UDC 347.67 Правоведение. 2021. Т. 65, № 1

The admissibility of disinheritance and testamentary freedom

Joanna Haberko

For citation: Haberko, Joanna. 2021. The admissibility of disinheritance and testamentary freedom. *Pravovedenie* 65 (1): 123–135. https://doi.org/10.21638/spbu25.2021.107

The article highlights the principles of inheritance law in the Polish legal system. Specific emphasis is placed on testamentary freedom, appointment to inheritance only on the grounds of two titles and a limited number of statutory heirs. The author analyzes the consequences that the drawing up of a will may have for the persons closest to the testator. The subject of the considerations is both the nature of a legal act which is a will, the requirement of the form of wills and the admissibility of testamentary dispositions. Attention is paid to the admissibility of disinheritance and its effects. The text aims to answer the question whether depriving descendants, spouses and parents of the legitimate portion extends or restricts the testamentary freedom. The adopted legislative structure assumes that everyone who has the testamentary capacity, full legal capacity, may draw up a will. The act does not limit in any manner who can be appointed as the testamentary heir or the extent of such appointment. The testator is free to decide whether and when a will is to be drawn up. It is an expression of the principle of testamentary freedom. Anyone who has full capacity to act lawfully may exercise this freedom to make a will or not. However, if a person exercises this freedom, the scope and form of dispositions made depend solely on this person. Testamentary freedom is expressed in certain ways. Firstly, by making a will, a testator may change the statutory inheritance, appoint whomever they want and are not limited in terms of shares. Secondly, a testator may exclude certain persons from inheritance. The negative will and disinheritance serve this purpose.

Keywords: inheritance, will, testamentary freedom, legitimate portion, disinheritance.

The inheritance law is governed by certain principles[1]. These include testamentary freedom[2], appointment to inheritance only on the grounds of two titles[3] and a limited num-

Joanna Haberko — Prof. Dr. hab., Adam Mickiewicz University, 1, ul. Wieniawskiego, Poznań, 61-712, Poland; joanna.haberko@amu.edu.pl

[1] *Piątowski J. S., Kawałko A., Witczak H.* Pojęcie, funkcje i źródła prawa spadkowego // System Prawa Prywatnego. Prawo spadkowe / ed. B. Kordasiewicz. Warszawa: C. H. Beck, 2009. P. 3; *Pietrzykowski J.* Wybrane zagadnienia reformy prawa spadkowego // Z zagadnień współczesnego prawa cywilnego, Księga pamiątkowa ku czci Profesora Tomasza Dybowskiego / eds J. Błeszyński, J. Rajski, M. Safjan, E. Skowrońska-Bocian. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego, 1994. P. 249–257; *Skowrońska-Bocian E.* Prawo spadkowe. Warszawa: C. H. Beck, 1997. P. 250; *Piątowski J. S., Kordasiewicz B.* Prawo spadkowe. Zarys wykładu. Warszawa: LexisNexis, 2011. P. 55; *Pazdan M.* [Untitled] // Kodeks cywilny Komentarz: in 2 vols, vol. 2 / ed. K. Pietrzykowski. Warszawa: C. H. Beck, 2013. P. 758; *Kremis J.* [Untitled] // Kodeks cywilny. Komentarz / eds E. Gniewek, P. Machnikowski. Warszawa: C. H. Beck, 2013. P. 1546; *Zelek M.* Spadek. Testament. Warszawa: Difin, 2015; *Borysiak W.* Dziedziczenie. Konstrukcja prawa i ochrona. Warszawa: LexisNexis, 2013; *Osajda K.* [Untitled] // Kodeks cywilny. Komentarz: in 3 vols. Vol. 3: Spadki / ed. K. Osajda. Warszawa: C. H. Beck, 2013. P. 258; *Księżak P.* Zachowek w polskim prawie spadkowym. Warszawa: Wolters Kluwer Polska, 2012.

[2] *Załucki M.* [Untitled] // Kodeks cywilny. Komentarz / ed. M. Załucki. Warszawa: C. H. Beck, 2019. P. 1962.

[3] *Wójcik S.* [Untitled] // System prawa cywilnego: in 4 vols. Vol. IV: Prawo spadkowe / ed. J. S. Piątowski. Wrocław: Zakład Narodowy imienia Ossolińskich, 1986. P. 188–189; *Skowrońska-Bocian E.* Testament w prawie polskim. Warszawa: LexisNexis, 2004. P. 154.

ber of statutory heirs[4]. Moreover, the interests of the testator's closest relatives against unfavourable testamentary dispositions are secured by a legitimate portion. The adopted structure assumes that everyone who has the testamentary capacity, i. e. full legal capacity, may draw up a will. The act does not limit anyhow who can be appointed as the testamentary heir or the extent of such appointment. The testator is free to decide whether and when a will is to be drawn up. It is an expression of the principle of testamentary freedom. Anyone who has full capacity to perform acts in law may exercise this freedom in such a way that they will make a will or not. However, if a person exercises this freedom, the scope and form of made dispositions depend solely on this person. Testamentary freedom is expressed in some ways. Firstly, by making a will, a testator may change the statutory inheritance, may appoint whomever they want and are not limited in terms of shares. Secondly, by making a will, a testator may exclude certain persons from inheritance. The negative will and disinheritance serve for this purpose[5].

The group of potential testamentary heirs is wide and may include both persons from the group of statutory heirs and people outside this group. Testamentary freedom also means that the testator does not have to explain in any way his decision to statutory heirs, testamentary heirs or persons entitled to a legitimate portion. Nevertheless, the testator must take into consideration the fact that those included in the group of the closest people, enumerated in Art. 991 of the Civil Code of Poland (hereinafter the CC) (the deceased's descendants, spouse and parents) will have a claim for a legitimate portion when they are deprived of the due minimum. A legitimate portion is an amount of money being the equivalent of a certain share that the entitled person would receive in the event of statutory inheritance. This means that, for example, if the heir omitted in his will his wife and children (who are entitled to statutory inheritance) and in his will appointed his friend to the entire inheritance, both the wife and children would be able to demand from the friend, within the statutory period of 5 years from the announcement of the will, a share of what they would receive as statutory heirs.

