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On the Conversion of an Absolutely Void Legal Act Mortis Causa in the Views of Professor Jan Gwiazdomorski*

O tak zwanej konwersji bezwzględnie nieważnej czynności prawnej mortis causa w poglądach Profesora Jana Gwiazdomorskiego

ABSTRACT

The conversion of a void legal act is closely bound up with the general premise of civil law according to which, insofar as possible, an effort should be made to preserve the validity of a legal act once effected. In the dominant scholarly opinion, conversion is a distinctive juridical construct whereby the transformation of an invalid legal act into a valid one makes it possible to realise the practical objective that the parties sought to attain when undertaking the act. The object of conversion may, in principle, be any existing absolutely void legal act, including unilateral acts, whether *inter vivos* or *mortis causa*. Both doctrine and case law, in their prevailing view, have accepted the

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possibility of converting an invalid will. This tendency accords with the aforesaid broader premise and with the overriding aim of avoiding the extinction of the testator's intent. The point acquires special significance with respect to wills, since in the case of *mortis causa* legal acts it is impossible for the party who performed the original act, rendered absolutely void, to repeat it. The conversion of a will thus aims at realising the testator's true intent and accordingly represents an application of the intent theory. Its legitimacy rests both upon strictly juridical argumentation and upon considerations of a social nature. While the aim so defined may seem *prima facie* sound, the conversion of an invalid will is fraught with theoretical difficulty. Nor is this the sole reason why the doctrine has found determined opponents. One of its prominent critics was Professor Jan Gwiazdomorski. He offered a thorough critique of the position that the conversion of an invalid will is admissible when the cause of invalidity lies in a breach of the formal requirements governing wills.

Keywords: legal act; conversion; absolutely void legal act; Jan Gwiazdomorski

INTRODUCTION

An absolutely void legal act does not generate the legal effects envisaged by the party or parties undertaking it. Although declarations of intent have been made and the act has been concluded, the legal consequences toward which the act was directed fail altogether to arise. Thus, the legal act neither produces nor can ever produce any legal consequences encompassed by the parties' intent,[1] for, as has been observed, "the legal consequences that were meant to be created by means of such an act do not materialise". As both doctrine and case law have stressed, this does not preclude the emergence of the legal effects of a particular act that are prescribed by the applicable provisions – those that flow simply from the fact that the act has been performed.[2] Only exceptionally, and by express legislative determination, is it possible to cure an absolutely void legal act in the situations and on the terms prescribed by statute. In other words, a void legal act may "become valid", provided the law so ordains.[3] Yet, only those rare cases expressly designated by the legislator can

[1] For example, see judgment of the Court of Appeal in Katowice of 11 April 2002, I ACa 169/02, LEX no. 78765, thesis 1.

[2] B. Lewaszkiewicz-Petrykowska, [in:] *System Prawa Cywilnego*, vol. 1: *Część ogólna*, ed. S. Grzybowski, Wrocław 1985, p. 706. For example, see judgment of the Court of Appeal in Lodz of 13 September 2017, I ACa 1615/16, LEX no. 2372203, thesis 1. Cf. Z. Radwański, [in:] *System Prawa Prywatnego*, vol. 2: *Prawo cywilne – część ogólna*, ed. Z. Radwański, Warszawa 2002, pp. 435–436. For more information on the effects of an absolutely void legal act, see concisely M. Gutowski, *Nieważność czynności prawnej*, Warszawa 2006, pp. 397–401 and the literature cited therein. See also J. Preussner-Zamorska, *Skutki nieważnej – niewykonanej umowy – problem dopuszczalności konwersji*, [in:] *Nieważność czynności prawnej w prawie cywilnym*, Warszawa 1983, pp. 130–153.

[3] See Article 14 § 2 and Article 890 § 1 of the Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws 2025, item 1071, as amended), hereinafter: CC. For more, see S. Grzybowski, *O rzekomej konwalidacji czynności prawnej*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1974, no. 3pp. 46–48 and the literature cited therein.

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serve as justification for departing from the principle of *quod ab initio vitiosum est, non potest in tractu temporis convalescere* applicable to absolutely void legal acts. In such circumstances, the legal act is subject to validation.[4] Provided that specific prerequisites are fulfilled, an absolutely void legal act may also undergo conversion and thereby, albeit within a limited scope, produce effects corresponding to the parties' intent. In the dominant doctrinal opinion, conversion is regarded as a special and autonomous institution of private law, dependent upon three conditions: two objective elements of the actual status of conversion, namely the absolute invalidity of the legal act and the substitutability of the void act by another act, and one subjective element, namely the parties' hypothetical intent – an assumption that if they had been aware of the invalidity of the act performed, they would have effected a substitute act.[5] Conversion is understood as the substitution, modification, transformation, or reconfiguration of an absolutely void legal act to produce a valid act of a different type, i.e. another legal act that, at least to some extent, corresponds to the parties' hypothetical intent and seeks to attain, in whole or in part, an objective similar to the one originally pursued.[6] When conversion occurs, "in place of the intended legal act or declaration of intent there is substituted another legal act or declaration of intent (provided the intended act fulfils all the requirements of that other, substitute act), which allows the attainment of the same or a closely related aim".[7] The doctrine of conversion entails that "where a particular legal act is invalid, yet the conditions of validity for another legal act – one that achieves a purpose akin to the one originally intended – are simultaneously fulfilled, it is deemed that the latter, valid act has been performed".[8] The rationale lies in the assumption that the parties would have undertaken this substitute act had they known the act actually performed was void.[9] Conversion thus requires an inquiry into "the presumed, and hence hypothetical, intent of the parties, that is, the ascertainment of what reasonable parties would have desired, had they known of the invalidity of the transaction undertaken";[10] conversion is admissible only "where it accords with the parties' reasonable intent".[11] It must be

[4] Cf. S. Grzybowski, *op. cit.*, pp. 38–39.

[5] K. Gandor, *Konwersja nieważnych czynności prawnych*, "Studia Cywilistyczne" 1963, vol. 4, p. 58.

[6] Cf. B. Lewaszkiewicz-Petrykowska, *op. cit.*, p. 706; M. Gutowski, *op. cit.*, p. 401.

[7] E. Skowrońska, *Z problematyki nieważności testamentu allograficznego*, "Nowe Prawo" 1983, no. 11–12, p. 78 and the literature cited therein.

[8] A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1998, p. 329. See also, similarly, the grounds of the judgment of the Court of Appeal in Poznan of 12 October 2005, I ACa 214/05, LEX no. 175158.

[9] Cf. decision of the Supreme Court of 25 May 2021, II CSK 96/21, Legalis; judgment of the Supreme Court of 5 February 2010, III CSK 105/09, LEX no. 951735, thesis 1; grounds of the judgment of the Supreme Court of 26 November 2002, V CKN 1445/00, LEX no. 78013.

[10] K. Gandor, *op. cit.*, p. 76, 58.

[11] *Ibidem*, p. 73. Cf. M. Gutowski, *op. cit.*, pp. 407–408 and the case law cited therein.

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emphasised, however, that the legal consequences of any substitute legal act "may not extend beyond" those envisaged by the parties to the act subject to conversion.[12] The expression "another legal act" is to be understood as "any act producing different effects (though frequently of the same type) or embodying different content than the invalid act, insofar as it allows the attainment of the intended practical aim". For this to hold, it suffices that the other act achieves this aim at least in part.[13] The prevailing doctrinal view holds that the conversion of absolutely void legal acts serves to uphold private autonomy,[14] being "an emanation of the tendency of civil law to effectuate the intent of the parties".[15]

Conversion may only apply to legal acts that are absolutely void. There must, therefore, be a legal act performed in the first place.[16] Conversion may likewise extend to unilateral legal acts, which is of material importance in the present context.[17] Given that the range of defects resulting in the absolute invalidity of a legal act is very broad, it should be emphasised that not every instance of such defect justifies the conversion of the act into another. Excluded from this category are acts undertaken by parties that are legally incapacitated, by *non compos mentis* persons, and apparent (sham) legal acts. Given that the objective of conversion is "to safeguard the parties' intent and to allow them to secure effects at least approximating those embraced by their intent", in cases where the parties lack the capacity to make a decision or to express intent, or where they positively exclude the desire for the act performed to produce legal effects, there is no basis for its application.[18]

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[12] K. Gandor, *op. cit.*, p. 69; B. Lewaszkiewicz-Petrykowska, *op. cit.*, p. 709; M. Gutowski, *op. cit.*, p. 409.

