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THE FORM OF THE WILL

SUMMARY

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Content

List of abbreviations

Introduction..p.8

Part I: The form of the will in the history of law..p.12

Title 1. Roman law and the issue of the death of a person... p.12

Chapter 1. Introduction...p.12

Section I: Terminology..p.12

Section II: Legal succession from a political, economic and social perspective..p.16

Section III: Other universal transmissions..p.17

Conclusions..p.17

Chapter 2. Creating an heir. Forms that led to the appearance of the will......................p.18

Section I: *Adoptio quod adrogatio*..p.18

Section II: *Donatio mortis causa*...p.21

Conclusions..p.22

Title 2. The will in Roman law..p.22

Chapter. 1.Introduction...p.22

Section I: Definition. The importance of establishing an heir...........................p.23

Section II: The right to create a will...p.25

Section III: The substantive conditions of the will and the modalities in which they affect the institution of an heir...p.29

Conclusions...p.32

Chapter. 2. Testamentary forms...p.34

Section I: The form of the will in the ancient Roman law.................................p.34

Section II: The form of the will in the classical period of the Roman law….....p.43

Section III: The form of the will in the postclassical period of the Roman law………………………………………………………………………………….p.46

Section IV: Common aspects regarding the Roman testamentary forms……..p.50

Section V: Eluding formalism. Practical aspects..p.52

Section VI: Legs and *fideicommissum*...p.55

Conclusions...p.60

Title 3. The period before modern codification..p.62

Chapter I. Ancient French law...p.62

Chapter II. The ancient law applicable on the current territory of Romania.................p.65

Section 1. The situation before the sec. XIV..p.65

Section 2. The form of the will in sec. XIV-XVI………………......................p.69

Section 3. The form of the will in sec. XVIII-XIX...p.72

Conclusions...p.74

Section 4. The will in Transylvania in the sec. XIX-XX...................................p.75

1. Introduction...p.75

2. Application of the Austrian Civil Code……..p.76

A. The extrajudicial will...p.76

B. The judicial will...p.78

3. The form of the will regulated by the provisions of the Law no. XVI in 1876...p.79

3.1. The private will..p.79

3.1.1. The written private will...p.82

a) the ordinary will..p.83

b) the special will..p.92

c) the common will...p.93

3.1.2. the private oral wills..p.98

Conclusions...p.103

Section a 5-a. the public will and the private written wills deposited at the notary public...p.103

Conclusions...p.116

Part II: The form of the will in current civil law - contextual aspects..................p.118

Section 1. The form of the civil legal act..p.118

Section 2. The will - a civil legal act..p.120

Section 3. The justification of testamentary formalism..p.123

The proof of a will...p.126

The interpretation of the will..p. 131

Conclusions..p.132

Section 4. General formal conditions for the validity of the will...............................p.134

1. The written form...p.134

2. The prohibition of a mutual will...p.138

- conjunctive (joint), mutual or correlative?..p.138

- issues regarding the nature of the prohibition..p.139

- the admissibility of the mutual will in German law...p.150

- the donations and the spouses..p.151

- the preciput clause..p.153

- conclusion..p.154

- the recognition of mutual will concluded in accordance with the law of a Member State in the course of a notarial succession procedure...p.155

3. The sanction of non-compliance with the general conditions of form - confirmation of the will (art. 1010 civ.)..p.155

Part III: The form of the will in the current civil law - the special aspects……..p.159

Preliminary aspects..p.159

Section 1. The holographic will……………………………......................................p.160

1. The code’s requirements..p.160

The handwritting...p.161

Special issues regarding the handwriting..p.165

a) The typed holographic will……………………………………….........p.165

b) The holographic will written in a foreign language...................................p.167

The date of the will..p.168

- the incomplete or the non-existent date...p.170

- the false or the inaccurate date...p.179

Conclusions. The importance of the date..p.181

The signing of the will..p.181

2. The holographic will and the role of the notary public...p.183

- The obligation of the notary to advise his client……..p.185

- The submission of the will……………..p.186

- The role of the notary after the drafting of the holographic will. The opening procedure and validation………………………………………..p.189

