not only to meet essential elements of a will but also to unquestionably and unequivocally contain the last wishes of the deceased (Art. 714 of the *Civil Code of Quebec*).[724] Both regulations require a search for testamentary intent in order to determine will's validity. Similar solutions can be found in other countries. It is the essence and rationale that lies behind wills formalities regulations, even if it is not expressed *verba legis*, as for example, in the Polish *Kodeks cywilny*. Despite the lack of an unambiguous legal regulation requiring the assessment of whether the testator had *animus testandi* in a given case, it is assumed in Polish practice that the content of the will must clearly indicate *animus testandi* - the intent to dispose in case of death.[725] Therefore, as a *mortis causa* legal act, a will is to a certain extent subject to more stringent rules than *inter vivos* acts. This is expressed in particular in the requirement for the testator to act *cum animo testandi*.[726] The intention to create a will (*animus testandi*) has to be aimed at and aware of a legal act done upon death. *Animus testandi* is a specific requirement and should be searched at a specific person, for a specific moment. Therefore, the testator has to include, with his consciousness, the fact of regulating the fate of his property for the time after his death (with consequences after his death). The testator often, as is evident from the observation of everyday life, wonders, cites divergent projects, makes various variants of his dispositions in case of death, which he then rejects, changes, and sometimes does not finish, and therefore considers projects that are not yet a reflection of his last intent. Often there may be difficulties in determining the caesura between the project of his last will and its full, final expression. To put it another way, the question of assessing whether the deceased, when drawing up a particular document, had testamentary intent at all, can and often does cause difficulties in practice.[727] Therefore, the wills formalities must be structured in such a way as to make it possible to evaluate the existence of testamentary intent after the death of the testator. In this respect, the doctrines of *substantial compliance*, *harmless error*, *dispensing power* or *favor testamenti* seem to allow for such an assessment.

Cautionary function is most readable in connection with the drafting of these wills, where a certain role is assigned to an official person, such as a

723 White (n 7) 56–60.
724 Martin (n 55) 431 ff.
725 III CZP 78/72, [1973] 12 OSNCP 207.
726 Pabin (n 31) 101.
727 Wolak (n 535) 2.

notary.[728] In this case, it may be the task of the official to make sure that the testator has the intent to make a disposition of property upon death, and that he is sufficiently aware of and understands the meaning of his conduct.

Such a solution can be found, for example, in the Polish law on notaries, where when performing notarial activities, the notary is obliged to ensure that the rights and legitimate interests of the parties and other persons for whom the activity may cause legal effects, as well as to provide the parties with the necessary explanations concerning the performed notarial activity. In case of significant doubts the notary should refuse to perform the notarial act (Art. 86 et seq. of the *Prawo o notariacie*).[729] The often emphasized goal of this form of will is to ensure consistency between the content of the will and the intent of the testator, which will become effective at the moment of his death. The form of a will is to give the testator - in this respect - a high probability of security. Therefore, when drawing up a will, the testator must be aware of the consequences of his disposition after his death.[730] The participation of a notary, or presence of another official person certainly facilitates this. Similarly, in the case of solutions based on the doctrine of *substantial compliance*, the requirement of "clear and convincing evidence" or the "beyond reasonable doubt" standard etc. are also steps towards the implementation of the cautionary function of the wills formalities regulations.

However, not all known forms of wills are based on so-called "professional" advice. While the participation of a lawyer with special qualifications may protect the testator from doing something he did not intend to do, the vast majority of wills functioning in practice are wills drawn up without the participation of such a person and not of a public character.[731] In such cases, the testamentary intent may be evidenced by the content of the will. The use of words and phrases in a document drawn up to indicate that it is a will, including, among others, terms such as "after my death", "in case of death", "my last will", "if I die", etc., may suggest that the document in question was conceived as a *mortis causa* disposition. However,

728 Holmes (n 261) 511 ff.

729 Maksymilian Pazdan, 'Czynności notarialne w międzynarodowym prawie spadkowym' (1998) 8 Rejent 99, 99–115.

730 Ciotola, 'Le testateur et son clone inavoué, le juge : clone difforme ou conforme dans la recherche des intentions du testateur : le juge et l'interprétation des volontés du testateur' (n 53) 239–301.

