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SECRET WILL IN SOME EUROPEAN LAWS WITH SPECIAL REFERENCE TO SOLUTIONS IN THE DRAFT OF THE CIVIL CODE OF NORTH MACEDONIA[450]

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Abstract

When regulating the system of testamentary forms, the legislator tries to offer different forms of testaments to enable the testator to choose the most accessible form for expressing his last will. When the testator decides whether to make a will in one of the private or public forms, he then weighs whether to opt for the security of the public form of the will, which is provided by the participation of the representative of the public authority in its drafting, or for the secrecy of the content, which is provided through private form of the will. A secret (mystic, closed or sealed) will is one of the testamentary forms prescribed in the European legal area, particularly interesting considering that it is a public form of will, in which creation participates public notary, and which provides the secrecy of the contents of the testator's last will. The paper will point out the basic characteristics of secret wills in some contemporary European legal systems and the differences in regulation between them. Special attention will be paid to the solutions in the draft of the Civil Code of North Macedonia, since the editors of the Civil Code decided to regulate secret will in Macedonian law for the first time.

***Keywords*:** *secret will, forms of wills, testamentary freedom, Civil Code.*

1. Introduction

When editing the system of testamentary forms, the legislator seeks to offer a number of different forms of testament to enable the testator to choose for him the most accessible form for expressing his last will, given the characteristics of each form of will. When a testator decides on the drafting of a testament in private or public form, he then weighs two of his basic claims – the desirability of the secrecy of the content of the private form of the testament or the security of the public form of the will, provided by the participation of representatives of the public authority in its drafting. Bearing in mind the needs of the testator expressed in this way, the legislators of individual states regulate a special form of testament – secret testament.

Secret (mystical or closed) testament is a form of testament regulated in the European legal area, specifically in that it represents a public form of testament, in the composition of which a notary

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participates, and which ensures to the testator the secrecy of the contents of his last will, for those persons for whom he wishes it, primarily for the notary public and testamentary witnesses. It's a matter of free will of testator if he will disclose his last will to third parties. In this way, a symbiosis of seemingly opposing demands has been achieved – the secrecy of the content and the publicity of the testamentary form.[451]

The legislation of numerous European states regulates secret testament: France, Germany, the Netherlands, Spain, Italy, Portugal, Greece, Hungary, Russia, Ukraine, Georgia and others. In the legal space of the former Yugoslavia, in the laws of states created by its dissolution, secret testament is not regulated. Since work on drafting the Civil Code is underway in North Macedonia, the editors of the codification are of the opinion that secret testament should be codified in Macedonian law, and in the working version of the Civil Code they envisaged the procedure for drafting this form of will and the conditions for its validity.

In this paper, the authors will analyze the regulation of the secret will in some European legal systems. Special attention will be paid to the solutions proposed by the Macedonian codifier in the working version of the Civil Code regarding this institute.

2. Secret Will in Russian Law

In the Russian Federation, testamentary forms are regulated in the third part of the Civil Code, which entered into force in 2002.[452] Article 1126 of the code regulates a closed (secret) testament, stipulating that the testator has the right to make a testament without giving other persons, including the notary, the opportunity to become acquainted with its contents.[453] This method of disposal of property in the case of death realizes the secrecy of the will, thus ensuring the security of the information contained in the will and their absolute confidentiality.[454] The procedure for drafting a closed will has a number of mandatory formal rules whose performance directly affects the validity of the drafting of a closed will.

First of all, the secret will must be written and signed by the testator by his hand. Otherwise, the testament will be null and void.[455] This means that the secret will cannot be typed on a computer and printed, nor can any third party instead of the testator make this form of testament. This prevents the possibility of falsifying the testament, because the authenticity of the manuscript and signature can be determined by graphological expertise.[456] In Russian theory, such a solution is justified by the fact that the testator does not declare his last will before a notary and that he cannot determine whether the will contained in the letter is indeed the testator's will.[457]

Nevertheless, this condition for validity of the secret testament, specific for Russian law, is very strict and seems unnecessary, because the testator must certainly confess the testament to his own before the notary.[458] In addition, the obligation of handwriting can lead to various problems in practice. First of all, it eliminates illiterate persons from the circle of subjects who can make this testament. Further, people with physical disabilities who are unable to write a last will with their own hands and sign themselves also cannot draw up a secret will. Therefore, in theory it is indicated that it is necessary to amend paragraph 2 of Article 1126 of the Civil Code of the Russian Federation in the way to be stipulated that in the case where

[451] B. Arsenijević, Тајно завештање у појединим савременим европским правним системима (Secret Will in Some Contemporary European Legal Systems), Зборник радова Правног факултета у Нишу (Collection of Papers Faculty of Law Niš), no. 78/2018, p. 411.

