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Testamentary Law in Congress Poland on the example of the files of the Zgierz notaries in the years 1826–1875[1]

1

Contemporary Polish inheritance law provides for testamentary freedom, which means that everyone can freely dispose of their estate in the event of death by way of a will. Testamentary freedom, however, is not obvious and it did not govern inheritance rights in the Polish territory in the First Polish Republic.

Europe, including the Polish territory, saw fundamental changes in inheritance law only in the nineteenth century. The Enlightenment trends promoted the idea of unlimited property law, which was inseparably linked with testamentary freedom. The general principle of testamentary freedom was basically first introduced in modern Europe by the Napoleonic Code (hereinafter: NC) of 1804. In the Polish territory, it was in force with regard to inheritance law during the brief period of the existence of the Duchy of Warsaw, then in Congress Poland, and then from the regaining of independence until 1946.

I would like to discuss modern testamentary law developed in Congress Poland in the nineteenth century, which assumed freedom of disposing of one's property in the event of death as an inherent right of every person, at the same time recognising the rights of their closest relatives.

[1] The article is based on the authors book: J. Bieda, *Testament – prawo a praktyka Królestwa Polskiego. W świetle akt notariuszy zgierskich w latach 1826–1875*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź 2013.

I mostly use nineteenth-century literature and studies from the interwar period, with references to historical and legal works from the twenty-first century[2].

I also draw on the practice exemplified by public, handwritten, and secret wills drawn up by notaries from Zgierz between 1826 and 1875, from the collection of the State Archive in Łódź[3].

2

The legislator gave every individual the right to freely dispose of their property, but the scope of such dispositions of property in the event of death was determined by the rights of the closest relatives, i.e. forced heirs. NC divided estate into a portion reserved for forced heirs and a disposable portion that could be freely disposed of by the testator. For forced heirs, the legislator reserved the so-called compulsory portion to which descendants and ascendants were entitled to, and a statutory portion due to legally acknowledged natural descendants and the spouse.

2.1. What mostly limited testamentary freedom at the time of the bequeather's death was the existence of legitimate children (born to legal marriages). Art. 913 of NC linked the size of the compulsory portion of the inheritance with the existence of legitimate children and their number. If the bequeather had one child, the compulsory portion was half of the estate; in the case of two children, it was two-thirds of the estate; and if there were more children, the portion reserved for descendants was three-fourths of the inheritance[4].

If the bequeather did not leave any descendants, the right to the compulsory portion of the inheritance was transferred to the bequeather's ascendants (Art. 915 of NC). If the bequeather was survived by ascendants in both lines, then the compulsory portion reserved for them was half of the inheritance, and if there were only ascendants in one line, then they were entitled to one-fourth of the estate[5].

2.2

2.2.1. A natural child was a child born to a single man and an unmarried woman[6].

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[2] Cf. *Ibidem*, pp. 16–17.

[3] *Ibidem*, pp. 19–20.

[4] *Prawo cywilne obowiązujące w Królestwie Polskim*, ed. by S. Zawadzki, Vol. 1, Warszawa 1860, p. 665.

[5] *Ibidem*, p. 666.

[6] S. Płaza, *Historia prawa w Polsce na tle porównawczym*, Part II: *Polska pod zaborami*, Księgarnia Akademicka, Kraków 2002, p. 66.

The Napoleonic Code divided natural children into legally acknowledged and unacknowledged. Testators were limited in their freedom with regard to disposing of their property in the event of death only if they had acknowledged their natural children (Art. 756 of NC)[7].

As the legislator did not provide for any separate regulations governing inheritance rights of natural children in cases when there was a will, the doctrine assumed that regulations on statutory inheritance applied[8].

According to Art. 757 of NC, the size of the statutory portion due to a natural child depended on the category of relatives also coming into the inheritance[9].

In case a natural child came into an inheritance along with lawful descendants as provided for in Art. 757 of NC, it was entitled to "one-third of the hereditary portion which the child would have had if he had been legitimate".

If there were no lawful descendants, and a natural child came into an inheritance along with ascendants or the testator's siblings, then it was entitled to a half of the share of the inheritance it would have received had it been lawful. If a natural child was legitimate, the statutory portion was half of the estate (Art. 913 of NC). This is why the statutory portion of the inheritance of a natural child coming into an inheritance along with ascendants or siblings of the testator was one-fourth of the inheritance.

In case only distant relatives of the testator were alive, Art. 757 of NC reserved for a natural child three-fourths of the inheritance share it would have received had it been legitimate. As the statutory portion of the inheritance due to a legitimate child would be a half, then a natural child should receive three-eighths of the inheritance.

