Disinheritance Against The EU Regulation on Succession (No. 650/2012) Polish Law Perspective

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Abstract

The disposition of disinheritance, which as part of the freedom of the assets disposition in the event of death, interferes with the legislative solutions protecting persons close to the deceased. This institution is not uniformly understood and regulated in national laws of the EU countries. Moreover, the legal systems of some those countries do not provide for disinheritance. Therefore, in connection with the entry into force of the EU Regulation No. 650/2012 on succession, the practical application of this institution appears to be problematic even at first glance. Therefore, the author believes that it seems necessary to present the disposition of disinheritance and the possible consequences of its use arising from the entry into force of the EU Regulation No. 650/2012 on succession**.** Because it is not possible to present all European solutions in one [scientific] article, the subject of author's presentation is the situation in which the law applicable to inheritance cases against the EU Regulation No. 650/2012 on succession is the Polish law.

Keywords: Disinheritance, EU Regulation on succession, inheritance, succession.

1. Introduction

17 August 2015 was the date from which most of the European Union (EU) countries began to apply the provisions of the Regulation (EU) No 650/2012 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[1]. By unifying the principles of the conflict-of-laws rules for

1 OJ L 201 of 27.2.2012, 107-134.

succession in the European Union, this act introduces a number of changes, which in many places can be called revolutionary[2]. One such area of this regulation is the designation of a connector for the law applicable to cross-border inheritance cases. According to Art. 21 of this Act such a connector is the law of the State in which the deceased had his/her habitual residence at the time of death[3]. Because under Art. 23 of this regulation, the law determined in accordance with Art. 21 of this regulation shall govern all the inheritance matters of a deceased natural person, a number of issues relating to the domestic law of succession require a reminder. It turns out that in the absence of the national law choice (which is allowed by Art. 22 of the Regulation) substantive law of the country of the testator's habitual residence will be the applicable law to determine the way of an appointment to the inheritance, the beneficiaries of this appointment and their shares, responsibility for the debts of inheritance or the obligation to return or credit donations towards the inheritance estate[4]. In this context, the issues concerning drawing up a will and dispositions contained therein are also important. The latter category includes the disposition of disinheritance, which as part of the freedom of the assets disposition in the event of death interferes with the legislative solutions protecting persons close to the deceased. This institution is not uniformly understood and regulated in national laws of the EU countries[5]. Moreover, the legal systems of some those countries do not provide for disinheritance. Therefore, in connection with the entry into force of the EU Regulation No. 650/2012 on succession, the practical application of this institution appears to be problematic even at first glance. Therefore, it seems necessary to present this institution and the possible consequences of its use arising from the entry into force of the EU Regulation No. 650/2012 on succession.

Because it is not possible to present all European solutions in one [scientific] article, the subject of this presentation will be solutions known to Polish law, which are not widely known, despite the fact that in Poland the discussion about the recodification of the law on succession has been going on for some time. Choosing Polish law is further justified by the fact that

2 N. C. Barreda, 'Reflexiones sobre los regímenes especiales en Derecho internacional privado sucesorio según el Reglamento europeo 650 / 2012 de 4 de julio de 2012', (2012) 6 *Cuadernos de Derecho Transnacional* 1, 122 et seq.

3 P. Lagarde, in U. Bergquist, R. Frmiston, F. Odersky, D. Damascelli, P. Lagarde, B. Reinhartz, *Commentaire du règlement européen sur les successions* (Dalloz, 2015), chapter 3.

4 M. Załucki, 'New Revolutionary European Regulation on Succession MAtters. Key Issues and Doubts', (2016) 3 *Revista de Derecho Civil* 1, 165-176.

5 Cf, for example, E. A. I Amayuelas, E. F. Amorós, 'Kinship Bonds and Emotional Ties: Lack of a Family Relationship as Ground for Disinheritance', (2016) 24 *European Review of Private Law* 2, 203-222.

Polish law on succession will often be the law applicable to inheritance cases of foreigners with their habitual residence in Poland. Poland as a country is an increasingly popular country for habitual residence of many EU citizens. Bringing the Polish solutions in this field to a wider range of readers can also be justified by the fact that Polish law may be the law applicable to Poles living abroad in another EU country, with habitual residence there, in connection with the jurisdiction of the court of that State regarding an inheritance case of a deceased Pole.

Describing the Polish solutions also is also valuable because it may allow testators to take possible steps to exclude the application of Polish law, or to the contrary, to encourage them to choose this law, instead of their national law, within the framework of the so-called *estate planning*. Therefore, the purpose of this article is to identify the legal nature of disinheritance by the Polish normative solutions with regard to the provisions of the EU regulation on succession.

2. The concept and construction of disinheritance

Disinheritance is an institution of inheritance law that aims to deprive a successor of a benefit from the estate by a testator's intention6. This legal construction is strongly linked to the freedom of the property disposition and as one of its elements is subject to legal protection7. In modern legislation, the testator can change the order of succession, including the decision to deprive a given successor of not only a participation, which would fall to him/her if there was statutory succession, but also depriving him/her of the obligatory portion of the inheritance estate, which in most legal systems is awarded to the members of the testator's immediate family8. The successor's adherence to certain ethical, moral or legal principles towards the testator, as well as third persons, is therefore an important element to be evaluated in the course of the inheritance mechanism. The effects of this evaluation may vary and they primarily depend on the shape of the various legal institutions in the system, including the legal construction of disinheritance. According to the prevailing view of the doctrine, disinheritance is understood in the world generally as an institution of private law, by which the testator disposes

