Przegląd Prawno-Ekonomiczny

REVIEW OF LAW, BUSINESS & ECONOMICS

lipiec–sierpień–wrzesień

Nr 44/1
(3/2018)

WYDAWCA

Katolicki Uniwersytet Lubelski Jana Pawła II | Wydział Zamiejscowy Prawa i Nauk o Społeczeństwie w Stalowej Woli

ADRES REDAKCJI

Redakcja „Przeglądu Prawno-Ekonomicznego" | 37-450 Stalowa Wola, ul. Ofiar Katynia 6a | e-mail: ppe@kul.pl

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VOLUMINA.PL DANIEL KRZANOWSKI | ul. Ks. Witolda 7-9, 71-063 Szczecin | tel. 91 812 09 08 | e-mail: druk@volumina.pl

ISSN 1898-2166 | Nakład 300 egz.

Watykan, 25 kwietnia 2018 r.

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I. Introduction

One of the key principles of Polish law of succession is that the deceased's intentions must be observed to the fullest extent possible. This principle feeds through to the rule of an amicable testamentary interpretation (as per the *favor testamenti* maxim). It is also manifest in statutory provisions intended to replicate the deceased's presumed intentions. The order of intestate succession is laid out with the intention to mimic the possible contents of the deceased's will, had they drafted one in due time.

Another provision of the law aimed at facilitating the deceased's will as closely as possible, is the one encoded in Article 961 of the Polish Civil Code[1]. The provision in questions appears simple, yet proves to be ambiguous in practical application, leaving certain significant issues to be determined in detail by jurisprudence and legal doctrine.

The issues in question may be interesting for foreign scholars. Polish civil law borrows and develops a lot from the pillars of continental law[2], intertwined and linked to the major continental systems. However, it is, to some extent, peculiar and different. It is, then, a convenient object of comparative efforts.

[1] Act of 23rd April 1964 – Civil Code (consolidated text: Journal of Laws of Republic of Poland of 2017, item 459 as amended), hereinafter referred to as: the "Polish Civil Code" or "KC".

[2] Thus: F. Zoll [in:] K.G. Creid, M.J. Dewall, R. Zimmermann (eds), *Comparative Succession Law, Volume I: Testamentary Formalities*, Oxford-New York 2011, p. 271.

Moreover, the introduction of a common instrument regulating the European private international law of succession[3] may result in a significant volume of successions to be ruled by Polish law[4]. For many foreigners residing in Poland, possibly unbeknownst to them, Polish law may prove to be applicable to their succession. by virtue of the choice of law clause[5]. Hence the practical significance of the issues discussed herein should not be undervalued.

II. General remarks

2.1. Inheritance

A person's assets – property rights and receivables – devolve, upon their passing, to one or several persons (Article 922 S. 1 KC)[6]. The heirs, then, inherit all property rights and become party to all obligations of the deceased (regardless of whether the deceased had been a creditor or a debtor to such obligations).

Polish law provides for two and only two bases for inheritance. An estate may pass to a person's heirs either pursuant to a will or to rules of intestacy. Intestate succession is referred to in Polish legal language as "statutory succession", as it is determined only by statute – inasmuch as it sets forth rules for intestate succession.

Accordingly, any disposition of property in case of death may only be made by way of a will (Article 941 KC). The statute sets forth binding and inflexible rules of intestacy. Should a person decide they want to influence the succession (even in the form of a so-called negative will, i.e. one containing only an exclusion

[3] The Regulation (Eu) No 650/2012 of the European Parliament and of the Council of 4 July 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 (Official Journal of the European Union L 201/107, hereinafter referred to as: the "Regulation").

[4] Pursuant to Article 21(1) of the Regulation states that – in general – the law of the State in which the deceased had his habitual residence at the time of death shall be the law applicable to the succession as a whole.

[5] Pursuant to Article 22(1) of the Regulation, the choice of law is limited however to the option to choose the law of the state whose nationality one possesses to govern one's succession. It is also possible.

