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REMARKS ON THE PROPOSED AMENDMENTS TO THE PROVISIONS OF THE CIVIL CODE WITH REGARD TO THE REQUIREMENTS FOR THE VALIDITY AND EFFECTIVENESS OF AN ORAL WILL

Dr. habil. Hanna Witczak, University Professor

The John Paul II Catholic University of Lublin, Poland
e-mail: hwitczak@poczta.fm; https://orcid.org/0000-0002-5949-3052

Abstract. An oral will remains one of the most commonly employed forms of testamentary disposition in practice. Owing to the overly liberal formulation of the requirements governing its validity and effectiveness, it is particularly susceptible to manipulation: instances of forgery and distortion are frequent, and in some cases the very expression of the testator's intent concerning the disposition of property upon death is effectively fabricated. Despite recurring *de lege ferenda* proposals within the doctrine advocating the repeal of Article 952 of the Polish Civil Code, the advanced progress of legislative work on the amendment of the provisions governing testamentary form indicates that the oral will, as a special will, is likely to be preserved. The criticisms directed at the existing normative framework have prompted a thorough modification of the requirements for both the validity and the effectiveness of an oral will. The circumstances permitting the making of such a will have been restricted, and the mechanisms for establishing its content have been significantly altered. The possibility of making an oral will, will be restricted to cases arising from extraordinary and sudden circumstances as a result of which compliance with an ordinary form of will is either impossible or excessively hindered, while a fear of the testator's imminent death exists concurrently. The content of such a will is to be established by the reduction of the testator's declaration to writing by one of the witnesses and by its subsequent signature by the witnesses and the testator themselves. An entirely novel element will consist in allowing the testator's declaration to be recorded on a durable data storage medium by means of a device capable of recording both image and sound.

Keywords: oral will; special will; form of will; invalid will; ineffective will.

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INTRODUCTION

The current legislative work on amending the provisions of the Civil Code[1] concerning the form of a will[2] justifies the view that we may soon witness, if not a revolution, then certainly a genuine optimization of the rules governing the permissible means of implementing the principle of freedom of testation. Since a disposition of property upon death may still be made only by will (Article 941 CC) [Wójcik 2005, 1488-489], these changes are not merely desirable but indeed necessary. Some of the proposed normative solutions merit full approval, whereas others raise doubts and invite further discussion. It is appropriate to begin with those proposed changes that appear to be beyond dispute. They relate to both ordinary and special wills. As regards the former, the proposal to remove the allographic will from the Polish legal system (Article 951 CC) deserves full approval. In the original text of the Civil Code, the formal (official) will was conceived as an alternative to a notarial will, given the limited access to state notarial offices, especially in smaller towns and rural areas. At present, the general availability of notaries – apparently far greater than that of the entities authorized under Article 951 CC to receive the testator's declaration in the case of an administrative will – casts doubt on the rationale for of preserving this testamentary form within the Polish legal system [Radwański 2007, 14]. The case against retaining the official will in the CC is strengthened by the practical observation that the entities authorized to receive the testator's declaration often lack sufficient knowledge of the applicable provisions of succession law, chiefly because they do not possess legal training [Wójcik and Zoll 2025, 461-62; Witczak 2025, 135-38; cf. Policzkiewicz 1960, 116-17]. A will is a formal legal transaction, and any breach of the mandatory rules governing testamentary form entails the absolute invalidity ("null and void") of that legal transaction. Each legally prescribed form of a will is, as a rule, a form *ad solemnitatem*,[3] unless the provisions on testamentary form provide otherwise (Article 958 CC), namely that non-compliance with a statutory formal requirement does not entail the absolute invalidity of the legal transaction [Gwiazdomorski 1966, 714; Chojnowski 1965, 46]. Since only a validly executed will may be subject to interpretation, the requirement that the testator's intent be given the fullest possible effect becomes,

[1] Act of 23 April 1964 – the Civil Code (Journal of Laws of 2014, item 1071 as amended) [hereinafter: CC].

[2] The 16 February 2026 Draft law amending the Civil Code and certain other acts, https://legislacja.rcl.gov.pl The draft is part of the ongoing legislative process concerning the Draft law amending the Civil Code and the Code of Civil Procedure, included in the List of Legislative and Policy Projects of the Council of Ministers under ref. no. UD30.

