

Conclusions and Recommendations

The considerations carried out in this book prove that the current legal solutions shaping the form of a will are not perfect and have many times failed to meet the expectations of practice and society. Flexibility of succession law is a merit which should be pursued.⁸⁷⁴ The competing values of the need to observe formal requirements on the one hand and the need to reflect the testator's last intent on the other⁸⁷⁵ cannot today be resolved in favour of formalism. Formalism,⁸⁷⁶ particularly when it is rigorous, can nullify the possibility of taking into account the testator's last intent, and the same aims as the aims of formalism can be achieved by other means.⁸⁷⁷

The 21st century, the era of new technologies, forces a modern outlook on law, including succession law.⁸⁷⁸ Solutions considered until now to be basic and not in need of change, when confronted with reality, turn out to be inadequate to the needs of today's practice and society.⁸⁷⁹ One such area is, as one might think, that of wills formalities. This is particularly noticeable in those countries that remain rather traditional in regulating this area and do not respond, or have not managed to respond to the needs of practice and society. The reality is, as can be seen with the naked eye, that more and more people are drawing up wills but doing so in a manner that does not comply with the legal requirements as regards last wills form.⁸⁸⁰ Limiting the possibility of disposing of property on death to the holographic form of a will, wills in the presence of witnesses or wills made in the presence of public persons, as is usually the case in European legislation, is not an appropriate or desirable solution. In practice, there is a need to respond to the phenomenon of so-called informal wills, i.e. wills not prepared in accordance with the provisions on form, due to an error on the part of the

874 Orth (n 163) 73 ff.

875 du Toit (n 99) 159 ff.

876 Richard H Pildes, 'Forms of Formalism' (1999) 66 University of Chicago Law Review 607.

877 Fulli-Lemaire (n 575) 10 ff.

878 Crawford (n 36) 294.

879 Philipp Scholz, 'Digitales Testieren. Zur Verwendung digitaler Technologien beim eigenhändigen und Nottestament de lege lata et ferenda' [2019] Archiv Für Die Civilistische Praxis 100.

880 Cf. Slingo (n 323).

testator or his misconception of the actual legal situation. It is the reflection of this will, and not compliance with formal requirements, that is the most important task of the succession law rules.⁸⁸¹ It is a task that these rules must fulfil if they are to remove any doubt that the testator acted with testamentary intent and with the intention of making a disposition of property upon death.⁸⁸² The last will of the testator need not, however, be recorded merely by means of instruments which are currently recognised in the different legal systems. Any recording of the testator's last will, regardless of the means used, should be potentially admissible as a medium for this declaration, provided that it allows for its reconstruction in the future.

This was recognised a long time ago, but in the course of development of the law in this area the relevant changes can basically only be seen in the *common law* countries and only certain other states.⁸⁸³ It is there that solutions operate that can be collectively referred to as the doctrine of *substantial compliance* and its variations, which successfully implement the postulate of reflection of the testator's last intent at the expense of formal requirements of dispositions upon death. These solutions, more broadly presented by John L. Langbein since 1975⁸⁸⁴, and subsequently developed by many scholars and implemented in some succession regulations,⁸⁸⁵ may constitute an interesting basis for further development of succession law in terms of wills formalities, especially in those countries that still remain solutions based on the primacy of formal requirements (which can be referred to as the *strict compliance* countries). However, these solutions are based on a model in which the law provides for specific forms of preparing a will, linked to a specific manner of making a declaration of intent and a specific manner of recording this declaration. Today it is more appropriate to dissociate the provisions on the form of a will from these specific ways

881 Shelly Kreiczer-Levy, 'Big Data and the Modern Family' (2019) 2019 Wisconsin Law Review 349.

882 Langbein, 'Substantial Compliance with the Wills Act' (n 10).

883 Cf. Menashe (n 54); Flaks (n 203).

884 Cf. Langbein, 'Substantial Compliance with the Wills Act' (n 10); Langbein, 'Defects of Form in the Execution of Wills: Australian and Other Experience with the Substantial Compliance Doctrine' (n 676); John H Langbein, 'The Nonprobate Revolution and the Future of the Law of Succession' (1984) 97 Harvard Law Review 1108; Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (n 42); Langbein, 'Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion' (n 94).

885 Cf., e.g.: Solzbach (n 60).

of making a declaration of intent and recording it. In this respect full freedom is required, including technological neutrality, of course taking into account the fact that any means must be capable of recording the declaration and reproducing it in the future, with the possibility of identifying the author of this declaration.

Taking into account the above, one may be tempted to draw some synthetic conclusions and proposals as to the future. Such a proposal is also part of this book. For I believe that in the future the provisions on the form of a will should be given the following wording:

“The testator may create a will in such a way that he expresses his testamentary intention by any conduct which reveals his declaration of will sufficiently, and his declaration is preserved on any medium which makes it possible to reflect it in a way which allows the person making this declaration to be identified”.

In this way it is possible to modify the current provisions on the form of a will in order to remove their characteristics as being dependent on any method of making and preserving the last will. The law would be flexible in this respect and require, in order for the will to be valid, that the last will be made and preserved in such a way as to enable it to be reproduced after the testator's death, but it would not prescribe a particular manner of making the declaration and the means of preserving it. Irrespective of whether a testator chooses to use the written or handwritten technique, to make a declaration of intent to an official person, to record the last will in the cloud or using blockchain technology, or in any other way, as long as it is possible to recreate the testator's last will after his death, such way of preparing a testator's disposition of property upon death, would be permitted. There will no longer be a phenomenon of informal will. This reflects the needs of practice and society.

Having regard to this proposal, the future law would allow for a free and discretionary construction of the declaration of the last will and the shaping of legal relations *mortis causa*.⁸⁸⁶ It will make a room in succession law for the Internet, social media, smart phones and other benefits of new technologies⁸⁸⁷ and will amend the forms of estate disposition coherent with the technological opportunities created by the emergence in recent years of a range of technological devices in almost every household, by

886 Mark Glover, ‘Restraining Live Hand Control of Inheritance’ (2020) 79 Maryland Law Review 329 ff.

887 Hall (n 81) 339–372.

making these rules technologically independent and therefore universal, something that cannot be said of them today. In this way, a functional mechanism of effective testation will be created. The set of provisions referred to as the wills formalities will be simplified and will allow practice to be shaped in a way that gives priority to the testamentary intention.⁸⁸⁸ Formalism will only become a supporting tool and not the decisive factor for the disposal of property upon death.⁸⁸⁹

888 *Cf.* Banta (n 48).

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