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“Will of Life” as a Challenge for the Polish Legislator – Selected Problems

Abstract: Proposals to regulate life problems in Poland cause interest and are discussed both in the social and doctrinal level. The issue is controversial because it concerns a very delicate sphere of human life. This work is an attempt to define “the will of life”. We state that this is a pro futuro statement, where each person can express his or her willingness to use specific medical procedures in anticipation of their future terminal condition. Then we will also discuss the form and scope of the will and we will try to determine the extent to which a doctor is bound by the patient’s independent will expressed in the testament of life. In our work, we conducted an analysis of the Supreme Court case law in order to consider problematic issues. We also dealt with difficult questions of the topicality of will of life by referring to a patient in a particular medical situation since the will of man can change because of an illness. A healthy person judges the value of life well; his will can change over time. In conclusion, we presented arguments for and against the acceptance of wills of life. We discussed the need to regulate the above issues in Poland and pointed out which solutions adopted in other countries could be enacted in the field of domestic legislation.

Keywords: will of life, pro futuro statement, terminal state

1. Introduction

The debate on “the wills of life” (advanced decisions) is of a fundamental nature because it considers an extremely delicate sphere of human existence, i.e. a moment

of death and its dignity¹. This issue arises immense interest and it is widely discussed both in the social and doctrinal level. The opponents claim that it is an attempt at introducing camouflage consent for euthanasia into the legal order. Yet the supporters believe that this regulation would confirm respect for human free will since a man can freely decide about the moment and manner to terminate his or her life².

In some foreign legislations, wills of life have already been regulated whereas Poland has not ratified the Oviedo Convention³ yet, in consequence of which Polish legal provisions lack specific standards of procedure. Deontological norms do not mention anything about anticipated declarations that could be made by a patient who is not able to make a declaration of will. Hence, regulation of the above issue will positively affect both medical and legal science.

A purpose of this work is to explain the definition, form and conditions of making such types of *pro futuro* statements and attempt to specify *de lege ferenda* postulates thereon.

2. An attempt at defining “a will of life”

The Polish legal order lacks a uniform definition of a will of life. In order to explain this term, it is necessary to specify what *pro futuro* statements are because the science of medical law distinguishes many forms thereof. It is inappropriate to apply the term “a will of life” to all *pro futuro* statements⁴.

According to M. Śliwka, a will of life is a patient’s statement where she or he objects against specific medical interventions to be carried out in relation to him or her if they lose their capacity to express informed consent⁵. J. Haberko holds a similar opinion thereon – it is a patient’s will derived from the statement that has been made earlier by the patient himself or herself in case of losing awareness⁶. We may talk about a will of life when a potential patient makes a statement for the future in a situation

1 E. Jachnik, Testament życia w świetle Europejskiej Konwencji Bioetycznej a możliwość składania oświadczeń pro futuro w prawie polskim, Zeszyt studencki Kół Naukowych Wydziału Prawa i Administracji UAM 2014, No. 4, p. 134.

2 B. Łabowicz, Testament życia, (in:) W cieniu czepka, Biuletyn informacyjny dolnośląskiej okręgowej izby pielęgniarek i położnych, 2014, No 2/268/ February, p. 9.

3 The convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine adopted on the 4 of April 1997 in Oviedo was signed by Poland in 1999, even though Poland has not ratified it.

4 M. Śliwka, Testament życia i inne oświadczenia pro futuro – przyczynek do dyskusji, www.ptb.org.pl/pdf/sliwka_testament_1.pdf (accessed: 30 March 2016).

5 A. Górski, Testament życia, (in:) A. Górski (ed.), Leksykon pojęć prawa medycznego, Warszawa 2012, p. 232.

6 J. Haberko, Realizacja standardów bioetycznych w prawie polskim w zakresie oświadczeń pro futuro, (in:) L. Kondratiewa-Bryzik, K. Sękowska-Kozłowska (eds.), Prawa człowieka wobec rozwoju biotechnologii, Warszawa 2013, p. 142.

when no threat has materialized yet⁷. We should also repeat after the doctrine representatives that it is a special manifestation of a patient's will made in case of a loss of awareness/consciousness concerning a manner of doctors' dealing with the patient⁸. M. Safjan expands the above definition claiming that these statements refer to a wider catalogue of cases than only a loss of consciousness. Unconsciousness should be understood as a factual incapability of independent awareness (understanding) of the situation and making decisions⁹. On the other hand, M. Syska is more precise by saying that as far as wills of life are concerned, it would be an instruction in case of a loss of capacity referring solely to withholding therapy in a terminal condition, or euthanasia as well¹⁰.

