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Selected Aspects of Testaments Made by Elderly People in Chilean and Polish Law[1]

Abstract: The subject of this study is an analysis of the Chilean and Polish legal orders in terms of ensuring the correctness (and thus the validity and effectiveness) of making a will, with particular emphasis on the legal situation of elderly people with old-age dysfunctions. This issue has an important social dimension in the face of the global ageing trend and age-related progressive senile dementia. Showing the legal solutions regarding testamentary inheritance in Chilean law, as a law based on the Roman tradition, as well as the positions of jurisprudence, has not only a cognitive value. It should be assumed that the analysis of both legal orders will allow for the formulation of conclusions regarding the applicable legal regulations in the field of inheritance law in relation to the phenomenon of ageing societies on a global scale. This article also provides a comment on the law applicable to the capacity to

1 This publication comparing Polish and Chilean law has been prepared as part of the NCN OPUS 22 project entitled 'Zdolność do uczestnictwa w obrocie cywilnoprawnym osób starszych. Instytucje wsparcia – perspektywa prawna' (*The elderly ability to engage in civil-law transactions. Support institutions – a legal perspective)*, funded by the National Science Centre, Poland, contract no: UMO-2021/43/B/HS5/00916.

make a will in Chilean and Polish law. Similarity between regulations pertaining to the capacity to make a will in Chilean and Polish law does not eliminate the obligation to determine the law applicable in this regard.

Keywords: ageing, old-age dysfunctions, capacity to make a will, Chilean law, conflict of laws, Polish law, testamentary inheritance

Introduction

In Chile, according to data from the National Institute of Statistics, 6,484 testaments are enacted annually, the annual average figure for the last ten years, of which 65% are to women. According to the 2017 census data, there are more than 2 million people over the age of 65, which is 11.4% of the population. In this segment, approximately 360,000 people are over 75. If we take deaths in Chile in a year without COVID-19 as an example, such as 2017 itself, 119,914 people died in the country, a mortality rate of 6.08%.[2] As can be seen, the number of testaments is extremely low in the country, so the vast majority of people who die do so without leaving a testament, so the rules governing this type of succession are those established by the Civil Code (CC),[3] based on the Roman tradition.[4]

The rules for no testament succession, for those who do not leave a testament or who leave a testament but do not dispose of their assets in the manner ordered by law, are governed by Arts. 980 *et seq*. CC. No testament succession rules govern, firstly, in cases where the deceased has not made a testament, secondly, if the deceased has made a testament but has not done so in accordance with the law and, thirdly, when the deceased has made a testament, has done so according to the law, but the testamentary provisions have no effect.

A similar tendency towards an ageing population is also visible in Poland. In the years 1989–2014, the number of elderly people in Poland increased by over 2.9 million.[5] There are also studies showing that the share of elderly people in the Polish population will increase to 40.4% (13.7 million) by 2050.[6] According to the data of the Central Statistical Office, as of 31 December 2021, the old-age index is 122, i.e. for every 100 'grandchildren' (children aged 0–14) there are 122 'grandparents' (people aged 65 or more), and the difference in the size of these populations is 1.3 million, to the disadvantage of children. (In cities it reaches 1.4 million, and in rural areas, where there are still more children, 169,000.) It needs to be clearly noted that the old-age in-

2 See Microdatos Censo 2017, http://www.censo2017.cl/microdatos/ (19.07.2023).

3 Civil Code of 14.12.1855.

4 F. Olszówka, Chilijski kodeks cywilny i przyczyna jego sukcesu, 'Czasopismo Prawno-Historyczne' 2022, vol. 74, p. 110.

5 Central Statistical Office, Population aged 60+. Demographic structure and health, Warsaw 2016, p. 2; see http://stat.gov.pl/obszary-tematyczne/osoby-starsze/ (19.07.2023).

6 *Ibidem*, p. 9.

dex increases year by year (in 2020 it was 119).[7] Undoubtedly, elderly people are also the social group that statistically will die the fastest.