Inheritance rights of a natural child could be reduced by a parent by half (Art. 761 of NC)[10].

2.2.2. The issue of inheritance rights of the spouse is more complicated as it has to be considered with regard to the provisions of NC and of the Civil Code of Congress Poland (CCCP), and these solutions were contradictory.

NC granted inheritance rights mostly based on blood ties, so the spouse was not treated as a forced heir: "In default of ancestors and descendants, free gifts by acts during life or by will may exhaust the whole of the property" (Art. 916 of NC).

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[7] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 613.

[8] A. Okolski, *Zasady prawa cywilnego obowiązujące w Królestwie Polskim*, Warszawa 1885, p. 381.

[9] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 614.

[10] *Ibidem*, p. 614.

CCCP assumed that the bequeather was more related to the spouse than to distant relatives and, in order to secure the spouse, granted spouses the status of forced heirs (Art. 232–235). The extent of the statutory portion due to the spouse depended on the category of relatives along whom the spouse came into the inheritance.

CCCP regulated inheritance rights of the spouse with regard to statutory inheritance, however, in Art. 235 it granted the bequeather the right to limit those rights by way of a will or an *inter vivos* act by half[11]. In such cases the surviving spouse received half of the share they would have received had their spouse failed to leave an effective will.

Art. 232 of CCCP granted the spouse coming into an inheritance by virtue of the law along with descendants only inheritance rights for life: "the surviving spouse shall receive from the dead spouse a portion of the inheritance equal to the share due to every child, counting the surviving spouse as one child and leaving them the choice of the portion when dividing the inheritance. The portion due to the spouse shall only be granted for lifelong use".

The portion due to a spouse entering into an inheritance by virtue of the law along with distant relatives of the deceased, in the case of co-inheritance with relatives up to the fourth degree, was one-eighth, and in case co-heirs were relatives up to the twelfth degree, it was one-fourth. In both cases, the spouse was granted property rights to the portion due (Art. 233 of CCCP). In case there were no such relatives or natural children, the spouse received the whole inheritance (Art. 767 of NC). Therefore, in such a situation, the spouse could freely dispose of only half of the property as the other half was due to the surviving spouse[12].

We do not know whether these regulations were observed in the testamentary practice as wills provide no specific information about the circle of forced heirs, the testator's estate and its detailed valuation or any earlier settlements of the bequeather with persons for whom the law reserved a portion of the estate. However, it is assumed that those drawing up their last wills were concerned with the sense of justice rather than provisions of law.

3

3.1

3.1.1. Pursuant to NC, all used notarial deeds were drawn up in the presence of at least one notary: "The will by public act is that which is received by two notaries

[11] *Ibidem*, p. 194.

[12] *Ibidem*, p. 615.

in the presence of two witnesses, or by one notary in the presence of four witnesses" (Art. 971).

Notaries from Zgierz commonly mentioned in notarial deeds that a public will was received in the presence of four witnesses[13]. However, there are doubts whether these notes always reflected the actual course of events. Such deviations can be found in four wills drawn up in the office of Jan Cichocki. In two deeds there are names of only three witnesses even though each of the documents was signed by four witnesses[14]. In the case of a public will drawn up on December 14/24, 1858, it can be suspected that the names of witnesses were added only after the whole deed had been drawn up as the ink used to write down those names is clearly different from the ink used to draw up the whole document[15].

3.1.2. A public will should be drawn up by a notary before whom the testator dictated their last will (Art. 972 of NC). On account of this, the act could not be drawn up earlier by the bequeather and only certified by a notary[16]. Moreover, it was necessary to include a note that the document had been written by a notary. This obligation was properly fulfilled by Zgierz notaries: "the testator […] declared that she demanded me to receive her disposal of property in the form of a last will by public act. Accordingly, I set about drawing up the mentioned deed for […]"[17].

3.1.3. A will should be dictated by the testator in person, and its content should be a record of the words of the person disposing of their property in the event of death (Art. 972 of NC). As a matter of principle, in the section containing the testator's declaration of will public wills are exact records of the words of the person disposing of their estate. This conclusion is based on the character of the language used in the wills, including colloquial phrases, many grammatical errors, and incoherent statements. However, in the case of some of the deeds it is obvious that the notary helped the testator to choose the right phrases to express their will to dispose of their property in compliance with the law.

The law (Art. 972 of NC) imposed an excessively carefully fulfilled obligation to include in a notarial deed a clause stating that the will was a record of the words dictated by the person disposing of their property: "The testator dictated this

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[13] E.g. Archiwum Państwowe w Łodzi [State Archive in Łódź], collection 444, Akta notariusza Jana Cichockigo w Zgierzu (1857–1863) [hereinafter: Jan Cichocki], ref. no. 153.