731 Osajda, 'Wpływ rozwoju techniki na uregulowanie formy testamentu - rozważania de lege ferenda' (n 540) 50–67.

this cannot guarantee the existence of *animus testandi*. Also, the place where the document is stored, including, for example, the previous will, may suggest the existence of the testator's testamentary intent. The determination of the existence of this premise is so important that in practice the found document may turn out to be only a project of disposition upon death. The provisions of the law of succession should be constructed in such a way as to preclude the possibility of such an action from producing legal effects.[732]

The cautionary function (sometimes referred to as the warning function) of the provisions on the form of a will is also connected with the concept based on the statement that in the law of succession it is necessary to counteract the testator's rash behaviour. Therefore, the obligation to observe the form is aimed at indicating to the testator that the activity performed by him does not belong to ordinary everyday activities, is not an activity undertaken cyclically or causing insignificant legal effects. Hence, the provisions on the form of a will may and should encourage the testator to think about the potential effects, evoking a sense of a kind of responsibility.[733] Therefore, a declaration of intent is required to be made in a certain way, and after the testator's death, the standard of proving the circumstances of testation is high. Otherwise, there would be too great of a risk that many ill-considered decisions or unfinished draft wills would have to be considered as valid dispositions.

The implementation of this function into the law of succession may be troublesome in practice, especially since the existing forms of will make it possible to create an appropriate disposition many years before death. In the case of private wills, a number of evidentiary difficulties arise in practice with regard to establishing a possible *animus testandi*. Too rigorous approach to this problem may result in the invalidity of the will, which is often too negative effect in a given succession case. Rigorism leading to the annulment of the testator's last will is not, especially in recent times, treated as an indispensable element of the view of *mortis causa* dispositions. It is increasingly accepted that the form of a will cannot be understood as an obstacle to reflecting the testator's last will. Hence, a number of mechanisms, where the lack of fulfilment of the formal requirements of the will when the existence of *animus testandi* is obvious allows the will to be maintained.[734] Under these assumptions, the bequeather's warning resulting

732 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 186.
733 Grundmann (n 61) 448.
734 Langbein, 'Substantial Compliance with the Wills Act' (n 10) 495 ff.

from the regulations on the form of the will can be understood as an instrument to determine, in an appropriate proceeding concerning the validity of the will, whether the bequeather treated the document he drew up as his last will legally binding. The testator must want and be aware of that he makes a *mortis causa* declaration. In case of a doubt, it is up to the authority assessing the effectiveness of the existing disposition in the succession case (usually a probate court) to determine this.[735]

Doubts about the bequeather's testamentary intention usually occur in practice in cases of using testamentary forms known to the succession law, but the testation activity is not traditional.[736] This may be the case when, while drawing up a holographic will, a deceased writes his intention in a letter addressed to some addressee, and thus he does not draw up a traditional document which can be quoted as a "will"', as well as when the deceased uses tools that he is convinced of its legality (e.g. a will drawn up in a text message), even though, according to the regulations in force in this respect, they may not produce legal effects. It is then up to the legislator and law enforcement authorities to resolve the dilemma of how far to deviate from the formal requirements when the testamentary intent appears to be unquestionable.[737] In general, however, the derogations related to the cautionary function are not common. The testator's last intent reflection is the most important task of the will, and this cannot be done without establishing that the testator had the testamentary intent, understood the circumstances and anticipated the consequences of his disposition. The lack of requirements as to the form of the will would conceal the danger of the testator taking ill-considered actions. This is probably why most legal systems relaxing formal requirements require some testation elements that are considered "essential" in a given legal system for the validity of an informal will. For example, New Zealand requires that a given document "appear to be a will" (section 14(1) of the *Wills Act)*,[738] New Jersey law indicates the possibility of validation when "the decedent intended the document or writing to constitute the decedent's will" (§ 3B:3-3 *New Jersey Revised Statutes)*[739] or Israeli law emphasizes the necessity of "fundamental parts of a will" (section 25 of the *Israeli Succession Law* חוק הירושה).[740]

735 *Cf.* Peart and Kelly (n 98) 78.
736 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 188.
737 John H Langbein, 'Crumbling of the Wills Act: Australians Point the Way' (1979) 65 American Bar Association Journal 1192.
738 Peart and Kelly (n 98) 83–85.
739 Sasso (n 30) 176.
740 Flaks (n 203) passim.

