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Gloss to the Supreme Court's decision of 15 June 2022, II CSKP 509/22

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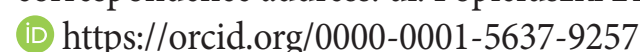
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Abstract: This paper is an attempt at a polemic with the position of the Supreme Court expressed in the cassation case II CSKP 509/22. The subject matter discussed in the paper is of great importance, particularly from a practical point of view, and concerns the issue of the (im)possibility of establishing the date of a will in a situation where doubts arise as to the relation of this will to another will which is dated. The considerations take into account not only the achievements of Polish doctrine, but also - for the sake of comparison and in order to find the best possible model for proceedings in this type of case - the solutions functioning in foreign legal systems (mainly German and French).

"The absence of the date of a handwritten will does not entail the document's invalidity where doubts arise as to the interrelationship of several wills in view of their content. In particular, such a situation occurs if, the testator mentions another will in one of two wills drawn up (e.g., by revoking it). It is also possible to imagine a case where in a will the testator refers to facts which are generally known and which are known to have taken place. In none of these situations could the court who is hearing the case have such doubt as to the date of the will which the said court would have to dispel by way of taking evidence in court proceedings."[1] The thesis cited here was the basis for the Supreme Court's dismissal of the participant's cassation appeal

[1] LEX nr 3409495.

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against the decision of the District Court in S. of 8 November 2019 on the ascertainment of the inheritance acquisition.

My objective is to attempt a polemic with the position of the Supreme Court, expressed on the grounds of the case in question, and to present arguments opposing the statement of reasons for this decision. Beforehand, however, it is necessary to briefly outline the facts of the case and the legal considerations of the Supreme Court carried out on their basis.

By decision of 18 June 2018, the District Court in S. declared that the inheritance after I. E. K., who died on 21 August 2017 in S., on the basis of a notarial will dated 30 July 2008, was acquired in full with the benefit of inventory by her granddaughter W. D. The court of first instance established that I. K. was a widow at the time of her death and had two sons, T. K. and G. D. The testator drew up a notarial will of 30 July 2008 in which she appointed her granddaughter W. D. as her heir. The participant T. K. submitted to the Court the original of handwritten will, which contained the following contents: "After my death, I mother K. I., bequeath to her sons: to T. K., all the furnishings in the flat, i.e., furniture, electronic equipment, and the sale of the entire flat and the division of 50% each, whereas G. D. is to get 5,000 zlotys more because he lent me to buy out the flat; that is my wish. Your loving mother." The court of first instance found that the inheritance was acquired on the basis of the notarial will, considering that the handwritten original does not meet the formal requirement of Article 949 of the Civil Code, as it lacks a date. In turn, this lack raises doubts as to the mutual relationship between the handwritten will and the notarized will, rendering it impossible to determine which of the invoked wills was drawn up first. The District Court accepted that, although it is accepted in case law that doubts as to the order in which the wills were drawn up can be removed by any available means of evidence, the clarification of such doubts cannot be reduced to proving the date on which the will was drawn up. Thus, the court considered it inadmissible to hear witnesses and parties on this circumstance.

By decision of 8 November 2019, the District Court in S. dismissed the appeal of T. K. against the order of the Court of first instance on the ascertainment of the inheritance acquisition. The District Court expressed its opinion on the inadmissibility of taking evidence in court proceedings pertaining to the date when the will was drawn up. It held that in the case

at hand, without the need to take evidence in court proceedings, it was clear that the absence of a date raised doubts as to the mutual relationship between the notarized will and the handwritten will, rendering the latter invalid. In addition, the Court of second instance pointed out that the taking evidence in court proceedings to establish the date of the notarial will was excluded because T. K. had not shown timely evidentiary initiative in this regard.

The decision of the District Court was appealed against in its entirety by the participant in the proceedings T. K., alleging violation of Articles 949(1 and 2) of the Civil Code and Article 958 of the Civil Code. The substance of the allegations boiled down to challenging the thesis that the handwritten will was invalid due to the impossibility of establishing the relationship of that will to the notarized will, whereas it was permissible to take evidence in court proceedings pertaining to the date on which the handwritten will was drawn up.