6 J. Dukeminier, R. H. Sitkoff, *Wills, Trusts and Estates* (Wolters Kluwer, 2013) 556 et seq.
7 L. Michalski, *BGB-Erbrecht* (C.F.Müller, 2010), 157.
8 On the differences between the various legal systems see, for example: W. Fratcher, 'Protection of the Family against Disinheritance in American law', (1965) 14 *International and Comparative Law Quarterly*, 293 et seq.; I. Kondyli, *La protection de la famillie par la reserve héréditaire en droits français et grec compares*, (Librairie Générale de Droit et de Jurispridence, 1997), 1 et seq.; M. Puelinckx-Coene, 'La Protection des Differents Membres de la Famille par le Droit Familial Patrimonial en Europe', (2004) 12 *European Review of Private Law* 2, 143-166; M. Załucki, *European Uniform Inheritance Law. Myth, Dream or Reality of the Future*, (AFM Publishing House, 2015), 105-128.

negatively in the event of death - in the circle of his/her statutory successors who have special rights under inheritance law because of certain bonds between them and the testator[9]. It is an instrument for exclusion from inheritance, depriving successors of all the benefits of the inheritance estate[10] or a tool to dispose of assets in the event of death - in line with the testator's expected intention[11]. It is used when the bonds linking the testator and the successor are affected by the latter, especially in moral or ethical terms.

Disinheritance is an institution known to the legal systems of many EU countries. Appropriate solutions in this regard are provided, e.g. by the German, Austrian, Swiss or Polish legislation. There are also systems that do not provide *expressis verbis* for such an institution in the provisions of the law. These legislations include French, Dutch and English law. This does not mean, however, that the mechanism of depriving the successor of the benefit of the inheritance estate is not known to these systems[12.] The differences in construing disinheritance, however, are considerable, making the practical use of this institution problematic, in particular in cross-border inheritance cases. According to Art. 23 Par. 2 Point d) of the regulation No 650/2012, disinheritance is one of the institutions subject to the law applicable to the inheritance established under the provisions of the Regulation[13.] Whenever Polish law turns out to be the law applicable to the inheritance, the validity and effectiveness of the disinheritance disposition will be determined by the regulations of Polish law, even if the disposition of disinheritance was made on the basis of another legal system (if this law does not turn out to be the law applicable to the inheritance). Polish legislation is one of the legal systems that uses and regulates disinheritance through statutory provisions. Disinheritance in the Polish legislation is one of the legal institutions, the effect of which is to exclude the successor of inheritance. Ethical and moral considerations are central to this institution in Polish law. The testator makes a decision to deprive a given person of certain potential benefits of the estate based on them. Although this decision is a manifestation of the testator's autonomy of intention, it must be based on the statutory standard of disinheritance. Only the elements of the disposition that satisfy the requirements under the law achieves the legal effect of disinheritance.

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[9] Cf W. Zimmermann, *Der Verlust der Erbschaft. Enterbung, Pflichtteilsschmälerung, Erb- und Pflichtteilsunwürdigkeit*, (Erich Schmidt Verlag, 2006), 79.

[10] K.E. Wehnert, *Die Enterbung bei unwirksamkeit Testamentarischer bestimmungen*, (Marburg Universität Dissertationen, 1987), 21.

[11] R. Chester, Should American Children Be Protected Against Disihheritance, (1997) 32 Real Property Probate and Trust Journal 3, 2.

12 Cf M. Załucki, *Wydziedziczenie w prawie polskim na tle porównawczym*, (Wolters Kluwer, 2010), 163-298.

13 J. Carrascosa González, *El Reglamento Sucesorio Europeo 650/2012 de 4 julio 2012. Análisis crítico,* (Editorial Comares, 2014) 167, 178-179.

Disinheritance has been regulated quite precisely under Polish law. The law provides the normative meaning of this concept, introduces a closed list of conditions necessary to be fulfilled for disinheritance to be effective and, finally, provides the result of disinheritance, which is the deprivation of the entitlement to the legitim[14]. The construction of disinheritance occurring *de lege lata* in Polish law allows the testator to punish the successor for certain reprehensible behaviour that is included in the list formulated by the legislator.[15]

According to Art. 1008 of the Civil Code "The testator may in his will deprive his/her descendants, spouse and parents of the legitim (disinheritance) if they are eligible for the legitim; 1) against the testator's intention, they act persistently in a manner contrary to the principles of social coexistence; 2) they have intentionally committed a crime against the testator or a person close to him/her threatening his/her life, health or freedom or have grossly affronted his/her dignity; 3) they persistently fail to perform family obligations with regard to the testator"[16]. According to such a legal construction, the testator by the act of his/her intention expressed in his/her will may deprive the eligible persons of the legitim based on their negative behaviour in relation to the testator or the person close to him/her.[17]

The provision of Art. 1008 of the Civil Code establishes a legal definition of disinheritance.[18] According to Polish law, disinheritance (wydziedziczenie) is a deprivation of the legitim and not other entitlements from certain persons in the event of the testator's death.[19] In addition, the deprivation of the statutory successor's status cannot be regarded as disinheritance.[20] Only a disposition which aims to deprive the eligible person of the right to the legitim can be classified as disinheritance.[21] This should not be interpreted as a simultaneous deprivation of the legitim in

14 In civil law, the legitim is the part of an estate that children or another close relative can claim against the deceased's testament. Cf A. Verbeke, *De legitieme ontbloot of dood? Leve de echtgenoot!*, (Kluwer, 2002), 17 et seq.