[13] K. Gandor, *op. cit.*, pp. 69–70. Cf. decision of the Supreme Court of 25 May 2021, II CSK 96/21, Legalis; judgment of the Supreme Court of 5 February 2010, III CSK 105/09, thesis 1; grounds of the judgment of the Supreme Court of 26 February 2002, V CKN 1445/00, LEX no. 78013.

[14] M. Bławat, *Konwersja nieważnych czynności prawnych*, Legalis 2019, chapter V § 2 point II and the literature cited therein.

[15] K. Gandor, *op. cit.*, p. 30.

[16] In particular, see J. Gwiazdomorski, *Kodeks zobowiązań (skrypt z wykładów)*, vol. 2, Kraków 1934; K. Gandor, *op. cit.*, pp. 58–60, 77. Stanisław Grzybowski (*op. cit.*, p. 39, footnote 11) notes that "a legal act cannot be regarded as having been effected in the absence of a declaration of intent within the meaning of the law, or where the *essentialia negotii* have not been determined. In such circumstances, we are faced with a non-existent legal act". Cf. A. Wolter, J. Ignatowicz, K. Stefaniuk, *op. cit.*, p. 328, footnote 251; A. Szpunar, *O konwersji nieważnej czynności prawnej*, [in:] *Księga pamiątkowa ku czci Profesora Leopolda Steckiego*, eds. M. Bączyk, J. Piszczek, E. Radomska, M. Wilke, Toruń 1997, p. 338. Scholarly commentary (M. Gutowski, *op. cit.*, p. 406, 409) emphasises that a proper definition of the subject-matter of conversion requires a reservation to be made that the invalidity of a legal act "ought not to rest upon structural premises of invalidity", with the exception of those cases where it derives from failure to observe the prescribed form (the *ad solemnitatem* form).

[17] K. Gandor, *op. cit.*, p. 67.

[18] Cf. *ibidem*, pp. 60–61; B. Lewaszkiewicz-Petrykowska, *op. cit.*, p. 706; A. Szpunar, *op. cit.*, pp. 331, 709–711. Cf. M. Bławat, *op. cit.*, chapter V § 2 points IV–V.

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The admissibility of the conversion of an invalid legal act, much like its validation, lies essentially within the province of the legislator, though it should be clearly emphasised that Polish civil law "does not furnish a general normative basis for the conversion of legal acts".[19] Conversion takes place on the strength of a specific provision referring to a particular factual situation and occurs by operation of law, irrespective of the parties' intent, with its outcome strictly determined by the legal norm.[20] Where no normative foundation exists for the conversion of a specific absolutely void legal act, its admissibility may be grounded in doctrinal opinion and judicial rulings,[21] with conversion usually occurring through a corresponding court decision.[22] The Supreme Court has emphasised that, given the lack of a general normative basis for the conversion of a legal act, as already noted, this doctrinal construct has been resorted to in the judicature only on an exceptional basis.[23] Accordingly, the literature distinguishes between so-called statutory conversion and judicial conversion.[24] Statutory conversion, which operates *ex lege* and irrespective of the parties' intent – hence in an automatic manner – occurs where the statute itself "commands that an invalid legal act be upheld as an act of another kind (…) where a specific provision of the law so expressly provides".[25] It is thus anchored in a concrete substitution norm.[26] By reference to the grounds of defect leading to the invalidity of a legal act and to the effect of conversion, doctrine differentiates between conversion with regard to form (formal) and one with regard to content (substantive). From the standpoint of the present inquiry, particular attention must be given to formal conversion, which consists "solely in replacing the form (the manner of performance) of an invalid legal act with another form permitted by

[19] Z. Radwański, [in:] *System Prawa Prywatnego…*, p. 431. See also idem, *Wykładnia testamentów*, "Kwartalnik Prawa Prywatnego" 1993, no. 1, p. 25; idem, *Wykładnia oświadczeń woli składanych indywidualnym adresatom*, Wrocław 1992, p. 122. See judgment of the Supreme Court of 5 February 2010, III CSK 105/09, LEX no. 951735, thesis 1; the grounds of the judgment of the Supreme Court of 26 February 2002, V CKN 1445/00, LEX no. 78013.

[20] K. Gandor, *op. cit.*, pp. 27, 34–35. Cf. B. Lewaszkiewicz-Petrykowska, *op. cit.*, p. 710.

[21] M. Gutowski, *op. cit.*, p. 401 and the literature cited therein.

[22] B. Lewaszkiewicz-Petrykowska, *op. cit.*, pp. 710–711.

[23] That is, exclusively for the recognition of a bill of exchange declaration as a civil surety; for the acceptance of an alternative form of security capable of affording at least partial recovery of losses; for acknowledging another form of credit authorised by law; and for upholding allographic wills as oral wills. See grounds of the judgment of the Supreme Court of 5 February 2010, III CSK 105/09, LEX no. 951735; grounds of the judgment of the Supreme Court of 26 February 2002, V CKN 1445/00, LEX no. 78013.

[24] M. Bławat, *op. cit.*, chapter V § 3. Por. Z. Radwański, [in:] *System Prawa Prywatnego…*, pp. 434–435.

[25] A. Szpunar, *op. cit.*, p. 336. More in K. Gandor, *op. cit.*, p. 34.

[26] M. Bławat, *op. cit.*, chapter V § 3 point II.2.

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the law, whereby the substitute act, as a rule, substantively and fully realises the parties' intent embedded in the converted act".[27]

Although the essence of conversion seems to be consistently apprehended in the doctrinal discourse, its legal character creates some controversy. The prevailing view in the literature conceives of conversion as a specific, autonomous institution of private law, modelled on German law:[28] "a juridical construct whereby the transformation of an invalid legal act into a valid one makes it possible to realise the practical objective that the parties sought to attain when undertaking the act. From the perspective of strict legal analysis, conversion effects the transformation of an invalid legal act into a valid one; in practical terms, it permits the parties to pursue their intended interests, whether in full or only in part".[29] Advocates of this position downplay the significance of the parties' actual intent, for conversion does not refer to it. Instead, they make conversion contingent upon the congruent socio-economic purpose of both acts – the converted and the substitute one.[30] They emphasise that the conversion of an invalid legal act into a valid one is grounded in the parties' hypothetical intent, that is, in the false presumption of their intent to produce a specific legal outcome. Hypothetical intent, that is, the intent the parties would have manifested had they been aware of the invalidity of the legal act undertaken, is closely connected with the substitute legal act, as it forms an indispensable component of its factual matrix.[31] The parties' intent is shaped above all by the economic purpose they sought to realise, and the *ratio legis* of conversion lies in the fact that what matters most to them is the attainment of that purpose.[32] A defining feature of the conversion of an invalid legal act is the effort to preserve, at least in part, the parties' manifested intent, so that the act may produce, even to some extent, the legal effect that had been embraced by their design and which they sought to achieve.[33]

The transplantation of the German doctrine of conversion of legal acts into the Polish legal order has encountered resolute opponents. They criticise not merely the lack of a clear normative foundation for conversion but principally the conceptual

[27] *Ibidem*, chapter V § 3 and the literature cited therein. Cf. A. Szpunar, *op. cit.*, p. 331 and the literature cited therein.

[28] See § 140 BGB. Cf. J. Preussner-Zamorska, *op. cit.*, p. 155 and the literature cited therein.

[29] K. Gandor, *op. cit.*, p. 30. So in B. Lewaszkiewicz-Petrykowska, *op. cit.*, p. 709.

[30] More in M. Gutowski, *op. cit.*, p. 402.

[31] Hence, conversion is precluded in cases where the parties were aware that the act they had performed was invalid. Such awareness rules out the possibility of positing the hypothetical intent indispensable for transforming an invalid legal act into another, valid one. In particular, see K. Gandor, *op. cit.*, pp. 58, 76–77.

[32] A. Szpunar, *op. cit.*, p. 335.

[33] So grounds of the judgment of the Supreme Court of 5 February 2010, III CSK 105/09, LEX no. 951735.