Therefore, in the context of the cautionary function of the provisions on the form of will, it is indicated that even a small formal requirement, such as the obligation to preserve the declaration of intent on any medium, requires the testator to take a minimum of care.[741] The materialization of the declaration of last intent, apart from the fact that it allows to determine its content, makes it possible to get acquainted with its content at any time, what increases the bequeather's knowledge of his legal situation, thus reducing the conflicting nature of turnover. The necessity to fulfil the technical conditions of a given form of will, even if they are a few, has the effect of delaying the submission of an appropriate declaration.[742] It gives the testator time to think about it, it helps him to understand the importance and the definite nature of the declaration made, despite the later possibility of revoking the will. In this respect, the bequeather's special form of action also provides protection against him.

Common forms of wills, including holographic wills, generally implement the above assumptions. While in the case of public wills, it is typical to have the testator's awareness of the *mortis causa* act, certain doubts may be raised in the case of private wills, where this is not necessarily obvious. Nevertheless, the mere requirement to keep the form, which serves primarily to consolidate the testator's declaration of intent, serves precisely to protect the testator from making an accidental declaration.[743] This is, as it may be assumed, the main warning task of the regulations on the form of wills.[744] This task is also realized by the recent anti-rigorous wills formalities provisions based on the doctrine of *substantial compliance* and its variations. In individual systems of this kind, the provisions of the law indicate the need to search for certain formalities, which are to show, among other things, that the testator acted with the proper intent and proper discernment. The relaxation of formal requirements does not therefore mean the loss of this element of examining the testation.

The above shows that the cautionary function of the wills formalities plays an important role in practice, and the legislation in force in this respect is not indifferent to it. In systems of *strict compliance* and *substantial compliance*, the issue of the existence of *animus testandi* is one of the most important elements of the *post factum* assessment of a succession by a par-

741 Langbein, 'Substantial Compliance with the Wills Act' (n 10) 495 ff.
742 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 188–189.
743 Sasso (n 30) 170.
744 Vukotic (n 377) 478.

ticular court, and therefore the statutory structure must make it possible. *Ex ante* construction is to make the testator aware of the circumstances in which he finds himself and to counteract the randomness and uncertainty of testation. It is therefore undoubtedly a function related to the evidentiary and standardization function of the wills formalities.[745] In the future law of succession, this function should also be taken into account, and possible statutory provisions must take into account the possibility of establishing after the testator's death that he acted with the awareness of drawing up the will.

## 5. *The protective function of the wills formalities regulations*

The existing solutions in the area of succession law can and often do serve other purposes as well. One important objective in this respect is also to protect the testator and other persons, including the testator's relatives, from dispositions that are not made freely by him. Some regulations on the substantive validity of the will may pursue this goal.[746] Among the various requirements that are placed on legal transactions, the specific statutory solutions are those concerning the behaviour of the person performing the legal transaction of interest.[747] It is known that the will of a person performing a legal action must be freely undertaken and expressed in such a way as to produce certain legal effects.[748] The personal qualifications on which the ability of a given subject to cause effects in the sphere of private law depends on the legislator who usually associates them with specific qualities of a given person, such as age and appropriate mental development. It is no different under the law of succession, where *mortis causa* acts can be performed only by persons who have the ability to do so.[749] In the case of a will, this is the so-called "testamentary capacity", i.e. an attribute

