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Will Formalities in Louisiana: Yesterday, Today, and Tomorrow

Ronald J. Scalise, Jr.[*]

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INTRODUCTION

It is well known and commonly understood that Louisiana maintains a mixed or hybrid legal system that blends both elements of common and

civil law to form its unique juridical landscape.[1] Some have argued that this hybridization allows Louisiana to maintain the "best of both worlds,"[2] and indeed in many instances that belief is entirely defensible. Perhaps it is even so with respect to wills, but there is some doubt. Louisiana's form requirements for wills are a curious amalgam of civil and common law rules. Although the current law, which provides that a will may be executed in either olographic or notarial form, was premised upon good intentions and designed with the goal of simplicity in mind, the current state of affairs has regrettably resulted in law that is artificially and unnecessarily complex and rigid. It is a unique Louisiana product that has crystalized in the law and, in practice, results in many unnecessary intestacies today. It is time for reform.

Only by understanding the Louisiana law on will formalities in the broader context of both the civil and common law traditions can one see most acutely the need for revision. To that end, this Article proceeds by laying out a very brief history of wills against the backdrop of the purpose of the form requirements for wills. It then utilizes comparative research from other civil and common law jurisdictions to inform and historically situate Louisiana's law and to document the global shift away from formalism in the will context. The bulk of this Article, however, is spent dissecting each of the individual requirements necessary for the making of a will in Louisiana with a goal not only of descriptive assessment but also of ascertaining whether each requirement is still necessary. To do so, this Article provides the history of Louisiana's experience with will formalities—the law of yesterday—along with a careful elaboration of all current aspects of the form for wills—the law of today. Before concluding, this Article also offers a glimpse into electronic wills—the law of tomorrow—and provides some backdrop for what surely will be a future issue that Louisiana and other states will have to address. This Article suggests that many—perhaps most—of the current form requirements for wills should be reconsidered, and it is hoped that this Article will provide a basis for discussion of future revision.

I. A (VERY BRIEF) HISTORY OF WILLS IN THE UNITED STATES

Scholars have well documented the development of the American system of will formalities elsewhere, and only the briefest sketch or outline

1. *See, e.g.*, VERNON VALENTINE PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 257–328 (2001).

2. Joachim Zekoll, *The Louisiana Private-Law System: The Best of Both Worlds*, 10 TUL. EUR. & CIV. L.F. 1 (1995).

will be provided here, mainly for context and as background for understanding the modern system of will-making in Louisiana.[3]

Academics have noted that when it comes to will-making, there are "three core formalities" for traditional attested wills: (1) the writing; (2) the signature; and (3) the attestation.[4] American law on will formalities has been consistent in those requirements, but some variation has historically existed among states. State-by-state variation is generally a result of the differing choices made by states in basing their statutes either upon the English Statute of Frauds of 1677 or the Wills Act of 1837. The states that based their laws upon the Statute of Frauds historically required a writing, a signature, and attestation by three witnesses.[5] The Wills Act, which was enacted over a century later, simplified the attestation requirement to merely two witnesses, in addition to the writing and signature requirement, but it also mandated that the testator sign "at the foot or end thereof."[6] Still other states "cobbled provisions" from each statute and sometimes added their own flourishes, such as New York, which requires that a testator "publish" his will by declaring before the witnesses that the act is his will.[7] As will be explained below, Louisiana was generally immune from the above influences due to its civil law heritage. In 1952, however, a change was made that brought a common law style will into Louisiana practice. Although civil law influences still exist today, Louisiana's current law on will formalities is heavily influenced by the above common law concepts.

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3. For a recent exposition of this issue, see Bridget J. Crawford, *Will Formalities in the Twenty-First Century*, 2019 WISC. L. REV. 269, 274–75.

4. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 148 (10th ed. 2017); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. f (AM. LAW INST. 1999); 2 JEFFREY A. SCHOENBLUM, PAGE ON THE LAW OF WILLS §§ 19.3–19.4, at 7–18 (2003); WILLIAM M. MCGOVERN, SHELDON F. KURTZ, AND DAVID M. ENGLISH, WILLS, TRUSTS AND ESTATES 197 (2010).

5. SITKOFF & DUKEMINIER, *supra* note 4, at 149; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. f; SCHOENBLUM, *supra* note 4, §§ 19.3–19.4, at 7–18; MCGOVERN, ET AL., *supra* note 4, at 197.

6. SITKOFF & DUKEMINIER, *supra* note 4, at 149; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. f; SCHOENBLUM, *supra* note 4, §§ 19.3–19.4, at 7–18; MCGOVERN, ET AL., *supra* note 4, at 197.

7. SITKOFF & DUKEMINIER, *supra* note 4, at 149; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. f; SCHOENBLUM, *supra* note 4, §§ 19.3–19.4, at 7–18; MCGOVERN, ET AL., *supra* note 4, at 197.

A. Functions of Form Requirements

Will formalities serve a number of functions. Most obviously, requiring that a will be executed with certain formalities serves an *evidentiary* function.[8] By requiring that a will be written rather than merely spoken, the law increases the reliability that the effected disposition is actually the one intended by the decedent. Oral testimony as to the decedent's intent is notoriously unreliable because of lapses in memory, misinterpretations, or deliberate misrepresentations.[9] These concerns are only exacerbated because the decedent—the person best equipped to confirm his intent and to correct faulty recollections of others—is not available.

In addition, will formalities also serve a *ritual* or *cautionary* function. In other words, "[e]ven if the witnesses are entirely truthful and accurate, what is a court to conclude from testimony showing only that a father once stated that he wanted to give certain bonds to his son John?"[10] That is, "the court needs to be convinced that the statements of the transferor were deliberately intended to effectuate a transfer."[11] Only those statements that the decedent actually intended to have effect should be given the effect of a transfer. By prescribing certain formalities or rituals for wills, the law ensures that individuals and courts know which statements are to be taken seriously and which ones are to be disregarded. The formalities for wills then serve to impress upon the transferor the "significance of his statements and thus justify[] the court in reaching the conclusion . . . that they were deliberately intended to be operative."[12]

Similarly, there are clearly *protective* functions of formalities. Requiring that witnesses attest to the will, for example, serves a "prophylactic purpose of safeguarding the testator, at the time of the execution of will, against undue influence or other forms of imposition."[13] This purpose is clearly illustrated by the English Statute of Frauds, which was enacted at a time when "wills were usually executed on the death bed" and when a testator's normal powers of judgment and cognizance were impaired or improperly influenced.[14] In modern times, however, "wills are

8. *See, e.g.*, Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 6–8 (1941).
9. *Id.*
10. *Id*. at 3.
11. *Id*. at 3.
12. *Id*. at 4.
13. *Id*. at 9.
14. *Id*. at 10.

probably executed by most testators in the prime of life and in the presence of attorneys."[15]

More recently, some scholars have observed that will formalities serve a *channeling* function.[16] John Langbein has succinctly expressed the importance of this idea by stating that "[c]ompliance with the Wills Act formalities for executing witnessed wills results in considerable uniformity in the organization, language, and content of most wills . . . [such that] [c]ourts are seldom left to puzzle whether the document was meant to be a will."[17] This channeling function serves both the interests of courts in terms of economy of judicial effort and those of the testator who "does not have to devise for himself a mode of communicating his testamentary wishes to the court."[18] Although many transactions require formalities, wills are somewhat unique insofar as they are of particular importance and contemplate non-adversarial judicial enforcement.[19]

Other scholars suggest that will formalities also provide an *expressive* function.[20] Aside from merely disposing of property, a testament can provide the testator with a unique opportunity to contemplate his mortality and communicate to his heirs and legatees, in a particularly germane way, either life lessons or final statements. Wills allow a testator to have one "last conversation" with his descendants.[21] In fact, in an effort to mirror the dispositive effect of wills, some have taken to exercising so-called "ethical wills" in an attempt to transmit their values and last wishes to close relatives.[22]

These functions—*evidentiary*, *ritual*, *protective*, *channeling*, and *expressive*—are important and not to be dismissed lightly. At the same time, however, the above purposes should not be used as a shield against criticism for continued blind adherence to antiquated formalities. James Lindgren has observed that "[i]n early Bavaria, to convey property one had to box the ears of young boys . . . . This strange formality served all the

15. *Id*. at 10.

16. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

17. *Id*. at 494.

18. *Id*.

19. *Id*.

20. *See, e.g*., Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427 (2012).

21. Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 696 (2011).

22. Zoe M. Hicks, *Is Your (Ethical) Will in Order?*, 33 ACTEC L.J. 33 (2008).

main functions of formalities . . . ," but it was both "perverse and silly."[23] Ultimately, almost any formality can be justified by the above purposes. The key, of course, is discovering the balance between promoting the intent of the testator and doing so at "an acceptable administrative cost."[24] After all, if most—or even many—wills failed for noncompliance with the formal requirements for execution, the imposed cost would likely be too high for the achieved benefit; thus, the prescribed rules likely ought to be reconsidered.

B. The Law of Yesterday: The Development of Louisiana's Will Forms

Although Louisiana today allows for only two forms of wills—olographic and notarial—this innovation occurred in the late 1990s. At the time of its first Civil Code, the Digest of 1808, Louisiana maintained three distinct types of wills: (1) the nuncupative will; (2) the mystic will; and (3) the olographic will.[25] At this point in time, Louisiana's law on will-making was entirely civilian. The Code Napoléon, enacted just four years before, similarly provided that a "testament may be olographic, or made by public act, or in the mystic form."[26] In fact, Roman law had recognized the olographic will since probably the 5th century.[27] Louisiana's new Civil

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23. James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1033 (1992).

24. *Id*. at 1033.

25. LA. CIV. CODE art. 89 (1808). Louisiana and French law employ the term "olographic" or "olographe," whereas some other states and jurisdictions often employ the "holograph" or "holographic." This Article employs both terms interchangeably and generally opts to use the spelling of the jurisdiction being discussed. For a discussion of the different spellings used to describe handwritten wills, see Elizabeth R. Carter, *The Last Word: This Handwritten Will Is (Not) Brought to You by the Letter "H,"* 31 PROB. & PROP. 64 (2017).

26. CODE NAPOLÉON art. 969 (1804). In correspondence with article 89 of the 1808 Code, the de la Vergne manuscript cross-references a great number of civil law sources—including Domat, Pothier—but mainly Spanish and Roman sources, such as the law of the Las Siete Partidas, the 13th century compilation of various Spanish laws by Alphonso the Wise. The law of Las Siete Partidas, however, is not entirely congruent with the law adopted by Louisiana in 1808. *See* A REPRINT OF MOREAU LISLET'S COPY OF A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS 226–227 (1971); *see also* 2 THE LAWS OF LAS SIETE PARTIDAS, WHICH ARE STILL IN FORCE IN THE STATE OF LOUISIANA Partida VI, Title 1, Law 1, at 961–962 (L. Moreau Lislet & Henry Carlton trans., 1820) (providing that there were two types of wills, nuncupative and in writing).

27. Reginald Parker, *History of the Holograph Testament in the Civil Law*, 3 THE JURIST 1 (1943).

Code also "abrogated" the "usage of . . . merely verbal" testaments that were established by witnesses "without having committed it . . . to writing."[28] A nuncupative will, a moniker derived from the Latin verb *nuncupare*, meaning to call or to take publicly, was so named because of the public way in which the will was presented. Ironically, nuncupative wills could be made either by public or private act.[29] A nuncupative will by public act had to be dictated to a notary public in the presence of either three witnesses residing in the place where the will was executed or five witnesses residing elsewhere, and then it was read to the testator in the presence of the witnesses and signed by him and the witnesses.[30] No interruptions or intervening acts were permitted, and the will itself needed to state the accomplishment of the formalities.[31] The nuncupative will by public act was "the most formal of all wills," but these wills engendered "a considerable amount of litigation" and were frequently declared null for lack of compliance with the many complexities.[32] Indeed, commentators have noted that "some attorneys tend[ed] to shy away from nuncupative wills by public act because the formalities were of such importance" as to be raised almost to the level of "substance."[33]

The nuncupative will by private act did not involve a notary public. Rather, this will could be written by the testator or declared by the testator to be his will or written by another from the testator's dictation.[34] The writing or declaration needed to occur in the presence of either five witnesses residing in the place where the will was executed or seven witnesses residing elsewhere and thereafter signed by the testator and the witnesses.[35] Although the nuncupative will by private act required a significant number of formalities—indeed, enough to likely discourage its use—it was "not as formal as the nuncupative will by public act."[36] Most notably, compliance with the formalities did not need to be stated in the

28. LA. CIV. CODE art. 90 (1808).
29. *Id*. art. 91.
30. *Id*. arts. 92–95.
31. *Id*.
32. Leonard Oppenheim, *The Testate Succession*, 36 TUL L. REV. 1, 1–2 (1961).
33. *Id*. at 4.
34. LA. CIV. CODE art. 96–97 (1808). The law did, however, contain an exception relaxing the number of witnesses from five and seven to five and three for nuncupative wills by private act "in the country." *Id*. art. 98.
35. *Id*. art. 96.
36. Oppenheim, *supra* note 32, at 4–5.

will itself.[37] Like the nuncupative will by public act, this will was read before the witnesses, thus destroying any hopes of privacy of the act.[38]

A mystic will was not open like a nuncupative will. Rather, this will was closed or secret because it was written by the testator, or caused by him to be written, and sealed in an envelope, which would then be presented to a notary and seven witnesses.[39] Privacy was preserved because the testator would merely declare the document to be his testament, and the notary would "draw up an act of superscription" to be signed by the notary, the testator, and the witnesses.[40] Although the formalities were fewer for mystic wills than for nuncupative ones, the mystic will had to be performed—like the nuncupative will by public act—without intervening acts or interruptions, and the superscription had to recite compliance with the formalities.[41] Debate in the courts, in fact, existed as whether wax was necessary for the sealing of the mystic will.[42] Still, some noted that after having become "practically . . . obsolete," the mystic will experienced a resurgence in use because of its capability for complex estate plans and its private nature.[43] One commentator noted that it "proved to be most useful in a number of instances."[44]

Finally, the olographic will, as the name suggests, is "entirely written, signed and dated with the testator's hand."[45] It is the simplest will and most useful for "uncomplicated situations."[46] It does not, however, easily accommodate sophisticated estate plans or "lengthy trust[s]."[47] The olographic will is a simple, do-it-yourself style will that has existed in Louisiana from its earliest days.

The above will forms persisted in a relatively stable fashion from 1808 to 1997. In 1898, the requirement for mystic wills was changed from seven

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37. *Id*. at 4.
38. *Id*. at 5.
39. LA. CIV. CODE art. 99 (1808).
40. *Id*.
41. *Id*.
42. Oppenheim, *supra* note 32, at 5–6.
43. *Id*.
44. *Id*. Although Belgian law has since replaced the mystic will, it is still retained in French law and Italian law today. Walter Pintens, *Testamentary Formalities in France and Belgium*, *in* TESTAMENTARY FORMALITIES 51, 64 (Kenneth G.C. Reid, Marius J de Waal, & Reinhard Zimmermann eds., 2011); Alexandra Braun, *Testamentary Formalities in Italy*, *in id*. at 133.
45. LA. CIV. CODE art. 103 (1808)*; see also* MCGOVERN, ET AL., *supra* note 4, at 212 (noting that the word "holographic" is derived from two Greek words meaning "whole" and "written").
46. Oppenheim, *supra* note 32, at 10.
47. *Id*.

witnesses to three.[48] In 1952, a fourth form of will, the statutory will, was introduced and so called because it was enacted by "statute" rather than by an amendment to the Louisiana Civil Code.[49] This new statutory will was based upon "the ordinary statutory will which exist[ed] with modifications in all the common law states."[50] The bill was a product of the efforts of the Louisiana Bar Association and undeniably modeled not on the law in civil law jurisdictions but on the laws in other American states.[51]

The statutory will was not, however, a direct copy of American law at the time. Indeed, there was no uniform law of wills in other American states in 1952. Rather, the drafters appear to have made policy choices and decisions among competing laws throughout the United States and, at the same time, crafted a product that was unique to Louisiana. For instance, although most American states in 1952 required only two witnesses for a will, some required three.[52] The final draft of the Louisiana bill opted for the lesser number to validate the new will and included in place of a third witness a unique Louisiana requirement that a notary be present.[53] Similarly, some American states at the time—and in fact the original draft of the Louisiana bill—also allowed a previously executed will to be valid if subsequently acknowledged after execution before witnesses, but the final product of Act 66 omitted this option in Louisiana.[54] Although only a minority of states in the 1950s required a testator to "signify" that the document was his will—that is, the so-called "publication" requirement—the Louisiana drafters chose to include this requirement in the statutory will, perhaps because of their familiarity at the time with the same requirement for mystic wills and nuncupative wills by private act.[55] Although signing the will was a common requirement throughout the

48. La. Acts No. 88 (1898).

49. La. Acts No. 66 (1952) (enacting LA. REV. STAT. § 9:2442–2444). Some authors have observed that "[i]t is both unexpected and unfortunate that [the statutory will] was not enacted as an amendment or addition to the Civil Code, which contains the other methods for making a will." *Louisiana Legislation of 1952*, 13 LA. L. REV. 21, 32 (1952).

50. Louise Korns, Comment, *The New Louisiana Wills Act*, 29 TUL. L. REV. 288, 288 (1954).

51. *Id*. at 291; *see also* Oppenheim, *supra* note 32, at 10 (noting that the bill was drafted by the Immovable Property, Probate and Trust Section of the Louisiana Bar Association).

52. Korns, *supra* note 50, at 291.

53. *Id*. at 291. Indeed, only recently has the Uniform Probate Code opted to allow the use of a notary, but in place of, rather than in addition to, two witnesses. *See* UNIF. PROB. CODE § 2-502.

54. Korns, *supra* note 50, at 291.

55. *Id*.

United States, the new Louisiana statute appears to have innovated from whole cloth the requirement that the testator sign the will on every page. Louisiana also adopted the minority approach of including a dual presence requirement that the witnesses signed the will both in the presence of the testator and each other.[56] Perhaps most bizarrely and unlike any state either then or now, Louisiana enacted into positive law the requirement that the will contain an attestation clause, in which the witnesses attest in the document to compliance with the will formalities.[57] Common law wills, known as "attested wills," merely required some form of "signing which show[ed] that it [was] done with the intent of acting as a witness"; "a formal attestation clause [was] not necessary."[58] Although attestation clauses were not then and are not now uncommon in other states, their omission is generally not fatal to the existence of the will—unlike in Louisiana.[59]

Despite the numerous technicalities and strictures for the new statutory will, it was heralded at the time—and likely rightly so—as an important innovation and liberalization of will formalities.[60] Olographic wills, although important, have never been practical for detailed or complicated estate plans.[61] Similarly, nuncupative wills were "highly technical," "difficult," and had to "be read by quite a few witnesses," thereby eliminating any hope for secrecy.[62] Only the mystic will lent itself to an estate plan with "complicated . . . provisions which the testator preferred to keep private."[63] This will too, however, was "technical" and unforgiving if its formalities were not "rigidly observed."[64]

The statutory will was thus an innovation for Louisiana and was predicted to be "of inestimable help to the attorney in the drafting of testaments."[65] The Louisiana Supreme Court even noted that "our

56. *Id*. at 295.

57. *Id*.

58. SCHOENBLUM, *supra* note 4, § 19.140, at 248–249.

59. Korns, *supra* note 50, at 295. The one limitation observed for the statutory will was that it could not be used by one who could not read. LA. REV. STAT. § 9:2443 (repealed); Oppenheim, *supra* note 32, at 11.

60. Korns, *supra* note 50, at 296–297*; see also* Loretta Garvey Whyte, *Donations—Imperfect Compliance with the Formal Requirements of the Statutory Will*, 15 LOY. L. REV. 362, 365 (1969); Oppenheim, *supra* note 32, at 10 (noting that "the formalities to be observed are not onerous and seem to give adequate protection against attack on the ground of fraud or forgery").

61. Korns, *supra* note 50, at 296; *see also* Whyte, *supra* note 60, at 363.

62. Korns, *supra* note 50, at 296.

63. *Id*.

64. *Id*. at 297; *see also* Whyte, *supra* note 60, at 364.

65. Oppenheim, *supra* note 32, at 10.

legislature authorized the statutory will, adopting it from the common law, as a means of evading the rigid standards of form required of civil law testaments."[66] Some have suggested that "[i]t was the intention of the legislature to provide a will form which was not complicated by rigid formalities, which would be suitable even for long and intricate testaments, and which would be executed without fear that it would be declared null in probate proceedings."[67] Others have noted that "there is no doubt that the purpose of the 1952 legislation was to adopt a form of a will free of many technicalities connected with the making" of previous types of wills.[68] If such was the case, then it worked quite well, as "relatively little litigation" was reported until the late 1960s.[69] One author noted that "[i]t appears that the courts have been aware of the purpose of the statute as they have, from the beginning, construed its provisions liberally."[70] A liberal approach to will construction was a notable change from the past when courts strictly assessed compliance with the formal requirements for wills authorized by the Louisiana Civil Code. In applying the will formalities for the traditional civil law wills, scholars have observed that "courts require[d] absolute compliance with the codal provisions to form in the execution of a will as a prerequisite to formal validity" and that "[f]ailure to comply exactly with the required formalities . . . [served to nullify] the testament."[71]

Although a multitude of will forms previously existed in Louisiana, today there are only two forms of wills: olographic and notarial.[72] The olographic will must still be written, dated, and signed in the handwriting of the testator.[73] The notarial will is essentially the old "statutory will" with its governing law relocated from the Louisiana Revised Statutes to the Civil Code and renamed to reflect its new placement.[74] Just as with the old statutory will, the notarial will involves the use of a notary and two witnesses, in addition to a number of other specific requirements.[75]

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66. Succession of Porche, 288 So. 2d 27, 30 (La. 1973).

67. *See* Whyte, *supra* note 60, at 365.

68. Carlos E. Lazarus, *Successions and Donations*, 24 LA. L. REV. 184, 186 n.7 (1964).

69. Whyte, *supra* note 60, at 362. During the late 1960s, however, a "relatively sudden upsurge of controversy" occurred. *Id*.

70. *Id*. at 366.

71. John Minor Wisdom & Paul O.H. Pigman, *Testamentary Dispositions in Louisiana Estate Planning*, 26 TUL. L. REV. 119, 121 (1952).

72. LA. CIV. CODE. art. 1574.

73. *Id*. art. 1575.

74. *Id*. art. 1577.

75. *Id*.

Although some civil law jurisdictions maintain "public wills" executed by a notary and two witnesses, these are not the notarial wills of Louisiana. The French or Belgian public will requires that the testator dictate his will to the notary in the presence of the witnesses, which is then read by the testator and signed by the testator, witnesses, and notary.[76] The laws in various Latin American countries provide similarly,[77] as does Italian law, under which a will can be received by a notary and two witnesses or by two notaries.[78] The public wills of the civil law are more reminiscent of the nuncupative will by public act, whereby Louisiana citizens could dictate their wills to a notary public in the presence of a varying number of witnesses. Louisiana's notarial will, on the other hand, is based upon the common law attested will with some civilian ornaments. Spanish law allows for notarial wills, but the requirement of witnesses has been discarded in most instances.[79] Indeed, even the Uniform Probate Code today allows for a will executed before a notary, but in place of, rather than in addition to, the two witnesses.[80]

II. COMPLIANCE WITH FORMALITIES

In light of the numerous requirements for the execution of a will in Louisiana—both historically and presently—the jurisprudence is replete with examples of defective compliance. The problem of defective compliance with the will formalities is not, however, a problem isolated, or even particularized, to Louisiana. In fact, the courts in all states have faced this issue and have slowly and somewhat inconsistently moved away from requiring "strict" compliance with will formalities to a more permissive "substantial" compliance doctrine. Unfortunately, even courts that have adopted a substantial compliance doctrine have, in many instances, proceeded excessively cautiously. Nevertheless, legislatures in some other states have raced ahead to adopt a permissive "harmless error" approach, which allows courts to probate many wills that clearly do not

76. Pintens, *supra* note 44, at 62–63. French law also allows for wills executed before two notaries without any further requirement for witnesses. *See, e.g.*, C. CIV. art. 971 (Fr.).

77. Jan Peter Schmidt, *Testamentary Formalities in Latin America with Particular Reference to Brazil*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 101.

78. Braun, *supra* note 44, at 131.

79. Sergio Cámara Lapuente, *Testamentary Formalities in Spain*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 79.

80. UNIF. PROB. CODE § 2-502 (2008).

comply with the requisite formalities. The patchwork landscape in the United States provides a fruitful ground for comparative assessment.

A. The Slow Migration from "Strict Compliance" to "Substantial Compliance" to "Harmless Error" in the United States

Historically, courts have very strictly assessed the validity of wills and their compliance with the prescribed formalities. As one scholar has noted, "[u]nder traditional law, for a will to be admitted to probate it must be in *strict compliance* with the formal requirements of the applicable Wills Act."[81] For instance, in *In re Groffman*, an English court refused to probate a will that failed to strictly comply with the Wills Act because the testator did not acknowledge his signature on the will to both witnesses at the same time, as required by the English Wills Act of 1837.[82] In *Groffman*, one night, after coffee and cakes, the testator summoned his companions to witness his will. Unfortunately, one of his companions was "somewhat cumbrous in his movements and was left behind."[83] Because the testator then proceeded to acknowledge his signature to the two witnesses at different times, the court denied probate. After noting that it was "satisfied that the document does represent the testamentary intentions of the deceased," the court declared that it was "bound to pronounce against th[e] will" for noncompliance with the required formalities.[84]

Two rationales, both of which make appearances in Louisiana judicial decisions, support the above strict compliance approach. The first is the floodgates argument. Form requirements exist for a reason—primarily to prevent fraud, mistake, undue influence, and uncertainty.[85] To relax the form requirements is to increase the risk for fraud: "The only safe rule is to confine [wills to those that comply with the prescribed formalities]: if we go one step beyond that, there is no reason why we should not go fifty."[86]

The second explanation for strict compliance is one based upon separation of powers and authority. The legislature writes the law, and the courts interpret it. When the legislature has made its will clear, the court cannot ignore the positive law in the pretense of pursuing its spirit or for the purposes of pursing individual justice. If the required prerequisites for

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81. SITKOFF & DUKEMINIER, *supra* note 4, at 146.

82. *Id*. at 147–47 (discussing *In re* Groffman, [1969] 1 W.L.R. 733 (PC)).

83. *Id*. (quoting *In re* Groffman, [1969] 1 W.L.R. 733 (PC)).

84. *Id*.

85. *In re* Estate of Chastain, 401 S.W.3d 612, 619 (Tenn. 2012).