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reliance on the very construct of parties' hypothetical intent.[34] They firmly reject the essence of conversion as the transformation of one legal act into another. In explicating the legal character of conversion, they deem it more accurate – methodologically as well as functionally – to approach conversion as a mode of juridical reasoning admissible within the process of construction and application of law.[35] The principal idea of conversion, in the eyes of this dissenting position, does not lie "in the 'transformation' of legal acts and in the search for a connection between two acts – the converted and the substitute one – but rather in recognising legal meanings and outcomes other than those that a purely linguistic interpretation of the parties' words would suggest".[36] Conversion does not consist in the transformation of a legal act, "but simply in assigning a different legal qualification to the content of the declaration of intent that has been upheld. This involves the so-called benevolent construction (…) of the declaration of intent, aimed at facilitating the recognition of a relevant legal act as valid".[37] As noted above, the foundation of the doctrinal and judicial view that conversion is rather a form of interpretative device – embracing the construction of the parties' declarations of intent – has been the absence of any general normative underpinning for the conversion of invalid legal acts in Polish civil law. The rationale for the conversion of a legal act must thus be sought in the principle of benevolent construction (interpretation) of contracts. *Benigna* interpretation consists in construing the parties' declaration of intent in a manner that sustains the validity of the relevant legal act, as opposed to construing it in a way that would render the act absolutely void.[38] "Conversion is effected by adopting, in the process of interpretation, such a construction of the parties' declaration as permits the legal act to remain in force, rather than one that would entail its recognition as invalid".[39] The function of conversion is thus reduced to

[34] See in particular Z. Radwański, *Wykładnia oświadczeń woli…*, pp. 118–135. Andrzej Szpunar (*op. cit.*, p. 335) maintained that although the argument may be accepted that a false declaration of intent cannot be subjected to interpretation, the objections raised against acknowledging "hypothetical intent" are unconvincing. In his assessment, given that the parties' intent is driven by economic purposes, and that their primary aim is the achievement of an economic objective – which constitutes the *ratio legis* of conversion – the use of this expression is doctrinally sound. More in M. Bławat, *op. cit.*, chapter V § 1.

[35] M. Bławat, *op. cit.*, chapter V § 6.

[36] Z. Radwański, [in:] *System Prawa Prywatnego…*, p. 433. Similarly, the grounds of the judgment of the Supreme Court of 5 February 2010, III CSK 105/09, LEX no. 951735. It is likewise noteworthy that foreign scholarship has developed a contemporary strand of the theory of conversion (Ger. *Konversionstheorie*), which integrates "the problems of construction, invalidity, and form of legal acts" (M. Bławat, *op. cit.*, chapter V § 6).

[37] M. Gutowski, *op. cit.*, p. 402. Similarly, the grounds of the judgment of the Supreme Court of 5 February 2010, III CSK 105/09, LEX no. 951735.

[38] So in the judgment of the Supreme Court of 5 February 2010, III CSK 105/09, LEX no. 951735, thesis 2.

[39] Decision of the Supreme Court of 25 May 2021, II CSK 96/21, Legalis. Similarly, judgment of the Supreme Court of 5 February 2010, III CSK 105/09, LEX no. 951735, thesis 2.

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ascertaining the parties' hypothetical intent, a task undertaken by the court in light of all the factual circumstances. Construction, by contrast, "concerns interpretative measures aimed at establishing the meaning of an actually existing, externalised intent".[40] Approaching conversion from an interpretative perspective "requires that decisive weight be accorded to the declaration of intent actually articulated. (…) Contrary to the prevailing view, the matter is not one of seeking a connection between two legal acts (…), but simply of determining the maximum permissible extent to which the content of the declaration may be upheld so that it is directed toward the attainment of the original contractual purpose, and only then subjecting the declaration of intent thus preserved to legal qualification, thereby establishing the full content of the binding legal relationship between the parties".[41] Thus, no transformation of one legal act into another occurs; instead, meanings and legal consequences are adopted other than those that would follow from a linguistic interpretation of the parties' words. What is effected, rather, is "a distinct legal qualification of the preserved content of the declaration of intent".[42]

ADMISSIBILITY OF CONVERSION OF AN INVALID WILL

As the Supreme Court has found, the absence of a general normative basis for the conversion of legal acts in the applicable provisions has caused this construction to be resorted to in legal practice only in the rarest of circumstances.[43] One of the few instances consistently recognised in case law as permitting conversion is that of a will whose invalidity stems from a violation of the statutory requirements governing the form of legal acts. To subject such a case to analysis requires, at the very outset, an appreciation of two fundamental considerations: that the act in question is unilateral in nature, and that it belongs to the category of legal acts *mortis causa*.

The debate that engaged many representatives of the doctrine centred, in essence, on the admissibility of converting an invalid allographic will into a valid oral one.[44] In large measure, it was a response to the stance adopted in case law, which had recognised the possibility, by invoking the construct of the conversion of an invalid legal act, of "saving" the testator's intent by treating their will that failed to satisfy the requirements of a prescribed form as though it had been ex-

[40] A. Szpunar, *op. cit.*, p. 331.
[41] Z. Radwański, *op. cit.*, p. 126.
[42] *Ibidem*, p. 124.
[43] See footnote 23.
[44] Attention may be drawn to the factual situation considered by the Voivodeship Court in Rzeszow, where a testator sought to make a notarial will; yet, after his intent had been committed to a draft and while the notary was preparing the official protocol, he passed away. See judgment of the Voivodeship Court in Rzeszow of 22 August 1957, III Cr 646/57, OSPiKA 1958, no. 6, item 155.

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ecuted in another form authorised by law.[45] It must be emphasised that the intent to draw up a will relates to the intention to dispose of one's estate *mortis causa*, but it does not encompass the choice to employ a specific testamentary form. The position articulated above has been consistently maintained in the case law of the Supreme Court for many years. Yet, while the judicial position on the admissibility of conversion of a will has remained, as noted, uniform, in the literature two sharply opposed views continue to contend with one another. It scarcely requires emphasis that no provision of statute envisages the possibility of converting one will into another. It should nonetheless be noted that in the provisions of Book Four of the Civil Code certain normative mechanisms may be identified which the scholarly literature designates as forms of statutory conversion.[46]

Advocates of "recognising a will that does not comply with the formal requirements of a particular form as one drawn up in another legally prescribed form" ground their position in the overarching objective of avoiding the extinction of the testator's intent.[47] The conversion of a will seeks to effectuate the genuine intent of the testator and may therefore be regarded as a manifestation of the theory of intent, supported both by juridical argumentation in the strict sense and by considerations of a social nature.[48] While the aim so defined may seem prima facie sound, the conversion of

[45] E. Skowrońska, *op. cit.*, p. 78 and the literature cited therein.

[46] As noted above, within the provisions of Book Four of the Civil Code, normative solutions can be found which the literature has described as instances of statutory conversion. An oft-cited example is Article 981³ § 2 CC. This provision effects the conversion of a special bequest into an ordinary one, thereby tempering the consequences of the statutory prohibition on stipulating a condition or a time limit in the establishment of such a bequest, save where the content of the will or the circumstances suggest otherwise. More in M. Pazdan, *Komentarz do art. 981³*, [in:] *Kodeks cywilny*, vol. 2: *Komentarz. Art. 450–1088*, ed. K. Pietrzykowski, Legalis 2021, no. 1–2 and the literature cited therein. See also A. Stempniak, *Nowelizacja Kodeksu cywilnego w zakresie prawa spadkowego*, "Monitor Prawniczy" 2011, no. 12, p. 632. Cf. J. Górecki, *Zapis windykacyjny w praktyce notarialnej*, "Rejent" 2011, no. 4, p. 24. This view, however, has not been uniformly embraced in the scholarly literature. Its opponents contend that the concept of conversion should properly be associated with an independent legal act, whereas the creation of a bequest represents merely a constituent element thereof. They further maintain that, given that the notion of conversion is at times applied in a broader sense – specifically, in instances where an allographic will invalid for non-compliance with formal requirements is regarded as a valid oral will – it cannot be excluded that the mechanism of conversion might also extend to another component of a legal act, particularly one possessing as much autonomy as the establishment of a bequest. Ultimately, however, they concede that "a more convincing theoretical approach would be to determine the effects of a conditional (or time-limited) establishment of a bequest at the level of interpretation of the will, rather than through the mechanism of conversion" (K. Osajda, *Komentarz do art. 981³*, [in:] *Kodeks cywilny. Komentarz*, vol. 3: *Spadki*, ed. K. Osajda, Warszawa 2013, theses 22 and 23).

