

**Succession to real property located in Poland,  
which the testator disposed of in the will drawn up  
abroad, with a particular regard to wills made in England  
and Wales**



**dr Anna Miśtał**  
legal counsellor

**I. Introduction – the assessment of the validity of a will prepared outside Poland**

Due to a large group of Poles living abroad, as well as due to mixed marriages concluded by the Poles, which results in the fact that foreigners frequently become heirs of property located on Polish territory, the issue of succession to property left in Poland on the basis of wills made abroad is of utmost social importance. **The will drawn up abroad will be effective in relation to property left by the testator in Poland, provided that conditions for its validity shall be fulfilled.**

The validity of the will drawn up abroad shall be assessed in Poland according to the national law of the deceased at the time of drafting the will<sup>1</sup>. Accordingly, if we deal with a British citizen, who did not have another citizenship, the validity of a will made in England or Wales will be assessed in Poland on the basis of English law. However, if this will was drawn up in England or Wales by a Polish citizen (even though he was also a citizen of another state – including a British citizen), in Poland it will always be subject to Polish law and, therefore, in order to assess in Poland the validity of the will prepared by a Polish citizen abroad, the provisions of the Polish Civil Code will be applicable<sup>2</sup>. On the other hand, if we deal with the citizen of at least two countries, who is, however, not a Polish citizen, then as far as the national law is concerned, he is subject to the law of the country which he is most closely connected with<sup>3</sup> and this law will be taken into account when assessing in Poland the validity of the will.

---

<sup>1</sup> The first sentence of article 35 of Private International Law Act of 12 November 1965 (Journal of Laws no. 46, item 290, as amended) – hereinafter as Private International Law.

<sup>2</sup> Article 2 § 1 of Private International Law.

<sup>3</sup> Article 2 § 2 of Private International Law.

It should be noted, however, that in order to assess the validity of the will in Poland in the scope of its form it is sufficient to comply with the appropriate form prescribed by the law of the country in which the will has been drawn up<sup>4</sup>. The latter is crucial insofar the provisions of various countries provide different forms of drawing up wills and, accordingly, in Poland, for example, handwritten and notarial deed are the most popular forms of the will. Handwritten form consists in the testator drawing up a will in such a way that he writes the whole of it in handwriting, signs and affixes with the date<sup>5</sup>. It should be noted that writing a will on one's computer, printing it and affixing with a signature by the testator does not meet the requirements of a written form and, therefore, such a will – made in Poland – will be invalid under Polish law, but a will drawn up in such form may be valid under the law of another country if this law allows such form of wills. Thus, if a will was drawn up in another country in a form approved by the law of this country, then such will shall fulfil in the light of Polish law the requirement of its validity in the scope of the form.

In the absence of a valid will of the testator, succession in Poland takes place under the provisions of the Civil Code (the so-called statutory succession).

## **II. Jurisdiction of Polish courts / notarial attestation of inheritance in Poland**

In order for an heir to be able to freely dispose of the property – acquired by inheritance – which is located in Poland, he may obtain a ruling on confirmation of inheritance acquisition issued by a Polish court or a deed of succession certification drawn up by a notary public in Poland. A deed of succession certification is a new institution which came into force in the Polish legal system on 2 October 2008. It allows to avoid at least several month long court proceedings which aim to certify inheritance. A deed of succession certification can be obtained at once unless there are circumstances which exclude the possibility of its issuance by a notary public, referred to in article 95e § 2 of the Notaries Act<sup>6</sup>, including, inter alia, the following ones: a deed of succession certification or a ruling on confirmation of inheritance were already issued in respect to the inheritance, the testator at the time of his death was a foreigner or, having no nationality, was not a resident in the Republic of Poland or the inheritance consists of the real property rights or possession of immovable property located abroad.