As in Chile, writing wills is not an activity preferred by Poles. According to research, only 8% of people surveyed over the age of 45 have made a will, so statutory inheritance predominates.[8] The principle of freedom in making a will applies in Polish law. According to Art. 926 § 2 Kodeks Cywilny (KC),[9] statutory inheritance of the entire inheritance occurs when the testator has not appointed an heir or when none of the persons he or she has appointed want to or can be an heir.

1. Rules for making a testament – general considerations

1.1. Formalities regarding the testament in Chile

A testament is defined in Chile in accordance with Arts. 999 *et seq*. CC as a more or less solemn act in which a person disposes of all or part of his/her assets so that it has full effect after his/her life, preserving the faculty to revoke the provisions contained therein for as long as one lives. In accordance with Art. 1003 CC, the testament is an act of a single person; therefore the testamentary dispositions by which the testator leaves part of the assets to a person are not valid, under the condition that this person leaves another personsome part of his/her own by testamentary dispositions. The law does not accept or prohibit a so-called joint or brotherhood testament. Each testament must be made by a single person because it is a very personal act, but the law does not prohibit two people from testifying reciprocally, one for the benefit of the other, as long as they do so in different acts. The power to make a testament cannot be delegated, as established in Art. 1004 CC. This means that a testament cannot be granted through a legal representative or through an agent. Therefore, an adult who is relatively legally incapable and a person declining in health or with a disability can validly grant a testament. The rule according to which the power to make a testament cannot be delegated is of public order; a consequence of this is the rule of Art. 1063 CC, which provides that '[t]he determination of an assignee, be it absolutely, or from among a certain number of people, shall not depend on the pure will of others'. This means that the choice of any heir can never depend on the sole will of other peo-

7 Central Statistical Office, Population. Status and structure as well as vital statistics by territory in 2021, Warsaw 2022, p. 10; see https://stat.gov.pl/obszary-tematyczne/ludnosc/ludnosc/powierzchnia-i-ludnosc-w-przekroju-terytorialnym-w-2022-roku,7,19.html,terytorialnym_na_31–12-2021.pdf.

8 Biznes, Polacy nie doceniają wagi testamentu. Tylko 8 proc. Osób powyżej 45. roku życia zdecydowało się na jego spisanie, https://biznes.newseria.pl/news/polacy-nie-doceniaja-wagi, p1860074453 (19.07.2023).

9 Kodeks Cywilny of 23.04.1964.

ple but only on the person who makes the testament.[10] It is possible in a testament to recognize children, designate a splitter, designate an executor of the testament, etc. These are declarations and not dispositions of assets.

According to Art. 1005 CC, the following are not able to make a testament:

- a prepubescent, because they are absolutely legally incapable,
- persons under interdiction due to insanity; in such cases, a testament shall be considered null and void, even if the person claims to have granted it in a lucid interval. On the other hand, if the insane person is not placed under interdiction, it is necessary to prove that s/he was insane at the time of granting the testament, and if s/he proves that s/he granted it in a lucid interval, the testament is a valid act,
- whoever is currently not in his/her right mind due to drunkenness or other causes. Drug addicts are also included in this group,
- anyone who cannot express their testament clearly. This category also encompasses the deaf who cannot make themselves understood.

People not included in this list are able to grant a valid testament.[11]

The testator must be capable of making a legal act of will at the time of granting the testament, regardless of whether on the following day they fall into a cause of incapacity or have incapacity to make a testament.[12] From this precept it follows that the adult are capable of granting a testament, because they are not listed among the persons unable to make a will.[13]

1.2. Comparison with Polish law

The legal regulation of the principles of making wills in Polish law is contained in Art. 941 KC. In Polish terms, a will is a disposition of the testator's property in the event of death. This concept is assigned two meanings: as a unilateral legal act or as a document.[14] As in Chilean law, a will contains a declaration of the will of one testator, because a prohibition on joint wills is expressed in Art. 942 KC. This does not preclude the testamentary appointment of 'each other'. The name of such dispositions, i.e. 'fraternal wills' or 'joint–joint' wills, adopted in Chilean jurisprudence, is worth considering in Polish jurisprudence.