[47] E. Skowrońska, *op. cit.*, p. 78. Cf. M. Rzewuski, *Konwersja testamentu*, [in:] *50 lat Kodeksu cywilnego. Perspektywy rekodyfikacji*, eds. P. Stec, M. Załucki, Warszawa 2015, p. 407.

[48] G. Wolak, *Konwersja testamentu allograficznego nieważnego z powodu zamieszczenia w nim rozrządzeń dwóch spadkodawców. Glosa do postanowienia Sądu Najwyższego z 9 września 2021 r., V CSKP 117/21*, "Nowy Przegląd Notarialny" 2021, no. 3, p. 80 and the literature cited therein.

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an invalid will is fraught with theoretical difficulty. With respect to a legal act mortis causa, namely the will, the divergences from the prevailing theory of conversion manifest themselves at the very point of departure. Since conversion is understood as the substitution of "another legal act" for the one originally intended – provided that the substitute one satisfies all the requirements of the original act and enables the pursuit of the same or a similar purpose as the act initially contemplated – there can be no doubt that this situation does not exemplify the conversion of an invalid legal act in its traditional understanding. The conversion of a will takes place within the very same category of legal act.[49] It is chiefly for this reason that, in reference to the "mechanism" by which an executed yet absolutely void will maintains its force, the expression "conversion of a legal act"[50] is employed, or, in broader terms, conversion *sensu largo*.[51] At the same time, certain scholars have argued that "conversion finds wider application in the law of succession – where there is no need to safeguard the balance of parties' reciprocal performances, and where in construing wills only the testator's interest is taken into account – than in the law of obligations, where the court's inability to intrude upon the essence of the economic transaction concluded by the parties markedly narrows the field of its application".[52] Yet, as already emphasised, contrary opinions are by no means absent from the scholarship, many of which object to the application of the institution of conversion to invalid wills. Jan Gwiazdomorski was among the most resolute critics of admitting the conversion of an invalid allographic will into a valid oral one.

THE PREREQUISITES FOR THE CONVERSION OF AN INVALID WILL IN JUDICIAL PRACTICE AND SCHOLARLY DOCTRINE: SOURCES OF INVALIDITY OF LEGAL ACTS AND ADMISSIBILITY OF CONVERSION THEREOF

Notwithstanding the fairly obvious theoretical and legal objections, both the scholarly doctrine and case law acknowledge the admissibility of converting an invalid will. As noted in the literature, this tendency derives from the overarching

[49] For example, see J.S. Piątowski, *Prawo spadkowe. Zarys wykładu*, Warszawa 2002, p. 116; A. Szpunar, *op. cit.*, p. 331; S. Wójcik, F. Zoll, W. Bańczyk, [in:] *System Prawa Prywatnego*, vol. 10: *Prawo spadkowe*, ed. B. Kordasiewicz, Warszawa 2025, p. 476. Cf. grounds of the resolution of the Supreme Court of 8 August 1986, III CZP 51/86, LEX no. 3265.

[50] S. Wójcik, *Testament*, [in:] *System Prawa Cywilnego*, vol. 4: *Prawo spadkowe*, ed. J.S. Piątowski, Wrocław 1986, p. 204. Aleksander Wolter, Jerzy Ignatowicz, and Krzysztof Stefaniuk (*op. cit.*, p. 329) refer to it as "a not altogether accurate instance of conversion". Cf. J.S. Piątowski, *Prawo spadkowe…*, p. 116.

[51] G. Wolak, *op. cit.*, p. 83.

[52] M. Bławat, *op. cit.*, chapter V § 2 point IV.

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assumption that, insofar as possible, a legal act once executed should be maintained in effect. Given that legal acts *mortis causa* cannot be repeated by the executor of the original act once it has been tainted by absolute invalidity, this assumption acquires particular force in relation to wills.[53]

Of relevance for the subject under consideration in this article was the Supreme Court resolution of 22 March 1971,[54] delivered by a panel of seven judges and vested with the force of a legal principle.[55] The Court held that "the invalidity of a will as provided for in Article 951 CC, occasioned by failure to comply with a mandatory provision of law, may be regarded as a special circumstance within Article 952 § 1 CC, thereby warranting the recognition of the decedent's declaration of last intent as an oral will" (thesis 1). The Supreme Court thus held that an allographic will may be converted into a valid oral will if the source of the former's invalidity resides in the violation of binding statutory provisions. This stance of the court requires two principal matters to be clarified: first, the precise construction of the term "special circumstances that preclude or substantially impede compliance with the ordinary form of the will"; and second, the correct interpretation of the expression "invalidity of a will resulting from failure to observe a binding provision of law".

By reference to historical interpretation, the Supreme Court embraced a broad understanding of the expression "special circumstances that preclude or substantially impede compliance with the ordinary form of the will". The Court noted that Article 82 of the Decree of 8 October 1946 – Law of Succession,[56] regarded as the "equivalent" of Article 952 § 1 CC, enumerated, by way of illustration, the special circumstances that could warrant recourse to the special form of the oral will. While scholarly commentary – having regard to the normative regulation adopted – suggested that this legislative device limited the discretion to assess what could be regarded as a special circumstance under Article 82 LoS, judicial decisions consistently held that the non-observance by the competent public officer of a statutory requirement, resulting in the invalidity of an allographic will, undoubtedly constituted such a circumstance.[57] The Supreme Court noted that Article 952 § 1 CC provides no exemplary listing of the special circumstances warranting recourse

[53] See E. Skowrońska, *op. cit.*, pp. 78–79.

[54] III CZP 91/70, OSPiKA 1972, no. 2, item 26.

[55] A. Wolter, J. Ignatowicz, K. Stefaniuk, *op. cit.*, pp. 69–70.

[56] Journal of Laws 1946, no. 60, item 328, hereinafter: LoS.

[57] For example, see decision of the Supreme Court of 22 December 1951, C 1325/51, LEX no. 160261 ("in which the testator was effectively deprived of the ability to execute a valid ordinary will owing to the municipality mayor's inadequate knowledge of his statutory duties concerning the making of wills") and of 10 September 1954, I CR 1026/54, LEX no. 1633928 (where the Court recognised that equivalent to the impossibility or serious difficulty of executing an ordinary will "is the incompetence of the named official to whom the testator had applied for the purpose of making such a will, in the conviction that all the requisite formalities would be duly observed"). Cf. decision of the Supreme Court of 21 October 1961, IV CR 644/61, LEX no. 106402.

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to the oral form of a will. This must be understood as an unequivocal expression of the legislator's position favouring a broad construction of such circumstances, thereby rendering meaningless the contention that the scope of discretion in their qualification is restricted under the applicable normative regime.[58] According to the Supreme Court, there is also no justification for excluding from the ambit of the special circumstances envisaged in Article 952 § 1 CC the non-observance by a state administrative body of a binding statutory provision, where such non-observance renders an allographic will invalid. The disclosure of invalidity of the will only after the testator's death is of such gravity for the interested parties as to fully warrant the assessment that it constitutes a special circumstance within Article 952 § 1 CC.[59]

Within the doctrine, there was virtually no dispute over the admissibility of recognising, and thus authorising recourse to the oral will, the invalidity of a will provided for in Article 951 CC as a special circumstance, where such invalidity results from a state official's failure to observe a binding legal provision. Criticism was instead directed against the possibility of construing this circumstance as one that either renders impossible or substantially impedes compliance with the will in an ordinary form. Clearly, the testator's failure to draw up a will in another ordinary form, after having availed him or herself of the allographic form, stemmed from the belief that they had already executed the legal act in full conformity with statutory requirements; to execute another testament of identical content would have been devoid of both purpose and utility.[60] It was stressed, however, that this idea of redundancy in making a will pursuant to Articles 949 or 950 CC "is by no means equivalent to the impossibility of complying with the ordinary testamentary form". Thus, the view that this circumstance amounts to an impossibility of observing the ordinary form of a will within Article 952 § 1 CC must be regarded as simply misguided.[61]

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[58] Cf. J. Gwiazdomorski, *Glosa do uchwały Sądu Najwyższego z dnia 22 kwietnia 1974 r., III CZP 19/74*, "Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" 1975, no. 5, p. 195.