745 Hardin (n 127) 1145–1190.
746 *Cf.* Penelope Reed, 'Challenges to Wills' [2012] Private Client Business 109.
747 *Cf.* Rescigno (n 583).
748 Jacek Wierciński, 'Sporządzenie testamentu w stanie wyłączającym świadome powzięcie decyzji i wyrażenie woli w praktyce notarialnej' [2011] Przegląd Sądowy 7.
749 *Cf.* Lawrence A Frolik, 'The Strange Interplay of Testamentary Capacity and the Doctrine of Undue Influence. Are We Protecting Older Testators or Overriding Individual Preferences?' (2001) 24 International Journal of Law and Psychiatry 253.

granted to an individual by a legal norm to make and revoke a will.[750] Against this background, various solutions are possible, which to a greater or lesser extent link the testamentary capacity with the requirement that the testator has full legal capacity.[751]

For a will to be valid, it is generally also required that the testator's intent was made freely, consciously and without any interference. A testator capable of testation, which is the starting point for assessing the validity of the will,[752] should therefore be aware of the situation of making a will and have a testation intent.[753] A condition in which the testator cannot make his last will consciously and freely and therefore, for whatever reason, excluding the conscious or free decision and expression of will, must result in the invalidity of the disposition.[754] Individual legislators have therefore developed mechanisms to protect the testator. Among these solutions, the ones that stand out are those concerning the defects of the declaration of intent and the negative consequences associated with the disruption of the testator's intent.[755] These regulations usually also apply to other defects in the declaration of intent, including errors and threats.[756] Legislators usually decide to specifically regulate this issue in the area of succession law, regardless of the general provisions for all legal acts. This is currently the case, for example, under the German law (§ 2078 and § 2229 section 4 of the *Bürgerliches Gesetzbuch*)[757] or French law (Article 901 of the French *Code civil*).[758] It is also characteristic of Polish law (Article 945 of the *Kodeks cywilny*).[759] The catalogue of legally relevant defects of the declaration of intent, which a will may be affected with, is generally closed. When

750 Miriam Anderson, 'La capacitat per a testar de qui té habitualment disminuïda la capacitat natural: l'art. 116 del Codi de Successions' (2009) 2009 InDret 1.
751 Lynch (n 721).
752 Kenneth I Shulman, Carole A Cohen and Ian Hull, 'Psychiatric Issues in Retrospective Challenges of Testamentary Capacity' (2005) 20 International Journal of Geriatric Psychiatry 63.
753 Julian Rivers and Roger Kerridge, 'The Construction of Wills' (2000) 116 Law Quarterly Review 287.
754 Kerridge (n 645) 19 ff.
755 *Cf.* Andrzej Mączyński, 'Wpływ wad oświadczenia woli na ważność testamentu' (1991) 1991 Rejent 24.
756 *Cf.* Scalise (n 582) 41 ff.
757 *Cf.* Leipold, *Erbrecht* (n 594) 89 ff.
758 Malaurie and Brenner (n 21) 190 ff.
759 Mączyński, 'Wpływ wad oświadczenia woli na ważność testamentu' (n 755) 24 ff.

a testator's declaration of intent is affected by a defect, it usually means its invalidity. This invalidity usually occurs *ipso iure*.[760]

Apart from those related to the testator's person and the process of testation, the requirements of substantive validity of a will include the content of a will.[761] This is because it is also important for determining whether a will may have certain legal effects. Generally speaking, it is connected with the idea that a will contrary to public order, the law or good faith should not have legal effects. In this respect, one may point out, for example, the prohibition in Polish law to include certain dispositions in the will, such as the limitation of the spouse's right to use the apartment and household facilities after the opening of the inheritance (Article 923 § 1 of the *Kodeks cywilny*) or the prohibition in Italian law to prepare one will by more than one testator (Article 989 of the Italian *Codice civile*).[762]