The will comes into effect at the moment of opening the inheritance. It is the moment of the testator's death in accordance with Art. 924 of the CC. Until his death, the Testator has practically unlimited possibilities of making further wills and revoking the wills he made earlier. The testator may make wills, amend their provisions, revoke them in whole or in part. According to Art. 946 of the CC a will may be revoked either by the testator making a new will or, with the intention of revoking the will, the testator destroying the will or depriving it of the features which make it valid, or lastly by altering the will in a way indicating that he intended to revoke its provisions. A will is revoked when a new will is drawn up, provided that its provisions cannot be reconciled with the provisions of the previous will, by destroying the document (tearing, burning) and eliminating any features of the document that determine the validity of a legal act (e. g. tearing off a signature). The testator may also cross out the provisions of the will or add the wording: "I revoke". Regardless of the method, the revocation of a will requires the testamentary capacity to be effective. The revocation will therefore be effective as long as the testator has the full legal capacity at the time of revoking the will[6]. When at the time of opening the estate, more than one will remains after the testator, with dispositions that cannot be reconciled, the will with the date closest to the opening of the inheritance is valid.

The legislator does not include a legal definition of a will in the legal act. In the literature on the subject it is assumed that, under the Polish law, a will is a unilateral, formal legal act

[4] *Piątowski J. S., Kordasiewicz B.* Prawo spadkowe. Zarys wykładu. P. 55.

[5] *Witczak H.* Skutki wyłączenia od dziedziczenia // Rejent. 2009. No. 3. P. 73–96; *Sokołowski T.* [Untitled] // Kodeks cywilny. Komentarz: in 3 vols. Vol. II / ed. M. Gutowski. Warszawa: LexisNexis, 2019. P. 1215.

[6] *Sokołowski T.* [Untitled] // Kodeks cywilny. Komentarz. Vol. II. P. 1224.

that is not addressed to a specific person, by which the testator personally and in a special form disposes of his property in the event of his death[7]. This act is revocable at any time.

A will is the only act in the event of death by which the testator disposes of his estate. Polish law does not stipulate the inheritance agreements or other property management activities *mortis causa*[8].

The legislator pays a lot of attention to the form of a will, and makes the provisions in this matter absolutely binding[9]. The adoption of this structure aims at making the potential testators consider the preparation and wording of the will[10]. The strict provisions regarding the form also makes it easier to investigate the evidence[11]. Especially after the testator's death, it is easier to prove that the will was made at all and prove its authenticity[12]. It is easier to determine whether there was a so-called *animus testandi*, the intention to dispose of property in the event of death[13]. A will made without adhering to this form is absolutely invalid and has no legal effects.

It is worth mentioning the forms of the will[14]. The Polish law provides for ordinary and special wills. The ordinary will can always be made regardless of the circumstances. On the other hand a special will is expressed in two matters. Firstly, it is expressed in the statutory determination of the premises for the admissibility of making a special will in one of the forms stipulated in the code, and secondly, in the limited legal force of special wills. A special will loses effect six months after the circumstances justifying failure to observe ordinary will form cease to exist unless the testator dies before the end of this period. The running of the period is suspended during the time in which the testator has no possibility of making an ordinary will. The existence of circumstances justifying the preparation of a special will does not exclude the possibility of drawing up an ordinary will. The choice in this matter is left to the testator. It should be noted that the choice regarding the admissibility of drawing up special wills also remains with the testator. This means that when there are circumstances justifying the preparation of two special wills (e. g. verbal and traveller's last will), the choice of a specific form is left to the testator. He does not have to reveal to anyone the reasons for his standpoint. However, it is important that the circumstances justifying the choice meet the statutory conditions for drawing up a will.

The ordinary wills include: personal, statutory and notarial will. The special wills include: verbal, military and traveller's last will. Under the limited extent of this publishing, the main, rather disputable or debatable issues relating to each will are outlined below.

The will provided for in Art. 949 of the CC is a handwritten will of a testator. According to Art. 949 of the CC a testator may make a will by writing it entirely by hand, signing and dating it[15]. The absence of a date, however, does not invalidate a holographic will if it does not raise doubts about the testator's capacity to make a will, about its content or about the

---

[7] *Załucki M.* [Untitled] // Kodeks cywilny. Komentarz. P. 1961.

[8] *Sokołowski T.* [Untitled] // Kodeks cywilny. Komentarz. Vol. II. P. 1209.

[9] *Pazdan M.* [Untitled] // Kodeks cywilny. Komentarz. Vol. 2. P. 840.

[10] *Załucki M.* Forma testamentu w perspektywie rekodyfikacji polskiego prawa spadkowego. Czas na rewolucję? // Państwo i Prawo. 2017. No. 3. P. 31–49.

[11] Judgement of the Supreme Court of 28.04.1973. III CZP 78/72 (hereinafter this and other judgments are available at: https://sip.lex.pl (accessed: 01.12.2021)).

[12] *Pabin A.* Testament jako akt sformalizowany — uwagi w sprawie przyszłego kształtu regulacji dotyczących rozrządzeń testamentowych // Studia Prawnicze. 2016. No. 1. P. 91–126.

[13] *Kremis J.* [Untitled] // Kodeks cywilny. Komentarz. P. 1618; *Sokołowski T.* [Untitled] // Kodeks cywilny. Komentarz. Vol. II. P. 1213.

[14] *Skowrońska-Bocian E.* Forma testamentu w prawie polskim. Warszawa: Wydawnictwo Uniwersytetu Warszawskiego, 1991. P. 18; *Radwański Z.* Zielona księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej. Warszawa: Oficyna Wydawnicza MS, 2006. P. 178.