[3] See e.g., the decision of the Supreme Court of 13 January 2005, ref. no. IV CK 428/04, Lex no. 277875.

in this context, largely illusory. The objection that this creates a genuine risk to the testator's interests is, admittedly, mitigated by the construct of conversion of an absolutely invalid legal transaction, as applied in legal practice. It permits, in strictly circumscribed circumstances and on the assumption that the testator's declaration of intent was validly formed and expressed, the preservation of the will through its treatment as having been executed in another legally recognised form, notwithstanding its non-compliance with the requirements of a given testamentary form. It must be emphasised that the intent to draw up a will relates to the intention to dispose of one's estate *mortis causa*, but it does not encompass the choice to employ a specific testamentary form [Witczak 2025, 139]. This, however, does not change the fact that the reasons formerly warranting the inclusion of this form of will in the Polish legal framework are no longer valid. Moreover, given its marginal practical significance, there is no sufficient justification for preserving it in the CC. The proposal to eliminate the will executed during air or sea travel (traveller's will) from the Polish legal system (Article 953 CC) [Cf. Radwański 2007, 14; Pietrzykowski 1994, 254] likewise merits full approval. The requirements governing its validity are, to put it mildly, controversial, particularly in the case of air travel, while its practical significance is marginal, if not altogether absent [Cybula 2013, 388-99].[4]

Clearly, one of the most anticipated amendments to the provisions of the CC on testamentary form is that concerning the oral will (Article 952 CC). Although there is no shortage of doctrinal voices advocating the removal of this form of will from the Polish legal system [Radwański 2007, 14; Pazdan 2006, 194; Pręda 2009, 89; Załucki 2017, 38; Wolak 2019, 126], chiefly on account of the numerous – or, more precisely, all too numerous – instances of forgery associated therewith, such a solution appears overly categorical unless an adequate "successor" to the oral will is provided [Załucki 2015, 361]. It should be beyond doubt that a testator must have the possibility of making a will in a life-threatening situation, and also in circumstances in which, regardless of whether the reasons are objective or subjective, making a will in an ordinary form is impossible. The oral will possesses significant practical relevance, being the most frequently encountered form of special will in practice. Although, as previously indicated, it is likewise the form most prone to forgery,[5] it remains, *de lege lata*, the only "universal" form of special will.

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[4] See the Explanatory Memorandum to the 16 February 2026 Draft law amending the Civil Code and certain other acts, pp. 13-15, https://legislacja.rcl.gov.pl Cf. opinion of the National Council of the Judiciary of 25 November 2022 on the Draft law amending the Civil Code (UD 448).

[5] Explanatory Memorandum to the 16 February 2026 Draft law amending the Civil Code and certain other acts, pp. 2-3.

The normative design of the oral will is specific against the backdrop of the remaining provisions of the CC concerning testamentary form. Moreover, it should be noted that a will itself is a highly particular legal transaction when assessed in terms of the consequences of its defects. This specificity lies in the fact that compliance with the requirements for the validity of a legal transaction, unlike in the case of legal transactions other than wills, does not guarantee its effectiveness and therefore does not establish a testamentary basis for succession. Conversely, failure to satisfy the requirements for the validity of a will does not necessarily prevent it from serving as such a basis. *Prima facie*, such a statement may appear almost absurd. Yet, an analysis of the effects of making a will affected by a defect in the declaration of intent (Article 945(2) CC) leads to the conclusion that, in practice, succession may occur on the basis of an invalid legal transaction as a result of the ineffective expiry of the time limits prescribed for interested parties to rely on the invalidity of the will caused by a defect in the testator's declaration of intent [Mączyński 1991, 24-44]. The normative framework of the oral will is distinctive, however, in that the CC separately governs the requirements for its validity (Article 952(1) CC) and its effectiveness (Article 952(2) and (3) CC). As a consequence of this legislative technique, a validly made oral will becomes a basis for succession – that is, produces legal effects – only if its content is duly established, in accordance with the requirements laid down by statute [Gwiazdomorski 1966, 723; Żyżylewski 168-69; Wójcik 1986, 207, but 212; Skowrońska-Bocian 2004, 114-15 and 121; Cf. Kucia 2012, 7-17].[6] In the vast majority of cases, however, the establishment of the content of an oral will, will fall to persons other than the testator.

In the interpretation of the current provisions governing the form of an oral will, numerous doubts continue to arise, while reservations concerning both the requirements for its validity and those for its effectiveness have long been expressed in doctrine and case law. The principal general objection relates to the excessively liberal treatment of the requirements governing its validity and effectiveness, which permits the testator's intent to be distorted [Wójcik 2001, 161; Rudnicki 2013, 44; Cf. Gwiazdomorski 1976, 335]. The drafter has opted to preserve the oral will as a special will, while taking

[6] See, e.g., the decision of the Supreme Court of 29 August 2024, ref. no. I CSK 1603/23, Lex no. 3749508; the decision of the Supreme Court of 3 December 2010, ref. no. I CSK 37/10, Lex no. 694228, thesis 4; the decision of the Supreme Court of June 5, 2002, II CKN 509/00, Legalis; reasoning for the decision of the Supreme Court of 14 December 2000, ref. no. CKN 668/00, Lex no. 48094; reasoning for the decision of the Supreme Court of 22 January 1974, ref. no. III CRN 326/73, Lex no. 1728, and reasoning for the decision of the Supreme Court of 10 May 2002, ref. no. CKN 1044/00, Lex no. 57205. Cf. decision of the Supreme Court of 15 May 1958, ref. no. IV CR 325/58, Lex no. 115778.

account of the need to restrict the circumstances in which it may be made and to restrict the methods for establishing its content.[7]

1. REQUIREMENTS FOR THE VALIDITY OF AN ORAL WILL *DE LEGE LATA* AND *DE LEGE FERENDA*

Article 952(1) CC permits an oral will where there is a fear of the testator's imminent death or where special circumstances preclude, or seriously impede, the use of an ordinary testamentary form. In such circumstances, the testator may declare their last will orally before at least three witnesses present at the same time. Accordingly, *de lege lata*, the validity of an oral will is conditional upon: the existence of a fear of imminent death or the impossibility, or serious difficulty, of resorting to an ordinary form of will; the testator's oral declaration; and the simultaneous presence of no fewer than three witnesses.