[14] Jan Cichocki, ref. no. 203, 1386.

[15] Jan Cichocki, ref. no. 2328.

[16] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 680.

[17] Archiwum Państwowe w Łodzi [State Archive in Łódź], collection 439, Akta notariusza Franciszka Boguńskiego w Zgierzu (1827–1846) [hereinafter: Franciszek Boguński], ref. no. 31.

public will to me, the notary writing this deed in my own hand, in the presence of four witnesses, and it reads as follows"[18].

3.1.4. NC imposed an obligation to read out a written public will to the testator in the presence of witnesses and to make a note of this (Art. 972). This provision was carefully followed in notary offices in Zgierz, using a note as follows: "this is how the testator finished his disposition, upon which this deed drawn upon in the presence of four aforementioned witnesses was slowly and clearly read out, and the testator declared it had been written down as he had dictated it and that it was in accordance with his intentions"[19].

3.1.5. A public will had to be signed by the person disposing of their property in the event of death. If the testator could not sign the will, the reason for the lack of their signature had to be given (Art. 973 of NC)[20]. In about 40% of cases, public wills were not signed by testators. The reasons given included the testator's illiteracy or illness[21].

In the notary office of Józef Stokowski, it was common for testators unable to sign their wills to make the sign of three crosses, next to which the notary would write down the testator's full name and add a note that the signs were made by the testator[22].

The requirement of the witnesses' signatures was complied with, however, there were some deviations. For example, in a will drawn up by Józef Stokowski on June 4, 1834, the notary stated that it had been signed by four witnesses, but the document includes signatures of only three witnesses[23].

3.2. Unlike in the case of other will types, drawing up a handwritten will did not require observing any official forms or presence of third parties. "An olographic will shall not be valid unless it be written throughout, dated and signed by the hand of the testator: it is not subjected to any other formality" (Art. 970 of NC). This offered the testator the best possibility of keeping the dispositions made secret.

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[18] Archiwum Państwowe w Łodzi, collection 441, Akta notariusza Romana Jarońskiego w Zgierzu (1857–1863) [hereinafter: Roman Jaroński], ref. no. 2204.

[19] Roman Jaroński, ref. no. 141.

[20] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 680.

[21] E.g. Jan Cichocki, ref. no. 1375; Franciszek Boguński, ref. no. 198.

[22] E.g. Archiwum Państwowe w Łodzi, collection 438, Akta notariusza Józefa Stokowskiego w Zgierzu (1821–1847) [hereinafter: Józef Stokowski], ref. no. 9100.

[23] Józef Stokowski, ref. no. 3349.

Relevant court minutes indicate that wills were written down, dated, and signed by the hand of testators. No deviations were found in this respect[24]. As NC did not determine the place where the date was to be put, in practice, the deeds were dated at the beginning or at the end[25].

Even though regulations did not determine the location of the signature, it was obvious it was to be put at the end of the document. Otherwise, it would be impossible to say whether the testator finished their dispositions.

The signature did not have to include a full name but it had to be legible enough so as not to raise any doubts about the identity of the testator. In practice, testators virtually always provided their first name and surname.

3.3. A secret will combined the characteristics of a handwritten will, as its provisions remained secret, and of a public will, as it had the evidentiary value of an official document. It consisted of two parts: a private document, i.e. declaration of the last will, and an official document, i.e. legal overwriting added by the notary.

3.3.1. A secret will had to be drawn up in writing (Art. 976 of NC)[26]. NC did not require the will to be written by the hand of the testator. However, nearly all legal overwritings include the testator's declaration that the text was handwritten. Sources indicate that the existing requirement to sign the deed by the testator was met. All legal overwritings include the testator's declaration that they personally signed the document.

The sheet on which the will was written or the envelope in which it was placed had to be closed and sealed (Art. 976 of NC). This could only be done by the testator or, upon the testator's request, by the notary in the presence of the testator and witnesses. In practice, testators did not ask the notary for help to close and seal their wills. All legal overwritings include notes that the will was sealed with family seals of the person making the declaration of the last will[27] or of their spouse[28].

The last will, closed and sealed, had to be delivered to a notary by the testator in person along with a declaration "that the contents of such paper are his will, written and signed by himself, or written by another and signed by him" (Art. 976 of NC). This requirement was satisfied by testators.

3.3.2. The notary would draw up a written record, the so-called legal overwriting, written on the paper with the text of the will or on the envelope containing the

[24] E.g. Roman Jaroński, ref. no. 284.