In assessing the merits of the cassation appeal filed, the Supreme Court observed that the appellant's objections factually related to a single issue – the admissibility of taking evidence in court proceedings pertaining to the date of a handwritten will in a situation where doubts exist as to its relation to the other will. Without denying the fact that, in the circumstances of the case at hand, the participant had not placed any requests for evidence at the stage of proceedings before the Court of first instance, and the requests contained in the appeal had been disregarded as belated, the Supreme Court agreed with the position adopted by the Courts of both instances. In the statement of reasons for the decision under review in this gloss, the Court stated that: „linking the absence of a date, i.e., a certain feature of a will, to the arising doubts means that the focus should be on the will itself (or wills where, as in the present case, the relationship of several wills to each other is potentially doubtful) and not on the entirety of the accompanying circumstances. If it had been the legislator's intention to refer to a wider range of facts, the legislator would have used a formulation that is neutral from the point of view of the source of potential doubt, e.g., 'if no doubts arise' or 'if, in the light of the circumstances, no doubts arise'. Moreover, a linguistic interpretation of the regulation leads to the conclusion that the legislator refers explicitly to the mere arising (emergence) of doubts and not to the possibility of removing doubts that have already arisen. If doubts

arise (emerge), this entails the invalidity of the will, whether or not the doubts are removable. The regulation does not provide, for example, that a will is valid if the absence of a date does not create doubts that cannot be removed. For this reason, the taking of evidence in court proceedings, e.g., as to the determination of the mutual relationship of several wills, is to be regarded as irrelevant. Evidence in court proceedings is taken when doubts exist (have arisen) and not when the factual situation is beyond doubt. If, on the other hand, doubts have arisen, the will is invalid regardless of the hypothetical results of proceedings to take evidence."[2]

In its considerations, the Supreme Court also decided that "the results of the grammatical interpretation of Article 949(2) of the Civil Code are not inconsistent with the conclusions emerging from the application of other methods of interpretation. In its resolution of 19 May 1992, III CZP 47/92, the Supreme Court held that '[i]t is permissible to establish the date of a handwritten will by any means of evidence if the date's absence gives rise to doubts as to the relation of that will to another will,' using as the basis for such a conclusion a historical interpretation based on a comparison of Article 949(2) of the Civil Code with Article 79(2) of the Decree of 8 October 1946, which was in force in the previous legal standing – Inheritance Law. The latter provision stated that 'the absence of a date in a will does not render the will invalid if the date can be determined based on the contents of the will or if it can be ascertained by other means of evidence.' Comparing the two provisions, the Supreme Court assumed that the legislator's aim was to relax the strict formal requirements of the will. This conclusion is not convincing. On the one hand, the cited provision of the Inheritance Law was indeed stricter, as it mandated that the missing date of a shall be established in every case, and not only when it could raise doubts about the capacity to make the will, its content or to make out the relationship among several wills. On the other hand, however, the former regulation expressly permitted the use of evidence other than the will to establish the date of the will, which is lacking now. The assumption that the legislator's aim was to mitigate strictness is therefore arbitrary; moreover, it is also rejected by the Supreme Court in the statement of reasons for Resolution

[2] The statement of reasons for the Supreme Court's decision of 15 June 2022, II CSKP 509/22, LEX No. 3409495.

of 23 October 1992, III CZP 90/92. In contrast to Article 79(2) of the Inheritance Law, which concerned demonstrating with evidence a missing formal element in the will, under the current regulation the legislator does not mandate proving anything, but exempts from the obligation to adhere to one of the formal requirements in those cases where the necessity to do so would serve no purpose. Indeed, there should be no doubt that the necessity to date a will is stipulated precisely in order to eliminate potential doubts as to the testator's capacity to draw up a will, the content of a will or the reciprocal relationship among several wills."[3]

The Supreme Court prefaced its conclusion by stating that "arguments relating to expediency also do not support, or at least do not unequivocally support, the admissibility of taking evidence in court proceedings to eliminate doubts arising from a will without a date. On the one hand, it cannot be ruled out that such a possibility would in certain situations lead to a more complete execution of the testator's will, but on the other hand, one must also bear in mind that the increased formalism in drawing up a shall ultimately also serve that same purpose. After the testator's death, deciphering his or her true intentions is particularly vulnerable to manipulation by his or her survivors. The reconstruction of the date when the will was drawn up through any means of evidence might also afford a potential for such abuse. What may also hold some weight is the argument put forward in the literature on the subject that allowing the removal of doubts referred to in Article 949(2) of the Civil Code through any means of evidence would render the very requirement to date the will a statutory *superfluum* (...). Ultimately, this translates into adopting the conclusion that the absence of a date on a handwritten will does not entail the will's invalidity when the emergence of doubts as to the interrelationship of several wills is ruled out on account of their content."[4]

An attempt at a polemic with the position of the Supreme Court should be preceded by a few remarks, systemic in their nature. It is also worth noting foreign legal solutions regarding the consequences of the lack of a date

[3] This is how the Supreme Court argues in the statement of reasons for the decision under review in the present gloss.

