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# A Will Made During an Epidemic – Roman *testamentum pestis tempore condictum* and Selected Modern Regulations

**ABSTRACT**

This article deals with the problem of making a will during an epidemic and simplifications in the testamentary formalities that are necessary to facilitate a testator to validly express his or her wishes in such difficult and specific circumstances. It analyses *testamentum tempore pectis conditum* in Roman law and its modern equivalents in Spanish, Italian and Polish law. Preconditions of applicability of the special forms of a will in those systems and the simplifications introduced therein are compared. The article presents the specific provisions in which this form of a will is regulated and their interpretation in civil law doctrine and case law. The central questions are: under which circumstances this form of a will is allowed, what the purpose of the special regulations is, what the relaxation from the ordinary testamentary formalities consists in and what requirements should be fulfilled after the will is made to preserve its validity. Some basic comparisons with the ordinary forms of a will are made to establish the peculiarities of the will drawn up during the epidemic. The differences between the analysed provisions and their importance in practice are pointed out.

**Key words:** testamentum pestis tempore conditum, a will, special forms of will, epidemic

## I. Introduction

The pandemic of coronavirus SARS-CoV-2 affects our everyday life in many ways with a negative impact also on our juridical sphere. One of its vital effects refers to inheritance law, chiefly to the drawing up of a will, which becomes more difficult in those particular circumstances. Many legal systems take the difficulties into account and provide special provisions for a will made, among other things, during an epidemic or even exclusively at that time. They are known in French[1], Dutch[2], Portuguese[3], Swiss[4], German[5], Austrian[6] and Polish law[7]; however, the regulations differ[8] and in most of the countries they are applied much more frequently in extraordinary circumstances other than an epidemic.

There is no need to describe here all the special provisions; it is also impossible due to the limited framework of my article, which is why I decided to make some brief remarks only on Roman, Spanish, Italian and my native Polish law. Roman law was the first legal system that created a special solution for the will made during an epidemic, which can be regarded as a common root for the modern forms. Spanish and Italian law operate with provisions of testamentary law that directly address an epidemic or contagious disease and can be seen as model solutions. In Polish law the relevant provision (art. 952 of the civil code) is much wider, because it regulates a will made in imminent danger of death and in extraordinary circumstances in which it is not possible or very difficult for a will to be made in the ordinary form.

In Spain and in Italy that form of a will has been considered obsolete and anachronistic hitherto[9], even called a juridical mummy (momia juridíca)[10] or inert fossil (fossile inerte)[11]. In fact, it was regarded as redundant because the

1 Art. 985-987 of the French civil code.
2 Art. 4.102 of the Dutch civil code.
3 A will made in case of public calamity in art. 2220 of the Portuguese civil code.
4 Art. 506 of the Swiss civil code (ZGB).
5 Nottestament vor dem Bürgermeister (§2249 of the German civil code, BGB), Nottestament vor drei Zeugen (§2250 BGB).
6 §597 of the Austrian civil code (ABGB).
7 Art. 952 of the Polish civil code.
8 See the short survey of these regulations in: W. Borysiak, *Testamenty szczególne w formie ustnej w perspektywie porównawczej* [Special Nuncupative Wills in a Comparative Context], "Prawo w działaniu. Sprawy cywilne" 2016, no 27, pp. 108 ff.
9 E. Muñoz Catalán, *Aplicación jurídica del testamentum tempore pestis o testamento en caso de pandemia como la generada actualmente por el coronavirus*, "Foro, Revista De Ciencias Jurídicas Y Sociales, Nueva época" 2020, vol. 23, p. 116.
10 F. Ramón-Fernández, *El coronavirus, el testament en situación de epidemia y el uso de las TICS en el derecho español*, "Rivista de Derecho Privado" 2021, no 40, p. 424.
11 M. Vinci, *Il testamento redatto in tempo di malattia contagiosa: radici romanistiche e letture attualizzanti*, "Bullettino dell'Istituto di Diritto Romano" 2020, no 114, p. 283.

outbreak of a new epidemic seemed impossible due to the great medical progress in recent decades[12]. This form was not the subject of case law in Spain in the 20th century[13]. I did not find any example of a will made during an epidemic in the published Polish case law. After the outbreak of the coronavirus pandemic that issue became vital, and it seems that the "dead provisions" will eventually apply.

## II. *Testamentum pestis tempore conditum*

Without going into details, for the purpose of my study it is enough to mention that under classical Roman law the ordinary forms of testaments (mancipatory will[14] and praetorian will[15]) were complex: the testator's declaration had to be made without interruption (*uno contextu*) in the simultaneous presence of seven witnesses and under praetorian law the *tabulae testamenti* should be also sealed by them. In the basic ordinary form in postclassical law, introduced by Theodosius II in 439[16] and Valentinus III in 448[17] and named later *testamentum tripartitum*, the will had to be made without interruption in the simultaneous presence of seven witnesses, written out by a testator or a person to whom he dictated his declaration, sealed by all the witnesses and subscribed by them and by the testator himself. Besides the written form, a nuncupative will remained admissible, where the oral declaration of the testator's wishes was made before the simultaneously present seven witnesses.

Apart from the ordinary form of a will, Roman postclassical law recognized several special (extraordinary) forms, which were available only in particular circumstances. The extraordinary forms either relaxed formal requirements of ordinary *testamentum* to facilitate the making of a will or imposed an additional formality to ensure the authenticity of the will.

One of the special and more flexible forms of a will was *testamentum pestis tempore conditum*, a will made during pestilence. It was introduced in a constitution of Emperors Diocletian and Maximilian issued in 290. The text of the rescript is preserved in the Codex of Justinian (C.6.23.8):

Casus maioris ac novi contingentis ratione adversus timorem contagionis, quae testes deterret, aliquid de iure laxatum est: non tamen prorsus reliqua etiam

12 S. Castán Pérez-Gómez, *Testar en tiempos de pandemia: antecedentes históricos y en la actualidad*, "Rivista Internacional de Derecho Romano" 2021, p. 454; E. Serrano Chamorro, *Covid-19. Testamento ológrafo. Testamento ante testigos*, "Rivista de Derecho Civil", 2020, vol. 7.4, p. 292; F. Ramón-Fernández, op. cit., p. 397.

13 S. Castán Pérez-Gómez, op. cit., p. 455.

14 LDT 5.3, G.2.102-104, I.2.10.1.

15 G.2.119, I.2.10.2.

16 NT.16, C.6.23.21.

17 NV.26.

testamentorum sollemnitas perempta est. 1. Testes enim huiusmodi morbo oppresso eo tempore iungi atque sociari remissum est, non etiam conveniendi numeri eorum observatio sublata.

This rescript is very succinct and unclear, which is the main reason for the lively controversies in its interpretation[18]. In fact, it is disputed in which circumstances this form of a will was applicable and what the relaxation introduced by the rescript consisted in. The answers to these question depend on the interpretation of the crucial terms *casus maioris*, *timor contagionis*, *morbo oppresso* and *iungi atque sociari*.

As for the first major problem, the circumstances in which this special form of a will was available are described by the phrase *casus maioris ac novi contingentis ratione*. In translations of the Code of Justinian it is understood as the misfortune of a new and serious plague (das Unglück einer neuen und schweren Seuche[19]), serious and unusual occurrence[20], serious and recent occurrence[21], serious and new contingencies (gravi e nuove contingenze[22]), greater and newly arising adversity[23], bigger and newer case (größerer und neuartiger Fall[24]), serious and unusual disaster (ernstige en ongewone ramp[25]), force majeure (fuerza mayor[26]), or extraordinary event of force majeure (acontecimiento extraordinario de fuerza mayor[27]). All these translations are

18 It is stressed by T. Rüfner, *Testamentary formalities in Roman law*, [in:] *Comparative Succession Law,* vol. 1*, Testamentary formalities,* eds. K.C. Reid, M.J. Dé Waal, R. Zimmermann, Oxford University Press 2011, p. 23.