86. Winterbottom v. Wright, 10 Meeson & Welsby 109, 115 (1842) (denying recovery to an injured party based upon lack of privity of contract).

the execution of a testament fail to achieve justice, it is the job and responsibility of the legislature, not the court as a super-legislature, to correct the law. Even as recently as 2012, the Tennessee Supreme Court seemed to adopt the above argument and noted that "courts have consistently interpreted statutes prescribing the formalities for execution of an attested will as mandatory and have required strict compliance with these statutory mandates."[87] It continued by concluding, "we have no authority to dispense with the statute mandating" the prescribed will formalities.[88]

Although both of the above arguments have some force, the dire consequences predicted by the first have not come to pass. Courts in a variety of jurisdictions around the world have loosened form requirements without appreciable increase in the risk of fraud or uncertainty. Moreover, although the reluctance of many courts to rewrite the law is admirable, it is hard to ascribe deliberative legislative intent to some seemingly insignificant and minor technical form requirements. In partial recognition of this fact, many courts in modern times have adopted standards of "substantial compliance" rather than absolute strict compliance.

Certainly, no one argument for "substantial compliance" has been more influential in the wills context than that of John Langbein.[89] As far back as 1975, he advocated for enforcement of noncomplying wills, provided that the will demonstrates "testamentary intent" and fulfills the purposes of the Wills Act.[90] Importantly, Langbein's argument was not one for forgiving only slight mistakes or technical violations of the form requirements. Rather, he advocated for overlooking noncompliance in general when the violation did not contravene the purpose of the relevant wills law:

> Attestation by two witnesses where the state calls for three, or by or where it asks for two, is a less serious defect, because the execution of the will was witnessed and the omission goes to the quantity rather than the quality of the evidence. Other evidence of finality of intention and deliberate execution might then suffice to show that the missing witness was harmless to the statutory purpose.[91]

87. *In re Estate of Chastain*, 401 S.W.3d at 621.
88. *Id*. at 619.
89. Langbein, *supra* note 16, at 513–31.
90. *Id*. at 513.
91. *Id*. at 522.

As popular as the phrase "substantial compliance" has become, however, "the substantial compliance doctrine evolved into something narrower than Langbein had intended."[92] Many courts held that a document could not be in substantial compliance if the deviation from the form requirements was anything other than "minimal."[93] For instance, in *Smith v. Smith*, a Kentucky court—at clear odds with the doctrine of substantial compliance as advocated by Langbein—concluded that substantial compliance was "inapplicable" to a will signed by only one witness when two were required.[94] As a result of a plethora of cases like *Smith* and after a detailed review of cases in Queensland that employed the "substantial compliance" doctrine, Langbein acknowledged that the experiment with the doctrine was a "flop."[95]

The Louisiana experience with "substantial compliance" is no different. Although *Succession of Guezuraga* is often credited as the genesis of the "substantial compliance" doctrine in Louisiana,[96] its origins date much further back. At least as early as 1838, the Louisiana Supreme Court indicated a desire to flexibly apply many of the rigid form requirements for wills and to enforce wills that may not strictly comply, provided substantial compliance with the form requirements exists. For example, in *Segur's Heirs v. Segur, et al*., the Louisiana Supreme Court evaluated a nuncupative will by public act that the notary had written not from direct dictation but from a memorandum that itself was written in part from the testator's dictation.[97] Despite the requirement at the time that the will be "written by the notary as it is dictated," the Court upheld the will and stated that due to "the manner in which it was written, it appears to us there was *substantially a compliance* with the requisites of law."[98]

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92. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 180 (9th ed. 2013).

93. George Holmes, *Comment, Testamentary Formalities in Louisiana; Curing Notarial Will Defects Through a Likelihood-of-Fraud Analysis*, 75 LA. L. REV. 511, 524 (2014); Leigh A. Shipp, *Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States*, 79 TUL. L. REV. 723, 29–732 (2005).

94. Smith v. Smith, 348 S.W.3d 63 (Ky. App. 2011).

95. John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 1 (1987).

96. Succession of Guezuraga, 512 So. 2d 366 (La. 1987).

97. Segur's Heirs v. Segur, et al., 12 La. 25 (La. 1838).

98. *Id*. (emphasis added); *see also* Succession of Eubanks, 9 La. Ann. 147 (La. 1854) (in similar circumstances, finding that "there was a substantial compliance with the requirements of Article 1574 of the Code").

In the 20th century, the Louisiana Supreme Court repeatedly reaffirmed its commitment to the substantial compliance doctrine in dicta in *Succession of Crouzeilles* by stating that although "the observance of the legal formalities required by law in the drawing up of wills should be rigidly enforced[,] . . . [i]t is not our duty to refuse the carrying out of the wishes of deceased persons by pushing the requirements of the law to extremes." [99] Similarly, in *Stephens v. Adger*, the Court announced that "[t]he tendency of our present day jurisprudence does not exact an absolute, strict and literal application of the wording which prescribes the observance of specified formalities, and that such exactitude should not be pushed to extremes unless it be in those instances in which the law is palpably violated."[100] The Court observed that it was "in full accord and ha[s] so announced, that a *substantial compliance* with the formalities required in the execution of wills is sufficient to sustain its validity, more especially where there is no suggestion or intimation of fraud, deception, undue influence, or mental incapacity."[101]

Even though the early cases on "substantial compliance" concerned nuncupative wills, the courts were aware that the purpose of the statutory will, enacted in the 1950s, was to provide testators with flexibility, and hence they "construed its provisions liberally."[102] In *Succession of Porche*, for example, Justice Tate, writing for the Court, upheld a will that was signed by the testator at the end of the dispositive provisions but not after the attestation clause.[103] The Court concluded that the will "substantially complies with the statutory formalities and is therefore valid."[104]

The rationale of the Court in *Porche* was picked up over a decade later in *Succession of Guezuraga*, where the Court even further amplified its reasoning.[105] In *Guezuraga*, the Court evaluated a will in which the testatrix failed to sign on the page that contained only the conclusion of the attestation clause.[106] In upholding the will, the Court noted that although the legislation required that a will be signed at the "end," the Court was not required "to give the statutory will a strict interpretation."[107] The Court reasoned:

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99. Succession of Crouzeilles, 31 So. 64, 67 (La. 1901).
100. Stephens v. Adger, 79 So. 2d 491, 494–95 (La. 1955).
101. *Id*. (emphasis added).
102. Whyte, *supra* note 60, at 366.
103. Succession of Porche, 288 So. 2d 27 (La. 1973).
104. *Id*. at 29.
105. Succession of Guezuraga, 512 So. 2d 366, 368 (La. 1987).
106. *Id*.
107. *Id*. at 368.

> Where the departure from form has nothing whatsoever to do with fraud, ordinary common sense dictates that such departure should not produce nullity. It was the intent of the legislature to reduce form to the minimum necessary to prevent fraud. It is submitted that in keeping with this intent, slight departures from form should be viewed in light of their probable cause. If they indicate an increased likelihood that fraud may have been perpetrated they would be considered substantial and thus a cause to nullify the will. If not, they should be disregarded.[108]

Several decades later, the Court revisited substantial compliance in *In re Succession of Holbrook*. Justice Guidry, writing for a unanimous Court, appropriately concluded that a notarial will, which contained the date within the body of the will, was still valid, even though the attestation clause did not separately contain a date.[109] While noting that the model attestation clause provided in the Louisiana Civil Code contains blanks and language indicating that a date is required, the Court reiterated its longstanding holding that "courts need not strictly adhere to the statutory will, to the extent of elevating form over function."[110]

Up to this point, one might have reasonably concluded that Louisiana had adopted an expansive version of "substantial compliance" along the lines of which Langbein had advocated. In 2017, however, the Louisiana Supreme Court in *Successions of Toney* indicated that such was not the case. The *Toney* case involved a three-page will in which the first two pages were initialed rather than signed and in which the attestation clause on the third page contained a number of formal defects.[111] Although the technical deviations were certainly numerous, the trial court made it a point to observe that there did not seem to be any indication of fraud. Nonetheless, the Louisiana Supreme Court found the deviations not to be "slight departures" or "minor deviations," but rather "significant and material" ones.[112] Consequently, the will was invalid. The *Toney* case provoked two persuasive dissents by Chief Justice Johnson and Justice

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108. *Id*.

109. *In re* Succession of Holbrook, 144 So. 3d 845 (La. 2014).

110. *Id*. at 851.

111. Successions of Toney, 226 So. 3d 397 (La. 2017) (specifically, the attestation clause did not state that the will was signed on each page, did not state that the notary viewed the will being signed, did not state that the testator declared to the notary that the instrument was the testator's last will—although the witnesses so stated—and did not state that the witnesses signed in the presence of the notary).

112. *Id*.

Weimer, both of whom argued for upholding the will based upon a consideration of the substantial compliance doctrine in light of the lack of evidence suggesting the existence of fraud.[113]

As the latest expression of the substantial compliance doctrine from the Louisiana Supreme Court, the *Toney* case is significant, albeit lamentable. It repudiates the broader language in earlier cases that focused upon the risk of fraud and the purposes of the formalities, substituting in its place a narrower doctrine that upholds wills only when deviations from the form requirements are minor or insignificant. The Court concluded that any "material" deviation from the form requirements renders a will null, "even in the absence of any indication of fraud. Any language in previous jurisprudence which suggested otherwise is rejected."[114] Indeed, even an accumulation of insignificant deviations appears to amass to a material and significant one that would be enough to invalidate a will.

As expected, the progeny following *Toney* has taken a narrow view of substantial compliance. In *Succession of Anderson*, the Louisiana Second Circuit invalidated a will in which "color copies of the testator's signature somehow appeared on the first two pages of the testament."[115] Citing *Toney*, the court noted that the Louisiana Supreme Court has held that "the testator's initialing each page did not substantially comply with the formal requirements of the code article and was not merely a minor or a technical deviation."[116] The same court in *Succession of Rogers* invalidated two wills because "[n]owhere on the final page of the wills is it indicated that the notary and witnesses signed in the presence of the testator/testatrix and each other."[117] Relying upon *Toney*, the court noted that even though "there does not appear to be any indication of fraud, we find the deviation from the required testamentary form . . . [to be] significant and material."[118]

Similarly, in *Succession of Johnson*, the First Circuit declared null a will because the attestation clause did "not contain a declaration that it was signed by the testator in the presence of the notary, or that the testator declared it to be his last will and testament in the presence of the notary."[119] Rather, the declaration merely stated that he "acknowledged to me [the notary] that he . . . executed the instrument."[120] Furthermore, in *Succession*

113. *Id*. at 408.
114. *Id*. at 407.
115. Succession of Anderson, 264 So. 3d 684, 692 (La. Ct. App. 2d Cir. 2019).
116. *Id*. (citing Successions of Toney, 226 So. 3d 397 (La. 2017)).
117. Succession of Rogers, 243 So. 3d 1209, 1215 (La. Ct. App. 2d Cir. 2017).
118. *Id*. at 1214.
119. Succession of Johnson, 2017 WL 658775 (La. Ct. App. 1st Cir. 2017).
120. *Id*.

of Ivey, the Third Circuit invalidated a will when the attestation clause failed to contain a statement that "the witnesses and notary declare in the presences of the testator and each other that they signed their names on a specified date."[121] The court noted that "Mr. Ivey's will does not substantially comply with the requirements of a notarial will" and is therefore "invalid and null."[122] Despite a claim that there was no allegation of fraud, the court noted that "[t]he supreme court rejected this argument in *Toney* . . . , holding that the failure of an attestation clause to substantially comply with the requirements . . . renders it absolutely null, 'even in the absence of fraud.'"[123]

Most recently, the Fifth Circuit invalidated a four-page will that had been "signed . . . at the end of the testament and only initialed [on] the other three pages."[124] The court, relying on *Toney*, concluded that deviation from the form requirements was "material and significant."[125] Although the court noted that *Toney* involved multiple deviations and the present case involved only one, the court concluded that "[t]here is no indication that the result would have been different if only one deviation was present."[126]

Of course, there is no way to tell, *ex ante*, which form deviations are "significant and material" and which are not. Additionally, it is worth remembering that the point of substantial compliance is not to distinguish between excusable slight errors and inexcusable large ones. All formalities should be considered in light of the purposes they serve. In *Succession of Pickett*, from the 1960s, the First Circuit upheld a will even though the attestation clause did not contain an "express declaration on the part of the testator to the notary and the witnesses that the instrument was the testator's last will and testament."[127] This result, of course, is directly contrary to the recent case of *Succession of Johnson*, mentioned above. In explaining its rationale, the *Pickett* court observed that:

> We believe . . . that the attestation clause set out in [statute] is permissive, and that the attestation clause in the instant case . . . constitutes substantial compliance with the formalities required by the statute in the execution of a will under its terms. The body of

121. Succession of Ivey, 238 So. 3d 532, 537 (La. Ct. App. 3d Cir. 2018).
122. *Id*.
123. *Id*.
124. Succession of Carter, __ So. 3d __, 2020 WL 2764372, at *1 (La. Ct. App. 5th Cir. 2020).
125. *Id.* at *4.
126. *Id*. at *3.
127. Succession of Pickett, 189 So. 2d 670, 673 (La. Ct. App. 1st Cir. 1966).

> the will in this case . . . contains a recitation by the testatrix that she signed the last will in the presence of the witnesses. There is not present in this case any suggestion or intimation of fraud, deception, undue influence, or mental incapacity.[128]

In particular, the flexibility with which courts historically treated form requirements for statutory—now notarial—wills seems to have been forgotten. In *Succession of Saarela*, the testator's will began with a declaration that it was his last will and testament and ended with an attestation clause that stated he had "signed this my last will and testament in the presence of the witnesses and notary."[129] In what would regrettably be an almost unthinkable result today, the court upheld the will, finding it "substantially similar to the form given as an example in the statute."[130] Unfortunately, the wisdom of the courts in *Pickett* and *Saarela* seems overlooked in many modern instances. Some commentators have rightly "characterized Louisiana's version of 'substantial compliance' as 'substantially strict compliance.'"[131] They contend that courts should probate a will "unless there is a likelihood of fraud or undue influence."[132]

Due in large part to the "unfulfilled promise" of the substantial compliance doctrine, John Langbein largely abandoned the doctrine in favor of a different approach. Writing in 1987, Langbein advocated for an approach known as "harmless error," which would permit the probate of a defectively executed will, provided the proponents could establish that the "will expresses the decedent's testamentary intent."[133] The rationale for the "harmless error" approach was to allow for the distribution of "estates of those who have committed innocuous execution errors" without at the same time "engendering trumped-up claims."[134] After studying the experience of South Australian courts with this doctrine, Langbein argued that "the rule works" and that "litigation levels have been astonishingly low."[135] In 1990, the Uniform Probate Code adopted a "harmless error" rule for wills. Specifically, under the Uniform Probate Code, a document that is not in compliance with the prescribed formalities "is treated as if it had been executed in compliance . . . if the proponent of the document or writing establishes by clear and convincing evidence that the decedent

128. *Id*.
129. Succession of Saarela, 151 So. 2d 144, 146 (La. Ct. App. 4th Cir. 1963).
130. *Id*.
131. Holmes, *supra* note 93, at 534.
132. *Id*.
133. Langbein, *supra* note 95, at 4–5.
134. *Id*. at 51–52.
135. *Id*.

intended the document or writing to constitute . . . the decedent's will."[136] The Restatement is also "aligned with this modern trend" and "adopts the position that a harmless error in executing a will may be excused if the proponent establishes by clear and convincing evidence that the decedent adopted the document as his or her will."[137] At present, 11 states have adopted some version of the "harmless error" rule for will formalities.[138]

B. Compliance in Other Jurisdictions, Civil and Common

The United States is not the only jurisdiction to wrestle with the tension between imposing strict compliance and allowing substantial compliance with will formalities. As previously mentioned, the move toward substantial compliance originated not in this country but from comparative research based upon the experience of courts in various Australian states. In fact, many jurisdictions— both civil and common— have experienced a "flight from formalism," but courts have implemented it in differing ways.

In Australia, New Zealand, and South Africa, a document can be probated as a will, even if it does not comply with the prescribed formalities, if it can be shown that the testator intended it to be his will.[139] As Nicola Peart has written, "[i]n both Australia and New Zealand the court has the power to admit documents to probate that do not satisfy the formal requirements for execution of a will. South Australia initiated this change in 1975 to save wills from technical failure to reduce the number of unintended intestacies."[140] In fact, the South Australian experience served as the basis for John Langbein's research and the foundation for his proposal on "harmless error," which is now in place in a number of U.S.

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136. UNIF. PROB. CODE § 2-503.

137. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b (AM. LAW INST. 1999).

138. SITKOFF & DUKEMINIER, *supra* note 4, at 176. For further discussion of the evolution of will formalities, see Crawford, *supra* note 3, at 280–85. For a recent discussion of the cases that apply the harmless error rule in both the United States and abroad, see Susan N. Gary, *When Is an Execution Error Harmless?: Electronic Wills Raise New Harmless Error Issues*, 33 PROB. & PROP. 41 (2019). As a result of the COVID-19 pandemic, Minnesota enacted, effective March 13, 2020, a temporary "harmless error" rule for wills executed between March 13, 2020, and February 15, 2021. MINN. STAT. ANN. § 524.2-503.

139. Kenneth G.C. Reid, Marius J de Waal, & Reinhard Zimmermann, *Testamentary Formalities in Historical and Comparative Perspectives*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 465.

140. Nicola Peart, *Testamentary Formalities in Australia and New Zealand*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 349.

states. Other Australian states, such as Queensland and New South Wales, followed suit in 1981 and 1989.[141] Tasmania is the outlier, insofar as it adopted the dispensing power only in 2008, and it requires a higher burden of proof, namely the proponent of the will must demonstrate that there is "no reasonable doubt that the deceased intended the document to constitute his will."[142] Although some states have been conservative with the dispensing power, South Australian courts have used it to probate even "unsigned" documents, provided it can be shown that the testator intended the document to serve as his will and that the omission was accidental.[143]

South Africa—a mixed jurisdiction like Louisiana—also statutorily provides that courts may probate noncompliant documents as wills. In South Africa, this power is referred to as the "condonation power" because courts can "condone formally defective wills under certain circumstances."[144] Specifically, "[i]f a court is satisfied that a document . . . was intended to be [the testator's] will . . . , the court shall order the Master to accept that document . . . as a will, although it does not comply with all the formalities for the execution . . . of wills."[145] Israel, another mixed jurisdiction, also maintains a version of the dispensing power, under which courts may order probate of a document, notwithstanding defects in form, provided the fundamental parts of the will are present.[146] Québec includes a type of dispensing power in its civil code and provides that "[a] holograph will or a will made in the presence of witnesses that does not meet all the requirements of that form is valid nevertheless if it meets the essential requirements thereof and if it unquestionably and unequivocally contains the last wishes of the deceased."[147]

Even some more traditional civil law jurisdictions have taken a flexible approach to will formalities. Some jurisdictions have made a distinction between important or "core" formalities and less important or

141. *Id*. at 350.

142. *Id*.; TASMANIAN WILLS ACT § 10(1) (2008).

143. Peart, *Testamentary Formalities in Australia and New Zealand*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 350.

144. Marius J de Waal, *Testamentary Formalities in South Africa*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 396.

145. *Id*.; TASMANIAN WILLS ACT § 2(3) (2008).

146. *See, e.g*., Samuel Flaks, *Excusing Harmless Error in Will Execution: The Israeli Experience*, ESTATE PLANNING & COMMUNITY PROP. L.J. (2011); Celia Wasserstein Fassberg, *Form and Formalism: A Case Study*, 31 AM. J. COMP. L. 627, 643–51 (1983).

147. QUÉBEC CIVIL CODE art. 714.

"ancillary" ones. In Polish law[148] and under certain international wills, noncompliance with formalities results in invalidity only if the defect relates to a "core" formality, such as: (1) that the will be in writing; (2) that the will be signed by the testator, witnesses, and notary; and (3) that the will be declared by the testator as his will.[149]

Other civil law jurisdictions have saved noncompliant wills by holding that they are merely voidable or relatively null, as opposed to void or absolutely null. For example, in Spain, Italy, Hungary, and the Netherlands, a noncompliant document may be considered as voidable, rather than void, meaning that it might still be given effect if no relevant party objects.[150] Under Spanish law, a formally defective will is "void" in principle, but commentators have noted that wills are occasionally rescued by the distinction between absolute and relative nullity.[151]

Although under Dutch law, as under Louisiana law, failure to meet the formal requirements for a will traditionally rendered the transaction void or absolutely null,[152] since 2003 Dutch law has become more lenient in recognizing that many of the formalities associated with wills are designed to protect private parties rather than being intrinsic to public order or the nature of the act.[153] Consequently, "only failure of the notary or the testator

148. Fryderyk Zoll, *Testamentary Formalities in the Poland*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 277 (documenting the academic debate for the argument that noncompliance by a notary with the rules prescribed for wills may not in all cases result in invalidity of a will).

149. Reid, et al., *Historical and Comparative*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 466.

150. *Id*.

151. Lapuente, *Testamentary Formalities in Spain*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 91.

152. Wilbert D. Kolkman, *Testamentary Formalities in the Netherlands*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 170.

153. *Id*. For critique of Louisiana's law on nullity, see Ronald J. Scalise, Jr., *Rethinking the Doctrine of Nullity*, 74 LA. L. REV. 663 (2014). As an interesting note of comparison, a recent Louisiana case seems to have adopted this approach in substance, if not in form. In *Succession of Barbee*, the court of appeal for the Fourth Circuit reversed a trial court's decision when the trial court, sua sponte, denied probate to a will based upon the court's observation that the signatures on the decedent's will varied to such an extent that the court believed they were not authentic. 286 So. 3d 461 (La. Ct. App. 4th Cir. 2019). The court of appeal concluded that the trial court "lacked standing to challenge the validity or veracity of decedent's signature when there was no such challenge raised by any party." *Id.* at 466. Although the court did not explicitly employ the distinction between absolute and relative nullities, its decision clearly invokes the substance of that dichotomy insofar as relative nullities can be raised only by the party in whose

to sign the will has resulted in voidness; any other formal defects result only in voidability."[154] In fact, even before the change in the law in the Netherlands, the Dutch Supreme Court "showed it was not in favour of excessive adherence to formalities" in holding that a will that mentioned the month and day but not the year was not void for formal defects but only voidable.[155] Because the year could be established in other ways, the will was upheld.[156]

Italian law provides similar results.[157] Under the Italian Civil Code of 1865, all formal defects resulted in a transaction being void.[158] Today, however, under article 606 of the current Italian Civil Code, the answer is more complex.[159] An olographic will without a signature or not in the handwriting of the testator is void.[160] Likewise, a notarial will is void if it is not reduced "to writing" from the testator's declaration or if "the testator is incapable of signing . . . [and] there is no declaration indicating the reason."[161] In all other cases of formal defects, however, the will is merely voidable and can only be set aside if challenged within five years.[162]

Similarly, Hungarian law employs the concept of voidability (relative nullity) rather than the concept of voidness (absolutely nullity) for formal defects in wills.[163] Of course, "[t]he idea is that defects should not be penalized unless they affect another person who objects to the defective

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interest the nullity is established, whereas absolute nullities can be invoked by anyone, even the court on its own initiative. *Compare* LA. CIV. CODE art. 2030, *with* art. 2031. In light of article 1573 declaring that "[t]he formalities prescribed for the execution of a testament must be observed or the testament is absolutely null," the court's conclusion is certainly suspect. LA. CIV. CODE art. 1573. Given the legislative dictate of article 1573, it seems the preferable way to resolve the *Barbee* case would have been to reverse the trial court by concluding that there was insufficient factual evidence to sustain the trial court's decision.

154. Kolkman, *Testamentary Formalities in the Netherlands*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 170.

155. *Id*. at 171.

156. *Id*.

157. Braun, *Testamentary Formalities in Italy*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 138.

158. *Id*.

159. *Id*.

160. *Id*.

161. *Id*.

162. *Id*.

163. Lajos Vékás, *Testamentary Formalities in Hungary*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 267.

will . . . mean[ing] that neither a notary public nor a court can take into account *ex officio* a formal mistake in the drawing up of a will."[164]

Despite the variety of approaches, one thing is clear: Formalism is waning in favor of promoting testamentary intent. Whether it is through substantial compliance, harmless error, the dispensing or condonation power, the distinction between core and peripheral formalities, or the differences between relative and absolute nullities, both civil and common law jurisdictions alike show a disdain for invalidating wills with some level of formal defect. Although not all doctrines are equally permissive, the trend is clear. Even though Louisiana, in some sense, is in the prevailing trend, it has much work to be done, as the recent trend in Louisiana jurisprudence seems to be to invalidate wills that fail to strictly comply with the will formalities.

III. THE LAW OF TODAY: COMMON FEATURES OF NOTARIAL AND OLOGRAPHIC WILLS IN LOUISIANA

With the above background in mind, this Part considers in detail each of the formalities prescribed for the making of wills under Louisiana law. Of the two types of wills recognized in Louisiana—olographic and notarial—some common characteristics exist. That is, one can speak of basic or core requirements for either type of will in Louisiana before proceeding to the specific or additional requirements for a particular type of will. Namely, three common formalities exist for all wills in Louisiana: (1) that they be in writing; (2) that they be signed; and (3) that they be dated.

A. Writing

At first glance, the requirement that a will must be in writing seems obvious. Oral wills are not legally enforceable. Ordinarily, the formality of writing—without more—is imposed for proof purposes and satisfies the evidentiary function. A writing is more reliable than witness testimony. No classic swearing contests can be allowed when the matter involves the disposition of one's estate after death; the requirement of a writing forestalls any such disputes. But suppose one could establish the contents of a decedent's last wishes without any dispute and by unequivocal and unrebutted testimony. With reliability beyond doubt as to the decedent's desires, what reason exists not to enforce the undisputed desires of the decedent?

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164. *Id*. at 267.

Unlike testimonial proof, a writing is more permanent. Its proof exists as long as the writing itself exists, and it outlives the memory of both witnesses and the parties themselves. For these reasons, land transactions—that is, the transfer of immovable property—must, at a minimum, be in writing.[165] Such transactions are far too important and durable to leave up to the recollection of mere mortals.

Some jurisdictions, in extreme cases, allow oral wills. Prior to 1999, Louisiana law contained special rules for testaments made by military personnel in the field, by sick or wounded military personnel, and by sailors at sea.[166] Although these "special" wills could be "received" by officers, physicians, or the master of the vessel, they thereafter had to be "reduced to writing" and signed by the testator "if he could write" and by the person who received it and any witnesses. In other words, the testator would "dictate" his will to the relevant recipient who would then write it down, and the relevant parties would sign the document. All such "irregular" wills, however, were of limited duration—six months after the return of the testator for military wills and three months from return for wills made at sea.[167] These wills were always considered "extraordinary," and deviations from the regular form were tolerated only because of the lack of ability to make a regular will and only for such time as the testator could be expected to make a regular will after his return.