It should be noted that Polish courts have jurisdiction over inheritance cases on the condition that the testator, at the moment of his death, had his place of residence or habitual residence in Poland as well as in the situations when the inheritance or its considerable part is located in the Republic of Poland<sup>7</sup>. However, in principle – **with the exception of property located in Poland** – it is sufficient for the heir, in order to demonstrate his entitlement to inheritance property left in Poland, to provide a foreign counterpart of the ruling on the confirmation of inheritance acquisition or a deed of succession certification, i.e., he must present such document which constitutes the confirmation of the title to inheritance property in the country where the latter was produced – accordingly, in case of a will drawn up in England or Wales, the heir will demonstrate his right to succession of property located in Poland when he provides authenticity certificate stating the attestation and registration of the will (*Grant of Probate*), affixed with an *apostille*<sup>8</sup>, with a copy of the will, certified by the court, affixed with *apostille*.

---

<sup>4</sup> The second sentence of article 35 of Private International Law.

<sup>5</sup> Article 949 § 1 of the Civil Code of 23 April 1964 (Journal of Laws no. 16, item 93, as amended) – hereinafter as the Civil Code.

<sup>6</sup> Notaries Act of 14 February 1991 (consolidated text of 14 October 2008, Journal of Laws 189, item 1158).

<sup>7</sup> Article 1108 of the Polish Code of Civil Procedure of 17 November 1964 (Journal of Laws no. 43, item 296 as amended) – hereinafter referred to as “the Code of Civil Procedure”.

<sup>8</sup> *Apostille* is affixed to official documents (or attached to them) if they are to be used for legal transactions in the countries that are parties to the Hague Convention of 1961 on Abolishing the Requirement of Legalisation for Foreign Public Documents (Journal of Laws of 2005 No. 112, item 938) which are, for example, Poland and the United Kingdom of Great Britain and Northern Ireland. *Apostille* – referred to in article 4 of the abovementioned convention – is issued by the competent authority of the state where the document was produced in order to

In order for the heir to be able to freely dispose of the real property left in Poland by the testator, that is to demonstrate his entitlement to property, he must necessarily obtain a **confirmation of inheritance acquisition** issued by a Polish court, since it is within the exclusive national jurisdiction of Polish courts to adjudicate cases involving real property rights in immovable properties located in Poland<sup>9</sup> – the latter also applies to succession cases where a property, constituting a part of inheritance, is located in Poland. Alternatively, the heir may obtain a deed of succession certification drawn up by a notary public in Poland unless there are any exclusions referred to in article 95e § 2 of the Notaries Act.

### III. Current Polish law regulations concerning last wills

As indicated above, the validity of a will drawn up by a Polish citizen abroad will be assessed on the basis of the provisions of the Polish Civil Code, except from the form of a will, as mentioned in point I. above. The latter may raise certain problems in practice when the law of another country provides different regulations in the field of inheritance law – in particular wills – than the Polish law whereas the testator – when preparing a will – did not follow the provisions of Polish law concerning wills.

The basic principle of the Polish inheritance law is that **one inherits a share in inheritance, rather than the specific items that the latter consists of**. The testator may in his last will appoint all or some of the heirs to the whole or the part of the inheritance. Thus, if the testator has appointed to inheritance two of his children in equal shares, it means that each child will inherit a share of one half of the whole estate. The issue of what items he will actually receive from the estate, will be specified in the contract for the distribution of the estate concluded between all the heirs or in the court ruling issued at the request of any of the heirs<sup>10</sup>. Until the estate has not been distributed, all heirs are entitled to a share in all inheritance items in the proportion of their inheritance share<sup>11</sup>. The testator is not therefore capable to effectively determine in his last will, which inheritance items shall be distributed to his heirs.

The testator may, however, allocate specific objects to a designated person, by means of devising a legacy, which is the obligation of a statutory or testamentary heir to provide financial performance for the benefit of a designated person<sup>12</sup>. A person entitled to a legacy is not an heir, but only a legatee. In the event of opening of the inheritance – which will take place at the moment of the testator's death – such person will be vested only with a claim to the heirs to have certain rights transferred to him, for example real property ownership, which was the subject of a legacy made on his behalf by the testator. The legacy thus requires an **agreement between the legatee and heirs in order to carry out the legacy**.