[15] *Rosengarten F.* Podpis na testamencie // Nowe Prawo. 1983. No. 3. P. 10–17; *Skowrońska E.* Jeszcze o podpisie na testamencie własnoręcznym // Ibid. 1982. No. 5–6. P. 55–63. — Translation of

mutual relations among several wills. The legislator does not use the term "handwritten". However, there is a provision "the testator may make a will by writing it in full in handwriting". Making a will in handwriting indicates the ownership of this activity. This will requires from the testator certain abilities and skills, without them it will not be possible to make a personal will[16]. This is the ability to read and write and the related signature under the declaration of will. It is also a will that does not require witnesses[17]. The signature should appear under the testator's declaration of will. It means that by signing the will, the testator confirms the wording of the submitted dispositions, that he identifies himself with this wording and confirms that the declaration is a full and completed declaration. As proven by life experience, placing a signature is therefore the confirmation of the completion of making a testament and completion of the will[18].

Another ordinary will is a will having the form of a notarial deed. The entire definition of this will is expressed in one sentence in Art. 950 of the CC: a will may be made in the form of a notarial deed. The preparation of a will in this form has not been limited by any additional premises. A testator may choose the form. The testator's reason for choosing the form of a notarized deed is irrelevant. Drawing up a will before a notary who is a person of public trust and, at the same time, a qualified person having legal knowledge and experience, allows the heir to assume that his will is expressed entirely. The notary also contributes to the testator's sense of security that the testament will not be invalidated. A notarial will is also the only acceptable form for preparing a debt collection entry.

The statutory will is defined in Art. 951 of the CC. The legal provision has a rather complicated editorial form: A testator may make a will also by declaring, in the presence of two witnesses, his final wishes orally to the head of a municipality (wójt), (mayor or president of a city), head of a province (starosta), voivodship marshall, secretary of the province or municipality or manager of the Office of Vital Records (§ 1). The testator's declaration is written down in a record with an indication of the date it was made. The record is read out to the testator in the presence of the witnesses. The record should be signed by the testator, by the person to whom the final wishes were declared, and by the witnesses. If the testator cannot sign the record, this fact must be mentioned in the record together with the reason for there being no signature (§ 2). Deaf or mute individuals cannot make a will in the manner provided for in this article (§ 3)[19].

The code does not provide for any additional premises concerning the inability to draw up a personal will[20]. Therefore, a testator has a choice as to how to use this form of will. It should be noted that a statutory will, by the participation of local authorities and witnesses, may mislead a potential testator that this form of will, like a notarized will, has more effective disposition than a handwritten will. The idea of a statutory will, however, means that it limits the potential allegations as to its authenticity[21]. Moreover, it makes it difficult to challenge the wording of made statements. In terms of its admissibility and legal force, a statutory will is an equivalent to a handwritten will and a notarized ordinary will.

---

the provisions of the Civil Code. Available at: http://supertrans2014.files.wordpress.com (accessed: 01.12.2021).

[16] *Szpunar A.*: 1) Forma podpisu na testamencie własnoręcznym // Rejent. 1993. No. 3–4. P. 9–23; 2) Glosa do uchwały SN 9.5.1995 — III CZP 56/95 // Ibid. 1995. No. 12. P. 80–87.

[17] Resolution of the Supreme Court of 20.07.2005. II CK 2/05.

[18] *Wójcik S.* Glosa do uchwały Sądu Najwyższego z 19.07.2001. III CZP 36/01 // Orzecznictwo Sądów Polskich. 2001. No. 2. Item 18.

[19] See also: *Pazdan M.* [Untitled] // Kodeks cywilny. Komentarz. Vol. II. P. 850.

[20] *Jasiakiewicz T.* O regulacji prawnej testamentu alograficznego w prawie polskim — uwagi *de lege lata* i *de lege ferenda* // Prawo cywilne i handlowe w działaniach administracji. Stosowanie, wykładnia i stosowanie / ed. G. Kozieł. Lublin: Wydawnictwo WSPA, 2018. P. 143–161.

[21] *Kremis J.* [Untitled] // Kodeks cywilny. Komentarz. P. 1618.

In order to be valid, a statutory will requires the presence of an official and two adult witnesses. *De lege lata*, the following officials are included in the group competent to collect the testator's declaration: mayor, head of the district, province marshal, secretary of the district or commune or the registrar. The authorized officials may change depending on the legislator's decision.

The voices were raised in the doctrine for the abolition of this form of an ordinary will. The postulate to exclude this form of a will arises from the lack of necessary legal preparation of an official, which may lead to the invalidity of a will as it fails to meet formal requirements. Although this form of a will gives the testator the feeling that it will be more difficult for heirs or relatives to challenge the existence of a will and corresponding dispositions, it does not completely exclude doubts[22].

While analysing special wills, it should be noted that the Polish legal system provides for a verbal testament first. According to Art. 952 § 1 of the CC: "If there is a fear of the testator's imminent death or special circumstances make it impossible or very difficult to keep the common form of the will, the testator may declare his last will verbally in the presence of at least three witnesses". The legal provision continues as follows: 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. If the content of an oral will has not been established in the above manner, it may be established, within six months of the succession being opened, by the consistent testimonies of the witnesses given before a court. If the testimony of one of the witnesses cannot be heard or encounters obstacles which are difficult be overcome, the court may consider the consistent testimonies of two witnesses sufficient[23].

When assessing the circumstances that justify the preparation of a verbal testament, one should remember that these circumstances not only prevent the testator from preparing a will in its ordinary form, but are also of a special nature. The code does not provide examples in this matter. The catalogue of possible situations is open. Life experience shows that some circumstances or events must have a special character. These are exceptional circumstances that cannot be attributed to some universal features. These can be both circumstances on the part of the testator and affecting him (e. g. illness, disability, inability to make a will in the usual form due to an old age, etc.) and circumstances resulting from external factors. (e. g. natural disasters, inability to draw up a will due to the suspension of the mayor, etc.). The testator will be able to refer to special circumstances justifying the existence of the condition under Art. 952 of the CC, when it is impossible or significantly difficult to draw up an ordinary will, including a handwritten will due to special circumstances.

The premises for making a verbal testament were expressed with an alternative conjunction "or". This conjunction denotes an exclusive disjunction. In such a case, only one or another element (segment) indicated in the provision will apply. According to Art. 952 of the CC, the alternative should be understood in such a way that, only one indicated situation is sufficient for the valid preparation of a verbal testament and the situations do not have to occur jointly. Both the fear of the testator's imminent death and the inability or difficulty to draw up a will in the ordinary form due to special circumstances constitute independent, exclusive and at the same time sufficient conditions for a valid verbal testament[24].