19 C.A.W. Jungmeister, [in:] *Das Corpus Iuris Civilis in's Deutsche übersetz*, Band 5, hrsg. C.E. Otto, B. Schilling, C.F.F. Sintetis, Leipzig 1832; R. Haller, *Corpus Iuris Civilis. Das römische Zivilrecht. Codex Iustiniani nach der zweiten Bearbeitung*, Opera Platonis 2018, www.opera-platonis.de/CI/Codex_Iustiniani.pdf.

20 S.P. Scott, *The Civil Law, XIII-XIV*, Cincinnati 1932.

21 O. Tellegen-Couperus, *Testamentary succession in the constitutions of Diocletian*, Zutphen 1982, p. 27; L. Desanti, *Dominare la prassi. I rescritti diocleziani in materia di successioni*, [in:] *Diocleziano la frontiera giuridica dell'impero,* a cura di W. Eck e S. Puliatti, Pavia 2018, p. 541.

22 A. Cherchi, *L'idulgenza nel emegenza. Brevi note sul c.d. testamentum tempore pestis nel diritto romano*, [in:] *Emergenza e diritti tra presente e futuro*, a cura di V. Corona e M. F. Cortesi, Napoli 2020, p. 146.

23 B.W. Fier, D.P. Kehoe, T.A.J. McGinn, T*he Codex of Justinian, A New Annotated Translation, with Parallel Latin and Greek Text, Based on a Translation by Justice Fred W. Blume*, Vol. 2, Cambridge 2016.

24 C. Willems, *Zwischen Infektionsschutz und Schutz des Erblasserwillens: Das sogennante testamentis tempore pestis conditum*, "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung" 2021, no 138, p. 634.

25 J.A. Ankum, J.E. Spruit, [in:] *Corpus Iuris Civilis. Text en Vertaling*, hgg. J.E. Spruit, J.M.J. Chorus, L. de Ligt, bd. 8, Amsterdam 2007, p. 471.

26 A. Díaz Bautista, *Conspectus Constitutionum Diocletiani,* Madrid 2013, p. 217.

27 S. Castán Pérez-Gómez, *El peligro inminente de muerte como fundamento de formas testamentarias extraordinarias en el Derecho romano y en el Código Civil*, [in:] *Nuevas orientaciones del Derecho civil en Europa*, dir. M. Pereña Vicente y P. Delgado Martín, Madrid 2015, p. 933; idem, *Testar*, p. 425; E. Muñoz Catalán, op. cit., p. 113.

inspired by a particular interpretation of the source as a whole and are different in fact.

The basic meaning of *casus maior* in the sources of Roman law is force majeure, as an equivalent to the well-known term *vis maior*[28]. In the famous definition Gaius says that it is a force which human infirmity cannot resist (*casus maior, cui humana infirmitas resistere non potest*[29]). However, only in the cited Spanish and Polish[30] translation of Diocletian's rescript *casus maior* is understood as force majeure. Other translations are less precise: in particular, the term cannot be translated directly into pestilence, because it did not designate pestilence, epidemic or plague and did not have the same meaning as *pestis*, *pesilentia* or *lues*. It is worth mentioning also that until the 19th century the view proposed previously by medieval lawyers[31] was popular, which was that *casus maior* referred here to epilepsy in the sense that if one of the witnesses was attacked by epilepsy, the will remained valid even if the process of its making was interrupted[32]. That was regarded as an exception to the rule that such an interruption violated the fundamental requirement of the integrity of the act (*unitas actus*), invalidating the will. Nowadays, this hypothesis is no longer considered[33].

In my view, *casus maior* means force majeure and this meaning has a significant impact on the understanding of the constitution, because the term referred to the characteristics of the particular circumstance in which this form of a will could be used. In non-juridical sources pestilence (*pestis, pestilentia*) is mentioned among the force majeure events[34] and it is believed to be sent by the gods or the Christian God as a punishment for offences or sins[35]. It does not

28 D.2.13.7, D.44.7.1.4.

29 D.44.7.1.4.

30 S. Kursa, *Testator i formy testamentu w rzymskim prawie justyniańskim*, Warszawa 2017, p. 221.

31 Vivianus Tuscus, *Casus in terminis Super Codice,* Strasburg 1484, p. 84.

32 G.L. Marezoll, *Über die bei der Testamentserrichtung zu beobachtende Einheit des Ortes, des Tages, der Zeit des Rechtsactes*, "Zeitschrift für Civilrecht und Prozeß", 1831, no 4, pp. 54 ff. The interpretations proposed over the centuries are presented by C. Willems, op. cit., pp. 616 ff.

33 In fact, this hypothesis was refuted by E. Ackermann, *Über das Testament zur Pestzeit*, "Archiv für die civilistische Praxis" 1849, no 32, pp. 55 ff.

34 Cicero, *De natura deorum* 2,5,14; Seneca, *Ad Helviam matrem De consolatione* 7,4; Arnobius, *Adversus Nationes* 2,76.

35 I. Mazzini *La malattia conseguenza e metafora del peccato nel mondo antico, pagano e Cristiano*, [in:] *Cultura e promozione umana. La cura del cuerpo e dello spirito nell'antichità classica e nei primi secoli cristiani. Un magistero ancora attuale?*, Atti del I Conv. Intern. (Troina, 29 ottobre-1 novembre 1997), E. Dal Covolo e I. Gianetto (ed.), Troina 1998, pp. 159-172; W. Suder, *Gniew bogów. Etiologia religijna epidemii w Republice Rzymskiej* [Wrath of the Gods. Religious Aetiology of an Epidemic in the Roman Republic], "Acta Universitatis Wratislaviensis" Wrocław 2008, No 3063, Prawo CCCC, pp. 391-397; idem, *Et forte annus pestibus erat: Epidemie w Republice Rzymskiej* [Epidemics in the Roman Republic] Wrocław 2007, p. 47; J. Iwańska, *Przyczyny, zapobieganie i leczenie chorób epidemicznych w starożytnej Grecji i Rzymie* [Reasons, Prevention and Treatment of Epidemic Diseases in

mean, however, that all events of force majeure, e.g., earthquake or invasion by are contemplated by the rescript, due to the fact that *timor contagionis* (fear of contagion) and *morbus* (disease) are expressly mentioned therein[36]. Therefore not force majeure as such, but pestilence as a source of contagious disease and fear of infection was the only event to be taken into account. Only the severe outbreak of infectious disease could be qualified as force majeure and only in that case could the alleviated form of a will be resorted to. It did not suffice that the testator or one of the witnesses suffered from infectious disease if there was no dangerous pestilence raging in the testator's region. Minor pestilence or the isolated illness of the testator was not regarded as force majeure and did not justify this alleviated form of a will. Similarly, noninfectious diseases, even if lethal, did not justify the application of this form of a will, because they did not cause the fear of infection and were not an obstacle to the fulfilment of the requirements of an ordinary will[37]. Although serious disease was regarded as force majeure[38], it triggered fear in witnesses only if it was contagious and did not prevent them from being engaged in testamentary proceedings unless it was contagious.