15 M. Pogonowski, 'Wydziedziczenie. Zarys problematyki', (2005) 15 *Rejent* 4, 121-131.

16 A. Rojek, 'Wydziedziczenie i testament negatywny', (2006) *Przegląd Sądowy* 9, 105-117.

17 J. Ignaczewski, *Prawo spadkowe. Komentarz*, (C.H. Beck, 2004), 247-239.

18 B. Kordasiewicz, in B. Kordasiewicz (ed.), *System prawa prywatnego. Prawo spadkowe*, (C.H. Beck, 2013), 954 et seq.

19 For example, the spouse and other persons related to the deceased who lived with him until the day of his death shall be entitled to use, during three months from the opening of the inheritance, the living accommodation and its household equipment as before. The disposition of the deceased precluding or limiting that right shall be null and void (*Cf* Art. 923 § 1 of the Civil Code).

20 Cf M. Pazdan, in K. Pietrzykowski (ed.) *Kodeks cywilny. Komentarz*, (C.H. Beck, 2000), 902.

21 E. Skowrońska-Bocian, J. Wierciński, in J. Gudowski (ed.) *Kodeks cywilny. Komentarz. Spadki*, (Lexis Nexis, 2013), 254.

relation to all eligible persons, which could be suggested by the text of Art. 1008 of the Civil Code.[22] It is sufficient for disinheritance to occur if any eligible for the legitim (i.e. a descendent, spouse or parent) is deprived of it.

This regulatory framework defines the views of the doctrine. According to the widely accepted position, disinheritance in Polish law means the deprivation of the legitim. This treatment is characteristic of most statements on this subject. It is reflected in available commentaries to the Civil Code and textbooks of law on succession. They generally indicate that disinheritance takes place in the event when the testator deprives their descendants, spouse and parents - so people formally eligible for - of the legitim. Sometimes the definition of disinheritance is formulated from the negative side and it is indicated what disinheritance is not. It is emphasized, for example, that statutory terminology defines that disinheritance is not the deprivation of the successors of their participation in the inheritance estate by appointing other persons to the inheritance estate or by drawing up a negative will.[23] This view derives from Art. 1008 of the Civil Code. The statutory definition indicates that a given concept should be understood against a specific legislation.

The above description shows that Polish legislation has adopted a *sensu stricto* model of disinheritance but does not indicate that the deprivation of the right to the legitim is just one type of disinheritance, thus limiting the use of the term "disinheritance" for other cases of depriving the successors of all the benefits of an inheritance estate. Thus, disinheritance in Polish law is not understood as the deprivation of all the benefits of an inheritance estate[24] but only as the deprivation of the legitim. In this way, the Polish construction of disinheritance is different from, Dutch, French and Ukrainian legislations, which do not provide for such institutions as disinheritance with the meaning adopted by Polish law[25]. It is similar to the solutions found in Germany, Austria or Switzerland where disinheritance has been given a similar meaning[26]. For testators whose national law is Dutch or French law, and their habitual residence is in Poland, this is important because the range of available dispositions in the event of death after 17 August 2015 includes a new instrument - disinheritance[27].

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[22] It is noticed, *inter alia*, by B. Kordasiewicz, 'n 18 supra'.

[23] A. Szpunar, 'Uwagi o prawie do zachowku', (2002) 12 *Rejent* 6, 25-26. Thus, the author admits a wider concept of disinheritance, which, however, is not reflected in the normative content of Polish law.

[24] Cf. W. Zimmermann, 'n 9 supra'.

25 Cf, for example, W. Breemhaar, 'Familiäre Bindung und Testierfreiheit in neuen niederländischen Erbrecht', in D. Henrich, D. Schwab (eds), *Familienerbrecht und Testierfreiheit im europäischen Vergleich,* (Gieseking, 2001), 147 et seq.

26 Cf M. Załucki, 'n 12 supra'.

27 See also A. Bonomi, 'Testamentary Freedom or Forced Heirship? Balancing Party

It should be noted here that if Polish law turns out to be the applicable law to succession, it provides for the legitim as a special right of persons close to the testator. They are entitled to it when the testator did not foresee any benefits from the inheritance estate for them. Among various models which are admissible in this respect and are used worldwide[28] (the most popular being the reserve, the maintenance claims system or the legitim), the Polish legislator decided to keep only the legitim. According to Art. 991 § 1 of the Civil Code, a descendant, a spouse and parents of the deceased, who would be entitled to the statutory succession (the entitled), are entitled if they are permanently unable to work or if the entitled descendant is a minor[29]. They take two-thirds of the value of their shares in the inheritance estate in the case of statutory succession, and in other cases, a half of such shares (legitim). According to Art. 991 § 2 of the Civil Code, if the eligible has not received the legitim due to him/her either in the form of a donation by the testator, or in the form of an appointment to the inheritance, or in the form of a bequest, he/she is entitled to a claim for payment of a sum of money needed to cover or to supplement the legitim. The legitim is not dependent on the fulfilment of any other conditions. In a suit for legitim, the only relevant factors are whether a given person belongs to the eligible group and whether he/she received his/her due benefit from the estate - under Art. 991 of the Civil Code. Therefore, it constitutes a certain restriction of freedom to dispose of the testator's estate in the event of death. To deprive the eligible person of the legitim, the testator must disinherit him/her, and as described above, disinheriting an entitled is permitted only where the statutory requirements are fulfilled. One should keep this in mind, especially since various European legal systems are not uniform in this respect. For example: Dutch law provides for legitim, but only for the descendants of the deceased (Art. 4:63 Par. 2 of the Dutch Civil Code)[30]; French law provides for a system of the inheritance estate reserve but without the deprivation of the eligible persons of their rights by the testator's intention[31]; and German law, which is based on the legitim and provides for disinheritance, contains a completely different list of conditions for disinheritance than Polish law (§

Autonomy and the Protection of Family Members' in M. Anderson, E. Arroyo I Amayeuelas, *The Law of Succession: Testamentary Freedom*, (Europa Law Publishing, 2011), 31.