A will of life is to provide a person who made it with the control over acts and omission of acts which would be undertaken in relation to him or her in the future. A fully conscious patient determines his or her preferences on the acceptance of the course of treatment or its lack in case of a loss of competence to make such a decision in the future.

A will of life is sometimes mistaken for euthanasia, which actually involves helping another person to die upon his or her explicit request and under the influence of compassion (sympathy), which also implies active participation. In contrast, a will of life is passive respect for the patient's will by a doctor, mostly similar to withholding the so-called futile medical care.

3. A legal nature and form of the statement

Drawing a will of life, a person making this declaration should, above all, be fully informed about possible medical interventions that may be undertaken in relation to him or her. In the practice, it is difficult to inform a patient precisely because the statement refers to future and uncertain events¹¹. It results from the research carried out in the 1990s that doctors are not duly prepared to talking to patients despite such an obligation imposed by the legislator¹².

A will of life should be classified as a unilateral legal action. It is effective in effect of a declaration of will itself made by a potential patient. According to the principle *voluntas aegroti suprema lex est*, a patient's will authorizes a doctor to undertake specific medical interventions or omit their launch in the future. B. Janiszewska poits

7 M. Śliwka, Testament życia i inne oświadczenia pro futuro..., *op. cit.*, p. 11.

8 M. Syska, Medyczne oświadczenia pro futuro, Warszawa 2013, p. 33.

9 M. Safjan, Prawo i medycyna. Ochrona praw jednostki a dylematy współczesnej medycyny, Warszawa 1998, p. 44.

10 M. Syska, Medyczne..., *op. cit.*, p. 41.

11 E. Jachnik, Testament życia..., *op. cit.*, p. 141.

12 W. Chańska, Ewolucja dyrektyw na przyszłość w amerykańskiej praktyce medycznej. “Prawo i Medycyna” 2015, No. 1, p. 38.

out that unilateral actions which, in accordance with case law, include declarations of will, are subject to the *numerus clausus* principle, pursuant to which only actions envisaged in the law are admissible. A lack of regulation of will declarations should result in their inadmissibility¹³. Thus, a lack of legal regulation leads to situations restricting patient autonomy. We may not deprive an individual capable of making decisions of this right only due to a loss of awareness (consciousness) or a lack of possibility of communicating their needs. M. Boratyńska notices the same: "... hence, we would have a group of adult patients who are mentally able and yet fully deprived of autonomy. The same patient would enjoy full autonomy as long as he or she is conscious. In other words, merely physical inability to communicate, express and receive an answer itself would entail abolition of autonomy while, at the same time, the patient would have no possibility of counteracting it in advance"¹⁴. The legislator should be obliged to construct provisions which will not limit autonomy and freedom of decision of individuals including their loss of consciousness.

According to M. Śliwka, regulation concerning *pro futuro* statements may, on no account, be merely limited to the objection raised by the patient; it should also embrace the individual's preferences. With the help of *pro futuro* declarations of will, a patient may not only specify which services he or she does not agree to, but they may also express a relevant wish as to the further treatment. Hence, a properly (duly) drafted will of life should contain a catalogue of acts that may not be performed in relation to the patient.

Therefore, we should apply a solution which will enable to make a declaration of will without a subsequent risk of errors or abuse. If the domestic legislator adopted a requirement of formulating statements in one of the special forms, health professionals would be exempted from the substantive analysis of such a statement. The burden connected with the statement's examination (review) with regard to its credibility and consistency with the patient's actual will should not be delegated into health professionals. Considering an example of withholding treatment in a terminal phase, it should be pointed out that such a decision is not exclusively a purely medical issue but it is also an ethical choice. Apparent and clear regulation specifying the principles of expressing and respecting a prior patient's will would allow to exempt doctors from the obligation to consider these intertwining and thus complicated issues.