Due to the fact that two versions of the rescript have come down to us, it is not clear whether the testator had to be already sick, or one of the people who was to act as a witness was sick or whether it was not necessary for them to be sick, because the raging plague itself gave a sufficient legal ground for this form of a will. In Paul Krüger's edition of the Code of Justinian[39] the crucial words are *morbo oppresso*, which indicates that it was necessary for the testator to be already sick. In the edition of Codices Casinas and Berolinenses[40] the phrase is *morbo opressos*, which suggests that at least one of the potential witnesses was sick. The first possibility is sensible, but the other one is rather unlikely. If one of the people who was to act as a witness was sick, he would not be asked to appear as a witness or another person could replace him, so there was no difficulty in collecting the required number of witnesses and consequently, there was no justification for the alleviated form of a will. However, the first interpretation –

Ancient Greece and Rome], "Seminare. Poszukiwania naukowe" 2010, no 28, pp. 223-237; R. Paura, *L'ermeneutica delle epidemie nel pensiero Cristiano e l'idea del Dio Punitore*, "Orbis Idearum" 2020, no 8.1, pp. 41-67.

36 E. Ackermann, op. cit., pp. 55 ff.; S. Kursa, op. cit., pp. 221 ff.; S. Castán Pérez-Gómez, *Testar*, p. 425; idem, *El peligro*, p. 933; E. Muñoz Catalán, op. cit., pp. 113 ff.; L. Desanti, op. cit., p. 543.

37 Cf. E. Ackermann, op. cit., p. 73; S. Castán Pérez-Gómez, *El peligro*, p. 933.

38 D.2.11.2.3, D.13.6.5.4, D.17.1.26.6, H. Siems, *Bemerkungen zu sunnis und morbus sonticus. Zum Problem des Fortwirkens des römischen Recht im früher Mittelalter*, "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung" 1986, no 103, pp. 409 ff.; C. Lanza, *Impedimenti del giudice. Alcuni modelli di "diritto classico"*, "Bullettino dell'Istituto di Diritto Romano" 1987, no 90, pp. 467 ff..; M. Sobczyk, *Siła wyższa w rzymskim prawie prywatnym*, Toruń 2005, pp. 139 ff.

39 P. Krüger, *Codex Iustinianus*, Berolini 1877.

40 Codices Casinas and Berolinenses 273.

the illness of the testator – is not indispensable. The expressions *eo tempore* and *morbo oppresso* did not necessarily refer to the moment at which the witnesses gathered and to the testator; they could refer instead to "the time afflicted by the pestilence", so the time during which the contagion was seriously affecting the area where the will was to be made[41]. In this interpretation this form of a will was available because of the plague in general, even if neither the testator nor a witness was sick, so the scope of the form's application was much wider.

In my view, the *testamentum pestis tempore conditum* was useful and permitted when, apart from the raging plague which could be described as *casus maior*, the testator was already suffering from a contagious disease. If the testator remained healthy, there were no justifiable grounds for this special form of a will, because the plague itself did not give such grounds. Only where those two conditions were met, so the testator became infected by a fatal plague raging in his surroundings, was the alleviated form allowed.

The other crucial controversy in the interpretation of the rescript concerns the relaxation of the formal requirements of the will. It is sure that it was rather limited alleviation because it referred only to the activity of witnesses and the testator in the process of making the will; other formal requirements were preserved, especially the number of witnesses was still the same as in the ordinary form. One can assume that Diocletian attempted to reconcile two, in some sense contradictory values: the alleviation of the formal requirement in order to enable a testator to make a will and the essential guarantees that the will could not be falsified and would manifest properly the testator's intention[42]. In other words, the emperor tried to find the balance between the need for formal simplification and maintenance of certain essential guarantees for the testator. He did not introduce a radically new form of a will, but only slightly modified the existing ordinary form.

According to the dominant view in secondary literature, the dispensation from the ordinary requirements introduced by Diocletian, described by the phrase *iungi atque sociari remissum est***,** referred to the meeting of the testator and witnesses and abolished the necessity of their gathering in one place and time. It was enough when each witness sealed the testamentary deed separately from others[43]. However, this interpretation is unsatisfactory, because if the witness had to come into direct contact with the sick testator, even without meeting other witnesses, the problem of fear of contagion was not solved. According to

41 Cf. O.E. Tellegen-Couperus, op. cit., p. 28; M. Vinci, op. cit., p. 291; L. Climent Escrivá, *Análisis comparativo entre los testamentos actuales y los del derecho romano*, p. 33, (http://dspace.umh.es).

42 M. Vinci, op. cit., p. 286.

43 A. Burdese, *Manuale di diritto privato romano*, Torino 1985, p. 649; W. Litewski, *Rzymskie prawo prywatne* [Roman private law], Warszawa 1999, p. 508; F. Longchamps de Bérier, *Law of Succession*, Warszawa 2011, p. 168; L. Climent Escrivá, op. cit., p. 33.

other scholars, the witness could fulfil his duty separately from both the testator and other witnesses[44], which is suggested by the Basilica[45]. The testator could inform the witnesses by messenger that he had left his testamentary deed in a public place (e.g., a temple or an office building) and ask them to go there and seal the deed[46].

It is very difficult to reconcile the last hypothesis with the fundamental principle of Roman testamentary law that the witnesses fulfilled their duty in the presence of the testator (*in conspectu testatoris*[47]). From another Diocletian constitution issued at the same time we know that this requirement was maintained also during pestilence, unless it was abolished by a local privilege[48]. It is really doubtful that a person who did not see the testator and did not listen to his declaration could be regarded as a testamentary witness[49]. For these reasons in my opinion there had to be some kind of contact between the witnesses and the testator, but not close, direct contact. One can imagine many situations where the witnesses came together at a place that was some distance away from the testator and attested the testamentary deed in the presence of the testator, so he could observe their attestations and they could observe his activity in the testamentary proceeding[50]. In a multi-room building the testator could stay in one room and the witnesses in another room or other rooms with the possibility of mutual observation (seeing and hearing) of their activities. The witnesses could gather outside the building of the sick testator and keep in touch with him through the open window to his room. Finally, the making of the will could take place outdoors, in the open air, keeping the necessary distance between the people involved. In a place where the formality of acting *in conspectu testatoris* was abolished on the grounds of special privilege, there was no need to come into contact with the testator; however, here relaxation of the testamentary requirements went further than in usual cases of pestilence.

Taking into consideration all the views presented above I come to the conclusion that Roman *testamentum pestis tempore conditum* was applied when a person who was suffering from an infectious disease during an epidemic which

44 J. Iglesias, *Derecho romano. Instituciones de derecho privado*, Barcelona 1965, p. 612; W. Bojarski, Prawo rzymskie [Roman law], Toruń 1994, p. 238; S. Castán Pérez-Gómez, *Testar*, p. 428; C. Willems, op. cit., p. 630 ff.

45 Bas. 35,2,7.

46 S. Kursa, op. cit., p. 226.

47 C.6.23.9, C.6.23.12, C.6.23.30.

48 C.6.23.9. See: O.E. Tellegen-Couperus, op. cit., p. 28; E. Muñoz Catalán, op. cit., p. 113; A. Cherchi, op. cit., p. 152; L. Desanti, op. cit., pp. 543 ff.; S. Castán Pérez-Gómez, *Testar*, p. 432; M. Vinci, op. cit., pp. 295 ff.

49 S. Castán Pérez-Gómez, *Testar*, pp. 431 ff.

50 The basic examples were mentioned already in old secondary literature: G.L. Marezoll, op. cit., p. 77 ff.; E. Ackermann, op. cit., p. 56 ff.; L. Piętak, *Prawo spadkowe rzymskie* [Roman Inheritance Law], vol. 1, Lwów 1882, p. 236.

was spreading in his environs wanted to draw up his will. It did not suffice that there was pestilence as such or that a person who was to act as a witness was infected by the disease if the testator remained healthy. The relaxation of formalities concerning the making of a will was that the witnesses did not have to perform their task in close contact with the sick testator; however, they still had to come together at a place which was some distance away from the testator and stay in his presence. I am not convinced by the interpretations of the rescript which assume that an attestation under the eyes of the testator was abolished and that the witnesses could do it without the testator's presence. Such a far-reaching alleviation could be introduced only by means of special local privileges.