[25] E.g. Józef Stokowski, ref. no. 63, 1386.

[26] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 681.

[27] Franciszek Boguński, ref. no. 4.

[28] *Ibidem*.

last will[29]. In order to confirm the fulfilment of this obligation, notaries used such clauses as "she presented and submitted to the notary sealed paper"[30].

Pursuant to Art. 976 of NC, in order for a secret will to be valid, presence of six witnesses except for the notary was required (Art. 976 NC). This requirement was properly fulfilled by Zgierz notaries who made notes in wills listing persons taking part in the procedure.

The legal overwriting had to be signed by the testator (and in case the testator was unable to do that, a note explaining reasons for the lack of signature had to be included), witnesses, and the notary. This requirement was also properly fulfilled by Zgierz notaries.

4

4.1. The Code introduced the principle of universal capacity to dispose of one's property in the event of death: "All persons may dispose […] by will, excepting such as are declared incapable of doing so by the law" (Art. 902 of NC), with only a few limitations.

Analysis of the source material indicates that most authors of wills were men. Usually, they were married men who had descendants, they were craftsmen or farmers, and they wanted their last wills to prevent future disputes. It should be noted that unlike in the case of men, women who drew up wills were mostly childless.

4.2. Exceptions to the principle of full freedom in disposing of one's property in the event of death took the form of absolute or relative incapacity. Those who were absolutely incapacitated could not dispose of their property in the event of death in any way, and their incapacity concerned all potential heirs. Relatively incapacitated persons were deprived of the right to bequeath their property only to specific persons[31].

4.2.1. "In order to make a donation during life or by will, it is necessary to be of sane mind" (Art. 901 NC), which had to be true at the time of drawing up the last will[32].

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[29] E.J. Barwiński, *Prawo spadkowe obowiązujące w b. Królestwie Polskim w zarysie*, Warszawa 1938, p. 21.

[30] Józef Stokowski, ref. no. 5091.

[31] M. Planiol, *Podręcznik prawa cywilnego (o darowiznach i testamentach)*, transl. by A. Słomiński, Warszawa 1922, p. 159.

[32] *Ibidem*, p. 154.

The source material does not allow to conclude that mentally ill persons made any dispositions in the event of death. On the contrary, Zgierz notaries in their deeds used such notes as: "known to the notary personally and in terms of their legal capacity"[33] to confirm that the testator had the necessary legal capacity. In some cases, the note on the legal capacity was replaced with a declaration that the testator was of sane mind. This mostly concerned situations in which the person drawing up the will was ill, e.g. "physically debilitated, but of completely sane mind, which the notary and witnesses confirmed during a conversation with him"[34].

The capacity of minors to dispose of their property in the event of death took one of two forms, depending on their age[35]. "A minor under the age of sixteen years is capable of disposing in no way" (Art. 903 of NC). Thus, children were not allowed to bequeath anything. Only after turning sixteen, minors were granted a limited right to dispose of their property in the event of death: "A minor who has reached the age of sixteen years can make disposition by will only, and to the amount of not more than half the property of which the law permits an adult to dispose" (Art. 904 of NC).

The public wills drawn up by Zgierz notaries do not indicate that any of the deeds was drawn up by a minor.

4.2.2. In their wills, minors could not make any dispositions for the benefit of their guardian (Art. 907 of NC)[36]. This prohibition, however, only concerned the so-called main guardians, meaning persons who managed the minor's property. The above limitation did not apply if the minor's guardian was the testator's ascendant[37]. The legislator realised that in such cases the testator's parents or grandparents would inherit the property by virtue of the law anyway. A bequest to the guardian despite the provisions of law was invalid, however, the remaining part of the will remained in force[38].

The deeds of Zgierz notaries do not include any document that would allow to say that any testator ever made a disposition contrary to Art. 907 of NC.

The regulation concerning spouses was a special case of relative incapacity to dispose of one's property in the event of death as it only concerned the scope of such dispositions, while limitations only applied in a situation when the testator

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[33] Jan Cichocki, ref. no. 135.

[34] E.g. Roman Jaroński, ref. no. 218.

[35] M. Planiol, *op. cit.*, p. 160.

[36] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 662.

[37] *Prawo cywilne obowiązujące w guberniach Królestwa Polskiego*, Sankt Petersburg – Warszawa 1875, p. 161.

[38] A. Okolski, *op. cit.*, p. 379.

left descendants (Art. 1094 and 1098 of NC)[39]. Bequeathers who left children or other descendants could bequeath to their spouses either one-fourth of the property with ownership transfer and another one-fourth of the property for use or half of the property for use.