[452] Гражданский кодекс Российской Федерации (Civil Code of the Russian Federation), часть треья (Book Three) Российская газета (Russian Gazette), 233/2001, with last amendments as of 14.04.2023.

[453] Art. 1126, par. 1 of the Civil Code of the Russian Federation.

[454] М. Д. Витальевич (M. D. Vitalevich), Правовые особенности совершения закрытых завещаний (Legal Specifics of Making a Secret Will), Научно-практический электронный журнал Аллея Науки (Scientific and Practical Electronic Journal of Alley of Science), No 6(22), 2018, p. 2.

[455] Art. 1126, par. 2 of the Civil Code of the Russian Federation.

[456] D. Djurdjević, Слобода тестирања и формализам олографског тестамента (Testamentary Freedom and the Formalism of the Holographic Will), Правни живот (Legal Life), no. 11/2009, p. 852.

[457] Г. В. Плеханова (G. V. Plekhanova), Наследственное право (Succession Law), Moscow, 2018, p. 79.

[458] B. Arsenijević, p. 411.

the testator, due to his physical defects, is unable to write a will with his own hand, the use of technical device will be permitted. If this is not the case, than to be allowed to the testator to hire a person who will technically make a testament instead of him.[459] This would significantly expand the circle of subjects entitled to draw up a closed will. On the other hand, in the case of hiring a third party, the principle of secrecy of the will would be compromised. Therefore, latter proposed solution seems not to be in the spirit of this form of will.

The process of drafting a secret testament begins with the testator handing over the testament to the notary in a closed opaque envelope.[460] The basic prerequisite for drafting a closed testament is that the testator has full legal capacity,[461] which the notary is obliged to determine. If at the stage of submitting the closed will, the notary finds that the testator is legally incompetent, he will decide to refuse acceptance of the closed will.

The will must be submitted to a notary in the presence of two witnesses. The notary is obliged to ensure that the persons present as witnesses meet the requirements of paragraph 2 of Article 1124 of the Civil Code. Only persons who have legal capacity, who are literate and who do not have such deficiencies that prevent them from understanding the importance of the legal action may appear as testament witnesses. The notary public is obliged to ensure that the invited witnesses are not persons in whose favor the will is disposed of, that they are not the spouses of such a person, his children and parents.

Only when he establishes these circumstances does the notary allow the testators to place their signatures on the closed envelope containing the testament. The envelope signed by witnesses in the presence of the testator is placed by the notary in another envelope and sealed in their presence, putting on it the testator's information, the place and date of delivery of the envelope, as well as the data on witnesses.[462]

When taking over from the testator an envelope with a closed testament, the notary is obliged to inform the testator of the rights of the heirs to the forced shares, which are of an imperative nature, and which cannot be violated by the will.[463] The notary puts a note about it on the second envelope. After that, the notary is obliged to issue to the testator a document confirming the acceptance of the closed will,[464] which remains with him for safekeeping. In this way the process of creating a secret testament is concluded.

The fourth paragraph of art. 1126 of the Civil Code also provides for a procedure with a secret will after the death of the testator. When a notary receives a certificate from the register of deceased persons which relates to the one who wrote closed will, no later than fifteen days from the date of receipt of the certificate, he shall proceed to the declaration of the will by opening the envelope that contains the last will in the presence of at least two witnesses and interested persons from among the legal heirs who wished to be present. After the opening of the envelope, the text of the will contained in it is immediately communicated by the notary, after which he draws up and, together with witnesses, signs a record which contains the entire text of the last will. The original of the will is kept with a notary, and to the heirs are issued a certified copy of the record.