[4] The statement of reasons for the Supreme Court's decision of 15 June 2022, II CSKP 509/22, LEX No. 3409495.

on a will, in order to select the best possible arguments when evaluating the issue in question. Apart from this, the considerations presented below should be of a more general (abstract) nature, due to the fact that, against the background of the case in question, the participant in the proceedings has not demonstrated the appropriate evidentiary initiative for this type of court proceedings.

Firstly, it must be stated that the dating of a will is important for several fundamental reasons. This is because such an action makes it possible: to indicate when the will ended; to ascertain the provisions in force at the time the will was made and to assess whether these requirements have been met; to examine whether the testator had testamentary capacity at the time of making the declaration of the last will[5]; and to establish the interrelationship among several wills.[6] Naturally though, it is beyond dispute that in order for the date of drawing up a will to fulfil the functions attributed to it, it must be true. If a will is dated falsely, it must be treated as if it had not been dated. This rigor shall not apply where there is an obvious clerical error in the date (e.g., the year 1012 is given instead of 2022). In such circumstances, however, it shall be necessary to demonstrate that the testator indicated the wrong date inadvertently and that the actual moment when the will was drawn up can be determined from the surrounding facts. In such a case, a will which bears an erroneous date shall be treated as a dated will.[7]

Given the handwritten form of the dispositions in the will, it is assumed that the date on the will in question should be handwritten by the testator him- or herself. If the date is put on the will mechanically or by computer, it will be treated as if the will had not been dated. By way of comparison, there is a difference in this respect in the German system of inheritance law, which may be worth pointing out; namely the date in a handwritten will does not need to be in the testator's own handwriting and can be effectively

5 Broader on the subject, Maciej Rzewuski, "Zdolność testowania – uwagi de lege lata i de lege ferenda," *Przegląd Sądowy*, no. 6 (2012): 93–97.

6 Elżbieta Skowrońska, *Forma testamentu w prawie polskim* (Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 1991), 57–58; Sylwester Wójcik, *Podstawy prawa cywilnego. Prawo spadkowe (*Warszawa: C.H. Beck, 2002), 54.

7 Jan Gwiazdomorski, *Prawo spadkowe w zarysie* (Warsaw: Państwowe Wydawnictwo Naukowe, 1985), 99; Maciej Rzewuski, *Podpis spadkodawcy na testamencie własnoręcznym* (Warsaw: Wolters Kluwer, 2014),78.

put in with a typewriter or imprinted with a date stamp. It is only important – and this is a condition for a will to be treated as dated – that it remains relevant to the written declaration of the last will.[8]

The provision of Article 949(1) of the Civil Code does not enumerate the specific elements of which the date on a will should consist.[9] The regulation in force differs from the previously binding provision of Article 79(1) of the Inheritance Law,[10] in which the legislator listed the following components among the obligatory elements of the date: the day, month and year when the will was made.[11] Literature on the subject seems to regard the Polish legislator's departure from the previous regulation of inheritance law as a sign of new leniency with regard to the formal requirements concerning the date on a will and, consequently, as a manifestation of the intended liberalization of inheritance law.[12]

Representatives of the doctrine also agree that the date on a handwritten will may be stated descriptively, e.g., "on my 50 birthday," "on the day my brother passed away," etc. In most cases, such descriptions will make it possible to establish the time when the will was drawn up and should generally be treated as the date indicating the pertinent day, month and year. Sometimes, however, it may be the case that the precise date of making the will cannot be clearly established on the basis of the above indications (e.g., when the testator had several brothers and they are all deceased). In such a case, the will should be treated as one that is

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8 Broader on the subject, Gerhard Schlichting, *Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 9, Erbrecht. § 1922–2385, § 27–35 BeurkG* (Munich: Verlag C.H. Beck, 2004), 1437–1438; Jarosław Turłukowski, *Sporządzenie testamentu w praktyce (*Warsaw: LexisNexis, 2009), 48; Rzewuski, *Podpis spadkodawcy,* 78.

