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The subject matter of the considerations presented in this article is the notarial testament, specifically forms of such a disposition allowed by the law. Due to the author's origin, a lot of attention has been devoted to the Polish notarial testament. More or less innovative solutions which operate in selected legal systems of the European countries have also been considered.

The Napoleonic Code already referred to *ordinary testaments*, which could be drawn up under normal circumstances, as well as *special testaments*, which were allowed under extraordinary circumstances of a war or an epidemic only to specific persons. Napoleon's Civil Code provided three forms of ordinary testaments: handwritten, secret (mystic) and official, that is notarial testaments. Ordinary testaments could be prepared in writing subject to specific formalities provided for by the Code[1].

In Poland also traditionally two types of testaments can be distinguished, namely ordinary and special. An ordinary testament may be drafted by the testator at any time, however a special testament may be prepared only under the circumstances specified by the law and its validity is limited in time (art. 955 of the Civil Code)[2]. Polish ordinary testaments include: a holographic testament, referred to as a handwritten testament, an allographic testament and a testament drawn up as a notarial deed. Following E. Skowrońska-Bocian, it is worth stressing that formalising the testament does not entail the necessity to provide a relevant name, e.g. "Testament". What is necessary is the will to prepare it, the awareness of the legal burden of such an act and keeping the form provided for by the law[3]. This issue looks a bit different in the legal systems of common law countries, where in general the principle of providing by the testator of an appropriate heading,

[1] E. J. Barwiński, *Prawo spadkowe obowiązujące w byłym Królestwie Kongresowym w zarysie*, Warszawa 1938, pp. 19–20.
[2] E. Skowrońska-Bocian, *Testament w prawie polskim*, Warszawa 2004, pp. 63–64.
[3] E. Skowrońska-Bocian, *Forma testamentu w prawie polskim*, Warszawa 1991, p. 28.

like e.g. "Last Will and Testament" applies for the purpose of eliminating any doubt as to the actual will of testation[4].

A notarial testament makes it rather highly probable that the dispositions reflected in its contents comply with the actual will of the testator. In addition, the presence of a lawyer is a guarantee for the testament to be prepared in line with the law, and prevents any defects in the testator's declaration of the last will. Moreover, depositing the disposition at the notary's office excludes the possibility of its concealing, counterfeiting or destroying by third parties[5]. The Polish Civil Code, as is the case with the German legislator, does not specify any formalities which a testament subject to analysis should comply with. The provision of § 2232, para. 1 of the German Civil Code only implies that a testament may be prepared as a notarial deed after the testator has handed to the notary their declaration of the last will and submitted a statement that such a declaration reflects their actual intentions. A document which does not have to be drafted by the hand of the testator, may be submitted to the notary open or closed (para. 2).

Formal requirements for a notarial testament in Poland may be formulated based on the provisions of the Notary Public Act[6]. Before collecting the testator's statement, the notary has to verify their identity (art. 85 of the Notary Public Act). It is assumed that the documents used for this purpose are currently an ID card and a passport[7]. These exclude: service papers and the health insurance card[8]. As far as possible, the notary should also verify the testator's legal capacity, and if any uncertainty occurs they should refrain from performing a notarial act (art. 86). The notary's refusal to prepare a testament in question may constitute the basis for filing a complaint by the testator with a regional court competent for the notary's registered office (art. 83)[9]. Pursuant to art. 94 § 1 of the Notary Public Act, when reading out the notarial deed the notary is obliged to make sure whether the testator understands the contents and significance of the deed[10], and whether it

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[4] G. Boreman Bird, *Sleight of Handwriting: The Holographic Will in California*, "The Hastings Law Journal" 1980–1981, vol. 32, p. 605.

[5] J. Ignaczewski, *Prawo spadkowe. Art. 922–1088 KC. Komentarz*, Warszawa 2004, pp. 131–132; E. Skowrońska-Bocian, *Forma testamentu...*, p. 102.

[6] Act of 14 February 1991 (consolidated text: Journal of Laws of 2002, no. 42, item 369 as amended).

[7] J. Turłukowski, *Sporządzenie testamentu w praktyce*, Warszawa 2009, pp. 66–67. C.f. M. Kolasiński, *Odpowiedzialność cywilna notariusza*, Toruń 2005, p. 81 et seq., and the ruling of the Supreme Court of 22.03.1995, III KRN 221/94, „Prokuratura i Prawo" 1995, no. 10, item 5.

[8] According to the ruling of the Supreme Court of 30.09.1985, V KRN 656/85, OSNPG 1986, no. 6, item 86.

[9] More in J. Turłukowski, op. cit., p. 63 et seq.

[10] See: Resolution of the Supreme Court of 19.07.2001, III CZP 36/01, OSNC 2002, no. 1, item 7.

corresponds to the testator's actual will[11]. Pursuant to § 2 of the article, all empty spaces in the notarial deed should be crossed out and all amendments described at the end of the document before affixing the signatures, or otherwise they are deemed null and void[12].