[59] In the literature, following the Supreme Court (grounds of the resolution of 22 March 1971, III CZP 91/70, OSPiKA 1972, no. 2, item 26), it was emphasized (E. Skowrońska, *op. cit.*, p. 79) that a different construction of the provision of Article 952 § 1 CC "would furthermore lead to excessive failure to uphold the testator's dispositions, which could consequently result in the State Treasury being held liable for state officials".

[60] It is beyond dispute that, should one accept the conversion of an invalid ordinary will into a valid special will, reference must be made to Article 955 CC. Where the special circumstance contemplated in Article 952 § 1 CC – warranting the recognition of the testator's declaration of last intent as an oral will – consists in the invalidity of a will under Article 951, arising from non-compliance with a binding statutory provision, the cessation of the circumstance justifying departure from the ordinary testamentary form occurs at the point in time when the testator becomes apprised of the invalidity of the will made under Article 951 (see decision of the Supreme Court of 30 May 2001, III CKN 184/01, LEX no. 550963). Cf. J. Gwiazdomorski, *Glosa…*, pp. 196–197.

[61] J. Gwiazdomorski, *Wykładnia przepisów o testamencie na tle uchwały składu siedmiu sędziów Sądu Najwyższego*, "Nowe Prawo" 1973, no. 6, pp. 823–824; idem, *Glosa…*, p. 194. Cf. A. Mączyń-

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In the literature, it was further observed that, although it should be acknowledged that the testator regarded the act as unnecessary, questions remain whether the mental image of redundancy in executing another will (in the ordinary form) did not amount, in effect, to a semantic equivalence with the impossibility or serious difficulty of employing that form. Is the wording contained in Article 952 § 1 CC to be understood strictly literally, through an exclusively textual construction?

Conversion may take place only where a legal act has indeed been performed, yet, by virtue of statutory provisions, is deemed absolutely void. In evaluating the admissibility of conversion of an invalid will, it is essential to determine with precision the origin of the irregularity or defect affecting that legal act. The starting point should be the ground identified above: the non-observance of a binding legal provision by a state official, which is, as a matter of principle, the consequence of ignorance on the part of the person authorised to receive the testator's declaration.[62]

It is reasonable to concur with the position of the Supreme Court, which recognised that "not every case of invalidity of an allographic will may be deemed a circumstance preventing, or substantially impeding, the observance of the ordinary testamentary form".[63] Although the admissibility of conversion of an invalid legal act should not be rejected altogether, it must be confined to "exceptionally and only in circumstances that truly warrant and enable its application".[64] The grounds for the invalidity of a will may be varied and, although their legal consequences are generally identical, in that they all entail the absolute invalidity of the legal act,[65] not every such ground may be regarded as justifying the admissibility of its conversion. A distinction must be maintained between those grounds which stem from the conduct of a public official authorised to receive the testator's declaration and those which arise on the part of the testator him or herself, since only the former may justify the conversion of an invalidly executed will.[66] It is therefore not advisable to treat alike a case in which the testator's declaration has been made before a competent official but in contravention of the provisions on testamentary form, and one in which such declaration has been made before a person not listed in Article 951 § 1 CC. Accordingly, the invalidity of an allographic will in cir-

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ski, *Glosa do uchwały składu siedmiu sędziów Sądu Najwyższego z dnia 22 marca 1970 r., III CZP 91/70*, "Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" 1972, no. 2, p. 56.

[62] Certainly, liability for damage caused by the actions of public authorities is yet another problem. See J. Gwiazdomorski, *Glosa…*, p. 195. For example, see also P. Dzienis, *Odpowiedzialność cywilna władzy publicznej za nieważny testament allograficzny. Glosa do wyroku Sądu Najwyższego z 18.11.2015 r., III CSK 16/15*, "Przegląd Sądowy" 2017, no. 7–8, pp. 163–169 and the literature cited therein.

[63] Decision of the Supreme Court of 17 February 2004, III CK 328/02, LEX no. 602713, thesis 2.

[64] Grounds of the decision of the Supreme Court of 17 February 2004, III CK 328/02, LEX no. 602713.

[65] However, cf. Article 945 CC.

[66] So aptly the Supreme Court in the grounds for its decision of 17 February 2004, III CK 328/02, LEX no. 602713.

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cumstances where the testator "visits" and ultimately makes his or her declaration before an unauthorised state official cannot be considered a special circumstance within Article 952 § 1 CC.[67]

The scholarly literature also clearly draws attention to the differences between the two factual circumstances indicated above. Commentators stress that while the testator's submission of his or her last will to a person expressly authorised by statute to participate in the act "is in compliance with the requirements of Article 951 § 1 CC and permits the official's incompetence to be treated as a special circumstance, recourse to an unauthorised individual affords no such possibility".[68] In such a case, it has been noted, no allographic will exists at all,[69] just as, by analogy, a legal act carried out in the absence of a notary public cannot give rise to a notarial deed. The testator's mistaken belief in the authority of the person approached cannot therefore be regarded as a special circumstance within Article 952 § 1 CC, i.e. when the testator submits his or her will to an official who is not entitled to collect an allographic will. The crux of the matter, then, in assessing the admissibility of converting an invalid allographic will into a valid oral one lies in drawing precise delineation of the interpretive limits of Article 952 § 1 CC. While the interpretation advanced above is defensible, both in strictly juridical terms and on social grounds, in cases of the legally improper conduct of a public official authorised to receive an allographic will, there is no doctrinal justification for moving beyond those boundaries. To do so would risk implying that such limits simply do not exist. The boundary must be understood as the testator's recourse to a person

[67] Cf. the grounds of the resolution of the Supreme Court of 9 February 1981 (III CZP 68/80, LEX no. 2595), where the Court held that a testator's mistaken assumption that he had declared his or her will before a public official authorised to assist in the execution of an allographic will constituted a special circumstance precluding the making of the will in the ordinary form (a misapprehension as to the validity of the executed will). See also resolution of the Supreme Court of 22 March 1982, III CZP 5/82, LEX no. 2761; decision of the Supreme Court of 31 August 2023, I CSK 6121/22, LEX no. 3722531. It should be observed, incidentally, that under the Law of Succession the Supreme Court also articulated the position that the incompetence of a public official could be equated with the making of a testamentary declaration before an unauthorised person, approached by the testator, who, without dispelling this misapprehension, committed the testator's will to writing. See W. Żywicki, *Testamenty ustne w świetle orzecznictwa*, "Nowe Prawo" 1971, no. 1, p. 111 and the case law cited therein. Cf. A. Lamparska, *Kilka uwag na tle stosowania przepisu art. 82 Prawa spadkowego*, "Biuletyn Ministerstwa Sprawiedliwości" 1961, no. 1, pp. 28–30. Of course, it cannot be ignored that the prerequisites for the validity of an oral will *de lege lata* and during the effective period of the Law of Succession were markedly different.

[68] See more concise discussion in E. Skowrońska, *op. cit.*, p. 85.

[69] It may legitimately be questioned whether, in the factual scenario under consideration, a will was ever executed, or whether the instrument produced must instead be deemed absolutely void. Still, even assuming that an absolutely void legal act occurs, the admissibility of its conversion must be rejected, as the circumstance identified above cannot be qualified as a special circumstance within Article 952 § 1 CC.

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designated by the law in force at the time as authorised to receive an allographic will.[70] In such circumstances, any failure to honour the testator's intent stems from the incompetence or ignorance of the official vested by statute with the power to receive the relevant declaration. The testator, acting in good faith, would then be persuaded of the validity of the act precisely because it was carried out before the proper official in whom he reposed full trust.

What proves crucial, in the context of the present inquiry, is identifying the precise moment at which the "special circumstances" arise that render the making of an ordinary will impossible or excessively difficult. These circumstances, it appears, must exist prior to the commencement of the act of testation. In the case under analysis, however, they occur only during the process of drafting the will, that is, in the course of performing the legal act itself, and not as the *causa efficiens* necessitating recourse to a special form of will. That the testator does not execute a subsequent will in ordinary form is attributable to his or her reliance on the validity of the act already carried out. Scholars have observed that if such a case were nonetheless to be treated as a conversion of the will, it would be marred by a "logical vicious circle": the legislator renders a will invalid, only for that very invalidity to serve as the foundation for affirming its validity.[71] Certain commentators, however, consider such a conclusion excessively rigorous and unduly categorical. While it is beyond doubt that in the factual constellation described no conversion can take place in its classical sense, the conduct of the testator in choosing a particular form for his or her will may nevertheless fulfil the conditions of validity required for another form recognised by law. It has been emphasised that reliance upon the notary or official involved in the preparation of the will – essentially, the confidence that the legal act performed before or with the participation of such a person is valid – may be regarded as a special circumstance that either precludes or significantly impedes the execution of the will in ordinary form.[72]

While the Supreme Court accepted that conversion is not limited to factual scenarios in which a legal act is invalid owing to non-observance of the prescribed form, legitimate doubts may be raised, not so much as to the thesis so framed, but rather with respect to the cited example. The court asserted – importantly, in the light of the preceding remarks – that "a special circumstance within Article 952 § 1 CC may also consist in the breach of provisions not relating to the form of the will but defining the circle of persons authorised to receive the testator's declaration".[73] The question

[70] E. Skowrońska, *op. cit.*, pp. 85–86; S. Wójcik, *op. cit.*, pp. 203–204; M. Pazdan, *Komentarz do art. 952*, [in:] *Kodeks cywilny…*, margin number 40.