Furthermore, we should discuss a relation of interdependence between doctor's actions and the attitude (position) of the incompetent patient's family. It does matter

13 B. Janiszewska, Dobro pacjenta czy wola pacjenta – dylemat prawa i medycyny (uwagi o odmowie zgody na leczenie oraz o dopuszczalności oświadczeń pro futuro), "Prawo i Medycyna" 2007, No. 2, p. 46.

14 M. Boratyńska, Niektóre aspekty świadomej zgody pacjenta na leczenie na tle orzecznictwa Sądu Najwyższego. Cześć 1. Sprzeciw pro futuro, "Prawo i Medycyna" 2007, No. 2, p. 25.

for a doctor whether the family actually cares about the patient’s good, or whether family members are consistent in their opinion while this opinion is rational. Working out *modus vivendi* with the patient’s family is not an easy task because it may generate a risk of delegating too serious responsibility for medical decisions onto the nearest and dearest. At the same time, it is also important show due respect for the doubts raised by the patient’s family members¹⁵.

In the Polish law there are no regulations indicating the need to respect prior declarations of will. However, the Supreme Court ruled in its judgment of 27 October 2005 that “a patient’s declaration made in case of a loss of consciousness and specifying the will concerning doctor’s action [...] in medical situations that may occur in the future is binding if it has been made explicitly, unambiguously and undoubtedly”¹⁶. The Court further decided that “the principle of patient autonomy requires respect for his or her will regardless of the motives (confessional, ideological or medical, etc.). Hence, it should be assumed that a doctor is bound by a lack of patient’s consent for a specific surgery (type of surgeries) while criminal or civil liability is excluded, and if the surgery is performed – it becomes legally invalid”. For this reason, despite a lack of appropriate regulations, “a will of life” (advance decision) is admissible in our country – pursuant to the judicature’s opinion.

4. Doubts concerning will of life’s validity

We would like to discuss here a difficult issue of validity of a “will of life” with regard to the actual medical situation of a patient. Opponents of advanced decisions argue that in life threatening situations people behave different than they would if they were fully healthy; thus, human will may change in the face of an illness. A healthy individual assesses the value and quality of life differently. Drawing an advanced decision, an individual may wish not to continue living if found in a terminal condition, in particular when they were totally depended on others and requiring day and night incessant care.

As rightly noticed by M. Machinek, both experience and research prove that healthy individuals much more often reject certain medical interventions in their advanced decisions than those who draw such statements being aware of the unfavourable diagnosis¹⁷.

15 J. Hartman, *Bioetyka dla lekarzy*, Warszawa 2012, p. 111.

16 The decision of the Supreme Court of 27 October 2005, III CK 155/05, OSNC 2006, No. 7-8, item 137.

17 M. Machinek, *Etyczna problematyka testamentu życia i innych oświadczeń pro futuro*. Głos w dyskusji. Debata wokół testamentu życia 23.11-30.11.2009, available at: www.ptb.org.pl/pdf/machinek_testament (accessed: 15 July 2016).

The case of a well-known German professor Walter Jens, a supporter of euthanasia, serves as an example thereof. He strongly advocated for a possibility of withholding any life supporting care. When he became ill, he did not recognize his family and required constant care. Significantly enough, he most frequently uttered the words “please do not kill me” when addressing his family at all. This situation confirms that a patient may change his or her mind. Has the will expressed in such a manner changed his earlier declaration of will made in full consciousness and autonomy¹⁸? The question is which advanced decision should be respected.

In our opinion, if there are doubts about the patient’s prior will, which undeniably are his words uttered later, doctors should refrain from the fulfilment of the earlier statement. Moral intuition speaks against absolute respect for the patient’s will autonomously expressed by him if he later changed this decision. According to T. Dukiet-Nagorska, “if there are no doubts as to the fact that a conscious patient has the right to refuse treatment, as long as there are no grounds to challenge authenticity of his statement or doubts as to whether he or she has not changed this decision, it should be respected”¹⁹. J. Hartman claims that if a doctor may not assume if the patient’s will expressed before the dramatic situation he has encountered is the same as his current will, the doctor may reasonably doubt the validity of the advanced decision, or even more when it contains more reservations against medical interventions²⁰.