10 F. Rozas Vial, F.J. Allende Decombe, M. Astaburuaga Suarez, J.P. Diaz de Valdes, Sucesión por causa de muerte: Historia, textos, jurisprudencia y comentarios, Santiago 1985, p. 927.

11 M. Somarriva Undurraga, R. Abeliuk Manasevich, Derecho sucesorio, explicaciones de clases revisadas por el profesor, Santiago 2005, pp. 193–231, 528–543.

12 P. Rodriguez Grez, Instituciones de derecho sucesorio, Santiago 1993, p. 190.

13 For cases of Chilean jurisprudence in which different nullity hypotheses are analysed, see M. Barrientos Zamorano, Derecho sucesorio metodología de casos, Valencia 2019, pp. 35, 67, 71.

14 E. Skowrońska-Bocian, Prawo spadkowe, Warsaw 2010, p. 71.

Similarly to Chilean law, Polish law prohibits the drawing up of wills by a representative, as it is a personal legal act (Art. 944 § 2 KC). There is also a similarity in the admissibility of making a will only by persons with full legal capacity, as a consequence of which a completely incapacitated person will not be able to draw up a valid will. Also in Polish law, a will may be revoked at any time until death. According to Art. 946 KC, a will may be revoked either by the testator making a new will, by destroying the will or depriving it of the features that make it valid in order to revoke it, or by making changes to the will.

Comparing the regulation relating to the content of a will, it should be noted that in Polish terms, it contains the disposition of the testator's assets, together with the so-called records and commands. Unlike Chilean law, a child cannot be recognized in a will. However, it is possible to appoint an executor of the will (Art. 986 *et seq*. KC).

2. Validity of a will – general considerations

2.1. Possible grounds for nullity of a testament in Chile

The Chilean Civil Code, when dealing with a testament, refers solely and exclusively to force, but this does not mean that the other faults of consent do not operate; it is also considered an error regarding testamentary assignments, in accordance with Art. 1007 CC. The force must be severe, meaning that it causes a serious impact on a sane person, taking into account their age, sex and condition.

The testament can therefore be a solemn or less solemn legal act of will. It is solemn when all the conditions ordinarily prescribed by the law have been observed, and it is less solemn when some of these solemnities can be omitted due to consideration of particular circumstances expressly determined by the law. Less solemn and privileged testaments are verbal, military and maritime testaments. To see the solemnities to which the testamentary act is subject, it is necessary to distinguish whether the testament is granted in Chile or abroad.[15] A solemn testament granted in Chile can be an open, nuncupative or public testament or a closed one. An open, nuncupative or public testament is one in which the testator informs the witnesses of his/her provisions. A closed testament is one in which it is not necessary for the witnesses to be aware of the testator's provisions; it is also called secret.

Whether the testament granted in Chile is open or closed, it is subject to two common solemnities, as follows: it is always written and has the common solemnity of the presence of witnesses, which can be three or five in the open testament or three in the closed testament. Witnesses must be qualified, and Art. 1012 CC indicates

15 F. Elorriaga de Bonis, Derecho sucesorio, Santiago 2005, pp. 185–245.

who is unable to be witnesses in a solemn testament granted in Chile.[16] If any of the expressed causes of incapacity is not manifested in the appearance or behaviour of a witness and is generally ignored in the place where the testament is granted, basing the contrary opinion on positive and public facts, the testament shall not be invalidated due to the real incapacity of the witness; however, the putative ability can only be used for one of the witnesses.