28 A. Verbeke, Y.-H. Leleu, 'Harmonization of the Law of Succession in Europe' in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron, M. Veldman, *Towards a European Civil Code*, (Kluwer Law International, 2004), 335 et seq.

29 P. Księżak, *Zachowek w polskim prawie spadkowym*, (Lexis Nexis, 2010), 98 et seq.

30 T. J. Mellema-Kranenburg, in J. H. Nieuwenhus, C.J.J.M. Stolker, W.L. Valk (eds), *Erfrecht. Tekst &* Commentaar (Kluwer, 2002), 94.

31 F. Lipworth, J.-P. Le Bouffo, J. Le Boufo, in L. Garb, J. Wood (eds), *International Succession* (Oxford University Press, 2015), 280-282.

2333 of the German Civil Code)[32]. Not in every case, the testator's last will causes the legal effect intended by him/her. For example, if a German testator draws up a will in which he/she invokes the condition for disinheritance occurring in German law but which is not a feature of Polish law, when Polish law is the law applicable to the succession, the disposition of disinheritance will not cause any legal effect. Furthermore, upon drawing up a will, the testator whose national law differs from the Polish law on the legitim, does not usually take into account the rights of persons close to him/her, provided for in the system in the event of his/her death. This may lead to undesirable solutions and may cause his/her will not to be implemented. This will happen if according to the intention of a Swiss testator, the benefit is in the form of the inheritance estate reserve for his registered partner pursuant to Art. 470 of the Swiss Civil Code (he/she will dispose of the free part of his/her estate on behalf of other persons[33]) or when a Dutch testator decides that all his/her estate should go to his/her descendants, recognizing that the surviving spouse is not entitled to the estate benefits. Both in the first and in the second case, when the law applicable to the inheritance is Polish law, the testator's intention will not be implemented. In the first case, because Polish law does not know the institution of civil partnerships, the legitim that will replace the reserve, will not cover the registered partner. In the second case, in addition to the descendants, the spouse is also entitled to the benefit from the inheritance estate (in the form of the legitim; ½ of what would go to him/her in the case of statutory succession). Surely, this will cause major difficulties in practice, and in many cases, it will lead to surprising solutions for the testator and successors.

3. The content of the declaration of disinheritance

The content of the testator's declaration of disinheritance expressed in his/her will is also important for the Polish legislator. In practice, the exclusion from inheritance is relatively common when the testator draws up a will. However, in general, the effect is thendepriving the successor of statutory inheritance or the participation in it, but not disinheritance. The legitim will still be due. To achieve such an effect - i.e. to deprive the successor of the inheritance estate or the participation in it, it is generally sufficient just to draw up a will. However, to disinherit a person, the disposition of disinheritance must contain the required content, and in particular, disclose adequately the intention of the testator related to the

32 A. Dutta, 'The Legal Protection of the Surviving Spouse – German Law in Comparative Perspective', in T. Frantzen (ed.), *Inheritance Law – Challenges and Reform,* (Berliner Wissenschafts Verlag, 2013), 41-44.
33 Cf P. Weimar, *Berner Kommentar. Das Erbrecht,* (Stämpfli Verlag, 2009), 161-164.

deprivation of the legitim in relation to that person, determine precisely the disinherited person and indicate the reason for disinheritance.

There is no clear answer to the question how to formulate a testator's declaration whose effect is to deprive a person of the legitim. The testator's intention must be expressed in such a way that the intention of disinheritance is clear, and beyond any doubt. So here, the testator may use various types of wording, including "I disinherit", "I deprive of the legitim" or "I deprive of all the benefits of inheritance estate".[34]

Under Polish law, there is flexibility in the manner in which the disinheriting intention is expressed. The testator's intention, however, must be clear in the declaration. When explaining the testator's declaration, the rule of interpretation expressed in Art. 945 § 1 of the Civil Code is applicable to implement the testator's intention as fully as possible. The testator's declaration of intention should be explained according to the circumstances in which it has been given, the rules of social conduct and established customs (Art. 65 § 1 of the Civil Code).[35] Delimiting the situation in which the testator's intention is not clear can be difficult in practice.

There is no doubt that the content of the disinheritance declaration, besides the explicit articulation of the disinheritance intention, should duly identify the successor who is to be disinherited and include the testator's motives. The determination of this person is very important because the testator must express his/her intention clearly, as disinheritance cannot be presumed. In turn, the requirement to specify the testator's motives is clear under Art. 1009 of the Civil Code. A person who draws up a will, which will then be the subject of analysis under Polish law, should have this in mind.