9 The date does not necessarily identify the place where the will was drawn up.

10 Decree of 8 October 1946. - Inheritance Law, Journal of Laws 1946 no. 60 item 328.

11 Interestingly, this date format is still required in many existing European (e.g., Article 602 of the Italian Civil Code, Article 688 of the Spanish Civil Code) and American (e.g., California) legislations. See Lanfranco Ferroni, *Codice civile. Annotato con la giurisprudenza. vol.I,II: Libri I–IV (artt.1–2059). Libri V–VI (artt.2060–2969)* (Milano: Co-curatori Valerio Donato. Geremia Romano, 2006), 738–741; Gail Boreman Bird, "Sleight of Handwriting. The Holographic Will in California," *The Hastings Law Journal*, vol. 32 (1980–1981): 612–613.

12 Broader on the subject, Jacek Ignaczewski, "Prawo spadkowe. Art. 922–1088," *KC. Komentarz* (Warsaw: C.H. Beck,2004), 129; Skowrońska, *Forma testamentu,* 58; Rzewuski, *Podpis spadkodawcy,* 79.

not dated. Instead, it is considered sufficient to date the will in the form of the month or season and the year in which the will was made (e.g., August 2021, summer 2022). The validity of a will dated in this way will be determined by the absence of doubt as to the circumstances listed in the wording of Article 949 of the Civil Code.[13]

As a general rule, both the absence of a date as well as the inclusion of a false date result in the will being declared invalid (Article 959 of the Civil Code). However, there are exceptions to this code sanction. The failure to indicate the date on a will shall not render the will invalid if it does not raise doubts as to: the testator's capacity to draw up the will; the content of the will; the reciprocal relationship among several wills (Article 949(2) of the Civil Code). In other words, when the absence of a date gives rise to doubts as to the testator's testamentary capacity, the content of the will or the interrelationship among several wills, it will render the will invalid. However, literature on the subject presents an increasing number of opinions admitting the possibility to determine the date of the will by any means of evidence (e.g., by examining the content of the will or through the testimony from persons present at the making of the will). For this reason, inter alia, the failure to date a will should not result in the will being immediately rendered invalid if: the testator has never been incapacitated; the court has not appointed an interim counsel for him or her; there is no doubt as to the content of the will; it is apparent from the content of the will or extrinsic circumstances that the testator made the will after he or she had reached the age of majority, leaving no other wills or leaving such wills which are reconcilable with each other.[14]

Bearing all of the above in mind, I believe that the possibility of establishing the date on a handwritten will by any available means of evidence should be approved. "After all, it must be remembered that the legislator aims at liberalization and not at 'stiffening' the legal order that was previously in force. Interesting solutions to the issue under consideration exist in French practice, where each element (i.e., the day, month and year) is considered as a separate, independent component of the date and is analyzed accordingly by the court deciding *in casu*. In addition, any deficiencies

[13] Skowrońska, *Forma testamentu,* 58–59; Rzewuski, *Podpis spadkodawcy*, 79–80.

[14] Rzewuski, *Podpis spadkodawcy,* 81. Cf. Skowrońska, *Forma testamentu*, 58–59.

in the date can be rectified by the French courts if the need arises and the judicial rectification harmonizes with the content of the will. (...) [B]y way of exception, inadequacies in the date may be remedied on the basis of circumstances other than the content of the dispositions in the will (e.g., when the testator provides a date consisting only of the day and the month when the will was made, without mentioning the year, the testator's death certificate or the opinion of an expert of the relevant specialization is generally taken into account).[15] The admissibility of establishing a date by means of various types of evidence in Polish law is supported by the previous legal regulation (Article 79(2) of the Polish Civil Code), in the light of which each individual case when a date was missing obliged the court to establish it, while possible ambiguities resulting from the content of Article 949(2) of the Civil Code were irrelevant for the assessment of the validity of a specific dispositions in the will. There were thus two possibilities, i.e., if it was possible to determine the date of the legal act – the will was valid, if not – the dispositions in the will were declared invalid. At the same time, during this period, a view began to prevail that the absence of a precise date did not give rise to doubts as to the validity of the will, it was sufficient to indicate the approximate moment at which the dispositions in the will were made."[16]

I believe that "the question of assessing which of the described legal regulations should be regarded as stricter is not straightforward. On the one hand, the legislator currently stipulates that the absence of a date or the impossibility of establishing a date does not always mean that the will is invalid; on the other hand, the possibility of establishing a date in doubtful situations is not expressly permitted in the Civil Code. This circumstance could demonstrate the need for restrictive treatment of similar omissions. It should be noted, however, that the lack of a relevant reference by the legislator in the text of Article 949(2) of the Civil Code to the possibility of establishing a date by means of various types of evidence in no way precludes

[15] Georges Wiedegkehr, Xavier Henry, Alice Tisserand, Gay Venandet, François Jacob, *Code Civil* (Paris: Dalloz, 2004), 830.