## III. *Testamento epidémico* in Spanish law

In Spain testate succession is very popular and the number of wills is one of the greatest in Europe. The most popular are the open will and the holograph will[51]. The holograph will is written out in full and signed by the testator, with an expression of the year, month and date on which it is made[52]. It requires neither notary nor witnesses. An open will is made before a notary, as a rule without the presence of witnesses; here the testator expresses his or her will verbally or in writing to the notary, who prepares the notarial deed with some further requirements, it is not necessary to present here[53].

Apart from these, the most popular and uncomplicated wills, Spanish law recognizes both a will made in imminent danger of death[54] and a will made in the event of an epidemic[55], commonly referred to as a "testamento epidémico"[56]. They are relaxed versions of a common open will[57], made verbally, so they are not regarded as special wills[58]. The forms are not applicable in Catalonia, because the civil code of Catalonia does not recognize a will made only in the presence of witnesses[59]. If the testator should be in imminent danger of death, the will may be made before five suitable witnesses, without the need for a notary.

51 See the data provided by S. Cámara Lapuente, *Testamentary formalities in Spain*, [in:] *Comparative Succession Law,* vol. 1, *Testamentary formalities*, eds. K.C. Reid, M.J. Dé Waal, R. Zimmermann, Oxford University Press 2011, p. 72.

52 Art. 688 of the Spanish civil code.

53 Detailed requirements are regulated in art. 695 of the Spanish civil code.

54 Art. 700 of the Spanish civil code.

55 Art. 701 of the Spanish civil code.

56 E. Muñoz Catalán, op. cit., p. 105.

57 They are regulated in the section of the Code named "Del testamento abierto" (On the open will).

58 Art. 676 and 677 of the Spanish civil code.

59 Art. 421-5 of the Civil code in Catalonia. Other territorial special provisions are described by F. Ramón-Fernández, op. cit., pp. 403 ff.

In the event of an epidemic, a will may also be executed without the intervention of a notary, before three witnesses older than sixteen years.

It is noticeable that there is a distinction between the will made in imminent danger of death and the will made during an epidemic and that in the latter case the simplification goes further. Naturally, the imminent danger of death can arise from an infectious disease caught by a testator during an epidemic or pandemic, but it is usually caused by a variety of reasons, including those not connected with health, e.g., natural distasters[60]. The fields of application of these forms overlap only to a small extent and the first form turns out to be insufficient in the case of an epidemic. The form regulated in art. 701 c.c. is allowed only in the event of an epidemic that devastates the population and puts people's health at serious risk[61]. It is not necessary that the testator himself or a potential witness is already sick[62]; the testator does not need to prove the imminent danger of death[63]. A serious epidemic officially declared in a region where the will is to be made is a justifiable ground for its application[64].

In both forms the requirements of a valid will are alleviated in comparison with a common open will[65]. In the case of the will in the event of an epidemic, the alleviation is of a greater degree, because fewer witnesses are required. In both of them, the extraordinary circumstances are taken into account to facilitate the drawing up of a will. They do not require the intervention of a notary at the time the will is made, which is one of their main distinctive features, because as a rule the open form must be made before a notary[66]. The exemption from the intervention of a notary is motivated by the facilitation of formal requirements, especially due to the fact that the notarial offices are often closed in an epidemic or work only in exceptional cases[67].

The next crucial feature of the forms is the presence of witnesses. As a rule, neither the notarial will nor the holograph will is made in the presence of witnesses. In the absence of a notary or a document written by the testator, the presence of witnesses is the essential guarantee necessary in the testamentary proceeding.

60 S. Castán Pérez-Gómez, *Testar*, pp. 452 ff.; F. Ramón-Fernández, op. cit., p. 421.

61 L. Crimen Escrivá, op. cit., p. 57; F. Ramón-Fernández, op. cit., pp. 409 ff.

62 L. Crimen Escrivá, op. cit., p. 57; E. Muñoz Catalán, op. cit., p. 105, p. 107; S. Castán Pérez-Gómez, *Testar*, p. 456.

63 E. Serrano Chamorro, op. cit., p. 312; F. Ramón-Fernández, op. cit., p. 422.

64 E. Muñoz Catalán, op. cit., p. 107, pp. 115 ff.; S. Castán Pérez-Gómez, *Testar*, p. 456; C. López-Rendo Rodríguez, *Testamentos y cuestiones sucesorias en el Covid-19*, "Revista Abogados de Familia" 2020, no 103, p. 21; F. Ramón-Fernández, op. cit., pp. 410 ff.

65 The common forms are regulated in detail in art. 676 ff. of the Spanish civil code.

66 Art. 694 of the Spanish civil code.

67 E. Muñoz Catalán, op. cit., p. 108, p. 142; S. Castán Pérez-Gómez, *Testar*, p. 457 ff.; E. Serrano Chamorro, op. cit., pp. 291 ff.; F. Ramón-Fernández, op. cit., pp. 400 ff.

During an epidemic this formal requirement is relaxed even in comparison with the will made in imminent danger of death, because only three, not five, witnesses should be present and it is enough when they are older than sixteen years[68]. The reduction in the required number of witnesses is justified by the fear of contagion and the need to lessen the risk of infection[69]. The people who are to act as testamentary witnesses should meet some specific requirements. The witnesses should know the testator personally and should attempt to ascertain his capacity[70]. They must be simultaneously present in the act of making the will and should understand the language of the testator; moreover, they cannot lack the soundness of mind to complete the formalities related to the will[71]. In an open will, heirs and legatees appointed therein, their spouses, or the relatives of the former within the fourth degree of consanguinity or the second degree of affinity may also not be witnesses[72]. Due to these limitations, it may be difficult to find even the minimum number of people who agree to act as a testamentary witness in spite of the danger of infection and without being personally interested in the inheritance[73]. The considerable restriction on the free movement of people imposed during an epidemic poses an additional impediment to the fulfilment of that requirement[74]. In addition, the fear of infection is an important factor that strongly discourages people from coming into contact with a sick or potentially sick person[75]. When the testator is already in hospital among other severely suffering patients and overloaded medical staff this task can be practically impossible.

All formalities of a valid will shall be solemnized in a single act, which shall begin with the reading of the will, without any interruption being allowed, unless it is motivated by a fleeting incident[76]. This provision corresponds to the Roman concept of *unitas actus*, but it can pose a difficulty in the event that the testator is seriously ill with a contagious disease[77].

The solution adopted in Spain for the time of epidemic is different than in Roman postclassical law, because the number of witnesses is reduced and the provision does not impose any particular precautions that should be taken to prevent the disease. The reduction in the number of witnesses and exemption

68 According to art. 681 of the Spanish civil code minors are not allowed to act as witness.
69 L. Crimen Escrivá, op. cit., p. 58; S. Castán Pérez-Gómez, *Testar*, p. 464.
70 Art. 685 of the Spanish civil code, cf. E. Muñoz Catalán, op. cit., p. 106.
71 See the detailed requirements in art. 681 of the Spanish civil code.
72 Art. 682 of the Spanish civil code.
73 E. Serrano Chamorro, op. cit., p. 297.
74 E. Serrano Chamorro, op. cit., p. 310; C. López-Rendo Rodríguez, op. cit., p. 22; F. Ramón-Fernández, op. cit., pp. 399 ff.
75 F. Ramón-Fernández, op. cit., p. 412.
76 Art. 699 of the Spanish civil code.
77 S. Castán Pérez-Gómez, *Testar*, p. 465.

from intervention by the notary are regarded as sufficient measures to facilitate the making of a will and minimize the risk of infection.