4. Indication of the disinherited person

An important element of the declaration of disinheritance - as a Polish institution - is to identify the disinherited person. This should be done in a manner analogous to identifying the person appointed to inheritance. Such a person must be determined by the testator in such a way that his/her identity does not raise any doubts. Thus, the most desirable way is to state the name and surname of the person eligible for the legitim, and possibly other data. It is acceptable and sufficient, however, to determine the disinherited person in such a way that it will identify him/her in a way that does not raise any doubts. Expressions such as "my eldest son" or "my wife" are meant here. In turn, the lack of identification of such a person through an incomplete or inaccurate term can make the disinheritance disposition

[34] S. Herzog, *Die Pflichtteilsentziehung - ein vernachlässigtes Institut*, (Gieseking, 2003), 10 et seq.

[35] For more see Z. Radwański, M. Zieliński, in M. Safjan (ed.), *System prawa prywatnego. Prawo cywilne – część ogólna*, (C.H. Beck, 2007), 417 et seq.

ineffective.[36] Theoretically, it appears to be acceptable, however, to determine the person in judicial proceedings either by the interpretation of the will, or by proving it by other means and, therefore, in the same way as it could possibly be while determining the circle of persons appointed to testamentary inheritance.[37]

The admissibility of identifying the person appointed to the inheritance estate through the interpretation of the will is generally accepted.[38] The disinherited person can also be determined in the same way. To do this, one can follow the directives indicated e.g. by the Supreme Court, which in one of the decisions pointed out, *inter alia*, that it is permissible to define a person by way of the will interpretation, but only when the testament contains clear criteria for determining the testator's intention in an unambiguous way. According to the Court, there is no way to exclude the possibility to determine the heir by the rules of the will interpretation, provided for by Art. 948 of the Civil Code. In particular, under Art. 948 § 1 of the Civil Code, an order aimed at establishing the real intention of the testator means the departure from the rule of interpreting intention declarations with regard to objective factors in favour of subjective elements. When determining the real intention of the testator, any circumstances that may be helpful should also be taken into account, e.g. the testator's declaration in connection with the contents of the will, but not included in it (external circumstances). The principle of benevolent interpretation also applies, expressed by Art. 948 § 2 of the Civil Code. The interpretation of the will, however, is always intended only to remove the ambiguities contained in the testator's last will, and may not lead to complete or modify the content of the will.[39] This rule also applies where interpretation of the will shows that the disinherited person is intended. Determination in this way is possible, but only if the testament contains clear indications that allow the testator's intentions to be determined in a manner that does not raise any reasonable doubt. Besides, as indicated by the doctrine, such testamentary provisions are most common in practice and it is sufficient that a person is described in a way that allows identifying him/her.[40]

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[36] E. Bystrzyńska-Fornal, 'Oznaczenie (określenie) osoby spadkobiercy w testamencie', (2004) *Przegląd Sądowy* 2, 55.

[37] E. Skowrońska-Bocian, *Testament w prawie polskim*, (Lexis Nexis, 2004), 135.

[38] Cf, for example, B. Rakoczy, 'Glosa do postanowienia Sądu Najwyższego z dnia 13.06.2001 r., II CKN 543/00' (2002) *Przegląd Sądowy* 10, 123; M. Niedośpiał, 'Powołanie spadkobiercy', (1986) *Nowe Prawo* 4-5, 58.

[39] Judgement of the Supreme Court of 13 June 2001, II CKN 543/00, 2002 *Orzecznictwo Sądu Najwyższego Izba Cywilna* 1, 14.

[40] M. Niedośpiał, *Testament w polskim prawie cywilnym. Zagadnienia ogólne*, (Wydawnictwo Uniwersytetu Jagiellońskiego, 1991), 120.

It is also important that as the testator may not authorize any third party to indicate the heir, he/she cannot authorize anyone to declare disinheritance on his/her behalf. This is due to a strictly personal nature of the will and the declaration of disinheritance. Hence, any dispositions of the testator in this regard must be a manifestation of his/her intention, expressed in person and not by a third party. The possibility to leave the choice in this regard to a third party would be a glaring contradiction with the principle of the personal nature of the legal act of drawing up a will.[41] It is also one of the circumstances that must be taken into account, especially since some views expressed in comparison with other legal systems may often differ in this regard.

5. Indication of the reason

The indication of the reason for the disinheritance is also a necessary element of the disinheritance disposition in Polish law. According to Art. 1008 of the Civil Code, disinheritance can occur only in the will and only on the grounds specified in it. The testator wishing to disinherit a successor must therefore draw up a will, properly identify the disinherited person, declare that he/she wants to deprive this person of the right to the legitim and give the reason why. Pursuant to Art. 1009 of the Civil Code, the reason for disinheritance should arise from the contents of the will.

The provision of Art. 1009 of the Civil Code means that it is sufficient that the contents of the will allow determining the reason for disinheritance. Therefore, it is not necessary to state precisely one of the circumstances indicated by the legislator in Art. 1008 of the Civil Code. It is enough if the testator describes the facts, namely the specific inappropriate behaviour of the successor. From this it will be possible to determine whether the behaviour is in the statutory list of reasons and accordingly whether the declaration of disinheritance is effective. Art. 1009 of the Civil Code states that the legislator does not strictly require that the testator should indicate the reason for disinheritance directly, although that is most desirable. The duty does not mean a precise definition and justification of the reason for disinheritance in the will. It is to be expressed in a way that allows the reason to be determined and reflects the settlor's real intention.

