

THE HOLOGRAPHIC TESTAMENT

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Abstract: *Ad validitatem, the holographic testament must be handwritten, dated and signed entirely by the testator. The testator entirely handwriting the testament is seen as a guarantee of freedom to express the last will. The dating of the testament must be done by the testator in person. The date must meet two requirements: to be complete and to be exact. As a novelty in the Romanian New Civil Code, we find the need to fulfill a formal procedure subsequent to drawing up the testament and opening the inheritance. Steps to be taken in this regard assume, first, endorsing it for proof of non-alteration. The next stage in opening the holographic testament implies drawing up by a notary public or by the representative of the diplomatic mission, where testaments are drawn up abroad of the record of findings concerning the condition of the testament.*

Key words: *holographic testament, handwritten, date, signature, formal procedure.*

Introduction: The Romanian New Civil Code stipulates in art. 1041 that, under the penalty of nullity, the holographic testament must be written entirely handwritten, dated and signed by the testator²⁶⁵. The provisions of the Romanian New Civil Code do not differ from the previous ones of French inspiration²⁶⁶.

Compared to the legal provision, we can therefore define the holographic testament as the solemn act, upon death, entirely handwritten, dated and signed by the testator him/herself.

Nothing prevents, however, that a written testament, signed and dated by the testator be certified by a lawyer, in what concerns the identity, content and the date on which it was issued, this statement supplying the shortcomings of the handwritten form, bringing the holographic testament to the same probative value as the authentic testament.

The advantages and the disadvantages²⁶⁷

²⁶⁵ This type of testament is not accepted in the Netherlands and Portugal, where the authentic form is required in all cases, nor in the common-law jurisdictions where the testament assisted by witnesses is specific. The latter may be written by the testator personally, typed or handwritten by a third party, the essential part being only the simultaneous presence of two witnesses at the signing of the testament, the confirmation of the testator's signature and their signing the testament.

²⁶⁶ Art. 859 of the Romanian Civil Code of 1864 provided that "the holographic testament is not valid unless it is written throughout, dated and undersigned by the testator"

²⁶⁷ Ioana Nicolae – „Drept civil. Succesiuni. Moştenirea testamentară”, Hamangiu Publishing, Bucureşti, 2014, p. 40-42

D. G. Ionaș

The holographic testament presents a number of advantages in that it is accessible to anyone who can write, it may be drawn up anywhere and anytime, ensuring the absolute secrecy of the testator's last will, does not imply costs and can be reversed easily by the testator.

The disadvantages of this type of will are mainly related to the fact that it can be stolen, forged or more easily contested than other forms of testament. Moreover, the testator's lack of knowledge and experience can determine the use of certain terms subject to interpretation, with the risk that the testamentary will be invalidated or altered.

Ad validitatem, the holographic testament must be handwritten, dated and signed entirely by the testator. Assuming that the three conditions are met, the testament produces legal effect without requiring its authentication²⁶⁸. The three conditions imposed by the legislature must be met cumulatively under absolute nullity²⁶⁹.

In the French doctrine, it was considered that in addition to these formal requirements that the holograph testament must meet, a basic condition must also be filled, namely the existence of the intention to test (animus testing), this being the one that differentiates the testament from a simple project without legal value²⁷⁰.

Special conditions of form of the holographic testaments

1. The holographic testament must be entirely handwritten by the testator

The testator entirely handwriting the testament is seen as a guarantee of freedom to express the last will. Therefore, the testament written by another person shall be invalid even if it faithfully reflects the deceased person's will. Assuming the testament drafted by a third party by guiding the hand, help determined by the author's physical inability to write alone, the doctrine appreciated that it is valid if it meets two conditions: - it contains the testator's handwriting done personally and only with the material assistance of a third party, and it represents the testator's single will²⁷¹. The testament drawn up by the author but on a model drawn up by a third party, who may be a lawyer or other person without legal training, was also considered to be valid, as long as the author understood the legal significance of the text and the will was absolutely free²⁷².