In relation to the process of drafting a secret testament, various disputable issues arise in practice: the notary cannot determine the legal capacity of the testator at the time of writing the testament because he only receives a closed envelope from the testator, so there is no guarantee that there is a testament in the envelope that the person submits to the notary. There is the lack of qualified legal assistance to the testator when writing the will which can lead, and in practice leads, to a material or formal incompleteness of the testament It happens because the testator, as not legally educated, does not have to be familiar with all the proscribed conditions that the will must meet in order to be valid. That is why in the Russian doctrine this

[459] M. D. Vitalevich, p. 6; G. V. Plehanova, p. 79.
[460] Т. С. Владимирович (T. S. Vladimirovich), Формы завещания в гражданском законодательстве Российской Федерации (Testamentary Forms in the Russian Federation Civil Law), Belgorod, 2018, p. 15.
[461] Art. 1118, par. 2 of the Civil Code of the Russian Federation.
[462] Art. 1126, par. 3, al. 1 of the Civil Code of the Russian Federation.
[463] T. S. Vladimirovich, p. 15.
[464] Art. 1126, par. 3, al. 2 of the Civil Code of the Russian Federation.

form of testament is considered an aleatory legal work, because it is questionable whether the testament will produce an effect.[465]

In the case of a secret testament, it is an exception from the general rule applicable in Russian law that the date and place of its drafting must necessarily be placed on the testament.[466] The doctrine deals with the question of determining the moment of drawing up a closed will: whether it is the date of its drafting, or the moment of its submission to a notary. It is believed that the moment of making a closed will should be considered the moment of its "official registration" – the moment of handing over the will to a notary, because only after conducting the procedure before a notary it takes the form of a secret will. However, the date of writing a closed will plays a significant role in testament making process, because of importance to determine whether the decedent had full legal capacity at the time of its creation.[467]

3. Secret Will in French Law

Chapter 1 of the third Book of the Civil Code of France[468] contains provisions that regulate inheritance. One of the forms in which the last will can be expressed is the secret testament, which is proscribed as a special form of testament.

In French law, the testator can write a testament in his own hand, which will take the form of a secret testament. In addition, the testator can type it out using a technical device, and a third party can do it instead, as well. When someone makes a secret legacy instead of a testator, his essence is not violated: the secret legacy allows the testator to keep his last will unknown to those persons for whom he wishes it, primarily for the notary and the testamentary witnesses, who participate in its drafting. Whether the testator will make his last will known to third parties is a matter of his free will.[469]

Persons who cannot read cause they are illiterate, or not capable of reading from other reason, cannot make a mystical testament.[470] If the testator cannot speak, but can write, he can make a secret testament if he is able to sign the will, and if in the presence of notary and witnesses he writes on the document of delivery of the will that the document submitted by him is his last will, and signs that statement.[471]

The procedure for drafting a secret will runs in several stages. First, the document containing last will which is signed by the testator is handed over to the notary in the presence of two witnesses,[472] closed and sealed, in the envelope or without an envelope. On this occasion, the testator declares that the document he submits contains his last will written and signed by him.[473] In the case that someone else has written a testament to him, the testator must declare that he has read and personally checked the text of the last will and to testify of the procedure in which the testament is made (using technical devices or by hand).[474]

On the closed document or envelope, the notary public draws up an act on the receipt of the will, in which he is obliged to indicate the date and place of receipt of the will and to describe the closed document and seal. This date is considered as the date of creating the secret will.[475] After that, the act on the reception of the testament is signed by the testator, notary and both testamentary witnesses. In the case

[465] M. D. Vitalevich, p. 8.
[466] Art. 1124, par. 4 of the Civil Code of the Russian Federation.
[467] M. D. Vitalevich, p. 8.
[468] Code Civil des Français, with last amendments as of 21.05.2023.
[469] B. Arsenijević, p. 412.
[470] Art. 978 of the Code Civil des Français.
[471] Art. 979, par. 1 of the Code Civil des Français.
[472] Testamentary witnesses must understand the French language and be of legal age, know how to sign and to be legally capable. What is interesting is the limitation in a way that a husband and wife cannot witness the submition of the same secret legacy (art. 980 of the Code Civil des Français).
[473] If the testator is unable to sign himself or if he was unable to do that when drafting the testament, the document of receipt of the testament will include the statement that the testator has declared that he does not know how to sign or that he could not do so (art. 977 of the Code Civil des Français).
[474] Article 976, par. 1 and 2 of the Code of Civil des Français.
[475] A. Leroyer, Droit des successions, 2.ed. Mayenne, 2011, p. 192.

that due to some circumstance that arose after the moment of signing the testament, the testator is not able to sign himself, he will state the reasons for this in a written statement. All actions taken before the notary are performed continuously.[476]

After completing the procedure of receiving the secret testament and registering it, French law stipulates that the notary is not obliged to keep the secret testament, unless the testator hands it over to him in a deposit.[477] In the case that the secret will due to defects in the form is null, the French legislator has explicitly stipulated that it will produce an effect as a holographic will if all the conditions for its validity are met.[478]

4. Secret Will in Italian Law

The second book of the Civil Code of Italy[479] contains the rules governing succession, and testamentary inheritance is regulated in the third chapter of this book. One of the testamentary forms that are stipulated in Italian law is secret testament. The Code prescribes a number of specific and interesting solutions that regulate the process of secret will creation.