[6] Polish law refers to the moment of the death of the person in question as the "opening of inheritance", interlinking this moment with the automatic acquisition of inherited assets (and duties) by the heir or heirs (Article 924 and 925 of the Polish Civil Code).

– though not disinheritance – of a would-be-heir from what otherwise would have been intestate succession) must be effected in the form of a will.

Polish law, unlike e.g. Austrian, does not distinguish in any way between a will and codicil[7]. Pursuant to Polish law, then, the testator in their will may appoint heirs (one or many) as well as institute legacies or just restrict to one of these options. It does not anyhow affect the validity of a will.

It is easy to identify, then, that Polish law does not recognize a typical third method of disposing of property on death[8], known in certain other jurisdictions (specifically in German and Austrian law), namely: an inheritance agreement[9]. The legality of such an agreement is expressly excluded in Article 1047 KC[10].

2.2. Wills in Polish Law

Wills in Polish law share their defining features with common law wills. The five essential characteristics of a will as identified by common law scholars may be also truly ascribed to Polish law wills[11]. In Polish law, much like in English law, the wishes expressed in a will are intended to take effect on death and no earlier. They are always revocable (and alterable) as a whole or in part (Article 943 KC[12]). They are ambulatory – *capable of dealing with property which is acquired after the date of the will*[13]. Finally, a will is merely a declaration of intention. It may not be enforced before the testator's death nor does a (future) heir or legatee have any claims arising from the will till the moment of the testator's passing.

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[7] F. Zoll [in:] *Comparative…*, p. 274.

[8] J.S. Piątowski [in:] *idem* (ed.), *System Prawa Cywilnego, tom IV. Prawo spadkowe*, Warszawa 1984, s. 28.

[9] This translation of the Polish phrase *umowa dziedziczenia* has been chosen purposefully to distinguish from the notion of *an agreement as to succession* as defined in the Regulation (Article 3 s. 1(b)).

[10] This provision, reading that an agreement concerning the inheritance after a living person shall be invalid, enshrines, when read together with Article 941 (mentioned above), the principle according to which it is permissible to perform only such mortis causa legal acts, which were determined by statute as permissible. This principle results in illegality of executing legal acts which would be binding for the future testator and considered effective upon the said testator's death. Thus: W. Borysiak, *Konstrukcja czynności prawnych mortis causa w polskim prawie cywilnym*, Przegląd Prawniczy Uniwersytetu Warszawskiego 2006, Nr 2, s. 8–9.

[11] The list of characteristics of wills under English law is based on: C. Rendell, *Law of Succession*, London 1997, p. 3-6.

[12] Compare with the *ratio* in Vynior's Case (1609) 8 Co Rep 816, from which follows that a will may be revoked even where the will itself provides for its irrevocability.

[13] *Ibidem*.

This characteristic element is in Polish jurisprudence directly linked with the issue of revocability[14]. One vital characteristic of a will, often overlooked in legal doctrine, is that there might be no will without a proprietary disposition[15]. Apart from the so-called special wills (including a military will and a travel will), two most frequently encountered forms of wills are holographic wills (handwritten in whole and signed) and notarial wills (made in the form of a notarial deed by a notary public).

As mentioned above, testamentary dispositions may either take the form of an appointment of heir (one or more) or establishing of a legacy. The key principle of Polish law of succession is that of general succession. It follows from it that the whole of testator's property at the time of his death becomes the estate, subject to inheritance by heirs either statutory or testamentary – they receive shares in any and all assets of that estate, and become debtors to all estate debts. The testator, by means of a testamentary appointment, disposes of the estate in whole or in part (Article 959 KC). Therefore, the appointment of an heir is of a general nature and is, as a rule, save for the institution being the subject matter of this paper, inherently separated from dispositions aimed at singular objects. Disposing of certain components of an estate may be effected by means of a legacy. A legacy may either be an ordinary legacy or a specific legacy. An ordinary legacy creates an obligation, burdening the heirs, be it statutory or testamentary, to render specific performance for the benefit of a specified third person (Article 968 KC). A specific legacy may only effectively be made within a notarial will and is capable of transferring the legal title to an object automatically upon the opening of inheritance (Article 981^1 KC).