---

[22] *Wójcik S., Zoll F.* Testament // System Prawa Prywatnego: in 21 vols. Vol. 10 / ed. B. Kordasiewicz. Warszawa: C. H. Beck, 2013. P. 310.

[23] *Gałakan-Halicka A.* Stwierdzenie treści testamentu ustnego // Monitor Prawniczy. 2004. No. 16. P. 739–745.

[24] See: Resolution of the Supreme Court of 25.03.1974. III CRN 5/74 // Orzecznictwo Sądu Najwyższego Izba Cywilna i Pracy. 1975. No. 3. Item. 42; Judgement of the Supreme Court of 07.01.1991. III CZP 135/91.

The doctrine and judicial decisions analyse the aspect of fear of imminent death[25]. The testator's interest is to determine whether the fear should be subjective or objective. In other words, should the testator be in a situation where according to life experience, there is an objective risk of loss of life in every case and it is regardless of the testator himself, or is it about the subjective feelings of the testator? While analysing the first of the presented possibilities, it should be assumed that the fear of imminent death arises whenever anyone (and therefore the testator) finds himself in given circumstances. This would mean that only the circumstances, to a greater extent, justify the possibility of the fear of imminent death. While analysing the case from another point of view, it should be assumed that when the testator finds himself in the given circumstances, the fear of imminent death is justified not only by his subjective feeling, but also by objective premises. However, it should be noted that even an objective premise justifying the potential fear of imminent death does not have to lead to its occurrence in given situations. Particularly the testator does not have to refer to such situation while making his last will. It is essential to take into account the individual nature of the experiences and the fact that even the events that, in principle, are characterized by a feeling of fear or anxiety in a particular person do not have to arouse such feelings elsewhere. The fear in question should be characterized as the fear of imminent death. The use of the somewhat specific term "imminent" death in the wording of the provision should be explained in such way that it is probably about the inevitability of death in a short time or the probability of death as a result of events that a testator is currently experiencing[26].

Travel and soldier's wills are regulated in Art. 953 of the CC[27] and Art. 954 the CC[28]. As they are not of much practical significance at present, they will be omitted in this presentation[29].

Coming back to the testamentary freedom, the testator is fully competent to make the dispositions as he finds it suitable. It is however necessary that any disposition has a property character. The testament itself is a disposition of property upon one's death. The legislator does not impose in any way which of the available property dispositions the testator should turn to. Under the testamentary freedom the testator may use all available dispositions, he may also use only one of the provided dispositions. The testator does not have to name the dispositions included in the will in any way, nor does he have to use language of the law or lawyers' language[30]. A will should be interpreted in such a manner so as to ensure that the testator's intentions are realized to the fullest extent possible. If a will

---

[25] *Gwiazdomorski J.* Prawo spadkowe w zarysie. Warszawa: Państwowe Wydawnictwo Naukowe, 1990. P. 112; *Piątowski J. S.* Prawo spadkowe. Zarys wykładu. Warszawa: LexisNexis, 2003. P. 111–112; *Świat łowski A.* Obawa rychłej śmierci jako przesłanka testamentu ustnego // Monitor Prawniczy. 1993. No. 3. P. 65–66.

[26] *Niemczyk S., Łazarska A.* Prawno-medyczna wykładnia "obawy rychłej śmierci" jako przesłanka ważności testamentu ustnego // Prawo i Medycyna. 2007. No. 2. P. 86–100.

[27] During a journey on a Polish sea-going vessel or aircraft, a testator may make a will before the commander of the vessel or aircraft or his deputy by declaring his final wishes to the commander or his deputy in the presence of two witnesses the commander of the vessel or the aircraft or his deputy writes down the final wishes of the testator, giving the date they are written, and reads the instrument out to the testator in the presence of the witnesses, after which the instrument is signed by the testator, the witnesses and the commander or his deputy. If the testator cannot sign the instrument, the reason for there being no signature should be given in the instrument. If this form cannot be observed, an oral will maybe made.

[28] The specific form of a soldier's will is set forth in a regulation of the Minister of National Defense issued in agreement with the Minister of Justice.

[29] *Cybula P.* Testament podróżny de lege lata i de lege ferenda (zagadnienia wybrane) // 50 lat kodeksu cywilnego. Perspektywy rekodyfikacji / eds P. Stec, M. Załucki. Warszawa: Wolters Kluwer Polska, 2015. P. 385–400; *Osajda K.* [Untitled] // Kodeks cywilny. Komentarz. Vol. 3. P. 399–401.

[30] Resolution of the Supreme Court of 28.09.1989. III CRN 292/89.

can be interpreted in various ways, the interpretation allowing the testator's dispositions to remain in force and giving them reasonable meaning should be applied[31].

The legal system under the testamentary freedom allows the testator to make several testamentary dispositions. They include the following:

- naming of an heir (Art. 959 of the CC); if a testator has named several heirs to succeed to the estate or a specified part thereof without specifying their shares in the estate, they succeed in equal parts[32];
- legacy (Art. 968 of the CC); a testator may, by testamentary disposition, oblige a statutory or testamentary heir to make a specific property performance for the benefit of a given person (particular legacy)[33];
- absolute legacy (Art. 981^1 of the CC); in a will drawn up in the form of a notarial deed the testator may decide that a specified person acquires the object of a legacy at the time the succession is opened[34];
- ordinary substitution (Art. 963 of the CC); a testamentary heir may be named in the event that another person named as the statutory or testamentary heir does not wish to or cannot be the heir[35];
- testamentary instructions (Art. 982 of the CC); the testator may in a will impose on an heir or a legatee the obligation to carry out a specific action or to refrain from carrying out from a specific action without making anyone a creditor[36];
- establishing a foundation (§ 3 Art. 927 of the CC); a foundation established by the testator in a will can be an heir if it is entered in the register within two years of the will being read;
- disinheritance (Art. 1008 of the CC)[37];
- appoint an executor or executors of the will (Art. 986 of the CC)[38].