As for the support of the manifestation of will, this can be of any type (paper, canvas, wood, glass etc)²⁷³. The writing can be done with any tool (pencil, ball-point pen, pen, chalk,

²⁶⁸ C. de Apel Suceava - dec. no.120 / 25.01.2005 viewed on address http://legeaz.net/spete-civil/plangere-legea-18-1991-testament-120-2005_on_11/08/2014 - the so-called "authenticated holographic testament" is null if it is not written, signed and dated by the author in person

²⁶⁹ The literature expressed the point that "in the testamentary matters, a rational formalism must be applied: neither the specific stiffness of the instinctive formalism about which I wrote above, but nor a total liberalism to deprive the formal conditions of any role" - M.D. Bob - "*Testamentul olograf și ponderea formalismului: un studiu aplicat pe problema datei*" in the STUDIA magazine, Universitatis Babeș-Bolyai - Jurisprudentia series, no.2/2012

²⁷⁰ Ph. Malaurie, L. Aynes - "*Les successions. Les liberalites*", 4^{eme} ed., Defrenois Publishing, Paris, 2010, p. 260

²⁷¹ B. Beignier - "*Liberalites et successions*", Montchrestien Publishing, Paris, 2012, p. 115

²⁷² The same opinion was also embraced in the practice of courts - Gorj Court, dec. no. 321a / 29.08.2007 viewed on address <http://legeaz.net/spete-civil/nulitate-testament-art-859-cod-321a-2007> on 11/08/2014

²⁷³ C. of Appeal, sect. Civ IV., in dec. no.898 / R of 14 June 2010 viewed on the address http://legeaz.net/spete-civil/testament-olograf-scris-pe-hartie-898-2010_on_11/08/2014- "The expertise concluded that the testament of 11 June 2007 has been written, dated and signed by A.N. The fact that the text of the contested document, the date and name that follow it, rendered in capital letters are inserted using black indigo and the testator's signature is made in the original, directly with the writing instrument, indicates the possibility for the holder to have extracted the copying paper from among the copies of the testament at the time of its signing. Given the circumstances indicated as well as

THE HOLOGRAPHIC TESTAMENT

paint etc) in any language and any script. The typed document comprising dispositions for the cause of death will not be considered as will, as the requirement of exclusively handwriting the will is not met, the sanction being absolute nullity.

The law does not condition the validity the holographic testament by the use of sacramental formulas²⁷⁴, which is why this type of testament is accessible to anyone.

Also, its validity is not affected even if the testament contains additions, modifications, deletions made by the testator, whether they are signed and dated by the author or not. It is alleged that they are integral with the testament and shall be considered as such. It is irrelevant whether the author's intervention has been precisely when the testament was drafted or later. But if this intervention changes the previous testamentary dispositions, they are seen as a new testament which bears the name of codicil. This must meet the conditions of validity of any holographic testament respectively be handwritten, dated and signed by the testator, regardless of the fact that it is written on the same act (meaning instrumentum) or compiled as a separate document. If the subsequent provisions are not amended, but contradict the previous ones, then we are no longer in the presence of a codicil, but we have a new testament.

The emergence of a different writing in the testament, which is related to the testamentary dispositions and of which the testator was aware, all will attract nullity. If, however, the writing is not related to the contents of the will, or the testator had no knowledge about the occurrence of this writing, the legacy will be valid and the different writing will be ignored.

2. The testament must be dated by the testator in person

The dating of the testament must be done by the testator in person. The date must meet two requirements²⁷⁵:

- to be complete by indicating the year, month and day. The requirement is considered to be fulfilled if the dating is done by indicating an event. If the date is incomplete, it may be determined by the court based on the intrinsic elements of the document, or even extrinsic ones, to the extent that the latter is based on the intrinsic ones;
- to be exact, the fraudulent backdating or postdating being sanctioned by absolute nullity, without admitting the rectification of the date. An inaccurate date, which does not allow the precise determination of the time when the testament was drafted attracts nullity²⁷⁶. The proof of its falsity can be done by any means, even if only extrinsic²⁷⁷. Uncertainty regarding the date entails the nullity of the testament, the same as the total lack.

the legal provisions mentioned, the Court found that the law courts correctly stated the validity of the testament, this being entirely written, dated and signed by the testator, the fact that he used copying paper lacking any legal relevance, the law not providing limitations regarding the writing instrument and the material support. "

²⁷⁴ Cass 1^{re} civ., 11.01.2005, in the Civ.Bul. I, no. 24 in B. Beignier - *op cit.*, p. 118

²⁷⁵ D. Văduva - *"Moștenirea legală. Liberalitățile în Noul Cod Civil"*, Universul Juridic Publishing House, București, 2012, p. 155

²⁷⁶ Cass. 1^{re} civ. 11 FeV. 2003 in *"Recueil Dalloz"* no. 10/2003, p. 669

²⁷⁷ F. Terre Y. Lequette - *"Droit civil. Les successions. Les liberalités"* Dalloz Publishing, Paris, 1997, p.306; M. Grimaldi - *"Droit civil. Liberalités. Partages d'ascendants"*, Litec Publishing, Paris, 2000, p. 84

D. G. Ionaș

Related to the fact that the total lack of the date entails absolute nullity, we consider that in order for the testament to be valid, it is necessary that another condition be met, namely that the date be found²⁷⁸. A null testament for the lack of date can not be confirmed by a subsequent testament²⁷⁹.