Spanish law provides some further special rules constraining the effectiveness of the will made in the event of an epidemic. Although this is an oral form, the will shall be written down, if possible; if not, it shall be valid even if the witnesses do not know how to write[78]. It can be inferred from the provision that the written form drawn up by the testator or a witness is preferable unless it is impossible[79]. The effectiveness of the will is limited in time: it becomes ineffective if two months elapse from the time when the epidemic ended. If the testator should die within such a period, the will shall be ineffective if, within three months following the death, the interested party does not appear before the competent notary to notarize it (raise it to a public deed), irrespective of whether it was executed in writing or verbally[80]. For this reason, this form of will is described as "an ephemeral will" (testamento efiméro)[81]. Furthermore, the will is ineffective if it is not notarized in a public deed and put on a notarial record as provided in notarial legislation[82]; for that reason it is named *pretestamento*[83].

## IV. A will made in a place where a disease considered contagious is prevalent in Italian law

**U**nder Italian law, there is a distinction between ordinary testaments and special wills. The ordinary wills are the holograph testament and the testament made through notarial act (public or secret)[84]. A will made in the event of contagious disease belongs to the group of special testaments and is regulated under the same provisions as a will made in the event of public calamity (e.g. earthquake) or accident (e.g. severe injury). The requirements of a valid will in all these circumstances are the same, because the circumstances are similar and have one fundamental feature in common – a serious impediment to the ordinary form. The analysed form is a simplified version of the public will[85].

78 Art. 702 of the Spanish civil code.

79 E. Muñoz Catalán, op. cit., p. 109, p. 115; S. Castán Pérez-Gómez, *Testar*, p. 466; C. López-Rendo Rodríguez, op. cit., p. 21; F. Ramón-Fernández, op. cit., pp. 408 ff.; S. Cámara Lapuente, op. cit., p. 81.

80 Art. 703 of the Spanish civil code.

81 F. Ramón-Fernández, op. cit., p. 403.

82 Art. 704 of the Spanish code.

83 F. Ramón-Fernández, op. cit., p. 403.

84 Art. 601 of the Italian civil code.

85 A. Braun, *Testamentary Formalities in Italy*, [in:] *Comparative Succession Law: vol. I, Testamentary Formalities*, K.G.C. Reid, M.J. de Waal, R. Zimmermann, Oxford University Press, p. 134.

In fact, this kind of a will has been rarely employed and there is very little case law[86].

According to art. 609 of the Italian civil code, entitled "Contagious disease, public calamity or accident"[87], when the ordinary formalities are not available to the testator, because he is where a disease considered contagious is prevalent or because of public calamity or disaster, the will is valid if it is received in the presence of two witnesses over sixteen years of age, by a notary, by a local magistrate or the local justice of the peace, or the mayor or his deputy or by a clergyman.

The special form is available only when it is not possible for the testator to use an ordinary will, especially because of the outbreak of a disease considered contagious, even if in fact it is not contagious[88]; however, it is not required that the testator is personally affected[89]. It is disputable if serious difficulty encountered by the testator in using an ordinary will is sufficient ground to resort to this special will[90]. The requirements of an ordinary will cannot be met because the will is to be made in a place where the contagious disease is prevalent. It must be a disease spread over a wide territory[91]; however, an official declaration of any preventive measures against the disease is not necessary[92].

The requirement that the special form is admissible provided that an ordinary form cannot be used greatly limits the field of application of the special form. The most popular forms of a will in Italy are the holograph will and the notarial will[93]. In fact, the requirements of these two basic ordinary wills are not complicated. The holograph will must be wholly handwritten, dated and signed by the testator[94]. It does not need to be drawn up in the presence of a witness or a notary, so there is no need to involve another person in the process of its making. Those holograph wills that have been formally deposited with a notary should be registered in the General Register of Wills. The person who is in possession of a holograph will must present it to a notary for publication, as soon as he knows of the death of the testator. Further requirements refer to the publication of the will by the notary and take place after the testator's death[95].

86 Art. 702 of the Spanish civil code.
87 Malattie contagiose, calamità pubbliche o infortuni.
88 M. di Fabio, *Commentario del Codice civile. Delle successioni art. 565-712*, Torino 2010, p. 406.
89 A. Braun, op. cit., p. 135; M. Vinci, op. cit., p. 304; A. Cherchi, op. cit., p. 158; M. Di Fabio, op. cit., p. 406; M. Sesta, *Codice della successioni e donazioni*, Giuffré Editore 2011, p. 1231.
90 M. Cherchi, op. cit., p. 304; M. di Fabio, op. cit., p. 406; M. Sesta. op. cit., p. 1230.
91 M. di Fabio, op. cit., p. 406; J. Waszczuk, *Szczególne formy testamentu w prawie włoskim* [Special Forms of a Will in Italian Law], "Zeszyty Prawnicze" 2007, no 7.1, p. 257.
92 J. Waszczuk, op. cit., p. 257; M. Sesta, op. cit., p. 1231.
93 A. Braun, op. cit., p. 125.
94 Art. 602 of the Italian civil code.
95 Art. 620 of the Italian civil code.

A public will must be received by a notary in the presence of two witnesses[96]. The witnesses must be of legal age (eighteen) and full capacity and not have any interest in the will[97]. This form is more complex than the holograph will because of the necessity to involve a notary and two witnesses. The testator declares his or her intention to the notary, who puts it into writing. The will should be read out by the notary in the presence of two witnesses and among other formalities subscribed by the notary and witnesses.

As in the case of the Roman *testamentum pestis tempore conditum* this Italian form of a special will is a search for balance between the need for formal simplification and maintenance of certain essential guarantees for the testator[98]. For that reason, the process of making a will is simplified, but only to a limited extent, which shall guarantee the authenticity of the will, the proper declaration and then implementation of the testator's intention.

The first simplification is that the special will can be received also by a person who is not a notary, but still in the presence of two witnesses. Instead of a notary the will can be received by a number of people who can be described as officials or in some sense persons of public trust[99]: a local magistrate or justice of peace, or the mayor or his deputy or a clergyman. The participation of an official person is still required, only the choice of such a person is not limited to notaries, which can be of practical importance during an epidemic. The official guarantees the correctness of the testamentary procedure, which is particularly important when the formalities are simplified[100].

The second simplification is that even a minor can act as a witness[101]. It is enough that the witness is over sixteen years of age. It does not seem to be a relaxation of fundamental importance, but in casu it can be useful.

The third simplification is that the testator's intentions do not have to be immediately reduced in writing and read aloud by the person who receives the will or a witness. That is another important difference from the ordinary public will, motivated by the fact that in the case of a contagious disease it may be impossible or very difficult to reduce the will in writing and read it aloud immediately after the testator's oral declaration[102]. Furthermore, that simplification significantly reduces the time necessary for the preparation of the will, which is relevant when the people involved in that process must or want to quickly leave the place where the will is made[103]. It does not mean, however, that

96 Art. 603 of the Italian civil code.
97 A. Braun, op. cit., p. 131.
98 M. Vinci, op. cit., p. 302.
99 J. Waszczuk, op. cit., p. 257; M. Vinci, op. cit., p. 303.
100 J. Waszczuk, op. cit., p. 259; M. Vinci, op. cit., pp. 303 ff.
101 A. Braun, op. cit., p. 135.
102 M. Vinci, op. cit., pp. 305 ff.
103 Ibidem.

this form of will can remain oral permanently, because it must be reduced in writing. Italian law does not recognize the purely oral form of a will; a written document should be prepared under pain of nullity[104]. Only the requirement that the will should be read aloud is not applicable here.