2.2. Comparison with Polish law

Based on the Polish regulations of the Civil Code, it is assumed that a valid will is one that is drawn up in person (Art. 944 § 2 KC) by a natural person with full legal capacity (Art. 944 § 1 KC) in a manner free from defects in the declaration of will (Art. 945 KC), in a form reserved by statute (Art. 958 KC), containing dispositions of only one testator (Art. 942 KC), the content of which is not contrary to the law or the principles of community life and is not intended to circumvent the Act (Art. 58 KC).[17]

Defects in the declaration of will when making a will are regulated by Art. 945 KC. The indicated specific provisions on defects in the declaration of will have a wider spectrum than in Chilean law. In the light of Art. 945 KC, a will is invalid if it was drawn up in a state that excludes a conscious or free decision and expression of will. These conditions can include a lack of discernment, the inability to understand one's own behaviour and the behaviour of others, or not being aware of the meaning and consequences of one's own behaviour. Such a state must result from an internal cause, i.e. from the state of the person making the declaration of will, and not from the external circumstances in which that person has found him/herself.[18]

Also invalid is a will made under the influence of an error justifying the assumption that if the testator had not acted under the influence of the error, s/he would not have made a will of this content. The testator's error in drawing up the will results in its defectiveness when the error was subjectively significant. Another reason that may result in the invalidity of the declaration of will is a threat. This results in the creation of a state of emergency in order to induce the testator to make a declaration of will with a specific content and which causes fear in the testator.[19] The invalidity of the will for the above reasons cannot be invoked after three years from the date on which the person having an interest therein learned of the reason for the invalidity, and in any case after ten years from the opening of the succession.

16 R. Dominguez Águila, R. Dominguez Benavente, Derecho sucesorio, vol. 1, Santiago 1998, pp. 253–413.

17 B. Kucia, (in:) M. Habdas, M. Fras (eds.), Kodeks cywilny. Komentarz, tom 6, Warsaw 2019, pp. 248–249.

18 Judgment of the Supreme Court of 7 February 2006, IV CSK 7/05, Lex No. 180191.

19 M. Maciejewska-Szałas, (in:) M. Balwicka-Szczyrba, A. Sylwestrzak (eds.), Kodeks cywilny. Komentarz, Warsaw 2022, p. 1448.

We distinguish between ordinary and special forms of a will. A will in the ordinary form is a holographic, notarial and allographic will. Special wills are oral, travelling and military wills. The Civil Code specifies the formal requirements for each of these forms of will, the failure to comply with which results in the invalidity of a testament.

As in Chilean law, Art. 956 of the Civil Code specifies who cannot be a will witness (absolute and relative ability to be a will witness). Polish law, unlike the law of Chile, does not recognize a closed will, i.e. one in which the provisions of the will are not known to the witnesses and are kept secret. Witnesses must hear the provisions of the will. Polish law also lacks the requirement of two ceremonies. A testamentary declaration drawn up with the participation of witnesses should be written down in the form of a protocol and signed. If the will is made in an ordinary allographic form, the protocol should be signed by the testator, by the person to whom the will was declared (head of the commune, mayor, president of the city, starost, marshal of the voivodeship, secretary of the poviat or commune, or head of the registry office) and by witnesses (Art. 951 KC). If it is a special oral will, its content may be stated in such a way that one of the witnesses or a third party writes down the testator's statement within one year of its submission, specifying the place and date of the statement and of the letter, with the letter signed by the testator and two or all witnesses (Art. 952 § 2 KC).

3. Problems regarding the nullity of a will in relation to the shortcomings of old age

3.1. Chile

The Chilean Civil Code considers someone who 'is not currently sane due to drunkenness or other causes' incapable of making a testament. Consequently, all persons who, at the time of making a testament, for any reason are deprived of reason are included, for instance the insane who have not been declared interdicted due to provisional or permanent insanity, as well as subjects affected by mental illnesses of a different nature or simply those deprived of sanity due to their advanced age or any temporary cause. The grounds of paragraph 4 of Art. 1005 CC consider those who are not in their right mind to be unable to make a testament, either because they are under the influence of alkaloids or because they are insane and are not under interdiction.[20] To declare the nullity of the testament because the deceased was not, at the time of making the testament, in his/her right mind or because s/he was unable to ex-

20 Criterion expressed in Resolution of the Supreme Court, First Chamber (Civil) of 10 May 2017, No. 209113, Cause No. 68724/2016 (Appeal).

press his/her testament clearly orally or in writing, 'it is necessary that the evidence attached to the records shows irrefutably said inability to make a testament'.[21]

The signs of old age, decrepitude, ailments or physical decay do not lead by themselves or necessarily to mental insanity, the absolute inability requirement. Such arrangements are subject to court rulings.