Art. 1098 of NC determined the scope of testamentary depositions a testator with children from the first marriage could make to a subsequent spouse[40]. In the case of a marriage in which one of the spouses already had descendants from a previous marriage, the portion the testator was allowed to give to the present spouse could not exceed the share of a legitimate child, and in no case one-fourth of the inheritance.

5

5.1. A beneficiary could be anyone except for persons found legally incapacitated (Art. 902 of NC)[41]. NC regulated the issue of capacity to be a beneficiary by indicating circumstances that deprived the legatee of the right to receive a bequest. These negative grounds either made it impossible for a person to receive a bequest from any testator (absolute incapacity) or concerned only specific testators (relative incapacity), but they had to exist at the moment of death of the testator[42].

In a majority of cases, beneficiaries were natural persons. Understandably, most of them were descendants or a spouse coming into an inheritance together. Dispositions to distant relatives or strangers were definitely rarer and they were usually made in default of children.

Bequests to entities other than natural persons were very rare. Virtually always they included benefits for church institutions, which was probably connected with the intention to find expiation for the testator's guilt or ensure them better eternal life.

5.2

5.2.1. NC allowed for the obtaining of property by way of will by natural persons who were at least conceived at the time of the opening of the inheritance: "In order to be capable of receiving during life, it suffices to be conceived at the moment of the donation" (Art. 906).

[39] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 719.

[40] Art. 1098 of NC applies to both donations and wills. Art. 913 of NC does not apply in the special case provided for in Art. 1098 – S. IX. 404/1858. *Prawo cywilne obowiązujące na obszarze b. kongresowego Królestwa Polskiego*, ed. by J.J. Litauer, Warszawa 1923, p. 316.

[41] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 660.

[42] M. Planiol, *op. cit.*, p. 159.

According to the material analysed, conceived persons appointed as beneficiaries were in all cases the future children of testators, who came into the inheritance along with other children of the bequeathers[43] or their spouses[44].

The capacity of a *nasciturus* to inherit by will was granted "so far as the infant shall be born likely to live". The legislator did not explain, however, what "likely to live" meant, e.g. whether it was necessary for a child to have all the organs necessary for independent living or whether a child likely to live was a child who was born alive but lived for only a few minutes.

A legal person could not be a beneficiary if it did not exist at the time of the testator's death (Art. 725 of NC)[45]. It was an absolute requirement as whenever heirs indicated that at the time of opening the inheritance the beneficiary was not deemed legally existing, it gave grounds for invalidating such a bequest[46].

A way of evading the principle provided for in Art 725 was an idea arising from judicial decisions, which allowed for appointing in a will an institution to be established after the testator's death[47]. In a sentence of 1858, the 9th Department of the Senate acknowledged the possibility of appointing in a will a legal person the testator became the founder.

5.2.2. "Doctors in physic or in surgery, officers of health and apothecaries, who shall have attended a person during the malady of which he dies, shall not be allowed to profit by donations during life or by will which such person shall have made in their favour in the progress of the disorder" (Art. 909 of NC). This provision introduced a rational limitation referring to a will drawn up during a terminal disease. Thus, even if a testator drew up a will before contracting the disease but it provided for a bequest to a doctor that tended the testator during the disease, the regulation remained effective[48]. Similar rules were followed when the provisions of Art. 909 were applied to clergymen performing last rites: "The same rules shall be observed with regard to the minister of religion". By their very nature, the analysed notarial deeds could not give grounds for observing the discussed limitations in practice.

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43 E.g. Franciszek Boguński, ref. no. 19.

44 E.g. Franciszek Boguński, ref. no. 40.

45 *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 616.

46 F. Podlewski, *O spadkach i testamentach*, Warszawa 1900, p. 112.

47 A. Słomiński, *Prawo cywilne obow. w b. Królestwie Kongresowym w jurysprudencji Senatu 1842–1914*, Łódź 1929, p. 107.

48 S. Kulpa, *Testament. Praktyczne uwagi nad prawem spadkowym, pouczenia i wzory testamentów opracowane według ustaw obowiązujących w Małopolsce, na ziemiach byłego zaboru pruskiego i w byłej Kongresówce*, Kraków [n.d.], p. 37.

Limitations of the rights of foreigners: "Dispositions shall not be allowed for the benefit of a foreigner, except in a case where such foreigner might be allowed to make disposition for the benefit of a Pole" (Art. 912 of NC)[49], imposed during the Napoleonic period of the Empire to determine the relationship between France and Europe in this respect, had no practical significance as none of the European states forbade bequeathing property to citizens of Congress Poland. It is worth noting that foreigners in Congress Poland experienced certain limitations; however, they did not arise from Art. 912 of NC but from other provisions of law, which, for example, forbade foreigners to own land outside cities[50].