2.3. Testamentary interpretation

All texts require interpretation[16]. The process of interpretation allows the reader to ascribe meaning to signs and sets thereof. Statements made in legal transactions are no exception to this general rule.

In everyday life wills, especially the holographic ones, are often drafted by non-lawyers. Polish legal doctrine and jurisprudence has come forward with

[14] K. Osajda [in] K. Osajda (ed.), *Kodeks cywilny. Komentarz*, Legalis/el. 2018, commentary to Article 941, item 25.10.

[15] S. Wójcik, F. Zoll [in:] B. Kordasiewicz (ed.), *System Prawa Prywatnego. Tom 10. Prawo spadkowe*, Warszawa 2015, s. 328.

[16] See e.g.: B. Brożek, *Granice interpretacji*, Kraków 2015.

a number of rules of legal interpretation regarding legal acts effected by parties in legal relations. The general rule of testamentary interpretation places upon anyone interpreting, including the courts, an obligation to decode and recreate the testator's true will – as it had in fact been (or actually: as it, in accordance with the best of knowledge and best intentions, may be deemed to have been), not as third persons see it *post factum*[17] - and to the fullest possible extent, *to justify an interpretation which, so far as possible, upholds the validity of wills*[18]. Finally, the law construes certain presumptions, as well as rules dictating what need be established in case of doubts. One such rule is laid out in Article 961 KC.

III. The rule from article 961 kc

3.1. The content of the rule and its significance

First clause of Article 961 KC states that if the testator had in a will allocated to a particular person particular assets that exhaust almost the entire estate, such person shall not – if doubts arise – be deemed a legatee, but an heir appointed to the entire estate. Second clause follows with an explanation that in case of a disposition made to the benefit of more persons, such persons shall be deemed to have been appointed to the entire estate – in shares proportional to values of assets allocated to them.

The meaning and significance of this rule seem clear. Normally, appointment of an heir is effected by appointing him to the estate or part thereof (Article 959 KC), with consequences described above. Disposing of specified assets to the benefit of a specified person results in creating a legacy, dependent on situation

[17] Of course this opens an avenue of issues regarding the notions of objective vs. subjective, of whether we are, while arriving at the process of interpretation, free of bias and our own viewpoints affecting the very process before us, of whether a person dealing with interpretation may at all recreate the intimate thought process of the author of the text being interpreted and is the interpreting person, especially a career lawyer (as all judges and a vast majority of persons acting in court as attorneys in inheritance proceedings), able to divulge from their character, beliefs and traits both inborn and learned. Though all kinds of attempted answers to these questions remain more of a philosophical or at least legal-philosophical nature, may the author submit that the commons sense intuition as to these issues would be that the process of interpretation always is and always will be seriously influenced by the particular and subjective characteristic of the interpreter.

[18] F. Zoll [in:] *Comparative…*, p. 273; M. Niedośpiał, *Glosa do postanowienia SN z 16.IV. 1999 r II CKN 255/98*, Państwo i Prawo 7/2000, p. 109.

and context: either ordinary or specific. Polish law does not limit the quantity of legacies or cap the value of assets distributed this way. Hence, legacies instituted in a will may well exceed the value of assets "left" for the heirs or even exhaust the whole estate[19]. However, in many such cases Article 961 KC may step in and establish that in fact an appointment of an heir was effected instead of a legacy.

K. Osajda has identified two aspects of Article 961 KC significance[20]. Firstly, the implementation of the *favor testament* maxim. Following from the assumption that if a testator had disposed of his assets almost in entirety, given especially that the testator probably had little knowledge of the legal technicalities of succession, notably of the difference between appointing heirs and establishing a legacy – their intention was in fact to indicate and appoint heirs instead of creating legacies[21]. Secondly, the rule protects the interests of persons benefitting from the will, as the legal position of heirs is much stronger that legatees. The heirs, said author argues, obtain property and other rights *in rem* and become party to the deceased's contractual relations automatically, while legatees only obtain claims for performance of the legacy[22]. A few further remarks may be added to strengthen the argument. Should the estate devolve unto several heirs, the legacy encumbers them proportionally to the value of their shares in the estate (Article 971 KC). Some authors believe that thus the law waives the normal rules of liability for estate's debts, which normally is joint and several (Article 1034 KC). There follows that the legatees' situation is worsened inasmuch as one of the heirs obliged to perform the legacy is in a poor financial condition or even insolvent. This argument is void if the minority concept[23] – arguably more reasonable – is accepted, stating that Article 971 KC affects only the internal liability between the heirs. In external relations, also towards legatees, the heirs are liable jointly and severally as per the general rules.