Article 952(1) CC allows an oral will to be made in any of three alternative circumstances: where there is a fear of the testator's imminent death; where special circumstances preclude the making of a will in an ordinary form; or where such circumstances substantially hinder recourse to an ordinary testamentary form. It is sufficient that one of these requirements[8] be fulfilled, with the qualification that the impediments referred to in Article 952(1) CC concern all three ordinary forms of will, and that the impossibility or substantial difficulty of making an ordinary will is to be assessed in light of the testator's own abilities [Pazdan 2021, 1049; Cf. Wójcik 1986, 203-204].

If the proposed amendments enter into force, Article 952(1) CC will read as follows: "If, as a result of special and urgent circumstances, compliance with an ordinary testamentary form is impossible or excessively difficult, and a fear of the testator's imminent death exists, the testator may declare their last will orally in the simultaneous presence of at least three witnesses." The proposed modification of the requirements governing the validity of an oral will is, in essence, a return to the regime established by the Decree of 8 October 1946 – the Law of Succession.[9] It is evident that, if enacted, this would not be a minor amendment but a substantive one. Pursuant to the beginning of Article 82 LoS, if special circumstances occurred – such as the interruption of communication, an epidemic, military operations, the testator's illness, or an accident suffered by the testator – justifying a fear

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[7] Explanatory Memorandum to the 16 February 2026 Draft law amending the Civil Code and certain other acts, p. 6.

[8] See e.g., the decision of the Supreme Court of 31 August 2023, ref. no. I CSK 6121/22, Lex no. 3722531.

[9] Journal of Laws No. 60, item 328 [hereinafter: LoS].

of their imminent death, and if, for that reason, the making of an ordinary will would be impossible or very difficult, the testator could make an oral will by declaring their intent to three witnesses present simultaneously. Thus, the validity of an oral will was contingent upon the cumulative occurrence of two requirements: a fear of imminent death and the impossibility, resulting from special circumstances, of making an ordinary will [Gwiazdomorski 1959, 309-12]. The special circumstances warranting recourse to an oral will were enumerated in Article 82 LoS only by way of example.[10] The amended wording of Article 952(1) CC abandons any illustrative enumeration of the circumstances warranting recourse to this form of special will. This legislative choice deserves approval. Examples of such circumstances are not indispensable; by contrast, an excessively casuistic regulation in the form of a closed-ended list would be hazardous, since no exhaustive enumeration of all possible "special and urgent circumstances" can be provided.[11] Attention should also be drawn to the proposed change whereby the Polish conjunction *lub* ("or" – logically implying "one, the other or both"), previously connecting the requirement of impossibility of recourse to an ordinary testamentary form with that of excessive difficulty in using such a form, is to be replaced with *albo* ("or" – logically implying "either one or another"). In substantive terms, the two requirements cannot coexist.

The most consequential, though highly contentious, proposed amendment concerns the requirements governing the validity of an oral will. At issue is the determination of the circumstances that should justify recourse to this form of special will. The proposal has attracted both adherents and resolute opponents. I count myself among the latter. The retention of the requirement of a fear of the testator's imminent death as a requirement for the validity of an oral will appears not to be in doubt, even allowing for the extensive body of case law that has interpreted this phrase in different ways. The contentious issue, however, is whether this requirement should constitute an autonomous and independent ground for resorting to the oral form of will,[12] or whether, as in the 1946 Decree, it should be coupled with the requirement of impossibility or substantial difficulty in making a will in an ordinary form. Such a need was already indicated many years ago by representatives of the doctrine. They justified it by reference to practical considerations, in particular the need to impede the forgery of oral wills. They stressed that, *de lege ferenda*, the aim should be to frame the requirements

[10] Decision of the Supreme Court of 30 September 1954, ref. no. I CR 1026/54, Lex no. 1633928, thesis 1.

[11] See the Explanatory Memorandum to the 16 February 2026 Draft law amending the Civil Code and certain other acts, pp. 2-3.

[12] Decision of the Supreme Court of 21 May 2003, ref. no. IV CKN 174/01, Lex no. 146434, thesis 3.

laid down in Article 952(1) CC cumulatively, as the grounds warranting recourse to the oral form of will [Cf. Skowrońska 1994, 261 and 265; Idem 2004, 111; Borysiak 2007, 1032; Idem 2017, 92-94; Idem 2018, 28, 30, 33-34 and 43; Wójcik and Zoll 2025, 470-75; Kucia 2012, 109].