It has been resolved that sanity of judgement is presumed in every person who has not been previously incapacitated, since every person must be considered in his/her right mind as a normal attribute of being; therefore, with regard to the right to make a will, the indispensable mental integrity constitutes a *iuris tantum* presumption that forces the consideration that the testator has full capacity which can only be destroyed by more 'evident and complete' evidence to the contrary, very completely and convincingly and of unequivocal 'force'. Whatever the latest anomalies and evolution of the disease, even in a latent state, in the subject, given the difficulty of knowing where reason ends and madness begins, the law requires and consecrates the jurisprudence that the incapacity attributed to a testator has been demonstrated. The testator's lack of capacity due to mental illness must necessarily refer to the precise moment of making the testamentary statement, and the notarial statement about the testator's capacity acquires special relevance of certainty. Such a situation lasts until his/her incapacity is fully demonstrated in court, destroying the strong presumption *iuris tantum* that reveals the act of granting.[22]

Likewise, it has been established that neither illness nor dementia prevent the free exercise of the faculty of testament, since there are lucid intervals; the advanced age of the testator is also an insufficient circumstance to establish incapacity. In this case, the idea is emphasized that the disease must not only exist at the time of making the will, but also must meet the requirement of being able to affect their cognitive capacity in such a way that the disability or mental condition must be so serious that it goes to the extreme of making the psychic personality disappear in the life of the person who suffers from the disease, to the exclusion of awareness of their own actions.[23]

In the absence of totally and irrefutably symptoms limiting will at the date of the testament, or another disease that deprives someone of the sanity to make a will, the validity of the testament must be opted for, not its nullity. The signs of old age, ailments or physical decline do not necessarily lead to mental insanity; this point must be proven in terms that leave no room for doubt about the capacity of the testator.[24] Moreover, if a 51% incapacity for work of the grantor of the testament were to be es-

21 Judgment of the Supreme Court of 21 November 1991, GJ, No. 137, p. 44.

22 A. Alessandri Besa, La nulidad y la rescisión en el derecho chileno, vol. 2, Santiago 2008, pp. 9–20.

23 Resolution of the Court of Appeal of Valdivia of 11 August 2016, No. 28105, Cause No. 301/2016 (Civil).

24 Resolution of the Court of Appeal of San Miguel of 23 March 2012, No. 10804, Cause No. 129/2012 (Civil).

tablished, this type of work is an antecedent that does not affect their mental and volitional condition, and as a consequence of this, a testament granted in this condition is perfectly valid.

With respect to the role played by the notary in the annulment of the testament in Chile, Art. 1016 CC states that the notary must indicate in the act 'the circumstance of [the testator] being in his entire judgement' at the time of making a testament. The notary's statement is made by a non-medical professional to whom the legislator has entrusted such a mission, in his/her capacity as a minister of faith.[25] It is not the notary who can declare the testament null and void, since the law reserves this power to the judge, after a trial. The notary acts as a minister of faith and declares what s/he sees, but s/he is not, in any case, an expert in neurocognitive disorders so cannot determine if there is cognitive deterioration, unless, due to the behaviour of the testator, s/he perceives in the short time in which s/he makes contact with him/her that s/he is not in his/her entire judgement. That is why, as a way of protecting their civil liability in the face of the declaration they make about the cognitive situation of the testators, notaries in Chile request and insert in the deed of the testament act, protocolizing it, a certificate from any doctor who declares that the testator is not in his/her whole judgement. There is no requirement, in practice, that the reporting medical professional must be a geriatrician, neurologist or psychiatrist. Thus, the only thing that is achieved with this notarization is to constitute evidence in favour of the notary for eventual civil liabilities; it does not necessarily protect the testator or the person in a state of fragility.[26]