- Conclusions..p.195

3. The probative force of the holographic will………………………........................p.196

Section 2. The solemn will...p.197

1.The legislative history………...p.197

2. The competence to authenticate a will...p.200

3. The procedure of authenticating a will……………...p.202

- The application addressed to the notary for the authentication of the solemn will...p.202

- Formalities performed upon receiving the application..p.204

- The authentication formalities..p.206

1) the case in which the testator does not present a will drafted in advance.. p.206

2) the case in which the testator presents a will he had already drafted..p.207

- The solemn will and the presence of witnesses..p.207

a) the place where witnesses sign...p.208

b) the need for witnesses………………...p.210

c) conclusion..p.219

d) the testator who, due to an illness or other causes, cannot sign the will...p.220

- The language of the solemn will...p.224

- Completing the authentication procedure..p.232

- Practical aspects regarding the content of the solemn will…………........................p.235

4. The probative force of the solemn will...p.279

5. Conclusion...p.279

Section 3. Special wills..p.281

1. Types...p.281

2. Common rules for the privileged will..p.283

Section 4. The will containing sums of money, values or securities…………...….....p.284

Section 5. The international testament, a form of the late sealed will………..............p.290

Section 6. The conversion of the will...p.296

Part IV. Final conclusions……..p.298

Bibliography………...p.316

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Our doctoral research started from two findings: the solemnity of the will is a constant of our civil legislation in the last two centuries; the notary public has an essential role in law enforcement.

Therefore, we have set out to examine the following issues:

- what is the origin and justification of the forms in testamentary matters? How have these forms evolved from ancient law to the modern civil codes?

- how was the testamentary formalism presented in the Romanian civil code from 1864, adopted under the influence of the French model from 1804?

- what is the role of testamentary formalism in current Romanian civil law?

The research method first considers the punctual analysis of legislation, judicial and notarial practice, in order to see how effective were the relevant regulations and how were practitioners able to apply them. Then we will use the comparative method. On the one hand, we will thus determine the influence of French civil code and French practice and doctrine. Research in the field of comparative law will help us to determine correctly the current solutions we can reach, as well as the suggestions that we will make.

This research is divided into four main parts:

The first part deals with the form of the will in the history of law, in which we have included the analysis of the forms of the will in Roman law as well as the forms of the wills in the period of modern codification.

The second part deals with theoretical aspects of the will in current civil law.

The third part deals with the special aspects regarding the form of the will on two levels: the presentation of the legislation as well as practical aspects encountered in our activity as a notary public.

The fourth part contains the final conclusions.

1. In the old Roman law, a definition of the patrimony is not outlined, in the sense understood today as a set of rights and obligations. The property is intimately linked to the human society: on the land there was a collective property. In addition to the

collective property, there was also a property of the family, over which the pater familias had only a right of administration. When *pater familias* dies, his heirs take his place as a new *pater familias*, but not on the basis of his will, but on the basis of the law. This is because, in the old Roman law, there was no individual property, but a collective one, which could not be disposed of. The testamentary succession requires the existence of individual property. If the *pater familias* wanted to establish an heir, he had to create a fictitious one using other institutions: *adoptio* or *adrogatio*. The family property could not be passed on to third parties, who were not under the power of the *pater familias*. However, these solutions were under the control of an assembly, which must confirm, by a law, the desire of the *pater familias*.

We then analyzed the way in which an heir was designated in the Roman wills.

The result of this analysis is that the will was in Roman law a solemn act, drawn up with certain formalities. If the testator did not comply with these formalities, the will was invalid.

The right to dispose by will does not derive from the natural law, but from civil law, from the attributes of property. The freedom to test was originally restricted by the formalism required when designating an heir and the approval of the will by the assemblies. After the regulation of will *per aes et libram*, the testamentary freedom was restricted by the formalities related to disinheritance and the reserve.

We then concluded that the evolution of testamentary forms in Roman law was closely related to the evolution of property law. Initially, the property could not be alienated using a will. At the death of *pater familias*, his heirs (*heredes sui*) had only a right of administration.