Writing in the 1920s, Judge Saunders stated that "[t]hese instruments have no practical value whatever . . . and that [he could not] recall . . . that one of these irregular wills has ever been presented to probate in the courts of Louisiana."[168] Indeed, the present author could not find a single reported case in which any of the above "extraordinary" wills was ever discussed or even mentioned. In any event, Louisiana no longer has such rules. All wills must be in writing.

Despite the clarity of the "writing" rule, its content still remains murky. After all, what constitutes a writing? As obvious as this issue may seem, it has been, and is again, subject to debate. Under the prior law, which allowed for nuncupative wills by public act to be dictated to and "written" by a notary, the question arose as to whether a will "typewritten" by the notary qualified as "written." In *Prudhomme v. Savant*, over a strenuous dissent, the Louisiana Supreme Court concluded that a typewritten document constitutes a writing.[169] Consequently, in 1952,

165. LA. CIV. CODE art. 1839 (2018).

166. LA. CIV. CODE arts. 1597–1604 (1870).

167. *Id*. arts. 1600, 1604.

168. EUGENE D. SAUNDERS, LECTURES ON THE CIVIL CODE OF LOUISIANA 325 (1925).

169. Prudhomme v. Savant, 90 So. 640 (La. 1922).

when the legislature first allowed for statutory wills, the law provided that "a will shall be valid if in writing (whether typewritten, printed, mimeographed, or written in any other manner)."[170] Aside from the obvious semantic problem of defining a "writing" as something "written in any other manner," scholars have suggested that the parenthetical was wisely included in the legislation to remove "any doubt regarding the meaning of the word 'written.'"[171]

The law is the same today. Comment (d) to article 1577 provides that for notarial wills, "the form of the writing (typewritten, mimeographed or any other form) is immaterial."[172] Black's Law Dictionary defines a writing as "[a]ny intentional recording of words in a visual form, whether in handwriting, printing, typewriting, or any other tangible form that may be viewed or heard with or without mechanical aids."[173]

Although wills in Louisiana are most often written in English, "there is no requirement that the testament be in the English language, or even in Roman characters."[174] Older examples in Louisiana jurisprudence provide examples of enforceable wills written in French.[175] Indeed, wills could presumably be written in any language, even in code or a made-up language, such as Esperanto or even Klingon.[176] As the comments to the Louisiana Civil Code indicate, "[s]o long as it is written in a language that the testator can read and understand, the protections to assure verity of the provisions are satisfied."[177]

Despite the clarity of the current "writing" requirement, an oral will could still have some effect today. An often forgotten provision in the Louisiana Civil Code provides that a natural obligation exists "[w]hen the universal successors are not bound by a civil obligation to execute the donations and other dispositions made by a deceased person that are null for want of form."[178] Thus, oral testaments—and indeed any testament null for want of form—impose a natural obligation upon the testator's universal successors to execute the donations mortis causa that the

170. LA. REV. STAT. § 9:2442 (repealed).

171. *Louisiana Legislation*, *supra* note 49, at 32.

172. LA. CIV. CODE art. 1577 cmt. (d).

173. *Writing*, BLACK'S LAW DICTIONARY (10th ed. 2014).

174. LA. CIV. CODE art. 1577 cmt. (d). This is a notable improvement over the Roman requirement that "the whole will must be in Latin." BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 258 (1962).

175. *See, e.g.*, Lagrave v. Merle, 5 La. Ann. 278 (La. 1850).

176. *See* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 251 (1937).

177. LA. CIV. CODE art. 1577 cmt. (d).

178. *Id*. art. 1762(3).

decedent intended. It is consequently worth noting that although a disappointed legatee could not successfully sue for enforcement of such a donation, any performance by the decedent's universal successors could not be reclaimed, and promises by them to the legatees to discharge the legacies could be enforceable as onerous contracts without need of complying with the form requirements for donations.[179] The same is true today in France.[180] So too in Italy, where article 590 of the Italian Civil Code "prevents a challenge to a will by a person who, having been informed as to the cause of invalidity, nonetheless confirms the disposition or voluntarily executes it after the testator's death."[181]

Natural obligations aside, written wills come in a variety of styles, and examples of unconventional writings that courts have accepted include wills written on a corncrib, scratched into a bedpost, written on an empty eggshell, or etched into a fender of a tractor.[182] As there is no requirement in Louisiana law that a will be written on paper—certainly the most common medium—all of the above wills should be acceptable in Louisiana, provided the other formalities are met. Although not explicitly stated, it certainly seems reasonable that the writing must take place in a medium of some level of permanence.[183] Waving a finger in the air would likely be an insufficient "writing,"[184] as would a writing in sand or "scratched on a cake of ice."[185] There seems no reason, however, that a will could not be tattooed onto a person, as some novelists have suggested.[186] The specifications provided by Atkinson in the 1940s seem equally apt today: "Ordinary wills must be in writing but may be in any language and inscribed with any material or device on any substance which results in a readable and fairly permanent record."[187]

Although it is clear today that the term "writing" is broad and includes handwritten, typewritten, and similar types of permanent recordation of words, the advent of new technology has created both new opportunities

179. *Id*. arts. 1760–61.

180. MICHEL GRIMALDI, DROIT CIVIL: LIBÉRALITÉS PARTAGE D'ASCENDANTS 259–60 (2000).

181. Braun, *Testamentary Formalities in Italy*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 139.

182. ATKINSON, *supra* note 176, at 250; SITKOFF & DUKEMINIER, *supra* note 4, at 202.

183. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. i (AM. LAW INST. 1999).

184. *Id*.

185. ATKINSON, *supra* note 176, at 249.

186. *Id*. at 250; SITKOFF & DUKEMINIER, *supra* note 4, at 164.

187. ATKINSON, *supra* note 176, at 249.

and new questions. For example, in *In re Estate of Julian Castro*, an Ohio court found that a testator validly executed a will from a hospital bed when the testator dictated his will to a friend who transcribed it onto a Samsung Galaxy tablet. The testator then signed the electronic document with a stylus. The court found that the writing requirement for a will was satisfied, even though the will was written only on an electronic medium and not on physical paper.[188] Under Louisiana law, this method should also be acceptable as a writing, provided the testator complies with the other necessary formalities.[189]

Although a will written on an electronic tablet seems to plausibly constitute a writing, some jurisdictions go even further and allow for the probate of computer files and video recordings as wills. South African courts have accepted electronic documents as wills, including emails and an unprinted computer file labeled as follows: "C:WINDOWS/MYSTUFF/MYWILL/PERSONAL."[190] Documents or writings in Australia include "not only standard paper wills, but also computer files and discs, microfiches, photographs, text messages on mobile phones, emails, as well as video and audio tapes."[191] New Zealand law is similarly expansive, but it excludes "video and audio-taped wills."[192] Even in the United States, courts have had to consider whether a will recorded on video is a "writing" under the wills statute. Namely, in *In re Estate of Reed*, the Wyoming Supreme Court considered whether the holographic will statute allowed the probate of a tape recording that the testator sealed in an envelope upon which the testator had written, "Robert Reed To be played in the event of my death only! (signed) Robert G. Reed."[193] First, the court disregarded the envelope, noting that "[t]his writing standing alone has no testamentary consequence, and cannot be considered a will."[194] Although voice recordings may demonstrate many of the same identifying functions as a writing, the court noted that:

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188. *In re* Estate of Javier Castro, No. 2013ES11140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013).

189. For discussion of this issue under German law, see Cyril H. Hergenröder, *Testieren 2.0: Errichtung eines digitalen eigenhändigen Testaments mittels Touch- oder Smartpen?*, 1 ZEITSCHRIFT FÜR ERBRECHT UND VERMÖGENSNACHFOLGE 7 (2018).

190. de Waal, *Testamentary Formalities in South Africa*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 396–97.

191. Peart, *Testamentary Formalities in Australia and New Zealand*, *in Testamentary Formalities in Austria*, *supra* note 44, at 351.

192. *Id*. at 351.

193. *In re* Estate of Reed, 672 P.2d 829 (Wyo. 1983).

194. *Id*.

> The use of a tape recording or other type of voice print as a testamentary instrument is a decision for the legislature to make. We will not enlarge, stretch, expand or extend the holographic will statute to include a testamentary device not falling within the express provisions of the statute.[195]

The court reached this conclusion, even though the Wyoming law of evidence defines a "writing" or "recording" as "letters, words, sounds or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation."[196] This definition, in the court's view, was not intended to change the meaning of similar terms in the law of wills.

In Austria, it is "not possible to establish a will in electronic form."[197] It is doubtful under Louisiana law that one could stretch the meaning of the term "writing" to include a video recording, although the requirement of a signature would likely prove even more problematic.[198] Even though a video recording could achieve the same level of permanence as a writing and could plausibly identify the testator's intent for the recording to be his will, such an expansion of the term seems outside the purview of the courts and better addressed at the legislative level.

B. Signature

In addition to the writing requirement, all wills—olographic and notarial—must be signed by at least the testator, although notarial wills require additional signatures of a notary and two witnesses. Once again, however, one must pause to consider the purpose of the testator's signature in addition to its parameters. In terms of purpose, this requirement seems benign. After all, every instrument under "private signature" must be signed,[199] and the signature requirement seems reasonable because it, at a minimum, helps "link the will with the testator" and fulfills the evidentiary and cautionary functions.[200]

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195. *Id*.

196. *Id*.

197. Christiane C. Wendehorst, *Testamentary Formalities in Austria*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 225.

198. ATKINSON, *supra* note 176, at 250.

199. Pintens, *Testamentary Formalities in France and Belgium*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 60.

200. MCGOVERN, ET AL., *supra* note 4, at 202

To be sure, the testator's signature serves at least three important purposes. First, a signature helps to identify the testator as the author of the document. If a will were drafted but not signed, the question would exist as to whom the will was connected with. Second, the existence of a signature indicates that the author not only has drafted the document but also has adopted it and taken ownership of it. An unsigned painting, for example, could be evidence that a painter, although the creator of the work, is dissatisfied with the work and does not wish to be associated with it. The signature on the will, in the words of one court, is necessary "to make certain that [the document] constitute[s] [the decedent's] last will."[201] Third, a signature communicates finality and indicates that the testator has completed the document. Again, analogizing to a painting, when the painter signs his work he indicates in some form that he is content with his creation, and it has achieved some level of finality. The signature "serves to distinguish the final will from a preliminary draft, an incomplete document, or scribbled thoughts about how the will might take shape in the future."[202]

Louisiana law has been relatively consistent on this topic. A will without a signature has no effect. European civil law systems are generally in accord.[203] Common law sources generally agree as well. The Restatement, which takes a permissive approach to will formalities, notes that "[a]mong the defects in execution that can be excused, the lack of a signature is the hardest to excuse. An unsigned will raises a serious but not insuperable doubt about whether the testator adopted the document as his or her will."[204] Although some courts in extreme cases have probated unsigned wills,[205] Louisiana courts generally have not. This is true even if the testator has sealed his unsigned will inside of an envelope and thereafter signed the envelope. Such an action has been held "not [to] constitute a sufficient signature to the will."[206] Only in a very idiosyncratic case has a Louisiana court allowed the probate of a document as a will if the document does not contain a signature. For example, in *Hamilton v. Kelley*, the siblings of a testator removed the signature from his olographic will to prevent its probate in favor of one nephew and in a putative attempt

201. Succession of Fitzhugh, 127 So. 386 (La. 1930).

202. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. j (AM. LAW INST. 1999).

203. Fassberg, *supra* note 146, at 639.

204. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 cmt. b.

205. *See, e.g.*, *In re* Anton, 2015 WL 6085394 (N. J. Super. Ch. Div. 2015).

206. *In re* Poland's Estate, 68 So. 415 (La. 1915).

to preserve familial harmony.[207] The court concluded that "[i]n the absence of a showing that the signature was removed pursuant to the testator's request to revoke the will, the removal of the signature is ineffective in law."[208] Consequently, the court probated the unsigned olographic will because "the removal of a testator's signature by a third party cannot operate to invalidate the olographic testament."[209]

1. What Is a Signature?

The mere existence of the testator's name on a will is not necessarily a signature. The typewritten title of a document indicating that it is "The Last Will and Testament of John Smith" is not necessarily a signed will merely because John Smith's name is printed in the title. In fact, not even "[a] person's name written in his or her own handwriting is . . . necessarily a signature."[210] One may include one's name in print or in handwriting in the exordium to a will, which may or may not constitute a signature. For example, a will that begins, "I, *John Smith*, being of sound mind and body, hereby make this my last will and testament" may or may not be signed. If there is evidence that the testator adopted the document as his will and viewed it as complete, then the name in the exordium should be treated as a signature.[211] Such could be the case when the testator asks witnesses to sign the document and indicates that he adopts the document as his will.[212] In other instances, such as when the document is merely found in a desk drawer, the same writing may not be a signature. In short, "[t]o be a signature, the testator must write his or her name with the intent of adopting the document as his or her own."[213]

Ideally, a testator would sign his full legal name at the end of the testament with the intent of adopting the document as his will. Unfortunately, "best practices" are often not followed, and courts are frequently left to interpret the testator's name written in some abbreviated form in a place other than at the bottom of the testament. Undoubtedly, "*John Smith*" could be a sufficient signature, even if the testator's full legal name is "*John Robert Smith III*." In fact, "*Jack Smith*" or "*J. Smith*" could also be sufficient and meet the above requirements of a signature. Without

207. Hamilton v. Kelley, 641 So. 2d 981 (La. Ct. App. 2d Cir. 1994).
208. *Id*.
209. *Id*.
210. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. j (AM. LAW INST. 1999).
211. *Id*. § 3.1 cmt. k.
212. *Id*.
213. *Id*. § 3.1 cmt. j.

exactly equating a "signature" and a "mark," the Louisiana Civil Code allows a testator to "affix his mark . . . where his signature would otherwise be required" in instances where a testator cannot sign his name, indicating perhaps a flexible and liberal approach to the signature requirement.[214] The Restatement provides similarly in stating that "[s]ignature by mark or cross is sufficient . . . . So also is a signature by a term of relationship (such as 'Dad,' 'Mom,' or 'Auntie'), abbreviation, nickname, pet name, a first name, a last name, initials, or pseudonym, or even by fingerprint or seal."[215] Black's Law Dictionary also provides that a signature is a "person's name or mark written by that person or at the person's direction; esp., one's handwritten name as one ordinarily writes it, as at the end of a letter or a check, to show that one has written it."[216] Atkinson similarly observes that "[l]etters have been sustained as [signed] holographic wills though signed with an abbreviation of the first name, or initials. Even letters signed 'mother,' or with other familiar term have been held sufficient."[217] Common law authorities have declared that "[t]he testator may sign his name by writing it out in full or by abbreviating it, or by writing his initials, . . . or by using an assumed name where not done with intent to deceive."[218]

Civil law systems are also in accord. Under Brazilian law, a signature by "a pseudonym may also be sufficient if it is a name which the testator generally uses."[219] Italian law has a similar approach:

> [A] signature is valid even without the forename and surname so long as it designates with certainty the person of the testator . . . . Accordingly, . . . it is possible to sign the will by using, for instance, only the surname or the first name (whether with or without the initial of the surname) or a nickname if that is habitually used to identify the testator or even the initials of the first name and surname.[220]

Originally, French law was rigid with respect to the signature, requiring a "proper signature" and providing that merely mentioning the

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214. LA. CIV. CODE art. 1579.

215. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. j.

216. *Signature*, BLACK'S LAW DICTIONARY (10th ed. 2014).

217. ATKINSON, *supra* note 176, at 310; *see also id*. at 252.

218. SCHOENBLUM, *supra* note 4, §19.41, at 89; *see also id*. § 20.7, at 737–38.

219. Schmidt, *Testamentary Formalities in Latin America with Particular Reference to Brazil*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 103.

220. Braun, *Testamentary Formalities in Italy*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 129.

"surname and first name in the text of the will does not suffice."[221] In the modern day, however, both French and Belgian courts have taken a more flexible approach and have allowed a mere "reference to [a] family function, such as mother or grandmother" to be enough.[222] In addition, "French law is untroubled by first names or initials" as signatures.[223] A number of lower court decisions in Louisiana suggested similarly. For example, in *Succession of Squires*, the Third Circuit upheld a will that was signed on the last page but only initialed on the first.[224] The Fourth Circuit in *Succession of Armstrong* encountered the same situation and concluded the same by stating that "initials suffice for his signature . . . . There is little formality required for signatures which come in all shapes and sizes." [225] In *Balot y Ripoll v. Morina*, the Louisiana Supreme Court upheld a will of Sebastian Ripoll, who signed his will under a pseudonym, Francisco Ballesta, which he adopted for political purposes when he moved to Louisiana.[226] The Court observed: "We are not prepared to say that the testator's signature of an assumed name is sufficient in itself to vitiate the will; it is at least a sufficient *descriptio personae*, and perhaps more so here, than if he had signed it under his real name."[227]

Other legislation in Louisiana also adopts a broad definition of the signature. The Louisiana Uniform Electronic Transactions Act broadly defines an electronic signature as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." [228] Notably, however, both the federal Electronic Signatures Act and Louisiana's version of the Uniform Electronic Transactions Act are inapplicable to wills.[229] Interestingly, the same exclusion applies in the Netherlands, where the scope of the legislation on electronically signed documents also excludes wills.[230]

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221. Pintens, *Testamentary Formalities in France and Belgium*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 61.

222. *Id*.

223. *Id*.; *see also* PHILIPPE MALAURIE & CLAUDE BRENNER, DROIT DES SUCCESSIONS ET DES LIBÉRALITÉS 297 (8th ed. 2018).

224. Succession of Squires, 640 So. 2d 813 (La. Ct. App. 3d Cir. 1994).

225. Succession of Armstrong, 640 So. 2d 1109, 1110 (La. Ct. App. 4th Cir. 1994).

226. Balot y Ripoll v. Morina, 12 Rob. 552, 558 (La. 1846).

227. *Id*.

228. LA. REV. STAT. § 9:2602(8) (2018).

229. 15 U.S.C. §§ 7001, 7003(a)(1); LA. REV. STAT. § 9:2603(B)(1).

230. Kolkman, *Testamentary Formalities in the Netherlands*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 166–67.

In *Successions of Toney*, however, the Louisiana Supreme Court cast doubt upon the flexibility with which courts had previously treated signatures when it invalidated a will that was initialed rather than signed. Although the testator's full signature appeared on the final page of the will and upon an affidavit attached to the will, the testator merely initialed—rather than fully signed—the first two pages. In invalidating the will in *Toney*, the Louisiana Supreme Court reasoned as follows:

> Although signatures come in a variety of forms, and although a few appellate courts have upheld wills where some pages were initialed rather than signed, we note that La. Civ. Code art. 1557(1) unambiguously requires the testator to "sign **his name** at the end of the testament **and on each other separate page**," and merely initialing undoubtedly falls short of this requirement.[231]
>
> In this case, the first two pages of the will are not signed, but are only initialed "R.T." Further, the initials are in print rather than cursive writing . . . . Particularly where, as here, the initials are written in easily imitable print rather than cursive, we are hesitant to find that this deviation from the codal requirement is merely minor or technical. [232]

The above statements should not be read broadly by subsequent courts. There is clearly no requirement that a testator's signature be either his full legal name or that it be written in cursive.[233] Unfortunately, the Fifth Circuit has already given a broad reading to *Toney* and invalidated a will that was signed at the end but only initialed in cursive on the other three pages.[234] According to the court, "this deviation [from the requirements of the Civil Code] is material and significant."[235] In light of the prevailing understanding of the meaning of the term "signature," it is hard to imagine how this deviation was either material or significant. It is hoped that the Louisiana Supreme Court will soon clarify and realign Louisiana jurisprudence with a broad and permissive interpretation of the signature requirement that prevails in the law elsewhere. A strict interpretation of the signature requirement is a notable deviation from the law in civil law systems, common law courts, and other laws in Louisiana.

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231. Successions of Toney, 226 So. 3d 397, 404 (La. 2017).
232. *Id*. at 404 (emphasis in original).
233. Rainey v. Entergy Gulf States, Inc., 35 So. 3d 215, 225 (La. 2010).
234. Succession of Carter, __ So. 3d __, 2020 WL 2764372 (La. Ct. App. 5th Cir. 2020).
235. *Id*. at *4.

2. Location of the Signature

Moreover, Louisiana law imposes yet another signature requirement, namely, that the signature appear "at the end of the testament."[236] This requirement, however, is not a deeply historical one and does not originate in Louisiana's civil law heritage. Under Brazilian law, for example, "[n]ormally the signature is placed at the end of the document, but it is also permissible to place it elsewhere, for example at the top, in the margin, or even on the other side of the document."[237] French law contains no rules for the location of the signature, nor did early English law.[238] The English Statute of Frauds—and thus the law in many states—similarly contained no requirement as to where the signature should be placed.[239] Under such authority, in the leading case of *Lamayne v. Stanley*, an English court upheld as validly signed a will that stated as follows: "I, John Stanley, make this my last will."[240] Of course, a number of other states followed the later enacted English Statute of Wills, which required that a will be subscribed—from the Latin *subscrire*, meaning "to sign or write under."[241] Some other states, including Louisiana with its original statutory will and now its notarial will, have followed this approach. Prior to the most recent revision, however, Louisiana law historically imposed no such requirement regarding the location of the signature for an olographic will. The 1870 Louisiana Civil Code merely provided that "[t]he olographic testament is that which is written by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form, and may be made anywhere, even out of the State."[242] Today, however, for all types of wills, Louisiana requires a signature to appear "at the end of the testament."[243] Thankfully, Louisiana courts have interpreted this requirement liberally.[244]

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236. LA. CIV. CODE arts. 1575, 1577.

237. Schmidt, *Testamentary Formalities in Latin America with Particular Reference to Brazil*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 103.

238. Italian law, however, requires a signature at the end so as to indicate a "'conscious seal of the intent manifested in the document.'" Braun, *Testamentary Formalities in Italy*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 129.

239. Statute of Frauds, 1677, 29 Car. II, c.3 (Eng.); ATKINSON, *supra* note 176, at 255.

240. Lamayne v. Stanley, 83 Eng. Rep. 545 (1681).

241. ATKINSON, *supra* note 176, at 256–57.

242. LA. CIV. CODE art. 1588 (1870).

243. *Id.* arts. 1575, 1577.

244. ATKINSON, *supra* note 176, at 309; *see also* Succession of Fitzhugh, 127 So. 386 (La. 1930).

Given the new placement requirement for the signature on olographic wills, the Civil Code has adopted a permissive approach and makes clear that if the signature does appear at the end, "the testament shall not be invalid."[245] Rather, any writing appearing after the signature "may be considered by the court, in its discretion, as part of the testament."[246] For notarial wills, however, no such flexibility for the courts is written into the Civil Code. Article 1577 merely states that the testator "shall sign his name at the end of the testament and on each other separate page."[247]

The discrepancy between olographic wills in article 1575 and notarial wills in article 1577 did not always exist. In 1999, when the revision to the law on donations went into effect, article 1575 read:

> An olographic testament is one entirely written, dated, and signed in the handwriting of the testator. It is subject to no other requirement as to form.
>
> Additions and deletions on the testament may be given effect only if made by the hand of the testator.

This language, of course, is substantively the same as the 1870 Civil Code and, in fact, prior versions of the Civil Code as well. Under the prior law, the jurisprudence had imposed yet another requirement—that the will be signed at the end—and the court in *Succession of King* held invalid an olographic will that the decedent had not signed at the end.[248] Although the court observed that the Louisiana Supreme Court had relaxed the formalities for wills, the court noted that "the requirement that the testatrix's signature be affixed to the end of an olographic will has not been relaxed by the Louisiana Supreme Court."[249] Far from being an idle formality, the requirement that the testator's signature be at the end of the will, according to the court, is "to show that the provisions preceding the signature are approved by the testatrix. Furthermore, the placement of the signature at the end conclusively demonstrates that there are no other provisions."[250] In light of this requirement, the court concluded that it

245. LA. CIV. CODE art. 1575.
246. *Id*.
247. *Id*.
248. Succession of King, 595 So.2d 805, 809 (La. Ct. App. 2d Cir. 1992), *overruled on other grounds* by Act. No. 824, 2001 La. Acts 1718.
249. *Id*.
250. *Id*.

could "only speculate as to whether or not there were any other provisions in Mrs. King's will."[251]

Consequently, an amendment to article 1575 was necessary to reverse the outcome of *Succession of King*.[252] In 2001, article 1575 was amended to include the following language:

> Although the date may appear anywhere in the testament, the testator must sign the testament at the end of the testament. If anything is written by the testator after his signature, the testament shall not be invalid and such writing may be considered by the court, in its discretion, as part of the testament . . . . The date is sufficiently indicated if the day, month, and year are reasonably ascertainable from information in the testament, as clarified by extrinsic evidence, if necessary.[253]

For both olographic and notarial wills, though, the requirement remains that the will should be signed at the end. But "[w]here is the end of a will?"[254] For olographic wills, the answer may be clearer, namely, at a place on the document with no writing that follows or, put simply, the "part that is furthest from the beginning."[255] For a notarial will, however, the answer is a bit murkier. Certainly, "if a dispositive provision is clearly below or after the testator's signature, the will is not signed at the end."[256] But a notarial will in Louisiana must also include an attestation clause signed by the witnesses and the notary, which almost always follows the dispositive provisions of the testator's will. If the testator signs after the dispositive provisions, but not after the attestation clause, has he signed the will at the end?

Both the comments to Civil Code article 1577 and the jurisprudence from the Louisiana Supreme Court suggest that the end of the will is after the dispositive or appointive provisions of the will, not after the attestation clause. Specifically, comment (b) to article 1577 states that "[t]he testator need not sign after both the dispositive or appointive provisions of th[e] testament and the declaration, although the validity of the document is not affected by such a 'double' signature . . . . He need only sign at the end of the dispositive, appointive or directive provisions."[257]

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251. *Id*.
252. LA. CIV. CODE art. 1575 cmt. (2001).
253. La. Acts 2001, No. 824.
254. ATKINSON, *supra* note 176, at 257.
255. *Id*.
256. *Id*. at 258.
257. LA. CIV. CODE art. 1577 cmt. (b).