It has been indicated in the jurisprudence that

> as regards the statement of the acting notary regarding the circumstance that the testator is 'apparently in his right mind', and not 'in his entire judgement', as the aforementioned legal norm would prescribe, it should be noted that the requirement established by the legislator should not be understood literally, but in a logical and systematic way, since the limited appreciation that may be required of professionals in legal areas, who are manifestly not technical in the field, must necessarily be taken into account, to be able to appreciate all the manifestations of a dementia or mental disorder.[27]

It has also been indicated that

> although it is the duty of the notary before whom the solemn testament is authorized to express in it, among other circumstances, that the testator is in his right mind, this official lacking the special scientific knowledge that is sometimes required to recognize the true state of the mental faculties of the testator or the disturbances that an illness may cause him, that requirement of the law can only refer

25 Judgment of the 15th Civil Court of Santiago of 27 December 2010, Cause No. C-33513–2008.

26 L. Cares, Cognitive and Legal Aspects in Older People, 'San Juicio Revista médica de Chile' 2020, no. 8, pp. 1183–1188.

27 Judgment of the 15th Civil Court of Santiago, *op. cit.*

> to the apparent state of the testator at the time of making his provisions known to the notary public and the witnesses […] notary only testify to the fact by its apparent manifestation, testimony that has legal effects until the contrary is proven.[28]

3.2. Poland

Similar to Chilean law, the age of the testator may affect the validity of the will in Poland due to progressive senile dementia. When analysing the issues related to the making of a will by elderly people, two particular circumstances that may be important in determining the validity of a will should be discussed. The first is the total incapacitation of an elderly person, and the second is the institution of defects in the declaration of will when making a will, and especially its preparation by an elderly person in the absence of awareness or freedom in making a decision and expressing will.

Total incapacitation, in the light of Art. 13 KC, may be adjudicated against a person who is over 13 years of age and who, due to mental illness, mental retardation or other mental disorders, in particular alcohol or drug addiction, is unable to control his/her conduct. The prerequisite for incapacitation is being over 13 years of age and having the inability to control one's behaviour caused by circumstances specified by the legislator: as a result of mental illness, mental retardation or other types of mental disorders.[29] Other indicated circumstances of disorders are exemplary in nature, which means that they may also be other mental disorders caused by various circumstances. The literature and jurisprudence indicate that senile dementia is a circumstance that may be the basis for total incapacitation.[30]

The effects of total incapacitation are far-reaching.[31] Such a person is deprived of legal capacity and, consequently, cannot effectively perform legal transactions. The exception is defined in Art. 14 § 2 KC, but it applies only to current activities of everyday life, and activities in the field of inheritance law cannot be considered as such. As a consequence, an incapacitated elderly person is deprived of the ability to make a will, and inheritance will take place only on statutory terms. Thus the property of an incapacitated elderly person cannot be freely disposed of in the event of their death. These limitations are important in view of the numerous cases in Poland of adjudicat-

28 Resolution of the Court of Appeal of Valparaíso of 29 October 2012, No. 78156, Cause No. 1263/2012 (Civil).

29 Decision of the Supreme Court of 18 May 1972, II CR 138/72, Lex No. 1436; Judgment of the Supreme Court of 5 February 1965, I CR 356/64, Lex No. 291; Decision of the Supreme Court of 19 August 1971, I CR 297/71, OSNC 1972/3/53.

30 M. Tomaszewska, Oblicza starości osób ubezwłasnowolnionych a wykluczenie społeczne, (in:) W. Wilk, M. Gołowkin-Hudała (eds.), Prawne aspekty starości, Warsaw 2014, p. 123.

31 The exclusionary nature of incapacitation th is the subject of debate in Polish scholarship; see M. Balwicka-Szczyrba, A. Sylwestrzak, Instytucja ubezwłasnowolnienia w perspektywie unormowań Konstytucji RP oraz Konstytucji ONZ o prawach osób niepełnosprawnych, 'GSP' 2018, vol. 40, p. 163.

ing incapacitation of elderly people with dementia.[32] It has already been pointed out that pursuant to Art. 944 § 2 KC, a will in Polish law cannot be drawn up by a representative.