The limited extent of the publishing do not allow for a detailed analysis of all regulations. There are obviously practical problems related to each of these regulations. The following paragraphs bring a detailed analysis of a disposition of disinheritance, as it most clearly allows the testator to influence the order of inheritance and the situation of the relatives by testamentary disposition made.

The doctrine of the subject emphasizes two aspects related to the admissibility of this type of testamentary disposition[39]. Disinheritance may be perceived as a restriction on testamentary freedom, but may be seen as its extension. The argument in favour of the extension of testamentary freedom is the possibility of excluding the persons entitled to the legitimate portion, where the testator's will is executed to the fullest extent. When it

---

[31] *Radwański Z.* Wykładnia testamentów // Kwartalnik Prawa Prywatnego. 1993. No. 1. P. 5–20; *Kremis J.* [Untitled] // Kodeks cywilny. Komentarz. P. 1610.

[32] *Bystrzyńska-Fornal E.* Oznaczenie (określenie) osoby spadkobiercy w testamencie // Przegląd Sądowy. 2004. No. 2. P. 55–67; *Zelek M.* [Untitled] // Kodeks cywilny. Komentarz: in 3 vols. vol. II / ed. M. Gutowski. Warszawa, 2019. P. 1283–1292.

[33] *Rzewuski M.* [Untitled] // Kodeks cywilny. Komentarz / ed. M. Załucki. P. 2006–2023; *Zelek M.* [Untitled] // Kodeks cywilny. Komentarz. Vol. II. P. 1316–1333.

[34] *Osajda K.* Przedmiot zapisu windykacyjnego i odpowiedzialność zapisobierców windykacyjnych za długi spadkowe oraz zachowki // Monitor Prawniczy. 2002. No. 3. P. 128–130; *Zakrzewski P.* Zapis windykacyjny // Przegląd Sądowy. 2012. No. 2. P. 17–23; *Rzewuski M.* [Untitled] // Kodeks cywilny. Komentarz. P. 2023–2039.

[35] *Szpyt K.* [Untitled] // Kodeks cywilny. Komentarz / ed. M. Załucki. P. 2003.

[36] *Rzewuski M.* [Untitled] // Ibid. P. 2039–2045.

[37] *Doliwa A.* [Untitled] // Ibid. P. 2082–2086.

[38] *Bełza L.* Skuteczność powołania wykonawcy testamentu // Przegląd Sądowy. 1994. No. 11–12. P. 54.

[39] *Kordasiewicz B.* Zachowek // System Prawa Prywatnego. Prawo spadkowe / ed. B. Kordasiewicz. Warszawa: C. H. Beck, 2009. P. 841.

comes to restricting the testamentary freedom, a fact should be underlined that the testator is not given a complete autonomy of disinheritance. The limitation is expressed in the subjective and objective premises of disinheritance.

If we start from the unrestricted testamentary freedom, then it should be consequently assumed that making the possibility of disinheritance dependent on the statutory premises included in the catalogue, being a closed catalogue, must be perceived as a restriction of the testamentary freedom. The testator has no possibility to completely and independently deprive the persons who are members of his immediate family of any share in property rights after his death. While a person entitled to a legitimate portion cannot be attributed with one of the features mentioned in Art. 1008 of the CC, the testator only has the option to make the disposition in the form of an exclusion from statutory inheritance and the testator needs to accept the situation that, after his death, the entitled person will apply for the legitimate portion.

However, if the inheritance law assumes that after the death of the testator, a certain part of the property accumulated during his lifetime should go to the closest family members, then it should be admitted that the institution of disinheritance extends the testamentary freedom[40].

Disinheritance is a testamentary disposition. It can only be executed in a will. The form of the will is irrelevant. The reason for disinheritance must be stated in the will[41]. It aims at preventing the dispositions as a result of which the testator would disinherit a person, assuming only that the heir entitled to a legitimate portion may commit acts in the future that would deprive him of the right to a legitimate portion.

There is *numerus clausus* principle of premises for disinheritance. These are listed in Art. 1008 of the CC. This legal provision reads as follows: A testator may, in his will, deprive his descendants, spouse and parents of the legitimate portion (disinheritance) if the forced heir:

— against the testator's wishes persistently acts in a manner contrary to the principles of community life;
— has intentionally committed a crime against the testator or a person close to him threatening life, health or freedom or has grossly affronted his dignity;
— persistently fails to perform family obligations with regard to the testator.

There are doubts concerning the premise of acting contrary to the principles of social coexistence[42]. It is assumed that it is about both a criminal lifestyle (e. g. making a crime a source of income: e. g. fraud, theft, receiving stolen goods, etc.) and permitting other acts that are not classified as crime but come under negative moral judgment. The examples may include the abuse of alcohol, drugs, legal highs, avoiding work and living at the expense of others (especially the testator), prostitution, neglecting one's family by a person entitled to a legitimate portion, etc.[43]

However, the doubt arises when the principles of social coexistence, the moral criteria of assessment are understood differently by the testator and by a person entitled to a legitimate portion. In other words, these are the situations when certain behaviours, in the view of the testator, violate the established principles of relations between people and the testator, and in the view of the person entitled to a legitimate portion, these behaviours do not have such features. The answer to the problem presented here should be found in the persistence of the heir entitled to a legitimate portion and in his acting against the

[40] *Szaciński M.* Wydziedziczenie w polskim prawie spadkowym zunifikowanym // Nowe Prawo. 1962. No. 7-8. P. 1005.
[41] *Kordasiewicz B.* Zachowek. P. 842.
[42] *Kremis J.* [Untitled] // Kodeks cywilny. Komentarz. P. 1697.
[43] *Kordasiewicz B.* Zachowek. P. 847.

will of the testator. The disinherited person constantly acts in a manner contrary to the principles of social coexistence and against the will of the testator. However, there is no statutory indication concerning the need to adopt any particular manner of manifesting dissatisfaction with the behaviour of the entitled person by the testator. Acting contrary to the principles of social coexistence is often perceived with shame or embarrassment by the testator, and if this is the case, remarks about the improper conduct are made in home privacy and they do not have formal character[44]. This interpretation may lead to the conclusions that since the testator decides to disinherit, making a reference to the principles of social coexistence, this already means acting against the will of the testator. However, this view may be disputable[45].

