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## 21<sup>ST</sup> CENTURY WILLS

*Summary:* Wills are formal legal affairs that must satisfy strict prerequisites in order to be valid. Otherwise, they will be either automatically null or voidable. The rules pertaining to the form of wills have always been strict and have required wills to be made in a certain way. It is said that the amplified formalism promotes testamentary intent, ensures reliable evidence of testator's wishes and reinforces the gravity of testation. However, it seems that, as of late, formalism sometimes clashes with the real intent of the decedent. Some countries have already adopted rules that allow judges to consider documents that do not meet all of the formal requirements needed for wills, to be valid and have effect. By doing so, they have opened the door to creation of certain new types of wills, made with the help of digital technology, that have never existed before – i.e. wills created with the help of smartphones, cameras or computers. Wills made with the help of digital technology are extremely informal but nonetheless; they purport testamentary intentions of the people who made them. These wills would not have any effect in most countries, however, in some, they can be declared valid, under certain conditions. This paper deals with a number of such examples and implications of abandoning strict formalism concerning the form of wills.

*Keywords:* digital wills, electronic wills, digital technology, testamentary intent, formalism, in favorem testamenti

### 1. INTRODUCTION

Wills have not changed much since Roman times, and like in Roman times, wills are still strictly formal legal affairs. For a will to be valid, certain rules have to be respected, especially concerning its form. However, our society has changed tremendously and today we are able to do things that, even ten years ago, seemed impossible.

Technology has affected all areas of our lives, therefore it is not surprising that people are making (or at least, attempting to make) testamentary dispositions on their laptops or mobile

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phones.<sup>1</sup> In spite of technology being such an important part of modern life, it seems that law has not followed suit and this is especially true when it comes to law pertaining to the form of wills.<sup>2</sup> As one commentator declared: “(...) the law of wills and the digital age remain, for the most part, on parallel paths.”<sup>3</sup> This is also very true when it comes to Croatian inheritance law, which has yet to allow modern technology to have any significant role in creation of wills. However, in the future, things will have to change, since no area of law is immune from influence of technology, considering it has already prompted changes in both procedural and substantive law.<sup>4</sup>

Despite of technology not being used to create wills in most countries, there are examples today in the world where certain legislators have started to recognize that rules on testamentary inheritance needed to change. Because of that, they have allowed “documents” created with the help of digital technology, that do not meet all of the formal requirements to be wills, to be valid. As a result, they have opened the door to creation of new types of wills that have never existed before.

This paper will provide examples of certain entities that have been recognized to be wills, regardless of them not fulfilling necessary requirements pertaining to their form. These examples are mostly from Australia, but there are also a couple from the U.S. When it comes to Australia, rules allowing judges to declare documents that do not meet all of the strict formal requirements to be valid wills, were accepted into their legislation over ten years ago.<sup>5</sup> This certainly puts Australia on a proverbial frontier when it comes to new types of wills.

All of the examples, which will be discussed in this paper, come from common law legal systems. However, for this topic, it does not matter which legal system these examples originated from, since this paper is not about common law vs. civil law. What this paper will try to draw attention to, is the fact that people (probably in many countries) have started making various “documents” in a digital form that contain their testamentary dispositions and, in some countries, courts have started to recognize these “documents” as valid wills. It is bound that this is going to happen more and more around the world, because, what is happening in Australia and in the U.S. is surely an indicator of things to come.

First part of this paper will deal with various types of wills that existed in Roman law thousands of year ago and still exist in Croatian inheritance law today. Second part of the paper will bring analysis of various cases from Australia and the U.S. that have opened the door to recognizing the impact digital technology has on law regulating the form of wills. Third part

1 Horton, D., *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, Boston College Law Review, 2/2017, p. 546-547.

2 Lopez, A. B., *Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets*, George Mason Law Review 24:1/2016, p. 184.

3 *Cf ibid*, p. 185.

4 Nunez, A. V., *A Testament to Inefficacy: Louisiana's Videotape Evidence in the Probate Process*, Louisiana Law Review, Vol. 67, p. 871. For examples of the use of new technologies in Croatian law of criminal procedure: Martinović, I., Tripalo, D., *Zvučno i slikovno snimanje u kaznenom materijalnom i procesnom pravu – teorijski i praktični izazovi novih tehnologija i zakonskih rješenja*, Hrvatski ljetopis za kaznene znanosti i prasku, 2/2017. For examples of the use of new technologies in Croatian law of civil procedure: Dika, M.: *O nedopuštenim dokazima u parničnom postupku*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 1/2016, p. 18-19 and 25. Art. 126 a, b and c of Civil Procedure Act, National Gazette, 53/1991, 91/1992, 58/1993, 112/1999, 88/2001, 117/2003, 88/2005, 02/2007, 84/2008, 96/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014.

5 Horton, see note 1, p. 547.

will discuss pros and cons on insisting on formalism concerning form of wills and the forth part of this paper will suggest how digital technology could be implemented into Croatian law of wills, at least to begin with.

## 2. WILLS – BEFORE AND NOW

### 2.1. WILLS IN ROMAN LAW

In Roman law, there were various types of wills, some of which still exist today throughout the world. Ordinary private wills could have been composed in oral or written form, and had to be made in front of seven witnesses.<sup>6</sup> Written wills could have been written by the testator him/herself and did not need to be signed (*testamentum holographum*) or by someone else, in which case the testator had to sign it (*testamentum allographum*).<sup>7</sup>

Ordinary public wills were either composed with the assistance of a judicial official or a municipal clerk (*testamentum apud acta conditum*) or were kept in imperial archives (*testamentum principi oblatum*).<sup>8</sup>

The most used extraordinary will, that did not have to meet any formalities, was a military will (*testamentum militis*) that was composed either in oral or written form. A will made in the country (*testamentum ruri conditum*) was another type of extraordinary will with only few formalities that needed to be fulfilled for it to be valid.<sup>9</sup> At the same time, people who were blind or could not read and write had to make a will in front of eight witnesses (making these wills even more formal than other types, which had to be composed in front of “only” seven witnesses).<sup>10</sup>

### 2.2. WILLS IN CROATIA TODAY

The types of wills that exist in Croatia today derive from different types of wills that existed in Roman law (holographic, alographic, public and oral will) and are similar to types of wills that exist in most other legal systems in the world.<sup>11</sup> They are still divided into ordinary and extraordinary wills, ordinary being the ones made during regular circumstances and ex-

6 Romac, A., *Rimsko pravo*, Narodne novine, Zagreb, 1994, p. 374.

7 *Ibid.*

8 For more about these wills see *ibid.*, p. 374–375.

9 *Ibid.*, p. 375–376.