The date can be located anywhere, at the beginning or end, but when it is contained in the testament, the court will be called, based on the rules of interpretation, to determine whether it refers only to the provisions which precede it or and the subsequent ones, too²⁸⁰.

Complete and accurate dating of the testament is of particular importance because according to it, one can determine whether or not the testator had the ability to test²⁸¹ [17]. The date may contain even only the year of drafting, and it will be valid if the testator has been unable or did not draft revocatory provisions²⁸². In case of a plurality of testaments containing contrary or incompatible provisions, depending on the date of each, it can be determined which one is the last, this revoking the previous ones²⁸³. The doctrine²⁸⁴ found that the specification of the date is relevant, also *animus testandi*, it allows the identification of the circumstances in which the will was written, which may be useful to the interpretation of the doubtful clauses.

In the literature, the view that dating would not be such a matter of importance as writing or signing the will by the testator has been expressed. In this regard, it was considered that the date has no significance in itself, as a formal element, but only as an element of proof when it comes to the revocation resulting from the existence of successive testaments whose provisions exclude each other, "or as a matter of ability or unwillingness resulting from a mental disability or a rape or fraudulent deceit to which the testator fell victim"²⁸⁵. In our opinion such a claim can not be accepted because the Civil Code does not distinguish between the legal effects which the lack or falsity of the date arises or the legal consequences which the lack of testator's writing or

²⁷⁸ In practice, the view that the non-compliance with the provisions of the Civil Code in terms of not dating the codicil of the testament is grounds for relative nullity, which can be invoked by the parties and those entitled under or legal heirs, as the interest protected is personal, particular, and not general - see C. of Appeal, sect. Civ IV., in civ. dec. no. 367 of 10 March 2005, *C.P.J.C.C.A. Bucharest*, 2005, p. 56

²⁷⁹ G.L. Nouel - *"Testaments et Donations"*, Delmas Publishing, Paris, 1992, p.3 6

²⁸⁰ In relation to the fact that the Romanian legislator in 1864 had imposed the condition that the testament be undersigned, the absolute nullity should affect any disposition made before October 1, 2011 in case the signature would appear somewhere other than at the end - M.D. Bob - *"Probleme de moșteniri în vechiul și noul Cod civil"*, Universul Juridic Publishing, Bucharest, 2012, p. 156; C. Hamangiu, I. Rosetti- Bălănescu, Al. Băicoianu - *"Tratat de drept civil român"*, Vol.III, All Beck Publishing, Bucharest, 1999, p. 518

²⁸¹ C. of Appeal, sect. III civ., in dec. no.102 / 07.02.1995 viewed on <http://legeaz.net/spete-civil/sucesiune-testament-olograf-actiune-prin-102-1995> address on 11/08/2014 - "In case the incorrect date of such a testament is due to the an inadvertent mistakes of the testator, the testament will be valid if it is possible that the date be completed or corrected by court order. For the holographic testament, if the testament is entirely written and signed by the testator, conditions which ensure that the document represent the free will of the testator, the date involuntary incorrect or incomplete is not likely to attract nullity because it now performs the function of protecting the testator's posthumous wish"

²⁸² Court de Cassation Civ. 1 ^{ere}. 06.07.2006, cts Belliard, et.al, bull.civ 1, no. 301, D. 2006 IR 1706 in I. Popa - *"Drept civil. Mosteniri si liberalitati"*, Universul Juridic Publishing, Bucharest, 2013, p. 305

²⁸³ C. of Appeal Craiova, in civ. dec. no. 376/2010 viewed on <http://portal.just.ro/54/Lists/Jurisprudenta/DispForm.aspx?ID=706> address on 11.08.2014

²⁸⁴ Ph.Malaurie, L. Aynes - *"Les successions. Les liberalites "*, op cit, p. 256

²⁸⁵ M.B. Cantacuzino - *"Elemente de drept civil"*, All Educational Publishing S.A., Bucharest, 1998, p. 350

THE HOLOGRAPHIC TESTAMENT

signature issues, stating that all three conditions are provided ad validitatem under the penalty of nullity. From the wording of the legislator, a classification in terms of value of the three conditions does not follow, or a subordination of one to the other, or, *ubi lex non distinguit nec nos distinguere debemus*.

3. The testament must be signed by the testator

Similar to writing and dating, the testament must be signed by the testator in person. It is a substantial form that can not be replaced in any way or by extrinsic factors, even intrinsic to the testament²⁸⁶.