The fourth simplification is that the testator and witnesses can be excused from signing the document in which the testator's intentions are reduced in writing. In principle, the will after being written out shall be signed by the person who receives it, the testator and the witnesses. However, if the testator or the witnesses are unable to affix their signature, the reason shall be indicated.

These are the most distinctive features of the relaxed form; there are several other differences from the formalities of the ordinary public will[105], especially that there is no need to indicate the place and the date of the will[106].

The Italian solution to the problem of a will drawn up during an outbreak of a contagious disease is less flexible than the Spanish one because of the necessary involvement of an official. Both in Italy and Spain the declaration should be made in the presence of three people, but in Italy one of them should be an official.

The period of validity of a will made in a place where a disease considered contagious is prevalent is limited, which is motivated by its exceptional character[107]. A will that has been received with the formalities indicated above loses its validity three months after the cessation of the cause which prevented the testator from availing himself of the ordinary formalities. The three-month period is long enough to draw up an ordinary will in place of the special one. If the testator dies within that period of time, the will shall be deposited, as soon as possible, in the notarial archives of the place where it has been received[108].

## V. An epidemic as an extraordinary circumstance within the meaning of art. 952 of the Polish civil code

Under Polish law there is no special form exclusively dedicated to wills made during an outbreak of a contagious disease or an epidemic. In the Polish civil code there is no provision that can be regarded as a direct equivalent to art. 701 of the Spanish civil code or art. 609 of the Italian civil code. It does not mean, however, that Polish law does not take into consideration specific circumstances of the process of making a will and does not provide the testator with a legal

104 Art. 619 of the civil code.
105 The formalities of a nuncupative will are specified in art. 603 of the Italian civil code.
106 M. Vinci, op. cit., pp. 305 ff.; M. Sesta, op. cit., p. 1232.
107 M. di Fabio, op. cit., p. 413.
108 Art. 610 of the Italian civil code.

instrument to enable him to overcome special difficulties he can encounter in that process.

First of all, it should be pointed out that the basic ordinary form of will, the holograph will, is very simple and does not involve any intricate or complex formalities, because it is enough when the testator draws up his testament by writing it entirely by hand, signing it and dating it[109]. There is no need to engage a notary, any other official or witnesses. The one crucial thing which a testator should bear in mind is that the entire testamentary deed must be written by his own hand and signed by him personally; it does not suffice that he puts his signature to a typed and printed document or a document written by another person. In fact, it is easy to fulfil these requirements and apart from a grave health problem or the testator's illiteracy, serious difficulties can occur rather in exceptional circumstances[110].

In spite of the relative simplicity of the holograph will and rather exceptional cases where its requirements cannot be complied with, there is still a need to apply special forms of a will. These special wills in Polish law are the nuncupative will (art. 952)[111], a will made during a journey on a Polish sea-going vessel or aircraft (art. 953) and a soldier's will (art. 954). Only one of them is practically important and only this one is generally suitable to be used in the event of an epidemic – the nuncupative will.

The nuncupative will can be made in two cases: either in imminent danger of death or in extraordinary circumstances in which it is not possible or very difficult for a will to be made in the ordinary form. It is not required that the imminent danger of death is caused by an extraordinary circumstance or that the testator is at the same time in such a danger and in an extraordinary situation. It is enough when either of the prerequisites is present because they are independent[112]; however, they sometimes overlap, especially if a testator is in imminent danger of death because he is suffering from a contagious

109 Art. 949 §1 of the Polish civil code.

110 K. Osajda, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. K. Osajda, Warszawa 2021, n. 39.1 to art. 952.

111 On the genesis of this regulation see A. Moszyńska, *Geneza prawa spadkowego w polskim kodeksie cywilnym z 1964 roku* [Genesis of Inheritance Law in the Polish Civil Code of 1964], Toruń 2019, pp. 82 ff.; 305 ff.

112 Judgments of the Supreme Court of 23.02.2001, II CKN 402/00 and 20.03.2018, V CSK 492/17; S. Wójcik, F. Zoll, *System Prawa Prywatnego* [System of Private Law], vol. 10, *Prawo spadkowe* [Inheritance Law] ed. B. Kordasiewicz, Warszawa 2009, p. 310; W. Borysiak, *Funkcjonowanie w praktyce testamentu sporządzanego w formie ustnej (art. 952*) [Functioning in Practice of a Will Made in Oral Form (art. 952)], Warszawa 2014, p. 14; E. Niezbecka, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. A. Kidyba, Warszawa 2015, n. 2 to art. 952; J. Kuźmicka-Sulikowska, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. E. Gniewek, Warszawa 2021, n. 1 to art. 952; K. Osajda, op. cit., n. 15 to art. 952; J.S. Piątowski, B. Kordasiewicz, *Prawo spadkowe. Zarys wykładu* [Inheritance Law. Outline of the Lecture], Warszawa 2011, p. 113.

disease during a pandemic. There is no doubt that an epidemic can be such an extraordinary circumstance[113] and a contagious disease or even the epidemic itself can cause such imminent danger[114]. The latter case, when the imminent danger of death can be verified on the basis of objective criteria, is simpler to assess. The problem of an epidemic as an "extraordinary circumstance" is more complex.

In the case of an extraordinary circumstance, the nuncupative will is permissible only provided that it is not possible or very difficult for a will to be made in the ordinary form. In other words, an extraordinary circumstance itself is not sufficient if at least one of the ordinary wills remains possible and can be used without great difficulties[115]. In the assessment of those circumstances only the difficulties faced by the testator are taken into account; the fact that somebody can help him to overcome them, e.g. fetch him a notary, is irrelevant[116]. In fact, this reservation is of critical importance because it greatly limits the scope of application of the form. In many cases in spite of the extraordinary circumstance, the holograph will, notarial deed or nuncupative will by public act (before the head of a municipality)[117] can still be made. In particular, an epidemic, as a rule, does not exclude or obstruct the possibility of using one of the ordinary forms, especially the holograph will usually remains possible, the notarial offices are still open or a notary can visit the testator at home, so the prerequisites of a nuncupative will are met only in very rare cases[118]. The state of an epidemic does not have to be declared officially; however, such an official declaration or adoption of appropriate preventive measures in the public space may facilitate the evidentiary situation[119]. Besides the epidemic a stay in an infectious disease hospital or in quarantine may also be regarded as

113 S. Wójcik, F. Zoll, op. cit., p. 312; W. Borysiak, *Funkcjonowanie*, p. 29; E. Skowrońska-Bocian, J. Wierciński, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. J. Gudowski, Warszawa 2017, n. 12 to art. 952; J. Kuźmicka-Sulikowska, op. cit., n. 3 to art. 952; L. Kaltenbek-Skarbek, W. Żurek, *Prawo spadkowe* [Inheritance Law], Warszawa 2012, p. 46; H. Witczak, A. Kawałko, *Prawo spadkowe* [Inheritance Law], Warszawa 2014, p. 94; J. Knabe, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. J. Ciszewski, Warszawa 2021, n. 8 to art. 952; K Osajda, op. cit., n. 28 to art. 952.

114 K. Osajda, op. cit., n. 28 to art. 952.

115 S. Wójcik, F. Zoll, op. cit., p. 312; W. Borysiak, *Funkcjonowanie*, p. *29;* K. Osajda, op. cit., n. 29 to art. 952; J. Kuźmicka-Sulikowska, op. cit., n. 3 to art. 952, M. Załucki*, Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. M. Załucki, Warszawa 2021, n. 4 to art. 952, cf. M. Pazdan, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. K. Pietrzykowski, Warszawa 2021, n. 7; J. Knabe, op. cit., n. 1 to art. 952; B. Kucia, Kod*eks cywilny. Komentarz* [Civil Code. Commentary], ed. M. Fras, Warszawa 2018, n. 18 to art. 952.