10 *Ibid.*, p. 376.

11 For different types of wills in various countries, see: *International Encyclopedia of Laws, Family and Succession Law*, Vol. 1–4, general editor: Blaipain, editor: Pintens, W., Kluwer Law International.

traordinary is made when the testator is not capable of making a will in a form required under regular circumstances.<sup>12</sup>

Ordinary wills can be holographic; composed in front of witnesses; public wills and international wills.<sup>13</sup> Extraordinary will, according to the Croatian Inheritance Act,<sup>14</sup> is a will made in oral form in front of two witnesses.<sup>15</sup>

**Holographic will** is a will that must be written and signed with the testator's own hand.<sup>16</sup> No other formalities are necessary.<sup>17</sup>

**Alographic will** is a will that can be written on a computer or typewriter, it does not even have to be written by the testator him/herself. However, because of that, according to Art. 31 of Inheritance Act, the testator must declare in front of two simultaneously present witnesses<sup>18</sup> that the document in question is indeed his/her last will and testament. In addition, alographic will needs to be signed by both the testator and witnesses.

**Public will** is composed in front of municipal court judges, municipal court counselors or public notaries.<sup>19</sup> Most people can choose if they want to make this type of will, but if the testator is not able to read, write or sign the document, this is the only type of will he/she can compose and in that case, this type of will is made in front of two witnesses.<sup>20</sup>

**International will** is a public will that is composed in accordance with the rules of the Convention providing a Uniform Law on the Form of an International Will together with a certificate made by a person authorized to act in connection with international wills.<sup>21</sup>

**Oral will** is the only type of extraordinary will in Croatia.<sup>22</sup> It is made under extraordinary circumstances because of which a testator cannot make any other type of will. It is valid only while extraordinary circumstances last and up to 30 days after they end. This type of will, for obvious reasons, has to be composed in front of witnesses. Art. 37. Paragraph 1 of Inheritance Act state there have to be at least two witnesses present while the testator speaks his/her last wishes.

<sup>12</sup> Klasiček, D., Wills in the digital era, *Informatologia*, 1–2/2016, p. 32.

<sup>13</sup> Made in accordance with the rules of the Convention providing a Uniform Law on the Form of an International Will, full text: <https://www.unidroit.org/instruments/international-will> (January 2019).

<sup>14</sup> Inheritance Act, National Gazette, no. 48/2003, 163/2003, 35/2005, 127/2013, 33/2015, (further in the text: IA).

<sup>15</sup> Art. 30–40 IA.

<sup>16</sup> The signature should consist of the testator's first and last name. Gliha, I., *Family and Succession Law – Croatia*, Suppl. 28 (August, 2005.) in *International Encyclopedia of Laws, Family and Succession Law*, vol. 1., Kluwer Law International, 2005, p. 226.

<sup>17</sup> Art. 30 IA.

<sup>18</sup> About the conditions that have to be met in order for a person to be a witness to this, and other types of wills, see: Art. 35 IA.

<sup>19</sup> Art. 32–33 IA.

<sup>20</sup> Gavella, N., Belaj, V., *Nasljedno pravo*, Narodne novine, Zagreb, 2008, p. 140–141.

<sup>21</sup> For more about international wills see Gliha, note 16, p. 234. and Belaj, V., *Oblik oporuke prema Zakonu o nasljeđivanju*, *Pravni vjesnik*, 1-2/2004, p. 18–21.

<sup>22</sup> Art. 37 IA. Before 2003, there were more types of extraordinary wills, other than the oral will. There were wills made abroad the ship or military wills – for more about these types of wills see Gavella, N., *Nasljedno pravo*, *Informator*, Zagreb, 1990, p. 173–176.

This was a very short overview of various types of wills that existed in Roman law and, for the most part, still exist in Croatian law in the 21<sup>st</sup> century. However, different types of wills and their characteristics are not important for the topic of this paper so the author chose not to go into too much detail. The important thing is to know that most modern types of wills come from Roman law and they haven't changed much since then. In addition, wills were, and still are, strictly formal legal affairs. Of course, many formalities that were required in Roman law are now abandoned for practical reasons, but there are still a lot of formalities that have to exist in order for a document to be considered a will. In case those requirements are not met, a will is not going to be valid. In Croatia, it will not be automatically null, but will be voidable, so dissatisfied heirs may annul it if they want to.<sup>23</sup> Despite of this being the case, not only in Croatia, but in most other countries around the world, the next part of this paper will show that, in some countries, the digital age has affected the interpretation of those requirements (in the U.S. in certain isolated instances<sup>24</sup> and in Australia, as a rule.<sup>25</sup>)

### 3. WILLS IN THE 21<sup>ST</sup> CENTURY

This part of the paper will present certain examples of people making “documents” with the help of technology, that consist of their testamentary dispositions, which were later recognized by courts to be their wills, regardless of the fact that those “documents” did not meet all or most of the strict requirements that needed to be met.<sup>26</sup>

The judges from all of these countries were able to do so, because they have, in their legislation, what could be called, a “will saving statute” that is used to rescue defective wills.<sup>27</sup> This principle is known in the U.S. as “harmless error rule” and it is used in various branches of the law.<sup>28</sup> When it comes to law of wills, it allows courts to enforce a failed attempt to make a will, if there is evidence that decedent intended this “failed attempt” to be effective.<sup>29</sup>

Most of the cases discussed in the paper come from Australia, which has been the epicenter of important changes in the law of wills, since 1975. Because of those changes, supreme courts of Australian states and territories can validate a will if it lacks certain formalities, provided there are evidence that the decedent intended this document to be his/her will.<sup>30</sup>

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23 Gavella, Belaj, see note 20, p. 149.