The signature can be placed anywhere within a testament, usually at the end of it, and it attests that the testament is the ultimate manifestation of the deceased's will, made with the intention of producing legal effects, and that it emanates from him. The will signed on the margins or which does not contain a signature at the bottom of the document is considered void²⁸⁷.

Regarding the signature appended only on the envelope in which the testament is sealed, the doctrine expressed several opinions. Thus, some authors have argued that the signature on the envelope is not valid because it would allow anyone to replace the testament²⁸⁸. Other authors have argued the opposite²⁸⁹. Finally, there were also views that the signature on the envelope is valid as far as a link between this and the contents of the envelope can be established with certainty, any possibility of substitution of the testament being excluded²⁹⁰. *We rally the latter opinion on the grounds that the interpretation of a legal document must always be in the sense of it becoming effective, and not on the contrary.*

The signature may include the name and surname of the testator or may take the form commonly used by him/her²⁹¹. The only condition required by the law is that it is actually written by the testator, sealing or putting a finger in case of the illiterate being equivalent to the signature. Also, the mere utterance of the name does not represent a signature, the requirement being that it is sufficiently detached from the text in order to mark its approval²⁹².

²⁸⁶ Cass. 1^{re} civ., 16 mars 1995 Obs.J. Hauser, Defrenois, Paris, 1993, art. 356 629 in D. Chirică - *"Tratat de drept civil. Succesiuni si liberalitati"*, C.H. Beck Publishing, București, 2014, p. 261

²⁸⁷ D.C. Florescu - *"Dreptul succesoral in Noul Cod civil"*, Universul Juridic Publishing, Bucharest, 2013, p. 83

²⁸⁸ D. Chirică - *"Drept civil. Succesiuni"*, Lumina Lex Publishing, Bucharest, 1996, p. 100-101

²⁸⁹ C. Hamangiu, I. Rosetti - Bălănescu, Al.Băicoianu - *op cit*, p. 518

²⁹⁰ Fr.Deak - *"Tratat de drept succesoral"*, Universul Juridic Publishing, Bucharest, 2002, p. 190; Iliora Genoiu - *"Dreptul la moștenire în noul Cod civil"*, C.H. Beck Publishing, București, 2012, p. 164

²⁹¹ By the civil sentence no.1224 / 1.06.2012 of the Medias County, unpublished, it was settled that "the document was written on one sheet of paper, double - sided, the date of 14.02.2011 being inscribed in its final phrase. In order to identify himself in the contents of the document drafted, the deceased used the phrase "your uncle C." using as a mark the degree of relationship to the two grandchildren, to whom the document is addressed, whom he describes as those who nursed him during his state of helplessness due to illness. Although the deceased used his first name and did not apply a signature in the technical sense of the word, the phrase "your uncle C." is sufficiently clear so that there is no doubt that the document bears in a legal sense, the signature of the deceased. Therefore, the court finds that the document reviewed represents the holographic testament of the deceased D.C., keeping to the conditions of validity prescribed by art.859 Civil Code. "

²⁹² M. Grimaldi - *"Droit civil.Liberalites. Partages d'ascendants"*, *op cit.*, p. 277; in the same effect Cass. 1^{re} civ., 14 Janvier 2003 Obs. F. Boulanger, in J.C.P. no. 10/2004, p. 404 ff. in D. Chirică - *"Tratat de drept civil. Succesiuni și liberalități"*, *op cit.*, p. 261

Opening the holographic testament and the probative value of the holographic testament

As a novelty in the New Civil Code, we find the need to fulfill a formal procedure subsequent to drawing up the testament and opening the inheritance. Steps to be taken in this regard assume, first, endorsing it for proof of non-alteration. In this regard, art. 1042 in the New Civil Code provides that before being drawn up, the holographic testament will be presented to a notary public in order for it to be endorsed for proof of non-alteration. Meeting the procedure involves marking by the public notary of the words "endorsed for proof of non-alteration" on the text, followed by his/her signature and stamp. This procedure is fulfilled only by a notary public or, in case it was drawn up abroad, representatives of Romania's diplomatic missions. In the doctrine it was held that compared to the expression of the legislature, the endorsement for proof of non-alteration may be made by any notary public, and not just the one competent to perform the notary succession procedure²⁹³. The lack of formality is not punishable by law, so the holographic testament will be effective even if it was not presented to the notary public²⁹⁴.

The next stage in opening the holographic testament implies drawing up by a notary public or by the representative of the diplomatic mission, where testaments are drawn up abroad²⁹⁵, of the record of findings concerning the condition of the testament.