Due to the above considerations, we should remember that an individual may change his or her decision even if not facing death. Therefore, the Polish legislator intending to regulate the issue of advanced decisions should introduce time limits during which such statements are valid. It may be postulated that each person who made a *pro futuro* statement should update his or her decision after the lapse of a few or several years.

5. Selected legal regulations of other countries

Discussing the issue of advanced decisions, it is worth looking at the laws of other countries to examine their solutions thereto. We will present only some of them, i.e. those that, in our opinion, are worth considering with regard to regulating the above issue in Poland, in particular with regard to special types of agents.

Even though euthanasia is admissible in Belgium, there is an apparent distinction between this issue and *pro futuro* statements. Both issues have been regulated in distinct normative acts to prevent confusing these two institutions. As far as Belgium in concerned, we should approve of such Belgian principles as a binding nature of *pro*

18 J. Haberko, Realizacja standardów bioetycznych..., *op. cit.*, p. 144.

19 T. Dukiet-Nagórska, Autonomia pacjenta a polskie prawo karne, Warszawa 2008, p. 63.

20 J. Hartman, Bioetyka dla lekarzy, Warszawa 2012, p. 110.

futuro statements, comprehensiveness of regulations, and referral to different forms of such statements. As far as comprehensiveness of regulations is concerned, it is expressed, among others, in the Act on the Patient’s Rights of 22 August 2002, which was to systemize the patient’s rights and extend their protection²¹. The above quoted Act implements such institutions as advanced decisions, which are based on accurate information provided to the patient, person of trust and health agent. A person of trust shall act only when the patient is not conscious; if he or she loses consciousness, the Belgian law envisaged the institution of a health agent. This implies that the appointment of *personne de confiance* is not embraced by *pro futuro* statements. A role of this person is to support the patient in the process of providing information; a doctor conveys information to both the patient and person of trust. That is why he or she is appointed when the patient has problems with understanding information due to his or her health condition. A health agent shall act when the patient loses his or her consciousness and continues until the patient regains capacity to make conscious and autonomous decisions. A health agent is a kind of the patient’s deputy because he or she enjoys a full scope of rights the patient is entitled to. Belgian solutions are based on respect for the right of an individual to decide about themselves with regard to the protection of human dignity. Relations between the patient and doctor rely on partnership, mutual respect and dialogue²².

The Swiss legislator has also introduced the institution of a special agent/proxy. This agency is a special type of civil agency; it embraces comprehensive powers – apart from making medical decisions, the agent may also dispose of the principal’s assets and represent him or her in legal relations with third parties. The agent’s powers should be determined in the power of attorney whereas only a natural or legal person may be an agent and the document may be drafted in a holographic form or before a notary. The legislator envisaged a manner of the power of attorney’s storage and a possibility of its registry in a special database. It should be remembered that the power of attorney is efficient solely if the principal is not capable of arranging his interests autonomously.

Switzerland has adopted an interesting solution assuming that the patient should be accompanied by someone who will be both a partner and counterweight for the doctor. This is a specific system of statutory agency in case of a loss of consciousness when the patient has neither made a *pro futuro* statement nor appointed a health agent. A person who may fulfil this role is a spouse or registered partner if they ran a common household or the partner who took care of the patient on a regular and continual basis. In this case, a doctor is obliged to include such a person in a decision-making process, and in particular provide him or her with all and necessary

21 Ustawa z 22 sierpnia 2008r. o prawach pacjenta (Moniteur Belge, MB z dnia 26 września 2002 r., No. 2002022737, p. 43719).

22 M. Syska, *Medyczne...*, *op. cit.*, pp. 151-153.

information about the patient's health condition. Doctors are bound by all types of *pro futuro* statements as well as decisions made by statutory representatives. The Swiss legislator has rightly assumed that if an unconscious or incompetent patient does not decide about his or her treatment any more, it would be better if the decisions are made by the patient's persons of trust rather than the court. Furthermore, the legislator has formulated criteria to be satisfied by such representatives. They reconstruct the patient's will based on their general knowledge about him or her. Such a decision should not only be consistent with the patient's will but it should also protect his or her interest.