24 Lopez, see note 2, p. 184.

25 Langbein, J. H., Absorbing South Australia's Wills Act Dispensing Power in the United States: Emulation, Resistance, Expansion, *Adelaide Law Review*, Vol. 38, 1/2017, p. 1.

26 More cases were discovered while writing this paper, but the author chose to include only these, because they adequately show variety of ways decedents used digital technology to make their wills.

27 Tucker, H. E.: Electronic Wills – Dispensing With Pen and Paper (Part I), July, 17, 2017, p. 2 at <https://www.wadeash.com/firm/blog/electronic-wills-dispensing-with-pen-and-paper-part-i.html> (January 22, 2019).

28 Horton, see note 1, p. 560–561.

29 *Cf. ibid.*, p. 559–560.

30 Langbein, see note 25, p. 1.

Legislation (most important for this part of the paper) that allows for documents that do not meet requirements to be formal wills, to be considered valid, include Section 8 of New South Wales Succession Act, 2006,<sup>31</sup> Section 18 of Queensland Succession Act, 1981,<sup>32</sup> Tennessee Code Title 1.Code and Statues § 1-3-105<sup>33</sup> and Ohio Revised Code, Title 21 Chapter 2017/3.<sup>34</sup>

### 3.1. COMPUTER DOCUMENT WILL

#### 3.1.1. WILL.DOC (YAZBEK V YAZBEK, NEW SOUTH WALES, AUSTRALIA)<sup>35</sup>

Daniel Yazbek was an Australian restaurateur who committed suicide in September 2010. After he died, one of his brothers alleged that Daniel created a document on his computer titled “Will.doc” about ten months before he died, which he intended to be his will.<sup>36</sup> There were indicators that there was also a printed out copy, which was never found. Unlike his brother,

- 31 Full text of Succession Act: <https://www.legislation.nsw.gov.au/#/view/act/2006/80/full> (January 15, 2019).  
Section 8: “When may the Court dispense with the requirements for execution, alteration or revocation of wills?  
(1) This section applies to a document, or part of a document, that:  
(a) purports to state the testamentary intentions of a deceased person, and  
(b) has not been executed in accordance with this Part.  
(2) The document, or part of the document, forms:  
(a) the deceased person’s will—if the Court is satisfied that the person intended it to form his or her will, or  
(b) an alteration to the deceased person’s will—if the Court is satisfied that the person intended it to form an alteration to his or her will, or  
(c) a full or partial revocation of the deceased person’s will—if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.  
(3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to:  
(a) any evidence relating to the manner in which the document or part was executed, and  
(b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.  
(4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).  
(5) This section applies to a document whether it came into existence within or outside the State.”
- 32 Text of Succession Act: <https://www.legislation.qld.gov.au/view/pdf/2016-03-22/act-1981-069> (January 17, 2019).  
Section 18: “Court may dispense with execution requirements for will, alteration or revocation  
(1) This section applies to a document, or a part of a document, that -  
(a) purports to state the testamentary intentions of a deceased person;  
and  
(b) has not been executed under this part.  
(2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person’s will, an alteration to the person’s will or a full or partial revocation of the person’s will.  
(3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to -  
(a) any evidence relating to the way in which the document or part was executed;  
and  
(b) any evidence of the person’s testamentary intentions, including evidence of statements made by the person.  
(4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).  
(5) This section applies to a document, or a part of a document, whether the document came into existence within or outside the State.”
- 33 <https://codes.findlaw.com/tn/title-1-code-and-statutes/tn-code-sect-1-3-105.html> (January 22, 2019).
- 34 <http://codes.ohio.gov/orc/21> and <http://codes.ohio.gov/orc/> (January 22, 2019).
- 35 Court decision can be found at: <https://www.caselaw.nsw.gov.au/search?query=Yazbek&pagenumber> (January 18, 2019). Full text: <https://www.caselaw.nsw.gov.au/decision/54a637ad3004de94513d9a45> (January 18, 2019).
- 36 Full text of the will:  
“Dear Family,

Daniel's parents claimed that their son did not mean for "Will.doc" to be his will. They claimed that he might have intended for the printed out copy to represent his will. However, they believed Daniel must have destroyed it, since it was nowhere to be found, thus revoking his will.

The court was faced with the following issue: did this electronic document (or even its printed out copy) satisfy the requirements of Section 8 of Succession Act<sup>37</sup>, in a sufficient way, for the judge to declare it to be Daniel's last will?

The judge was satisfied that it did. He explained:

1) "Will.doc" constitutes a document under Succession Act, Section 8, because it meets all of the requirements to be considered a document<sup>38</sup>.

2) It purports to state Daniel's testamentary intentions, for several reasons: it did distribute significant parts of his estate; it was titled "Will.doc" which clearly showed Daniel's intention. In it, Daniel spoke of his life as only existing in the past<sup>39</sup>, which, the judge concluded, could only mean that he wanted this document to operate on his death.

3) Because of its contents and the circumstances in which it came to being, the judge was satisfied that Daniel wanted "Will.doc" to be his will. As was already mentioned, he named it "Will". He then told people about it and its location. He made it right before going on a long trip (he traveled from Australia to Europe for vacation), which is usually when many people contemplate their passing. He typed his name at the end of the document, where he would sign it if it were in a paper form. The will was where Daniel said it would be – on his computer and it was established by a computer expert that "Will.doc" was actually opened two weeks prior to Daniel's death, but was not changed or deleted.