However, K. Osajda's argues also that the advantage of the of heirs' position lies in the possibility to reject inheritance. Thus heirs may gain the benefits of inheritance and simultaneously limit the risk of liability for the estate's debts,

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[19] Even if they surpass the value of the whole estate it does not invalidate them, only leads to a limitation.

[20] K. Osajda [in:] K. Osajda, *op.cit.*, commentary to Article 961, item 4.

[21] Similar reasoning seems to arise from the judgement of the Supreme Court of 3 November 2004 r., case no.: III CK 472/03, where the Court explained that the law intended to recreate the motives behind testators' dispositions, submitting that where someone had disposed of his assets almost in entirety, he most possibly intended to nominate the beneficiary to be an heir, not a legatee.

[22] *Ibidem*.

[23] S. Wójcik, F. Zoll, *op.cit.*, p. 367.

while in legatees' case, should the estate's debts surpass its assets, the heirs are released by law itself from performing the legacies. It is submitted, however, that the aforementioned is hardly an argument in favour of being appointed an heir. A legatee can either expect the legacy to be performed or find the obligations void due to the ratio of estate's debts to assets. The legatee does not have to take any actions nor bear any costs. Heirs, however, even taking into account the 2015 reform[24], are in worse position. Even given the limitation of liability arising from the benefit of the inventory heirs must bear the costs (including court fees and other such costs) and accept the nuisance of performing the estate's debts (at least tolerate the liability and enforcement effected against them). Alternatively, upon waiving inheritance, they still must bear the costs and go through the practical troubles related with waiving.

Another vital purpose of the discussed regulation may be identified in the protection of intestate heirs and the creditors of the estate[25]. If it weren't for operation of Article 961 KC, persons who would normally be the heirs would not gain a lot from succession – assuming that almost the entire estate would have been disposed of by legacies, while being forced to accept the general liability. That would be cumbersome and, in certain cases, could event result in a net loss for some heirs. Article 961 KC steps in and helps prevent at least certain such cases The protection of creditors is achieved by ascribing the status of heirs and the liability linked to it to persons who are the true beneficiaries of the estate. Had such persons been treated as legatees only, they would be free from such liability. Hence Article 961 KC allows the liability for the estate's debts to follow the benefits resulting from succession.

3.2. Controversial issues in article 961 kc

Four controversial issues regarding Article 961 KC will be discussed herein:

1. Does the rule in question constitute another method of appointing heirs, apart from the general one (Article 959 KC), or is it a supplementary rule of testamentary interpretation?

[24] Act of 20 March 2015 on the amendment of the Civil Code and several other Acts (Journal of Laws of the Republic of Poland of 2015, item 539), which changed i.a. Article 1015 KC and introduced a new rule regarding the acceptance of inheritance, reversing the former rule. From then on, should an heir fail to make a declaration regarding the acceptance or waiver of inheritance in due time, such failure is tantamount to a declaration of acceptance with the so-called benefit of the inventory, i.e. with the heir's or heirs' liability limited to the value of the estate's assets.

[25] K. Osajda [in:] K. Osajda, *op.cit.*,, items 5-7.

2. Which moment is relevant to stablishing whether the assets allocated in the will exhaust almost the entirety of the estate – the making of the will or the testator's passing?
3. Should the testator's subjective assessment of the estate – its assets and value thereof – be taken into account, or should and objective assessment be made?
4. What does the phrase "almost entire estate" essentially mean?