In *Succession of Guezuraga*, the Louisiana Supreme Court considered the validity of a will that had been signed at the end of the dispositive provisions but not on the last page, which contained "only the conclusion of the attestation clause."[258] Citing common law commentators, the Court noted that the attestation clause is not regarded as part of the testator's will.[259] Thus, the Court concluded, "[t]he testator does not have to sign again following the attestation clause."[260] An earlier decision by the Louisiana Supreme Court on the same issue regarding statutory wills was similarly decided,[261] although the lower courts had indicated to the contrary.[262] The result in *Guezuraga* is to be celebrated as a sensible and flexible application of the rules on will formalities. Strictly speaking, however, one may well question the rationale. An attestation clause for a common law will is not part of the testator's will because the attestation clause is not required in other states. Under article 1577, however, it is an absolute requirement for the validity of a notarial will.

Nevertheless, one would hope that for both olographic or notarial wills, a court would uphold the will irrespective of the location of the signature—for example, the beginning, the middle, the end, the exordium clause, or the margin—if the court "is convinced that the instrument is the complete will intended by the testator."[263] The Restatement suggests a reasonable approach, namely, "[t]he testator's handwritten name in freestanding form at the end of the document unquestionably satisfies the signature requirement. The testator's handwritten name in freestanding form at any other place on the document raises an inference that the testator 'signed' the document."[264] The Uniform Law on International Wills also requires a signature at the end, but it does not consider it a core formality; thus, its placement elsewhere does not affect the validity of the will.[265]

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258. Succession of Guezuraga, 512 So. 2d 366 (La. 1987).

259. *Id*.

260. *Id*.

261. Succession of Porche, 288 So. 2d 27 (La. 1973).

262. Succession of Wilson, 213 So. 2d 776 (La. Ct. App. 2d Cir. 1968).

263. ATKINSON, *supra* note 176, at 310.

264. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. j (AM. L. INST. 1999).

265. UNIF. INT'L WILLS ACT arts. 1, 6; *see also* Zimmermann, *Testamentary Formalities in Germany*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 466.

C. Date

Finally, the requirement of a date is clearly stated as a prerequisite for both notarial and olographic wills.[266] This prerequisite is perhaps the most curious of the common formality requirements. Although legal documents—for obvious reasons—are commonly dated, few transactions specifically require the existence of a date as a condition of the validity of the transaction.[267] In the context of wills, however, the law is clear—an olographic testament has to be "entirely written, dated, and signed in the handwriting of the testator,"[268] and a notarial will "shall be prepared in writing and dated."[269] Although Louisiana law has always required a date for an olographic will, the same is not true for notarial wills. The date requirement was mysteriously added in 1999. Prior to then, the statutory will, on which the notarial will is based, did not require a date.[270]

1. What Is a Date?

In the etymological sense, the word "date" derives from the Latin word *datum*, referring to "both the time and place of the execution of an act."[271] Today, however, it is commonly accepted that the word "date" refers only to the time of an act, not the place.[272] Civil law sources agree with this modern definition, although Spanish law still requires the notary to state

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266. LA. CIV. CODE arts. 1575 & 1577.

267. Importantly, the Louisiana Supreme Court has recently upheld an undated revocation of a will because "there is no requirement in La. C.C. art. 1833 or any other article of the Louisiana Civil Code that requires an authentic act contain the date on which it was executed." Succession of Robin, 286 So. 3d 396, 402 (La. 2019).

268. LA. CIV. CODE art. 1575.

269. *Id*. art. 1577.

270. Lemuel E. Hawsey, III, *Louisiana's Statutory Will: The Role of Formal Requirements*, 32 LA. L. REV. 452, 459 (1972):

> Although neither the statute nor the jurisprudence make the date a formal requirement for validity of a statutory will, it is still necessary to determine whether some general principle at either common or civil law necessitates inclusion of the date of execution in order for a testament to be valid. The Louisiana Wills Statute had as its origin similar statutes existing in all of the common law states. It is well settled at common law that, in the absence of an express statutory requirement, the date of execution is not essential to the validity of a statutory will.

271. K.A. CROSS, CROSS ON SUCCESSIONS 200 (1894).

272. *See Date*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "date" as "[t]he day when an event happened or will happen").

the place of execution.[273] Although the Code Napoléon was silent on how specific the temporal indication must be, an ordinance from 1735, which has been kept in force by the jurisprudence, prescribes the inclusion of "the day, month, and year."[274] Louisiana law provides the same for olographic wills but does not specifically provide what constitutes a "date" in the context of a notarial will.[275] Reasoning *in pari materia*, one may assume the requirements are the same, especially in light of the attestation clause requirement for notarial wills, which requires the execution of a statement by the witnesses regarding compliance with the formalities and the "subscri[ption] [of their] names this __ day of __, ____."[276]

The date may be written in a number of forms, including: (1) words—for example, the first day of January in the year 1999; (2) numerals, such as 1/31/99, 1-31-99, or 1.31.99; (3) some combination of words and numerals—for instance, January 31, 1999, January 31, '99', or Jan. 31, '99; and even (4) colloquial expressions, such as "New Year's Day '99."[277] Questions, however, may exist as to the exact date when slash or numeric dates are used and when both the first and second numbers are below 12. For example, does "2/3/99" reference February 3, 1999, or March 2, 1999? Although it is customary in Europe and elsewhere to write the month in the second place, the custom in the United States is the opposite, and one should presume that 2/3/99 refers to February 2 and not March 3 of the year 1999.[278] In fact, an early Louisiana Attorney General Opinion counseled that "[t]he date of an olographic will should not be written in a way so frequently used in dating letters. For example, today's date should

273. 3 MARCEL PLANIOL, CIVIL LAW TREATISE, pt. 2. No. 2711, at 318 (La. State L. Inst. trans., 1959); Lapuente, *Testamentary Formalities in Spain*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 79; Pintens, *Testamentary Formalities in France and Belgium*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 465.

274. PLANIOL, *supra* note 273, at 318 n.27.

275. *Compare* LA. CIV. CODE art. 1575, *with* LA. CIV. CODE art. 1577.

276. LA. CIV. CODE art. 1577.

277. PLANIOL, *supra* note 273, at 318 n.27. *See also* Succession of Heinemann, 136 So. 51 (La. 1931) (holding that an olographic will was valid when the date was written as "Jan 2-1930," despite a challenge that the month should be written in full and that the word "Jan" was written "without even a period to denote the abbreviation"). The Court in *Heinemann* noted that "'Jan 2-1930,' means January 2, 1930, and cannot mean anything else . . . . The absence of the period to denote the abbreviation is of no importance. The abbreviation is sufficiently manifest without it." *Id*.

278. *See also* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 cmt. (e) (AM. LAW INST. 1999).

not be written '7/10/42,' but should be written 'July 10, 1942.'"[279] Eminent authority has posited that "[a]bbreviations are permissible, unless they render the date uncertain. Thus, the abbreviation 9/8/18 is insufficient because according to certain usage this would refer to September 8th and by other custom to August 9th."[280] And, in fact, early Louisiana courts invalidated wills with slash dates, such as "10/3/50,"[281] "12.10.1934,"[282] and "9/8/18,"[283] because in all such cases the date was uncertain.

Happily, under current Louisiana law, extrinsic evidence may be admitted to clarify an ambiguous date.[284] Extrinsic evidence, however, must render the day, month, and year "reasonably ascertainable."[285] In *Succession of Raiford*, the Louisiana Supreme Court considered an olographic will dated "Monday.8 1968."[286] Even after the admission of extrinsic evidence, the Court concluded that "[t]he only certain thing about the date here is the year 1968. The figure 8 could reflect either the day or the month," and Louisiana law requires the establishment of a day, month, and year.[287] Thus, "the will [was] invalid."[288] Other decisions from the Louisiana Supreme Court have been equally clear that "the month, without the day, is no date" at all.[289]

2. Location of the Date

Originally, there was some dispute regarding where the date must appear. Many French sources held the view that the date could appear anywhere in the will—the beginning, the end, or the body.[290] Some sources, however, called this into question.[291] The Louisiana Supreme Court, relying on French sources, clarified the matter and held that the date

279. La. Att'y Gen. Op. 1942, 773.
280. ATKINSON, *supra* note 176, at 308–09.
281. Succession of Mayer, 144 So. 2d 896 (La. Ct. App. 4th Cir. 1962).
282. Succession of Lasseigne, 181 So. 879 (La. Ct. App. 1st Cir. 1938).
283. Succession of Beird, 82 So. 881 (La. 1919).
284. LA. CIV. CODE art. 1575 (2018).
285. *Id*.
286. Succession of Raiford, 404 So. 2d 251, 253 (La. 1981).
287. *Id*. at 253.
288. *Id*.
289. Succession of Holloway, 531 So. 2d 431, 433 (La. 1988); Heffner v. Heffner, 20 So. 281 (La. 1896).
290. PLANIOL, *supra* note 273, at 318.
291. CROSS, *supra* note 271, at 201–02 (arguing that "[t]here would be even room to fear that the testament would be declared null if the signature precedes the date").

could appear anywhere in an olographic will.[292] Subsequent cases reaffirmed this conclusion and held that the date was sufficient if it was contained in the head of the will, at the foot, or in the body.[293] Other courts classified the location of the date in an olographic will as "immaterial."[294] Still other courts held that the date could appear even on the "reverse side" of the page on which the testator disposed of her property.[295] It is now beyond doubt that the location of the date in an olographic will is unimportant and that the date "may appear anywhere in the testament."[296] In fact, article 1575 of the Louisiana Civil Code was revised in 2001 to codify jurisprudence holding that the location of the date in a testament is irrelevant. One presumes that the same rule would and should apply in a notarial will, although the Civil Code is silent on this matter.

3. The Need for a Date?

Although the rules for the location and specificity of a date are clear, what remains to be ascertained is why a date is required at all. Some justifications that scholars have offered include the importance of ascertaining the order of multiple wills and the need to "determine whether the will was made while the testator was competent."[297] Although these justifications are undoubtedly valid, many questions remain. For instance, suppose a testator makes two wills on the same day. Should the exact time be required as part of the date to avoid uncertainty as to the order?[298] More importantly, why should a will be invalid due to the absence of a date or an imperfect date when no question exists regarding the testator's capacity or the existence of another will? Perhaps most bizarrely, Louisiana courts have found that as long as a will is dated, it does not matter if the date is correct.[299] In *Succession of Roniger*, the court allowed oral testimony to

292. Succession of Fuqua, 27 La. Ann. 271, 273 (1875) (stating that "[i]t is not essential that the date to an olographic will should precede the signature; it may be placed below").

293. Jones v. Kyle, 123 So. 306 (La. 1929).

294. Zerega v. Percival, 15 So. 476 (La. 1894).

295. Succession of Barnett, 245 So. 2d 418 (La. Ct. App. 2d Cir. 1971).

296. LA. CIV. CODE art. 1575 (2019).

297. PLANIOL, *supra* note 273, at 319; *see also* MALAURIE & BRENNER, *supra* note 223, at 295.

298. Pintens, *Testamentary Formalities in France and Belgium*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 59 (noting that the hour is not required as part of the date for a holographic will).

299. Succession of Roniger, 706 So. 2d 1025 (La. Ct. App. 4th Cir. 1998). *But see* PLANIOL, *supra* note 273, at 319 ("A false date and an incomplete date are equivalent in that they both cause a nullity of the will. The case law is well

establish that a will dated December 12, 1996—10 months after the decedent died—was actually executed on January 12, 1996.[300] Similarly, in *Succession of Dawson*, the court probated a will and allowed testimony from the drafter of a notarial will that was dated February 28, *2103*.[301] One wonders what help a false date would be in ascertaining the order of multiple wills or the timing of the testator's capacity. If extrinsic evidence is allowed when a date is wrong, incomplete, or unclear, why is it not similarly allowed when a date is absent? Louisiana courts should be praised for thinking expansively and avoiding unnecessary formalism in many instances, but the approach on this issue has not always been consistent. Some courts have held invalid wills that contain dates if the dates are illegible.[302] Other courts, however, have been more liberal with this requirement and found that a will can be valid even if it is dated after the will is completed[303] or if it contains multiple dates because it was written on different days.[304]

Be that as it may, Louisiana law still requires a date, although this was not always the case in every instance. In *Succession of Gordon*, the Louisiana Supreme Court considered "whether the omission of the day of the month in the attestation clause invalidates" a statutory will.[305] Although the Court noted that it is "not only desirable but legally advantageous that this type of will and all wills be dated," it held that statutory wills did "not require a date in the testament" for the will to be valid.[306] Shortly thereafter, however, the legislature amended the statute to provide that a statutory will "shall be dated."[307] Today, Louisiana jurisprudence is clear that a date is still essential for a will.[308] Although "[e]xtrinsic evidence may be considered to clarify an ambiguous date, . . .

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established in that sense. It has been criticized acidly as formalism and legalism.").

300. *Roniger*, 706 So. 2d at 1028.

301. Succession of Dawson, 210 So. 3d 421 (La. Ct. App. 2d Cir. 2016).

302. Succession of Wenling, 135 So. 21 (La. 1931).

303. Jones v. Kyle, 123 So. 306 (La. 1929); Succession of Picard, 155 So. 11 (La. 1934).

304. Succession of Fitzhugh, 127 So. 386 (La. 1930); Oroszy v. Burkard, 158 So. 2d 405 (La. Ct. App. 3d Cir. 1963).

305. Succession of Gordon, 245 So. 2d 319, 320 (La. 1971).

306. *Id.*

307. La. Acts 1974, No. 246; *see also* Succession of Holloway, 531 So. 2d 431 (La. 1988).

308. Succession of Aycock, 819 So. 2d 290 (La. 2002); Succession of Boyd, 306 So. 2d 687 (La. 1975); Succession of Lefort, 71 So. 215 (La. 1916); *In re* Succession of Lain, 147 So. 3d 1204 (La. Ct. App. 2d Cir. 2014); Succession of Holloway, 531 So. 2d 431 (La. 1988).

extrinsic evidence may not be provided for an absent date."[309] Twice now, in fact, the Louisiana Supreme Court has agreed in stating that "[a]n absent date cannot be supplied."[310] In fact, for an olographic will, a date written by one other than the testator, such as by a notary, is not valid and results in an invalid will.[311]

When the issue of a date was debated in the Louisiana State Law Institute in 1972, the Council rejected the Successions and Donations Committee's proposal and voted not to require a date in a will as a matter of substance. Wood Brown spoke eloquently and noted that to require a date for a statutory will would be "a step backward" because "[n]uncupative wills and mystic wills do not require a date."[312]

The Uniform Probate Code has also entirely abandoned the date requirement for wills.[313] The Québec Civil Code similarly no longer requires a date for a witnessed or an olographic will.[314] Common law authority has also stated that a "date is not an essential part of the will," and thus a "will is not rendered invalid" by an erroneous date or no date at all.[315] Louisiana law, however, still clings to the requirement of a precise date that specifies the day, month, and year.[316] Although French law in principle contains the same requirement, the modern tendency of French courts is to require a date "only if there is a problem concerning capacity or chronology, and the will is only void when, due to an incomplete date, it is impossible to determine if the will was written when the testator had capacity or to chart the order of competing wills."[317] Although the Louisiana Civil Code allows for the date to be "clarified by extrinsic

309. *In re* Succession of Lain, 147 So. 3d 1204 (La. Ct. App. 2d Cir. 2014).

310. Succession of Boyd, 306 So. 2d 687, 692 (La. 1975); Succession of Aycock, 819 So. 2d 290 (La. 2002).

311. Succession of Aycock, 819 So. 2d 290 (La. 2002) (invalidating an olographic will where the notary had filled in the date).

312. Minutes of the April 7–8, 1972 Meeting of the Council of the Louisiana State Law Institute at 3–4; *see also* Succession of Holloway, 531 So. 2d 431, 435 (La. 1988) (C.J. Dixon, dissenting).

313. UNIF. PROB. CODE § 2-502.

314. QUÉBEC CIVIL CODE arts. 726–30; *see also* Judy Martin, *La Pertinence de l'Article 714 du Code Civil du Québec ou le Paradoxe d'un Formalisme Sujet à la Libre Interprétation des Tribunaux*, 113 REVUE DU NOTARIAT 431, 486 (2011) ("*Au Québec, la date ne constitue pas un élément essentiel du testament olographe ou devant témoins*.").

315. SCHOENBLUM, *supra* note 4, § 19.7, at 22.

316. LA. CIV. CODE arts. 1575, 1577 (2018).

317. Pintens, *Testamentary Formalities in France and Belgium*, *in* Testamentary Formalities, *supra* note 44, at 59.

evidence, if necessary,"[318] the French *Cour de Cassation* has demonstrated a willingness to accept even a completely undated will "when, on the basis of extrinsic evidence confirmed by intrinsic evidence, it can be demonstrated that the will dates from a particular period."[319] Specifically, the French court noted that despite the absence of a date, the olographic will was valid because it was not demonstrated that the will was written during a period when the testator was incapable or that the testator executed a revocatory or incompatible will.[320] Some Belgian courts have followed the French lead on this issue, and it is hoped that a Louisiana court would act similarly.

Perhaps the best approach can be observed in German law, which requires a holographic will to be "written and signed in [the testator's] own hand," but then recommends that the "testator should state in the declaration the time when (day, month and year) and the place where he wrote it down."[321] German law also sensibly provides that if the will "does not contain any information about the time when it was made and where this causes doubts about its validity, the will is to be deemed to be valid only if the necessary ascertainments about the time when it was made can be established in some other manner."[322] The Uniform Law on International Wills also requires a date but does not consider it a core formality, so its absence does not affect the validity of the will.[323] Italian law requires a handwritten date for a holographic will to be valid but treats a will as merely voidable, rather than void, in the absence of a date.[324]

Louisiana's codal insistence on a date, although motivated by good reasons, now seems overly strict and out of step with the modern approach to will formalities in both civil and common law jurisdictions. Unlike other requirements that ensure validity and authenticity of the testament, the date requirement seems useful, but it is only necessary in isolated cases. Accordingly, "when the date is not needed to guarantee validity, because there are no problems concerning capacity or competing wills, it does not

318. LA. CIV. CODE art. 1575.

319. Pintens, *Testamentary Formalities in France and Belgium*, *in* Testamentary Formalities, *supra* note 44, at 60.

320. Cass. 1re civ., 10 Mai. 2007, No. 05-14366.

321. BÜRGERLICHES GESETZBUCH [BGB] § 2247(1), (2).

322. *Id*. § 2247(5).

323. UNIF. INT'L WILLS ACT arts. 1, 7; *see also* Zimmermann, *Testamentary Formalities in Germany*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 466.

324. Braun, *Testamentary Formalities in Italy*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 128.

make sense to insist on its presence."[325] Some have characterized this approach as a "logical consequence of an evolution from an absolute formal requirement to an additional guarantee of validity."[326] Justice Lemmon, dissenting in the *Raiford* case, observed similarly in concluding that a will dated only by the year ought to be valid when the purposes for which the date is required—that is, competency of the testator and order of multiple wills—are not thwarted.[327] Commentators have likewise criticized a strict rule requiring a date and argued that "[o]ne need only say that the 'date' must be sufficient to resolve those controversies present in the case for which the date was intended."[328] In short, the hypothetical value of the date requirement is far exceeded by the litigation cost imposed on challenging wills. In reviewing over a dozen cases involving challenges to wills due to an insufficient date, Justice Dixon aptly explained:

> It is interesting to note that in none of the cases involving dates in olographic wills were the dates of any significance or relevance, except to fulfill the codal requirement that the will be written, dated, and signed by the testator. It is easy to see that, without a history, it might be assumed by early jurists in Louisiana that there would be occasions the correct date of a will would be of significance, to decide, for example, it was written before or after the birth of a child, or whether it was the last of two wills, or whether it was written when the decedent had testamentary capacity. That occasion surely will arise, but it has not yet proved a significant reason for requiring precision in the date.[329]

The date requirement and the other common formalities for wills in Louisiana have been longstanding formalities for wills. The times, however, have changed. So too have the laws in other jurisdictions. It is time for the law in Louisiana to change as well to keep up not only with

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325. Pintens, *Testamentary Formalities in France and Belgium*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 60.

326. *Id*.

327. Succession of Raiford, 404 So. 2d 251 (La. 1981) (Lemmon, J., dissenting).

328. H. Alston Johnson, *Successions and Donations*, 43 LA. L. REV. 585, 601 (1982).

329. Succession of Boyd, 306 So. 2d 687 (La. 1975); *see also Succession of Raiford*, 404 So. 2d at 254 (Lemmon, J., dissenting) (arguing that a will dated "1968" should be valid because it establishes "the point in time of its making sufficiently to show that this will was made later than the 1963 will in which the decedent left the property to her brother").

societal developments but also with the changes in the laws in similar states and countries.

IV. SPECIAL REQUIREMENTS OF OLOGRAPHIC WILLS

In addition to the general requirements of a writing, a date, and a signature by the testator, Louisiana's rules on olographic wills also contain some additional special requirements. Specifically, under Louisiana law, an olographic will must be "entirely written, dated and signed in the handwriting of the testator . . . . The olographic testament is subject to no other requirement as to form."[330] The ease of execution for an olographic will is a notable—and somewhat surprising—departure from the strictures of any of Louisiana's prior will forms and, in fact, even from the current alternative, the notarial will. Unlike the notarial will and its "statutory" predecessor, the olographic will is purely a civil law product. Only about half of the states in the United States have adopted the "holographic" form,[331] which is common in civil law countries.[332]

As explained by one scholar:

> The dominant theory today appears to be that holographic wills as we now know of them today probably originated in the customs of the people of France during the later Middle Ages, and that these merely customary institutes were given lasting sanction in the sixteenth century when customary law was written down.[333]

After olographic wills were sanctioned by the Code Napoléon, they gradually passed into the civil law of other countries and eventually into selected common law regimes.[334]

Olographic wills, however, were not unknown even to Roman lawyers.[335] From the 5th century, the concept of a olographic will existed

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330. LA. CIV. CODE art. 1575 (2018).

331. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.2, Statutory Note (AM. LAW INST. 1999); SCHOENBLUM, *supra* note 4, § 20.2.

332. *See, e.g.*, C. CIV. art. 970 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] § 2247; CODICE CIVILE art. 602; GREEK CIVIL CODE art 1721 (Constantin Taliadoros trans., 2000); CIVIL CODE OF SPAIN art. 688 (Julio Romanach Jr. trans., 2994); QUÉBEC CIVIL CODE 726e; *but see* Kolkman, *Testamentary Formalities in the Netherlands*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 147–61.

333. Richard Helmholtz, *The Origins of the Holographic Will in English Law*, 15 J. LEG. HISTORY 97, 98 (1994).

334. *Id*. at 98.

335. *See, e.g*., Parker, *supra* note 27, at 1.

in parts of the Roman empire.[336] An imperial constitution by Valentinian III provided that a will "could be made without the presence of witnesses . . . if it was written in its entirety by the testator in his own hand."[337] This new form of will, however, was of "little consequence" because it was "only valid in the western part of the empire, and it did not make it into Justinian's codes."[338] Later, however, in Novel 114, Justinian provided that:

> If anyone who knows how to write should wish to divide his estate among his children, he must first put down the date with his signature; next he must inscribe the names of his children with his own hand; and then he must indicate the shares for which he appoints them heirs by completely writing them out, and not by merely expressing them in numerals, in order that said shares may be exactly known and free from all doubt.[339]

Despite early recognition of the olographic will under Roman law, it was not universally received early on by civil law jurisdictions. In fact, there was limited use of the olographic will in the *pays de droit écrit*, that is, the area of France governed by written, rather than customary, law prior to enactment of the Code Napoléon.[340] Such olographic wills existed in French customary law and were further endorsed in France via the *Ordonnance* of 1735.[341] When the *Code Civil* was enacted, article 969 provided that "[a] testament may be olographic, or made by public act, or in the mystic form."[342] An olographic will under the Code Napoléon was stated to be one that was "entirely written, dated, and signed by the hand of the testator."[343] It was "subject to no other form."[344] The olographic will also made its way into Scottish law, the Austrian Civil Code, and the

336. *Id*.
337. Thomas Rüfner, *Testamentary Formalities in Roman Law*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 19.
338. *Id*.
339. JUSTINIAN NOV. CONSTIT. 114, *in* S.P. SCOTT, THE CIVIL LAW (1932); Nils Jansen, *Testamentary Formalities in Early Modern Europe*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 42.
340. *See also* GRIMALDI, *supra* note 180, at 271.
341. Jansen, *Testamentary Formalities in Early Modern Europe*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 43.
342. C. CIV. art. 969 (1804) (Fr.).
343. *Id*. art. 970.
344. *Id*.

Italian Civil Code.[345] Although it was originally resisted in German law,[346] today § 2247 of the German Civil Code allows olographic wills.[347] In the modern day in France, the olographic will is heralded as the most practical form of will in France.[348] Olographic wills also exist in Latin American counties, such as Brazil, Argentina, Paraguay, Uruguay, Mexico, Panama, and Peru.[349]

From French law, the olographic will was exported to Louisiana and was enacted as part of the Digest of 1808. The drafters of the 1808 Digest, however, appended additional language providing that the olographic will could be "open or sealed," but when sealed it needed to contain a "superscription" signed by the testator stating that the document was "my olographic will or codicil."[350] Although not required, the Digest of 1808 suggested that it would be "prudent to deposit [the will] with a notary to prevent its being purloined."[351] Interestingly, when the Civil Code was revised in 1825, the original proposal of the drafters was to impose additional requirements that an olographic will "have the signatures of two witnesses, to whom the testator [had] declared that the paper which he offers them to sign is his testament."[352] The drafters explained their thought process as follows:

> It appears to us, as the art of counterfeiting writing has been carried to such an extent, that it is no longer safe to admit as certain a testament, which has no other proof of its verity than the hand-writing of the testator. A testament may be made in one or two lines . . . . To be beyond the reach of this danger, we require that the olographic testament should have the signature of two witnesses; and in order that the testator be not bound to reveal to them its contents, we do not oblige him to read it to them.[353]

The above proposal, however, was never enacted. Instead, the 1825 Civil Code adopted a streamlined version of the prior article and modeled it

345. Jansen, *Testamentary Formalities in Early Modern Europe*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 43.

346. *Id*.

347. BÜRGERLICHES GESETZBUCH [BGB] § 2247.

348. MALAURIE & BRENNER, *supra* note 223, at 254 (describing the olographic will as "*beaucoup la plus pratiquée en France*").

349. Schmidt, *Testamentary Formalities in Latin America with Particular Reference to Brazil*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 109–10.

350. LA. CIV. CODE art. 103 (1808).

351. *Id*.

352. 1 LOUISIANA LEGAL ARCHIVES 214 (1937).