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I want to say that it was an absolute pleasure to be a part of this family in this life. I want to say to mum and pop that I could not ask for more in a parent.

Mum, your unconditional love is the reason I made it to 38 and that I will never forget you. You were the soul of my very existence.

Pop, thank you for being there for me. I know in my heart that you loved me more than words could have ever been said.

To all of my brothers and sister. Thank you for everything and every memory that I have of you all.

I want to tell you all that I love you all and will miss your company in every way.

Following is the list of things that I have accumulated over the years and would like to hand out to the following persons.

MUM- I want you to have the car of your dreams. With the equity I have I want you purchase whatever you want.

POP- I know that you don't want anything but my love, so this is yours.

ANWAR- I want to give you my Ibanez guitar, my CD collection any electrical goods I have. Plus \$100,000 from my equity in my Ashton st property.

DAVID- I want to give you \$50,000 in cash from the equity in my Ashton st property.

MAL- I want to give you \$50,000 in cash from my superannuation fund.

AL- I want to give you all of my architecture books and 50% of my equity in our business.

MAT- I want to give you my motorbikes, and 50% of my equity in our business and my equity in Stewart st property.

AMANDA- I want to give you [address not published] Lorna ave, and my share of money overseas.

CHRIS, MIKEY & ROCCO- Thanks for our friendship. I could not ask for better friends.

Ps I want you to tell of my friends that I love then and will miss them all.

Pss I want to give my Gibson Les Paul to Rocco and \$20,000 which I have in my savings accounts with Westpac and commonwealth bank so you can finish your album.

Love and light

Daniel Yazbek."

Court decision, section 25 at <https://www.caselaw.nsw.gov.au/decision/54a637ad3004de94513d9a45> (January 18, 2019).

37 <https://www.legislation.nsw.gov.au/#/view/act/2006/80/full> (January 15, 2019).

38 This according to Acts Interpretation Act 1954, section 36, <https://www.legislation.qld.gov.au/view/html/inforce/current/act-1954-003#sch.1> (January, 22, 2019).

39 "I want to say that it was an absolute pleasure to be part of this family in this life". See note 24.

### 3.1.2. TAYLOR V. HOLT (TENNESSEE, U.S.A.)<sup>40</sup>

This will was as close to a formal will of all of the others discussed in this paper. However, the problem with this one was that it was not signed by deceased's hand, but rather by a computer-generated version of his signature.

In 2002, Steve Godfrey made a document on his computer, purporting to be his last will and testament. He died a week after making it. Deceased asked two of his neighbors to act as witnesses to the will. Deceased attached a computer-generated version of his signature at the end of the document in the presence of both witnesses and printed the document out. Witnesses then each signed their name below deceased's and dated the document next to their respective signatures. In this document, Godfrey bequeathed everything he owned to a person identified only as Doris. His girlfriend's name, that he lived at the time, was Doris Holt and she attempted to admit the will to probate. Deceased's sister filed a complaint stating, among other things, that she was the only living heir of the deceased and that a document he made was not a valid will, since it lacked a signature. The court decided that the computer-generated version of a signature represented a signature, according to Tenn. Code Ann. § 1-3-105<sup>41</sup>, and therefore declared this will to be valid.

## 3.2. DVD WILL

### 3.2.1. MELLINO V WNUK & ORS (QUEENSLAND, AUSTRALIA)<sup>42</sup>

In 2013, a case of Sean Peter Wnuk and his DVD will was decided before Supreme Court at Brisbane. Wnuk, before committing suicide, made a DVD recording in which he stated his testamentary dispositions. The judge was satisfied that the DVD met all of the requirements according to Queensland Succession Act, Section 18 and therefore represented Wnuk's will. First, the judge stated that, since Wnuk wrote "my will" on the DVD, it was clear that it was meant to embody his testamentary dispositions. In addition, on a recording, he said as much. Judge concluded that the DVD was clearly made in contemplation of Wnuk's death because he discussed his intentions to commit suicide in the recording. The deceased also defined the property he owned and disposed of it. The judge also accepted that the substance of the recording demonstrated that the DVD itself would operate upon Wnuk's death as his will. Wnuk even explained why he decided to make a will in the form of a DVD, stating that he was not good with paperwork and, therefore, hoped the recording would be sufficiently legal to operate to dispose of his property.

<sup>40</sup> Court decision can be found at: <https://www.courtlistener.com/opinion/1405291/taylor-v-holt/> (January 21, 2019).

<sup>41</sup> Tennessee Code Title 1. Code and Statutes § 1-3-105, "(30) "Signature" or "signed" includes a mark, the name being written near the mark and witnessed, or any other symbol or methodology executed or adopted by a party with intention to authenticate a writing or record, regardless of being witnessed" <https://codes.findlaw.com/tn/title-1-code-and-statutes/tn-code-sect-1-3-105.html> (January 22, 2019).

<sup>42</sup> Court decision can be found at: <https://archive.sclqld.org.au/qjudgment/2013/QSC13-336.pdf> (January 19, 2019).