[71] Cf. S. Wójcik, F. Zoll, [in:] *System Prawa Prywatnego…*, p. 381. This view was somewhat relaxed in the next edition of the publication (S. Wójcik, F. Zoll, W. Bańczyk, *op. cit.*, pp. 477–478).

[72] G. Wolak, *op. cit.*, pp. 82–84.

[73] See footnote 67.

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inevitably arises whether the indication of the persons before whom the testator's declaration may be made should not itself be regarded as an element of the form of the legal act. Second, even assuming that in such instances the cause of invalidity does not lie in the breach of testamentary form, the view that the legal act may be converted must, as previously indicated, be rejected on the ground that it transgresses the limits of permissible interpretation of Article 952 § 1 CC. At the same time, however, the Supreme Court maintained that "in the absence of any grounds for narrowing the notion of special circumstances within Article 952 § 1 CC solely to cases where the competent official has failed to comply with the provisions of Article 951 thereof, such a special circumstance may equally consist in that official's failure to observe another provision, likewise resulting in the invalidity of a will under Article 951 CC".[74]

With regard to the admissibility of conversion in instances where other sources of defect in a legal act result in the absolute nullity of the resultant will, it must be observed that although the list of such grounds is fairly extensive, the majority will, from the outset, preclude any possibility of conversion. The sources of defect must be such that, notwithstanding the testator's death, they could, in principle, be altered so as to allow the emergence of "another legal act" serving the same or a similar purpose. Under the law as it currently stands, the relevant sources will certainly be those relating to the testator him or herself: their capacity to testate;[75] the condition they were in when performing the act (namely, a condition preventing them from disposing validly of their estate upon death within Article 945 § 1 CC); or the violation of the personal character of this legal act through its performance by an attorney-in-fact. The requirements for the validity of a will are assessed at the time of the opening of the succession. Thus, while a comparison of the formal requirements of different testamentary forms may result in one being recognised as valid notwithstanding the failure to meet the requirements by another, the conditions attached to the person of the testator – their capacity to testate, the personal character of the act, or the absence of defects in their declaration of intent – can never be "cured". These prerequisites remain immutable in the face of the death of the person executing the legal act.

It is thus appropriate to endorse the position articulated in the scholarship that not every case of the invalidity of an allographic will may be regarded as a special

[74] Grounds of the resolution of the panel of seven judges of the Supreme Court of 22 March 1971, III CZP 91/70, OSPiKA 1972, no. 2, item 26.

[75] It would appear that under the former legal regime, when the provisions of the Law of Succession allowed a valid will to be made by a natural person with limited capacity to perform legal acts – provided that such a person made use of only the strictly designated testamentary forms (Article 76 LoS) – such a disposition was admissible and valid. Under the current law, however, the conversion of such a will must be considered inadmissible. The requirement of capacity to testate – being common to all forms of wills recognised by law – does not allow for liberalisation, and any validation thereof after the testator's is precluded. Cf. M. Rzewuski, *Zdolność testowania – uwagi de lege lata i de lege ferenda*, "Przegląd Sądowy" 2012, no. 6, pp. 93–97.

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circumstance within Article 952 § 1 CC, precluding or substantially impeding the observance of the ordinary testamentary form. The concept is said to "refer exclusively to invalidity resulting from the non-compliance with statutory requirements by an official (…) authorised to participate in the execution of an allographic will and not to invalidity arising from other reasons". In this sense, any breach of the provisions governing wills by a state official would seem to amount, in effect, to a breach of the statutory requirements concerning the form of the will. "For the duties of the official extend not merely to receiving the testator's declaration of last will and signing the relevant record, as is expressly provided in Article 951 CC, but also to exercising every effort necessary to ensure that the requirements essential for the validity of the will are duly observed, even where these requirements concern other persons. This entails, for instance, supervising the accuracy of the record and verifying that witnesses brought in by someone else meet the eligibility requirements under Articles 956 and 957 CC. The omission of such duties suffices to conclude that the official has failed to comply with statutory requirements".[76] The obligation set out above may rest only upon those persons whom the legislator has expressly designated as empowered to cooperate in the making of an allographic will. No such duties can be imposed upon an official lacking the requisite authority. This furnishes yet another argument in support of the view that the invalidity of a will arising from the testator's recourse to an official who is not included in the list in Article 951 § 1 CC, and the consequent execution of the will before such a person, cannot be regarded as a special circumstance within Article 952 § 1 CC. Save for that single instance, every other deviation – however inadvertent – from the rules governing the form of an allographic will, whether attributable to the testator or to those assisting in its execution, must be treated as a breach of the applicable law on the part of the official who was under a duty to rectify it.[77]

Finally, it should be stressed that the conversion of an invalid legal act is admissible only where the act subject to conversion fulfils the requirements of validity applicable to a substitute legal act[78] – in the case at hand, the conditions of validity of an oral will[79] as set out in Article 952 § 1 CC.[80]

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[76] A. Mączyński, *op. cit.*, p. 58. Cf. C. Tąbecki, *Glosa do uchwały Sądu Najwyższego z dnia 7 listopada 1962 r., III CO 14/62*, "Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" 1963, no. 12, especially p. 680.

[77] A. Mączyński, *op. cit.*, p. 58.

[78] Cf. grounds of the judgment of the Supreme Court of 9 May 2001, II CKN 425/00, LEX no. 1125086; decision of the Supreme Court of 23 August 2022, I CSK 1416/22, Legalis, thesis 2.

[79] Decision of the Supreme Court of 12 January 2007, IV CSK 257/06, LEX no. 277295, thesis 2. See also grounds of the decision of the Supreme Court 16 March 2016, V CSK 576/15, Legalis.

[80] By way of example, consider the situation in which, in the process of drawing up an allographic will, one of the witnesses – assuming the statutory minimum is present – is absolutely incapacitated from serving in that capacity (Article 956 CC). In such a case, conversion into a valid oral will is excluded, owing to the statutory requirement of a greater number of witnesses than that prescribed

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A CRITICAL GLANCE AT THE ADMISSIBILITY OF CONVERTING AN INVALID WILL: JAN GWIAZDOMORSKI'S REFLECTIONS ON THE QUESTION

Certain representatives of the doctrine have categorically rejected the admissibility of converting an invalid allographic will into a valid oral will. Their objection does not rest solely on the fact that, in such a case, there is no conversion in the classical, institutional sense of the term. Conversion presupposes that an absolutely void legal act may be recognised as another legal act directed toward the same or a comparable economic purpose. What conversion cannot achieve, however, is the transformation of a legal act into another act of the same type. Here, by contrast, "entirely different legal mechanisms" are at work. Conversion in the strict sense allows the parties to a legal act to achieve an outcome closely approximating their original intent, while safeguarding the very interest that rendered the initial act invalid. In the case of a will, however, "nothing of this kind takes place".[81]

As already noted, Jan Gwiazdomorski counted himself among the staunchest opponents of allowing the conversion of an invalid will. He contested the idea that an invalid allographic will could be transformed into a valid oral will for two principal reasons. The first was the absence of particular circumstances that would either preclude or substantially impede the execution of a will in the ordinary form. He argued that even if the "breach of a binding legal provision by an official" were to be treated as a special circumstance within Article 952 § 1 CC, it could not be said to have made the execution of an ordinary will impossible. As previously noted, Gwiazdomorski stressed that the testator's subjective perception of the superfluity of making a will in one of the forms provided for in Articles 949 and 950 CC was "something completely different" from the actual impossibility of observing the ordinary form of a will.[82] He further maintained that Article 952 § 1 CC concerns the impossibility or substantial difficulty of preserving the ordinary form of a will, rather than the impossibility or substantial difficulty of executing a will *per se*. Through such a meticulous interpretation of Article 952 § 1 CC, it becomes indisputably evident that the statutory condition is fulfilled solely where there is either an impossibility or considerable difficulty in accessing or bringing in

for the allographic form. A different conclusion must be reached, however, where ignorance of the relevant provisions results in a public official receiving from the testator an allographic declaration expressed in sign language. Provided the other conditions of validity for an oral will are met (Article 952 § 1 CC), the conversion of an invalid allographic will into a valid oral one should raise no objections. Conversely, if the witnesses to an allographic will were persons who are deaf or deaf-mute, conversion would be excluded by reason of the statutory requirements applicable to witnesses, or more precisely, by the statutory exclusions laid down in Article 965 CC.

