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HOLOGRAPHIC WILL IN MACEDONIAN LAW ON INHERITANCE

-abstract-

The holographic will dating back from the antient roman law, till these days is one of the most used legal forms for expressing the last will of testators. The subject of analysis of this paper is defining the holographic will, the essential elements, and non-essential elements of holographic will in accordance with Macedonian law on inheritance. In the paper the authors make comparative analysis, and an analysis of some judicial cases from domestic and comparative law. The aim of the paper is to make a conclusion about the advantages and disadvantages of holographic will, how to minimize the disadvantages and to give some recommendation to the Macedonian legislator in way to improve the legislative framework of this widespread legal form for expressing the last will of testators.

Keywords: *holographic will, Macedonian law, inheritance, case study.*

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I. INTRODUCTION

Inheritance in Macedonian law is regulated by the Law on Inheritance of 1996.[1] According to the Law on Inheritance, inheritance can occur based on law (legal inheritance) or based on a will (testamentary inheritance).[2]
In Macedonian law on inheritance, the inheritance agreement is not a basis for inheritance, and legal and testamentary inheritance are not mutually exclusive.
In inheritance based on a will, in contrast to legal inheritance, the will of the testator as the owner of the property to dispose of the property in accordance with his interests on which his will is based is of primary importance.
The term inheritance based on a will means inheritance based on a unilateral statement of the will of the testator made during his lifetime in a form prescribed by law. According to Spirović Trpenovska (2009, p.140), the will is a one-sided personal and revocable declaration of will of a person with which he arranges his property in case of death given in a form provided by law. The giver of the will is called the testator. Persons who inherit based on a will are called testamentary heirs.
A will is understood as a unilateral statement of the last will of the testator regarding his property given in a form prescribed by law.
Inheritance-legal relations are regulated by the will. With the will, the testator determines which person(s) will be his/her heir(s) and which part of the testator's will belong to the heir or the heirs after his/her death.
For the will to be a legal basis for inheritance, it must exist at the time of the testator's death.
The will is one of the bases for invoking inheritance. The will is a strictly personal act of the testator and a direct product of his will (Risteski, 1995, p 21). From here, anyone who wants to make a will must do so in person. Representation during the drafting of the will is excluded.

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[1] Law on Inheritance, Official Gazette of the Republic of Macedonia no. 47/96.
[2] This is in accordance with the principle of limitation of inheritance bases. See more at: Dejan Mickovic, Ristov Angel, Inheritance Law, University of St. Cyril and Methodius, Skopje, 2020, p.39.

The basic elements on which the existence of the will depends are the following:

- existence of a natural person who is capable of drafting a document in the form of a will (testator);
- that the letter drawn up by the testator contains a statement of will, as the last will of the testator;
- the declaration of will must be given in a precisely defined form;
- that there is property to which the statement of the last will of the testator refers.

The will, in addition to being a unilateral legal act, is also a mortis causa legal act. This means that the legal actions of the will arise from the moment of the testator's death

II. FORMS IN WHICH A WILL CAN BE DRAWN UP

The will is exclusively a formal legal act, that is, for its creation, that is, for its validity, a legally prescribed form is required (Blagojević, 1979, p. 244). In this context, the Law on Inheritance of the Republic of North Macedonia contains a provision according to which the will is valid which is drawn up in a form determined by law and under conditions provided by law.

The Macedonian legislation provides the following forms in which the will can be drawn up:

- holographic (handwritten) will
- judicial will
- diplomatic consular will
- military will
- international will
- oral will.

When choosing the form, one should consider the conditions that the Law on Inheritance provides for the specific form.

Holographic will belongs to the group of regular forms of wills. Unlike the law, the science of inheritance law divides wills into regular and

extraordinary and private and public wills (Mickovic & Ristov, 2020, p. 224). Based on this division, this testament is regular and private.
The holographic will can be drawn up at any time, and its validity period is unlimited (Vardarski, 1983, p. 204).