### 3.2.2. RE ESTATE OF WAI FUN CHAN (NEW SOUTH WALES, AUSTRALIA)<sup>43</sup>

Wai Fun Chan was 85 years when she died in 2012. Before she died, she made a formal will, prepared by her attorney. However, two days after making it, she had recorded a DVD of a supplementary statement of her testamentary intentions, due to her dissatisfaction with the formal will. The judge was satisfied that this DVD constituted a document (in this case, according to New South Wales Succession Act, Section 8<sup>44</sup> and Interpretation Act 1987,<sup>45</sup> Section 21<sup>46</sup>). The judge was also satisfied that the DVD purported to state the deceased's testamentary intentions and that she intended the recording to form an alternation to her existing formal will.<sup>47</sup>

### 3.3. IPHONE WILL (RE: YU, QUEENSLAND, AUSTRALIA)<sup>48</sup>

In 2011, shortly before committing suicide, Karter Yu created a number of documents containing final farewells on his iPhone. However, one of the documents was Karter Yu's will. After reviewing all of the elements of the case, the judge was satisfied that all of the conditions stated in Queensland Succession Act, Section 18 were met and therefore this document can have its intended effects. The judge explained that, according to Queensland's Acts Interpretation Act, 1954<sup>49</sup>, Section 36, something created and stored on an iPhone could constitute a document.<sup>50</sup> The judge was also satisfied that the document purported to state the testamentary intentions of the deceased – an iPhone document dealt with the whole of the deceased's property and in it he distributed it, while contemplating his imminent death. In the document, the deceased appointed an executor and an alternative executor. The document author-

43 Court decision can be found at: <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWSC/2015/1107.html> (January 20, 2019).

44 <https://www.legislation.nsw.gov.au/#/view/act/2006/80/full> (January 22, 2019).

45 Full text of the Act can be found at: <https://www.legislation.nsw.gov.au/#/view/act/1987/15> (January 20, 2019).

46 Section 21 is titled "Meanings of commonly used words and expressions". It defines a document as: "(...) any record of information, and includes:

(a) anything on which there is writing, or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or

(d) a map, plan, drawing or photograph".

47 Court decision, sections 61–66. See note 43.

48 Court decision can be found at: <https://www.sclqld.org.au/caselaw/QSC/2013/322> (January 18, 2019). Full text: <https://archive.sclqld.org.au/qjudgment/2013/QSC13-322.pdf> (January 18, 2019).

49 Text available at: <https://www.legislation.qld.gov.au/view/pdf/2016-03-22/act-1954-003> (January 17, 2019).

50 Section 36 of the Act ("Meaning of commonly used words and expressions") defines document as:

"(a) any paper or other material on which there is writing;

and

(b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them;

and

(c) any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)".

ized the executor to deal with the deceased's affairs after he died. All of this, according to the judge, confirmed that the deceased stated his testamentary dispositions in it.

The judge stated that the third requirement from Section 18 was also satisfied – an intention that this document forms decedent's will. It started with the words: "This is my last Will and Testament..."<sup>51</sup> The deceased formally identified himself and stated his address. In it, he appointed an executor, as was already mentioned. He typed his name at the end of a document where he would sign it if it were a paper document, adding a date and, again, his address. The document consisted of instructions and dispositions that any other will usually consists of. That particular iPhone document was created shortly after other documents that were final farewell notes, which also shows that this document was meant to be operative on his death.

### 3.4. UNSENT TEXT MESSAGE WILL (NICHOL V NICHOL, QUEENSLAND, AUSTRALIA)<sup>52</sup>

Mark Nichol committed suicide in October 2016. A day before he died, he wrote a text message on his phone, which he never sent.<sup>53</sup> In it, he left everything to his brother and nephew, omitting his wife and son he had from a previous relationship. As in previous cases, the judge had to decide whether section 18 of Queensland Succession Act was satisfied. The first requirement was that an unsent text message constituted a document – the judge was satisfied that it did.<sup>54</sup>

When it comes to second requirement – whether the document purports testamentary intentions of the deceased – the judge stated that there were a number of elements that suggested that this requirement was also satisfied. At the bottom of a message, it said "my will"; it identified deceased's property and stated his wishes on who will receive it upon his death; a pin number to his bank account was even provided. The deceased also identified where he wanted his ashes placed.

The judge concluded that the third requirement from section 18 was also satisfied (an intention that this particular document operate as the deceased's will). The message was created while the deceased was contemplating death (he stated where he wanted his ashes to be placed). His mobile phone was found next to his body and in that message, he gave instructions on the disposition of his assets and explicitly stated he did not want to leave his wife anything. He gave directions as to where the cash is located; also stating that he had some money in the bank and provided his card pin number. He also put his initials together with his date

<sup>51</sup> Court decision, section 9. See note 48.

<sup>52</sup> Court decision can be found at: <https://www.queenslandjudgments.com.au/case/id/301131> (January 19, 2019).

<sup>53</sup> "Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin 3636 MRN190162Q  
10/10/2016  
My will 😊"  
Court decision, section 13. See note 52.

<sup>54</sup> According to section 36 of the Acts Interpretation Act 1954.

of birth at the end of the message and wrote “my will” at the end. What was also important for this case, according to the judge, is the fact that the deceased had never expressed contrary wishes in relation to his estate, from the ones found in the text message.<sup>55</sup>

### 3.5. VIDEO WILL RECORDED ON A PHONE (MARION DEMOWBRAY, QUEENSLAND, AUSTRALIA)

In 2018, Queensland Supreme Court has declared that a video recording on a telephone was Marion Demowbray’s final will. In a video, she explained what she wanted to happen with her assets after death and she recorded her final wishes on a phone. The court accepted that this will is valid and can have its intended effects (according to Queensland Succession Act, section 18). It is interesting that the deceased declined the offer of a lawyer to come to the hospital to draft a formal will on her behalf, because she did not want to cause additional expenses. However, the cost of the procedure that took place before the court in order for her “will” to be declared valid, far more exceeded the cost it would take to make a formal will.<sup>56</sup>