The process of composing of a secret testament consists of two different, closely related elements: a will, written by a testator or third party, and an act of accepting a will by a notary.[480] Without the existence of these two elements, there is no secret testament.

As in French law, in Italy, a secret testament can be written in the form of an olographic testament, an allographic testament or by using technical devices, such as a computer or a typewriter. This form of bequest can be written by the testator himself or by a third party. The legislator makes an important difference in terms of the obligation to sign the testament which depends on the way in which the will has been made. If the last will is written by the testator himself, he only has to sign at the end of the testament. However, if the testament is made by a technical device, or was made to the testator by a third party, then the testator must sign on each sheet containing the text of the testament, regardless of whether the sheets are merged or not.[481]

A person who for any reason is unable to read and write cannot compose this form of testament. However, if the testator can read but not write, or if he was unable to sign the testament, he must declare before the notary when handing over the will, that he has read the testament and state the reasons why he is unable to sign himself, which the notary incorporates into the act of receiving the will.[482]

A document containing the last will must be closed and sealed, so that it cannot be opened or taken out without being damaged. Sealed document the testator hands over to the notary, in or without an envelope, in the presence of two witnesses. On this occasion, the testator must declare that his last will is contained in the document he submits. Only if he is deaf or dumb, he must write a declaration of confession of the will in the presence of a witness, and if the will was written by a third party, he must also write that he has read the will.[483]

After receiving the testament, the notary shall, on the sealed testament, or on the envelope containing the bequest, draw up itself an act of receipt of the will stating the fact of handing it over, the declaration of the testator. The seal shall be affixed and the witnesses who attended this act shall be indicated. The act must be signed by a notary, testator and witnesses. If the testator is unable to sign, the

[476] Article 976, par. 3-5 of the Code of Civil des Français.
[477] *Successions et libéralités*, *Régime juridique et fiscal* (group of authors), 3rd ed. Francis Lefebvre Editions, 2011, p. 359.
[478] Article 979, par. 2 of the Code of Civil des Français.
[479] Codice Civile Italiano, Gazzetta Ufficiale, 79/42, with last amendments as of 21.04.2023.
[480] G. Salito, Il notaio e gli atti mortis causa (The notary and the acts mortis causa), Revista do Ministério Público do RS (Journal of the Public Ministry of RS), Porto Alegre, n. 79, Jan. 2016 – Abr. 2016, p. 180.
[481] Art. 604, par. 1 of the Codice Civile.
[482] Art. 604, par. 2 and 3 of the Codice Civile.
[483] Art. 605, par. 1 and 2 of the Codice Civile.

notary must state the reason in the act. All actions taken in the process of making a secret testament must be continuous, followed one after the other.[484]

A secret testament deposited to a notary for safekeeping, which has not been withdrawn by the testator in accordance with Article 608 of Codice Civile, the notary shall proclaim as soon as he becomes aware of the fact of the death of the testator.[485] If the secret testament lacks some formal element that renders this testament invalid, the legislator has prescribed its automatic conversion into a handwritten will, if it meets the conditions for the validity of the holographic testament referred to in Article 602 of The Codice Civile.[486]All testament dispositions made in favour of the person who wrote the text of the will for the testator, unless the testator has confirmed these provisions in his own hand, are considered invalid. Invalid are also testamentary dispositions made in favor of the notary to whom the secret will was handed over.[487]

5. Secret Will in Greek Law

The Greek Civil Code[488] has devoted its fifth book to the regulation of hereditary relations. Greek law knows three types of testaments that can be made in ordinary circumstances: handwritten, public and secret will. The editors of the Civil Code devoted as many as 11 articles to regulating the secret testament (Article 1738-1748) and prescribed a number of specifics that condition its validity.