The *calatis comitis* and *in procinctu* forms of will represent the type of acts related to *ius publicum* (public order) due to the legislative character in which the assemblies voted. We can talk about a certain testamentary freedom starting with the form of the will *per aes et libram*, a moment that coincides with the relaxation of the characteristic formalism of the old Roman law. With the evolution of society and the emergence of individual property, the Roman citizen has the right to dispose using *per*

singularim wills. Observance of words and gestures was essential in the process of drawing up a will. We have analyzed that the ancient formalism was a psychological formalism, which attributed efficiency to rituals. This religious formalism tends to disappear, a fact found by accepting synonymous words, similar phrases and by diminishing the legislative role of the assemblies used when writing the will.

Therefore, we have asked ourselves the following question: will the formalism be absent in modern law or, on the contrary, are we witnessing the creation of a modern type of formalism, whose sole purpose is to facilitate social relations?

2. Analyzing the old Romanian law, we came to a set of conclusions based on legal texts.

The will made before the witnesses was documented prior to the appearance of the laws of the 19th century. Regarding the formal conditions, the Calimach Code, admitted that the will could be made both in writing and orally, in the presence of five witnesses, when the disposer could not write his own will due to his illness, or for some other reason. However, the code did not recognize the will made before the bishop, which was admitted by the Caragea Legislation (IV, 3, 26 para. 1). The latter provided that "the will should be made in writing", in authentic, secret or holographic form (IV.3.26 para.3)

In any of these forms it was tested, there was no need for the will to be written and signed by the testator. The will was considered to be valid if it was made in the presence of an authority, which confirmed that the will contained the testator's last wishes. (L. Car. VI.2.7; C.Cal. 742, 743).

The legislation of the 19th century, probably inspired by a novel by Valentinian III, whose provisions were not maintained by Justinian, also admitted the holographic will (L.Car. IV.3.26, final paragraph; C. Cal. 739).

The mystic or concealed will was also taken over from Roman law, in the 19th century. (Donici, XXXV.12, C. Cal. 741, L. Car. IV.3.26 para.2). This type of will was made in the presence of witnesses, and it was presented to them by the testator. The testator presented the deed as his will and asked the witnesses to sign it, without them knowing its contents.

The will drawn up without observing the formal conditions was void (Donici, XXXV.26, C. Cal. 759, C. Car IV.3.40).

We have also studied the forms of wills in the old Transylvanian law, of Hungarian origin. Analyzing the two forms of private wills, respectively the written and the oral will, we could conclude that both deeds have the same legal weight in terms of its purpose: the will, is going to produce the same legal effect at the time of the testator's death. Moreover, referring to formalities, the oral will seemed to us to have been more advantageous: it did not need to be handwritten or subscribed the testator, nor by the witnesses, etc.).

According to the rules of evidence, we have considered some observations to be necessary. The written will was made by handwriting. Therefore, the determination of the content and the verification of the validity of the will was carried out on the basis of a written document. Instead, the oral will was made by the testator's statements (that it represented the last will and that he considered it his verbal will). The proof of the content of the testamentary deed was made on the basis of the statements of the witnesses, who we have identified as insecure and fleeting. Unsure, because the witnesses could forget some of the clauses in the will, fleeting, because between the time of testing and the validation of the oral will the witnesses could die.

3. The approach of the testamentary form in the current law was not possible without prior presentation of the form of the legal act in general. In this context, we have noticed that the rule in fixing the form of the civil legal act is the principle of consensualism in contractual matters. As an exception, the law provides for the validity of the act that the manifestation of will be expressed in a certain form: *ad validitatem, ad probationem* or the form required for opposability to third parties. This specification was necessary for the analysis of the testamentary deed, because the text of art. 1034 of the Civil Code defines the will as "the unilateral, personal and revocable act by which a person, called testator, disposes, in one of the forms required by law, for the time he will not be alive." This definition attributed to the will in the civil code, determined us to treat

the following problem: What is the role of testamentary formalism in current Romanian civil law?