[81] See G. Wolak, *op. cit.*, pp. 81–82 and the literature cited therein.

[82] J. Gwiazdomorski, *Wykładnia przepisów o testamencie…*, p. 823.

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competent public officials, and, moreover, an impossibility or considerable difficulty in executing a holographic will. This may arise either from the testator's inability to write or, notwithstanding both the capacity and the opportunity to write, from "an incapacity to commit to writing the content of the will in a manner sufficiently specific and couched, even in the most rudimentary fashion, in legal form".[83]

Gwiazdomorski emphasised that in the entire body of jurisprudence relating to the law of wills, there is a discernible tendency toward an unduly liberal construction of the relevant provisions, a tendency which manifests itself "in the evident inclination to maintain in force wills executed in contravention of the formal requirements laid down for their validity". Yet, it is the statute that determines the prerequisites for making a valid will, and "where these requirements are not observed, even the 'expressly stated' intent of the testator cannot be upheld". The rationale of these provisions lies not solely in facilitating the ascertainment of whether the testator did in fact make a declaration of last intent and what its content was. By way of example, if the testator drafts his or her will in their own handwriting, affixes the signature and the date, encloses the document in an envelope, seals it, and, in the presence of three witnesses, declares that the document that they entrust to one of the witnesses for safekeeping is their handwritten will, then the testator's intent is expressed with absolute clarity. However, should it emerge after their death that the will enclosed in the envelope had been typed rather than handwritten, there would scarcely be any doubt that such a will – by reason of the non-fulfilment of what may appear to be a minor formal requirement – must be adjudged invalid".[84] The author further observed that a considerable number of similar factual constellations might be adduced, in which, notwithstanding the testator's manifest intent, the will must be declared invalid on account of non-observance of the formal requirements governing its form.[85] The sanction of invalidity attached to a legal act expresses the risk inherent in disregarding statutory requirements prescribed *ad solemnitatem* when making a will. A finding that, in the execution of a will, a provision carrying such a sanction has been violated means that the will must be declared invalid, "without inquiring whether, in the view of the person called upon to decide the matter, observance of the breached provision was, in the given case, necessary or not". Gwiazdomorski regarded "the reluctance to apply the sanction of invalidity, the attempts, by means of various dubious and hazardous interpretations, to preserve defective – and indeed invalid – wills in force" as irreconcilable with the binding provisions.[86]

[83] Idem, *Glosa…*, pp. 194–195.

[84] Idem, *Wykładnia przepisów o testamencie…*, pp. 833–834.

[85] For example, see M. Załucki, *Perspektywy rekodyfikacji polskiego prawa spadkowego*, [in:] *50 lat Kodeksu cywilnego…*, p. 361.

[86] J. Gwiazdomorski, *Wykładnia przepisów o testamencie…*, p. 834.

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Gwiazdomorski attached exceptional weight to the statutory provisions on the form of wills. Their purpose, he argued, is to safeguard the authenticity of the instrument, the very intent to make a will, the testator's capacity to testate, and the proper determination of the relationship between several wills (as confirmed in the same judgment). The formalised nature of the will stems from the gravity of the act of executing it, and "the statutory provisions governing its form, being of mandatory character, should – given their fundamental objectives – be construed and applied with exactitude".[87] The purpose of the formal rules is not merely to compel the testator "to reflect with due maturity on the gravity of the step to be undertaken and on the content of the will to be executed", but also to facilitate "the examination of whether the testator truly possessed *animus testandi* (…) and whether he intended to make a will of the given content".[88] The objectives of these provisions necessitate that "they be scrupulously complied with".[89] It was pointed out in the literature of the time that it is difficult to accept as rational the assumption that the legislator, having imposed stringent formal requirements on this type of legal act and having attached to their violation the sanction of absolute invalidity (the *ad solemnitatem* form), would at the same time regard the breach of these very requirements as a special circumstance justifying the liberalisation of those same formal standards.[90]

Gwiazdomorski highlighted, on the basis of Supreme Court's case law concerning the form of wills, that "one might well gain the impression that the form of the allographic will was too complex for the authorities before whom such wills could be executed (…); consequently, in a great many instances allographic wills were drawn up defectively, without compliance with (…) essential formalities required for such a will".[91] At the same time, he remarked that what underpinned these defects was often "the pernicious conviction prevailing among the competent local authorities that strict adherence to binding legal provisions amounted merely to an encumbrance of formalism".[92] The Supreme Court, confronted with such defective allographic wills, sought to preserve them by upholding their va-

[87] J. Kosik (*Przesłanki sporządzania testamentu ustanego w kodeksie cywilnym*, "Studia Cywilistyczne" 1969, vol. 13–14, p. 197, 208) fully aligned himself with Gwiazdomorski's position, referring to his "notable arguments in this regard" (J. Gwiazdomorski, *Prawo spadkowe w zarysie*, Warszawa 1967, pp. 118–120).

[88] J. Gwiazdomorski, *Formy testamentu*, "Nowe Prawo" 1966, no. 1, p. 713.

[89] *Ibidem*. Cf. J. Stobienia, *Glosa do uchwały SN z dnia 9 lutego 1981 r., III CZP 68/80*, "Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" 1982, no. 9–10, p. 365.

[90] B. Kordasiewicz, *Glosa do postanowienia z 25.X.1973, III CRN 241/73*, "Państwo i Prawo" 1975, no. 5, pp. 164–165.

[91] J. Gwiazdomorski, *Prawo spadkowe w kodeksie cywilnym PRL*, "Państwo i Prawo" 1965, no. 5–6, p. 717; idem, *Przed kim sporządzać należy testament allograficzny*, "Nowe Prawo" 1960, no. 10, pp. 1279–1280.

[92] As J. Kosik (*op. cit.*, p. 200) reiterated explicitly.

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lidity as oral wills. Gwiazdomorski noted that the principal impediment to the operation of these tendencies consisted in the fact that, pursuant to the provisions of the 1946 LoS, the oral will was ranked among the extraordinary forms of will and its use was only admitted when executing an ordinary will was impossible or highly impracticable. "The Supreme Court sought to circumvent this obstacle to rescuing defective allographic wills, first by adopting a very liberal interpretation of the requirements for making an oral will (…), and later by confining itself to the equally liberal inquiry into whether the oral form had been preserved, without verifying whether, in the specific case, the conditions laid down in Article 82 *in principio* of the Law of Succession were satisfied. In consequence, legal practice began to foster the impression that the oral will was to be regarded as an ordinary, rather than an extraordinary form".[93] With the enactment of the Civil Code and the amendment of the provisions concerning the oral will, Gwiazdomorski concluded that these developments "unequivocally required adherence to a strict interpretation of the relevant statutory provisions".[94]

CONCLUSIONS

The provisions of Polish civil law do not establish a general normative foundation for the conversion of legal acts. Its admissibility may be grounded solely in specific provisions or, in certain instances, in the practice of judicial application. Nevertheless, conversion does not constitute a uniform legal institution. The classical doctrinal construct of the conversion of an invalid legal act diverges substantially from the form of conversion accepted in the case law with respect to wills. For decades, scholars have emphasised these divergences, speaking in this context of "conversion of a legal act", "formal conversion", or even "conversion *sensu largo*". The essential conceptual difference lies in the fact that, in the case of a will, the instrument sustained through conversion – albeit different in its form – remains the same type of legal act as the act converted. The distinction between an act subjected to conversion and a "new" valid legal act consists primarily in the difference of form in which the declaration of intent is expressed. The testamentary disposition itself remains, in principle, unchanged, irrespective of the mechanism of "curing" or "rescuing" the act. What is referred to as the conversion of a will is directed towards the preservation of a legal act that is structurally and substantively identical, whereas proper conversion pursues an entirely different end: not the retention of the defective act but the substitution of another legal act, thereby allowing the parties to attain the legal consequence that had been envisaged when

[93] J. Gwiazdomorski, *Prawo spadkowe w kodeksie cywilnym…*, pp. 717–718.
[94] *Ibidem*, p. 720. Cf. J. Kosik, *op. cit.*, pp. 203–205.