It may be questioned whether the proposed wording of Article 952(1) CC does not unduly curtail the testator's ability to make an effective disposition of property upon death. It should be beyond dispute that a testator who possesses testamentary capacity at the time of making or revoking a will should have a real opportunity to decide whether to preserve, modify, or wholly displace the statutory order of succession. If, by reason of special circumstances, the testator is unable to resort to an ordinary testamentary form – whether those circumstances are objective in character or arise solely on the part of the testator – they must be afforded another means of disposing of property *mortis causa*. Otherwise, it is difficult to regard the subjective right derived from Article 941 CC as effectively guaranteed. The impossibility or substantial difficulty of resorting to an ordinary testamentary form should, in itself, be sufficient to warrant recourse to a special form of will [Cf. Osajda 2016, 1039]. Likewise, a fear of the testator's imminent death should constitute a sufficient and autonomous ground for making an oral will [Cf. Skowrońska 1994, 265]. The fact that death is temporally proximate should be assessed separately from the question whether it is possible, or difficult, to make a will in an ordinary form. It would not appear appropriate to deny hospital patients or residents of residential care homes, who find themselves in fear of imminent death, the possibility of making an oral will merely because a notary could, in principle, be summoned to either place.

The requirement of a "fear of the testator's imminent death," upon which the validity of an oral will depends, has not been interpreted uniformly in legal practice[13] [Cf. e.g.: Skowrońska-Bocian 2005, 239-44; Borysiak 2007, 1027-1029; Kucia 2012, 88-93]. The extensive jurisprudence has disclosed markedly divergent positions, from a purely subjective interpretation of the phrase to an objective conception of the fear of imminent death [Wójcik 1986, 202; Pietrzykowski 1994, 255]. It is the objective-subjective conception that has ultimately prevailed, becoming the dominant view in both legal scholarship and case law [Witczak and Kawałko 2025, 109-12; Kucia 2012, 94-109]. While this conception acknowledges the testator's conviction that death is approaching, such a conviction must primarily find confirmation

[13] On the absence of a uniform interpretation in the case law of the requirement of a fear of the testator's imminent death, see, for example, the reasoning of the decision of the Supreme Court of 12 December 2002, ref. no. CKN 259/01, LEX No. 77066, and the reasoning of the decision of the Supreme Court of 21 January 2011, ref. no. III CSK 98/10, Legalis, along with the case law cited therein.

in medical knowledge and must therefore be objectively warranted. The mere fear of death is not sufficient, particularly since, as the case law emphasises, every person lives with an awareness of the inevitability of death; the fear must relate to death that is imminent in temporal terms.[14]

The presence of witnesses constitutes a requirement for the validity of an oral will both *de lege lata* and *de lege ferenda*. Under the current legal regime, there must be at least three witnesses. Should the proposed amendments enter into force, this number will remain unchanged. Notwithstanding the importance of the role performed by witnesses to a will – and, in the case of an oral will, particularly in view of the requirements for its effectiveness [Cf. Tąbecki 1963, 680; Gwiazdomorski 1976, 334] – the CC regulates this institution only fragmentarily. An entirely new element is the proposed definition of a witness to a will. Given the proposed repeal of Article 951 CC, and consequently the removal from Book Four CC of the normative regulation of allographic and traveller's wills, the institution of the witness would, under the new legal regime, be connected only with oral and military wills, that is, with special wills. It may, of course, be doubted whether the definition of a witness should take this circumstance into account or whether it should retain a universal character. In the case of special wills, the requirements imposed on a person capable of acting as a witness to such a will would appear to warrant a more liberal formulation than those applicable to witnesses to an ordinary will. This concerns, in particular, the requirement that the testator select and invite, or summon, a witness. While such a requirement is neither impossible nor difficult to satisfy in the case of an ordinary will, in urgent situations – where the impossibility or substantial difficulty of making a will in an ordinary form is connected with the fear of the testator's imminent death – there may simply be no time to close the formalities. Conversely, in view of the significance of witnesses for the validity and effectiveness of an oral will, the liberalization of the requirements applicable to persons who are to perform this function may itself raise doubts [Cf. Kozaczka 1962, 89-91; Wójcik 1986, 204-205; Osajda 2016, 1016-1039]. Although the Code of Civil Procedure[15] imposes stricter rules on the examination of witnesses to an oral will than those applicable under the general regime for witness evidence – by precluding refusal to testify

[14] Cf. e.g., the decision of the Supreme Court of 24 November 2022, ref. no. II CSKP 1674/22, Lex no. 3457564; the decision of the Supreme Court of 18 December 2019, ref. no. II CSK 498/18, Lex no. 3552337; the reasoning of the decision of the Supreme Court of 15 February 2008, ref. no. I CSK 381/07, Lex no. 465921; the decision of the Supreme Court of 17 February 2004, ref. no. III CK 328/02, Lex no. 602713, thesis 1; the decision of the Supreme Court of 15 April 2003, ref. no. V CK 9/02, Lex no. 146432. See also the decision of the Supreme Court of 8 February 2006, ref. no. II CSK 128/05, Lex no. 192038, thesis 1.