A secret will can only be made by a person who is capable of reading.[489] In order for a secret will to have legal effect, it is necessary for the testator to hand it over to a notary in the presence of either three witnesses, or in the presence of another notary and another witness. On that occasion, the testator must declare that the document he submits to the notary represents his last will.[490] The will can be written by the testator himself or a third party, and can also be typed on a computer or typewriter.[491] If the testament is written by the testator himself, it must be signed at the end, and if it is written in part or in whole by a third party, the testator must sign on each page of the testament.[492] An exception is provided in the case when the testator cannot sign the will for any reason. Then, in the presence of a notary and a witness, he must declare that he has read the testament and state the reason why he cannot sign it. In the case when the testator is dumb or deaf, he must write on the submitted document or on the envelope a statement that such a document is his last will, and if the testament was written by another person. In the statement must be written that the document has been read to the testator. Such a statement must be written by the testator in the presence of notaries and witnesses and must be placed in an envelope with a testament.[493]

The will is handed over to a notary sealed or in a sealed envelope, so that it cannot be unsealed or opened without damage. If the testator has not done so, the notary will seal the envelope in the presence of the testator and the witness. On the submitted document, i.e. a closed envelope, the notary must indicate the name and surname of the testator and the date of admitting the will, and then the testator and witnesses must be signed on the document. If the testator cannot be signed, his signature is replaced by the witness statements entered into the document, stating that he has confessed the testament and what are the reasons why he cannot be signed. In the end, the notary must issue a document confirming that a secret testament has been made.[494]

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[484] Art. 605, par. 3-5 of the Codice Civile.
[485] G. Salito, p. 181.
[486] Art. 607 of the Codice Civile.
[487] Art. 598 of the Codice Civile.
[488] Civil Code of Greece of 1946, with last amendments as of 09.09.2022.
[489] Art. 1748 of the Civil Code of Greece.
[490] Art. 1738 of the Civil Code of Greece.
[491]A. Tsakiraki, Greek Inheritance Law: Last Wills and Testaments. Available at: https://www.atslaw.com/pdf/3.pdf. Access: 25/05/2023.
[492] Art. 1740 of the Civil Code of Greece.
[493] Art. 1744-1745 of the Civil Code of Greece.
[494] Art. 1741-1743 of the Civil Code of Greece.

Like the Italian, the Greek legislator specifically stipulated that in the case that the secret will is null, due to formal deficiencies,[495] it will produce an effect as a handwritten testament, if the conditions for the validity of this testamentary form are fulfilled.[496]

6. Secret will in Macedonian law *de lege ferenda*

Modern Macedonian law regulates six forms of last wills: handwritten, judicial, will drawn up before a diplomatic or consular representative abroad, military, international and oral (nuncupative) will.[497] The draft version of the Civil Code[498] provides for three new forms of testaments: written will before witnesses (testamentum allographum),[499] notarial will[500] and secret will.[501] When proposing new testamentary forms, the editors of the Civil Code were guided by the desire to provide citizens with a greater degree of freedom and a wider range of forms in which they can express their last will.

Article 5:98 of the current Working Version of the Civil Code of North Macedonia, which contains seven norms (paragraphs), provides the conditions for the formal validity of the secret will as well as the procedure for its drafting: 1. the secret testament must be made in writing, 2. it must be signed by the testator, 3. it must be delivered to a notary in a sealed envelope, 4. its contents must not be read, 5. the testator in the presence of two witnesses must declare that it is his last will, 6. Providing a notary document for receiving the testament and signatures on the envelope, and 7. keeping the testament in a special envelope.

6.1. Written form

A secret testament can only be made in writing. The oral form of bequest is provided only for the manifestation of the last will in exceptional circumstances, before two witnesses present at the same time, when the testator is unable to make any form of written will.[502]

Civil code editors do not specify whether the secret testament must be handwritten, or whether it can be typed on a computer or typewriter, or whether a third party can technically make a testament for the testator. From this absence of clear regulation, it undoubtedly follows the conclusion that the way in which the testament is made, by hand or by some technical devices, is not important – the only thing that matters is that it is in writing. Also, the statement of the last will submitted to a notary does not have to satisfy the formal requirements of validity for any other form of written bequest (e.g., holographic or allographic).

In this way, the editors gave up a higher degree of legal protection against misuse, because they didn't prescribe that testament should be handwritten by the testator itself, as required in Russian law.

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[495] S. Giouni, E. Dacoronia, G7: Greece. Available at: https://www.bahagram.com/wp-content/uploads/2015/12/Giouni_ISL_G07.pdf. Accessed : 25/05/2023.

[496] Art. 1748 of the Civil Code of Greece.

[497] Art. 66-93 Закон за наследувањето Северне Македоније (Law of Succession Act of North Macedonia), Службен весник на РМ (Official Gazette of the RM), no. 47/1996 and 18/2001.