From the examination of the general framework of the testamentary deed, it is observed that the testator may dispose of the whole patrimony or a fraction of it, following that this transmission will take place at the time of the testator's death. It follows that the reason why the lawmaker imposes the form *ad validitatem* on liberalities is different. With regard to donations (if we are to compare), the *ad validitatem* form aims, above all, to protect the family patrimony, because donations, especially those for which the *ad validitatem* form is not required, may not be brought to the attention of the heirs, thus affecting their part of their inheritance.; the presence of the notary is likely to protect the donor from acting contrary to the family interest. On the other hand, the testamentary forms are not instituted to protect the family members of the deceased, but to protect the testamentary freedom from the pressures that may occur due to age or imminent illness of the testator.

In addition, it was found that there is a certain tendency towards formalism in unilateral acts, compared to the conventional ones. This is due to the fact that as the former are the work of a single party, it requires that the manifestation of will be ascertained by a procedure that excludes uncertainty about the existence and content. The vices of consent are also different: testamentary forms come to protect the family patrimony against captation and suggestion.

These rules regarding the form of the will are also meant to avoid the interpretation of the will by the court: an invalid will due to its lack of form, does not allow the court to rule on the content of the will.

As a consequence of the gravity of the will, the legislator establishes several forms of the will, which have two general conditions: the will must be written and it is prohibited the mutual will.

The general condition of the written form was analyzed on two levels: the prohibition of the oral will and the investigation of the meaning of a "written act". The prohibition of the oral will is found in French law, in the Ordonance of 1735 of Chancellor Daguesseau. With regard to writing, given the evolution of electronic media,

the question arose as to the extent to which a will written in Word format or on a pre-printed document could be qualified as a testament valid in terms of form. The question remains: should we comply with the testator's last wish which can be, in this case, proved by electronic will or should we follow the law in order to preserve the solemnity of the testamentary act? As a notary, we agree that admitting the validity of such a will would reduce the "rules of form of wills to rules of evidence, instead of considering them, as they have always been and continue to be, essential rules for the existence of the act ".

The second general condition of the will refers to the prohibition of mutual will. Our practice and literature have long debated the nature of this prohibition and the issue does not seem to be clarified in present. The article 1034 of the Civil Code stipulates that "the will is a unilateral, personal and revocable act". Are these characters ensured by the interdiction of the mutual will mentioned in the article 1036 of the Civil Code? In other words: is the prohibition we are talking about a formal one? We consider that the prohibition ensures the violation of a formal condition. As the will remains essentially revocable (art. 1034 civ.), the unilateral annulment by one of the disposers of the will must be prevented when they are formally reunited in the same act. Our study also included some aspects of comparative law:

Under French law, the prohibition applies especially to wills made between spouses. It was argued that, "if the revocation of the mutual will were to be allowed, the mutual character of the will would be affected. On the other hand, if a will were to be considered as irrevocable, this statement would affect the nature and essence of the will. "

There are certain legislations that recognize the form of the joint will. For example, German law regulates the possibility of two spouses to test in the form of a mutual will.

Analyzing the origin of this testamentary form and the German law, the admissibility of donations between spouses, we have expressed our opinion that between the spouses such a will could be allowed, in certain conditions.

We have also presented the sanction of non-compliance with the general formal conditions and the special formal conditions provided for the different types of wills: the wills that not comply with the law requirements are void.

However, in the light of art.1010 civ., this sanction is attenuated. Thus, according to the Civil Code, the confirmation of a will made by the testator's heirs entails the renunciation to the right to address the court on grounds of formal flaws or any other grounds of nullity that may affect the will. How can we make this article practical? The specialized literature proposed that the assets should by divided according to law and subsequently the conclusion of an act between the legal heirs and the beneficiary of the will.

After studying the French law on this matter, we have reached the following conclusions and suggestions:

As a first step, the notary public will issue a certificate of quality of heir, attesting the number, quality and extent of the rights of all legal heirs, in accordance with the procedure for issuing the certificate of heir, except for the provisions on the estate.

Then, the heirs and the beneficiary of the will may conclude a contract in which it is necessary to stipulate that the heirs, renounce the right to oppose the formal flaws or any other reasons for the nullity of the verbal will.

