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ORAL WILLS – A COMPARISON: GERMANY, AUSTRIA AND SWITZERLAND

In our article on wills in times of the coronavirus, we examined the Spanish legal system in this context. But what possibilities do other legal systems offer?

In German-speaking countries (Germany, Austria and Switzerland), such an "epidemic will" (or as it is called in Spanish law: "Testament in case of an epidemic") is no longer provided for. In our neighbouring countries, however, only a similar form of the Spanish "will in danger of death" is regulated nowadays. Depending on the specific law we are examining, there are slight differences in the scenarios as to when such a special will can be drawn up or what is considered an exceptional situation justifying this extraordinary form.

Considering that the legal systems of the Germanic law structures generally have similar or common origins, it is not surprising that the wording of the Civil Codes (BGB, ABGB and ZGB respectively) has certain parallels with regard to the nuncupative will ("*Nottestament*" or "*mündliches Testament*" in German), or earlier still the "Plague Testament" ("*Seuchentestament*"). At least in the current version.

The first version of art. 2250 BGB (German Civil Code) from 1900, which was valid until 1938, still referred to the "outbreak of an illness" that made it difficult for a judge or notary to be present at the execution of a will, so that it was possible to execute it orally in front of witnesses. The old art. 597 ABGB (Austrian General Civil Code) of 1914 also provided that "*in the case of last orders made on ships and in places where the plague or similar contagious diseases are present, persons who have completed the fourteenth year are also valid witnesses*". Oral wills were not widespread in Austria in modern times, although the Vienna City Regulations already recognised this type of will in 1526 in cases of emergency or imminent danger of death. What is now debated in Spanish law was already clear in Austrian law at the time: if there was a risk of infection, the simultaneous presence of both witnesses was not required. However, this special provision of the Maritime and Plague Testament ceased to apply at the end of 2004.

The inspiration for the more liberal modern version of articles 2249 and 2250 BGB, however, comes from Swiss law. Article 506 ZGB (Swiss Civil Code) is characterised by two main features: on the one hand, exceptional circumstances must exist which prevent the testator from having recourse to a notarial or handwritten will; on the other hand, a special formal validity adapted to the emergency or exceptional situation: the intervention of two witnesses (or the non-intervention of a competent jurist or an official public servant).

The oral testament already existed in earlier cantonal laws before its inclusion in the Swiss Civil Code, which served as a model. They differed mainly only in the number of witnesses before whom the testator had to make his or her emergency will (BGE 104 II 68, p. 71 E. 2b – in Fargnoli, I. et al., 2017).

The oldest regulation of modernity, however, is that of the ABGB. The earlier articles on this (art. 597 to 599 old ABGB), which dealt with the testament in danger of death or epidemics, have indeed been omitted, so that art. 584 ABGB now applies to the nuncupative will as follows: If, from the point of view of the testator, there is an immediate and well-founded danger that he will die or lose the ability to make a will before he is able to declare his last will in another way, he can declare his last will in the presence of two witnesses, either by a strange hand (allographically) or orally. The aptitude of the witnesses is found in art. 587 and 588 ABGB (Austrian Civil Code); minors of legal age can also be witnesses, but not heirs or legatees who are considered to be beneficiaries in the will and would therefore be biased (incapable witnesses are also their closest relatives or partners). Such a verbal last will and testament must be confirmed by the witnesses' concurring statements, otherwise this declaration of last will and testament is invalid. A last will declared in this way loses its validity three months after the cessation of danger and is considered not established. In case of doubt, the revocation of an earlier last will by the nuncupative will is thus also revoked.

The nuncupative will therefore differs from the ordinary Austrian types of will (art. 577 et seq. and art. 585 ABGB) by the emergency, the lower number of witnesses and of course the fact that it can be orally ordered by the testator.

In comparison to the other legal systems that are dealt with in the present case, it is conspicuous that in Austria the nuncupative will can be considered not only in the case of danger to life but also if the testator is in danger of losing his or her ability to

testify.

In Switzerland, the emergency refers to a near mortal danger, a traffic ban, epidemics or war events. The extraordinary circumstance mentioned in art. 506 ZGB requires that the testator is also prevented from using other forms of execution. In principle, this means that the testator cannot use other types of will (public or personal disposition). According to paragraph 2 of the quoted article, the testator must declare his last will and testament before two witnesses who are capable of acting and are not directly related (see grounds for exclusion art. 503 ZGB) and must instruct them to obtain the necessary certification of his will. Article 507 of the ZGB requires the witnesses to draw up the will in writing, stating the place and date of its establishment, and to file it with a judicial authority without delay.

A special feature of the Swiss regulation is the very short validity of the last will and testament. As soon as the testator is subsequently able to make use of one of the other forms of disposition, the oral will loses its validity after 14 days calculated from this point in time (art. 508 ZGB).

In exceptional situations, (extraordinary) wills can also be drawn up in Germany under simplified conditions. The German Civil Code provides for three emergency wills: the emergency will before the mayor, the emergency will before three witnesses and the emergency will at sea or "Maritime Testament" (art. 2249 et seq. BGB). The so-called three-witness testament (art. 2250 BGB) presupposes the following scenario: a) the testator is in a place that is cordoned off (in the broadest sense) in such a way that it is considerably more difficult to draw up a notarial will; b) that the cordoning off exists as a result of extraordinary circumstances; the circle is unrestricted here, it can be police, military measures, riots, natural disasters, etc.

The testator then has two options: he can choose the mayor's will (sometimes also called the communal will) according to art. 2249 BGB or make an oral statement in front of three witnesses. The latter especially if the testator is in danger of death. It is sufficient if all witnesses are concerned that the execution of the will before a civil law notary or mayor will probably not be possible due to the imminent danger of death. This oral testament must be written down by the witnesses (the provisions of the *Beurkundungsgesetz*, short "BeurkG" –German certification Act– apply here, in particular with regard to grounds for exclusion, see art. 6 BeurkG). Similarly to Austrian law, the concern about the risk of death can in this sense be aligned with the concern about the imminent occurrence of incapacity to make a will (RG-Räte u. Bundesrichter, Johannsen, Kregel, 2018), if it is to be feared that the incapacity to make a last will will probably continue uninterruptedly until the death of the testator or only with short interruptions which do not guarantee the possibility of making another will.

Article 2252 of the German Civil Code stipulates that the above-mentioned emergency wills have a validity period of three months. If this time elapses and the testator is still alive, the (emergency) will is deemed not to have been established. However, the beginning and the course of the period are suspended as long as the testator is unable to draw up a will before a civil law notary. If the testator is declared dead after the expiry of the time limit, or if the time of death is determined in accordance with the provisions of the law on missing persons, the will remains valid if the time limit had not yet expired at the time when the testator was still alive according to the available information.

Interesting in German law is the option of the joint emergency will (art. 2266 BGB), according to which a joint will can be drawn up in accordance with art. 2249 and 2250 BGB even if the conditions laid down there are only fulfilled by one of the spouses.

Although the German saying "other countries, other customs" also proves its worth in this context, there are also common features in the standardisation of emergency wills: oral declarations are permitted, the involvement of witnesses replaces (at least temporarily) the testimony by other authenticators and the period of validity of such last wills is limited. All three countries' jurisdictions also have in common that formal errors are taken very seriously and usually end up in invalidated wills. In this respect, it is therefore important to observe the exact formalities of the respective legal systems.

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