### 3.6. A STYLUS WILL (IN RE ESTATE OF JAVIER CASTRO, OHIO, U.S.A.)

In 2012, Javier Castro was admitted to hospital where he was advised to undergo a blood transfusion without which, he was told, he would die. Since Castro was a Jehovah’s Witness, he declined the treatment due to religious reasons. Castro was aware that he was going to die, so he told his brothers he wanted to make a will. Since he did not have a pen and a paper, one of his brothers suggested that a will could be made on his Samsung Galaxy tablet.<sup>57</sup> Castro then proceeded to dictate his last wishes and one of his two brothers that were present at the hospital, recorded his words using a stylus (an electronic pen).<sup>58</sup> At the end, Castro signed his name at the bottom of the document using a stylus and his brothers and a nephew did the same. After he died, his brothers printed the will and presented the copy to probate.<sup>59</sup> According to Ohio Revised Code, Title 21<sup>60</sup> Chapter 2017/3, a valid will has to be in writing, signed by the testator or some other person at his/her direction and in his/her presence and attested or subscribed to in the conscious presence of the testator by two or more witnesses.<sup>61</sup>

55 Court decision, section 59. See note 52.

56 <https://www.mcw.com.au/page/Publications/wills-and-estates/2018/be-careful-that-video-might-be-a-will/#-ftn5> (January 21, 2019).

57 Tucker, see note 27, p. 2.

58 Horton, see note 1, p. 541.

59 Tucker, see note 27, p. 2.

60 <http://codes.ohio.gov/orc/21> (January 22, 2019).

61 2107.03 Method of making will: “Except oral wills, every will shall be in writing, but may be handwritten or typewritten. The will shall be signed at the end by the testator or by some other person in the testator’s conscious presence and at the testator’s express direction. The will shall be attested and subscribed in the conscious presence of the testator, by two or more competent witnesses, who saw the testator subscribe, or heard the testator acknowledge the testator’s signature.” <http://codes.ohio.gov/orc/2107> (January 22, 2019).

Castro's electronic will did not contain attestation clause, so it did not meet all the necessary requirements. However, a judge admitted it to probate based upon a will saving statute (Chapter 2107/24).<sup>62</sup>

#### 4. WHAT TO DO WHEN FORMALISM CLASHES WITH DECEDENT'S INTENT?

In most countries today, a will that meets most of the legal requirements, but, for example, lacks a hand written signature, is invalid.<sup>63</sup> At the same time, there are countries where a will, that more resembles a grocery list than a formal testament (as one commentator wrote), will be considered valid and will have effect.<sup>64</sup>

Now, maybe more than ever, there is a clash between two important characteristics of the law of wills: its formalism and the real intent of the decedent. As all of the cases mentioned *supra* show, sometimes it is difficult to reconcile these two. Maybe the reason for this is that, for the most part, modern law has abandoned the principle of formalism that existed in Roman law, which meant that a legal affair could only be valid and enforceable, if it was in a strictly prescribed form.<sup>65</sup> Today, many legal affairs do not have to be formal in order to be valid and enforceable. Of course, even now, there are some, which have to be in a certain form for various reasons<sup>66</sup>, but most other legal affairs can be drafted in any form the parties choose. However, this does not apply to wills and it seems that wills are always going to be some of the most formal legal affairs that a person can make during his/her life. Modern wills are certainly not as formal as they were in Roman law, but compared to other legal affairs, they are still quite formal.

When it comes to strict formalism, it is clear why it endures this long when it comes to wills: it ensures reliable evidence of testator's wishes and reinforces the gravity of testation – if a will needs to meet strict formalities, testators will not be able to change it or make new ones rashly, without serious consideration.<sup>67</sup> In addition, formal wills alleviate burden placed

62 Ohio Revised Code Chapter 2107/24: "(A) If a document that is executed that purports to be a will is not executed in compliance with the requirements of section 2107.03 of the Revised Code, that document shall be treated as if it had been executed as a will in compliance with the requirements of that section if a probate court, after holding a hearing, finds that the proponent of the document as a purported will has established, by clear and convincing evidence, all of the following:

(1) The decedent prepared the document or caused the document to be prepared.

(2) The decedent signed the document and intended the document to constitute the decedent's will.

(3) The decedent signed the document under division (A) (2) of this section in the conscious presence of two or more witnesses. As used in division (A) (3) of this section, "conscious presence" means within the range of any of the witnesses' senses, excluding the sense of sight or sound that is sensed by telephonic, electronic, or other distant communication".

63 Horton, see note 1, p. 551-553.

64 *Cf ibid*, p. 554.

65 Klarić, P., Vedriš, M., *Gradansko pravo*, Narodne novine, Zagreb 2014, p. 131.

66 For example, in Croatian civil law, some contracts will not be valid if they are not in a certain form, usually because one or both contractual parties need special protection (or for some other reason). There are contracts that must be in a certain form or a creditor will not be able to enforce them. Some contracts have to be in a certain form, or otherwise, parties will not be able to prove they existed. In addition, there are contracts that need to be registered in special registries (for example, land registry) and they can only be registered if they are in a certain form. *Cf ibid*, p. 136.

67 Horton, see note 1, p. 556. Gavella, Belaj, see note 20, p. 134.

on courts, since – as was shown in all of the cases mentioned in this paper – long and expensive legal battle preceded proclamation of those informal wills, which could have easily been avoided if a decedent made a formal will.<sup>68</sup> There are more reasons why a will should be in a certain form – it prevents content deception and undue influence on the testator. It confirms the existence of will and protects against deviation from testator's wishes thus preserving his/her true intent. Formalism also verifies testamentary intent and ensures deliberation and reflection.<sup>69</sup>

One has to remember that a will is distinct from all other legal affairs in one very important detail: it will have effect only when the one who made it is dead and no longer capable of making another one. Therefore, if it is not valid because it did not meet all of the strict formalities that were necessary for its validity, and there is no corrective mechanism for this situation, the wishes of the testator will be ignored and rules of intestacy will apply. In Croatian inheritance law, this corrective mechanism is probably reflected in one very important principle having to do with the contents of a will – the principle of *in favorem testamenti*. This principle means that, in doubt about the contents of a will, testamentary dispositions should be interpreted in favor of the testament and its validity.<sup>70</sup> In Croatian inheritance law, this principle is also implemented in one more important detail – if a certain reason exist, which would make any other legal affair automatically null (for example, it not being in a prescribed form), when it comes to wills, it will cause it to only be voidable.<sup>71</sup> However, the mere fact that the will is not in a prescribed form and thus voidable, means that it might (and probably will) be annulled by dissatisfied heirs. It seems that the principle *in favorem testamenti* is applied much more liberal in all of the countries mentioned *supra*, that allow informal wills made with the help of technology to have effect. This was obviously done in order to respect the decedent's wishes to the fullest, regardless of them not being in a necessary form.