As wills drawn up by notaries did not provide the citizenship of the beneficiaries, it cannot be said whether any dispositions were made to foreigners.

6

6.1. Every estate disposition in the event of death could be made in one of the forms provided for in NC, i.e. as a general disposition, a disposition under universal title, or a specific disposition. The legislator did not provide for any limitations in this respect on account of the subject of the disposition, neither did the practice develop any custom, while the analysed notarial deeds indicate that both immovables and movables were bequeathed to beneficiaries in all three forms provided for by the law.

6.1.1. A testamentary disposition was general if its subject was the whole property the testator bequeathed to one or several persons (Art. 1003 of NC)[51]. If the disposition was made to several persons, such a disposition was deemed general if the testator, appointing several beneficiaries, bequeathed to them the whole property without indicating the exact share due to each of them, e.g. "I hereby bequeath my whole property to Jan and Paweł"[52].

A testator who wanted to make a general disposition in their will was not obligated to use the statutory phrase "I bequeath the whole estate I shall leave at the time of my death". However, the deed had to clearly indicate that it was the testator's intention to bequeath undivided property they would own at the moment of their death to one or several persons[53].

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[49] *Prawo cywilne obowiązujące w guberniach Królestwa Polskiego*, ed. by K. Hube, Warszawa 1877, p. 421.

[50] H. Cederbaum, *Jak napisać testament własnoręczny*, Warszawa 1900, pp. 71–72.

[51] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 688.

[52] A. Okolski, *op. cit.*, p. 405.

[53] M. Planiol, *op. cit.*, p. 109.

In practice, when appointing beneficiaries to the whole estate, the most commonly used phrases included:

– "The whole property that will be left at the time of my death and any and all of its constituents I hereby bequeath to my son as his property and I hereby appoint him as the universal Successor"[54],

– "The whole property that will be left at the time of my death I hereby bequeath and assign to the Grzybowskis"[55],

– "I appoint my husband as the Universal Successor to my whole movable and immovable property I own now and can own at the time of my death"[56].

6.1.2. A disposition under universal title only gave the beneficiary the right to a part of the inherited property and could be made in five different forms: as a bequest of a specific portion of the property, a bequest of all immovables, a bequest of all movables, a bequest of a specific portion of immovables, or a bequest of a specific portion of movables (Art. 1010 of NC)[57].

The records of Zgierz notaries include 106 cases of disposition of property under universal title. Bequeathers most frequently made bequests of a specific portion of the property[58]; there were also relatively frequent bequests of all movables[59]. Bequests of a portion of movables[60], all immovables[61], and a portion of immovables[62] were rare.

6.1.3. A specific disposition was any disposition outside the definition of a general disposition and a disposition under universal title[63]. This view, though commonly acknowledged and accepted, did not arise directly from the provisions of law. Art. 1010 of NC, only referring to the essence of a disposition under universal title, stated that "every other legacy forms only a disposition by particular title". This can lead to a literal interpretation according to which a specific disposition

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[54] Archiwum Państwowe w Łodzi, collection 445, Akta notariusza Wojciecha Hałaczkiewicza w Zgierzu (1862–1876) [hereinafter: Wojciech Hałaczkiewicz], ref. no. 640.

[55] Archiwum Państwowe w Łodzi, collection 443, Akta notariusza Marcelego Jaworskiego w Zgierzu (1855–1872) [hereinafter: Marceli Jaworski], ref. no. 164.

[56] Franciszek Boguński, ref. no. 16.

[57] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 689.

[58] E.g. Jan Cichocki, ref. no. 350.

[59] E.g. Jan Cichocki, ref. no. 71.

[60] E.g. Józef Stokowski, ref. no. 8802.

[61] E.g. Jan Cichocki, ref. no. 1386.

[62] E.g. Franciszek Boguński, ref. no. 1413.

[63] A. Okolski, *op. cit.*, p. 409.

is any disposition that is not a general disposition, so the notion of a specific disposition should also cover dispositions under universal title.

Based on a specific disposition, a testator could bequeath one or more items, both movable and immovable, which did not have to be individually indicated and, for example, profits from the property or maintenance[64]. A subject of a specific disposition could also be the use of the whole property, its part, or a specific item.