353. *Id*.; *see also* Parker, *supra* note 27, at 23–28.

heavily on the French Civil Code, which requires that the will be "entirely written, dated, and signed by the hand of the testator" with no other form requirements.[354] The same provision was retained in the 1870 revision[355] and is largely reflected in current law today.[356]

A. Handwriting

Obviously, what distinguishes an olographic will from others is that the olographic will is in the handwriting of the testator.[357] Webster's Third New International Unabridged Dictionary defines handwriting as a "writing in which the hand forms the letters with a pen, pencil, stylus, or similar writing implement."[358] Black's Law Dictionary similarly defines handwriting as a "person's chirography; the cast or form of writing peculiar to a person, including the size, shape, and style of letters, and whatever gives individuality to one's writing."[359] Some have posited that the "use of hand printing or block lettering satisfies the handwriting requirement."[360] Pen, pencil, or a combination of the two should suffice as long as the testator himself utilized the medium for writing.[361] Typewritten documents or documents confected with stamps are clearly insufficient.[362] From the Anglo-American perspective, in which attested wills are the norm, the reason for allowing holographic wills is that the "testator's handwriting provides an adequate substitute for the presence of witnesses."[363] From a civil law perspective, olographic wills are not second-best substitutes to attested wills. They developed over a thousand years ago in Roman times and have long been present in civil law.

354. LA. CIV. CODE art. 1581 (1825).
355. *Id.* art. 1588 (1870).
356. *Id.* art. 1575.
357. For a recent case in which the court denied probate of a purported olographic will on the basis that the will was written by another who tried to simulate the handwriting of the testator, see Succession of Olsen, __ So.3d __, 2020 WL 465560 (La. Ct. App. 5th Cir. 2020).
358. 2 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED, 1028 (1986).
359. *Handwriting*, BLACK'S LAW DICTIONARY (10th ed. 2014).
360. SCHOENBLUM, *supra* note 4, § 20.5, at 275.
361. *Id.*; Succession of Smart, 36 So. 2d 639 (La. 1948).
362. SCHOENBLUM, *supra* note 4, § 20.5, at 275–76.
363. Helmholtz, *supra* note 333, at 97.

B. "Entirely" in the Testator's Handwriting

Under the Louisiana Civil Code, an olographic will must be "entirely" written, dated, and signed in the testator's hand.[364] Consequently, in addition to the dispositive provisions and, obviously, the signature, the date must be in testator's handwriting.[365] Although decided under the prior version of the Louisiana Civil Code, the Louisiana Supreme Court has noted that if part of the date is completed by someone other than the testator, the entire will is invalid.[366] In fact, courts have been quite rigid in requiring the date to be in the handwriting of the testator. In *Succession of Robertson*, the Court held invalid an olographic will in which the first three digits of the date—that is, 189—were in print, and the testator merely supplied the last numeral.[367] The Court reasoned that "when the printed matter is ignored," it "rendered the date nonexistent."[368] Although this result seems dictated by legislation, the policy underlying it is questionable, especially in light of the general insignificance of the date.

A question has also arisen as to the exact meaning of the word "entirely." Scholars have characterized olographic will laws that require the will to be "entirely" written in the testator's handwriting—like Louisiana's Civil Code article—as "first-generation" provisions, presumably because these types of provisions were the first kinds of olographic will statutes adopted in the United States. Obviously, the dispositive provisions, the date, and the signature—the essential elements of the will—must be in the testator's handwriting, but what if the will contains nonessential or superfluous elements that are typewritten or preprinted? Louisiana has adopted the "surplusage" approach to this problem, which, stated briefly, provides that "the portions of the document in the testator's handwriting are given effect as a holographic will if they make sense as a will standing alone."[369]

One of the earlier Louisiana cases on this matter is *Andrew's Heirs v. Andrew's Executors*, in which the Louisiana Supreme Court stated that the presence of witness signatures on an olographic will did not invalidate it merely because of the presence of writing not in the hand of the testator. The Court upheld the validity of an olographic will to which the witnesses

364. LA. CIV. CODE art. 1575 (2018).

365. *Id*.

366. Succession of Robertson, 21 So. 586 (La. 1897); *see also* ATKINSON, *supra* note 176, at 308 (citing similar court decisions from other states).

367. *Succession of Robertson*, 21 So. 586.

368. *Id*.

369. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 cmt. a (AM. LAW INST. 1999).

attested because their signatures, which were at the bottom of the will and "ma[d]e no part of it," could be ignored as surplusage, and the remainder of the document in the testator's handwriting could be probated.[370]

Similarly, in *Heirs of McMichael v. Bankston*, the plaintiff alleged that an olographic will was invalid because it was not "wholly written" by the testator.[371] Specifically, there were two words in the will, the word "to" in the sixth line and the word "acres" in the eighth line, which were apparently written by someone else.[372] Nonetheless, the Court enforced the will because "the presence or absence of the two words can have no material effect upon the meaning or contents of the will.[373] The Court noted that "we may safely . . . consider them as not written, and not impair the validity or effect of the will."[374] Similarly, in *Succession of Heinemann*, the children of the deceased, who were omitted from his olographic will, sought to annul the will on, among other grounds, the basis that the will was written on letterhead of the New Orleans Baseball and Amusement Company and the place, "New Orleans, La." was in print rather than handwritten.[375] In evaluating the arguments of the plaintiff, the Court noted that the printing of the location was not challenged by the plaintiff because the plaintiff "correctly recognized that the place where the will is written is properly no part of the date of the will and may be disregarded, as not appearing, without affecting the validity of the will."[376]

The surplusage approach, however, does not universally mandate the deletion of all preprinted material and the probate of the remaining handwritten parts of a will. In some instances, the handwritten material is insufficient to constitute an olographic will and thus cannot be given effect. In *Succession of Plummer*, the plaintiff sought to probate as an olographic will a revocable living trust with handwritten instructions designating the beneficiaries and directing the management and division of the trust upon his death.[377] The court found that the handwritten material alone did not evidence testamentary intent.[378] Unlike prior cases, the court noted that the trust instrument consisted of "several pages of printed words that are an essential part of the trust instrument."[379] The handwritten

370. Andrew's Heirs v. Andrew's Executors, 12 Mart. (o.s.) 713 (La. 1823).
371. Heirs of McMichael v. Bankston, 24 La. Ann. 451 (La. 1872).
372. *Id*.
373. *Id.* at 452.
374. *Id*.
375. Succession of Heinemann, 136 So. 51 (La. 1931).
376. *Id*. at 52.
377. Succession of Plummer, 847 So. 2d 185 (La. Ct. App. 2d Cir. 2005).
378. *Id*. at 187.
379. *Id*. at 189–90.

portion was "inseparable" from the trust, and "all pages are essential to the confection of the trust document."[380] In distinguishing it from previous cases involving preprinted stationery or letterhead, the court concluded that it could not "ignore the printed words of the trust document because they are inextricably tied to and form an integral part of the entire document, thus negating the formal requirement that the will be entirely written in the hand of the testator."[381]

Louisiana's "surplusage" approach, however, is not the only way in which preprinted matter in olographic wills could be handled. Second-generation holographic will statutes tend to be modeled on the original Uniform Probate Code provision and require only that the "signature and the material provisions" of the olographic will be in the handwriting of the testator.[382] This approach breaks from first-generation statutes and makes clear that the will need not be "entirely" in the testator's handwriting and that both the handwritten and non-handwritten portions are part of the will.[383] Even under this more permissive approach, however, questions exist as to validity of a *provision* disposing of property to a legatee where a boilerplate *portion* of the *provision* contains typewritten words of disposition, such as "give, devise, and bequeath," and only the name of the legatee and the identity of the property are handwritten.

To address the above problem, some states have enacted so-called third-generation statutes that are modeled upon a newer version of the Uniform Probate Code, promulgated in 2008. These statutes require only that the "signature and material portions of the document" be in the testator's handwriting.[384] As explained in the Restatement:

> [T]he purpose of changing from "material provisions" to "material portions" was to leave no doubt about the validity of a will in which immaterial parts of a dispositive provision—such as "I give, devise, and bequeath"—are not in the testator's handwriting. The material portion of a dispositive provision—which must be in the testator's handwriting under the Revised Uniform Probate Code—are the words identifying the property and the devisee.[385]

380. *Id*. at 190.
381. *Id*.
382. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.2 cmt. a (AM. LAW INST. 1999).
383. *Id*. § 3.2 cmt. b.
384. *Id*. § 3.2 cmt. a.
385. *Id*. § 3.2 cmt. b.

Just as with the common will formalities, the particular will formalities for olographic wills have been part of the Louisiana law for decades, if not centuries. Louisiana's interpretation of these additional formalities is somewhat traditional and has largely remained unchanged. Although comparative research does not mandate the adoption by Louisiana of the more permissive approaches taken elsewhere, practical wisdom suggests that the Louisiana experience should at least be informed by these alternative approaches.

V. SPECIAL REQUIREMENTS OF NOTARIAL WILLS

Just as for olographic wills, additional special requirements exist for notarial wills in Louisiana. Although many, if not all, of these requirements can be traced back to the statutory will, the formalities imposed for statutory wills were intended to make will execution easy and efficient, and the requirements were historically interpreted liberally to further that purpose. Despite this purpose and approach, as far back as the 1960s, commentators have noted that "the formalities prescribed [for statutory and now notarial wills] . . . continue[] to be a source of litigation."[386]

A. Signed at the End of Each Page and at the End of the Testament

The requirement that every page of the notarial will be signed appears to be a somewhat unique Louisiana rule copied, most likely, from the same innovation imposed upon statutory wills. As with the requirement of a date, it is no doubt good practice—perhaps, best practice—to sign every page of the will to eliminate any doubt as to the authenticity of the entirety of the will. One court has observed that "[t]he purpose of the requirement is to prevent fraud by the substitution of one typewritten page for another after the execution of the will by the testator."[387] Some scholars have similarly noted that "[t]he logic behind this rule is to make it impossible to remove or exchange pages."[388] Although a laudable goal, indeed, once again, Louisiana's codification of this best practice has served as an enemy of the good.

In addition, if the signing of each page of a notarial will is an absolute requirement, why then is the testator of an olographic will required to sign

386. Carlos E. Lazarus, *Successions and Donations—The Work of the Appellate Courts—1968–1969*, 30 LA. L. REV. 197, 205 (1969).

387. Succession of Hoyt, 303 So. 2d 189 (La. Ct. App. 1st Cir. 1974).

388. Vékás, *Testamentary Formalities in Hungary*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 260.

only at the end? Perhaps the handwritten nature of an olographic will is enough protection to ensure validity and authenticity, and, no doubt, olographic wills are much less likely than notarial ones to be multi-paged. But surely the existence of the notary—if not the two witnesses—provides a similar safeguard in the context of a notarial will, especially when a lawyer or notary may retain a copy of the will and could testify as to the authenticity of each page. Nonetheless, this requirement exists solely for notarial wills,[389] and, although good practice, the requirement that each page be signed has wrought substantial havoc in Louisiana law. For instance, in *Succession of Hoyt*, a Louisiana court declared invalid a two-page will that was signed only on the last page.[390] The court noted that "[t]he failure of the testator to sign each sheet is fatal to the validity of the will."[391] Similarly, in *Land v. Succession of Newsom*, the court found that failure to sign each page of a two-page will was "fatal" to the validity of the entire will.[392]

More recently, in *In re Hendricks*, the testator executed a multi-page notarial will in which it was "undisputed that [the testator] did not sign one of the pages of the . . . testament that contained dispositive provisions in favor of his three sisters."[393] In distinguishing *Succession of Guezuraga*, in which the Louisiana Supreme Court upheld a will not signed on the page containing only the "conclusion of the attestation clause," the court in *Hendricks* noted that the "attestation clause is a certificate to a will and not part of the will itself," whereas the dispositive provisions are of primary concern to the testator.[394] Thus, the court concluded that "the formalities prescribed for the execution of a testament [we]re not observed, [and, consequently,] the [entire] testament [wa]s absolutely null."[395]

Additionally, in *Successions of Toney*, the Louisiana Supreme Court invalidated a will that admittedly contained a number of deviations from the requirements for notarial wills prescribed in the Louisiana Civil Code. Notable for present purposes, however, was the Court's following observation:

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389. Pintens, *Testamentary Formalities in the France and Belgium*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 61 (noting in the context of a holographic will that a testator is not required to sign every page of the will).

390. *Succession of Hoyt*, 303 So. 2d 189.

391. *Id*.

392. Land v. Succession of Newsom, 193 So. 2d 411 (La. Ct. App. 2d Cir. 1966).

393. *In re* Hendricks, 28 So. 3d 1057, 1060 (La. Ct. App. 1st Cir. 2009).

394. *Id*. at 1063.

395. *Id*.

> [I]n this case, the first two pages of the will are not signed, but are only initialed "R.T." Further, the initials are in print rather than cursive writing. Although signatures come in a variety of forms, and although a few appellate courts have upheld wills where some pages were initialed rather than signed, we note that La. Civ. Code art. 1557(1) unambiguously requires the testator to "sign his name at the end of the testament and on each other separate page," and merely initialing undoubtedly falls short of this requirement. Particularly where, as here, the initials are written in easily imitable print rather than cursive, we are hesitant to find that this deviation from the codal requirement is merely minor or technical.[396]

Given the general flexibility of the signature requirement and the traditionally liberal application of this requirement, the outcome of *Successions of Toney* is puzzling. It is even more concerning when one realizes that the liberality with which courts have treated signatures is longstanding. Before the change to the law in 1999, Louisiana Revised Statutes § 9:2442 required that the testator "sign each separate sheet of the instrument."[397] Several Louisiana courts interpreted the signature requirement permissively. In fact, in *Succession of Butler*, the court was clear that any mark or X can constitute a signature. The court explained that "[w]e are of the opinion that the words 'signed' and 'signature' appearing in this statute do not mean that a testator must literally write his or her name. An 'X' mark, properly witnessed, fulfills the requirement thereof in this respect."[398] Another court in *Succession of Anderson* echoed this sentiment by holding:

> [W]e think an "X" mark placed on the will by the testator, with the intent that the affixing of that mark constitutes a signing of the will, fulfills the requirement that the will be signed by the testator. This is particularly true in a case such as this where the testator does not know how or is not able to sign his name.[399]

Curiously, in neither *Toney* nor *Hendricks* was there even a hint or suggestion that foul play was involved. No claim was made that someone inserted the unsigned page in the will in place of another page. Nonetheless, the courts strictly followed the written law. In fact, in both

396. Successions of Toney, 226 So. 3d 397, 404 (La. 2017).
397. LA. REV. STAT. § 9:2442 (repealed).
398. Succession of Butler, 152 So. 2d 239 (La. Ct. App. 4th Cir. 1963).
399. Succession of Anderson, 159 So. 2d 776 (La. Ct. App. 3d Cir. 1964).

Hendricks and *Toney*, the courts noted the absence of any argument of impropriety, other than, of course, failure to follow the form requirements. The *Hendricks* court, like so many courts before it, recognized the hardship but expressed concern about the slippery slope:

> The fact that there is no fraud, or even suggestion or intimation of it, will not justify the courts in departing from the codal requirements, even to bring about justice in the particular instance, since any material relaxation of the codal rule will open up a fruitful field for fraud, substitution, and imposition.[400]

Similarly, the Louisiana Supreme Court in *Toney* observed that "[a]lthough fraud was not alleged at the trial court level, signing one's name on each page of the will undoubtedly offers more heightened protection from surreptitious replacement of pages than mere initialing, particularly when the initialing is in print rather than cursive as is found here."[401]

Although some of the above judicial interpretations are undoubtedly stricter than one might hope, one can hardly fault the courts for following the law. Nevertheless, it is hard not to be reminded of the colloquy between Mr. Brownlow and Mr. Bumble in the famous novel, *Oliver Twist*, whereby the former accuses the latter of being responsible for conduct that Mr. Bumble attributes to his own wife. After being accused by Mr. Brownlow of being "the more guilty of the two, in the eye of the law; for the law supposes that your wife acts under your direction," Mr. Bumble emphatically responds: "If the law supposes that . . . the law is a ass—a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience—by experience."[402] So too should the law, in this instance, have its eyes opened by experience.

Experience has shown that although good practice would encourage the signing of every page, it should hardly be an absolute bar to a will's validity. This approach holds true especially when no fraud or similar allegation is made and when the testator made some identifying mark, such as initialing, to indicate his assent to the will's provisions. Some out-of-state practitioners explain:

> [I]t is a common or "best" practice, but not required by law, for the testator to sign or initial every page of a traditional paper will, as a low-tech safeguard against later substitution of an altered

400. *In re* Hendricks, 28 So. 3d 1057 (La. Ct. App. 1st Cir. 2009).
401. *Toney*, 226 So. 3d at 404–05.
402. CHARLES DICKENS, OLIVER TWIST 403 (1867) (Bantam Classic ed. 1981).

> page. A more extreme safeguard is to fasten the pages of the paper will together, before signing, using brass rivets or eyelets along the top.[403]

Experience from other jurisdictions and conventions is likewise illuminating. The Uniform Law on International Wills also requires a signature on every page, but it does not consider it a core formality; thus, its absence does not affect the validity of the will.[404] Similarly, Hungarian law requires that the pages be "consecutively numbered and signed by the testator," although only partial invalidity is the consequence under Hungarian law for failing to sign every page.[405] Spanish law requires that a testator sign each page only for closed or secret wills, which have all but disappeared in practice.[406] Brazilian law also requires that multi-page typed documents be only initialed on every page.[407] Dutch law provides that every page of a notarial deed must "be initialed, except, of course, for the last page which must be signed."[408] Although the French Civil Code does not require that a public will be initialed on every page by the testator, French notarial law requires that "each page be initialed by the notary and the signatories to the act under the penalty of nullity of pages of the act not initialed."[409] A recent case from the *Cour de Cassation* has made clear that in executed wills, notaries must comply not only with the French Civil Code, but also with French notarial law.[410] Thus, the court held invalid a public will that had not been initialed by the testator.[411] Louisiana law is perhaps the harshest, insofar as failure to sign, rather than initial, every single page results in complete invalidity of the will.[412] Although perhaps

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403. Jeffrey S. Dible, *"Electronic Wills" in Indiana: Answers to Frequently-Asked Questions* at 6, (on file with author).

404. UNIF. INT'L WILLS ACT arts. 1, 6; *see also* Zimmermann, *Testamentary Formalities in Germany*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 466.

405. Vékás, *Testamentary Formalities in Hungary*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 260.

406. Lapuente, *Testamentary Formalities in Spain*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 82, 89.

407. Schmidt, *Testamentary Formalities in Latin America with Particular Reference to Brazil*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 103.

408. Kolkman, *Testamentary Formalities in the Netherlands*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 167.

409. Decret, No. 71-941, art. 9, 26 Nov. 1971.

410. Cass. 1re civ., 10 Oct. 2012, No. 11-20702.

411. *Id*.; *see also* MALAURIE & BRENNER, *supra* note 223, at 300 ("*S'il comporte plusiers feuillets, tous doivent être paraphés*.").

412. Successions of Toney, 226 So. 3d 397, 404 (La. 2017).

some jurisdiction may impose an even more rigid formality on this matter than Louisiana, the present author has not found such a place or rule.

B. Executed in the Presence of a Notary and Two Witnesses

The requirements of a notary and two witnesses for notarial wills are easy to state but deceptively complex in practice. As explained below, there is ambiguity in the meaning of term "presence," which is only magnified by the double requirement of Louisiana law that the testator sign in the presence of the notary and witnesses and that they sign in the presence of the testator and each other. In addition, Louisiana wills have at times been plagued by the problem of unqualified notaries. Finally, the law has had to grapple with the correct number of qualified and disinterested witnesses.

1. The "Presence" Requirement

In Louisiana, the requirement that a notarial will be signed by a notary and two witnesses does not merely require that they must sign the will; rather, they must sign in the "presence" of the testator and each other, and the testator must sign in their "presence" as well. Although civil law nuncupative wills historically had to be dictated by the testator and written in the presence of witnesses,[413] the dual presence requirement of the current law was likely taken from statutes in other states at the time of enactment of the statutory will and probably owes its genesis to the English Wills Act of 1837.[414]

The current law, however, leaves many unanswered questions. First, why must the testator sign in the presence of the witnesses and the notary? Under prior law, a testator could execute a nuncupative will by private act outside of the presence of the witnesses if he "presented the paper" on which it was written and "declar[ed] to them that that paper contain[ed] his last will."[415] The requirement that the testator sign in the presence of the witnesses and the notary is, perhaps, the easiest of the unanswered questions to explain. It is not an uncommon requirement that documents be executed before a notary and two witnesses, commonly known as an

413. Richard v. Richard, 57 So. 28 (La. 1912) (holding a will invalid when it was not "dictated by the testator or written by the notary in the presence of the witnesses").

414. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. p (AM. LAW INST. 1999).

415. LA. CIV. CODE art. 1581 (1871) (repealed).

authentic act.[416] The purpose behind this requirement is to instill an "air of solemnity and formality created by the execution of an act before a notary and witnesses, designed to fulfill a cautionary function and induce the parties to a final reflection on the wisdom of the act."[417] Although a strong argument could be made for allowing a testator to sign his will in private and thereafter acknowledge it before a notary—or even a notary and two witnesses—such a formality, commonly known as an act duly acknowledged, would not receive the same level of proof as an authentic act[418] and cannot currently "substitute for an authentic act."[419] The Louisiana Supreme Court has held similarly in *Succession of Pope*, a case in which the testator signed his will while in his office and in the presence of two witnesses.[420] The testator thereafter "repaired to the courthouse (about two or three blocks away from the office of the deceased) where . . . [the notary] affixed his signature in the presence of the testator and . . . one of the witnesses."[421] The Court, with little discussion, declared the will invalid for failure to follow the "mandatory provisions of the statute."[422]

Second, why must the witnesses and the notary, after having witnessed the testator sign, then sign in the presence of the testator? Some have suggested that the purpose of this requirement is to make certain that the will being signed is the will of the testator. Although this argument might sound facially appealing, it does not withstand scrutiny. If the concern is that the witnesses have signed a forged document not actually signed by the testator, surely allowing the testator to acknowledge his will to the witnesses would suffice. The fact that the testator happens to be out of the room when the witnesses sign, after having heard the testator's acknowledgement and after having seen him sign, seems irrelevant. If the concern is that the "entire transaction is fictitious, it is as easy to testify to the presence of the testator as to any other facts which did not happen."[423] Moreover, "[i]f the will is the real expression of testator's wishes and his name thereto is genuine, it is difficult to see what opportunity there is for substitution by permitting the witnesses to sign out of [the testator's]

416. *See* LA. CIV. CODE art. 1833.

417. SAÚL LITVINOFF, THE LAW OF OBLIGATIONS § 12.7, *in* 5 LOUISIANA CIVIL LAW TREATISE (2001).

418. *Compare* LA. CIV. CODE art. 1835, *with* LA. CIV. CODE art. 1836.

419. LA. CIV. CODE art. 1836.

420. Succession of Pope, 89 So. 2d 894, 898 (La. 1956), *overruled on other grounds by* Succession of Jenkins, 481 So. 2d 607 (La. 1986).

421. *Id*.

422. *Id*.

423. SCHOENBLUM, *supra* note 4, § 19.120, at 210–11.

presence."[424] The real effect of this requirement, it is suggested, is to "render invalid a great many wills which are genuine expressions of the testator's wishes."[425]

Third, why must the witnesses and the notary sign in the presence of each other? Imagine a scenario in which a testator signs his will in the presence of a notary and two witnesses, after which one witness signs in the presence of all other parties but is then called away by an emergency. After the first witness leaves, the second witness signs in the presence of the testator and the notary, and the notary signs in the presence of the testator and the remaining witness. Under Louisiana law, the above will would be invalid because the second witness and the notary did not sign in the presence of the first witness, and article 1577 requires that each witness and the notary sign "[i]n the presence of the testator and each other."[426]

Again, it is worth remembering that this presence requirement is taken from the English Wills Act as it was adapted into the law of other states in the mid-20th century. Prior law on nuncupative wills did not require the witnesses to sign the will in the presence of each other. In fact, in *Succession of Bush*, the plaintiff alleged that the will was invalid because "the witnesses did not affix their names in the presence of each other."[427] The Court noted that although the requirement that the witnesses sign in each other's presence had been stated in dicta, there was "no specific provision of the Civil Code obligating the witnesses to sign in the presence of each other."[428] Nevertheless, the Court quickly dismissed the argument, as "the preponderating evidence establishe[d] that the witnesses signed in the presence of each other."[429] In *Stephens v. Adger*, the Court even more emphatically declared that a nuncupative will by private act "does not require the signing of the will by the witnesses in each other's presence" because there is "no provision requiring the witnesses to affix their signatures to the will at the same time, or that it shall be signed simultaneously or that the witnesses shall act in concert with each other."[430]

Fourth and finally, what is meant by the term "presence"? As noted by the Restatement, "[t]here are two interpretations of the presence requirement, the line-of-vision presence and the conscious-presence

424. *Id*.
425. *Id*.
426. LA. CIV. CODE art. 1577.
427. Succession of Bush, 67 So. 2d 573, 578 (La. 1953).
428. *Id*.
429. *Id*.
430. Stephens v. Adger, 79 So. 2d 491 (La. 1955).

test."[431] Under the line-of-sight test, "the witnesses [and notary] must sign within the testator's 'line of vision,'" as well as the line of vision of each other.[432] If the line-of-sight test is adopted, it is noteworthy that the literal language of article 1577—that is, "in the presence"—does not require the parties "to have watched [each other] sign, as long as [they] could have watched [each other] sign."[433] The jurisprudence, however, suggests that the presence requirement may require that the parties actually witness the signing, rather than merely finding that they could have witnessed it. In *Succession of Daigle*, the court noted that "the record supports the trial court's finding that the purported witnesses did not *actually* witness the testatrix's signature nor did they sign in the presence of the notary, the testatrix, and each other."[434]

In discussing the line-of-sight test, some authority has suggested that acts done in the same room should be prima facie evidence that they are done in the presence of the parties, whereas those done in different rooms should be prima facie evidence of the opposite.[435] Under the line-of-sight test, however:

> Two persons are [also] in the presence of each other if they are in the adjoining offices separated by a window which is raised, and through which each can see the other; or if one of them is outside the office on the street, but they can see each other through the office window.[436]

In contrast, the Restatement adopts the "conscious presence" test, rather than the "line-of-sight" test.[437] In explaining its rationale, the drafters note that:

> A person can sense the presence or actions of another without seeing the other person. If the testator and the witnesses are near enough to be able to sense each other's presence, typically by being within earshot of one another, so that the testator knows

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431. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. p (AM. LAW INST. 1999).

432. *Id*.

433. *Id*.