3.2.1. Alternative method of heirs' appointment or a rule of testamentary interpretation?

As indicated above, one area of controversy is the very legal nature of the rule expressed in Article 961 KC. There exist two possible approaches to the issue at hand. The first is that the norm encoded in Article 961 KC allows testators to choose an alternative method of appointing heirs (apart from the one provided for in Article 959 KC). The other is that the discussed regulation constitutes a rule of testamentary interpretation, applicable whenever, in spite of conducted interpretation, doubts as to the testator's will subsist.

The dominant opinion in Polish legal doctrine is that the regulation from Article 961 KC is a rule of interpretation. The current case law also seems to supports this statement[26]. Most contemporary commentators are sympathetic towards this viewpoint[27]. The very content of the provision in question indicates so, by restricting the operation of the rule to cases of doubt. Such wording is typical for rules of interpretation created by statute to operate when doubts arise[28].

E. Skowrońska underlines that the dominant interpretation stems directly from the general succession rule in Polish law (stating that heirs inherit at least a fractional share in all assets of an estate)[29]. S. Wójcik and F. Zoll emphasise that the discussed rule may only be applied in cases where, after conducting due testamentary interpretation, doubts remain as to the intents of the testator. This view is entirely correct. Article 961 KC pronounces a secondary rule of

[26] Resolution of the Supreme Court of 16 September 1993, case no. III CZP 122/93.

[27] E.g.: S. Wójcik, F. Zoll, *op. cit.*, p. 362; J. Kremis [in:] E. Gniewek, P. Machnikowski (eds.), *Kodeks cywilny. Komentarz*, Warszawa 2014, p. 1750; *idem, Reguły interpretacyjne z art. 961 KC przy wykładni testamentu notarialnego,* Rejent 2009 no. 9; E. Skowrońska, *Glosa do uchwały SN z 16.9.1993 r., III CZP 122/93*, Orzecznictwo Sądów Polskich 1994 No 10, item 447; M. Pazdan [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*. Tom II, Warszawa 2011, p. 1064; P. Księżak, *Zapis windykacyjny*, Lex 2012, item 2.8.

[28] Similar provisions include inter alia: Articles 70, 71, 97, 674, 759 KC. Characteristic is always the use of the words: *in case of doubts, if doubts arise*, and other such similar.

[29] E. Skowrońska, *Z problematyki powołania spadkobiercy w testamencie,* Palestra 1993 no. 1-2, p. 5.

interpretation, supplementing the general testamentary interpretation principle set out in Article 948 KC[30]. Making use of the secondary rule requires that all interpretive measures subordinated to decoding the testator's intention be exhausted before going into detailed interpretative rules, like the one expressed in Article 961 KC[31].

E. Skowrońska seems also to ascribe to the rule set out in Article 961 KC a "reverse" effect, arguing that testamentary inheritance is, pursuant to Article 961 KC, only possible when a will depletes almost the entirety of an estate. Otherwise, according to this author, intestacy rules should step in, and persons to whom only assets constituting a minority of the estate should be deemed to be legatees. This opinion is seemingly correct in a majority of cases. Usually, inasmuch as the testator had made only specific allocations pertaining to a minor parts of an estate's assets, these allocations should be in fact deemed legacies. Yet descriptive correctness compels to state that if there are no doubts, i.e. when a testator had made it clear that he desires such "minority allocations" to operate or be interpreted as appointment of heirs, then the "reverse" effect of Article 961 KC will not take effect. It may be disputed whether this is due to there being no doubts (while Article 961 KC expressly requires such) or just due to the operation of normal, general rules of testamentary interpretation (Article 948 KC), yet the conclusion still stands.

3.2.2. The moment relevant to determine the ratio of estate eshausted by testamentary disposition

Another matter of controversy in Polish legal doctrine is the questions of the moment relevant for the purpose of determining whether majority of the estate had been "used up" by the testamentary dispositions. There are two possibilities: the moment of drawing up the will or the moment of the testator's death.