To become valid, a notarial testament also has to be signed by the persons present during the act in question (art. 92 item 8 of the Notary Public Act). In addition, a notarial deed has to be signed by the notary (item 9 of the article). Lack of the notary's signature justifies the thesis on non-existence of an official document[13]. The relevant literature is very demanding as to the notary's signature. It is assumed that it has to comprise of at least the notary's surname[14]. However, some authors legitimately point out that if a given handwritten sign is known to be the signature of a specific person and makes it possible to confirm the person's identity without any doubt, no obstacles exist to consider it as a fully effective signature[15]. On this account, initialling the testament by the notary should also be deemed acceptable. J. Turłukowski makes an accurate remark that the possibility of signing a notarial deed by the notary in the manner referred to above is justified by the fact that their first name and surname as well as the place where their office is located, are mentioned in the prepared document. Moreover, if such a need arises, there are a number of other documents prepared by the notary which may perfectly serve for comparison purposes[16].

The subjective limitations regarding the possibility to prepare a notarial testament are applicable to the notary themselves. They are not allowed to issue a deed whose dispositions refer directly to themselves, their spouse, relatives or relatives by affinity in the direct line without any degree limitations, and up to the third degree in the collateral line, persons related to the notary by adoption, custody or guardianship, as well as persons in a close relationship. This exclusion also applies to the deputy notary (art. 84 of the Notary Public Act)[17]. The violation of the discipline referred to above makes the act performed invalid *mortis causa*[18]. Although some representatives of the theory take the view that the invalidity of a given disposition depends on

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[11] C.f. J. Dziwański, *Obowiązek wyjaśniająco-doradczy notariusza przy sporządzaniu testamentu notarialnego w przypadku z art. 961 kc (część pierwsza)*, NPN 2003, no. 2, p. 8 et seq. and S. Wójcik, *Rola notariusza w sprawach spadkowych (na przykładzie testamentu notarialnego)*, „Rejent" 1996, no. 4–5, p. 144 et seq.

[12] E. Skowrońska-Bocian, *Komentarz do kodeksu cywilnego. Księga IV. Spadki*, Warszawa 2005, pp. 103–104.

[13] According to J. Turłukowski, op. cit., p. 94.

[14] C.f. A. Oleszko, *Podpis własnoręczny jako element formalny aktu notarialnego obejmującego czynność prawną (część druga)*, „Rejent" 2001, no. 9, p. 80.

[15] Ibidem, p. 81.

[16] J. Turłukowski, op. cit., pp. 94–95.

[17] E. Skowrońska-Bocian, *Komentarz...*, p. 104.

[18] C.f. J. Turłukowski, op. cit., pp. 85–88.

the type of a provision of the Notary Public Act which has been violated[19], however in my opinion such a view is too liberal and might lead to law evasion. If the legislator has introduced special regulations regarding formal requirements for notarial deeds, they had a particular goal focused mainly on ensuring the maximum protection and reliability of a new legal situation. In addition, we cannot forget about the provision of art. 958 of the Civil Code, whose disposition in the scope described is exceptionally explicit and unambiguous. In the opinion of the Supreme Court, an invalid testament will also be "a testament prepared as a notarial deed, if the testator has failed to submit a declaration of will and only signed a document previously prepared by the notary and the devisee, after its reading[20]. The legitimacy of the position presented by the Supreme Court results from the wording of art. 45 § 1 item 5 of the Notary Public Act, according to which a testator should "declare" their last will to the notary.

It should be indicated by the way that pursuant to art. 5 of the Vienna Convention on Consular Relations ratified by Poland on 17 September 1981, in certain circumstances a consul may also act as a notary. However, in order to draw up notarial deeds they have to obtain a written authorisation from the Minister of Justice, issued at the request of the Minister of Foreign Affairs[21].

A notarial testament is a disposition commonly used in civil-law relations in numerous countries. However, its form is not always as uniform as in the case of the Polish law.

Pursuant to the Italian succession system, the disposition being analysed occurs in two alternative forms: a public and confidential one (art. 601 of the Italian Civil Code). Pursuant to art. 603 of the normative act referred to, a public testament is prepared by way of a verbal statement of the testator made to the notary in the presence of two witnesses (four witnesses, if the testator is unable to read). The disposition is written down by the notary, read out to the testator and the witnesses, and then signed by the persons participating in the notarial act (art. 603 of the Italian Civil Code). A public testament has to indicate the place and date of its acceptance, and the time of signing the document. In the event of impossibility to sign the disposition by the testator or due to serious difficulties performing such an act, before reading out the deed the notary should describe the reason for the aforementioned nonfeasance[22]. A confidential testament, on the other hand, may

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[19] According to F. Błahuta, [in:] *Kodeks cywilny. Komentarz*, Warszawa 1972, p. 1873.

[20] The ruling of the Supreme Court of 30.06.1972, I CR 403/72, OSNC 1973, no. 3, item 49.

[21] See: art. 19 § 4 of the Act of 13.02.1984 on Functions of Consules of the Republic of Poland (consolidated text: Journal of Laws of 2002, no. 215, item 1823 as amended).