[15] Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws of 2026, item 468 [hereinafter: CCP].

or to answer particular questions, and by prohibiting release from the obligation to take an oath (Article 662 CCP) – these safeguards do not appear sufficient to ensure the realization of the testator's intent.

In light of the doubts, arising both in legal theory and in the practice of applying the law, as to who may be recognized as a witness to a will, the insertion of a statutory definition of this notion into the CC appears well-founded. It would permit the court to make an unequivocal and relatively expeditious assessment of whether, in the case of a particular will, the requirement of the presence of witnesses has been met. It should be recalled that, under the current legal framework, the CC, apart from requiring the presence of witnesses as such, formulates no additional prerequisites for the performance of the function of a witness to a will. In legal doctrine, however, at least three competing views have emerged. The first recognizes that a witness to a will may only be a person who has been expressly, or at least tacitly, invited by the testator to perform that function, is conscious of their role, is prepared to fulfil it, and comprehends the content of the declaration made by the testator. A more liberal conception proceeds on the assumption that any person to whom the testator addresses a declaration concerning the disposition of property upon death may serve as a witness, regardless of whether they were specifically summoned by the testator for that purpose. The third view calls into question the extra-statutory requirements relied upon by the two preceding conceptions. The question of who, in a specific instance of testation, may be recognized as a witness to a will should be assessed by reference to the wording of Articles 951 and 952 CC. This assessment should enable, after a careful appraisal of the circumstances, the identification of the persons to whom, or in whose presence, the testator communicated their intent [Niedośpiał 2004, 92].

Article 952(1) CC lays down no additional requirements concerning witnesses; the only limitations are therefore those contained in Articles 956 and 957 thereof, which concern absolute and relative incapacity to act as a witness.[16] *De lege lata*, the case law provides that a witness to an oral will may be a person to whom the testator directs their declaration, who is present at the time it is made, is conscious of their role as a witness to the will, understands the content of the testator's intent, and is ready to satisfy it. Such awareness requires concentration throughout the testator's declaration of intent, together with the reception and retention of its content in memory. No legal requirement has been established that only a person specially summoned for that purpose may witness the making of a will; thus, the role may also be assumed by an individual who, for some other reason or merely by chance, is present with the testator. Such a person assumes

[16] See the reasoning of the decision of the Supreme Court of 29 June 2012, ref. no. I CSK 575/11, Lex no. 1216833.

the role of witness because the testator intends them to do so and conveys to that person the content of the disposition. It is nevertheless indispensable, for such a person to be treated as a witness to an oral will, that they hear not merely that the testator's declaration constitutes a will, but also the content of the declaration itself, namely the statement containing the disposition of property mortis causa[17] [cf. Trąbecki 1963, 680; Żywicki 1971, 111-13].

In formulating the definition of a witness to a will, the drafters highlight three requirements: the witness must be a person in whose presence the testator makes their declaration of intent; that person must be aware of the fact that the testator is making a will; and they must understand the content of the testator's declaration. The proposed definition merits approval, albeit with the qualification that such a person must also be capable of conveying the testator's intent.

The draft amendments further extend to the issue of so-called absolute incapacity to act as a witness to a will. The most noteworthy change consists in introducing an age threshold for the performance of the function of a witness and in severing the capacity to witness a will from legal capacity. The proposed wording of Article 956(2) CC is open to doubt. While it may still be acceptable to include, among persons capable of acting as witnesses to a will, natural persons who have attained the age of 16 – on the rationale that the role of a witness does not consist in making a declaration of intent, but in receiving the content of such a declaration from another person [Borysiak 2018, 35-36]– the failure to link exclusion from the performance of so legally and socially important a function to the absence of legal capacity creates serious concerns. These concerns apply in particular to persons who are fully incapacitated. It is difficult to accept that a natural person deprived of legal capacity by a court on the ground that mental illness, intellectual disability, or another mental disorder renders them unable to direct their own conduct could provide the necessary "assurance" of properly performing such a significant function.

Full incapacitation entails the complete deprivation of a natural person's autonomy in decision-making, with legal transactions being performed on that person's behalf by a statutory representative. In the case law, the inability to direct one's own conduct, as a ground for full incapacitation,

[17] Decision of the Supreme Court of 29 June 2010, ref. no. III CSK 317/09, Lex no. 611828, theses 2 and 3. See also the decision of the Supreme Court of 11 March 2011, ref. no. II CSK 379/10, Lex no. 784916, thesis 1; the decision of the Supreme Court of 18 May 2018, ref. no. V CS 653/17, Lex no. 2500529 and the decision of the Supreme Court of 8 February 2006, ref. no. II CSK 128/05, Lex no. 192038, thesis 1. Cf the judgement of the Supreme Court of 21 March 1966, ref. no. III CO 9/66, Lex no. 386 and the decision of the Supreme Court of 14 February 2006, ref. no. II CK 419/05, Lex no. 607107. See also the decision of the Supreme Court of 8 February 2006, ref. no. II CSK 128/05, Lex no. 192038, thesis 2 and the decision of the Supreme Court of 16 May 2025, ref. no. I CSK 3495/24, Lex no. 3864758.