K. Osajda argues[32] that if one assumes that Article 961 constitutes a method of appointment of heirs, the adoption of a subjective approach must follow, and, consequently, deeming the regulation in question a rule of testamentary interpretation must result in accepting the objective approach. It is submitted

[30] Article 948. § 1. A testament shall be construed in a manner ensuring as complete fulfillment of the decedent's intent as possible.
§ 2. If a testament may be construed in differing manners, the interpretation which allows to maintain the decedent's dispositions in effect and to give them reasonable meaning shall be accepted.

[31] Z. Radwański, *Wykładnia testamentów*, Kwartalnik Prawa Prywatnego 2.1/1993, p. 16. Similarly: the Supreme Court in the judgement of 14 May 2015, case no.: I CSK 489/14.

[32] K. Osajda [in] K. Osajda (red.), *op.cit.*, commentary to Article 961 KC, item 19.

that this is a non sequitur argument. Certain authors indicate that choosing the drawing up of the will as the relevant moment must result in procedural problems, especially with gathering evidence[33].

As indicated above, the interpretative meaning of Article 961 KC stems from the *favor testamenti* principle of and the eagerness to recreate the testator's real (if incorrectly expressed) intentions. If, then, the rule is directed at recovering and protecting the true will of the testator, then it is only reasonable that it should aim at deriving the results of its application from what his real convictions – from what the testator believed and how he in fact perceived the content and value of his property (see below). If such shall be the grounds for further legal assessment, especially if the purpose of Article 961 KC is to make sense of the testator's expressed intentions by adjusting their literal meaning toward the perceived indirect intentions (as possibly imagined by the lawmaker when drawing up Article 961 KC), then it is submitted that there is only one reasonable interpretation of said regulation. Procedural inconveniences should never constitute valid arguments as to the interpretation of substantive law. This interpretation compels us to recognise that the moment of reference for the purpose of applying Article 961 KC shall be the moment of drawing up the will[34].

3.2.3. Subjective or objective assessment of the estate?

The issue at hand has two aspects. One regards whether a list of the estate's assets, relevant for the purpose of applying Article 961 KC, shall be determined objectively *post factum* but *ex ante*, or shall the testators subjective belief be taken into account? This problem may be approached from another side[35]: how to deal, in the context of Article 961 KC, with testamentary dispositions regarding items and rights not belonging to the testator's property?

The second aspect of the problem is whether the basis for assessing the ratio of property disposed in a will to property not covered by the dispositions should be the objectively determined value (because, as will be later clarified, the value of assets, not their volume, is relevant in this respect) of assets or maybe their subjective value? The subjective value differs may differ in it that it takes into account the testator's conviction as to the value of particular subjects, even mistaken conviction, as well as his particular personal attitude to such assets, or other circumstances that increase their from the testator's viewpoint. This

[33] M. Niedośpiał, *Glosa do postanowienia SN z 29 III 2007, I CSK 3/07*, Państwo i Prawo 2011/05.

[34] Similarly: the Supreme Court in the judgement of 29th March 2007, case no.: I CSK 3/07.

[35] See: K. Osajda [in] K. Osajda (red.), *op.cit.*, commentary to Article 961 KC, item 11.

problem is important in practice not only in the context of determining whether the rule from Article 961 s. 1 KC will be applicable, but also for the purpose of determining the amount of co-heirs' shares, as per s. 2 of Article 961 KC.

As to the second of the above-mentioned aspects: numerous authors support the objective approach[36]. K. Osajda again proves that the adoption of an objective approach is a necessary consequence of recognizing that Article 961 constitutes in fact a rule of interpretation. A certain mixed concept was put forward, according to which the objective assessment should be preferred, unless in a particular case the examination of the entire will compels to refer to the subjective assessment[37].

However, for reasons identical to those outlined above regarding the moment relevant for the purpose of applying the regulation of Article 961, it should be recognized that the subjective aspect should be decisive. If the rule from Article 961 is shaped to tend to follow the testator's intentions, then any assessment made in accordance with this rule should take into account how the testator subjectively perceived his estate. It is true that, in most cases, the valuation of the estate should be made objectively[38]. Only if there are plausible arguments indicating that the testator's assessment absconded from one that is general and reasonably objective, should the subjective perception of value be taken into account. Same applies to the composition of the estate. First of all, it's examination should be based on common-sense findings. Only when, based on the facts of the case and the evidence gathered, it may be considered that the testator was mistaken as to the composition of the estate (he was not aware of some assets or mistakenly thought other assets belonged to him), these subjective issues should be investigated and based on.