The necessity to identify the reason for disinheritance arises due to some social doubt in Polish law. It is probably due to the lack of public knowledge about the basic principles of the law of succession, including the grounds for disinheritance. It should be emphasized here that any possible doubts regarding the contents of a testamentary disposition including

[41] E. Skowrońska, 'Z problematyki powołania spadkobiercy w testamencie' (1993) *Palestra* 1-2, 6.

disinheritance (with its reason) should be removed by the way of interpreting the will (Art. 948 of the Civil Code). This interpretation, however, serves only to establish the unambiguous wording of the testator's declaration of intention included in the will. Within this interpretation, the content of the will cannot be changed, modified or complemented. The application of Art. 948 of the Civil Code cannot therefore lead to the determination (by way of evidentiary proceedings) of the reason for disinheritance of the persons eligible for the legitim that is unexpressed in the contents of the will. It would be equal to complementing the contents of the will with provisions that were not included in it. Under current law in Poland, indicating the reason for disinheritance is therefore necessary to ensure the validity and effectiveness of the testamentary disposition of disinheritance. This aims, *inter alia*, at avoiding possible disputes after the testator's death between the heirs and the eligible for the legitim.

One may reflect on the legitimacy of the legal status in which the indication of the reason for disinheritance belonging to a closed statutory list is still desirable. In the reference literature, there is no discussion on the subject. It is only indicated that recognizing disinheritance which is not underpinned by a concrete reason as effective could lead to the deprivation of the right to the legitim for trivial reasons and not always in line with the testator's intention. This is an argument for the existing legal status. It should be indicated that the current rules of disinheritance are based on the dominant importance of the testator's intention, with the constraints of the statutory law. They are a kind of compromise between the interests of persons close to the testator and those of his heirs and those gifted by him during his lifetime. Therefore, in light of the current position of the doctrine, it does not seem justified to modify these rules, only to protect persons who do not know law. On the other hand, the existing limitations for the testator, in the form of a closed list of the reasons for disinheritance can lead to a situation in which the breaking of family relations by the heir with the testator will not justify the heir’s disinheritance. This may raise some doubts and lead to the adoption of the idea of the need to change the existing legal status. Theoretically, it is possible to adopt a concept of disinheritance that is not subject to a specific condition referred to in the law, but left only to the intention and recognition of the testator. As indicated by social needs, the intention of the testator, who after all is generally not a lawyer, should be respected. The lack of legal knowledge is not the right argument for not considering the testator’s intention. If he/she decides to disinherit a person, he/she must have a justified subjective reason. Then there is just a basic problem whether the motives of disinheritance should be examined through the prism of subjective or objective perception. In the latter case, it is possible to determine an appropriate list of reasons, which, according to the

legislator attempting to reflect the will of the public, are wicked and justify disinheritance. This direction was chosen by the Polish legislator, who catalogued the reasons for disinheritance (Art. 1008 of the Civil Code), deciding to leave the decision to the testator whether to use disinheritance. The legislator, however, also identified the reasons for unworthiness of inheritance (Art. 928 of the Civil Code).In principle, these reasons are applicable to any situation involving wicked behaviour in the context of disinheritance regardless of the testator's intention. The objective protection of inheritance from inappropriate behaviour on the part of potential heirs exists independently of the testator's intention and the use of disinheritance. Therefore, the question arises whether disinheritance can be shaped as an institution reflecting only the testator's interests. It seems that there are no obstacles to the adoption of such a construction, because the primary function of disinheritance is the protection of the testator's subjective interests. It is one thing to allow unrestricted disinheritance, and another to implement a judicial review of such dispositions aimed at protecting the heirs, which in the current state of the law is based primarily on Art. 1009 in conjunction with Art. 1008 of the Civil Code. Hence, it appears that the formation of disinheritance as an institution reflecting only the testator's subjective perception would be possible, if it was still possible to control such a disposition by the State, and if it was not in contradiction to other rules resulting from a given legal system. Such a solution, however, lies in the future[42].

For disinheritance to be effective, the law applicable in Poland therefore requires that the testator's will should give a particular and real reason that, in his opinion, justifies the disposition of disinheritance. This reason must refer to one of the three types of behaviour specified by the Civil Code, i.e. 1) a persistent conduct contrary to the testator's intention and in a manner contrary to the principles of social coexistence; 2) an intentional commitment of a crime against the testator or a person close to him/her threatening their life, health or freedom or a gross insult to his/her dignity; 3) a persistent failure to perform family obligations with regard to the testator. Moreover, the cause must exist at the latest at the time of the disinheritance disposition. Otherwise, potential disinheritance should be permitted, the construction of which is, however, incompatible with Art. 1008 in conjunction with Art. 1009 of the Civil Code. Disinheritance is in fact a kind of a repression act against the heir for his/her offences. It does not apply to hypothetical events, but only to those that actually took place.

42 Cf M. Załucki, 'Przyszłość zachowku w prawie polskim', (2012) 21 *Kwartalnik Prawa Prywatnego* 2, 556-562.

This type of solution can be - from the point of view of foreign legal systems - often surprising. Firstly, if the testator's national law does not provide for the institution of disinheritance and his/her intention would be a disposition in the event of death excluding the testator's descendants, spouse and parents, if Polish law is the law applicable to the succession after him/her, his/her will shall not have the planned effect. Secondly, when the testator's national law provides for disinheritance, if Polish law is applicable to the succession, disinheritance will have the desired effect only if his/her will specifies the reason for disinheritance and will be in the catalogue of reasons given in the text of Art. 1008 of the Civil Code. Otherwise, the disinherited person will not be effectively deprived of all the benefits of the inheritance estate. Difficulties may arise, e.g. if the testator's national law knows the so-called disinheritance in good faith (*bona fide*) as e.g. Swiss legislation (cf. Art. 480 of the Swiss Civil Code[43]) or partial disinheritance (e.g. Austrian legislation, the doctrine and judicial decisions of which do not deny in principle the admissibility of such an institution[44]). If a Swiss testator disinherits in good faith, then, if Polish law is applicable to his/her inheritance case, the testator's intention will not be implemented. The same happens when an Austrian testator provides for a partial disinheritance, the legal consequences of which are not clear in Poland. According to some representatives of the Polish doctrine, partial disinheritance may in fact be equated in its consequences with forgiveness, and thus would deprive the disinheritance carried out by the Austrian testator of its legal force.