116 W. Borysiak, *Funkcjonowanie*, p. 29; E. Skowrońska-Bocian, J. Wierciński, op. cit., n. 13 to art. 952; J. Kuźmicka-Sulikowska, op. cit., n. 3 to art. 952.

117 Art. 951 of the civil code.

118 K. Osajda, op. cit., n. 39.1 to art. 952; M. Załucki, op. cit., n. 4 to art. 952.

119 K. Osajda, op. cit., n. 28 to art. 952.

an extraordinary circumstance[120]. The difficulties with the ordinary forms of a will in all these circumstances should still be proved.

In theory, this exceptional form of a will has a narrow field of application; nevertheless, the practice is considerably different because this form is very often overused[121]. The nuncupative will is very popular and is the third form in terms of frequency of use, after the holograph will and notarial deed[122]. In many cases this exceptional form should not be even taken into account, but in fact is regarded as a simple alternative to an ordinary form, which is not justified and can bring about the invalidity of the will.

In a nuncupative will the testator declares his or her wishes orally in the simultaneous presence of at least three witnesses. The most important difference from the holograph will is the oral form of declaration, which is of crucial importance when the testator is illiterate or physically incapable of writing[123]. In turn, the most important difference from the notarial form is the lack of need to engage a notary, which is particularly important when the testator does not have access to a notary. During an epidemic a testator who is illiterate or unable to write can encounter serious difficulties in engaging a notary, but it is a rather rare case. In contrast to the Italian law there is no possibility of making a will before other people of public trust, with the reservation that a testator may decide to take advantage of the form of nuncupative will by public act, where he declares his wishes orally to the head of the municipality in the presence of two witnesses. In Poland that is an ordinary will, albeit far less popular than the special nuncupative will.

These simplifications are balanced by the requirement of the simultaneous presence of at least three witnesses to give the guarantee that the testament will not be falsified and the order of inheritance will be compatible with the testator's will. In contrast to Spanish or Italian law there is no special regulation of the minimum age of the witnesses, but they must fulfil general requirements of being testamentary witnesses, so they must have full capacity for legal acts, know the language in which the will is made, cannot be blind, deaf, mute or illiterate[124]. Apart from these general exclusions, there is a relative incapacity, which refers to an individual for whom or for whose spouse or close relative any benefit is envisaged in the will[125]. The witness cannot be personally directly or

120 S. Wójcik, F. Zoll, op. cit., p. 312; W. Borysiak, *Funkcjonowanie*, p. 29; J. Kuźmicka-Sulikowska, op. cit., n. 3 to art. 952; J. Knabe, op. cit., n. 8 to art. 952; B. Kucia, op. cit., n. 18 to art. 952.

121 S. Wójcik, F. Zoll, op. cit., p. 310; K. Osajda, op. cit., n. 17, see the examination of case files carried out by W. Borysiak, *Funkcjonowanie*, pp. 97 ff.

122 E. Skowrońska-Bocian, J. Wierciński, op. cit., n. 1 to art. 952; J. Knabe, op. cit., n. 2 to art. 952.

123 The testator's "shaking hand" or hand paresis are two of the most frequent reasons indicated in the case law as a ground for a nuncupative will (W. Borysiak, *Funkcjonowanie*, p. 30).

124 Art. 956 of the Polish civil code.

125 See the details in art. 957 of the Polish civil code.

indirectly interested in the content of the will to exclude any negative impact on his activity.

The presence of the witnesses must be simultaneous[126]; thus they should gather together with the testator in the same place and at the same time and be aware of being testamentary witnesses[127]. They should listen to the testator's declaration, understand it and remember its content[128] and cannot exert any influence on the content[129]. According to the dominant view, the witnesses do not have to be specially summoned[130]. During an epidemic a testator may find it difficult to collect at least three individuals who are not personally interested in the inheritance, especially when he has already caught the infection. The difficulty becomes enormous when the testator must stay at home in quarantine and should avoid meeting anyone. Here one faces the same problem as in Roman law: how to reconcile the danger and fear of infection with the requirement of the simultaneous presence of several people. In modern times this problem could be easily solved by the application of new technology, especially means of distance communication, but *de lege lata* they seem inadmissible[131]. *De lege ferenda* remote witness participation and videoconferencing are postulated[132].

The content of a nuncupative will must be established, which is possible in two different ways. Firstly, the 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. The place and date of the declaration as well as the place and date of the written instrument should be given. The document should be signed by the testator and two witnesses or all witnesses[133]. The names of the testator and witnesses should be indicated therein, unless they sign the document[134]. This document can be prepared both before and after

126 Judgement of the Supreme Court of 11.03.1998, III CKN 398/97, J. Kuźmicka-Sulimkowska, op. cit., n. 5 to art. 952.

127 Judgement of the Supreme Court of 10.12.1998, I CKN 924/97; W. Borysiak, *Funkcjonowanie*, pp. 48 ff.; E. Skowrońska-Bocian, J. Wierciński, op. cit., n. 23 to art. 952; J. Knabe, op. cit., n. 12 to art. 952.

128 Judgement of the Supreme Court of 23.08.2019, II CSK 177/18; S. Wójcik, F. Zoll, op. cit., p. 315; W. Borysiak, *Funkcjonowanie*, op. cit., pp. 48 ff.; E. Skowrońska-Bocian, J. Wierciński, op. cit., n. 25 to art. 952; E. Niezbecka, op. cit., n. 10 to art. 952; J. Knabe, op. cit., n. 11 to art. 952.

129 J. Knabe, op. cit., n. 10 to art. 952.

130 Judgements of the Supreme Court of 05.07.2006, IV CSK 419/05 and 11.03.2011, II CSK 379/10. All views are described in detail by W. Borysiak, *Funkcjonowanie*, pp. 44 ff.

131 B. Kucia, op. cit., n. 31 to art. 952.

132 M. Załucki, *Preparation of wills in times of Covid-19 Pandemic - selected observation,* "Journal of Modern Science" 2020, no 2/45, pp. 146 ff.

133 Art. 952 §1 of the Polish civil code.

134 E. Skowrońska-Bocian, J. Wierciński, op. cit., n. 36 to art. 952; J. Knabe, op. cit., n. 16; B. Kucia, op. cit., n. 42 to art. 952.

the testator's death, but not later than one year after his declaration[135]. It is not a will, but it only proves that the nuncupative will was made[136]. Secondly, if the content of the nuncupative will is not established in the way described above, it may be established within six months of the succession being open, 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 that are difficult to overcome, the two consistent testimonies may suffice[137]. The testimonies of the witnesses about the content of the will must be fully consistent; otherwise, they do not establish the will[138]. That alternative way is possible only after the testator's death and it is useless when the will is already properly established by the first method[139].

The effectiveness of the nuncupative will is time-limited. Like other special wills, it loses effect six months after the circumstances justifying failure to observe the ordinary will form cease to exist, unless the testator dies before the end of this period. It is another crucial difference from the ordinary will, which gives the nuncupative will a temporary character[140]. After the particular circumstances cease to exist the testator should draw up an ordinary testament as a much safer instrument that offers a testator more reliable guarantees for the protection of the testator's intention[141]. Another justification for this solution is the evidential difficulty in ascertaining that the nuncupative will was properly and effectively made and what content it had[142].

135 E. Skowrońska-Bocian, J. Wierciński, op. cit., n. 41 to art. 952; J. Knabe, op. cit., n. 18 to art. 952, the possibility of establishing the will after the testator's death is criticized by some scholars because it increases the risk of a falsification (for details see W. Borysiak, *Funkcjonowanie*, pp. 83 ff.).

