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Witnesses in the Establishment of Oral Will, Their Duty, in the Republic of North Macedonia and Other Comparative Views

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Abstract

In the legal system in the Republic of North Macedonia, only persons, who fulfill certain conditions, in accordance with the law, can be witnesses of the preparation of the oral will. Taking into consideration that the testator verbally declares the last will, in order to ensure the true will of the testator, in the Republic of North Macedonia, the witnesses, during the oral testimony, are obliged and with no delay to put in writing the statement of the testator and to hand it over to the court as soon as possible, or repeat it verbally to the court, disclosing when, where and on what occasions it was declared the last will by the side of the testator. Namely, given their role, of the witnesses, there is also a special duty for them. Thus, the purpose of this paper is to carry out a scientific study of which persons can be witnesses of the preparation of the oral will, what is their duty, in this context to resolve certain dilemmas, and in the paper there is also a place for whether with the oral testament, the testator, can perform dispositions for the benefit of the witnesses themselves and their particular close relatives.

Keywords: a testator; persons; without delay; a statement.

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1. Introduction

Taking into consideration the positive inheritance right of the Republic of North Macedonia, the testator may state his last will verbally before two witnesses only if due to exceptional circumstances he/she is not able, if he/she is not able to compose a written testimonial. However, in order for a certain person to be a witness when composing a oral will, that person is required to fulfill certain conditions in accordance with the law. The legislator has clearly defined which individuals can be witnesses in compiling this form of testimony. Here, of course, one should bear in mind that it is a will, where the testator orally declares his last will. Hence is the regulation of this domain when it comes to the oral will. Witnesses in the oral testament also have a certain duty, which in fact represents an insubstantial element for the validity of the oral will, which will be discussed in the paper. Namely, in addition to the existence of two essential conditions for the validity of this form of testaments, there is one non-essential element, which is the assigned duty of the witnesses. Namely, the paper deals with the persons who can appear in the role of witnesses when composing a oral will, their duty, the fulfillment or failure to fulfill that duty, the resolution of certain dilemmas in this context, whether the testator with the oral testimonial can make dispositions for the witnesses themselves, in relation to certain of their closer relatives, so in the paper a scientific study is carried out in this direction, which actually represents the purpose of this paper. In this regard, despite our positive inheritance right of the Republic of North Macedonia, in the extent necessary in this paper, the inheritance - legal regulations from 1973 and 1955, adopted during the existence of the former Yugoslav Federation, are studied, and also some comparative solutions are given in the paper.

2. Persons who can appear as a witnesses when composing the oral will

Only witnesses who fulfill certain conditions, that is, criteria can appear as witnesses when making a oral will. In macedonian positive inheritance law, regulation is made in this direction, with a certain correlation with the judicial will. Namely, Article 91 of the Law on Succession of 1996 [1] states that: “When preparing a oral will, only persons who can be witnesses in the preparation of a judicial will can testify, but they do not have to be able to read and write.” In this sense were the solutions provided for in the first Republican Law on Succession of 1973 [2]. (Article 77) and the Federal Law on Succession of 1955 [3]. (Article 79). Having in mind the aforementioned enactment, when it comes to a oral will, when composing it, as witnesses, only persons who can be witnesses when making a judicial will can appear, but they do not have to be able to read and write. Namely, with the fact that such witnesses do not have to be able to read and write, in a way, is a mitigating circumstance, and this is also in accordance with the fact among other things that and the statement of the testator can also be repeated before the court by the witnesses. Of course here it is necessary to bear in mind that the testator orally announces its last will. Namely, in the Law on Succession of 1996 in Article 90 paragraph 1 states that: “The testator may declare his / her last will orally before two witnesses only if due to exceptional circumstances he is unable to draw up a written will.” So when it comes to a oral will regarding which persons can be witnesses in the making of a oral will, one should bear in mind who can be a witness in the preparation of a judicial will, whereby the witnesses when composing a oral will as it was aforesaid they do not have to know how to read and write. In this context, as witnesses in the making of an oral will can appear, persons who are: adults who have not been deprived of their business ability it means an adult business ability person, that understand the language in which the will is composed, but also not to be in a certain kind and connection with the testator. In