From a practical point of view, our solution is advantageous for the client, as a double transfer of the estate is avoided.

Thus, in our first example, if the assets are divided according to law, the assets shall become part of the heirs' estate and they, in turn, will transfer the ownership of assets to the beneficiary of the will using a subsequent act.

The solution proposed by us exempts the legal heir from the inheritance division procedure, directly transferring the ownership of assets to the beneficiary's estate.

4. Examining the evolution of the testamentary succession, from Roman law to the present days, we found that in ancient Roman law, the origin of formalism depended on the influence of religion on heritage and family. We were dealing with a religious formalism, which was not practiced in order to produce legal effects. Instead, nowadays, the form is the way of expressing the internal wish (consent) at the conclusion of a legal act, in order to produce legal effects.

From our point of view, the testamentary formalism gives the testator a protection against captation (influence) and suggestion and an adequate information on the legal effects of the act. This is where the notary public intervenes: the notary is a mediator between what the testator wants to express through his last will and the legal provisions governing the form of the will.

Therefore, the notary public can play an important role in observing the form of the will: regardless of the choice of testator - whether he chooses the holographic or authentic will - the notary public has the obligation to advise and inform the client, so that the will of the party corresponds to his real wishes. The notary also ensures the compliance of the laws and public order.

Within the testamentary successions, the notary public will have to make every effort to establish the real desire of the deceased expressed in the will presented by the heirs. On the other hand, the notary public must be concerned whether to give effect to a will affected by a formal defect and which may compromise the solemnity of the act. Therefore, we consider that a reassessment of the significance of testamentary formalism is necessary.

5. From those presented in the chapter dedicated to the holographic form of will, we have noted the following special conditions regarding the form of this type of will: the will must be written by hand, dated and signed by the testator. We have seen how the handwriting of the will must give us the certainty that the deed comes from the testator. Any other type of writing (for example electronic typing) would contradict this certainty, making it possible for someone to falsify the will.

Third party interventions do not affect the validity of the will, when the foreign handwriting does not affect the content of the will. If the writing concerns the content of the will, a distinction must be made according to whether or not the testator was aware of the foreign intervention in drafting the content of the will. Thus, the will shall be void if the testator was aware of the foreign handwriting. Conversely, if the foreign handwriting was made without the knowledge of the testator, the will shall be valid and considered written by the testator, without taking into account the foreign intervention.

The date of the will is important because, depending on it, it can be determined whether or not the testator had the discernment to test; in the case of a plurality of successive wills, with contrary or incompatible clauses, the last will of the testator is established in relation to their date, which is to be taken into account, revoking the previous ones. In addition, the date may be important for the interpretation of the will, as the interpretable clauses can be easier to clarify if they are related to the date of the will. Taking into consideration the academic opinion, compared to the notarial and judicial practice in Romania regarding the date of the holographic will, we agree that the notion of the date should be clearly defined by law. We argue that the legislator should clearly stipulate the situations in which the date should be indifferent in order for the will to be valid as well as the situations in which we could take into consideration the validity of a will incompletely dated.

We have also presented the way in which the notary public can help remove the shortcomings of a holographic will. Among the disadvantages we have mentioned the following: the will can be easily lost or destroyed, the testator can be under the influence of a third party, the will can be more easily falsified. In the academic opinion and in practice it has been argued that these disadvantages could be easily removed, by the advice given by the notary public to the client and subsequently to the drafting of the holographic will, by storing the will at the notary public's office.

The notary public also has a role in establishing if a holographic will is valid. The procedure includes three stages. It is no coincidence that each stage corresponds to the obligation of the notary public to verify whether the will was drawn up by the deceased according to the legal provisions.

Thus, in the first stage, the notary public verifies whether the legal provisions regarding the form of the act have been followed (the will must be written, and it must be an individual act, not a mutual will).

In the second stage, the notary public verifies whether the holographic will was handwritten, dated and signed by the testator, recording the content of the will or its particularities (the instrument with which it was written, if it has additions, etc.).