In practice, a specific disposition was the most frequent form of disposing of one's property in the event of death. Most of the dispositions concerned the ownership of movables[65], with the most common subject of the disposition being money[66]. Another significant group of specific testamentary dispositions were dispositions concerning the ownership of immovables[67]. Apart from specific dispositions in the event of death the subject of which was the transfer of ownership of property, the source material includes testamentary dispositions that only gave the beneficiary the right to use the whole property[68], its part[69], or specific items[70].

6.2

6.2.1. The notion of the primary guardian can be found in public wills and it denotes a guardian appointed pursuant to Art. 364 of NC. In cases provided for by the law it was possible to appoint a guardian by will[71]. Each of the spouses, in case the other spouse died earlier or was deprived of parental authority, had the right to appoint a guardian for their minor children (Art. 364 of NC) in the event of death, in case the surviving spouse was the only carer of the child[72]. Moreover, the father had the right to appoint a guardian while the mother was alive in case she did not want to take care of the children in the event of the father's death.

In the practice of Zgierz notaries, there were cases of appointing a guardian for minor children on account of the lack of the other parent[73]. None of the wills

[64] M. Planiol, *op. cit.*, pp. 128–128.

[65] E.g. Jan Cichocki, ref. no. 350.

[66] E.g. Józef Stokowski, ref. no. 8802.

[67] E.g. Wojciech Hałaczkiewicz, ref. no. 155.

[68] E.g. Marceli Jaworski, ref. no. 1.

[69] E.g. Józef Stokowski, ref. no. 1409.

[70] Jan Cichocki, ref. no. 71.

[71] Art. 365 of CCCP: "Appointment of a guardian can only take place pursuant to the provisions of Art. 351".

[72] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 327.

[73] E.g. Roman Jaroński, ref. no. 3948.

found indicated that no guardianship was established for minor children when the testator was a widower.

6.2.2. The notions of an adopter and a sub-guardian can be found in public wills and they denote guardians appointed pursuant to Art. 35 of NC. After the death of one of the spouses, the other spouse took care of minor children by virtue of the law (Art. 349 of CCCP). However, the father had the right to appoint one or two advisers to the widow-mother, and the mother was obligated to seek their advice in matters connected with the care of children to a given marriage (Art. 350 of CCCP). The father appointing an adopter could precisely determine the scope of affairs with regard to which the mother was obligated to seek advice; in such cases she could perform all activities unlisted by the father independently[74]. A guardian referred to in Art. 350 of CCCP could be appointed by an official deed or a will[75].

Appointment of an adopter to advise a mother-guardian was common in the deeds drawn up by Zgierz notaries in the nineteenth century. There were only a few cases in which no adopter was appointed to advise the mother-guardian[76].

6.2.3. In their last will, a person who had voluntarily taken care of a minor could adopt the minor. Everyone who were fifty years of age or older had this right in case there were no descendants. If the person had been a voluntary guardian of a minor (Art. 326 of CCCP)[77], then after two years since becoming a guardian, if the person was afraid they would die before the minor came of age, the person could adopt the minor in a will and this provision was valid as long as at the time of death the testator had no descendants and the death took place not later than three months after the minor's coming of age[78].

No such procedure was found in the deeds drawn up by Zgierz notaries.

6.2.4. A legal act that could be performed in a public will as an official deed was acknowledgement of a natural child[79].

In the source material there is one case of acknowledgement of a natural child; it can be found in a will of January 10/22, 1866, drawn up by Florian Feldman, a cloth maker journeyman. In his disposition, the testator stated: "with my wife Wilhelmina, née Olszyńska, who stayed in my household before a religious mar-

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[74] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 223.

[75] *Ibidem*.

[76] Józef Stokowski, ref. no. 7450; Roman Jaroński, ref. no. 2537; Franciszek Boguński, ref. no. 40, 11.

[77] *Prawo cywilne obowiązujące w Królestwie Polskim…*, p. 218.

[78] *Ibidem*, pp. 218–219.

[79] *Ibidem*, p. 209.

riage, I begot a child whose first name was Teodor and surname Krompak, and he still stays with me, but my conscience cannot bear the child begotten by me to have a stranger's surname. Thus, I hereby acknowledge him as my lawful son and I beg my wife to give him my surname so that he is called just like his father"[80].

7

The principle of testamentary freedom guaranteed by the law of Congress Poland was considerably limited in case the testator had descendants or a spouse. However, as the practice indicates, bequeathers were frequently guided by their sense of justice rather than provisions of law.

Out of the discussed forms of dispositions, a public will and a secret will were hedged with a number of conditions arising from NC, whereas a handwritten will, though only requiring the testator to be able to write, was not very popular, probably because of the high illiteracy rate in the society.