The English law does not apply the institution of a person of trust but a specified person may be authorized to access medical documentation, yet without a possibility of deciding about the patient's treatment. Therefore, such a person is only authorized to access information about the patient's health condition and health services being provided²³. In England, patient's autonomy is also protected by the institutions of binding advanced decisions and a possibility of appointing a health agent. The principal may authorize his or her agent (attorney) to decide about their personal and financial matters; he or she may also restrict the agent's rights to act in strictly determined factual situations, or limit his or her powers solely to specified actions. An advanced decision shall be invalid if the person making it withdrew it efficiently, or appointed a health agent and entrusted him or her with the right to decide about treatment whose scope has been indicated in the decision. A decision about making an advanced decision must be well thought because the person making it must specify precisely his or her medical situation therein. As far as the form thereof is concerned, there are no special requirements, which implies that the decisions may be made in any form, not only written. A medical power of attorney is applied when the principal is not capable of giving or refusing consent autonomously. If the principal drafts an advanced decision after appointing an agent, the advanced decision shall prevail and exclude the agent's powers to make decisions on treatment specified in the decision²⁴.

Interestingly enough, the guardian court competent to make a decision may appoint an agent of an incapable person in special situations. The English legislation envisages the obligation to act in the patient's interest when making a decision about the person incapable of self-determination. This obligation is both objective and subjective in nature, which means that attempts are made to embrace the patient by the decision-making process. The obligation to reconstruct the will of an incapable person based on their earlier wishes and opinions is very clear. If all efforts to specify the patient's wishes prove unsuccessful, the institution of a guardian or advisor

23 A. Sporczyk, Oświadczenia woli *pro futuro* w prawie francuskim i anglosaskim, "Prawo i Medycyna" 2015, No. 1 (58, vol. 17), p. 63 and following.

24 M. Syska, Medyczne... *op. cit.*, p. 154 and following.

appointed for the person incapable of self-determination is applied to seek their opinion.

6. *De lege ferenda* conclusions and postulates

A heated debate on a will of life is still pending in Poland. Arguments raised by the supporters and opponents of wills of life mainly depend on their subjective beliefs and attitudes. Expressing their opinions, they mostly follow moral values and faith they have adopted. This shows that the debate will not end amicably in a compromise. It will be extremely hard to find a universal model of a will of life that both parties to the dispute would approve of.

Proponents of the will of life claim that it is an expression of respect for human free will providing people with the right to choose time and circumstances of their death. On the other hand, opponents strongly underline that such statements are attempts at implementation of legal consent for concealed euthanasia. Those who support the adoption of wills of life think that thanks to such decisions, they do not have to impose on their nearest and dearest a burden of care during a terminal illness. They also believe that wills of life prevent individuals from living indecently. On the other hand, others claim that this entails a risk of juggling human life.

We think that wills of life express attitudes of people living in contemporary times. We want to control all spheres of our lives, even those eternal (final), not accepting our lot. We should remember that we may not deprive individuals who categorically refuse to be kept alive in specific condition of the right to decide about themselves. Arguments of both parties to the debate are equivalent; therefore, it is so important to take into account both opinions when regulating the issue of a will of life. It is a formidable challenge for the legislator because institutions concerning subjective feelings of every person are always extremely difficult to be framed legally.

Life is believed to carry the highest value for the law. For this reason, no legal system should avoid making a stand on the arising need to regulate vital issues. Legislative procedure referring to the analyzed problem is not solely a matter between the legislator and a panel of experts. What is more, since it refers to the sensitive spheres of the entire society, society themselves should have a strong voice in the debate.