The last stage, that of the validation of the holographic will, the notary must be convinced that the writing and the signature really belong to the testator. For this reason, the statements of those present (legal and testamentary heirs) are taken into account, which can confirm that the handwriting and signature belong to the deceased. If the handwriting is contested by any of the heirs, the law expressly provides that the notary public has the obligation to order the expertise of the holographic will. The conclusions of the expert's report are included in the minutes of validation of the will, based on which the notary public decides to divide the assets according to the submitted will, or, if he will divide the assets according to the law.

6. We have dedicated an important part of our thesis to the complex theoretical and practical issues of the authentic will.

6.1. From the presented legislative history, we conclude that there is a special character and a specific importance of the authentic will. The authentic will was considered by the legislator as an act for which special formalities are required; even during communism, the notaries always drafted it independently of other authentic acts. Personally, we have noticed a constant of the Romanian succession law, because the vision of the civil law has not changed even in the current notarial regulation of the authentication of the will. We affirm this because the art. 93 from the notary public law stipulates that: "The authentication of the will is made in compliance with the provisions of art. 94." As pointed out in the notarial literature, the text "is of particular importance due to the fact that it reveals the vision that the current legislation has regarding the will, in general, and the authentic one, in particular. Its existence demonstrates, on the one hand, the conceptual evolution of the law and, on the other hand, the return to the values recognized before the communist period, partially abandoned by legislation overly concerned with the so-called "general interest" to give importance to the particular one.

Formalism in the matter of the authentic will had a special legislative and procedural fate: after moving away from the French model in 1864, it returned mainly to its regime, through the Romanian civil code of 2011. It is interesting that the authentic form is rarely practiced in France. The indiscretion of the witnesses discourages the testators, because the French jurisprudence has decided that the witnesses must witness

the dictation and the reading of the will. Notaries are also reluctant, as complex solemnities make them fear the possibility of engaging their professional responsibility. However, the authentic will is - as we have already shown - the preferred form in Romania for the last seventy years.

6.2. In our law, the authentication formalities were and still are less rigorous than those under French law, which, in order not to affect in any way the wishes of the testator, requires that the notary and two witnesses be present at the preparation of the will, or two notaries, while the authentication of the will in the Romanian legislation, the will can be authenticated by a sole notary. The presence of witnesses is optional in the sense that the testator may choose to be assisted by one or two assistant witnesses.

After studying the notarial practice and the jurisprudence of the courts, we found that wills authenticated without the presence of the witnesses present a higher risk of being annulled by the court, compared to wills authenticated in the presence of the witnesses.

We conclude that the presence of witnesses at the preparation of the authentic will has a double advantage.

Firstly, witnesses certify that the testator had read the deed, had understood the content and had consented to the authentication of the deed. We can say that the witnesses contribute to guaranteeing the expression of a fully informed consent.

Secondly, we consider that the mission of the witnesses is to ascertain the fulfillment of the procedural formalities performed by the notary public at the authentication of the will. Witnesses can ensure the free and untainted expression of the testator's wishes, being able to prevent the will from being annulled for flaws of consent such as captation or suggestion.

From our point of view, the participation of witnesses should be mandatory not only in cases where the testator is in a special situation, but in all cases.

6.3. One of the important and contributing sections of our thesis is of a practical nature: the analysis of wills written in notarial activity.

In all the exemplified wills, it is noted the care with which the testators include the “obligation” of the appointed persons to care and bury them. It can be seen how this obligation has become an important clause in many authentic wills in our notarial practice. It is true that the will is defined by the code as a unilateral act and for the cause of death (1034 civ.). Therefore, it cannot contain current commitments made by the beneficiaries of the will, because it is not a contract. The question then arises: what is the value of those clauses? In our opinion, these are in fact the expression of the cause of the testamentary act (art. 1235 civ.).

On the other hand, we have noticed from the authentic wills that the assets are rarely taken out of the family property. The heirs are, in most cases, either close blood relatives of the testator or the surviving spouse. Even when the testator establishes a third party as legatees, they are the ones who help the testator when in need - in the absence or (less often) indifference of the descendants. In this specific context, the notary public contributes with his professional knowledge and skills to drafting a will in agreement with his client’s wishes.