Social disapproval also concerns failure to fulfil family obligations. In this context, the premise of persistent failure to fulfil family obligations is related to persistent acting contrary to the principles of social coexistence. It is about not fulfilling family obligations of a property and non-property character.

The doctrine states that while assessing if "the condition of persistent failure to fulfil family obligations towards the testator has been met, a certain rigorism should be taken into consideration"[46]. A view should be shared that inheritance is not perceived by the legislator as a reward for performing family obligations towards the testator. Inheritance seems to be a normal matter, just as it is normal to help family members in situations that could be described as crisis situations, even if in some other circumstances the relationships between family members are far from ideal. This leads to the conclusion that not every reprehensible behaviour, that the testator dislikes, brings a premise and grounds for disinheritance. If it was the case, it would constitute (or at least could constitute) the grounds for circumventing the provisions on a legitimate portion. In other words, any defective behaviour of the person entitled to a legitimate portion and behaviour detrimental to family obligations could form the grounds for disinheritance.

The premise of persistent failure to meet the family obligations does not have to exist at the time of making the will. Moreover, it should be assumed that the premise should have existed some time before the preparation of the will.

Finally, the last premise forming the grounds for disinheritance, this is committing an intentional crime against the testator or one of his closest persons, threatening their life, health or freedom, or glaring insult to dignity, brings most interpretation doubts at the same time. First of all, considerations of a formal nature and qualifications under the Criminal Code will not determine the possibility of disinheritance. This means that the heir does not necessarily have to commit any crimes defined in particular chapters of the Penalty Code[47]. To provide an example: a rape would not be perceived as a crime justifying disinheritance on the grounds that it has not been systematized in the Penalty Code in the group of offenses against freedom. At the same time, as provided for in the literature, a threat of rape would form such grounds, because the serious threat of committing a crime that would harm a person (thus also the testator or the person closest to him) is treated as a crime against freedom[48]. There is no doubt, however, that rape is a premise for disinheritance. On the other hand, there is a group of crimes that have been formally classified by the legislator as crimes against life, health and freedom, but committing them will not always be considered sufficient grounds for disinheritance. When the crime of participating in a fight is considered, it is difficult to conclude that it is committed "against" the testa-

[44] Ibid. P. 848.

[45] Ibid.

[46] Ibid. P. 850–851.

[47] *Haberko J., Zawłocki R.* Prawnokarne konsekwencje popełnienia przestępstwa // Ruch Prawniczy, Ekonomiczny i Socjologiczny. 2014. No. 1. P. 29–42.

[48] *Kordasiewicz B.* Zachowek // System Prawa Prywatnego. Prawo spadkowe. P. 852.

tor, similarly provision of a medical treatment by a person entitled to a legitimate portion, without the consent of the patient being the testator.

When the premise of glaring insult to dignity is analysed, there are even more doubts, because it is not certain if it is an insult to dignity that must meet the criteria of a crime or not. Not every insult to dignity will form grounds for disinheritance. The legislator uses the adjective "glaring" insult to dignity. The assessment of whether the insult to dignity is glaring or not should be made in reference to the objective criteria and not to the subjective feelings of the testator[49].

Finally, the last doubt in the context of the formulation of the discussed premise: the legislator used the definition of one of the testator's closest persons in the provision of Art. 1008 point 2 of the CC. Different definitions of the closest person are adopted in the doctrine. The descriptive definition of the closest person seems to be the most appropriate. In the context of Art. 1008 point 2 of the CC, the closest person should be understood as an entity related to the testator with such strong emotional ties that the act committed against that person would be perceived and felt by the testator from the point of view of his complaints, harm or suffering, just like an act directed against him[50].

The disinheritance will be effective as long as the testator has not forgiven the heir. Forgiveness is effective as long as it has been done with sufficient discernment. It is effective as long as the testator knows the circumstances of the act that are forgiven. However, it is not necessary for the testator to be aware of the legal consequences of forgiveness. According to Art. 1010 of the CC: a testator cannot disinherit a forced heir if he has pardoned him. If, at the time of the pardon, the testator did not have capacity for legal acts, the pardon is effective if it was given with sufficient comprehension. Forgiveness is a purely emotional, emotional act of letting go of the harm suffered and not resenting it. However, the following doubt arises in this respect: if the testator suffered harm from the heir and then forgave this fact, whether it could constitute grounds for disinheritance. Guided by life experience, it can be assumed that, unless the testator has forgiven, he will not refer to the event detrimental to him as a premise for disinheritance. Rather, it will be possible to consider situations in which forgiveness follows a will rather than a will containing a disposition in the form of disinheritance. Therefore, there is a doubt: what happens with disinheritance in such a situation. There was a concept of giving the regulation contained in Art. 1010 of the CC a wider significance. This would mean that a forgiveness after disinheritance would result in a loss of the power of disinheritance, regardless of the form in which forgiveness occurred. However, this concept has met with criticism[51].

It was argued that since disinheritance may only take place in a will and only with reasons, and since it takes place by way of a legal act, it is only in the new will that the effects of disinheritance may be waived. Since disinheritance is still a testamentary disposition, its revocation or amendment may only take place under the same formal premises (quite strict).

Of course, one can doubt whether this was what the legislator meant, such perception of forgiveness reduces the significance of Art. 1010 of the CC almost to zero[52].

Finally, it should be emphasized that any disinheritance under the meaning of Art. 1008 of the CC, regardless of the deprivation of the entitled person of his legitimate por-

---

[49] *Kremis J.* [Untitled] // Kodeks cywilny. Komentarz. P. 1698.

[50] See the definition created by: *Gwiazdomorski J.* Prawo spadkowe. Warszawa: Państwowe Wydawnictwo Naukowe, 1959. P. 396.

[51] *Kordasiewicz B.* Zachowek // System Prawa Prywatnego. Prawo spadkowe. P. 859.