[16] As in Rzewuski, *Podpis spadkodawcy,* 81–82. Cf. Elżbieta Skowrońska-Bocian, *Testament w prawie polskim (*Warsaw: LexisNexis, 2004),80–81.

such an action. Indeed, as silent on the matter, the legislator cannot be presumed to view such an opportunity critically."[17]

Until the time of the decision under review in the present gloss, the Supreme Court seemed to unequivocally share this view in its earlier decisions. By way of example, it is worth noting the following case law statements:

- "(1) A declaration by the testator which does not have the characteristics of a will and does not correspond in its form to a revocation of a will, but which indicates the one among several wills made on the same day that constitutes the last will, may be considered sufficient to remove any doubt as to the several wills' sequence. (2) The appointment of the same heir in several wills made on the same day shall be valid notwithstanding the impossibility of ascertaining their sequence and the difference in bequests.";[18]
- "The absence of a date in a handwritten will entails its invalidity only if the court proceedings fail to remove the doubts referred to in Article 949(2) of the Civil Code. In removing them, the court shall also take into account evidence indicating the date on which the will has been drawn up."[19]

The cited case law statements of the Supreme Court prove that the previous jurisprudence allowed for, and sometimes even required, the external circumstances accompanying the will to be taken into account in the process of verifying the validity of a handwritten will. Significantly, the above-mentioned Supreme Court decisions reflected the spirit underlying a significant part of Polish doctrine,[20] with only a few authors indicating – in

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17 Rzewuski, *Podpis spadkodawcy,* 82.

18 Resolution of the Supreme Court of 30 September 1971, III CZP 56/71, OSNC 1972, no. 3, item 47.

19 Resolution of the Supreme Court (7) of 23 October 1992, III CZP 90/92, OSNC 1993, nos. 1–2, item 4.

20 Paweł Księżak, *Prawo spadkowe (*Warsaw: Wolters Kluwer Polska, 2017), 197; Konrad Osajda, "Rozrządzenia na wypadek śmierci," in *Kodeks cywilny*. *Komentarz*, vol. IV A. Spadki, ed. Konrad Osajda (Warsaw: C.H. Beck, 2019), art. 949, 442; Maksymilian Pazdan, "Rozrządzenia na wypadek śmierci," in *Kodeks cywilny. Tom II. Komentarz Art. 450–1088*, ed. Krzysztof Pietrzykowski (Warsaw: C.H. Beck, 2020), art. 949, 7; Joanna Kuźmicka-Sulikowska, "Rozrządzenia na wypadek śmierci," in *Kodeks cywilny*. *Komentarz*, ed. Edward Gniewek, Piotr Machnikowski (Warsaw: C.H. Beck, 2021*)*, art. 949, 1923.

preference to a strict interpretation of the provisions of inheritance law – that an undated will would always remain invalid, even if its date could be otherwise established.[21]

In conclusion, the position expressed with regard to Case II CSKP 509/22 cannot be accepted uncritically. The considerations carried out above prove the opposite of the conclusion articulated by the Supreme Court in the statement of reasons for the decision under review in the present gloss. Thus, it should be acknowledged that the absence of a date on a will shall cause the will's invalidity only if the doubts referred to in Article 949(2) of the Civil Code cannot be removed in court proceedings when the court takes into account not only the content of the will, but also other evidence indicating the date on which the will was drawn up.

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[21] Jan Gwiazdomorski, *Prawo spadkowe* (Warsaw: Państwowe Wydawnictwo Naukowe, 1990), 106; Sylwester Wójcik, Fryderyk Zoll, "Rozrządzenia testamentowe," in *System prawa prywatnego. Tom. 10. Prawo*, ed. Bogudar Kordasiewicz (Warsaw: C.H. Beck, 2015), 371.

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