III. A NOTION OF A HOLOGRAPHIC WILL (HOLOGRAPHIC TESTAMENT)

The holographic will was already known in Roman law (testamentum holographum). From Roman law until today, it is one of the most widespread forms of will in almost all inheritance laws (Vardarski, 1983, p. 205). Of course, the Macedonian inheritance law is not an exception to the Roman trend for testamentary will. The holographic will was not mentioned for the first time in Macedonia by the Law on inheritance from 1996, also it was regulated with the laws from 1955 and 1973, while Macedonia was part of Yugoslavia.
Holographic will in Macedonian inheritance law is legally regulated in the Inheritance Law. According to Article 66 of the Law on Inheritance, a will is valid if the testator wrote it with his own hand and personally signed it.[3]
For the validity of the holographic will, it is not necessary, but it is useful, to indicate in it the date when it was drawn up. Hence, in the positive Macedonian inheritance law, the date of drawing up the holographic will does not constitute a condition for the validity of this form of will.
The holographic will as a legal form allows and guarantees full discretion and secrecy (Ilioski, p.85). This is so because the testator can keep the secret of the existence of a will and its contents without notifying the heirs. This alone avoids the possibility of conflict situations between potential heirs because they cannot know about the existence and content

[3] Identical to the current Law on Inheritance, the holographic will was regulated in Article 68 paragraph 1 of the Federal Law on Inheritance from 1955 (Official Gazette of SFRY No. 20/55, 12/65 and 42/65) and Article 66 paragraph 1 of The Republic Law on Inheritance (Official Gazette of SRM No. 35/73 and 27/78), that is, in the previously valid regulations in Macedonian inheritance law.

of this will. Hence, the holographic will is an effective instrument for the testator to be able to carry out his last will, without formally and legally needing witnesses or state authorities.

The testator can make his own will at any time and under any conditions. This is so because the condition for the drafting and validity of holographic will is only for the person expressing the last will to know and be able to write. The validity period of the holographic will is unlimited.

According to its form, the holographic will is a regular and private will that is drawn up in writing. The testator can decide to keep the holographic will alone or hand it over to the court for safekeeping in a sealed envelope. With this alone, the secrecy of the content of the last will of the testator remains guaranteed until the moment of his death.

The new Law on notary[4], enacted in 2016, provides an obligation for the Notary Chamber in the Republic of North Macedonia to conduct a Register of wills. For that purpose, the Notary Chamber in the Republic of North Macedonia in 2019 adopted a Regulation for Register of Wills.[5] According to article 3 of this Regulation, every notary, basic court, testator, diplomacy and consular posts and advocate could apply for record of the will in the centralized electronic register of wills. The record of the will includes data about the testator, the subject who submit the application for record of the will, information about date and place where the will is kept, and date and place where the will is announced. The intention of the legislator is to simplify the inheritance procedure, and after the death of one person the notary should get information from the Notary chamber if it is a registered will of the deceased person in the Register of wills. In comparative law also some countries such as Croatia, Bulgaria, France, Slovenia, Czech Republic etc. have established centralized Register of wills (Mateska, 2010. p 34).

[4] Law on notary, Official Gazette of the Republic of Macedonia no. 72/2016, 142/2016 and 233/2018.

[5] Regulation for Register of Wills, 02-958/ 5, 28.06.2019.