The validity of a will drawn up by an elderly person is also affected by psychological elements. It has been noted that making it in the absence of awareness or freedom in decision-making and in expressing one's wishes makes the will invalid. The jurisprudence indicates that the boundary between the state excluding conscious decision-making and it excluding free decision-making and expression of will is very fluid. Making a decision and expressing will is free when both the decision-making process and the manifestation of will have not been disturbed by destructive factors resulting from the properties of the psyche or thought processes of the person making the declaration of will. Generally speaking, factors that exclude consciousness include lack of discernment, inability to understand one's own behaviour and the behaviour of other people, or not being aware of the meaning and consequences of one's own behaviour. Such a state must result from an internal cause, i.e. from the state of the person making the declaration of will, and not from the external circumstances in which that person finds him/herself.[33] Old age and the related deterioration of perception may be the basis for objections regarding the validity of wills drawn up by elderly people.

Referring to the legal situation of elderly people, especially those with progressive dementia, it should be emphasized that the security of civil law transactions upholds the need to support these people in performing legal actions, including actions in the field of inheritance law. Therefore, the recommended form of a will for an elderly person under Polish law seems to be a notarial will. The notary, while ensuring the safety of legal acts should, as a rule, challenge defective acts. It is rightly noted that a notary is not allowed to perform a notarial act if s/he doubts whether the party to the notarial act has legal capacity. It is not about legal capacity within the meaning of Art. 11 KC, but for situations justifying the assumption of a defect in the declaration of will. Therefore, the notary should refuse to perform a notarial act not only when the party to the act is formally incapacitated, but also when there is a reasonable doubt whether they act in a state of sufficient awareness. It is about stating the disability and its degree in relation to the person participating in the activity. In this approach, the notary public plays the role of a 'guarantor' of the validity of the act

32 It is worth noting the current noticeable increase in the number of incapacitation cases. Research conducted by M. Domański showed that in the period 2011–2019, the number of incapacitation cases in regional courts increased by nearly 40%. In the same period, the number of incapacitations adjudicated by courts of first instance increased by nearly 35%. See M. Domański, Analiza możliwości wprowadzenia instytucji pośredniej pomiędzy instytucją kuratora dla osoby niepełnosprawnej (art. 183 k.r.o.) a instytucją ubezwłasnowolnienia, Instytut Wymiaru Sprawiedliwości, Warsaw 2022, p. 15.

33 See Judgment of the Supreme Court of 1 February 2006, IV CSK 7/05, Lex No. 180191.

performed by an elderly person, and therefore this form of will should be considered as particularly dedicated to this social group.

4. Conflicts of laws issue

The similarity between regulations pertaining to the capacity to make a will in Chilean and Polish law does not override the obligation to determine the law applicable in this regard. When trying to determine the law applicable to the capacity to make a will, the Chilean court will in the first place refer to conflict-of-law rules resulting from the Chilean Civil Code and in particular to Art. 14 CC, which lays down the principle of territoriality. Territoriality is the principle according to which laws are dictated for the territory and have their limit within it. Established by Art. 14 CC, it indicates that the law is mandatory for all the inhabitants of the Republic, including foreigners domiciled in Chile and transients. The meaning of Art. 14 CC is that all individuals who inhabit the national territory, whether Chilean or foreign, are subject to Chilean law from the point of view of their persons, property and acts. This also applies to the capacity to make a will. On the other hand, according to the extraterritorial or personal principle, laws are dictated for people and accompany them outside of the territory; this principle is referred to in Art. 15 CC.[34] By virtue of this precept, Chileans will remain subject to the national laws that regulate civil rights and obligations, regardless of their residence in a foreign country, pertaining to the marital status of people and their ability to perform certain acts that must take effect in Chile.

In trying to determine the law applicable in this regard, a Polish court will refer to the EU Succession Regulation,[35] which in Art. 26(1a) provides that the capacity of the testator to make the disposition of property upon death shall be governed by the law applicable to the assessment of the 'substantive validity of dispositions of property upon death', determined under Art. 24 of the regulation.[36] The aforementioned provision indicates that a disposition of property upon death other than an agreement as to succession shall be governed, as regards its substantive validity, by the law which under this regulation would have been applicable to the succession of the person who made the disposition if s/he had died on the day on which the disposition was made. On top of that, a person may choose as the law to govern his/her disposition upon death as regards its substantive validity in accordance with Art. 22 and on

34 E. Picand Albónico, (in:) J. Basedow, G. Rühl, F. Ferrari, P. de Miguel Asensio (eds.), Encyclopedia of Private International Law, Cheltenham 2017, p. 1964.