3.2.4. What does "almost entire" mean?

The practical significance of this issue is obvious. Whenever, after due interpretation the intentions of the testator are still unclear (see above), the court will face the issue of whether or not to apply Article 961 KC. Following the unequivocal wording of the rule, it may only operate when "almost entire" estate had been exhausted by dispositions relating to specified assets. Hence the ambiguity as

[36] E. Skowrońska-Bocian [in:] J. Gudowski (ed.), J. Wierciński, E. Skowrońska-Bocian, *Kodeks cywilny. Komentarz. Tom 6. Spadki*, Warszawa 2017, commentary to Article 961, item 10; M. Pazdan [in:] K. Pietrzykowski, *op.cit.*, commentary to Article 961, Nb 6; J. Kremis [in:] [in:] E. Gniewek, P. Machnikowski (eds.), *op.cit.*, commentary to Article 961, Nb 5.

[37] E. Niezbecka [in:] A. Kidyba, *Kodeks cywilny. Komentarz*. Tom IV. Spadki, Warszawa 2015, p. 166.

[38] See: M. Zelek [in:] M. Gutowski (red.), *Kodeks cywilny*. Tom II. Komentarz. Art. 450-1088 Legalis/el. 2016, commentary to Article 961, item 7.

to under what circumstances may it be said that the majority of estate's assets have been disposed.

The relevant reference for this criterion is not, as someone might imagine, the number of items of the estate, but the ratio of the value of assets distributed to the value of all assets of the estate[39]. A good argument in favour of this interpretation is that § 2 of Article 961 KC refers to the value of assets distributed as ground to specify the shares of persons deemed to be heirs.

Another, seemingly surprising, area of doubt is what happens should the entire estate be exhausted. It was argued that Article 961 KC applies only to situations where assets intended for a particular person do not exhaust almost the entire estate – and if they do, i.e. when the entire estate has been depleted by dispositions, normal rules apply. This view may not be accepted in light of the *a minori ad maius* rule and has been refuted numerous times[40].

Otherwise the meaning of the phrase "almost entire" seems clear in general, but, due to its vagueness, totally obscure in practical application. The statute does not set out a threshold upon whose passing it could be concluded that "almost entire" estate had been depleted. To even speak of almost the entirety of something, indisputably there must be a majority. Hence, the 50% ceiling as the bare minimum seems ironclad. Yet surely such ascertainment is not satisfactory, as semantically "almost entire" requires more, otherwise the legislator could have said "majority" or used a synonymous phrase. Scholars seem to dodge this issue and persist in adding yet more descriptive vocabulary. It has been stated by various authors that the part of the estate not exhausted must be "negligible", "marginal"[41], "irrelevant"[42], "visibly insignificant"[43], that the imbalance between the part exhausted and not exhausted must be obvious, apparent for anybody[44]. Such expressions do not solve the problem in binary terms.

However, it is submitted that such vagueness was the underlying intention of the lawmaker. The statute could have indicated a In practice, courts apply Article 961 KC in cases where the value of the remaining part of estate amounts to 15% or less. The lawmaker purposefully left this issue for the courts to decide

[39] S. Wójcik [in:] *System Prawa Cywilnego*, p. 229; M. Pazdan [in:] K. Pietrzykowski (red.), *op. cit.*, p. 1068;

[40] *Ibidem*, p. 230; S. Wójcik, F. Zoll, *op. cit.*, p. ; K. Osajda, *op.cit.*, commentary to Article 961, item 15.

[41] E. Niezbecka [in:] A. Kidyba, *op.cit.* Warszawa 2015, p. 166.

[42] J. Ciszewski, J. Knabe [in:] J. Ciszewski (ed.), *Kodeks cywilny. Komentarz*, Warszawa 2014, p. 1654

[43] J. Kremis [in] E. Gniewek, P. Machnikowski (eds.), *op.cit.*, p. 1750.