434. Succession of Daigle, 601 So. 2d 10, 13 (La. Ct. App. 3d Cir. 1992) (emphasis added).

435. SCHOENBLUM, *supra* note 4, § 19.122, at 215.

436. *Id*.

437. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS, § 3.1 cmt. p.

what is occurring, the presence requirement is satisfied.[438]

At least one case in Louisiana appears to have explicitly adopted the line-of-sight test. Namely, in *Succession of Smith*, a Louisiana court of appeal reversed a trial court that held invalid a will that was confected by a testator from a hospital bed and that was witnessed by two nurses, one of whom observed the testator sign not from the room itself but while standing in the doorway.[439] The court stated: "When a testator signs a will in a small hospital room, a witness may see the signing more clearly from outside of the doorway than if a testator signed the document in a much larger room in which the witness was standing at the other end."[440] Nonetheless, the court still found the will to be invalid because the notary and the witnesses signed the will later at the nurses' station and outside of the presence of the testator. Thus, even though they observed the testator sign the will, the "presence" requirement for notarial wills was not met.[441] Whichever type of presence interpretation the Louisiana courts adopt, the matter is doubly important in this state, which requires both that the testator be "[i]n the presence of the notary and two competent witnesses" and that the notary and the witnesses be "[i]n the presence of the testator and each other."[442]

The Uniform Probate Code has, by and large, eliminated the "presence" requirement altogether. Under § 2-502, the will must be signed by two witnesses, "each of whom signed within a reasonable time after the individual witnessed either the signing of the will . . . or the testator's acknowledgment of that signature or acknowledgement of the will."[443] Thus, not only does the Uniform Probate Code allow for witnesses to sign after they have witnessed the event, but it even allows them—as many states do—to sign as witnesses when the testator has only acknowledged his signature or will to them after he has executed it.[444] Moreover, the comments to the Uniform Probate Code are clear that signing "within a reasonable time after" witnessing the testator's signing or

438. *Id*.

439. Succession of Smith, 806 So. 2d 909 (La. Ct. App. 5th Cir. 2002) (invalidating a will that was signed by two witnesses when one of the witnesses testified that the witnesses were not present at the time the testator signed the will and that they signed the will later in their respective homes outside the presence of the testator).

440. *Id*. at 912.

441. *Id*.

442. *Id*.

443. UNIF. PROB. CODE § 2-502.

444. *Id*.

acknowledgment could be satisfied by a signing that occurs after the death of the testator.[445] After all, "[t]here is . . . no requirement that the witnesses sign before the testator's death."[446] In one instance, however, the Uniform Probate Code retains a "presence" requirement, namely, if the will is signed at the testator's direction by someone other than the testator. If such is the case, the person signing on behalf of the testator may only do so if he signs in the testator's "conscious presence" and at the "testator's direction."[447]

2. The Notarial Requirement

A notarial will, as its name suggests, requires the presence and signing by a notary. The office of notary is a public office appointed by the governor and conferred after an applicant has met various qualifications.[448] Notaries, as a general matter, maintain a parish-wide commission and are authorized to perform certain legal functions within the jurisdiction of their parishes.[449] Persons licensed to practice law in Louisiana and those notaries who have taken and passed the notarial examination after June 13, 2005, however, may exercise the functions of a notary public in every parish in this state.[450]

The requirement of a notary is common in Louisiana, especially for gratuitous transfers. The general rule for donations inter vivos is that they must be executed before a notary and two witnesses. The notarial will, of course, adds even more formalities, such as signing on every page and the requirement of an attestation clause. Be that as it may, some basic notarial rules are applicable for wills just the same. The notary must sign in his official capacity and not in his private capacity as a mere witness.[451] Similarly, a private witnessed writing that is subsequently acknowledged before a notary will not suffice to meet the requirements of a notarial will.[452]

Despite the commonality of the notary requirement in Louisiana, two matters merit consideration: (1) the problem of unqualified notaries; and (2) the problem of interested notaries. On occasion, courts have had to consider the effects of a notary who exercises notarial functions outside of

445. *Id*. § 2-502 cmt.
446. *Id*.
447. *Id*. § 2-502.
448. LA. REV. STAT. § 35:1 (2019).
449. *Id.* § 35:2.
450. *Id.* at 35:191(P).
451. Spanier v. De Voe, 27 So. 174 (La. 1900).
452. *Id*.

his jurisdiction or of attorneys who are disbarred or suspended from the practice of law who persist in exercising notarial functions.[453] The Civil Code purports to answer the question in article 1834 by stating that "[a]n act that fails to be authentic because of the lack of competence or capacity of the notary public . . . may still be valid as an act under private signature."[454] Eminent authority has concurred in stating that "an act executed before a notary without jurisdiction in the parish where the act takes place is not an act executed before a competent notary and therefore is not authentic."[455] Nonetheless, courts have created a safety net for some transactions pursuant to the "de facto officer" doctrine, which allows some individuals to be treated as notaries and other officers, even though "under the law . . . [they have] no right or title to that office."[456] The idea of de facto officers is well rooted in Louisiana jurisprudence and, as some have noted, dates back to 1830.[457]

As stated in jurisprudence, the de facto officer doctrine generally has three requirements: (1) "[t]he office involved must exist as a *de jure* office"; (2) "the holder must have attained that office under some color of title"; and (3) the holder "must be in actual physical possession of the office."[458] Under the first requirement, the party claiming to occupy a de facto office can only do so if a de jure office of the same title exists. For example, one cannot claim to occupy the de facto position of Holy Roman Emperor because such an office no longer exists. More pertinently, the Louisiana Supreme Court in *Garnier v. Louisiana Milk Commission* evaluated a claim by a party that he occupied a position on the Milk Commission because the statute named, as an ex officio member, the Secretary of the Louisiana State Live Stock Sanitary Board, a position to which he had been appointed.[459] Because no such position actually existed,

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453. *See, e.g.*, LA. REV. STAT. § 35:14:

> Any attorney at law, or person who was an attorney at law, who is disbarred or suspended from the practice of law due to charges filed by the Committee on Professional Responsibility of the Louisiana State Bar Association or who has consented to disbarment shall not be qualified or eligible nor shall he exercise any functions as a notary public in any parish of the state of Louisiana as long as he remains disbarred or suspended from the practice of law in Louisiana.

454. LA. CIV. CODE art. 1834 (2019).

455. LITVINOFF, *supra* note 417, § 12.21.

456. Henry J. Dauterive, Jr., Comment, *De Facto Public Officers in Louisiana*, 12 LA. L. REV. 200, 200 (1952).

457. *Id.*

458. Succession of Wafer, 715 So. 2d 672, 674 (La. Ct. App. 2d Cir. 1998).

459. Garnier v. Louisiana Milk Commission, 8 So. 2d 611 (La. 1942).

the plaintiff claimed that that he was a de facto, rather than de jure, member of the commission, as he was in possession of the office "under apparent color of title."[460] The Court denied the claim on the basis "that one may not claim to be a de facto officer unless there is a de jure office in existence."[461] In the context of wills, however, this element is rarely a problem, "given that the office of Notary Public exists by statute, [such that this] first requirement is clearly met."[462]

Under the second requirement, the holder must have attained that office under some color of title. In other words, the doctrine is only applicable for individuals who "have achieved this position . . . by virtue of some appointment or election, however irregular or informal."[463] Thus, a usurper with no legitimate claim or color of title to an office cannot utilize the de facto officer doctrine. The policy behind this requirement is that the individual claiming de facto status has some reputation for holding the office he now assumes, and the general public has acquiesced to his authority.[464] A private citizen with no colorable claim to or reputation for holding the office of notary public who takes it upon himself to notarize wills is likely not the type of person who could benefit from the de facto notary doctrine.

Under the third and final requirement, the claimant must be in actual physical possession of the office.[465] The jurisprudence has not extensively discussed this requirement, but it appears that "actual physical possession" requires a "good faith[] and faithful exercise of the functions of the office."[466] Thus, those who innocently or perhaps negligently exercise notarial functions after their right to do so has ceased likely have a valid claim to a "good faith" exercise of the functions of the notarial office.

The de facto doctrine has received regular application in relation to notarization, especially in the context of wills. For example, in *Succession of Wafer*, a notary commissioned in Natchitoches Parish notarized a statutory will in Bienville Parish—a parish where she did not have de jure authority.[467] The court noted that the prerequisites for the de facto notary doctrine were met and that the notary had on at least one other occasion notarized documents in Bienville Parish.[468] Similarly, in *Succession of*

460. *Id*.
461. *Id*.
462. *Succession of Wafer*, 715 So. 2d at 674.
463. Dauterive, *supra* note 456, at 204; *Succession of Wafer*, 715 So. 2d at 674.
464. Dauterive, *supra* note 456, at 204.
465. *Succession of Wafer*, 715 So. 2d at 674.
466. Dauterive, *supra* note 456, at 205; *Succession of Wafer*, 715 So. 2d at 674.
467. *Succession of Wafer*, 715 So. 2d at 674.
468. *Id*.

Sampognaro, the court held valid a will notarized by a disbarred lawyer by virtue of his exercise of the powers of a de facto notary.[469] In so holding, the court noted that the disbarred lawyer had applied for and received a notarial commission after his disbarment, and there was no evidence indicating that the decedent understood that the disbarred attorney was unqualified to notarize her will.[470]

The de facto notary doctrine, although routine in its application in these contexts, is not universally accepted by courts. For example, in *Succession of Plauche*, the court rejected application of the de facto notary doctrine and found invalid a will executed by an attorney who was suspended from the practice of law.[471] The court noted that the attorney remained suspended when he notarized the will—an action in violation of the law, which prohibited him from exercising notarial functions.[472] Because the attorney was prohibited from acting as a notary on the day that the will was executed, the will was not properly executed and was therefore invalid.[473]

Assuming the notary is validly commissioned, another potential stumbling block exists, namely, the prohibition that the notary to the will may not be a legatee to the will that is being notarized.[474] This issue is not new in Louisiana law. Even before a Civil Code article on the topic existed, the jurisprudence was clear that a notary to the will could not also be a legatee. In *Succession of Purkert*, the Louisiana Supreme Court explained that, even in the absence of an express prohibition in the Civil Code, a "notary public cannot serve as such in any deed to which he is a party or which is made directly to him personally," as he "acts in a quasi-judicial capacity, not only in the making of nuncupative wills by public act, but in many proceedings which are had before notaries public."[475] Cases, however, were clear that the will itself was not invalid, but the legacy to the notary was ineffective.[476] Additionally, if the notary renounced his legacy, the defect in the will was cured.[477] Current law continues the prohibition on interested notaries and now makes abundantly clear that the will is not invalid, but the legacy to the notary or the spouse

469. Succession of Sampognaro, 890 So. 2d 704 (La. Ct. App. 2d Cir. 2004).
470. *Id*.
471. Succession of Plauche, 866 So. 2d 1063 (La. Ct. App. 5th Cir. 2004).
472. *Id*.
473. *Id*.
474. LA. CIV. CODE art. 1582 (2018).
475. Succession of Purkert, 167 So. 444 (La. 1936).
476. Succession of Killingsworth, 194 So. 2d 331 (La. Ct. App. 1st Cir. 1966).
477. Succession of Rome, 478 So. 2d 1270 (La. Ct. App. 5th Cir. 1985).

of the notary is not valid.[478] There is no rule, as exists for witnesses (discussed below), that allows notaries who would otherwise be intestate heirs of the testator to continue to inherit. As the comments to article 1582 observe, the notary "performs a more solemn function than the witnesses and is a public officer. The notary remains prohibited from taking under the testament."[479]

3. The Witness Requirement

Just as with authentic acts in general, notarization alone is not sufficient for a notarial will; it also requires the signatures of two witnesses. The witness requirement for notarial wills is directly connected with the statutory will, which was a product of the Anglo-American attested will that required a will to be attested by two witnesses. The requirement of attestation by witnesses became prevalent with the Statute of Frauds of 1677.[480] Prior to then, the only requirement under the Statute of Wills of 1540 was that devises be in writing, but even then this requirement pertained only to personal property. Land was not subject to probate at all in 1677.[481] The Statute of Frauds was passed to curb fraud and forgery, which were prevalent in the 16th century, and to create a reliable substitute to probate land.[482] Despite the obvious change in the legal landscape between 1677 and the present day, two witnesses are still required today under Louisiana law. Just as with notaries, however, issues of qualifications exist, as does the concern for interested witnesses.

a. Capacity to Be a Witness

Stated simply, "[a] person cannot be a witness to any testament if he is insane, blind, under the age of sixteen, or unable to sign his name."[483] This capacity requirement is clearly designed to ensure that witnesses to wills have some minimum level of understanding of the role, an ability to read the necessary attestation clause, and the capability of signing the same attestation clause. Nonetheless, the terminology employed in article 1581 is somewhat antiquated and cryptic, particularly the reference to insanity. Although standards for capacity are common throughout the Louisiana

478. *Id*.
479. LA. CIV. CODE art. 1582 cmt. (b).
480. ATKINSON, *supra* note 176, at 17.
481. James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 551 (1990); *see also* Lindgren, *supra* note 23, at 1029–30.
482. Lindgren, *supra* note 481, at 552.
483. LA. CIV. CODE art. 1581.

Civil Code, the standard for insanity is not. Other provisions of law disqualify those who are interdicted from performing certain legal acts, but the Louisiana Supreme Court, in interpreting prior law, has held that the standards for insanity and interdiction are not the same.[484] Although article 1581 was revised as recently as 1997, the "insanity" standard appears to be a throwback from old law and prior days.

The capacity rule for witnesses in Louisiana is not derived from French law, which provides that "[w]itnesses called to be present at testaments must understand the French language and be majors, know how to sign and have the enjoyment of their civil rights. They may be of one or the other sex but a husband and a wife may not be witnesses to the same act."[485] The capacity rule in Louisiana is also different from other states where no special qualities are required, and witnesses need only be "generally competent."[486] Although some states set a minimum age of 14 or 18 to witness wills, most do not and generally allow anyone who is "able to understand the significance of an oath" to be a witness, even if the witness is a minor.[487] Additionally, for wills executed by testators who are unable to read, a witness "who is competent but deaf or unable to read cannot be a witness to [that testator's] notarial testament under Article 1579."[488] This approach seems sensible enough, as witnesses under article 1579 must listen to the reading of the will and follow along on a copy.

The rules on witness competency today are based on the rules under article 1591 from 1870.[489] Prior law made clear that the prohibition imposed was one of "absolute incapa[city]," such that violation of the rule results in an absolute nullity.[490] The same should be true today because an incompetent witness to a notarial will would mean that the will was not executed in compliance with the prescribed formalities. Unlike the de facto

484. Succession of Koerkel, 76 So. 2d 730 (La. 1954).

485. C. CIV. art. 980. The original provision in the Code Napoléon also fails to correspond to Louisiana law on this topic. *See* CODE NAPOLÉON art. 980 (1804). The de la Vergne manuscript references Spanish law and Domat, but neither are particularly good matches. *See, e.g.*, A REPRINT OF MOREAU LISLET'S COPY OF A DIGEST, *supra* note 26, at 230-32; *see also* 2 THE LAWS OF THE SIETE PARTIDAS, *supra* note 26, at 964.

486. UNIF. PROB. CODE § 2-505(a); MCGOVERN, ET AL., *supra* note 4, at 205; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. LAW INST. 1999).

487. MCGOVERN, ET AL., *supra* note 4, at 205; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS, § 3.1 cmt. (o).

488. *Id*.

489. LA. CIV. CODE art. 1591 (1870).

490. *See id.*

officer doctrine for incompetent notaries, there is no de facto doctrine for witnesses. The consequence is harsh, but a will witnessed by an incompetent witness is absolutely null.

b. "Disinterested" Witnesses

In addition to capacity, Louisiana law also requires witnesses to a will to be disinterested. Specifically, a witness may be neither a legatee nor a spouse of a legatee.[491] This prohibition is longstanding in Louisiana law. Prior to current article 1582, article 1592 of the Louisiana Civil Code of 1870 declared that for nuncupative wills, "[n]either can testaments be witnessed by those who are constituted heirs or named legatees, under whatsoever title it may be."[492] The question remained, however, as to the applicability of this prohibition to statutory wills, which originally contained no such explicit prohibition in Title 9. The Court in *Evans v. Evans* held that the prohibition in the prior article 1592 applied equally to statutory wills, and thus the entire will was invalid when a witness was interested.[493] The Court reasoned that it had previously held in *Succession of Eck* that the provisions of the Louisiana Civil Code should be incorporated into the law on statutory wills.[494] As such, the prohibition on interested witnesses applied with equal force to a statutory will.[495] In so holding, the Court reversed the lower courts, which had held merely that the legacy to the witness was invalid. The Court noted, however, that the sanction provided in the Civil Code for noncompliance with the formalities of wills is that the will is "null and void."[496]

It is not an uncommon requirement that a witness not be a legatee. French law has long prohibited interested witnesses.[497] The same is true in common law courts, where "a person who had a direct pecuniary interest in the outcome of the litigation[] was incompetent to testify."[498] The result,

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491. LA. CIV. CODE arts. 1582, 1582.1.

492. LA. CIV. CODE art. 1592 (1870).

493. Evans v. Evans, 410 So. 2d 729, 731–32 (La. 1981).

494. *Id*. (citing Succession of Eck, 98 So. 2d 181 (La. 1957)).

495. *Id*.

496. *Id*. (citing LA. CIV. CODE art. 1595 (1870)); *see also* Johnson, *supra* note 328, at 602–03 (suggesting that the solution of the court, although properly reasoned, may be "too extreme" and that perhaps legislative attention is required).

497. C. CIV. art. 975 (Fr.); *see also* Pintens, *Testamentary Formalities in France and Belgium*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 62; PLANIOL, *supra* note 273, at 330.

498. SCHOENBLUM, *supra* note 4, § 19.80, at 152; EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 5:4 (2d ed. 1999).

of course, was that the entire will could not be probated. This harsh result was changed in England by statute in 1752, such that the will was not invalid, but the legacy to the witness was voided.[499] This same approach continued in the English Wills Act of 1837.[500] These so-called "purging" statutes, which upheld the will but purged the interested legatee of his legacy, became popular throughout the United States.[501]

Of course, the "purging" rule may also be excessively onerous because children or descendants of the testator who witness a will would, even in the absence of the will, inherit from the decedent. Thus, their status as "interested" witnesses seems weaker or even nonexistent in the context in which a witness may receive more in intestacy than he would have received under the will. In fact, a witness who does not receive more under the will than he would under intestacy arguably is not an "interested" witness at all.[502] As a result:

> [M]ost American purging statues provide a partial exception for a devisee who is also an heir of the testator or a devisee under the testator's prior will. Under this exception, an heir or devisee forfeits only that portion of his or her devise that exceeds the amount that he or she would have taken by intestacy or under a prior will if the will in question were invalid.[503]

Even this prohibition, however, has been subject to criticism by scholars who have argued that "[s]ome requirements, like the one that witnesses be disinterested, probably do more harm than good; for every attempted fraud which these rules prevent, hundreds of genuine wills may be defeated by them."[504] The Uniform Probate Code has abandoned the requirement of disinterested witnesses and now provides that "[t]he signing of a will by an interested witness does not invalidate the will or any provision of it."[505] The drafters explain their rationale, which is not to "foster the use of interested witnesses," but to delete the previous penalty associated with

499. SITKOFF & DUKEMINIER, *supra* note 4, at 157.

500. Wills Act, 7 Will. 4 & I Vict. c. 26 (1837).

501. SITKOFF & DUKEMINIER, *supra* note 4, at 157; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1, at 175 (AM. LAW INST. 1999); MCGOVERN, ET AL., *supra* note 4, at 206; SCHOENBLUM, *supra* note 4, § 19.87, at 160–62.

502. MCGOVERN, ET AL., *supra* note 4, at 207; SCHOENBLUM, *supra* note 4, § 19.86, at 160.

503. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. o, at 176.

504. MCGOVERN, ET AL., *supra* note 4, at 199.

505. UNIF. PROB. CODE § 2-505(b).

the formality because it does "not increase appreciably the opportunity for fraud or undue influence."[506] After all, a legatee who is a witness to a will is "itself a suspicious circumstance" that could likely be challenged on the grounds of undue influence.[507]

Louisiana, however, goes even further in prohibiting not only legatees from witnessing wills but also spouses of legatees from witnessing wills. The prohibition on a spouse of a legatee was originally enacted in 2003 in Civil Code article 1582.1. It was not part of the prior law, and, in fact, the jurisprudence was previously clear that a legacy to the husband of a witness was not prohibited.[508] Moreover, this new prohibition was not included in the revision to the law of donations proposed by the Louisiana State Law Institute in 1997. Rather, it was added later without the input of the Law Institute. In fact, the original prohibition on spouses of witnesses was done quite inartfully and was even more restrictive than the prohibition on legacies to witnesses. It provided that "[a] spouse of a legatee may not be a witness to any testament. The fact that a witness is the spouse of a legatee does not invalidate the testament; however, a legacy to a witness' spouse is invalid."[509] The next year, the provision was modified to adopt the purging rule that was applicable for legacies to witnesses.[510] The article contains no comments to explain its rationale, and the rule contained within it is certainly not prominent in other states.

English courts, however, have held that the interested witness statute applies to spouses of legatees, and the statutory law was amended to make that clear.[511] The English Wills Act provides that:

> If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment . . . shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity

506. *Id*. § 2-505(b) cmt.
507. *Id*.
508. Succession of Eck, 98 So. 2d 181 (La. 1957).
509. La. Acts 2003, No. 707.
510. La. Acts 2004, No. 231.
511. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. o (AM. LAW INST. 1999); *see also* 7 Wm. 4 & 1 Vict., c. 26, § 15.

> thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.[512]

In the United States, however, "the spouse of a devisee is not an 'interested' witness unless the purging statute expressly voids all or a portion of a devise to a devisee if his or her spouse serves as an attesting witness."[513] Few states in the United States extend their purging statute as far. One exception is Connecticut, which provides that:

> Every devise or bequest given in any will or codicil to a subscribing witness, or to the husband or wife of such subscribing witness, shall be void unless such will or codicil is legally attested without the signature of such witness, or unless such devisee or legatee is an heir to the testator.[514]

Louisiana, of course, does the same. Few cases, however, seem to have arisen in Louisiana in which witnesses or spouses of witnesses have abused their position to obtain an improper disposition from the testator. Surely, the notary serves some protective function against witness misconduct, and one wonders whether the "interested" witnesses rule should be reexamined or at least tempered in Louisiana in light of experience both at home and in other states.

c. "Two" Witnesses and Supernumerary Witnesses

The idea of two witnesses signing the testator's will reminds one of the requirements of an authentic act, but it likely originated in the English Wills Act of 1837, which required "two or more witnesses" to attest to the testator's signing.[515] Modern American legislation almost universally requires two witnesses, although three were previously not uncommon,[516] and "a will which [wa]s subscribed by a less[er] number of competent witnesses [wa]s invalid."[517] Extra witnesses, sometimes called "supernumerary" witnesses, are acceptable,[518] and they may also receive

512. Wills Act, 7 Will. 4 & I Vict. c. 26 (1837).

513. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS§ 3.1 cmt. o.

514. CONN. GEN. STAT. § 45a-258 (2019).

515. Wills Act, 7 Will. 4 & 1 Vict. c. 26, § 9 (Eng).

516. SCHOENBLUM, *supra* note 4, § 19.75, at 144; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. o.

517. SCHOENBLUM, *supra* note 4, § 19.75, at 144.

518. MCGOVERN, ET AL., *supra* note 4, at 207.

legacies without the will being jeopardized or the legacy being purged.[519] By the same rationale, "if a will can be probated as a holograph, a devise to a subscribing witness is valid."[520]

French law still requires that public wills be executed before a notary and two witnesses, unless two notaries are present, in which case no witnesses are needed.[521] Québec law has separate types of wills, some of which can be notarized with one witness and others that can be witnessed but without the need of a notary.[522] German law does not require witnesses and allows wills under holographic form or by declaration to a notary.[523] Spanish law has virtually abolished the witness requirement for notarized wills since 1991, save very exceptional cases. The logic behind the abolition of witnesses is that "the presence of a notary more than sufficiently cover[s] the ritual role that was previously filled by witnesses."[524] Furthermore, although witnesses originally were viewed as a check on the testator in Dutch law, "this role was increasingly seen as being redundant . . . [and] the requirement of the presence of witnesses constituted a failure to appreciate the role of the notary."[525] In the Netherlands, the requirement of two witnesses was abolished for notarial deeds, other than wills, in 1971.[526] In 2003, "this requirement was finally also abolished for wills; deeds are now only executed in the presence of two witnesses if the notary so requires."[527] In a subsequent case involving a will under the old law, the Dutch Supreme Court also upheld a will executed before a notary when the witnesses were in an adjacent room and not present at the time of execution.[528] In so ruling, the court acknowledged the significance of the notary insofar as his presence, rather than that of the witnesses, was "a sufficient guarantee that the will is not void or voidable just because the witness rule has not been obeyed in the correct way."[529]

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519. *Id*.
520. *Id*.; Succession of Morgan, 938 So. 2d 196 (La. Ct. App. 1st Cir. 2006).
521. C. CIV. art. 971 (Fr.).
522. QUÉBEC CIV. CODE arts. 716 & 727.
523. BÜRGERLICHES GESETZBUCH [BGB] §§ 2231–2247.
524. Lapuente, *Testamentary Formalities in Spain*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 87–88.
525. Kolkman, *Testamentary Formalities in the Netherlands*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 168–69.
526. *Id*.
527. *Id*.
528. *Id*. at 172.
529. *Id*.

Even model legislation in America—a culture without the same historically significant role for notaries as in civil law countries—now provides that a will executed before a notary needs no witnesses at all.[530] Statutes to this effect have been adopted in Colorado and North Dakota.[531] The rationale is that the professional notary serves the same protective function under the law as witnesses, perhaps even more so. Some have even called for the abolition of witness attestation altogether because the purposes for which it was established have changed. "Fraud is rare," James Lindgren writes, "nor is attestation likely to prevent it."[532] Other scholars have noted that the witnessing requirement is not apt to prevent the fraud or forgery it is designed to prevent.[533]

C. Publication: Declared by the Testator to Be His Will

In addition to the myriad other requirements for a notarial will, Louisiana is one of the small number of states to require "publication" of a will.[534] Publication, simply stated, is "the declaration by the testator that the instrument is his will."[535] Today, publication is required only by very few states.[536] No major statutory enactment has ever required it, and it is difficult to understand today why this formality remains. Specifically, publication was not required by the English Wills Act, the Statute of Frauds, or by any version of the Uniform Probate Code.[537] Although English courts imposed such a requirement at one point, the courts have long since abandoned it.[538]

Of course, there is nothing inherently wrong with having the testator declare to the witnesses that the document is his will. In fact, it generally seems like good practice for that to occur. But why would a document that evidences testamentary intent by, among other things, stating that it is the

530. UNIF. PROB. CODE § 2-502.

531. COLO. REV. STAT. § 15-11-502; N.D. CENT. CODE § 30.1-08-02.

532. Lindgren, *supra* note 481, at 573.

533. Gulliver & Tilson, *supra* note 8, at 10–12.

534. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. h (AM. LAW INST. 1999) (noting that only a few states require publication of will to the attesting witnesses).