In practice it happens that the testator, when drawing up a will, does not take into account the abovementioned rules of inheritance and carries out testamentary dispositions in such a way that in his will, for example, he devises a parcel with a house to his wife together with all movable goods in this house, a car and all his savings. There arises a question then about who is the heir and whether his wife is only a legatee or, perhaps, an heir (or even the sole heir). The Civil Code contains a regulation<sup>13</sup>, which resolves these doubts in such a way that if the abovementioned property covers at least the entire inheritance, the wife – in case of doubt – will be treated as the heir to the whole inheritance. On the other hand, if the testator devises the abovementioned property – namely a parcel

---

certify the authenticity of the signature, character in which the person who signed the document acted and, where appropriate, the identity of the seal or stamp which the document is affixed with.

<sup>9</sup> Article 1107<sup>1</sup> of the Polish Code of Civil Procedure

<sup>10</sup> Article 1037 – 1038 of the Civil Code

<sup>11</sup> Article 1035 of the Civil Code – provisions on the co-ownership in fractional parts are accordingly applied to the community of inherited property and to the distribution of the estate under the specific provisions of the Civil Code which regulate this issue.

<sup>12</sup> Article 968 § 1 of the Civil Code

<sup>13</sup> Article 961 of the Civil Code

with a house and all movable goods in this house to his wife, a car – to his son and his bank savings – to his daughter, and these items would cover almost the entire inheritance, then these people would be in case of doubt deemed to be appointed to the whole inheritance in fractional parts corresponding to the ratio of the value of the items allocated to them. In practice, however, such a disposition raises a number of unnecessary problems, starting with the need for valuation of assets so that the court could properly determine particular share in the inheritance allocated to respective heirs.

Thus, when drawing up a will, it should be expressly indicated whether a particular person is to be an heir entitled to the whole of inheritance or only to a specified part of an inheritance (e.g. one half or one quarter of inheritance), or whether a person – pointed out in the last will – is to be a legatee, i.e. in case of the testator's death, he or she will be entitled to claim to have a certain property transferred to him or her by the heirs. The latter can, for example, involve the transfer of the ownership of real property which was the subject of a legacy made by the testator on his or her behalf.

The abovementioned issue is of great practical importance in the case of wills drawn up abroad, due to the differences between the Polish and other legal systems. For example, the English legal system provides for a complete freedom of disposing of one's assets in one's last will, including the possibility of disposing of all of one's property in the form of legacy. In the light of Polish law, however, such last will must be subject to the rules of its interpretation – primarily to the rules of the abovementioned article 961 of the Civil Code.

#### **IV. Problems with proving the rights of heirs to an inheritance in Poland**

In practice problems can arise in the situation when for the purpose of determining the right to immovable property located in Poland, the heir has to perform complex and lengthy inheritance proceedings before a Polish court. Polish court issues a ruling on confirmation of inheritance acquisition after conducting a hearing and it summons the petitioner as well as all people likely to be regarded as statutory and testamentary heirs<sup>14</sup>, or their successors.

In practice, potential problems may arise in connection with the following situations:

**a.** the testator made a will many years before his death and the persons designated in the last will changed their places of residence, for example, they live abroad, they changed their names or died – in such situation it will be very difficult to effectively summon all people likely to be statutory or testamentary heirs or their legal successors, as well as serve them with documents in the course of proceedings;

**b.** the testator stipulated in his will that he appoints a certain person as his heir, provided that the latter survives the testator by the period indicated in the will but, in the event that this condition is not met, the testator disposed of his entire property in the form of legacies.