is understood to arise where a person lacks conscious contact with their surroundings and is intellectually incapable of assessing their situation, conduct, and the consequences thereof. Legal scholars and psychiatrists alike also equate the inability to direct one's conduct, understood as a "lack of internal capacity to act," with the absence of "the necessary capacity to become aware of one's conduct, to determine its purpose, and to implement it," as well as with the inability to "make decisions rationally (reasonably)." The capacity to direct one's own conduct is thus determined by the degree of critical assessment exercised by the person concerned in relation to their own conduct, and by their awareness of their actions and intentions [Witczak and Rzewuski 2024, 526-27].

The draft also proposes that the requirement of understanding the language in which the testator made the will be removed from the list of grounds for absolute incapacity to act as a witness to a will. Since this requirement does not correspond to the concept of absolute incapacity to act as a witness and given the proposed introduction of a statutory definition of a witness to a will, the change should be considered well-founded.

The proposed amendments to the provisions on relative incapacity to act as a witness to a will deserve a positive assessment. In the drafted wording, Article 957 CC expressly provides that a witness to a will may not be a person for whom any benefit has been envisaged, unless this raises no doubts as to their impartiality (§ 1), and also that person's spouse or former spouse (§ 2(1)), as well as a person who, on the date of the making of the will or in the past, remains or remained in cohabitation with them (§ 2(2)). Also excluded from the circle of persons capable of acting as witnesses are those whose connection with the beneficiary is of such a nature as to give rise to justified doubts as to their impartiality (§ 3). Should the proposed amendments be enacted, a person linked to a legal person, or to an organisational unit without legal personality to which the law confers legal capacity, for which any benefit has been provided in the will, will likewise be incapable of acting as a witness, unless such a connection raises no doubts as to their impartiality (§ 4).

2. REQUIREMENTS FOR THE EFFECTIVENESS OF AN ORAL WILL *DE LEGE LATA* AND *DE LEGE FERENDA*

Amendments are also envisaged in respect of the requirements governing the effectiveness of an oral will, that is, those relating to the establishment of its content. As discussed earlier, Article 952 CC draws a clear distinction between the testator's act of making a will and the subsequent establishment of its content – an act in which, incidentally, the testator need not be "involved" at all. *De lege lata*, the content of an oral will may be established by its reduction to writing by one of the witnesses to the will or by a third

party within one year from the testator's declaration. Such a document must specify not only the content of the testamentary dispositions, but also the time and place of the testator's declaration and the time and place at which it was written down, thus making it possible to verify compliance with the statutory time limit. Under Article 952(2) CC, such a document may be signed either by the testator and two witnesses or by three witnesses to the oral will.[18] Where the content of the oral will has not been established by being reduced to writing, the other method consists in determining that content on the basis of concordant testimony of the witnesses before a court, within six months from the opening of the succession (Article 952(3) CC).[19]

Although, prima facie, the normative solutions adopted appear relatively uncomplicated, the interpretation of Article 952(2) and (3) CC has given rise to evident doubts in legal practice. As regards the first method of establishing the content of an oral will, those doubts concern above all the admissibility of reducing the testator's intent to writing after the succession has opened. While Article 952(2) CC does not preclude such a possibility, and the cited provision merely indicates that the document establishing the content of the testator's disposition may be signed either by the testator and two witnesses or by three witnesses, the question has not been addressed uniformly in legal doctrine [Pietrzykowski 1974, 813-14]. The case law accepts that, under Article 952(2) CC, it cannot be excluded that the testator's declaration may be reduced to writing and signed by three witnesses after the testator's death, provided that the document is drawn up within the statutory time limit, that is, within one year of the declaration being made by the testator.[20] This view is warranted by a literal interpretation, as the cited provision imposes no temporal restriction beyond that expressly indicated. It also finds additional support in systemic interpretation. A comparison of Article 952(2) and Article 952(3) CC with Articles 661-663 CCP shows that they provide for two independent and equivalent methods of establishing the content of an oral will. Their mutual exclusion may arise only in the sense that the reduction of the testator's declaration to writing renders the judicial determination of the content of the oral will on the basis of witness testimony devoid of purpose.[21]

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[18] Cf. the decision of the Supreme Court of 11 March 2025, ref. no. II CSKP 149/25, Lex no. 3865596 and the reasoning of the decision of the Supreme Court of 21 January 2011, ref. no. III CSK 98/10, Legalis.

[19] Cf. the resolution of the Supreme Court of 27 June 1969, ref. no. III CZP 31/69, *Orzecznictwo Sądów Polskich i Komisji Arbitrażowych* 4(1970), item 87 and the resolution of the Supreme Court (7) of 3 October 1969, ref. no. III CZP 75/69, Lex no. 6574. Cf. the judgement of the Supreme Court of 13 May 2003, ref. no. CKN 186/01, Lex no. 81634.