136 W. Borysiak, *Funkcjonowanie*, p. 94; E. Niezbecka, op. cit., n. 17 to art. 952; J. Kuźmicka-Sulikowska, op. cit., n. 15 to art. 952; B. Kucia, op. cit., n. 34 to art. 952; K. Osajda, op. cit., n. 121 to art. 952.

137 Art. 952 §2 of the Polish civil code.

138 S. Wójcik, F. Zoll, op. cit., p. 319; W. Borysiak, *Funkcjonowanie*, p. 83; E. Skowrońska-Bocian, J. Wierciński, op. cit., n. 45 to art. 952; E. Niezbecka, op. cit., n. 13 to art. 952; B. Kucia, op. cit., n. 54 to art. 952.

139 W. Borysiak, *Funkcjonowanie*, pp. 76 ff.; B. Kucia, op. cit., n. 49 to art. 952; J. Kuźmicka-Sulikowska, op. cit., n. 6 to art. 952.

140 S. Wójcik, F. Zoll, op. cit., p. 325; M. Załucki, *Kodeks*, n. 1 to art. 955.

141 S. Wójcki, F. Zoll, op. cit., p. 324

142 . J. Haberko, *Kodeks cywilny. Komentarz* [Civil Code. Commentary], ed. M. Gutowski, Warszawa 2019, n. 1 to art. 955.

## VI. Conclusions

All the above-described forms of wills appropriate for the time of an epidemic have the common purpose to facilitate the making of a will in such specific and severe circumstances. They can all be described as an emergency will, due to the extraordinary circumstances of their application, even though the Spanish form is not qualified as special. It should be stressed, however, that only the *testamentum tempore pestis conditum* was the real and practically important simplification in comparison with the very intricate form of the Roman ordinary will. All modern alleviated forms of a will have at least one reasonable and relatively simple alternative – a holograph will, which is possible, provided that the testator is physically and mentally able to write and has the necessary writing tools, without the need to engage others in the process, especially an official (notary) or witnesses. It seems that the need to simplify the testamentary formalities due to the impediments and risk caused by a contagious disease was more compelling in ancient times than today. Moreover, the choice of forms is wider today than in Diocletian's time and the forms available today differ considerably, so the position of the contemporary testator is better than in antiquity. It does not mean, however, that all the emergency or special wills are superfluous; on the contrary, they are still useful in extraordinary circumstances. Nevertheless, an oral will is particularly susceptible to abuse[143], being the most often falsified[144].

The reasons for the simplification of testamentary formalities in all the examined systems are similar, but not identical. The rescript of Diocletian was motivated by fear of contagion that seized the witnesses, while today the serious impediments result first of all from many restrictions imposed by the authorities, especially the limited freedom of movement and hindered access to a notary. Naturally, the fear of infection itself still plays a certain role, which is why the number of witnesses and their duties in the testamentary proceeding are reduced.

In Italy and Poland there is no free choice between the ordinary and the special form of a will. In the event of an epidemic, the special form is admissible only if the ordinary form is impossible or seriously difficult. The relation between these forms can pose a problem because the availability of the ordinary form should be assessed in every case; moreover, abuse of the special form can result in nullity of the will. The Roman testator did not have the dilemma of such a choice because the alleviated form was only a special version of the ordinary form, not a formal alternative to the latter. It was not necessary to assess if in

143 S. Wójcik, F. Zoll, op. cit., p. 317 K. Osajda, op. cit., n. 26 to art. 952.
144 E. Skowrońska-Bocian, J. Wierciński, op. cit., n. 1 to art. 952, W. Borysiak, *Funkcjonowanie*, p. 2.

spite of the epidemic the ordinary form was available, and consequently, there was no sanction for wrong assessment.

Only in Roman law was the special form of will applicable provided that the testator was already ill; in modern systems the state of the epidemic in itself is sufficient ground. The health condition of the testator is taken into account in a different light, namely to assess if he was able to use, ordinary form.

The level of simplification in comparison with the ordinary wills is different in each of the forms. None of them can be seen as a simplification of a holograph will, but only as an alternative to the holograph will, where the latter is very difficult or impossible. The comparison is thus sensible only between the simplified form and the ordinary forms other than the holograph will. In Roman law the alleviation of testamentary formalities was very limited and referred only to the gathering of witnesses and testator in one place and time; all other requirements had to be satisfied. Even the high number of witnesses (seven) and their duties in the testamentary proceeding remained the same. Nowadays, the simplification is visible in comparison with a form requiring the involvement of a notary or an official, mostly due to the fact they can be replaced by a different official with witnesses (Italy) or only witnesses (Spain, Poland). The age of witnesses can be lower in Spain and in Italy.

In all the wills designed for the time of epidemic the essential guarantee of the correctness, honesty and authenticity of the testamentary proceeding relies on the witnesses. They should fulfil some formal requirements: in particular, they must not have a personal interest in the inheritance. Their presence should be simultaneous with the necessity to keep social distance and other precautions.

Unlike the Roman *testamentum pestis tempore conditum,* its modern equivalents are only provisional because they lose effect in a short time (no more than six months) after the circumstances justifying failure to observe the ordinary will form cease to exist unless the testator dies before the end of this period. The basic assumption is that the special will should be replaced quickly by one of the ordinary forms if they are available. The simplification of the formal requirements is only temporary, to facilitate the testamentary proceeding only for the time when it is necessary and a reasonably short time afterward.

In all the modern systems the content of the oral declaration made by the notary should be established, especially reduced in writing. In Poland alternatively the will can be established by the consistent testimonies of the witnesses given before a court. Only in Roman law did the declaration given orally not have to be written down soon after being made.

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**SUMMARY**

**A Will Made During an Epidemic – Roman *testamentum pestis tempore condictum* and Selected Modern Regulations**

In this article I deal with the problem of making a will during an epidemic and simplifications in the testamentary formalities that are necessary to facilitate a testator to validly express his or her wishes in such difficult and specific circumstances. I analyse *testamentum tempore pectis conditum* in Roman law and its modern equivalents in Spanish, Italian and Polish law. I compare preconditions of applicability of the special forms of a will in those systems and the simplifications introduced therein. The oldest special form of a will was recognized in the constitution of Diocletianus and Maximianus issued in 290 and it was a relaxed form of a will, applied only after the outbreak of severe epidemic. The relaxed form took into consideration the danger of infection, the fear of the witnesses who were to seal the testamentary deed and the difficulty faced by a person who planned to make a will. *Testamentum pestis tempore conditum* was applied when a person who suffered from an infectious disease during the epidemic which spread in his locality wanted to draw up his will. It did not suffice that there was pestilence as such or that a person who was to act as a witness was infected by the disease if the testator remained healthy. The relaxation of formalities concerning the making of a will was that the witnesses did not have to perform their task in a close contact with the sick testator, however they still had to come together at a place which was some distance away from the testator and stay in his presence. Spanish law recognized a will made in the event of an epidemic, which may be executed without the intervention of a notary, before three witnesses older than sixteen years. It is allowed only in the event of an epidemic that devastates the population and puts people's health at serious risk. It is not necessary that the testator himself or a potential witness is already sick. In Italy a will made in the event of contagious disease belongs to the group of special testaments and is regulated in the same provision as a will made in the event of public calamity or accident. It is available only when it is not possible for the testator to use an ordinary will and valid if it is received in the presence of two witnesses over sixteen years of age, by a notary, by a local magistrate or justice of the peace, or the mayor or his deputy or by a clergyman. Under Polish law there is no special form exclusively dedicated to the outbreak of a contagious disease or an epidemic, but a special form called a nuncupative will is applied. It can be used either in imminent danger of death or in extraordinary circumstances in which it is not possible or very difficult for a will to be made in the ordinary form. In this form the testator declares his or her wishes orally in the simultaneous presence of at least three witnesses.