[52] *Pietrzykowski K.* [Untitled] // Kodeks cywilny. Komentarz: in 2 vols. Vol. II / ed. K. Pietrzykowski. Warszawa: C. H. Beck, 2013. P. 1631; *Księżak P.* Zachowek w polskim prawie spadkowym. P. 222; *Doliwa A.* [Untitled] // Kodeks cywilny. Komentarz. P. 2085; *Kremis J.* [Untitled] // Kodeks cywilny. Komentarz. P. 1699. — See also the judgement of the Supreme Court of 14.06.1971. III CZP 24/71.

tion, deprives this person a share in the estate, therefore it has the features of a negative will[53]. A person deprived of a legitimate portion is therefore removed from inheritance and is treated as if this persons has not lived until the opening of the inheritance.

References

Bełza, Lucjan. 1994. Skuteczność powołania wykonawcy testamentu. *Przegląd Sądowy* 11–12: 48–63.

Borysiak, Witold. 2013. *Dziedziczenie. Konstrukcja prawa i ochrona*. Warszawa, LexisNexis.

Bystrzyńska-Fornal, Ewa. 2004. Oznaczenie (określenie) osoby spadkobiercy w testamencie. *Przegląd Sądowy* 2: 55–67.

Cybula, Piotr. 2015. Testament podróżny de lege lata i de lege ferenda (zagadnienia wybrane). *50 lat kodeksu cywilnego. Perspektywy rekodyfikacji*, eds Piotr Stec, Mariusz Załucki: 385–400. Warszawa, Wolters Kluwer Polska.

Doliwa, Adam. 2019. [Untitled] *Kodeks cywilny. Komentarz*, ed. Mariusz Załucki: 2082–2086. Warszawa, C. H. Beck.

Gałakan-Halicka, Agnieszka. 2004. Stwierdzenie treści testamentu ustnego. *Monitor Prawniczy* 16: 739–745.

Gwiazdomorski, Jan. 1959. *Prawo spadkowe*. Warszawa, Państwowe Wydawnictwo Naukowe.

Gwiazdomorski, Jan. 1990. *Prawo spadkowe w zarysie.* Warszawa, Państwowe Wydawnictwo Naukowe.

Haberko, Joanna, Zawłocki, Robert. 2014. Prawnokarne konsekwencje popełnienia przestępstwa. *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 1: 29–42.

Jasiakiewicz, Tomasz. 2018. O regulacji prawnej testamentu alograficznego w prawie polskim — uwagi de lege lata i de lege ferenda. *Prawo cywilne i handlowe w działaniach administracji. Stosowanie, wykładnia i stosowanie*, ed. Grzegorz Kozieł: 143–161 Lublin, Wydawnictwo WSPA.

Kordasiewicz, Bogudar. 2009. Zachowek. *System Prawa Prywatnego. Prawo spadkowe*, ed. Bogudar Kordasiewicz: 1–953. Warszawa, C. H. Beck.

Kremis, Jerzy. 2021. [Untitled] *Kodeks cywilny. Komentarz*, eds Edward Gniewek, Piotr Machnikowski: 1–2336. Warszawa, C. H. Beck.

Księżak, Paweł. 2012. *Zachowek w polskim prawie spadkowym.* Warszawa, Wolters Kluwer Polska.

Niemczyk, Stanisław, Łazarska, Aneta. 2007. Prawno-medyczna wykładnia "obawy rychłej śmierci" jako przesłanka ważności testamentu ustnego. *Prawo i Medycyna* 2: 86–100.

Niezbecka, Elżbieta. 1992. Skutki prawne testamentu negatywnego i wydziedziczenia. *Rejent* 7–8: 18–21.

Osajda, Konrad. 2002. Przedmiot zapisu windykacyjnego i odpowiedzialność zapisobierców windykacyjnych za długi spadkowe oraz zachowki. *Monitor Prawniczy* 3: 128–130.

Osajda, Konrad. 2013. [Untitled] *Kodeks cywilny. Komentarz.* In 3 vols, vol. 3: Spadki, ed. Konrad Osajda: 1–1237. Warszawa, C. H. Beck.

Pabin, Anna. 2016. Testament jako akt sformalizowany — uwagi w sprawie przyszłego kształtu regulacji dotyczących rozrządzeń testamentowych. *Studia Prawnicze* 1: 91–126.

Pazdan, Maksymilian. 2013. [Untitled] *Kodeks cywilny. Komentarz.* In 2 vols, vol. II, ed. Krzysztof Pietrzykowski: 736–996. Warszawa, C. H. Beck.

Piątowski, Józef S. 2003. *Prawo spadkowe*. *Zarys wykładu.* Warszawa, LexisNexis.

Piątowski, Józef S., Kawałko, Anna, Witczak, Hanna. 2009. *Pojęcie, funkcje i źródła prawa spadkowego System Prawa Prywatnego. Prawo spadkowe*, ed. Bogudar Kordasiewicz: 1–40. Warszawa, C. H. Beck.

Piątowski, Józef S., Kordasiewicz, Bogudar. 2011. *Prawo spadkowe. Zarys wykładu*. Warszawa, LexisNexis.

Pietrzykowski, Janusz. 1994. Wybrane zagadnienia reformy prawa spadkowego. *Z zagadnień współczesnego prawa cywilnego, Księga pamiątkowa ku czci Profesora Tomasza Dybowskiego*, eds Jan Błeszyński, Jerzy Rajski, Marek Safjan, Elżbieta Skowrońska-Bocian: 249–257. Warszawa, Wydawnictwo Uniwersytetu Warszawskiego.

[53] *Niezbecka E.* Skutki prawne testamentu negatywnego i wydziedziczenia // Rejent. 1992. No. 7–8. P. 18–21; *Sokołowski T.* [Untitled] // Kodeks cywilny. Komentarz. Vol. II. P. 1215.