[20] See the judgment of the Supreme Court of 21 October 1970, ref. no. III CZP 62/70, Lex no. 1161.

[21] Reasoning of the Resolution (7) of the Supreme Court of 13 February 1980, ref. no. III CZP 69/79, Lex no. 2484.

The proposed amendments envisage both the modification of the existing methods for establishing the content of an oral will and the introduction of an audio-visual recording as an additional means of doing so, with both methods to be regarded as equivalent. In accordance with the drafted Article 952(2) CC: "The content of an oral will shall be established without delay by one of the witnesses reducing the testator's declaration to writing, the resulting document being signed by the testator and by at least three witnesses;" Article 952(3) CC: "The content of an oral will may also be established where the testator's declaration, made in the presence of witnesses, is recorded on a durable data storage medium by means of a device capable of recording image and sound, in a manner enabling the identification of the testator and of at least three witnesses, and where that recording is submitted, on such a medium, to a notary or to the succession court no later than within three months from the opening of the succession."[22]

Although there is no doubt that, in contemporary conditions, almost everyone has access to an audio-visual recording device – if only a mobile phone with an integrated camera – and that its use entails no particular technical difficulty, the risks inherent in this method of establishing the content of an oral will are obvious. They are expressed in a well-founded concern as to the possibility of falsifying an audio-visual recording, especially in light of the advances being made in the development of artificial intelligence. It would appear that the drafters must have assumed, if not with certainty then with a probability bordering on certainty, that court experts would be capable of determining whether, and in which cases, the recording of the testator's declaration had been falsified; consequently, the assessment of the authenticity of such a recording should not present difficulty for an expert, that is, a person possessing expertise in the field. It is challenging to determine how realistic the assumption is that progress in technical means of recording sound and image will be matched by progress in mechanisms capable of verifying the authenticity and integrity of content recorded by such means. In view of the development of artificial intelligence unfolding before our eyes – and, importantly, the pace of that development, including "deepfake" technology, which enables the generation of near-realistic images and sounds, namely the likeness and voice of a particular person – this assessment should be made with considerable caution. Perhaps the risk of forgery in such cases will be counterbalanced by the development of tools enabling the authenticity and integrity of recorded content to be verified. Yet, in view of the unprecedented development of modern technologies, it may be questioned whether the number of specialists in this field will be sufficient to ensure access to such expertise on a sufficiently broad scale, so that deficits in this respect do not prolong ongoing succession proceedings.

[22] In its proposed wording, Article 952 § 4 CC concerns the loss of validity of an oral will.

A separate issue is the actual cost of adapting district courts to the unrestricted application of the amended provisions.

It may also be doubted whether a recording will allow an unequivocal determination that the testator's declaration of intent was made without defect, and therefore without any irregularities that may fall within the category of defect in the declaration of intent. Situations in which the issue is not so much the "fabrication" of the declaration as the coercion of the testator into making it must not be entirely excluded. A recording would appear to be effectively useful only in establishing whether the testator acted in a state excluding the conscious formation of a decision and the expression of intent. As regards other defects in the declaration of intent, such certainty will, in essence, never be possible. This doubt has its source in the circumstances attending the making of an oral will. It must be remembered that the testator makes the will in fear of imminent death, and that their health and emotional state will undoubtedly differ from those present in "ordinary" circumstances. There may also be ethical reservations concerning the "filming" of a testator who finds themselves facing imminent death.

In view of the less than fully persuasive proposal to introduce an audio-visual recording as an alternative method of establishing the content of an oral will, the proposed abolition of the other method currently available *de lege lata* – that is, the establishment of the will's content on the basis of concordant testimony of witnesses before a court – raises justified doubts. The rationale for retaining this method may, of course, be challenged, given the evident and real risk of falsifying the content of the will, or even of fabricating the very fact of its making. As noted above, the provisions of the CCP governing the examination of witnesses to an oral will prohibit their release from the obligation to take an oath and preclude them from refusing to testify or to answer particular questions. It must nevertheless be acknowledged, realistically, that these regulations are no barrier to fraudsters giving false testimony before a court or, in extreme cases, "fabricating" a will of a specific content where no such will was ever made. Nevertheless, it must not be overlooked that the effective assessment of the credibility of witnesses ultimately depends on the skill and experience of the judge.

Under the proposed amendments, reducing an oral will to writing will continue to be one of the methods for establishing its content, although this method is to be substantially modified. It is appropriate to first consider changes that merit approval. The first is the new formulation of the temporal limits within which the content of an oral will may be established by writing it down. The content of the will will have to be reduced to writing without delay. In view of the close temporal connection between the two events – the act of testation and the recording of the will's content – this solution would seem, in principle, to guarantee an accurate and precise reflection of the testator's

intent and, as may be assumed, to mitigate the risk of falsifying the content of the testator's declaration. As a consequence of this change, the requirement that the document establishing the content of the oral will specify the date and place of the testator's declaration, as well as the date and place of its reduction to writing, has been removed from Article 952(2) CC. The revised wording of Article 952(2) CC settles the doubts discussed above regarding whether the testator's declaration may be reduced to writing after their death, provided that the one-year time limit is observed. The proposed amendment leaves no doubt as to the possibility – or, more precisely, the impossibility – of establishing the content of an oral will by reducing it to writing after the testator's death. Since this solution may be regarded as creating a "temptation" to falsify an oral will, owing to the absence of any control by the testator over the content of the document, it is right that this alternative has been abandoned and that the possibility of establishing the content of an oral will by reducing it to writing has been temporally limited to the moment preceding the opening of the succession. This will prevent many of the abuses associated with attempts to falsify oral wills [Pietrzykowski 1994, 254-55].