the Law on Succession of 1996, Article 70, paragraph 1 states that: "When preparing a judicial will can be witnesses, adult persons who have not been deprived of their business ability and who are able to read and write understand the language in which a will is drawn up." Thus, and the following persons cannot appear as witnesses: the descendants of the testator, his stepchildren and their descendants, his ancestors and adoptive parents, his relatives in the sideline to the fourth degree inclusive of the spouses of all of these persons and the spouse of the testator. Regarding this, Article 70 paragraph 2 of the Law on Succession stipulates that: "They cannot be witnesses in the preparation of a judicial will, nor to compile the will relying on the saying of the testator in the function of a judge: the descendants of the testator, his adopted children and their descendants, his ancestors and adoptive parents, his relatives in the sideline to the fourth degree inclusive of the spouses of all these persons and the spouse of the testator." Of course, as a legal requirement in the preparation of a oral will, witnesses need not be able to read and write, something that is required in the judicial will. This is understandable because the testator declares its last statement of will orally. However, when preparing the oral testament, witnesses are required to know the language in which the testator gives her final statement of will before them, that is, before the witnesses. Hence, the impossibility of a verbal testament to be made by a mute person. Thus in science it is said that: "Persons who are unable to speak (silent, mute) cannot make a oral will." [4]. While the witnesses as it was mentioned before are asked to know the language spoken by the testator. If the witnesses do not understand the testator, then the oral will cannot be made. In science it is noted that: "However, a person who is unable to understand what the testator has stated orally as his last will, for example a deaf person, could not be a witness in the making of a oral will." [5]. The knowledge of the language spoken by the testator is related to their special duty, which will be discussed in the next item. Comparatively reflected in the Law on Succession on Serbia of 1995 [6] witnesses of the testator must be literate, full-time business fully capable adults, while for the oral will they do not have to be literate, whereby the witnesses of the international and written testament before witnesses must also know the language in which the testator declares that the testament is his, while in the oral and judicial will they must also know the language on which the testament is made (Article 112). As far as the Law on Succession of Croatia of 2003 [7], as witnesses of the oral will can only be persons who may be witnesses of the public will, but they do not have to be able to read and write (Article 38).

3. Specific duty of the witnesses during the oral will

In according, macedonian law for the witnesses when composing a oral will there is a specific duty. It is a special duty of witnesses, of course, motivated by the desire to respect the true last statement of the will of the testator. Namely, this is also due to the fact that it is an extraordinary and private will. Thus, in Article 92 paragraph 1 of the Law on Succession of 1996 stipulates that: "The witnesses to whom the testator orally stated his / her last will are obliged without delay to put in writing the testimony of the testator and to hand it over to the court as soon as possible, or verbally repeat it before the court, presenting when, where and on what occasions the testator has declared his last will." While Article 92, paragraph 2 states that: "The execution of this duty is not a condition for the validity of a oral will." In this sense were the solutions provided for in the Federal Law on Succession of 1955 (Article 80) and in the first republican Law on Succession of 1973 (Article 78). In this sense is the new inheritance- legal legislation of Serbia since 1995 year (Article 111). A solution is also offered by Croatia's Law on Succession since 2003. Thus, in view of the 2003 Law on Succession of