Even though the right to receive bequests was universal, it was not absolute. The legislator provided for certain limitations, mostly resulting from social reasons and aimed at elimination of pressure on the testator. In the analysed practice, testators observed these limitations and possible deviations concerned appointment of an incorrect beneficiary, which practically made it impossible to execute the last will.

A will was a document that, apart from dispositions of property in the event of death, included dispositions that did not concern property. In a majority of cases, dispositions of property covered the whole estate of the testator, including all movables and immovables. Based on the documents drawn up by Zgierz notaries it can be said that the most popular form of disposal of property in the event of death was a specific testamentary disposition that transferred the whole property, its part, or specific items.

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Testamentary Law in Congress Poland on the example of the files of the Zgierz notaries in the years 1826–1875

Contemporary Polish inheritance law adopts the principles of freedom of testing, assuming that everyone has the right to freely dispose of their property in the event of death by way of a will. The freedom of testing, however, is not something obvious and it was not the one that governed inheritance in Poland during the period of the First Polish Republic.

It was not until the 19th century that it brought Europe, including the Polish lands, profound changes in the field of inheritance law. The general rule of freedom of testing was, in principle, the first in modern Europe to be introduced by the Napoleonic Code of 1804, in force in Poland from 1808 until 1846. However, the guaranteed principle of freedom of testing experienced serious restrictions if the testator had descendants or the spouse, although, as practice shows, the writers were often guided by their own sense of justice, and not by law.

The Napoleonic Code envisaged three forms of last wills: a public will, a secret will, and a handwritten will. The first two forms were subject to a number of formal conditions. A handwritten will, on the other hand, although it only required the writer to be able to write, was not popular, probably because of the society's considerable illiteracy.

Although the right to obtain testamentary bequests was universal, it was not absolute. The legislator provided for certain restrictions dictated primarily by social considerations, aimed at eliminating the pressure on the legislator.

The property dispositions predominantly concerned the testator's entire property and covered both all movable and immovable property. In the light of the deeds of the Zgierz notaries, the most popular form of property dispositions in the event of death was the making of testamentary dispositions in the form of a special clause, transferring all possessed property, its part or individual components.

Key words: Kingdom of Poland, inheritance law, will, notary

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Prawo testamentowe obowiązujące w Królestwie Polskim na podstawie akt notariuszy zgierskich z lat 1826–1875

Współczesne polskie prawo spadkowe przyjmuje zasadę swobody testowania – zakładającą, iż każdy ma prawo swobodnego rozporządzania swoim majątkiem na wypadek

śmierci w drodze testamentu. Wolność testowania nie jest jednak czymś oczywistym i nie ona rządziła dziedziczeniem na ziemiach polskich w okresie I Rzeczypospolitej.

Dopiero XIX w. przyniósł Europie, w tym także ziemiom polskim, gruntowne zmiany w zakresie prawa spadkowego. Ogólną regułę swobody testowania zasadniczo jako pierwszy w nowożytnej Europie wprowadził Kodeks Napoleona z 1804 r., obowiązujący na ziemiach polskich od 1808 do 1846 r. Jednakże gwarantowana zasada swobody testowania doznawała poważnych ograniczeń, jeżeli testator posiadał zstępnych lub małżonka, choć – jak pokazuje praktyka – zapisodawcy często kierowali się własnym poczuciem sprawiedliwości, a nie przepisami prawa.

Kodeks Napoleona przewidywał trzy formy rozporządzeń ostatniej woli: testament publiczny, testament tajemny i testament własnoręczny. Dwie pierwsze formy obwarowane były szeregiem warunków formalnych. Testament własnoręczny natomiast, choć wymagał od zapisodawcy jedynie umiejętności pisania, nie cieszył się popularnością, zapewne z powodu znacznego analfabetyzmu społeczeństwa.

Mimo iż prawo uzyskiwania zapisów testamentowych miało charakter powszechny, to nie było ono bezwzględne. Ustawodawca przewidywał pewne ograniczenia, podyktowane przede wszystkim względami społecznymi, mające na celu wyeliminowanie presji na zapisodawcy.

W przeważającej mierze dyspozycje majątkowe dotyczyły całego majątku testatora i obejmowały zarówno wszelkie ruchomości, jak i nieruchomości. W świetle aktów notariuszy zgierskich najpopularniejszą formą rozporządzeń majątkowych na wypadek śmierci było dokonywanie dyspozycji testamentowych w formie zapisu szczególnego, przekazującego cały posiadany majątek, jego część lub poszczególne składniki.

Słowa kluczowe: Królestwo Polskie, prawo spadkowe, testament, notariusz