1. A person who can make a holographic will

A holographic will can be drawn up by any person who according to the law has testamentary capacity and is in writing. (Mickovic & Ristov 2011, p.110)

Testamentary capacity is a general requirement, the fulfillment of which is required for drawing up any type of will, even for a holographic will. The capacity for reasoning ability is necessary at the moment of writing the holographic will. According to Macedonian court practice the diagnosis of neurosis does not mean that the testator is incapable of writing a holographic will.[6]

The ability to write and read is a necessary condition for drawing up a holographic will because a will must be drawn up and signed personally by the testator without the participation of other persons or authorities. From here it can be concluded that a holographic will can be drawn up whenever the testator decides to do so, regardless of time and circumstances. The only thing that the testator must have at that moment is a writing utensil, and it doesn't matter if it consists of a pencil, a pen and paper, or parchment, a board, chalk, a pointed object, or the like. According to Professor Chavdar, (1996, p.143) the deviation from the usual material (paper) and means of writing (pencil, pen) should be a consequence of the specific circumstances in which the will was drawn up, otherwise doubts would be cast on whether the will was drawn up by the testator, or whether it was serious his intention to make a will, when he did so in a most unusual manner and by unusual means. It is important that such a document allows him to record his last will in relation to the property he leaves and the manner of distribution of that property among his heirs/beneficiaries.

The holographic will is valid if the testator wrote it with his own hand and signed it. According to some authors it is allowed the holographic will to be written in language that the testator knows, it is not restricted that the

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[6] See more Appellation court Bitola, Judgment GZ no.3241/11 from 1.3.2012, available on Поништување на своерачен тестамент (sud.mk).

will must be written in the official country language or the native language of the testator (Ibid). For the validity of the holographic will, it is not necessary, but it is useful, that the date when it was drawn up is indicated in it. At the same time, the holographic will does not have to bear a heading or something similar. The letter is drawn up, that is, it is an order for the last will of the testator, and it can be titled in the way the testator addresses his heirs. But that letter does not have to have a title, and from the very content of the letter it is clearly expressed that it is a will, the content of which should be realized after the death of the testator.

2. Essential elements of a holographic will

A holographic will is a very simple form of will that is often used in practice. In many jurisdictions the holographic will meet only minimal requirements to be valid.[7] According to Macedonian law on inheritance, two essential elements of the holographic will stand out from the legal formulation of the will:

- the will must be written personally by the testator.
- the will must be signed by the testator.

The first condition for the validity of a holographic will is that the will was written personally by the testator (holographic will). This means that the testator must write the entire contents of the will personally. If only some parts of the will are written by the testator, but not the entire text of the will, the holographic will is not valid. The French legislator to avoid misunderstandings has certain prescribed in article 970 of the Civil Code that the entire contents of the will should be handwritten by the testator by himself.[8]

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[7] In comparative law there are still some systems where the testator sign must be proved by two or more witnesses, exp. some countries in Africa, Asia and South America like Ghana, Brazil, Bangladesh (Khan, Bangladeshi Law on wills: a comparative study) etc.

[8] Article 970 Civil Code, Chapitre V :Des dispositions testamentaires. (Articles 967 à 1047) - Légifrance (legifrance.gouv.fr)

A holographic will is not valid even if a certain part of the will was written by another person, even with the consent of the testator to do so. The executor's will is valid if the testator only consulted other people about the contents of the will. From the court practice the holographic will is valid even if the testator rewrite with his handwriting some maniscripture that some other person composed it and sign it.[9]

To make a holographic will, the testator must also have testamentary capacity at the time of declaring the last will.[10] At the moment of declaring the last will, the testator should know and be able to write. The script or language in which the testator wrote the will is not important for the validity of the holographic will.

A holographic will is valid even when it is not written in an official language and when it is written in any living or dead language, and even when it is written in stenographic characters. The material on which the will is written, and the means with which it is written, are also not of essential importance for the validity of the will. However, the deviation from the usual material (paper) and means of writing (pencil, pen) should be a consequence of the specific circumstances in which the will was drawn up, otherwise doubts would be cast on whether the holographic will was drawn up by the testator, or whether his intention was serious. In comparative law is well known the case of Cecil Geo Harris, who left his property to his wife scratching with a pocket knife a holographic will on the tractor fender, under which he was trapped.[11] In this case the last will of the testator was wrriten on the tractor fender. Also the flexibility of this

[9] Judgment of Appellation court in Bitola GZ no..3241/11 from 01.03.2012. Appellation court in Bitola, 2012. Bulletin of court practices, pg.29-30. According to the findings of the court, the fact that the testator rewrote the paper that advocate prepared for him, according to the will and telling's of the testator, has not have a character of an obstacle for the validity of the holographic will.