As was mentioned earlier, the predominant view is that formalism promotes testamentary intent. If a document complies with the law of wills, it is safe to assume that it was meant to be a will. However, it is not certain what the opposite should mean. If a document does not comply with the law concerning the form of wills, does it mean that it was not meant to be a will, so it should not have effect? Should any deviation from formalism automatically cause a “will” to be null or voidable and testamentary intentions of the deceased to be ignored?<sup>72</sup>

As much as it would be easier to leave things as they have been for thousands of years, advancement and prevalence of technology will make this close to impossible in the future.<sup>73</sup> Imagine a millennial, who is so used to living his/her life through technology, mostly paperless; not to be able to use this same technology, once the time comes to make a will. It is without a doubt that legislators will have to respond to situations like these and introduce changes

68 Horton, see note 1, p. 574.

69 Beyer, G. W., Hargrove, C.G., Digital Wills: Has the Time Come for Wills to Join the Digital Revolution, Ohio Northern University Law Review Vol. 33/2007, p. 875–880.

70 Gavella, see note 22, p. 198.

71 Gavella, Belaj, see note 20, p. 149.

72 Horton, see note 1, p. 571–572.

73 Langbein, see note 25, p. 9.

when the time for them comes.<sup>74</sup> As one commentator wrote: “With this evolving technology growing in popularity every day, the question now is no longer if all states will allow for wills (...) to be created and passed on electronically, but when”.<sup>75</sup>

Of course, completely abandoning formalism in lieu of technology would be very dangerous and would possibly cause more problems than it would solve. First, one has to be aware that technology becomes obsolete fast. Testators could create wills using their smart phones or computers today and might die decades later. In that time, wills stored on phones and computers might easily become inaccessible due to their outdatedness.<sup>76</sup> In addition, removing formalism might eliminate solemnity from the making of a will and cause it to be made on a whim and without serious consideration about its consequences. It would also make it possible for those that are technologically savvy, to manipulate them in ways that might not be easily discovered. Additionally, older people may be reluctant to adapt to new technologies that could be used to make a will. Besides, necessary technology is not cheap and electronic storage media are extremely fragile.<sup>77</sup>

## 5. HOW TO IMPLEMENT DIGITAL TECHNOLOGY INTO CROATIAN LAW OF WILLS?

When it comes to implementing technology into Croatian inheritance law, maybe what could be done, even today, without abandoning the rules concerning the form of wills, is to allow the use of digital devices in creation of extraordinary wills. Testamentary inheritance is not the norm in Croatia. Most decedents are inherited by their intestate heirs. Extraordinary wills are even more uncommon, and they were designed to be used as little as possible, only under extreme circumstances – their name alone says as much. However, they do exist and they are used from time to time. Therefore, it is important to make the rules that pertain to them in harmony with the demands of modern life.

Extraordinary (or oral) wills are the ones that are made under abnormal circumstances, because of which a testator cannot make any other type of will. For obvious reasons, it must be spoken in front witnesses who need to hear, understand and repeat what the testator said. Of course, to do that, one witness would suffice. However, at least two have to be present ac-

74 Beyer, Hargrove, see note 69, p. 900.

75 DeNicuolo, D., The Future of Electronic Wills, American Bar Association, October 15, 2018, <https://www.americanbar.org/groups/law-aging/publications/bifocal/vol-38/issue-5-june-2017/the-future-of-electronic-wills/> (February 7, 2019).

76 They might not only become inaccessible because they are outdated, but also because most of those gadgets and files stored on them are password protected. If the deceased did not leave his/her password behind, it could be very difficult, most times even impossible, to access those gadgets. One of the often-cited examples of this happening is a case of the famous conductor Leonard Bernstein. He died in 1990 and left a manuscript for his memoir titled “Blue Ink” on his computer in a password-protected file. Nobody has been able to break the password and access the document, to this day. McCarthy, L., Digital Assets and Intestacy; Boston University Journal of Science & Technology Law, Vol. 21, No. 2/2015, p. 402.

77 Beyer, Hargrove, see note 69, p. 890–896.

ording to Inheritance Act, in order for them to control each other and prevent or minimize possible manipulations of an oral will.<sup>78</sup>

Since oral wills are composed in dire situations, when testator's life is in danger due to certain unexpected circumstances<sup>79</sup>, one of the biggest problems concerning witnesses is the fact that there might not be any present or that they might also be stricken with whatever happened to the testator. Even if there was somebody present, they might lack the capacity to be witnesses to an oral will (i.e. they do not understand the language testator is speaking or are members of his/her family). Likewise, witnesses are unreliable, especially if they were involved in whatever happened to testator. A car accident, natural disaster or simply watching a person dying in front of them, can cause witnesses to be under enormous stress. All of the circumstances surrounding the creation of an oral will might make it difficult for them to hear properly what the testator is saying, understand it or remember and repeat it afterwards.<sup>80</sup> That makes witnesses highly unreliable.