The proposed amendment excluding the so-called third party from the circle of persons authorised to write down the testator's declaration may, however, give rise to doubts. It would mean that, where the content of an oral will is established in writing, this could be done only by a witness to the will. Although the CC contains no legal definition of this expression, established case law leaves no doubt as to its meaning. *De lege lata*, the content of an oral will may also be reduced to writing by a "third party," namely by a disinterested outsider, as in the case of a witness to the will. This cannot be a testamentary heir, any other beneficiary under the will, or any of their close persons indicated in Article 957 CC. For the purposes of assessing the effectiveness of an oral will reduced to writing as provided for in Article 952(2) CC, it is therefore necessary to establish whether its content was recorded by a person who, under the principles set out above, was capable of doing so. The term "third party" used in Article 952(2) CC does not encompass persons interested in the content of the testamentary dispositions. That category is delineated by Article 957 CC, applied by analogy owing to the similarity between the position of the person preparing the document establishing the content of an oral will and that of a witness to a will. Accordingly, persons for whom any benefit has been provided in the will, their spouses, relatives by consanguinity or affinity in the first or second degree, and persons connected with them by adoption, are not only precluded from acting as witnesses to the will but are likewise excluded from the circle of persons entitled to write down an oral will.[23] Considering that, under the

[23] See the decision of the Supreme Court of 13 May 1999, ref. no. CKN 231/98, Lex no. 38845; the decision of the Supreme Court of 15 December 2005, ref. no. II CSK 8/05, Lex no. 604125;

proposed Article 952(2) CC, the document establishing the content of an oral will must bear the testator's signature, it is difficult to regard the third party as posing a threat to the correctness and veracity of the testator's declaration.[24] For the testator is able to acquaint themselves with the content of the document and verify it, while a court expert may assess whether the testator's signature is handwritten and authentic [Borysiak 2018, 37-39].

CONCLUSION

Amendments to the provisions of the Civil Code concerning testamentary form are unavoidable. Not all the proposed solutions, however, merit approval. Beyond the reservations set out above, it should be noted that the question of applying the provisions on unworthiness to inherit to oral wills has been entirely disregarded. In view of the divergences existing in doctrine and case law, this matter requires to be addressed unequivocally.

Invoking the directive of strict interpretation of the grounds for unworthiness to inherit, which follows from the punitive nature of that institution, the Supreme Court rejects the application by analogy of Article 928(1)(2 and 3) CC to cases in which the document establishing the content of an oral will has been destroyed. Legal doctrine likewise underlines that a document establishing the content of an oral will constitutes merely a means of confirming that content and not the will itself; consequently, Article 928(1)(3) CC is not applicable to it. Nor, in the Supreme Court's view, does the purpose of that provision militate in favor of such an interpretation, since the destruction of a document establishing the content of an oral will does not render it impossible to establish the content of that will, even after the expiry of the time limits prescribed in Article 952(2) and (3) CC. The Supreme Court adopts a different approach to cases in which the document establishing the content of an oral will has been forged or altered than to cases involving its destruction. It allows Article 928(1)(3) CC to be applied where such a document is knowingly relied upon, and the testator's signature appearing on it has been forged, reasoning that the testator's signing of a document establishing the content of an oral will "assimilates the act of establishing the content of the oral will to a declaration of last will, and therefore to the will itself." In the Supreme Court's view, this conclusion

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the decision of the Supreme Court of 11 March 2011, ref. no. II CSK 379/10, Lex no. 784916, thesis 2; the reasoning of the decision (7) of the Supreme Court of 23 November 2001, ref. no. III CZP 54/01, Lex no. 49471; the reasoning of the decision of the Supreme Court of 10 May 2002, ref. no. CKN 1044/00, Lex no. 57205 and the reasoning of the decision of the Supreme Court of 15 February 2008, ref. no. I CSK 381/07, Lex no. 465921;

[24] See the Supreme Court's comments on the government's Draft law amending the Civil Code (UD 448), Research and Analysis Office, BSA I.021.72.2022, p. 2.

is also warranted by functional interpretation. A literal reading of the requirements laid down in Article 928(1)(3) CC would leave the oral will outside the scope of protection, a result that appears incompatible with the intent of a rational legislator – particularly since, as has been emphasised repeatedly, this type of will is especially vulnerable to conduct directed against the testator's intent [Witczak 2014, 274-80 along with the literature and case law cited therein].

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