As far as the situation described in point b. above is concerned, there appeared two practical problems, which Polish court had to face. Firstly, it was necessary to assess the condition, which is unacceptable in the light of Polish law when appointing testamentary heir, secondly, it was necessary to summon all people indicated in the last will as a conditional legatees (with all the associated problems identified in point a above). When making a reference to the issue of the condition, it should be noted that according to the Polish Civil Code<sup>15</sup> a reservation of the condition made at the appointment of testamentary heir is deemed to be non-existent. If, however, the content of the will or the circumstances imply that without such a reservation the heir would not be appointed, the appointment of the heir is invalid. A Polish court, therefore, had to assess how important the reserved condition was

---

<sup>14</sup> Article 669 of the Code of Civil Procedure

<sup>15</sup> Article 962 of the Civil Code

for the testator. Furthermore, despite the condition being met, i.e. the heir survived the testator by a certain time, the court summoned for the trial the would-be legatees.

## **V. Alternative solutions**

In order to avoid problems with carrying out inheritance proceedings in Poland, which – as should be once more noted – is necessary if the inheritance consists of the real property located in Poland (regardless of whether the testator was a Polish citizen or a foreigner), and a Polish notary cannot issue a deed of succession certification on account of the premise or premises excluding such a possibility<sup>16</sup>, one can consider alternative solutions that may serve the purpose of transferring the ownership of immovable property located in Poland to a future heir.

### **1. Contract of life-annuity**

By a contract of life-annuity the purchaser of real estate assumes the obligation – in exchange for the transfer of the ownership of the property – to provide the vendor or a close relative of his (life annuitant) lifelong maintenance<sup>17</sup>. Such an agreement must be concluded in a notarial deed<sup>18</sup>. Life-annuity can be established for the benefit of several people. The obligations corresponding with this right are borne by the purchaser of the property. The content of life annuity and, thus, the content of the purchaser's duties, are determined by the contract between the parties and in the absence of such regulation in the agreement, article 908 of the Civil Code – detailing the content of such agreement – shall be applicable. In particular, the parties to life-annuity contract may provide that the purchaser will encumber the acquired property with usufruct right – for the benefit of life annuitant – the exercise of which will be limited to the part of the real property or with an easement of residence.

### **2. Purchasing real property for “the final owner” (i.e. the future heir) or a donation for the benefit of the future heir**

In order to avoid long-term inheritance proceedings, it is also possible to purchase real estate in Poland for “its final owner” (i.e. the future heir) and then to encumber this property for the benefit of the testator with the usufruct right or with easement of residence. Of course, this solution has some disadvantages, in particular, lack of possibility to revoke in case the testator changed his mind about the final real property owner; what is also important, law will not provide any ownership rights of the testator. Moreover, this solution will not be acceptable if the testator was already the owner of the real property and he would like to make provisions relating to the latter in case of his death. What can be considered in such a situation is a donation of real estate which could be then encumbered by the parties of such an agreement with the usufruct right or the easements of residence for the benefit of the donor (testator).

---

<sup>16</sup> Compare article 95e § 2 of the Notaries Act and explanations in section II above.

<sup>17</sup> Article 908 § 1 and 3 of the Civil Code.

<sup>18</sup> In case of concluding such an agreement in another country, whose legal system does not provide for a notarial deed form, the validity of such an agreement shall be assessed by the requirement of the form prescribed by this country's provisions (compare article 12 of Private International Law Act).

## **VI. Planned reform of the provisions of the Polish Civil Code**

### **1. The project of the Senate of the Republic of Poland – contract of donation in case of death**

A contract of donation in case of death is not regulated by the provisions of the Civil Code. Its admissibility was indeed recorded in jurisdiction<sup>19</sup>, however the possibility of concluding such agreements and their effectiveness – especially in respect to real estate – is debatable. Therefore, in 2009 the Senate introduced to the Sejm a bill concerning the amendment of the Civil Code, which provides for introduction into the Polish legal system a contract of donation in case of death<sup>20</sup>. This project provides that the object of a contract of donation in case of death would not constitute the element of the inheritance after the donor (testator) but it would be transferred to the donee at the time of donor's death. It has to borne in mind, however, that such a donation (like donation contract not concluded in case of death) will be difficult to revoke; according to the abovementioned bill, revocation will be possible only in accordance with the already existing provisions<sup>21</sup>, i.e. the donor will be able to revoke a donation concluded in case of death, if after the contract the donor's state of assets has undergone such a change that the execution of the donation cannot be without prejudice to the donor's maintenance or to alimony obligations that he is burdened with or if the donee has committed a flagrant ingratitude towards him.