[10] For example, if a man had an accident in the mountains, and during his life did not distribute his property in the way he wished and using his last moments of life with his knife on a piece of wood to write a will, it will not be an obstacle for its validity.

[11] The Court at Kerrobert accepted as a holographic will, see more on Ellwand G. (2014) An analysis on Canada's most famous holograph will: How Saskatchewan Farmer scratched his way in a legal history, Saskatchewan law Review.

form is evident by the Czech case of the shortest will in history, listed in the Guinness Book of World Records when a man who realized his imminent death wrote on the bedroom wall “everything to my wife”. (Smits, 2016, p.109).

In theory, the question of whether a holographic will can be made by a person who has no hands is disputed. In practice, a person who has no hands is allowed to write a will using his mouth, legs or writing prostheses. It is considered that the holographic will is not valid if the person wrote this will personally but, on a typewriter, or computer. (Maksimovski, 2009, p. 26).

The second condition for the validity of a holographic will is that the will is signed by the testator. This means that without the testator's signature the will is not valid. The signature is usually placed by the testator at the end of the will. However, the law does not explicitly require the signature to be placed at the end of the will. From here, the will that the testator signed at the beginning is also valid.[12] If the holographic will contains several pages, the testator should sign each page separately. This is not necessary if the pages of the will are numbered. The testator signs the will by putting his first and last name, his own signature, but he can also use a pseudonym, a nickname, an artistic name. However, putting only the testator's initials makes the holographic will invalid. In legal science it is present an understanding that the holographic will is valid even if the testator has signed the will by explaining its position to the heirs (for exp. I, your /father/ grandfather/ mother etc) (Blagojević, & Antić, 1990, p.309).

However, the meaning of the second condition for the validity of a holographic will is that the testator signs the will so that there is no doubt that it was the testator who personally wrote the will and that the content of the will is an expression of his last will.

[12] For example: I, (name and surname), leave my property to ... More See: Chavdar Kiril, Commentary on the Law of Inheritance, Academic Agency, Skopje, 1996, 144.

3. Non-essential elements of a holographic will

Non-essential elements of a holographic will in Macedonian law are:

- the date of drawing up the will;
- the place of making the will.

Regarding the date of drawing up the holographic will, the law contains only a recommendation that it is useful to put a date when writing the will. However, this recommendation is not a condition for the validity of the holographic will.

In relation to the place of drawing up the holographic will, the legislator did not explicitly state. Hence, the place of making the holographic will is not a condition for the validity of the will.

The testator can specify the place of making the holographic will according to his will. This is desirable for the testator to do according to the locus regit actum rule, but also to get a more complete picture of the environment in which the testator wrote the will.

The German legislator[13], also Swiss[14] and France legislators[15] provide an obligation for indication of the date when the holographic will is concluded. An opposite from the Macedonian and Ex-Yugoslavian countries legislative, in Germany, Switzerland and France this element is essential and missing date in the holographic will makes it invalid.

IV. ADVANTAGES AND DISADVANTAGES OF A HOLOGRAPHIC WILL

A holographic will is a handwritten document that has not been witnessed or notarized. It is often written in the person's own handwriting and may not be typed or printed. Holographic wills are

[13] German civil code, BGB article 2247 (2) As a rule, the testator is to state in the declaration the time (day, month and year) and the place at which they wrote it down.

[14] Swiss civil code, article 505 (1) A holographic will must be written in the testator's own hand from start to finish, include an indication of the day, month, and year on which it is drawn up, and be signed by the testator.