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entering into the "original" act. The invalid act is thereby transformed into a legal act of a different type, and the recognition of the defective act as constituting this other act is said to reflect the parties' hypothetical intent.[95]

In assessing whether an invalid allographic will may be converted into a valid oral will, first and foremost – but not exclusively – the significance and legal nature of the statutory provisions governing testamentary form must be considered along with the sanction of absolute nullity attached to their violation. The underlying difficulty is that, if the statute provides for the execution of a legal act in a specific form, the party should be in a position to "avail themselves" of that form. Where the impossibility (or substantial difficulty) of executing a will in an ordinary form is independent of the testator's conduct, legitimate doubts concern not so much the freedom of choice of form guaranteed by law,[96] but rather the effective exercise of that freedom – an issue that, as noted, may hinge on circumstances or actors entirely beyond the testator's control. No adverse legal consequences should be visited upon an individual – nor, in this case, upon the potential beneficiaries of testamentary dispositions – where the exercise of a right guaranteed by statute, namely the making of a will, depends on circumstances beyond that individual's control. This is precisely the case in relation to compliance with the formal requirements prescribed for allographic wills. In the literature, the rigor advocated by Gwiazdomorski in insisting on strict adherence to the rules on testamentary form was recognised as well founded, albeit with the caveat that it should not lead to the categorical invalidation of an allographic will in cases where non-compliance with the formal requirements was due solely to the insufficient knowledge of the official authorised to receive the testator's declaration. The interpretation he criticised – namely, that the official's incompetence might itself be treated as a "special circumstance" justifying the making of an oral will – allows a formally defective ordinary will to be upheld as a special will, and "on that account rests on weighty considerations of a social character".[97]

Another difficulty, repeatedly emphasised, lies in how to construe the "special circumstances" that render the use of an ordinary testamentary form impossible or seriously hindered. There are sound reasons to doubt the correctness of the view that the invalidity of an allographic will, brought about by the "erroneous belief of the testator that he expressed his last will before an official authorised to receive such a declaration, may be deemed a special circumstance within Article 952 § 1 CC, on account of which the observance of the ordinary form of a will becomes

[95] Cf. P. Żerańsk, *Forma umów autorskich na tle zasady specyfikacji*, "Glosa" 2007, no. 3, pp. 62–64.

[96] Certainly, within the limits imposed by the provisions of Articles 949–954 CC.

[97] J.S. Piątowski, *Recenzja: Jan Gwiazdomorski: Prawo spadkowe w zarysie. Warszawa 1967, PWN, s. 367*, "Państwo i Prawo" 1969, no. 8–9, p. 410.

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impossible or excessively difficult".[98] It is almost self-evident to say that each of the prerequisites enumerated in Article 952 § 1 CC is sufficient to justify the execution of a will thereunder, for the hypothesis of the norm laid down in Article 952 § 1 CC was constructed in a disjunctive manner.[99] What is doubtful, and indeed problematic, is whether a testator's erroneous assumption of this kind may properly be subsumed under the category of "special circumstances" within the meaning of the provision in question.[100]

It is proper to endorse the position of the Supreme Court that a judicial declaration of intestate succession, in a situation where the conditions for converting an invalid allographic will into a valid oral will are satisfied, entails an infringement of both the autonomy of the testator's will and the fundamental right to dispose of one's estate *mortis causa*. Such a determination exemplifies "a breach of the principles, rights, and freedoms of the individual and the citizen as guaranteed by Article 21 (1) and Article 64 of the Constitution of the Republic of Poland, namely the right to property and the right to succession". At the very heart of the right of succession lies the freedom of testation. (…) Statutory designation of heirs who succeed *ex lege* to the estate *mortis causa* should remain (…) strictly subsidiary; primacy is to be accorded to succession in accordance with the testator's intent".[101] The relationship, as articulated in Article 21 (1) and Article 64 of the Constitution of the Republic of Poland, between "the categories of property and succession compels the recognition of the owner's will as the fundamental determinant of who shall, upon his or her death, succeed to the items comprising their estate".[102] Undoubtedly, it is incumbent upon the authorities to safeguard all rights associated with succession, which includes respecting the will of testators as the decisive factor in determining the devolution of their assets upon death. A violation of statutory requirements by a public official empowered to receive the testator's declaration of will cannot be allowed to frustrate that will.[103] The duty imposed by Article 670

[98] Decision of the Supreme Court of 31 August 2023, I CSK 6121/22, LEX no. 3722531, thesis 1.

[99] Cf. Article 82 LoS.

[100] It would appear that the Supreme Court has treated this situation somewhat arbitrarily, equating it with the invalidity of a will occasioned by the lack of competence of an official who, while formally authorised under the provisions in force at the time of the testamentary act, fails adequately to receive the declaration of the testator (see grounds of the decision of the Supreme Court of 31 August 2023, I CSK 6121/22, LEX no. 3722531, and the earlier rulings referred to therein, both under the Civil Code and in the period preceding its entry into force).

[101] Grounds of the decision of the Supreme Court of 23 March 2023, II NSNc 42/23, LEX no. 3511682.

[102] Grounds of the judgment of the Constitutional Tribunal of 25 July 2013, P 56/11, Legalis no. 722201.

[103] See grounds of the decision of the Supreme Court of 23 March 2023, II NSNc 42/23, LEX no. 3511682.

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§ 1 Civil Procedure Code[104] – obliging the court to examine *ex officio* who the heirs are – extends to the assessment of whether the conversion of a will may be admissible.[105]

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ABSTRAKT

Konwersja nieważnej czynności prawnej pozostaje w ścisłym związku z przyjętym w prawie cywilnym ogólnym założeniem, zgodnie z którym należy dążyć, w miarę możliwości, do utrzymania w mocy raz dokonanej czynności prawnej. Według poglądu dominującego w literaturze jest to szczególna konstrukcja prawna, za pomocą której – dokonując przemiany nieważnej czynności prawnej w inną, ważną czynność prawną – umożliwia się realizację życiowego celu, jaki strony zamierzały osiągnąć, dokonując czynności prawnej. Przedmiotem konwersji może być w zasadzie każda istniejąca, bezwzględnie nieważna czynność prawna, a także czynność jednostronna, zarówno *inter vivos*, jak i *mortis causa*. Zgodnie z poglądem dominującym w doktrynie i orzecznictwie za dopuszczalną uznaje się konwersję nieważnego testamentu. Tendencja ta pozostaje w zgodzie z wyżej wskazanym założeniem i nadrzędnym celem, którym jest uniknięcie unicestwienia woli spadkodawcy. Ma to szczególne znaczenie właśnie w przypadku testamentu z uwagi na to, że w odniesieniu do czynności prawnych *mortis causa* niemożliwe jest ich powtórzenie przez podmiot dokonujący czynności pierwotnej, dotkniętej sankcją bezwzględnej nieważności. Konwersja testamentu zmierza do urzeczywistnienia prawdziwej woli testatora, jest więc przejawem realizacji teorii woli i znajduje uzasadnienie zarówno w argumentacji ściśle jurydycznej, jak i we względach natury społecznej. Choć tak określony cel wydaje się *prima facie* słuszny, konwersja nieważnego testamentu jest wysoce wątpliwa teoretycznie, ale nie tylko z tej przyczyny ma zdecydowanych przeciwników. Jednym z nich był Profesor Jan Gwiazdomorski, który przeprowadził wnikliwą krytykę poglądu w przedmiocie dopuszczalności konwersji nieważnego testamentu w sytuacji, kiedy źródłem owej nieważności jest naruszenie przepisów o formie testamentu.

Słowa kluczowe: czynność prawna; konwersja; bezwzględna nieważność czynności prawnej; Jan Gwiazdomorski