[498] The last working version of the Civil Code of North Macedonia was presented at: Conference on Family Law and Inheritance Law – Legal Reform in the Western Balkans (LRWB) in cooperation with the Civil Code Working Group in North Macedinia, which was held on 31.03-01.04.2023. in Ohrid, North Macedonia.

[499] More: A. Ristov, О потреби регулисања писменог завештања пред сведоцима у македонском наследном праву (On the Necessity for Regulating the Written Will Before Witnesses in the Macedonian Inheritance Law), Зборник радова Правног факултета у Нишу (Collection of Papers Faculty of Law Niš), no. 81/2016, p. 270 and following,

[500] More: A. Ristov, За потребата од уредување на нотарскиот тестамент во македонското наследно право - *de lege ferenda* (On the Need of Regulating the Notarial Testament in Macedonian Succession Law - *de lege ferenda*), International Scientific Conference Ohrid School of Law, 2017, vol. 6, p. 29 and following.

[501] On the need for the reform of testamentary forms and the reasons that the editors of the Civil Code decided to propose the introduction of a notary and secret will in to Macedonian law: D. Micković, A. Ristov, Реформата на наследното право во Република Македонија, (The Reformation of Succession Law in the Republic of Macedonia), Skopje, 2016, p. 185-189.

[502] Art. 90 of the Law of Succession Act.

Therefore we believe that the testament could be made by a third party to the testator. It has been established that a sufficient level of protection is the fact that the testator must hand over the testament to the notary and admit that this is his last will statement in the presence of a witness. This justifiably can be assumed that the testator is aware of the content of the document he submits, and that it is not necessary that for the testament to be written personally. Otherwise, the freedom of testamentary disposition would be narrowed, which would render some secret testament not to be valid, if they were not written by hand.

When the subject on whom the testament must be made is in question, nowhere it is expressly stated that it must be written on paper. It is therefore concluded that it can also be made on some other suitable material. However, given that the testament is handed over in an envelope, it is clear that the secret testament will practically always be written on paper. We believe that the testament that is typed on a computer recorded on a CD or USB flash drive or on a similar medium does not meet the requirement of the written form, because it is an electronic form, and that such a testament, if the proposed regulation is adopted, will not be valid. Of course, in the future, it should be considered that in this form of testament, under certain conditions, the last will can be communicated in electronic form, stored on some medium (audio or video recording, testament typed in a computer program such as Word and similar).

6.2. Signature of the testator

The testament must contain the signature of the testator, regardless of how it is made. Since it is not explicitly stated where the signature is placed and whether the testator must sign at the bottom of each page if the testament consists of several pages, we believe that it is sufficient for the testator to sign at the end of the document, below the text of the stated last will.[503] If the testament does not contain a signature, it is formally incomplete. Also, the testament will not be valid if a fingerprint, facsimile and alike is placed instead of the signature. It follows from the above that this form of bequest cannot be made by a person who is illiterate or unable to sign himself.

The moment when the testator has to sign the testament is not determined – he can do right after the testament is made or at a later time. All that matters is that the testament handed down to the notary is signed. Apart from the signature, which is a mandatory element of the secret testament, the date and place of its drafting are not, so if the testator fails to enter these elements it will have no effect on the validity of the testament.

6.3. The testament must be submitted to the notary

The secret will has to be handed over strictly to the notary. It cannot be submitted to any other person in a notary's office, nor can it be handed over to a judge. The notary is solely competent to receive the will and to perform all other prescribed actions in order to comply with the procedure prescribed by the Code.

As a rule, the testament is handed over to the notary's office. There is, we believe, no reason for the testament not to be handed over to a notary elsewhere – in the house, hospital, prison or any other place where the testator is located, if for objective reasons he is unable to come to the notary's office.

The testament is handed over to the notary exclusively in an envelope that must be sealed. A testament cannot be handed over unless it is in an envelope. If the testator brings a testament without an envelope or in an open envelope, he will have to put the testament in an envelope and close it before handing it over to a notary.

6.4. The contents of the secret will must not be read

The testator opts for a secret testament so that its contents remain unknown to all third parties. There are several persons knowing about the existence of this testament, but what represents the testator's last will remains a secret for everyone but him, until his death. For this reason, it is expressly forbidden for

[503] In Italian law, for example, if a testament consists of multiple pages, each page must be signed, which for the legal laymen who makes a private testament could be an unnecessary burden. The failure of the testator to sign each page of the will makes it null and void due to defects in form.

a notary to read the contents of a secret bequest, after it has been handed over to him in a closed cover. The notary must in no way open the envelope or in any other way (by tearing, cutting, etc.) put himself in a position to read the testament – he must not do so even if other persons are not present, and he must certainly not publicly disclose the content of the testament.