[22] C.f. G. Cian, A. Trabucchi, *Commentario breve al codice civile, Complemento giurisprudenziale*, 2005, pp. 571–572.

be drawn up both by the testator or by a third party. The capacity to prepare such a disposition excludes persons who cannot or are unable to read (art. 604 of the Code)[23]. A deed including confidential dispositions should be sealed in the manner preventing its opening or removal without breaking or forging the seal. A document secured in this way is handed by the testator to the notary in person, in the presence of two witnesses, together with a declaration of including the testator's final will *post mortem* (art. 605 of the Italian Civil Code)[24]. On the envelope including the confidential testament the notary confirms its receipt and delivery by the testator, as well as the seal impress and presence of the witnesses in performing all the acts referred to above. Such proof has to be signed by the testator, the notary and the witnesses. If a confidential testament fails to meet the afore-mentioned formal requirements, it may be converted into a valid holographic disposition (art. 607 of the Code). A confidential testament submitted to the notary is treated as a handwritten testament. That being so, it may be retrieved by the testator from the notary at any time. The latter prepares a relevant protocol which should be signed by the testator, two witnesses and the notary (art. 608)[25].

On the other hand, the Dutch law provides for as many as three forms of testaments, with each of them requiring the presence of a notary and two witnesses. These include:

1) open testament (public) – drawn up by a notary based on the testator's declaration of their last will, signed by the testator and two witnesses;

2) holographic testament – written in the hand of the testator, and then deposited with the notary in the presence of two witnesses;

3) closed testament (secret) – does not have to be written by hand or signed by the testator, handed to a notary in the manner similar to a holographic testament[26].

Based on the aforesaid, it turns out that each case of testation pursuant to the Dutch law requires mandatory presence of a notary, and without their presence a testator may only prepare a codicil appointing the executor to handle the funeral-related issues and execute endowments regarding the movables[27].

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[23] See: G. P. Cirillo, V. Cufaro, F. Roselli, *Codice civile a cura di Pietro Rescigno. Le fonti del diritto italiano. I testi fondamentali commentati con la dottrina e annotati con la giurisprudenza*, t. I, libri I–IV, Milano 2006, pp. 788–790 and L. Ferroni, *Codice civile. Annotato con la giurisprudenza*, vol. I, libri I–IV, art. 1–2059, 2006, p. 744.

[24] More in G. Cian, A. Trabucchi, op. cit., p. 573.

[25] C.f. G. P. Cirillo, V. Cufaro, F. Roselli, op. cit., p. 792 and L. Ferroni, op. cit., p. 746.

[26] As [in:] The Information of the Embassy of the Republic of Poland in Hague, regarding inheritance distribution in the Netherlands and Dutch regulations on statutory and testamentary succession, published at: <http://www.haga.polemb.net/ files/ wk/info_spadki_pl.pdf>.

[27] Ibidem.

Without denying the legitimacy of introducing a uniform notarial testament in all the EU member states, the author would like to draw the readers' attention to a certain material flaw of a confidential testament. Until its opening, the document's contents remain in principle confidential. Taking account of the fact that the testament is opened after the testator's death[28] (when they cannot eliminate any potential omissions), almost each case of failure to meet the requirements regarding the holographic form of a disposition, except for the Dutch closed testament, will result in obligatory testament invalidity.

What is also negatively assessed is the solutions adopted in the Spanish law, which make the disposition validity dependent on the notary's acquaintance of the testator or confirming their identity by two witnesses known to the notary, or with the documents issued by public authorities whose task comprises of person identification (art. 685 of the Spanish Civil Code). Striking with excessive formalism, the indicated requirements limit the possibility of testation, and thus deserve disapproval. The situation is similar in the case of the French official testament which in order to be valid requires presence of as many as two notaries, or one notary and two witnesses (art. 969 of the French Civil Code)[29].

To sum up the above considerations, in the author's opinion the smaller the number of types of notarial testaments allowed in a given country, the more dispositions drafted by a notary continue in full force and effect. Without denying the need for a more extensive discussion on the analysed subject matter, the author would like to express his disapproval for confidential forms of notarial testaments. The presence of a lawyer in preparing a testament should by definition guarantee the validity of each disposition *mortis causa*. In the case of confidential (closed) forms of the testament, meeting of this requirement is practically impossible, due to the notary's minor knowledge or mostly lack of knowledge of the contents of a deposited sealed envelope.

Streszczenie

Testament notarialny w Europie

Słowa kluczowe: testament notarialny, testament zwykły, testament specjalny, spadkodawca.

Przedmiotem rozważań przedstawionych w tym artykule jest testament notarialny. Szczególną uwagę poświęcono polskiemu testamentowi notarialnemu. Zwrócono także uwagę na rozwiązania prawne funkcjonujące w wybranych krajach europejskich.

[28] C.f. art. 621 in connection with art. 622 of the Italian Civil Code and G. Cian, A. Trabucchi, op. cit., p. 576.

[29] More: G. Wiedegkehr, X. Henry, A. Tisserand, G. Venandet, F. Jacob, *Code Civil, Cent-Troisieme Edition*, Dalloz 2004, p. 827.