6. Excluding the impact of Polish law application

In light of this, as one could think, the practical use of disinheritance does not always lead to the desired effects. In extreme cases, this may mean achieving effects that are not socially acceptable. In this context, there is a question of the refusing mechanism to apply the applicable law specified by the provisions of the Regulation. This kind of solution, known as the public policy clause, in fact appears usually in private international law. Art. 35 of the Regulation indicates that it is possible to exclude the application of a provision of law of the country indicated by the Regulation by the court dealing with the inheritance case[45]. This may be particularly the case if such

43 P. Tuor, B. Schnyder, J. Schmid, A. Jungo, *ZGB. Das Schweizerische Zivilgesetzbuch*, (Schulthess Verlag, 2015), 843 et seq.; R. Fankhauser, in D. Abt, T. Weiberl (eds), *Erbrecht*, (Helbing Lichtenhahn Verlag, 2015), 341-346.

44 Cf M. Cottier, 'Soll das gut noch fliessen wie das Blut? Familienbilder in aktuellen Diskussionen zur Reform des Erbrechts', in P. Perrig-Chiello, M. Dubasch (eds) *Brüchiger Generationenkitt?,* (vdf Hochschulverlag, 2012), 162.

45 A. Wysocka-Bar, in. M. Załucki (ed.) *Unijne Rozporządzenie spadkowe Nr 650/2012. Komentarz*, (C.H. Beck, 2015), 216-224.

application is manifestly incompatible with public order (*ordre public*) of a Member State dealing with the inheritance case.

Specified in that provision criterion for the application of the public policy clause is therefore legal order (*ordre public*) in force at the seat of the adjudicating court. This includes some basic values stemming from the applicable legal, political and social system. It means the current public order, which reflects contemporary views on fundamental values in force in the country. Basic values are only those for which there is no doubt that they have a fundamental importance for the life of the country. If, therefore, the lack of effects of disinheritance based on a different legal system in Poland produces some controversy due to the conflict with public order, or if disinheritance is to be implemented, which also would raise some doubts, the provision of Art. 35 could become grounds for refusing the application of Polish law by the body deciding on the inheritance case. The application of this solution, however, should be treated with caution; it cannot serve to give preference to national law.

7. Conclusion

Disinheritance - in the light of the provisions of the EU Regulation on succession - is subject to the law applicable to the inheritance case indicated under the provisions of the Regulation (Art. 23 Par. 2 point d). As a rule, it is the law of the habitual residence (Art. 21 Par. 1) or the law of the State of the testator's nationality (Art. 22 Par. 2). In a situation where the legal system is designated as the system of the applicable law, the regulations of that State will be crucial for assessing the effectiveness of the act of disinheritance. The differentiation of the institution of disinheritance between countries in practice may give rise to some doubts that - as it may be assumed- will be difficult to remove. Therefore, the knowledge of the legal nature of each institution of law on succession occurring in their various regulations seems necessary. The road to the single law of succession in the European Union is in fact still far away. The only possibility that appears in the background of the adverse effects of the application of foreign law in the context of disinheritance - as it may be assumed - is the mode indicated in the text of Art. 35 of the Regulation. The public order clause indicated there, however, is the tool that should be reached for only in exceptional circumstances. Therefore, potential disputes on this matter will have to be resolved in the judicial decisions of the Court of Justice. Until then, it is necessary that the testator should make conscious choices and by using the mechanisms provided for in the provisions of the Regulation, should make his/her inheritance case subject to that legislation which he/she knows and which will reflect his/her intention as accurately as possible.

References:

Amayuelas E. A. I, Amorós E. F., 'Kinship Bonds and Emotional Ties: Lack of a Family Relationship as Ground for Disinheritance', (2016) 24 European Review of Private Law 2.

Barreda N.C., 'Reflexiones sobre los regímenes especiales en Derecho internacional privado sucesorio según el Reglamento europeo 650 / 2012 de 4 de julio de 2012', (2012) 6 Cuadernos de Derecho Transnacional 1.

Bonomi A., 'Testamentary Freedom or Forced Heirship? Balancing Party Autonomy and the Protection of Family Members' in M. Anderson, E. Arroyo I Amayeuelas, The Law of Succession: Testamentary Freedom, (Europa Law Publishing, 2011).

Breemhaar W., 'Familiäre Bindung und Testierfreiheit in neuen niederländischen Erbrecht', in D. Henrich, D. Schwab (eds), Familienerbrecht und Testierfreiheit im europäischen Vergleich, (Gieseking, 2001).

Bystrzyńska-Fornal E., 'Oznaczenie (określenie) osoby spadkobiercy w testamencie', (2004) Przegląd Sądowy 2.