Such protective purposes may also be achieved by the provisions on the form of a will. In particular, those forms which are connected with the participation of third parties accompanying the testamentary activities allow to counteract a situation in which the testator's intention is not free.[763] The freedom of testation, which means, among other things, autonomy in making of *mortis causa* dispositions without the influence of third parties, is an important value which legislators have decided to protect. In some legal systems, it is connected, among others, with the ban on making joint wills, where there is a fear that the influence of the other testator will violate the freedom to dispose of the property at the discretion of the testator. According to the prevailing opinion in this respect, in the case of a joint will, therefore, to some extent, there is a violation of the unilateral declaration of intent and the principle that the testator's declaration is based on his intent fully freely taken.[764] Therefore, in the opinion of many, only those persons who are not interested in the content of a specific disposition, even if they are not concerned about the potential financial benefits related to it, can and should create a guarantee of the testator's free decision.[765]

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760 Niedośpiał (n 622).
761 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 32 ff.
762 Benedetti (n 659) 60–70.
763 Aloy (n 17) 10–11.
764 Stefano Pagliantini, *Causa e motivi del regolamento testamentario* (Jovene 2000) 74.
765 *Cf.* Joseph Laufer, 'Flexible Restraints on Testamentary Freedom-a Report on Decedents' Family Maintenance Legislation' (1954) 79 Harvard Law Review 277.

The regulations on the form of a will are therefore familiar with situations in which the declaration of intent is made before a third party, often a body of public trust, which is intended precisely to provide not only reliable proof of the testation, but also the lack of influence on the testator of other people. Hence, public wills, which can be found in many legal systems, where it is generally believed that the participation of an official person in the process of declaring the last will by the testator is a guarantee of undisturbed course of making the testator's declaration.[766] In this case, it is not a matter of shaping the contents of the will, giving it an appropriate legal meaning in accordance with the testator's will, as it may be the case with the channelling function, but of ensuring that the final form of the will statement understandable by the testator is not influenced by third parties. In this sense, official persons can also be treated as witnesses of the *mortis causa* disposition, which sometimes leads to them being described as qualified witnesses.[767]

The participation of ordinary witnesses in testation activities can also have the same meaning. The presence of people who do not have any function, but can be a source of proof of the circumstances of testation is a very popular requirement of the wills formalities regulations.[768] And although this requirement is increasingly being waived in the case of public wills (an official person is sufficient), in the case of private wills witnesses still play a role, although there is also a tendency to eliminate the requirement of their presence when making wills. Where the regulations on the form of wills require the participation of witnesses, there are usually regulations that require the witnesses of a will to meet certain formal criteria, including full legal capacity, use of sight, speech and writing, and understanding of the language spoken by the testator.[769] This is justified inasmuch as it is the task of the witness of the will to ensure that the intent expressed by the testator will be accurately reproduced after the death of the testator. A witness is the depositary of this will and is to ensure its faithful transmission. This function therefore determines the basic characteristics that a testimonial witness must possess. In addition, there are other limitations in the various legal systems, including the regulations that the person for whom

766 *Cf.* Agustín Ibarra García de Quevedo, 'La forrnalización del testamento público abierto' (1996) 14 Revista Colegio de Notarios 1.
767 *Cf.* Alvin E Evans, 'The Competency of Testamentary Witnesses' (1927) 25 Michigan Law Review 238.
768 Catherine Rendell, *Law of Succession* (Macmillan 1997) 38 ff.
769 Gareth Miller, *The Machinery of Succession* (Darmouth 1996) passim.

the will provides any benefit cannot be a witness when drawing up a will. Neither may they be witnesses: the person's spouse, his first- and second-class relatives or affinities and persons in a relationship of adoption. Such regulation can be met, for example, in the Polish law (Art. 957 § 1 of the *Kodeks cywilny*).[770]