35 Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

36 M. Pazdan, Zakres zastosowania rozporządzenia spadkowego, (in:) M. Pazdan, J. Górecki (eds.), Nowe europejskie prawo spadkowe, Warsaw 2015, pp. 26–27.

the conditions set out therein. These determinations lead to the conclusion that the issue of a person's capacity to make a will shall be governed, under the Succession Regulation, by the law chosen – or, in the event of no choice being made, the law indicated by objective connecting factors. It should be noted here that the capacity of the person making a will shall not be associated with the legal capacity of natural persons, which is excluded from the scope of the Succession Regulation pursuant to Art. 1(2b),[37] even though it is often the case that the capacity of the person making a will will be determined using the same criteria as the legal capacity of natural persons.

Pursuant to Art. 22 of the EU Regulation, a person may choose as the law to govern their succession as a whole the law of the state whose nationality s/he possesses at the time of making the choice or at the time of death. The EU legislator has only allowed a limited choice; the law of another state must not be chosen by the testator. In the event that the testator has multiple nationalities, s/he may choose the law of any of the states whose nationality s/he possesses at the time of making the choice or at the time of death. The choice of law governing the succession as a whole, including, as regulated by provisions of Art. 26(1a), the capacity of the person to make a will, shall be made expressly in a declaration in the form of a disposition of property upon death (and hence in a will) or be demonstrated by the terms of such a disposition. Considering the wording of the aforementioned provision, the wishes of the testator must therefore be embodied in the will, although the choice can be implicit.

In the absence of a choice of law, pursuant to Art. 21 of the EU Regulation, the law applicable to the succession as a whole (including to the capacity to make a will) shall be the law of the state in which the deceased had his/her habitual residence at the time of death. Nevertheless, where, by way of exception, it is clear from all the circumstances of the case that at the time of death the deceased was manifestly more closely related with another state, then the law applicable to the succession as a whole shall be the law of that other state.[38]

The law determined by these conflict-of-law rules is applicable for the assessment of whether the person who made a will had the capacity to do so and thus whether s/he satisfied the conditions, as required by the law, and qualifications as regards the capacity to decide on the fate of his/her assets upon death and to make a will.

Conclusions

The conducted analysis gives grounds to conclude that both in Chilean and in Polish law, the mere age of the testator does not automatically determine the defectiveness of a will made by him/her. Only disabilities resulting from old age may, in

37 See Art. 1(2b) of the Succession Regulation *in fine*.

38 M. Pazdan, Zakres…, *op. cit.*, pp. 102–103.

some cases, affect the validity of the will. The analysis carried out gives the basis for the following theses and conclusions:

1. In the current context of countries such as Poland and Chile, with an ageing population and increasing cognitive impairment in the elderly population, there is an urgent need to update the regulations that ensure the autonomy of testators in making decisions in a testament act.
2. Few testaments are granted compared to the number of deaths per year in both countries, which suggests that legislation should develop support mechanisms in declarations of will through technical assistance at the time of testament, which would encourage legal certainty in the testament act as a valid instrument for the disposition of assets on the death of a person.
3. The absence of up-to-date scientific criteria in the legislation is substantially critical in the Chilean and also the Polish case, in which the notary only limits him/herself to verifying by appearance and behaviour what is a testator in his/her right mind. A testamentary annulment due to the annulment of the provisions will only be possible after a trial in court, which can be avoided with the adoption of scientific criteria on cognitive impairment at the time of making a testament.
4. The similarity between Chilean and Polish law concerning the capacity to make a will does not allow for the omission of determining which law is applicable in this regard. It is crucial because conflict-of-law rules are different in both legislations.

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