In the inheritance procedure, the notary public shall, under the special law, open and validate the holographic testament and file it into the inheritance. The validation involves summoning all legal and testamentary heirs, and is achieved by two methods: - recognition of the testament by the heirs or, in case of it being contested, by expertise. Those interested can get, after the endorsement for proof of non-alteration at their expense, legalized copies of the holographic testament. After the completion of the succession procedure, the original of the testament is handed to the legatees upon the agreement between them, and in its absence, the person designated by the court, who upon the wording of the text can be a legatee or any other person designated by the court.

Conclusions

This kind of testament although a solemn act is materialized in a document under private signature, so the provisions of art. 273 in the Romanian New Code of Civil Procedure are incident. Regarding the date of the testament, the presumption of validity is applied to the extent in which the validity of its writing and signature was ascertained, therefore the burden of proof falls on the one who invokes its absence or falsity²⁹⁶. The data entered by the testator in the

²⁹³ C.S. Ricu, G.C. Frentiu, D. Zeca, D.M. Cigan, T.V. Rădulescu, C.T. Ungureanu, G. Răducan, Gh. Durac, D. Calin, I. Ninu, Al.Bleoancă - *"Noul Cod civil. Comentarii, doctrină și jurisprudență"*, vol. II, Hamangiu Publishing, Bucharest, 2012, p. 168

²⁹⁴ L. Stănculescu - *"Curs de drept civil. Succesiuni"*, Hamangiu Publishing, Bucharest, 2012, p. 104; but there are opposing views in that the presentation of the testament concerning the endorsement for proof of non-alteration is not a mere formality at the discretion of the parties, it is a mandatory procedure that has the character of a preliminary procedure - see Daniela Negrilă - *"Testamentul în noul Cod civil. Studii teoretice și practice"*, Universul Juridic Publishing, Bucharest, 2013, p. 121

²⁹⁵ The possibility of the diplomatic missions to prepare the records of findings regarding the condition of the holographic testament established in UNNPR - *"Codul civil al României – Îndrumar notarial"*, Official Gazette, Bucharest, 2011, vol. 1 p. 377; for the contrary opinion, see Daniela Negrilă - *op cit.*, p. 131

²⁹⁶ C. of Appeal, sect. IX civ. and propr. int., in dec. no.521 / R of 8 December 2009 viewed on the address http://legeaz.net/spete-civil/testament-semnatura-apartinand-testatorului-expertiza-133a-2009_on_08/11/2014 - "Regarding the criticism on the fact that the testament was not or could not be signed by V.M., the Court found that,

THE HOLOGRAPHIC TESTAMENT

contents of the testament is presumed to be true under the double condition that it be complete and not contradicted by the intrinsic elements of the document²⁹⁷. The locus standi to seek the annulment of the testament for reason of not being dated by the testator is held only by the deceased person's legal successors who could claim a harm caused by the fact that he disposed of his property by a liberality upon death²⁹⁸. The proof of the date can be completed or corrected based on the intrinsic or extrinsic elements of the document, but only to the extent that the latter is derived from the intrinsic elements and contribute to strengthening the indications arising from the content of the last will document. It can produce evidence to clarify an incomplete or erroneous involuntary date applied by the testator on the testament, but not in the absence of this crucial assumption regarding the nonexistence of this essential element for the validity of the document²⁹⁹. In matters of the holograph testaments, the date must not meet the conditions of a certain date.

If you can not prove the holographic testament, but there is a mention of it in an authentic document, mentioning which is corroborated by testimonies, the court may consider that there was evidence of the testament.

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as correctly appreciated by the first instance and the court of appeal, the graphoscopic expertise established that the signature on the testament belongs to the deceased V.M., and the appellant has not made any further evidence to exonerate the conclusions of the mentioned expertise. The mere fact that V.M. had an advanced age is not likely to lead to the presumption that he could not sign. Also, the weakening of his eyesight does not eliminate the possibility that he signed the papers."

²⁹⁷ C. Turianu - *"Curs de drept civil. Dreptul la moștenire"*, Fundației România de Mâine Publishing, Bucharest, 2000, p. 69

²⁹⁸ C. of Appeal, sect. civ IV., in civ. dec. no. 367 of 10 March 2005, *C.P.J.C.C.A. Bucharest*, 2005, p. 56

²⁹⁹ C. of Appeal Craiova, in civ. dec. no. 376/2010 viewed on the address <http://portal.just.ro/54/Lists/Jurisprudenta/DispForm.aspx?ID=706> on 11.08.2014

D. G. Ionaș

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