It should be added that the concepts of forms of a will using the presence of people other than the testator are also intended to protect against the destruction or concealment of the will. While the succession laws of individual countries provide for sanctions for this type of action by certain persons which, after all, is annihilating the testator's intent, such protection cannot always be effective. It is not always clear whether the testator has drawn up a will, and if he has done so, where the will is located and what its content is. The presence of third parties during the drafting of the will therefore makes it possible to reveal the testator's will and to counteract pathological events.[771] The lawmakers, while observing the principle of the freedom of testation in order to guarantee the authenticity of the will and to obtain maximum certainty that the testator's declaration of intent at the time of making the will was free from defects, therefore use instruments which create conditions for determining the probability of the testation and its contents. It should be noted in this respect that personal sources of evidence do not always lead to the desired goals. This can be seen especially in the case of oral wills, which were questioned for many reasons for their validity, which were misjudged in Poland, abolished in Austria, for example, and remodelled in other legal systems.[772]

The formal requirements for wills can and usually are therefore used as a way for the legislator to protect the testator.[773] Various instruments that support this provide such protection either directly or indirectly. Guaranteeing legal certainty, the testator's intent and its finality is an objective that many legislators believe should be achieved in succession law.[774] Understanding this objective may, in extreme cases, lead to an attempt to impose solutions that make it difficult to revoke the will if the circumstances on the basis of which the testator made the disposition in the event of death change. There are solutions in the world that make it difficult or

770 Jan Gwiazdomorski and Andrzej Mączyński, *Prawo spadkowe w zarysie* (Państwowe Wydawnictwo Naukowe 1985) passim.
771 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 192.
772 *Cf.* Borysiak (n 626); Welser, 'Die Reform des österreichischen Erbrechts' (n 87).
773 Gulliver and Tilson (n 34) 9 ff.
774 Langbein, 'Substantial Compliance with the Wills Act' (n 10).

even impossible to revoke a will drawn up in one form with a will in another form. The example given in the doctrine is connected with the drawing up of a notarial will, which then, under the influence of an impulse, is revoked by a less formalised will, e.g. with a handwritten will.[775] According to some opinions, the regulations on the form of a will should prevent such dispositions and provide that a possible revocation of a notarial will should take place only in another notarial will. This idea has gained supporters in some European countries. Poland can serve as an example, where - according to this concept - this kind of regulation protects the testator, especially when, as an elderly person limited by his own awkwardness, he is under the influence of relatives for whom no benefits were provided for in a previously drafted will.[776] In this way, the protective function may complement the channelling function of the will form regulations, since on the one hand it counteracts hasty decisions made by the testator, making sure that his will is not disturbed by a momentary strong impulse from a person who may have a significant influence on the testator.

In this regard, however, it should be pointed out that the protective function has been criticized from the very beginning of its perception in succession law[777]. Among other things, it was pointed out that it is difficult to justify in modern times. It was alleged that there are forms which, by definition, do not protect the testator properly, such as the holographic form. It was argued, among other things, that it is difficult to provide relatively strong proof that the person signing the declaration of last intent actually did so.[778] Similar allegations were made against other forms of will, including the above mentioned form of an oral will. This does not mean, however, that the regulations on the form of a will are defective or useless. Rather, it is a clear signal that deviations from the formal rules in favour of the functionalism of succession law are possible and, moreover, necessary[779]. In the law of succession, it is desirable that the intent of the testator be reconstructed after his death, while at the same time maintaining the

775 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 193–194.

776 Fryderyk Zoll, 'Czy odwołalność testamentu zawsze powinna być nieograniczona' in Marlena Pecyna, Małgorzata Podrecka and Jerzy Pisuliński (eds), *Rozprawy cywilistyczne. Księga pamiatkowa dedeykowana Profesorowi Edwardowi Drozdowi* (Lexis Nexis 2013).

777 Gulliver and Tilson (n 34) 9–10.

778 Clowney (n 129) 58; Brown (n 107) 93 ff.

779 Załucki, *Videotestament. Prawo spadkowe wobec nowych technologii* (n 33) 194–195.

security of circulation, i.e., preventing the occurrence in circulation of dispositions of uncertain origin made in unclear circumstances with doubts as to their authorship. The task of the provisions on the form of a will is then to ensure that the testator's will is properly reflected. This can also be the case with types of *mortis causa* dispositions that potentially pose some risk to the realisation of these values. The conflict that exists between the freedom of testation and its reflection and the safety of legal trade should be resolved with due respect for the assumption that it is not the observance of formal requirements but the realization of the testator's intent that is important enough to strive for its realization, sometimes precisely against formal requirements.