535. ATKINSON, *supra* note 176, at 278.

536. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS, § 3.1 cmt. h; *see generally* ARK. CODE § 28-25-103; IOWA CODE § 633.279; N.Y EST. POWER & TRUST LAW § 3-2.1; OKLA. STAT. ANN. § 84:55; TENN. CODE § 32-1-104.

537. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. (h).

538. ATKINSON, *supra* note 176, at 278.

testator's last will and testament be invalid because the testator forgets to declare or signify this to the witnesses? Finding a valid policy reason strains the imagination because no other witnessed transaction requires the witnesses to know the character of the document they are witnessing. The witnesses, after all, are not attesting to the substantive contents or validity of the will. They are merely attesting to the signing by the testator. A testator's acknowledgement of his signature, however, does not meet the publication requirement, nor does a mere request by the testator that the witnesses sign the instrument.[539]

Why would it be relevant for the witnesses to know that the signature they are witnessing is on a will rather than a real estate contract? Some have suggested that perhaps the "publication" by the testator "tend[s] to fix the transaction in the witnesses' minds to call their attention to the question of mental competency of the testator."[540] But witnesses are not expected to know or understand the various nuances and differences in the substantive law of consent or capacity for wills versus real estate transactions.[541] Others suggest that some American states require "publication" in an effort to "drive home to the testator that the document being signed is the testator's will."[542] But this too is odd because ordinarily the draftsman of the will, such as a lawyer, could achieve this same end by explaining to his client that this is a will, rather than having the testator declare it to the witnesses. Writing in the 1940s, Atkinson astutely observed that any value achieved by publication "is more than overcome by the undesirability of overturning a will because the testator has omitted to declare the testamentary character or because the witnesses fail to remember this."[543] Regrettably, however, Atkinson reports that in the few states that do require publication, "absence of this formality is fatal to the validity of the will."[544]

Somewhat ironically, the publication requirement harkens back to the forms of will that Louisiana previously abrogated as unnecessarily strict and overly burdensome. Specifically, the nuncupative will—that is, the will by public declaration—surely impressed upon the testator and the witnesses that the document was the testator's will. In early Roman times, this type of will also required wax tablets and a fictitious sale, as well as a piece of bronze that was used to strike a balance prior to a declaration that the testator made before five Roman citizens beyond the age of puberty,

539. *Id*. at 280.
540. *Id*. at 279.
541. *Id*.
542. MCGOVERN, ET AL., *supra* note 4 at 209.
543. ATKINSON, *supra* note 176, at 279.
544. *Id*.

whereby he stated: "I do give and bequeath, and declare that I do so, everything written in these tablets and this wax, and do you, Roman citizens bear witness to my act."[545]

Happily, the Roman system of will-making had changed completely before the end of the Republic.[546] Even more happily, in the few states that maintain the publication requirement, the courts have read the requirement so broadly as to almost jurisprudentially eradicate it. Some commentators note that there "need be no express publication in the form of 'this is my will.' Acts and signs may be sufficient."[547] Cases from other states indicate that for the declaration to be sufficient, the witnesses must know that the document is the testator's will by some act of the testator, including acquiescence by the testator to the statement of another that the document is the testator's will.[548] Mere "[k]nowledge from another source will not suffice."[549] Despite its seeming insignificance, the publication requirement endures, and, much like the human appendix, its function and purpose remain unknown.

D. The Attestation Clause

Whereas the publication requirement seems unnecessary but innocuous, the requirement that a will contain an attestation clause has been problematic in Louisiana for over 50 years. It is time—beyond time—that this issue be remedied. Because the attestation clause is one of the necessary prerequisites to the validity of a notarial will in Louisiana, it is easy to lose sight of its general insignificance. It is a boilerplate statement signed, but probably rarely read, by the witnesses and the notary "attesting" to compliance with the will formalities. Under Civil Code article 1577, the attestation clause must state: (1) that the testator indicated that the relevant document was his will; (2) that the testator signed it at the end of each page and at the end of the will; and (3) that the notary and witnesses signed the stated attestation on the stated date in the presence of the testator and each other. Although it would always be nice to have such information spelled out in a will, it is hard to fathom the policy rationale for invalidating a will that otherwise complies with all of the formalities

545. THE COMMENTARIES OF GAIUS ON THE ROMAN LAW 2.104 at 303–04 (1869)*; see also* MCGOVERN, ET AL., *supra* note 4, at 209.

546. NICHOLAS, *supra* note 174, at 254–55.

547. ATKINSON, *supra* note 176, at 280; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. h (AM. LAW INST. 1999).

548. ATKINSON, *supra* note 176, at 280; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS, § 3.1 cmt. h.

549. ATKINSON, *supra* note 176, at 280.

but incorrectly recites the talismanic formula in the attestation clause. In other words, imagine that the testator *did* actually (1) indicate that the document was his will; (2) sign the will at the end of each page and at the end of the will; and that (3) the notary and witnesses *actually* signed the will in the presence of the testator and each other. Assume further that the attestation clause was missing certain magic words, but that the witnesses and the notary all testified that the will was otherwise properly executed. Still, under article 1577, the will would be invalid, and the testator would likely die intestate.

Similar circumstances occurred in *Howard v. Gunter*, a case from the 1960s in which a statutory will that was otherwise valid contained a statement by the notary indicating only that the will was "Sworn to and signed in the presence of me, Notary, and the [sic] these competent witnesses on this the 10th day of June, 1953. L.H. Mizell Notary Public."[550] In adopting the language and rationale of the lower court, the court of appeal noted that "'[i]n the present case, there is in reality no attestation clause within the apparent contemplation of the statute that such clause embrace a certification on behalf of all parties, the testator, witnesses, and notary. Instead, there is only the certification of the notary.'"[551] Accordingly, the will was held invalid.[552]

Citing an earlier appellate court case, *Succession of Brown*, the Louisiana Supreme Court in *Successions of Toney* made clear that a proper attestation clause contains three requirements:

> The attestation clause set forth in the statute . . . requires *the notary and witnesses* to declare (1) the testator signed the will at its end and on each separate page, (2) the testator declared in the presence of the notary and witnesses that it (the instrument) was his will, and [(]3) in the presences of the testator and each other, they (the notary and witnesses) signed their names on a specified date.[553]

To the extent that an attestation clause fails to include one of the above elements, it is defective and noncompliant. In *Toney*, the testator's will failed to fully meet each of the three requirements because: (1) the testator initialed the pages rather than signed them; (2) the notary failed to attest that the testator declared the instrument to be his will, but the witnesses did; and (3) the witnesses failed to declare that they signed in the presence

550. Howard v. Gunter, 215 So. 2d 222, 223 (La. Ct. App. 3d Cir. 1968).
551. *Id.* at 225.
552. *Id*.
553. Successions of Toney, 226 So. 3d 397, 405 (La. 2017).

of the notary.[554] Although all of these deviations seem incredibly insignificant, the Court found the deviations to be "significant and material" and thus invalidated the will.[555]

Thankfully, two very recent court opinions from the same court on the same day have taken a very practical and sensible approach to noncompliance.[556] In *Succession of Hanna*, decided on June 26, 2019, the Second Circuit upheld a will that contained the following attestation clause:

> SIGNED AND DECLARED by testator above named in our presence to be his last will and testament and in the presence of the testator and each other we have hereunto subscribed our names on the 18th day of October, 2012 at Jonesboro, Louisiana.

Most notably, the attestation clause "does not contain a declaration by the witnesses and notary that the testator signed the will at its end and on each of its separate pages."[557] In distinguishing prior cases, including *Toney*, the court noted that there was only a single minor deviation in this case and not a multitude of errors, as in previous cases. Moreover, the court appropriately observed that there was no suggestion of fraud in this case, that the testator's signature appeared at the end of the will and on each separate page, and that the witnesses and notary were present at the execution ceremony.

Similarly, in *Succession of Pesnell*, also decided on June 26, 2019, by the Second Circuit, the court upheld a will containing the following attestation clause:

> The Testator, THOMAS EDROE PESNELL, has signed this his Last Will and Testament at the end thereof, and has declared or signified in our presence that it is his Last Will and Testament and

554. *Id*.

555. *Id*.

556. *See also* Succession of Pelfrey, 248 So 3d 607 (La. Ct. App. 2d Cir. 2018) (upholding a will and concluding that the attestation clause was in substantial compliance, even though the will "contained two attestation clauses, one for the decedent and one for the notary and two witnesses"). The *Pelfrey* case is consistent with prior jurisprudence. *See* Succession of Hebert, 101 So. 3d 131 (La. Ct. App. 3d Cir. 2012) (upholding a will with a split attestation clause), *overruled on other grounds by Successions of Toney*, 226 So. 3d 397; Succession of Edwards, 619 So. 1249 (La. Ct. App. 3d Cir. 1993) ("[I]t is well settled in Louisiana jurisprudence that a 'split' attestation clause can be valid if it complies with the requirements" of the law.); Succession of Eck, 93 So. 2d 181 (La. 1957).

557. Succession of Hanna, 277 So. 3d 438, 441 (La. Ct. App. 2d Cir. 2019).

> in the presence of the Testator and each other we have hereunto subscribed our names on this the 19th day of November, 2014.[558]

Once again, what is clearly missing is a statement attesting that the testator signed each page of the will in the presence of the witnesses and the notary. The reasoning by the court is rather abbreviated. In total, the court stated as follows:

> We note that although it is the best practice to use the sample declaration provided in La. C.C. art. 1577(2), the legislature does not mandate that this language be used. Although the attestation clause does not contain the phrase "on each other separate page," we find that this deviation is non-material in this case where the Testator's signature appears on each page of the three-page document and where the notary and witnesses attested to the Testator signing at the end of the document. We emphasize that there is a presumption in favor of the validity of testaments and find that the nonobservance of formalities in this case is not exceptionally compelling as to rebut that presumption.

Just a few months later, the Second Circuit Court of Appeal affirmed its commitment to the holdings in *Hanna* and *Pesnell*. In *Succession of Liner*, the court upheld the validity of a will, despite an attestation clause that did not recite that the will had been signed "at the end and on each other separate page."[559] The court reasoned that the testator had actually signed the will at the end and on each page and that the attestation clause "substantially complies" with the requirements of article 1579 of the Louisiana Civil Code.[560]

Although well-reasoned and agreeable in outcome, these cases do not contain evidence of testimony that the witnesses saw the testator sign each page, and one is left wondering if signatures on each page were added at the ceremony or thereafter. Moreover, if deviation for one "minor" error is allowable, why would additional "minor" errors that are equally insignificant produce a different result? After all, in *Toney*, the Court in assessing the mistakes made by the testator, noted that "although the third page of the will states it 'was signed in our [the three witnesses'] sight and

558. Succession of Pesnell, 2019 WL 2607614 (La. Ct. App. 2d Cir. 2019).

559. Succession of Liner, 285 So. 3d 63 (La. Ct. App. 2d Cir. 2019), *writ granted*, 2020 WL 965666 (La. 2020).

560. *Id*. at 68.

presence,' it does not mention that the will was signed **on each separate page** as specified in the sample attestation clause."[561]

Despite the progressive approach taken by the Second Circuit in the above cases, *Hanna*, *Pesnell*, and *Liner* unfortunately should not be read as the beginning of a new age of liberalization in will formalities. In October of 2019, just days after the *Liner* opinion was decided, the Louisiana Supreme Court issued a brief per curiam opinion reversing the court of appeal in *Hanna* and, based upon *Successions of Toney*, concluded that "the attestation clause . . . materially deviated from the requirements of La. C.C. art. 1577(2) so as to render the testament invalid."[562] To make matters even more confused, the Court denied the writ application in *Pesnell* a mere 10 days before issuing its opinion in *Hanna*, leaving the court of appeal opinion in *Pesnell* to stand.[563]

Subsequent appellate court cases have also unfortunately continued the approach of rigid adherence to the wording of the attestation clause found in the Civil Code. In *Succession of Booth*, the Third Circuit reversed a trial court's judgment ordering that the wills of two testators were "valid" and "executed according to law."[564] According to the court, both wills were absolute nullities because "the attestation clauses . . . lack[ed] the language that the wills were signed in the presence of the witnesses and the notary on each page."[565] Furthermore, in *Succession of Bruce*, the Third Circuit invalidated a will merely because the attestation clause did not recite that the testator signed the will "at the end."[566] Somewhat unbelievably, the court came to this conclusion even though the testator had actually signed the will at the end and on every page.[567] Nonetheless,

561. Successions of Toney, 226 So. 3d 397, 405 (La. 2017) (emphasis in original).

562. Succession of Hanna, 283 So. 3d 493 (La. 2019). *But see id*. (Weimer, J., dissenting) (noting that the *Hanna* case involved a single legal issue, unlike *Toney*, which involved multiple issues of noncompliance, and suggesting that the case should be docketed for full consideration).

563. Succession of Pesnell, 280 So. 3d 600 (La. 2019). On February 26, 2020, the Louisiana Supreme Court granted certiorari in *Liner*. *See* 2020 WL 965666 (La. 2020).

564. Succession of Booth, 285 So. 3d 1, 2 (La. Ct. App. 3d Cir. 2019).

565. *Id*. at 6. Importantly, in *Booth*, the court noted that there was "no dispute that Mr. and Mrs. Booth [also] failed to sign two pages of their wills." *Id*.

566. Succession of Bruce, __ So. 3d __, 2020 WL 283525 (La. Ct. App. 3d Cir. 2020). The Louisiana Supreme Court granted certiorari in this case on June 22, 2020. *See* Succession of Bruce, __ So. 3d __, 2020 WL 3446903. It is hoped that the Court will help realign Louisiana law from "strict" compliance to "substantial" compliance in this area.

567. *Succession of Bruce*, 2020 WL 283525 at *4.

according to the court, "strict adherence regarding the will's attestation clause is required for a will to be found to be in compliance," and the "words 'at the end' do not appear in the will's attestation clause."[568]

The strict compliance by courts to the talismanic language of the attestation clause is curious for multiple reasons. First, article 1577 itself provides that the exact words contained in the article are not required and that a clause that is "substantially similar" will suffice.[569] Although rules are rules, nothing requires these rules to be applied in a rigid way that disregards the practical consequences of doing so. Second, the Louisiana Supreme Court has long ago noted that the attestation clause has only "evidentiary," rather than substantive, value.[570] In *Succession of Porche*, the Court noted that "the purpose of the attestation clause is primarily to evidence, at the time the will was executed, that the statutory formalities have been satisfied."[571] The Court continued by noting that when "the instrument as a whole shows that these formalities have been satisfied, we see no reason why technical variations in the attestation clause—which is designed merely to *evidence* compliance with the formalities—should defeat the dispositive portions of an otherwise valid will."[572] Moreover, "[t]he principal function of the witnesses in the attestation requirement is to supply a *source* of proof that the testator signed what he formally indicated to be his testament."[573] Alas, Louisiana seems to have lost sight of this function. The notarial will—and the statutory will from which the notarial will was taken—was meant as "a means of evading the rigid standards of form required of civil law testaments."[574] Today, however, the notarial will seems to have taken on a rigid stricture of its own.

Louisiana is the only state to require an attestation clause as a condition of validity for a will.[575] The attestation clause originated in the

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568. *Id*. *But see id.* (Perry, J., dissenting) (arguing that the deviation in this case was "minor"). *See also* Succession of Simms, __ So. 3d __, 2020 WL 859937 (La. Ct. App. 1st Cir. 2020) (Although the court of appeal dismissed the case and remanded it because the judgment failed to contain proper "decretal language," the trial court's judgment annulled a judgment probating a will where "the attestation clause failed to sufficiently comply with the requirements" of Louisiana Civil Code article 1577.).

569. LA. CIV. CODE art. 1577(2).

570. Succession of Porche, 288 So. 2d 27 (La. 1973).

571. *Id*. at 29.

572. *Id*.

573. *Id*.

574. *Id*. at 30.

575. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. h (AM. LAW INST. 1999) (mistakenly stating that "no state requires a will contain an attestation clause"); MCGOVERN, ET AL., *supra* note 4,

statutory will requirements in the 1950s and derives from the common, but not required, practice in other states in the 1950s when the statutory will was adopted.[576] Writing as far back as the 1940s, Atkinson, as a "practical hint regarding [will] execution," recommended that "every will should contain an attestation clause," but at the same time, he was quick to note that "an attestation clause is not required for the validity of a will."[577] Rather, it can merely be "a valuable and desirable aid in the proof of facts or execution."[578] According to the Restatement, the use of an attestation clause "raises a rebuttable presumption of the truth of the recitals."[579] The reason that the attestation clause was common, but not required, in the common law was because "the attestation clause is prima facie evidence of the facts which are recited therein."[580]

The original statutory will legislation and the current law on notarial wills requires that the notary and witnesses sign a statement that the testator appropriately signed the will and declared the instrument to be his will in the presence of the witnesses and notary and that the witnesses and notaries signed their names in the presence of the testator and each other.[581] The usual common law form of attestation in the 1950s was as follows:

> On this 28th day of March, 1950, the foregoing instrument was signed, sealed, published and declared by John W. Jones, the above-named testator, as and for his last will and testament, in our presence and the presence of each of us, and we thereupon, at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.[582]

The closest civil law analogue to the common law attestation clause is the notarial paraph often included before the notary's signature on notarized documents. Spanish law requires a notary to state the place, month, and day of the document and to certify that he knows or has

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at 212 ("No state requires that wills contain an attestation clause, but their use is generally recommended by attorneys.").

576. *See* WILLIAM J. GRANGE ET AL., WILLS, EXECUTORS, AND TRUSTEES: A PRACTICAL WORK ON THE LAW, ADMINISTRATION, AND ACCOUNTING OF ESTATES AND TRUSTS 47 (1950).

577. ATKINSON, *supra* note 176, at 296, 301.

578. *Id*. at 296.

579. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. q (AM. LAW INST. 1999).

580. *Id*.; SCHOENBLUM, *supra* note 4, § 19.141, at 250; RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. q.

581. LA. REV. STAT. § 9:2442; LA. CIV. CODE art. 1577.

582. GRANGE, *supra* note 576, at 47.

identified the testator, who he believes has capacity.[583] Italian law also requires that the notary state that the parties complied with all of the formalities and provide the date and time of the signature and the place where the will was received.[584] Although Hungarian law previously required an attestation clause, the Hungarian Civil Code of 1960 abolished the requirement.[585] Louisiana, in its rigid insistence on an overly technical attestation clause, appears to stand alone.

VI. SPECIAL NOTARIAL WILLS

Articles 1578 to 1580.1 of the Louisiana Civil Code provide for various alternative forms of notarial wills for testators with certain disabilities that would prevent them from otherwise making a notarial will under article 1577. Many of these articles are undoubtedly beneficial additions that make wills available to those who, under prior law, may have had difficulty executing the proper will forms.

A. Literate and Sighted but Physically Unable to Sign

Because the signature requirement is so important in Louisiana law, a special provision was needed to accommodate someone who was unable to sign because of physical infirmity. The basic requirements of a signed writing from article 1577 are still required, but the execution of the will is altered. Under article 1578, in place of a signature, a testator may "affix his mark" or "direct another to assist him in affixing a mark, or to sign his name in his place."[586] Similarly, the language in the required attestation clause that is signed by the witnesses and the notary is altered to reflect the modification in the procedure for execution.[587]

The declaration required by the testator and the specifics of the attestation clause in article 1578 are held by courts to be quite important. In *Succession of Bilyeu*, the court, in applying the substantially similar provision of prior law, noted that the testator is required to "declare or signify his physical inability and that the attestation clause reflect his

583. Lapuente, *Testamentary Formalities in Spain*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 79.

584. Braun, *Testamentary Formalities in Italy*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 132. Even in Italy, however, failure to comply with these requirements makes the will only voidable, not void. *Id*.

585. Vékás, *Testamentary Formalities in Hungary*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 268.

586. LA. CIV. CODE art. 1578.

587. *Id*.

declaration."[588] The declaration was easily established in *Bilyeu* when the attorney publicly questioned the testator, and the testator, after becoming exasperated by trying to sign his name, declared that he could not.[589] In other cases, however, courts have noted that the declaration can be "a sign or gesture, such as a nod, a grunt, or a series of eye movements."[590]

In *Succession of Maquar*, the court invalidated a will executed less than six months after the new provision in article 1578 took effect. In *Maquar*, a testator, who was unable to sign his name and instead signed with an "X," failed to declare to the notary and witnesses that he could see and read and failed to include a statement that he could see and read in the attestation clause.[591] In invalidating the will, the court noted that the attestation clause in the testator's will complied with the requirements of the prior law for executing wills, but it failed to include the phrase "see and read" as required by the new law.[592] The harshness of the result in the *Maquar* case is compounded by the fact that, as is so often the case, there were "no allegations of fraud, mistake, undue influence, or that the testator was unable to see or read at the time the testament was executed."[593] Nonetheless, the will was held invalid.

Far from being an outlier, the same holding was reaffirmed in *Succession of Breaux*, whereby the court invalidated a testament made pursuant to article 1578 by a testator who had brain cancer.[594] In *Breaux*, the testator appeared to have included an appropriate attestation clause pursuant to article 1578, but the evidence suggested that the testator did not, as was required, "declare or signify that he was able to see, read, and knew how to sign his name but was unable to do so because of a physical infirmity."[595] Acknowledging that its decision "may seem to be harsh," the court followed the reasoning of *Maquar* and concluded that the result was "legislatively mandated."[596]

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588. Succession of Bilyeu, 681 So. 2d 56 (La. Ct. App. 2d Cir. 1996).

589. *Id; see also* Succession of Fletcher, 653 So.2d 119 (La. Ct. App. 3d Cir. 1995) (finding that a testator executing a statutory will was required to declare or signify his inability to sign due to a physical impairment but was not required to provide further information in the testament itself).

590. *Succession of Bilyeu*, 681 So. 2d at 58; *see also* Succession of Chopin, 214 So. 2d 248 (La. Ct. App. 4th Cir. 1968) (finding that the declaration regarding impairment may be by sign or gesture).

591. Succession of Maquar, 849 So. 2d 773 (La. Ct. App. 4th Cir. 2003).

592. *Id*.

593. *Id*.

594. Succession of Breaux, 992 So. 2d 497 (La. Ct. App. 1st Cir. 2008).

595. *Id*.

596. *Id*.

Unlike in *Maquar* and *Breaux*, the court in *Succession of Watson* upheld a will in which the decedent stated that she wished to avail herself of the provisions of article 1578, but she failed to write the prescribed wording of the altered attestation clause from that article.[597] Instead, the testator appeared to properly execute a will under article 1577, in which she signed at the end and at the bottom of every page.[598] The court noted that because "the decedent could sign her full name, and in fact, did," it declined to find the will invalid under article 1578, as it was valid pursuant to article 1577.[599]

B. Unable to Read

Just as the law provides special rules for those who are unable to sign their name, so too does it prescribe rules for will-making for those unable to read. The jurisprudence is replete with cases indicating that the ability to read is a requirement of testamentary capacity.[600] As a result, a special rule for testators who are either sight impaired or illiterate was needed. Article 1579 fills that gap.[601] Like article 1578, article 1579 builds upon article 1577 on notarial wills and provides a special execution procedure for a testator who "does not know how to read, or is physically impaired to the extent that he cannot read, whether or not he is able to sign his name."[602] Unlike article 1578, which merely tweaks the declaration and attestation clause, article 1579 provides a separate procedure whereby the will of a testator is read aloud in his presence because the testator is unable to read the document for himself.[603] The witnesses follow along, and, after

597. Succession of Watson, 253 So. 3d 867 (La. Ct. App. 2d Cir. 2018).

598. *Id*.

599. *Id*.

600. Succession of Young, 692 So. 2d 1149 (La. Ct. App. 3d Cir. 1997); Succession of Barranco, 657 So. 2d 708 (La. Ct. App. 1st Cir. 1995); Succession of Fletcher, 653 So. 2d 119 (La. Ct. App. 3d Cir. 1995); Succession of Dorand, 596 So. 2d 411 (La. Ct. App. 4th Cir. 1992); Succession of Littleton, 391 So. 2d 944 (La. Ct. App. 2d Cir. 1980); Succession of Arnold, 375 So. 2d 157 (La. Ct. App. 2d Cir. 1979).

601. Article 1579 encourages wide application by noting that a testator who could utilize either article 1577 or article 1578 to make a will can also utilize the procedure proscribed in article 1579 to execute a notarial testament. LA. CIV. CODE art. 1579(4).

602. LA. CIV. CODE art. 1579.

603. *Id*. Current law no longer requires the notary to read the will to the testator but acknowledges that someone other than the notary may perform the reading. Under prior law, the jurisprudence had held that the reading of a will by a witness rather than the notary substantially complied with the requirements of a statutory

the reading, the testator declares that he heard the reading and that it accords with his wishes.[604] He then signs the will in the ordinary process, and the notary and the witnesses sign a modified attestation clause reflecting what occurred at the will execution ceremony.[605]

This type of will is based upon the prior law in Louisiana Revised Statutes § 9:2443.[606] The jurisprudence has made clear that inability to read does not mean that the testator has vision problems or merely a difficulty in reading. A "testator who can only read his will with his eyeglasses is 'able to read' within the statute, and the testator who can only read his will with a five-power or stronger magnifying lens is also 'able to read.'"[607] A court has found that a testator was able to read if, although his eyesight is failing, he is able to "get around in his house and in his hospital room" and he can "see well enough to sign his name properly on the designated line of the will."[608] Also, in *Succession of Lanasa*, the court held that a testator who was "unable to read with the naked eye or with glasses due to his severe macular degeneration" but who could read with a reading machine was not required to make a will utilizing the special procedure in article 1579. Instead, the testator could make an ordinary notarial will under article 1577.[609] Because the general notarial will provision—and the statutory one before it—does not require a testator to read his will, it is "immaterial that [the will's witnesses] testified that the testator did not use any magnifying device in order to read the will at the time of its signing."[610] If, however, the testator is actually unable to read and does not utilize the procedure provided in article 1579, then his will is absolutely null.[611]

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will when the notary testified that he had allergies and an asthma condition that prevented him from reading the testament to the testator. *See* Succession of Harvey, 573 So. 2d 1304 (La. Ct. App. 2d Cir. 1991).