Pietrzykowski, Krzysztof. 2013. [Untitled]. *Kodeks cywilny. Komentarz.* In 2 vols, vol. II, ed. Krzysztof Pietrzykowski: 1–1076. Warszawa, C. H. Beck.
Radwański, Zbigniew. 1993. Wykładnia testamentów. *Kwartalnik Prawa Prywatnego* 1: 5–20.
Radwański, Zbigniew. 2006. *Zielona księga. Optymalna wizja Kodeksu cywilnego w Rzeczypospolitej Polskiej.* Warszawa, Oficyna Wydawnicza MS.
Rosengarten, Filip. 1983. Podpis na testamencie. *Nowe Prawo* 3:10–17.
Rzewuski, Maciej. 2019. [Untitled] *Kodeks cywilny. Komentarz*, ed. Mariusz Załucki: 2006–2039. Warszawa, C. H. Beck.
Skowrońska, Elżbieta. 1982. Jeszcze o podpisie na testamencie własnoręcznym. *Nowe Prawo* 5–6: 55–63.
Skowrońska-Bocian, Elżbieta. 1991. *Forma testamentu w prawie polskim.* Warszawa, Wydawnictwo Uniwersytetu Warszawskiego.
Skowrońska-Bocian, Elżbieta. 1997. *Prawo spadkowe*. Warszawa, C. H. Beck.
Skowrońska-Bocian, Elżbieta. 2004. *Testament w prawie polskim.* Warszawa, LexisNexis.
Sokołowski, Tomasz. 2019. [Untitled] *Kodeks cywilny. Komentarz.* In 3 vols, vol. II, ed. Maciej Gutowski: 1208–1240 Warszawa, LexisNexis.
Światłowski, Andrzej. 1993. Obawa rychłej śmierci jako przesłanka testamentu ustnego. *Monitor Prawniczy* 3: 65–66.
Szaciński M. 1962. Wydziedziczenie w polskim prawie spadkowym zunifikowanym. *Nowe Prawo* 7–8: 996–1005.
Szpunar, Adam. 1993. Forma podpisu na testamencie własnoręcznym. *Rejent* 3–4: 9–23.
Szpunar, Adam. 1995. Glosa do uchwały SN 9.5.1995 — III CZP 56/95. *Rejent* 12: 80–87.
Szpyt, Kamil. 2019. [Untitled] *Kodeks cywilny. Komentarz*, ed. Mariusz Załucki: 1998–2006. Warszawa, C. H. Beck.
Witczak, Hanna. 2009. Skutki wyłączenia od dziedziczenia. *Rejent* 3: 73–96.
Wójcik, Sylwester, Zoll, Fryderyk. 2013. Testament. *System Prawa Prywatnego. Prawo spadkowe*. In 21 vols, vol. 10, ed. Bogudar Kordasiewicz: 271–348. Warszawa, C. H. Beck.
Wójcik, Sylwester. 1986. [Untitled] *System prawa cywilnego, Prawo spadkowe.* In 4 vols, vol. IV, ed. Józef S. Piątowski: 1–626. Wrocław, Zakład Narodowy imienia Ossolińskich.
Wójcik, Sylwester. 2001. Glosa do uchwały Sądu Najwyższego z 19.07.2001. III CZP 36/01. *Orzecznictwo Sądów Polskich* 2: 18.
Zakrzewski, Piotr. 2012. Zapis windykacyjny. *Przegląd Sądowy* 2: 8–23.
Załucki, Mariusz. 2017. Forma testamentu w perspektywie rekodyfikacji polskiego prawa spadkowego. Czas na rewolucję? *Państwo i Prawo* 3: 31–49.
Załucki, Mariusz. 2019. [Untitled] *Kodeks cywilny. Komentarz*, ed. Mariusz Załucki: 1959–1996. Warszawa, C. H. Beck.
Zelek, Mariusz. 2015. *Spadek i testament. Poradnik praktyczny.* Warszawa, Difin.
Zelek, Mariusz. 2019. [Untitled] *Kodeks cywilny. Komentarz.* In 3 vols, vol. II, ed. Maciej Gutowski: 1283–1292, 1316–1333. Warszawa, C. H. Beck.

Received: November 1, 2020
Accepted: September 29, 2021

Допустимость лишения наследства и свобода завещания

И. Хаберко

Для цитирования: *Haberko J.* The admissibility of disinheritance and testamentary freedom // Правоведение. 2021. Т. 65, № 1. С. 123–135. https://doi.org/10.21638/spbu25.2021.107

В статье рассматриваются принципы наследственного права в польской правовой системе, в частности принцип свободы завещания и последствия, которые составление завещания может иметь для лиц, наиболее близких к наследодателю. Автор анализирует характер завещания как юридической сделки и требования к форме завещания, а также допустимость указанных в нем распоряжений. Особое внимание уделяется допустимости лишения наследства и его последствиям. Цель статьи — ответить на вопрос, рас-

ширяет или сужает установленную законом свободу завещания допустимость лишения родственников принадлежащей им обязательной доли в наследстве. Принятая законодательная структура предполагает, что каждый, кто обладает завещательной дееспособностью, т. е. полной дееспособностью, вправе составить завещание. Закон никоим образом не ограничивает круг лиц, которые могут быть назначены наследниками по завещанию, или объем такого назначения. Завещатель волен решать, следует ли (и когда следует) составлять завещание, — это выражение принципа свободы завещания. Любой, кто обладает полной дееспособностью совершать законные действия, может воспользоваться этой свободой таким образом, чтобы составить завещание или нет. Однако если человек пользуется этой свободой, то объем и форма сделанных распоряжений зависят исключительно от этого человека. Свобода завещания выражается в определенных формах. Во-первых, составляя завещание, наследодатель может изменить законное наследование, назначить, кого захочет, и не ограничен в долях. Во-вторых, составляя завещание, наследодатель вправе исключить определенных лиц из наследования, чему служат отрицательная воля и лишение наследства.

Ключевые слова: наследство, завещание, свобода завещания, обязательная доля, лишение наследства.

Статья поступила в редакцию 1 ноября 2020 г.
Рекомендована к печати 29 сентября 2021 г.

Хаберко Иоанна — хабилитированный д-р юрид. наук, проф., Университет им. Адама Мицкевича в Познани, Польша, 61-712, Познань, ул. Венявского, 1; joanna.haberko@amu.edu.pl