We have reproduced and analyzed in detail some authentic wills encountered in practice, to argue concretely the idea we have proposed since the introduction of our doctoral research: testamentary formalism should not be reduced to the mere procedural steps provided in the civil code and detailed in notarial legislation.

Our opinion is that the notarial practice has given rise in time to certain formulations that have acquired a certain character of permanence. These are testamentary clauses, which refer in particular to the following aspects: the formulation of the will, the motivation of the disposition *mortis causa* (the clause regarding the care of the testator and his funeral), the mention of the known fact that there are legal heirs etc. These clauses appear in all authentic wills and in approximately the same terms, without too many lexical variations. Therefore, we believe that the notion of testamentary formalism in this matter must be viewed in a broader, more flexible sense. We plead for the recognition, in addition to the strictly legal formalism, of a customary formalism - generated by the notarial practice. Our proposal has a legal basis in art. 1, para. 1 and 6 c.civ.

Our research advocated the active commitment of the notary public in collaboration with the citizen who wishes to leave a will in authentic form. Experience plays an important role here, which is why we examined the notarial practice and tried to see how it came to meet the wishes of customers through the request for authentication of the will.

7. In cases where a person is in special, exceptional circumstances and wishes to make a will in authentic form, but cannot resort to the formalities of authentication according to common law, the law provides for the possibility of testing in a simplified form.

The form of privileged wills was seen as an obsolete testamentary form. This latent form of the testamentary act seemed to (re) find its utility after the World Health Organization (WHO) declared on March 11, 2020, that the spread of COVID-19 could be characterized as a pandemic. However, practical experience shows that the formalities necessary for the validity of the privileged will (often unknown to the parties involved: medical staff, witnesses, patient) still make it inaccessible. Under these conditions, the holographic will remains the only and most accessible option for people who want to leave a valid will.

8. The elimination of the sealed will from the provisions of the civil code was motivated by the absence of the use of this type of will in practice.

However, we believe that the usefulness of the sealed will can be verified in the situation where the testator cannot test in holographic form or when the use of the solemn will is not desired (in order to keep the secret of the will from witnesses and from the notary public). Also, its formalism ensures at least the same protection, as do the formalities for drawing up the authentic will;

It has been suggested as an alternative form of the mystical will, the form of the international will regulated by the Washington Convention signed in 26.X.1973, which is essentially a simplified sealed will. Taking into account the fact that this convention has not (yet) been ratified by Romania, a similar solution has been proposed: we believe that,

the notary public could effectively receive and deposit at his office the holographic wills written by his clients.

9. The study also presents an analysis of the provisions of art. 1050 civ, regarding the conversion of the will: "a null will due to a formal flaw produces effects if it meets the conditions provided by law for another form of will."

We have showed how under the old civil code, the provisions of art. 1172 c.c. were invoked as a legal basis for a formally invalid mystical will to be used as a holograph will. It was thus decided that “the act declared null and void as a mystical will may be valid as a holographic will if it is written, signed and dated by the testator; But, as it is well known, the sealed will was eliminated from the code (art. 1040 civ.).

The problem could arise when an authentic will or a privileged will was void due to formal flaws. Could such a will be considered valid as a holographic will ? It was considered that - in the current rules of notarial procedures - the conversion would not be applicable in the case of authentic wills. It is true that notaries will not write the authentication conclusion on the back of a private paper written by the testator (art. 94 par. 5 and 6, art. 95 par. 9 LNP). The sheet on which the intentions of the disposer are sketched when presented to the notary (or the content of the authentication application) is only a project; the final form of the will results from the discussion with the notary on the optimal way of expressing the will *mortis causa*. But, we believe that a prudent notary keeps in his archive the paper with the handwritten version of the testator: this can serve him should any problem arise.

In conclusion, our research showed that testamentary solemnities must not be eliminated, but perfected. Succession law needs certainty regarding the validity and content of the will. What can ensure it better than a rational formalism, attentive to the needs of practice?