Because of all these reasons, it would make sense to allow testators to utilize the technology they have at the time they are making their last wishes known. With the use of technology, witnesses could be reached and serve their purpose, without needing to be at the same place as the testator. The testator could also record an oral will on camera, that way avoiding his last words being distorted by witnesses' memory or interpretation.<sup>81</sup>

As was mentioned earlier, according to Croatian Inheritance Act, an oral will is valid only if it is composed in front of two simultaneously present witnesses.<sup>82</sup> However, it is not clear what the term "simultaneously present" actually implies. It could mean that the witnesses have to be present at the same place as the testator, but it can also mean that both or one of them could be reached by a cell phone or even through video call.<sup>83</sup>

If the witnesses to an oral will were reached by phone and were not present at the same place as the testator, it would still be in accordance with the motive behind the stipulation of Art. 37 of the Inheritance Act: these witnesses would be able to hear what the testator is saying and could ensure that the oral will is not manipulated.<sup>84</sup>

The other possibility of including digital technology in the making of an oral will would be to allow testators to record his/her last words, with no witnesses present whatsoever, either because none could be reached or because the testator does not have anybody he trusts, to witness his last wishes.<sup>85</sup> This could also be considered to be in accordance with the motive behind the rule that the witnesses must be present – if testators last words were recorded, nobody needs to be present in order to hear them and there need not be any witnesses who

78 Kačer, H., Neka (prijeporna) pitanja hrvatskog oporučnog prava, Liber Amicorum Nikola Gavella, Građansko pravo u razvoju, Zbornik radova u čast 70. rođendana profesora emeritusa Nikole Gavelle, Pravni fakultet Sveučilišta u Zagrebu, 2007, p. 737.

79 Gavella, see note 22, p. 175.

80 Klasiček, see note 12, p. 34.

81 *Ibid.*

82 Art. 37. IA.

83 Kačer, see note 78, p. 737.

84 *Cf ibid.*, p. 738.

85 Klasiček, see note 12, p. 35.

will serve as a means of control. All of those requirements would be satisfied with the recording.<sup>86</sup> In addition, if a disgruntled family member or another heir claimed that the recording was manipulated, there are experts who can examine the recording, reveal if the recording was intervened with and testify to its authenticity.<sup>87</sup>

## 6. CONCLUSION

Since technology has invaded all areas of peoples' lives, it was only a matter of time until it started to be used to create wills. Although this was to be expected, it seems it took most legislators by surprise. However, over a decade ago, some countries started implementing changes into their inheritance law, which would allow wills made with the help of digital technology to be valid. Regardless, in Croatia, like in most other countries around the world, documents like these would not be considered valid and would probably not have any effect in inheritance law.

At this time, the author does not intend to make assumptions on what should be done concerning technology being used in creation of wills. The aim of this paper was to draw the attention to it being done and, to the fact that somewhere, it is being recognized and allowed to have effect. Cases like these are still rare, but it seems that they will get more common as the time goes by.

At present, what all of the cases mentioned in this paper have in common is that people who made these types of wills were the ones that were aware they would die soon, whether from suicide or natural causes. These examples show that today, when people are faced with impending death and do not want to make a formal will for whatever reason, they will turn to technology to help them express their testamentary dispositions and hope for the best in terms of its validity. The reasons for making these types of wills vary – they were sometimes explicitly stated by decedents – Marion Demowbray did not want to pay the attorney to come to her hospital and draft a formal will, while Sean Peter Wnuk stated that he was not good with paperwork. Other times, it can only be guessed why decedents chose to use technology to make a will instead of making a formal one.

However, in most of the cases mentioned in this paper, wills were made with the help of technology in conditions that might be described as extraordinary – testators were either dying in a hospital or planning to take their own life, usually hours or days after creating a will. Accordingly, when it comes to Croatian inheritance law, it seems it would be reasonable to start thinking of allowing testators to use technology while making extraordinary wills. For example, smartphones could either help testators reach the witnesses who are not present or record themselves and bypass witnesses altogether.

In the future, legislators will face with more and more wills that will be created with the use of digital technologies. These wills are obviously not going to be in accordance with the strict rules pertaining to the form of wills. For a while, they will probably be ignored and pronounced

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86 *Ibid.*

87 *Ibid.*



invalid. However, after they get more common, legislators will have to consider changing the rules that have kept strict formalism concerning wills in place, for as long as it did. Luckily, none of them will have to reinvent the wheel, since in Australia and some parts of the U.S. solutions to these problems already exist and might give the rest an idea on how to proceed.

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## OPORUKE U 21. STOLJEĆU

### Sažetak

Oporuke su formalni pravni poslovi koji moraju udovoljavati strogim pretpostavkama kako bi bili valjani. Ako ne udovoljavaju tim pretpostavkama, bit će nevaljane. Pravila koja se odnose na oblik oporuke uvijek su bila stroga i zahtijevala da one budu sastavljene na točno određeni način. Mnogi naglašavaju kako takav pojačani formalizam promiče pravu volju oporučitelja, osigurava pouzdane dokaze o njegovim željama i pojačava ozbiljnost oporučivanja. Međutim, čini se da se formalizam katkad sukobljava s namjerom ostavitelja. Neke države već su usvojile pravila koja sucima omogućuju da dopuste određenim dokumentima, koji ne zadovoljavaju sve propisane formalnosti potrebne za oporuku, da budu valjani i imaju pravni učinak. Time su se otvorila vrata stvaranju određenih novih vrsta oporuka koje su napravljene uz pomoć digitalne tehnologije, a koje nikada prije nisu postojale: npr. oporuke napravljene uz pomoć pametnih telefona, kamera ili računala. Sve ovakve oporuke izrazito su neformalne, no, istodobno, odražavaju pravu volju osoba koje su ih napravile. Uglavnom takve oporuke nemaju nikakvog učinka, međutim, u pojedinim državama mogu, pod određenim uvjetima, biti proglašene valjanim. Ovaj će se rad baviti nizom takvih slučajeva i implikacijama napuštanja strogog formalizma kod pravljenja oporuka.

*Ključne riječi:* digitalne oporuke, elektroničke oporuke, digitalna tehnologija, oporučiteljeva volja, formalizam, in favorem testamenti



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