Carrascosa González J., El Reglamento Sucesorio Europeo 650/2012 de 4 julio 2012. Análisis crítico, (Editorial Comares, 2014).

Kordasiewicz B., in B. Kordasiewicz (ed.), System prawa prywatnego. Prawo spadkowe, (C.H. Beck, 2013).

Księżak P., Zachowek w polskim prawie spadkowym, (Lexis Nexis, 2010).

Lagarde P., in U. Bergquist, R. Frmiston, F. Odersky, D. Damascelli, P. Lagarde, B. Reinhartz, Commentaire du règlement européen sur les successions (Dalloz, 2015).

Lipworth F., Le Bouffo J.-P., Le Boufo J., in L. Garb, J. Wood (eds), International Succession (Oxford University Press, 2015).

Mellema-Kranenburg T.J., in J. H. Nieuwenhus, C.J.J.M. Stolker, W.L. Valk (eds), Erfrecht. Tekst & Commentaar (Kluwer, 2002).

Michalski L., BGB-Erbrecht (C.F.Müller, 2010).

Niedośpiał M., 'Powołanie spadkobiercy', (1986) Nowe Prawo 4-5.

Niedośpiał M., Testament w polskim prawie cywilnym. Zagadnienia ogólne, (Wydawnictwo Uniwersytetu Jagiellońskiego, 1991).

Pazdan M., in K. Pietrzykowski (ed.) Kodeks cywilny. Komentarz, (C.H. Beck, 2000).

Pogonowski M., 'Wydziedziczenie. Zarys problematyki', (2005) 15 Rejent 4.

Puelinckx-Coene M., 'La Protection des Differents Membres de la Famille par le Droit Familial Patrimonial en Europe', (2004) 12 European Review of Private Law 2.

Radwański Z., Zieliński M., in M. Safjan (ed.), System prawa prywatnego. Prawo cywilne – część ogólna, (C.H. Beck, 2007).

Rojek A., 'Wydziedziczenie i testament negatywny', (2006) Przegląd Sądowy 9.
Skowrońska E., 'Z problematyki powołania spadkobiercy w testamencie' (1993) Palestra 1-2.
Skowrońska-Bocian E., Testament w prawie polskim, (Lexis Nexis, 2004).
Skowrońska-Bocian E., Wierciński J., in J. Gudowski (ed.) Kodeks cywilny. Komentarz. Spadki, (Lexis Nexis, 2013).
Szpunar A., 'Uwagi o prawie do zachowku', (2002) 12 Rejent 6.
Tuor P., Schnyder B., Schmid J., Jungo A., ZGB. Das Schweizerische Zivilgesetzbuch, (Schulthess Verlag, 2015).
Verbeke A., De legitieme ontbloot of dood? Leve de echtgenoot!, (Kluwer, 2002).
Verbeke A., Leleu Y.-H., 'Harmonization of the Law of Succession in Europe' in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron, M. Veldman, Towards a European Civil Code, (Kluwer Law International, 2004)
Chester R., Should American Children Be Protected Against Disihheritance, (1997) 32 Real Property Probate and Trust Journal 3.
Cottier M., 'Soll das gut noch fliessen wie das Blut? Familienbilder in aktuellen Diskussionen zur Reform des Erbrechts', in P. Perrig-Chiello, M. Dubasch (eds) Brüchiger Generationenkitt?, (vdf Hochschulverlag, 2012).
Dukeminier J., Sitkoff R.H., Wills, Trusts and Estates (Wolters Kluwer, 2013).
Dutta A., 'The Legal Protection of the Surviving Spouse – German Law in Comparative Perspective', in T.
Frantzen (ed.), Inheritance Law – Challenges and Reform, (Berliner Wissenschafts Verlag, 2013).
Fankhauser R., in D. Abt, T. Weiberl (eds), Erbrecht, (Helbing Lichtenhahn Verlag, 2015).
Fratcher W, 'Protection of the Family against Disinheritance in American law', (1965) 14 International and Comparative Law Quarterly.
Herzog S., Die Pflichtteilsentziehung - ein vernachlässigtes Institut, (Gieseking, 2003).
Ignaczewski J., Prawo spadkowe. Komentarz, (C.H. Beck, 2004).
Kondyli I., La protection de la famillie par la reserve héréditaire en droits français et grec compares, (Librairie Générale de Droit et de Jurispridence, 1997).
Wehnert K.E., Die Enterbung bei unwirksamkeit Testamentarischer bestimmungen, (Marburg Universität Dissertationen, 1987).
Weimar P., Berner Kommentar. Das Erbrecht, (Stämpfli Verlag, 2009).
Wysocka-Bar A., in. M. Załucki (ed.) Unijne Rozporządzenie spadkowe Nr 650/2012. Komentarz, (C.H. Beck, 2015).

Załucki M., ‘New Revolutionary European Regulation on Succession MAtters. Key Issues and Doubts’, (2016) 3 Revista de Derecho Civil 1.
Załucki M., ‘Przyszłość zachowku w prawie polskim’, (2012) 21 Kwartalnik Prawa Prywatnego 2.
Załucki M., European Uniform Inheritance Law. Myth, Dream or Reality of the Future, (AFM Publishing House, 2015).
Załucki M., Wydziedziczenie w prawie polskim na tle porównawczym, (Wolters Kluwer, 2010).
Zimmermann W., Der Verlust der Erbschaft. Enterbung, Pflichtteilsschmälerung, Erb- und Pflichtteilsunwürdigkeit, (Erich Schmidt Verlag, 2006).