Croatia, the witnesses before who the testator stated his / her last will orally, are obliged without delay to write the contents of the statement of the testator and as soon as possible to hand it over to the court or Croatian hereditary Law or the public official of custody, or orally repeat it in front of the court or public official when, where and on what occasions the testator has declared his last will, whereas the failure to fulfill this duty of the witnesses does not harm the validity of the oral will (Article 39). Regardless of whether the testator has died or is alive, this duty of the witnesses remains. As can be seen from the aforementioned provision, the witnesses are obliged with *no delay* to put the statement in writing and as soon as possible to hand it over to the court, or to verbally repeat it before the court, stating when where and on what occasions his last will declared by the testator himself. If we were to take into consideration the possibility for the witnesses to forget the true will of the testator that he has declared, because over time, simply, the witnesses can omit some facts from the statement, forgetting them, then it becomes clear why exactly this duty is prescribed for the witnesses. Namely, in order to preserve the highest authenticity of the testimony of the testator. However, here it must be mentioned that for the validity of the oral will the fulfillment of this duty is not a requirement. It's not necessary. Namely, the testator according to the law declares his/her last will. The oral will is of a limited validity period. It is an extraordinary will. Thus, the execution of this duty constitutes a non-essential element of the oral will. Witnesses can do this duty during the probate proceedings. Thus, in the literature it is stated that: "For this reason, if the witnesses did not perform their duty in due time, it is possible to do so in the course of the probate proceedings."[8] Here, of course, the question can be asked and compensation for possible damage. Why there has been so much waiting, for example, to leave the statement from the last will of the testator to the court. In theory it is stated that: "If they miss it, they can answer for the damage they have caused to the people who have benefited from the will, according to the general principles of liability for damage due to guilt."[9]. Thus, here it can be a compensation for possible damage. The next question that also deserves an answer is how the court is handles it when the witnesses have such a duty. Namely, having in mind the Article 290 of the Law on Non-Contentious Proceedings [10], when the witnesses of the oral will submit to the court in writing where the will of the testator is fixed, the court receives the records of the court in writing and puts it in a special casing and seals it, this is done as well by the court when the witnesses come to court in order to verify the testimony of the testator orally, while the court takes a statements from the witnesses there is an endeavor on the side of the court to determine the statement of the will of the testator, and also to examine the circumstances from which the validity of such a testament depends. Furthermore, the court issues a certificate to the person submitting the document that the document has been handed over to the court to keep, and if the testament, that is, the document for the oral will is submitted to a court where the testator does not have a place of residence, there is a duty of that court to inform the court where testator is dwelling immediately, while the will handed over to the court in custody, as well as the documents for such a testament, are kept separate from the other records in the court (Article 291-293 of the Law on Non-Contentious Proceedings). When the testator is deceased, and the deceased has made a oral will, and for that there is a document signed by the witnesses hand-handedly, the court will make its pronouncement in a manner prescribed for the proclamation of a written will, but when there is no such document, the witnesses are questioned separately about the content of the testament, and especially about the circumstances from which its validity depends, and then the minutes for hearing the witnesses is declared according to the provisions that apply for the proclamation of a written will (Article 158, paragraphs 1 - 2 of the Law on Non-Contentious Proceedings).

4. Managing in benefit of the witnesses, by the testator with a oral will

Article 93 of the 1996 Law on Succession stipulates that: "The provisions of the oral will that leave something to the witnesses when they are composed, to their spouses, their ancestors, their descendants, their relatives in a sideline to the fourth degree of family relations, including the spouses of all these persons are null and void." In this sense were the solutions prescribed in the former Macedonian Law on Succession of 1973 (Article 79), and the Federal Law on Succession of 1955 (Article 81). In this sense, a solution is also offered by the Croatian 2003 Law on Succession (Article 40) and the Law on Succession of Serbia of 1995 (Article 160, paragraph 3). This is prescribed, of course, in the direction of respecting the true final statement of the will of the testator. Given the possible abuses, a decision is made for the nullity of the provisions that leave something to witnesses and to precisely determined close relatives. Thus the witnesses receive the role of a witness who cannot receive anything from the legacy of the testator, and this also applies to their close relatives, which the law prescribes. However, it should be noted that if there are such deployments, it does not mean the nullity of the entire will. Null and void are only such deployments in accordance with the said provision. Of course, this is also in the direction of ensuring the last will of the testator.

5. Concluding remarks

Only certain persons can, according to the law, appear in the role of witnesses when assembling a oral will. Of course, this is in the direction of respecting the last will of the testator and avoiding possible abuses when composing the oral will as an extraordinary and private will, which is valid for a limited period of time. When it comes to the oral will regarding the witnesses, there is a certain correlation with the judicial will. Thus, as witnesses when preparing the oral will can appear a persons who can to be witnesses when compiling a judicial will, but they do not have to be able to read and write. Thus, in macedonian positive inheritance law, in the role of witnesses in the process of assembling a oral will can appear people who are adults who have not been deprived of their business ability, furthermore they understand the language in which the testament is composed, that is, the language spoken by the testator and are not in a certain kind and degree of kinship with the testator. The witnesses during the composition of the oral will in accordance with the law also have a certain duty, and that is without delay that they put in writing the statement, that is, what the testator has stated and they must hand it over to the court as soon as possible, or verbally repeat it before the court stating, when, where and on what occasions the testator stated his last will, but the fulfillment of this duty is not a condition for the validity of such a will, as we explained in the paper itself. Also, in the Republic of North Macedonia some provisions of the oral will may be null and void when it comes to the disposal of the testator in favor of the witnesses and certain close relatives in accordance with the law. This is certainly justified in order to avoid certain abuses with oral will itself. But, the nullity of some provisions does not mean the nullity of the entire testament.

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