Now we would like to present our observations and solutions of other countries that should be taken into account while regulating wills of life:

- *pro futuro* statements in a positive and negative form, that is admitting not only the form of objection (opt out) but also consent specifying the individual's preferences;
- a requirement to draft wills of life in a special form, e.g. a written form on pain of invalidity, a type of holographic or notarial will;

- respect for the changes of prior wills of life even if the change was made in another psycho-physical condition;
- the need to introduce time limits and obligation of updating a will of life;
- the introduction of terminological transparency, which will prevent confusion of distinct institutions;
- the introduction of the institution of a statutory representative for patients who have not made a *pro futuro* statement.

BIBLIOGRAPHY

- Boratyńska M., Niektóre aspekty świadomej zgody pacjenta na leczenie na tle orzecznictwa Sądu Najwyższego. Część I. Sprzeciw pro futuro, "Prawo i Medycyna" 2007, No. 2.
- Chańska W., Ewolucja dyrektyw na przyszłość w amerykańskiej praktyce medycznej, "Prawo i Medycyna" 2015, No. 1.
- Dukiet-Nagórska T., Autonomia pacjenta a polskie prawo karne, Warszawa 2008.
- Górski A. (ed.), Leksykon pojęć prawa medycznego, Warszawa 2012.
- Haberko J., Realizacja standardów bioetycznych w prawie polskim w zakresie oświadczeń pro futuro, (in:) L. Kondratiewa-Bryzik, K. Sękowska-Kozłowska (eds.), Prawa człowieka wobec rozwoju biotechnologii, Warszawa 2013.
- Hartman J., Bioetyka dla lekarzy, Warszawa 2012.
- Jachnik E., Testament życia w świetle Europejskiej Konwencji Bioetycznej, a możliwość składania oświadczeń pro futuro w prawie polskim, "Zeszyt studencki Kół Naukowych Wydziału Prawa i Administracji UAM" 2014, No. 4.
- Janiszewska B., Dobro pacjenta czy wola pacjenta – dylemat prawa i medycyny (uwagi o odmowie zgody na leczenie oraz o dopuszczalności oświadczeń pro futuro), "Prawo i Medycyna" 2007, No. 2.
- Janiszewska B., Odmowa zgody na udzielenie świadczenia zdrowotnego w orzecznictwie Sądu Najwyższego, (in:) L. Bosek, M. Królikowski, Współczesne wyzwania bioetyczne, Warszawa 2010.
- Łabowicz B., Testament życia, (in:) W cieniu czepka, "Biuletyn informacyjny dolnośląskiej okręgowej izby pielęgniarek i położnych" 2014, No. 2/268/luty.
- Machinek M., Konflikty etyczne u kresu życia w relacji lekarz-pacjent: refleksja w kontekście projektu powołania szpitalnych komisji etycznych, "Diametros" 2009, No. 22.
- Machinek M., Etyczna problematyka testamentu życia i innych oświadczeń pro futuro. Głos w dyskusji. Debata wokół testamentu życia 23.11-30.11.2009. www.ptb.org.pl/pdf/machinek_testament (accessed: 15 July 2016).
- Safjan M., Prawo i medycyna, ochrona praw jednostki a dylematy współczesnej medycyny, Warszawa 1998.
- Sporczyk A., Oświadczenia woli pro futuro w prawie francuskim i anglosaskim, "Prawo i Medycyna" 2015, No. 1.
- Syska M., Medyczne oświadczenia pro futuro, Warszawa 2013.

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Szeroczyńska M., Dopuszczalność uprzednich oświadczeń pacjenta i pełnomocnictwa medycznego de lege lata i de lege ferenda, www.hospicjum.waw.pl

Śliwka M., Testament życia i inne oświadczenia pro futuro – przyczynek do dyskusji, www.ptb.org.pl/pdf/sliwka_testament_1.pdf (accessed: 30 March 2016).

Śliwka M., Testament życia oraz inne oświadczenia pro futuro – wyzwanie dla ustawodawcy polskiego, (in:) *Temida w dobie rewolucji biotechnologicznej*, Gdańsk 2015.

<http://www.miesiecznik.znak.com.pl/6672010andrzej-zollprawo-wobec-narozdzin-zycia-i-smierci/> (accessed: 4 June 2017).

<http://www.polityka.pl/tygodnikpolityka/kraj/276734,1,etyka-w-zarodku.read> (accessed: 30 June 2016).