[44] E. Niezbecka [in:] A. Kidyba, *op.cit.*, p. 167.

separately in individual cases. The courts in practical application may take into account a number of factors that are impractical or even impossible to cover in a statute in an abstract manner. Especially given the overriding objective of recreating the testator's true intention, the court may take into account his personal features and, adhering to the testator's subjective assessment of the estate and the value thereof, adjust verdicts to the circumstances of particular cases. In this context, any scholarly propositions[45] of specific percentage-based threshold must be treated as *de lege ferenda* calls, seemingly disregarding the possibly deliberate vagueness of the "almost entire" premise.

IV. Conclusions

The regulation of Article 961 KC seems rarely to be applied in practice, but is important nonetheless. Its significance for heirs and legatees likewise needs no detailed explanation. One characteristic feature of this rule is that it has been drafted as to include a number of varied and nuanced conditions. Either of them carries some interpretative difficulties, resulting in problems in practical application.

It seems, however, that many of these difficulties arose as a consequence of albeit proper and logically correct interpretation that has however lost sight of the most important goals that the legislator set before both the rule laid out in Article 961 KC as well before the interpretation of wills in general. The approach proposed above assumes that the norm worded in Article 961 KC is an interpretative rule, not an alternative way to appoint heirs. Therefrom follows a common-sense approach that seeks to derive the consequences of the mentioned finding as to the rule's character in order to abstain from purely linguistic interpretation, and give precedence to the purposive issues, construed from the perspective of the widest possible recreation of the testator's will. As a result, the text arrives at the conclusion that the controversy as to the moment decisive from the point of view of the application of Article 961 KC is the moment the testator had drawn up the will. Likewise, when adjudicating on issues related to Article 961 KC and applying it, the testator's subjective convictions as to the elements of his estate and their value should be taken into account. Finally, the issue of whether almost the entire estate had been exhausted shall not be decided with reference to a pre-set specific threshold, but be determined on a case to case basis.

[45] See: M. Zelek [in:] M. Gutowski (red.), *op.cit.*, commentary to Article 961, item 8.

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Streszczenie

Artykuł 961 kodeksu cywilnego statuuje doniosłą w praktyce regułę interpretacji testamentów. Przepis ten charakteryzuje jednak niejasność, wynikająca z liczebności i charakteru składających się nań przesłanek. Przekłada się to na głębokie zróżnicowanie stanowisk nauki prawa co do prawidłowego i pożądanego kierunku wykładni tych przesłanek. Artykuł, poza rekapitulacją tych rozbieżnych stanowisk stanowi próbę przedstawienia własnego stanowiska w kwestiach najistotniejszych dla praktyki stosowania omawianej regulacji. Poprzedzone to zostało przedstawieniem tematyki zastosowania artykułu 961 k.c. na tle ogólnych uwag o dziedziczeniu i wykładni testamentów w prawie polskim.

SŁOWA KLUCZOWE: spadek, testament, prawo spadkowe, reguła interpretacyjna, zapis.

Summary

Article 961 of the Polish Civil Code constitutes a practically important rule of testamentary interpretation. It's a complex rule of high ambiguity, related with the nature of numerous conditions underlying this provision. This results in the emergence of a wide array of doctrinal explanations as to the correct interpretation of the rule. The text summarises these varying doctrinal positions and attempts to present the author's own position on issues most relevant for practical application. The analysis is preceded by general remarks regarding inheritance and wills in Polish law.

KEY WORDS: succession, wills, interpretation, inheritance, legacy.

Author

Iwo Jarosz - autor jest doktorantem w Katedrze Prawa Cywilnego Uniwersytetu Jagiellońskiego oraz aplikantem adwokackim trzeciego roku przy Okręgowej Radzie Adwokackiej w Krakowie. The author is a doctoral candidate in the Civil Law Department at the Faculty of Law of the Jagiellonian University in Kraków and a third year trainee barrister with the District Bar Association in Kraków. Email: iwojarosz@gmail.com.