[15] Article 970 Civil Code.

typically created in situations where the person does not have access to a lawyer or is in a hurry to make a will. Like all other forms of will, a holographic will has certain advantages and disadvantages.
The main advantages of a holographic will are the following:

- the testator writes and signs it with his own hand;
- allows for a certain i.e complete discretion and secrecy;
- it is compiled at any time and under any conditions;
- the testator can keep it alone, or hand it over to the court for safekeeping in a closed envelope, so that the secrecy of the content of his last will remains guaranteed until the moment of his death;
- doesn't have to wear a header or anything like that. The letter is drawn up, that is, it is an order for the last will of the testator, and it can be titled in the way the testator addresses his heirs;
- the time of duration, i.e. of validity, is unlimited;
- a person who has no hands and writes normally with his mouth, or with his feet, or with a writing prosthesis can also make a valid handwritten will;
- the language in which this will be drawn up and the letter in which it is written have no importance in terms of validity.

The main disadvantages of a holographic will are the following:

- the entire content must be written personally by hand by the testator;
- can only be composed by a literate person who knows and can write (an illiterate person cannot compose);
- it must not be written by mechanical means, so the testator must have personally typed it;
- high risk for falsification of holographic will especially if the will is not kept in court or in notary offices;[16]

[16] There are a plenty of cases in Macedonian judicial practices where someone is making falsification of a holographic will. See more in Appellation court in Stip, Bulletin no.6 2012, pg. 204-206, where accused person is found guilty of falsification of documents, in the certain case holographic will.

- due to the fact that the testator could keep the holographic will anywhere, it is possible the holographic will not to be found at all;
- the date and place of compilation are not mandatory.

V. CONCLUDING OBSERVATIONS - ON THE NEED FOR AMENDMENTS AND ADDITIONS TO THE CURRENT LEGAL SOLUTION FOR THE HOLOGRAPHIC WILL IN MACEDONIAN INHERITANCE LAW

Continuing the tradition started in the Latin law, the Macedonian legislator is not the only one that regulates the holographic will, although we can make a conclusion that the way this kind of will is regulated in the comparative law is not identical. From the previously made analysis of the positive legal solution for the holographic will in the Macedonian law on Inheritance, one can conclude that changes and additions to the current solution are needed.

The amendments and additions de lege ferenda should move in the direction of regulating the date of drawing up the holographic will as a mandatory condition for the validity of this form of will, as well as regulating the issue of possible changes to the content of the holographic will by the testator or possibly by another person.

That the date of drawing up the holographic will should be a mandatory condition for the validity of the will is said by several arguments:

- if there are several wills of one person, it will be known which is older and which is newer, which is essential for which of them is valid when they refer to the disposal of the same property,

- the ability of the testator to make the will can be assessed according to the date,

- according to the date, the existence of other circumstances that indicate the possible invalidity of the will can be assessed, for example, coercion, delusion, or the place and circumstances in which the will was drawn up, if it was drawn up in an unusual way, etc.

The date should be a mandatory condition for the validity of the holographic will to avoid unnecessary litigation in a situation where

several wills are found, but also for the purpose of determining the testamentary capacity of the testator.
In judicial practice, there are also situations when the testator or possibly a third party makes certain changes in the content of the holographic will. This is usually done by supplementing the content or crossing out certain parts in the content of the holographic will. In such situations, doubts arise as to what the testator's true will is, especially if additions to the content or crossing out of certain parts in the content of the testament lead to a different result for the distribution of the inheritance between the heirs. In the context of this, it seems necessary to regulate the issue of amendments and additions to the testament in a precise manner in the Law on Inheritance. This alone will not only ensure the last will of the testator but also avoid many potential disputes between the heirs.
The legislator also should improve the Regulative for register of wills, by precising the obligation of the competent notary, judge, or consular office to collaborate with Notary Chamber, but it should not become a new obligation or obstacle for the testator after writing the holographic will to apply to register, as a mandatory obligation. Especially bearing in mind that this kind of will can be written on every occasion even during some disaster.

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