6.5. Recognition of the will by the testator

When handing over the testament to a notary, the testator must recognize the testament as his own. He declares in the presence of two witnesses and a notary that his last declaration of will is contained in the document.[504] From this it follows that the testator should be a person who is able to speak in a language that is in official use. The testator does not have to declare who and how made the testament – whether he wrote it in his own hand, typed it himself on the computer or the testament was made to him by a third party. It is only necessary for him to recognize the testament as his own.

From the stylization of the provision, the impression is that the notary and both witnesses must be present at the same time when making a statement by the testator. If this is not the case, if the testator confessed his testament to his own before a notary and one witness, and later told it to another witness, such a bequest would be void (unless the notary and the first-time witness were present when the testator confessed last will before another witness). The same applies when the will is admitted before both witnesses in the absence of a notary.

It is not particularly stipulated what are the conditions for the witnesses in this form of will, so there may be a dilemma whether Article 59-61 of the Notaries Act,[505] which regulates witnesses when drafting a notary document, should be applied, or Article 70 of the Law of Succession Act (i.e. Article 5:95 of the Draft of Civil Code), which regulates witnesses in judicial will. We believe that the most logical choice is to opt for the second option.[506] Anyway, we consider that a special provision should clearly refer to the application of the legal norm governing the conditions for a testamentary witnesses, which will be applied to the secret will, or it is even better to precisely regulate which conditions must be fulfilled by testament witnesses in this form of will.

The question may arise whether the testator, except by oral statement, can confess the testament by a conclusive action (e.g. by a notary asking him if it was his testament, and he nods his head or a similar action confirms that it is his last will, if for any reason he is unable to speak). If one interprets the envisaged solution restrictively, one would say that such a thing is not possible. It seems to us that, however, the recognition of the testament by a conclusive action would meet the formal requirements, i.e. that it would be enough to consider that in this way he recognized the testament as his own.

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[504] The notary is obliged to establish the identity of the testator and his legal capacity, as well as the identity of the testator's witnesses. Identity is determined on the basis of an identity card or travel document, and if this is not possible, the identity is established on the basis of the statement of two witnesses of identity who personally know the testator, and whose identity is determined on the basis of an identity card or travel document (art. 57, par. 1 and art. 58, par. 1 of the Notaries Act). Testamentary capacity is granted to anyone who has reached the age of 15 and is capable of reasoning (art. 62 par. 1 of the Law of Succession Act).

[505] Закон за нотаријатот Северне Македоније (Notaries Act of the North Macedonia), Службен весник на РМ (Official Gazette of RM), no. 72/2016.

[506] Consequently, witnesses of the secret testament could be only persons who are older than 18 and who are not deprived of legal capacity, as well as persons who know how to read and write. But, they would not have to fulfill another condition required for the witnesses for judicial testament – they would not have to know the language in which the will was made. However, we believe that witnesses must know the language in which the testator tells them that this is his testament. The descendants, as well as the testator's adoptive father and his descendants, his ancestors, adoptive parents, collateral relatives up to the 4th degree of kinship in conclusion, spouses of all these persons as well as the spouse of the testator are not able to be in a role of testamentary witnesses.

6.6. Other actions in the procedure of making a secret testament

After the testator declares that the document he submits represents his last will, several more important procedural actions, that are part of the proceedings, need to be done in order for the testament to be considered secret. All these actions follow one after the other.

First, the notary is obliged to draw up a notary act in which he states that he has received the testament. After that, he is obliged to put a stamp on the sealed envelope in which the testament is located. Then the envelope itself is signed by the testator, both witnesses and a notary, which means that all these persons not only have to be literate, but in a specific situation they must be able to sign themselves. Putting fingerprint or facsimile is out of question.

Upon completion of all these actions, the envelope on which the seal is placed and which is signed, is placed in a special cover. The secret will, which is contained in that cover, remains for safekeeping with the notary. This way the procedure prescribed for a secret testament is ended.