This idea is the guiding principle for all solutions to mitigate formal requirements, including those based on the doctrine of *substantial compliance* and its variations. However, a functional approach to the law of succession does not mean that the testator's protection is waived.[780] In essence, *substantial compliance* solutions serve to reflect the testator's last will, but not at any cost. There must be certainty, supported by clear and convincing evidence, beyond any doubt, that in a given succession the testator's last will was expressed unconditionally and absolutely. If looking, for example, at the requirements of American states with the doctrine of *harmless error*, it can be seen that in practice, the courts pay attention to whether the testator actually had the testamentary intent and whether the process of free testation was in any way compromised (e.g., *Estate of Wiltfong* in Colorado[781] or the *Estate of Smoke* in Michigan[782]). Formal errors are saved as long as there is evidence of the testator's free will. The same can be found in different *substantial compliance-type* solutions. South Africa can serve as another example. In *Macdonald* the court was examining whether the security measures with regard to the computer file containing a will were breached and only after it has been established that this has not happened, found a will valid.[783] In *Van der Merwe* the court finding an informal will valid has highlighted that it was only possible because the true intention of the drafter of an informal document was self-evident.[784] The same can be

780 *Cf.* Duncan Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"' (2000) 100 Columbia Law Review 94.
781 Re Estate of Wiltfong, [2006] 148 P.3d 465.
782 Re Estate of Smoke, [2007] Michigan Court of Appeals 273114.
783 MacDonald v. The Master, [2002] South African Law Reports 64.
784 Van der Merwe v. Master of the High Court & Another, [2010] ZASCA 99.

found in another case – *Ex Parte Maurice*.[785] A similar position was also expressed, for example, in the Canadian Province of Matinoba 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.[786] In this context, the testator can be considered to be protected.

Therefore, systems based on the doctrine of *substantial compliance* or its variations in addition to the intent of testation also pay attention to, among other things, the age of the testator, errors or other circumstances surrounding testation (e.g. *Estate of Richards* in California[787]). It comes from the above that these solutions can also have a protective function, and their task is, among other things, to prove that the testator, when expressing his last will, was completely uninhibited.

In such circumstances, against the background of the solutions found in individual countries, the protective function of the provisions on the form of wills has played and continues to play an important role. Today and in the future, it is and will be important to determine whether the testator acted intentionally and his will was undisturbed. The form rules (wills formalities) thus support the provisions on the substantive validity of the will, and in principle it is difficult to imagine the need to change this. At least to a minimum, this goal of wills formalities should continue to be pursued.

In the light of the above, it can be assumed that the provisions on the form of a will still have four basic functions: evidentiary, channelling, cautionary, protective. Each of these functions has a different role, and the introduction of solutions aimed at relaxing the rigor of wills formalities into the law of succession does not preclude the existence of these functions. On the contrary, the protection of the testator, the predictability and repeatability of his action, the possibility of proving that he has acted with testamentary intent and *animus testandi* and that he was aware of the consequences of his action as a result of the introduction of solutions based on the doctrine of *substantial compliance* or its variations are strengthened. In this case, in the succession proceedings, the elements that are examined (with such a high degree of probability) cause that the role of relaxation of wills formalities is at the same time a mechanism to search for the exis-

785 Ex Parte Maurice, [1985] 2 SA 713.
786 *Cf.* du Toit, 'Remedying Formal Irregularities in Wills: A Comparative Analysis of Testamentary Rescue in Canada and South Africa' (n 7).
787 Re Estate of Richards, [2011] B226261.

tence of the testator's last intent, which normally does not necessarily have to happen. The relaxation concerns only technical issues, not the proof of intent of the testator. The latter is to be preserved and restored after his death, and these requirements are not a subject to any mitigation. The need to determine, with clear and convincing evidence or beyond reasonable doubt, that testamentary intent occurs, strengthens the role of the provisions on wills formalities.