### **2. The bill of the Ministry of Justice – vindicative legacy**

The second project which provides for the revolutionary changes in Polish inheritance law is the draft prepared by the Ministry of Justice, which seeks to regulate the institution of vindicative legacy<sup>22</sup>. According to this project, the testator will be able to stipulate that a specific person acquires the subject of the legacy upon opening of the inheritance (i.e., upon the testator's death), provided that the last will has been drawn up in a notarial deed form<sup>23</sup>. The object of such vindicative legacy could be, inter alia, real estate and other identified items. The difference between vindicative legacy and the legacy currently regulated in the Civil Code, which was discussed in point III. above, will be such that in case of vindicative legacy, physical effect (for example, the transfer of ownership of real estate to the legatee) will take place automatically upon the testator's death, while in case of the standard legacy, upon the testator's death, the legatee only acquires a claim to the heirs to have the ownership of a real property transferred to him.

Information about vindicative legacy and its subject will be included in court ruling on confirmation of inheritance acquisition or deed of succession certification drawn up by a notary public. At the same time, in the event of a dispute concerning the heir, the court will be able to issue a partial ruling on the acquisition of the subject of vindicative legacy.

When comparing the institution of the contract of donation in case of death, as presented in section VI. 1. above and the institution of vindicative legacy, it should be noted that the vindicative legacy may be a more expedient form of disposing of assets by the testator in case of death, since the legacy can be revoked at any time. So if circumstances change or the testator will simply change his minds about a person that he wants to transfer part or all of his assets to, in case of drafting the will and including in the latter one or more vindicative legacies, the testator will be able to modify his will on an unrestricted basis and, for example, to remove from the last will the provision about the legacy or to change its subject or the legatee himself.

---

<sup>19</sup> Compare: the Supreme Court ruling – the Civil Division, of 6 May 2004, III CK 511/02, published in Legalis.

<sup>20</sup> The bill as introduced by the Senate is available on the website:

<http://orka.sejm.gov.pl/proc6.nsf/0/4375B241083D364EC12575DF0032C13C?OpenDocument>

<sup>21</sup> Compare article 896 of the Civil Code, articles 898-900 of the Civil Code and article 902 of the Civil Code.

<sup>22</sup> The bill as introduced by the Ministry of Justice is available on the website:

<http://www.ms.gov.pl/projekty/proj090901a.rtf>

<sup>23</sup> Compare footnote no. 18.

## **VII. Conclusions**

As can be seen above, the rules of the Polish inheritance law may cause difficulties in identifying the right of succession to property located in Poland but the forthcoming reforms should change and considerably simplify this situation. However, before the latter takes place, one has to consider in advance how to secure one's immovable property situated in Poland so as not to expose their heirs to time consuming litigation the effect of which is uncertain and not always compatible with the testator's original intention. Before the testator has drawn up the last will which consists of property (in particular real property) located in Poland, he should consider all options of disposing of his assets and the possible legal consequences that the latter might entail.

*dr Anna Miśtał, legal counsellor, 19.02.2010*

[a.mistal@bf.com.pl](mailto:a.mistal@bf.com.pl)

[krakow@bf.com.pl](mailto:krakow@bf.com.pl)

*BUDZOWSKA FIUTOWSKI I PARTNERZY. RADCOWIE PRAWNI, [www.bf.com.pl](http://www.bf.com.pl)*