A register of testaments is kept on the composed testaments. The register of testaments is maintained by the Notary Chamber.[507] The working version of the Civil Code provides for the keeping of a register of inheritance contracts and testaments, as a public record kept by the Notary Chamber. The data on the existence of the testament remain secret until the death of the testator, so that if he does not want, no one will even find out that the testament exists as long as the testator is alive, nor can its contents be known. Only the testator or a person specially authorized by him can obtain information about the existence of a testament in the Register.

6.7. What issues still need to be regulated by the Civil Code regarding secret will?

A significant issue that is not regulated in the current working version of the Civil Code is which day is considered as the day of creation of secret will: whether the day specified in the last will (if stated by the testator) or the day of handing over the will to the notary, when the will took the form of a secret will? This issue is very important primarily in the case when the testator makes two or more testaments that are contrary to each other, because the later testament revokes earlier. If, between the time when the testament was written and when, after taking a whole series of actions before the notary, it becomes a secret bequeath, the testator makes another testament, it would be disputed which bequest would be considered later and which would produce an effect. In addition, the testament capacity of the testator is valued by the moment of making the testament, and it may be significant which day is to be considered the day of the making of the last will. We believe that in the case of a secret testament, as the day of its creation should be considered the day of handing over the testament to a notary and recognizing the testament before a notary and witnesses, because only by undertaking all the prescribed actions a secret bequest becomes a single testamentary form. It's also a French law solution.

The second question that we think should be regulated is whether in the case when the testator takes back the testament that was on keeping at the notary, it automatically has the effect of revocation. Finally, we consider that it should be provided that when a secret will, due to formal deficiencies, is null and void, it can produce legal effect if it meets the formal requirements for the validity of some other form of will (e.g. a holographic will).

7. Conclusion

Many modern legal systems regulate secret will as one of the testamentary forms. Due to its characteristics, it is widely used in practice. Undoubtedly, its existence in modern law extends the freedom

[507] Art. 117, par. 4 of the Notaries Act.

of testamentary dispositions. This form of will is available to a very wide range of subjects, and as such provides a high degree of secrecy of the last will, while the participation of notaries in the process of its creation guarantees to the testator that the form of testament will be respected.

The process of making a secret will in the laws of Russia, France, Italy and Greece which were analyzed in this paper has significant similarities, but each of these legislations has some specific solutions. What all these legislations have in common is that the testator submits the testament to the notary in the presence of witnesses, which was previously signed, and has to be closed and sealed; if this is not the case, the notary places it in a special envelope and seals it. The content of the last will remains completely unknown to both the notary and the witnesses. The role of witnesses is to testify to the fact that the testator handed over the testament to the notary and that he confessed the testament for his own, which is confirmed by his signature. In all legal systems that have been the subject of analysis, except in Russian, the testament may be written by the testator himself, or typed using technical devices, or can be made by a third party. In Russian law, this form of testament is valid only if it is written and signed by the testator himself.

Although he participates in the process of making a secret will as the one who has the public authority, the notary only guarantees that the will is going to be formally valid. However, since he does not have the right to read the testament and get acquainted with its content, there is a real danger that the testamentary provisions would be invalid. This circumstance constitutes a secret will to be of aleatory nature, in the sense that it is not known whether it will produce an effect at all, and weather the testamentary heirs will indeed acquire the property goods bequeathed to them. Also, the notary cannot guarantee that in the sealed document submitted to him is indeed a testament, and not some other document, including those by which a person can be discredited or insulted by his honor and dignity.

The editors of the Macedonian Civil Code believe that secret will should find its place in the system of testamentary forms in North Macedonia. The proposed regulation in the current working version of the Civil Code relies on existing solutions in the analyzed foreign legal systems. We consider, however, that the Commission should make an effort to regulate some issues that are not covered in the existing text.

Thus, we are of the opinion that it should be clearly specified which day is considered as the day of making a secret will – whether it is the day when the will was written or, as we believe is the right solution, the day of submitting the testament to a notary in the presence of witnesses. Also, it should be clearly regulated whether this testament has to be made by the testator himself (handwritten or typed on the computer), or some other person can make a testament for him (e.g. on the computer), when the testator only puts his signature on the document. If it is not explicitly stipulated, it should be considered that all of the above mention possibilities are acceptable.

Another issue that needs more attention to be paid is the consequences of taking back the testament by the testator from the notary – whether this act has the effect of revocation of the will or not. Finally, we consider that it should be provided that when a secret will, due to formal deficiencies, is annulled, it can produce legal effect if it meets the formal requirements for the validity of some other form of a will (e.g., a holographic will).

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