604. LA. CIV. CODE art. 1579.

605. *Id*.

606. LA. REV. STAT. § 9:2443 (repealed). Interestingly, in instances in which the testator was also unable to sign, prior law required that he "declare or signify the cause that hinders him from signing." *Id*.

607. Succession of Harris, 329 So. 2d 493 (La. Ct. App. 4th Cir. 1976).

608. Succession of Smith, 261 So. 2d 679 (La. Ct. App. 2d Cir. 1972).

609. Succession of Lanasa, 948 So. 2d 288 (La. Ct. App. 5th Cir. 2006).

610. Succession of Polk, 940 So. 2d 895, 910 (La. Ct. App. 3d Cir. 2006).

611. Succession of Graham, 803 So. 2d 195 (La. Ct. App. 5th Cir. 2001). *See also* Succession of Armand, __ So. 3d __, 2020 WL 944473 (La. Ct. App. 3d Cir. 2020) (disqualifying lawyers who drafted the will from testifying as to the decedent's ability to read when the validity of the decedent's will was challenged by asserting that the decedent was legally blind and the attestation clause did not

C. Braille

Article 1580 of the Louisiana Civil Code allows for a will to be executed in braille. This article thus allows those who are sight impaired but can read braille to execute a will. This new article "reproduces the substance of R.S. 9:2444," which allowed for statutory wills in braille form.[612] There are no reported cases under this article and very little secondary commentary. It is uncertain to what extent this type of will has been utilized.

D. Deaf or Deaf and Blind

By its terms, article 1580.1 purports to provide a mechanism for the execution of a will by one who is either deaf or deaf and blind. Although the goal of article 1580.1 is laudable, its applicability remains unclear. The current article was added in 1999, but after the law of donations revision, which occurred in 1997. Due to the delayed effective date of the general revision to the law of donations, article 1580.1 took effect at the same time as the other revisions—July 1, 1999.

Prior to the effective date of the donations revision, the Louisiana State Law Institute recognized a gap in the law for testators who were unable to both hear and see.[613] Consequently, a "technical corrections bill" for a number of overlooked items was prepared in the form of House Bill 932 of 1999.[614] The text of House Bill 932 seemed sensible enough. It provided as follows:

> A testator who is unable to hear and is also unable to read may execute a notarial testament in the form provided in this Article if he can communicate his intention to execute a testament and the dispositions of his testament to a notary public in the presence of two competent witnesses in a manner of communication that is understood by the notary and the witnesses.[615]

In other words, House Bill 932 did not prescribe a particular form of communication between the testator and the notary and witnesses, but it

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recite that the will was read aloud in the presence of the testatrix and the witnesses).

612. *Succession of Graham*, 803 So. 2d 195; LA. CIV. CODE art. 1580 cmt.

613. Kathryn Venturatos Lorio, *Successions and Donations* § 12.4, *in* 10 LOUISIANA CIVIL LAW TREATISE (2d ed. 2009).

614. H.B. 932, 1999 Leg., Reg. Sess. (La. 1999).

615. *Id.*

instead allowed for flexibility in any manner that "is understood by the notary and the witnesses."[616] The testator's desires would then be "reduced to writing" and "read aloud" by the notary to the witnesses, who would follow along on copies.[617] Of course, the testator would not be able to hear the reading, given his impairment, but the witnesses would hear it, and the testator had communicated his original intentions in the witnesses' presence.[618] After the reading, the notary and the witnesses were required to communicate to the testator that the dispositions recited were the same as those he communicated to them.[619] The testator was then required to communicate his satisfaction, and all the respective parties would sign the document with an appropriate attestation clause.[620] Some scholars have noted that this "bill appeared uncontroversial and passed the House of Representatives by a vote of 91-0, [but] it died without a hearing in the Senate Judiciary Committee."[621]

Instead, Act 745 of 1999, which was not a Law Institute product, was prepared by Senator Landry and ultimately enacted as article 1580.1.[622] Because article 1580.1 was added outside of the Law Institute process, the article contains no comments to aid in its interpretation or application. If the point of article 1580.1 is to cover the gap for testators who cannot hear and see, it is unclear how it accomplishes its purpose. By its terms, it applies "only [to] a person who has been legally declared physically deaf or deaf and blind and who is able to read sign language, braille, or visual English."[623]

First, it is unclear why a "legal declar[ation]" of deafness or deafness and blindness is required. As explained below, article 1580.1 is not the only type of will that can be made by those who are sight impaired. So, why create an alternative method of will-making only for those for who have been "legally declared" deaf or deaf and blind? Because article 1580.1 purports to provide a method available "only" to a person who has been "legally declared physically deaf or deaf and blind," it is presumably not available to those who are deaf or deaf and blind but do not possess a legal declaration to that effect.

Second, although the article purports to provide how such a will "shall be prepared," it does anything but provide clarity. Whereas articles 1578

616. *Id*.
617. *Id*.
618. *Id*.
619. *Id*.
620. *Id*.
621. Lorio, *supra* note 613, § 12.4.
622. La. Acts. 1999, No. 745.
623. LA. CIV. CODE art. 1580.1.

to 1580 build upon the foundational requirements for a notarial will provided in article 1577 and establish special execution requirements for the various alternatives, article 1580.1 is different insofar as it states both a method of *preparation* and execution of a will. It states that "[t]he notarial testament shall be prepared and shall be dated and executed in the following manner."[624] Notably absent is a statement that the will must be "prepared in writing," although, once again, the strange obsession with the date appears.[625] One might infer a writing requirement from other requirements that the "instrument" be "sign[ed] . . . at the end of the testament and on each other separate page," but inference is hardly a preferable way to delineate the drafting requirements for wills, which must be observed under the penalty of nullity. Although the article purports to provide a will that is available to someone who is "legally declared physically deaf or deaf and blind" and "who is able to read sign language, braille, or visual English," it does not provide that a will can be communicated to the notary and witnesses in sign language, braille, or visual English and then transcribed by them into writing. In fact, the article provides no method of preparation at all. Rather, article 1580.1 lists a series of specific requirements for the testator's declaration and for the witnesses' and notary's attestation clause, all of which presuppose that there is some "instrument" to be "signed" by the testator. In fact, subsection (C) of article 1580.1 seems to suggest that the only virtue of this article is not that it allows a method of preparation or execution of a will for a testator who is deaf or deaf and blind, but that it provides a special way for the testator to communicate with the notary and witnesses that the relevant instrument is the testator's will.[626] Subsection (C) of article 1580.1 provides that "the testator shall declare or signify by sign or visual English to [the notary and two competent witnesses] that the instrument is his last testament."[627] But nothing in legislation or jurisprudence, however, prescribes a particular method of communication by a testator who executes a notarial will under article 1577.

Third, it is unclear why "blind[ness]" is included in this article at all. At the time of enactment of article 1580.1, the revision already contained two proposals for the execution of wills for those who had difficulty reading. Under article 1579, a will can be read aloud in the presence of the testator and the witnesses, who would then all sign, with the testator

624. *Id*.

625. *Compare* LA. CIV. CODE art. 1580.1, *with id.* art. 1577.

626. *But see id*. art. 1580.1(D) (stating that attestation clause "shall be prepared in writing," suggesting, perhaps, by *a contrario* reasoning that the rest of will need not be).

627. *Id*. art. 1580.1(C)(1)–(2).

attesting that the reading constituted the substance of his will and the witnesses attesting to the testator's attestation. Similarly, article 1580, as previously mentioned, allows for the execution of a will in braille for those able to read braille. For those who are deaf and blind, clearly article 1579 would not be appropriate because they would be unable to hear the reading. Provided, of course, a testator could read braille, a will under article 1580 is available. Nonetheless, article 1580.1 purports to make available another form of will for those who are "legally declared deaf or deaf and blind and who [are] able to read sign language, braille, or visual English."[628] For those can read braille, this article seems duplicative. For those who are deaf, but not blind, the traditional notarial will is available, which requires reading and signing, but not hearing. For those who are deaf and blind, it is unclear how they would still be able "to read sign language . . . or visual English."

Although article 1580.1 appears to make available another form of will-making for those who are "legally declared physically deaf"—that is, sign language—it should be remembered that there is no requirement under article 1577 for the ordinary notarial will that the testator be able to hear. He needs only to know how and be able to read and sign his name and, in some way, signify that the instrument he is signing is his will. Worse yet, article 1580.1 imposes additional requirements for the drafting of the attestation clause, including the signification by the testator that the document is his will by sign language or visual English and that at least one of the witnesses be "a certified interpreter for the deaf."[629] These requirements are unfortunate because many people may know and understand sign language and be able to communicate with a hearing-impaired testator. Nothing requires a testator who speaks only French, for example, to execute his will with an attestation clause reciting that he communicated with the notary and witnesses in French. Then why impose this requirement on testators who communicate by sign language? Moreover, nothing requires a witness to a will executed by a French-speaking testator to be certified or credentialed in the French language. Then, why impose this requirement on hearing-impaired testators?

Perhaps the only virtue of article 1580.1 is that it does not require a hearing-impaired testator to make use of it to effectively execute a will. Article 1580.1, as written, is an alternative to article 1577 for certain hearing-impaired testators, not an exclusive provision that must be utilized by them. It is difficult to imagine why a hearing-impaired testator would choose the more onerous route of 1580.1 rather than the ordinary one

628. LA. CIV. CODE art. 1580.1.
629. *Id*.

under article 1577. There are no reported cases applying or interpreting article 1580.1 and no secondary commentary that sheds light upon its usage. Its application and necessity remain elusive.

VII. THE LAW OF TOMORROW: THE COMING OF DIGITAL OR ELECTRONIC WILLS?

As should be evident from the above discussion, the laws on will formalities in Louisiana are some of the most restrictive and detailed in the United States. As such, it is unlikely that Louisiana would legislatively embrace a broad conception of an electronic will at this time, although four states and now a uniform act specifically provide for the regulation and use of this new form of will.[630] The laws among this handful of states recognize that electronic wills exhibit a substantial amount of variation, some of which is explored below. Suffice it to say, however, that before embarking upon a review of these laws, an understanding of what constitutes an electronic will is necessary.

A. What Is an Electronic Will?

The term "electronic will" is subject to a variety of interpretations and could include a range of transactions from a document written on a tablet with a stylus to a typed document that is electronically stored and signed not with a traditional cursive signature, but with a symbol, process, or identifying key.[631] Under one state law, an electronic will is defined as a will that "is initially created and maintained as an electronic record; . . . contains the electronic signatures of . . . the testator . . . and . . . the attesting witnesses; and . . . contains the date and times of the electronic signatures" previously described.[632] Some of the instances of what can be considered an electronic will, such as in the *Castro* case, mentioned above, can be adequately handled under the traditional law by undertaking an examination of whether the testator has adequately "signed" a document

630. NEV. REV. STAT. § 133.085; FLA. REV. STAT. § 732.522; ARIZ. STAT. § 14-2518; IND. CODE § 26-2-8-102; UNIF. ELECTRONIC WILLS ACT (July 17, 2019).

631. *See What Is an "Electronic Will"?*, 131 HARV. L. REV. 1790, 1791 (2018) (noting that "[a]s used today, an electronic will could mean any writing along a broad spectrum from a will simply typed into a word-processing program by the testator on a computer and stored on its hard drive to a will signed by the testator with an authenticated digital signature, witnessed or notarized via webcam, and stored by a for-profit company.") (footnote omitted).

632. IND. STAT. § 29-1-21-3(10).

or whether the act executed by the testator constitutes a "writing." Other situations involving wills hosted on various platforms and utilizing identifying data or markers in place of signatures do not easily fit within existing law and might necessitate special legislation, if they are to be allowed. It is the latter situation that most of the new legislation addresses.

B. Existing Law

To date, only a few states have undertaken to enact special legislation concerning electronic wills. Although legislatures in other states have introduced legislation, cautionary forces have prevailed, and the proposals have not been enacted.[633] Even in some of the states with legislation on electronic wills, the path to legislation has not always been a smooth one. In several cases, legislation was enacted only after having been defeated the year before. Irrespective of past practices, it seems likely that with the advance of technology and now a new uniform act, enactment of special legislation is likely to grow.

1. Nevada and Florida

In 2001, Nevada was the first adopter of the electronic will legislation—perhaps as an example of the law getting ahead of the needs and desires of the citizenry. One scholar has noted that the original Nevada law was "groundbreaking," but "the technology necessary to create an electronic will in compliance with the law was not yet in existence."[634] As a result, the law was "never used."[635] Commentators have observed that the statute was designed with tech-savvy California clients in mind, but the technology that the legislature had envisioned did not materialize until years later.[636] To begin with, the original Nevada statute required that the will be "written, created and stored in an electronic record" and that it

633. *See, e.g.*, S.B. 40, 2017 N.H. Leg. Sess.; H.B. 1403, 2018 Va. Leg. Sess. For an overview of the various state statutes and proposals, see Jennifer L. Fox, *Twenty-First Century Wills*, 33 PROB. & PROP. 52 (2019). For a critical assessment of electronic wills and a proposal to allow them only in emergency situations, see Adam J. Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. REV. 827 (2020).

634. Gerry W. Beyer & Katherine V. Peters, *Sign on the [Electronic] Dotted Line: The Rise of the Electronic Will,* WILLS, TRUSTS, & ESTATES LAW EJOURNAL (Nov. 29, 2018).

635. *Id*. at 2.

636. Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution*, 33 OHIO N.U. L. REV. 865, 888 (2007).

contain "the date and the electronic signature of the testator and which includes, without limitation, at least one authentication characteristic of the testator."[637] An "authentication characteristic" meant something that was "capable of measurement and recognition in an electronic record as a biological aspect of or physical act performed by that person," such as "a fingerprint, a retinal scan, voice recognition, facial recognition, a digitized signature or other authentication using a unique characteristic of the person."[638] Although such technology exists today, it was not readily available in 2001. Moreover, the statute required that "only one authoritative copy" exist, which was defined as "the original, unique, identifiable and unalterable electronic record of an electronic will."[639] Writing in 2007, one commentator noted that "[b]ecause computers are the perfect copying machine, every copy is a perfect copy, indistinguishable from the original, making it very easy to make changes and very hard to prove which version of a file is the original."[640] The Nevada legislation, which was "developed during the tech boom of the 1990s [] anticipated that the necessary software would soon be available," but such was not the case.[641]

The Nevada law was amended in 2017, in part to make the law more attractive, easy to use, compatible, and accessible. The new law still requires an "authentication characteristic" of the testator, but now fingerprint technology and facial recognition software are commonplace. Moreover, the "authentication characteristic" is no longer a requirement in addition to witnesses and a signature of the testator, but as an alternative method of validation.[642] The new law has also abandoned the idea that there must be one and only one "authoritative copy." Although the exact number of electronic wills is unclear, at least one has been executed: An organization known as Trust & Will issued a press release on January 24, 2019, announcing that they had executed "the first digital will for Cory McCormick, a police officer in Nevada."[643]

Although Nevada was the first, it is no longer the only jurisdiction to authorize electronic wills. Florida law also now permits electronic wills.

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637. NEV. REV. STAT. § 133.085 (2001).
638. *Id*.
639. *Id*.
640. Beyer & Peters, *supra* note 651, at 2.
641. *Id*.
642. NEV. REV. STAT. § 133.085.
643. Danny Tabatabai, *Trust & Will Closes First Electronic Will in the US (Plus $2m Investment)*, EXTRA CRUNCH DAILY, https://techcrunch.com/2019/01/24/trust-will-closes-first-electronic-will-in-the-us-plus-2m-investment/ [https://perma.cc/5ARX-HH3Y].

The introduction of the electronic will into Florida law was not, however, without controversy. In June of 2017, the Florida legislature approved House Bill 277, which authorized electronic wills. The governor at the time, Rick Scott, vetoed the bill and published a letter explaining his reservations with the proposed legislation.[644] In his letter, Governor Scott outlined three concerns. First, he stated that "the remote notarization provisions in the bill do not adequately ensure authentication of the identity of the parties" and thus increase the likelihood of fraud or exploitation of vulnerable citizens utilizing the legislation.[645] Second, the proposed legislation would increase the burden on the Florida court system, especially if, as proposed, the Florida law allowed for the probate of the wills of non-Floridians who utilized the law.[646] Third, the bill had a delayed effectiveness date so as to address "substantive changes and outstanding questions," which the governor felt should be addressed in a comprehensive bill during the next session.[647]

Over the objection of the Real Property Probate and Trust Section of the Florida Bar,[648] in June of 2019, the Florida Legislature again passed a bill, House Bill 409, authorizing electronic wills. Governor Scott, however, had since left his post and taken up a position as a United States Senator for Florida. The new governor, Ron DeSantis, signed the bill, which has now become law. Under the new law, which is a comprehensive enactment on electronic signatures, an individual can execute a will that is witnessed by individuals who are not physically present with the testator but are in communication with the testator through "audio-video communication technology."[649] In place of witnesses, a Florida testator may validly execute an electronic will before a notary who is in audio-video communication with the testator, provided the testator provides "verbal answers" to a series of questions regarding his location, age, mental status, free consent, and the names of "everyone you know in the room with you."[650] The Florida statute is unique, however, in providing that "[t]he execution of an electronic will of a testator who is a vulnerable adult . . . may not be witnessed by means of audio-video communication

644. Letter from Rick Scott to Ken Detzner (June 26, 2017) (on file with author).

645. *Id*.

646. *Id*.

647. *Id*.

648. *See* Real Property, Probate and Trust Law Section of The Florida Bar, *White Paper on Proposed Enactment of the Florida Electronic Wills Act* (regarding the 2018 bill).

649. FLA. REV. STAT. § 732.522(3)(a).

650. *Id*. § 732.522(3)(b).

technology."[651] Under Florida law, the definition of a "vulnerable adult" is quite expansive and includes those "whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging."[652]

2. Indiana and Arizona

Like Florida and Nevada, Indiana and Arizona also adopted electronic will laws in 2018. Both the Indiana law and the Arizona law are more conservative in approach. Just as in Florida, it took two attempts to get the legislation passed in Indiana. Although the bill was not successful in 2017, the governor of Indiana signed that state's electronic wills law into effect in March of 2018. Under the Indiana law, wills can be executed by means of an "electronic signature," defined as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record."[653] This description is broader than the traditional definition of a signature usually employed for wills. Unlike in Florida and Nevada, however, in the execution of an electronic will in Indiana, "[t]he testator and the attesting witnesses must be in each other's *actual presence* when the electronic signatures are made in or on the electronic will," and "[t]he testator and witnesses must directly observe one another as the electronic will is being signed by the parties."[654]

Similarly, Arizona passed an electronic wills act in 2017, but the effectiveness of the act was delayed until July 1, 2019. Like the Indiana law, the Arizona act allows for the will to be exclusively in electronic form and to be electronically signed by the testator and two witnesses.[655] An electronic signature is defined as a "method or process that . . . [i]s attached or logically associated with an electronic record and that is executed or adopted by a person with intent to sign the electronic record" and that "[u]ses a security procedure that allows a determination that the electronic signature" sufficiently identifies the signer.[656] The Arizona law is similar to the Indiana law—and unlike the Florida and the Nevada laws—in

651. *Id*. § 732.522(3)(c).
652. FLA. STAT. § 415.102(28).
653. IND. CODE § 26-2-8-102.
654. IND. CODE § 29-1-21-4 (emphasis added).
655. ARIZ. STAT. § 14-2518.
656. *Id*. § 14-1201(20).

requiring that the witnesses be "physically present," rather than merely electronically present, when the testator signs or acknowledges the will.[657]

C. Uniform Electronic Wills Act

In July of 2019, the Uniform Law Commission approved a new Uniform Electronic Wills Act.[658] The drafting committee first met in October of 2017 and gave three reasons for proceeding with the project: (1) people want electronic wills for various reasons, including ease of execution and cost savings; (2) people will try to execute wills electronically anyway, as some cases had already started to percolate on this issue, and electronic wills "are the new version of" holographic wills; and (3) companies will draft bills for legislatures, and a uniform law approach "could lead to some coherence around the country."[659] In the words of the committee: "The Uniform Electronic Wills Act retains core wills act formalities of writing, signature and attestation, but adapts them. The will must exist in the electronic equivalent of text when it is electronically signed."[660] The electronic will must be signed or acknowledged in the presence of two witnesses or a notary.[661] Additionally, the act adopts the traditionally broad definition of signing associated with electronic documents. Namely, signing means executing, adopting, affixing, or associating—with the present intent to authenticate or adopt—a sound, symbol, or process to an electronic record.[662] The new act leaves it to states, however, to decide if they will require the witnessing or notarization to be in either physical or electronic presence.[663] In short, the Uniform Electronic Wills Act does not dramatically alter the foundational law for will-making but merely adapts it so that its provisions are compatible with electronic execution.

657. *Id*.
658. UNIF. ELECTRONIC WILLS ACT (July 17, 2019).
659. *Id*.
660. Suzanne Brown Walsh, Turney P. Berry, & Susan N. Gary, *Electronic Wills Act* (May 30, 2019), *available at* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=13b336c4-b842-c792-fe57-03eb3d97ef96&forceDialog=0 [https://perma.cc/VY9A-FBGD]
661. UNIF. ELECTRONIC WILLS ACT § 5.
662. *Id*. § 2(6).
663. *Id*.

D. Conflicts of Law Issues

The above discussion is important in Louisiana for two distinct reasons. First, it foreshadows what may be in Louisiana's future. As technology continues to progress, it would be myopic to suggest that the law on wills, or the law on any topic, will not or should not change to accommodate this progress. Nonetheless, one must be careful not to rush headlong into unchartered and potentially choppy waters without a good reason to do so. Just because technology changes does not mean that the law should necessarily incorporate these changes if the point or purpose of the law is not served. After all, Betamax tapes and floppy disks were at one point seen as cutting edge technology; it now seems wise that the law did not change to allow wills to be executed through these media because such a will would be almost unreadable today due to continued technological change. Nonetheless, decisions on whether to change the law to suit the latest technological advance should be thoughtfully considered. Only by knowing what other states and technology provide can one fully engage in such consideration.

The second, and perhaps more immediate, reason for electronic wills to concern Louisiana lawyers is because courts and lawyers may encounter them today, even without a specific Louisiana law on this topic. Specifically, article 3528 of the Louisiana Civil Code on conflicts of law provides that many wills executed outside of Louisiana may be probated in Louisiana after the death of a testator.[664] It states as follows:

> A testamentary disposition is valid as to form if it is in writing and is made in conformity with: (1) the law of this state; or (2) the law of the state of making at the time of making; or (3) the law of the state in which the testator was domiciled at the time of making or at the time of death.[665]

Consider, for instance, a domiciliary of Florida, Nevada, Arizona, or Indiana who executes an electronic will under the laws of his state and then moves to Louisiana, where he subsequently establishes a domicile and dies. Under article 3528, such a will would be valid in form and would be subject to probate by a Louisiana court because the testator executed a will in writing that was in compliance with the "law of the state in which the testator was domiciled at the time of making."[666] Similarly, consider a second testator who is a Louisiana domiciliary but decides to visit Florida,

664. LA. CIV. CODE art. 3528.
665. *Id*.
666. *Id*.

Nevada, Arizona, or Indiana. While visiting, this Louisianian avails himself of the laws of those particular states, executes an electronic will, and then returns home and subsequently dies. Once again, under article 3528, the electronic will executed outside of Louisiana would be subject to probate in Louisiana by a Louisiana court because the testator executed a will in writing that was in compliance with "the law of the state of making at the time of making."[667] The conflicts provision under the Uniform Electronic Wills Act retains the above outcomes and notes that an electronic will executed in compliance with the act is valid if it is executed in compliance "with the law of the jurisdiction where: (1) the testator is physically located when the will is signed; or (2) the testator is domiciled or resides when the will is signed or when the testator dies."[668] As noted by the drafting committee, "[t]his is consistent with the current law applicable to traditional wills and prevents the intestacy of a testator who validly signs a will while living in a state that permits remote execution, but moves to or just happens to die in a state that prohibits them."[669]

Although the above is a reminder that electronic wills have potentially already arrived in Louisiana, a more controversial consideration also exists. Consider the Louisiana domiciliary who, while residing and remaining in Louisiana, goes online and executes an electronic will pursuant to either the Florida or Nevada statutes. A traditional conflicts analysis would suggest that such a will is not formally valid in Louisiana because the will was not made in conformity with: (1) the law of this state—Louisiana; (2) the law of the state of making at the time of making—also Louisiana;[670] or (3) the law of the state in which the testator was domiciled at the time of making or at the time of death—again, Louisiana. None of the conflicts provisions seem to make allowance in this example for the applicability of Nevada or Florida law. Nevada law, however, provides as follows:

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667. *Id*.

668. UNIF. ELECTRONIC WILLS ACT § 4.

669. Walsh, Berry, & Gary, *supra* note 660.

670. Although the expression "the law of the state of making at the time of making" is perhaps less than pellucid, comment (e) to article 3528 clarifies that the reference to the "state of making" is a reference to "the pertinent law of the *place of making* . . . in force at the time of making and not later." LA. CIV. CODE art. 3528 cmt. e (emphasis added). In other words, the applicable law in the above example is whatever Louisiana law, i.e., "the place of making" since the testator was in Louisiana at the time of making, was at the time the testator made his will, i.e., "the time of making."

> Regardless of the physical location of the person executing a document . . . , if a document is executed electronically, the document shall be deemed to be executed in this State and will be governed by the laws of this State and subject to the jurisdiction of the courts of this State if (1) [t]he person executing the document states that he or she understands that he or she is executing, and that he or she intends to execute, the document in and pursuant to the laws of this State; [and] (2) [t]he document states that the validity and effect of its execution are governed by the laws of this State.[671]

In other words, Nevada law has deemed a Louisiana domiciliary who, while residing and remaining in Louisiana, goes online and executes an electronic will in compliance with the Nevada statutes, to have executed the will in Nevada. If that is the case, however, then one could argue that the will is formally valid in Louisiana, as the law was in writing and formally valid pursuant to the laws of the deemed state of making at the time of making, that is, Nevada. The Florida statute provides similarly in stating that "[a]n instrument that is signed electronically is deemed to be executed in this state if the instrument states that the person creating the instrument intends to execute and understands that he or she is executing the instrument in, and pursuant to the laws of, this state."[672] Notably, this is not the approach of the Uniform Electronic Wills Act, which:

> [W]ould not validate the remotely executed, Nevada will of a testator who signed it while living in a state (say, Connecticut) which prohibits remote execution, if the will is later offered for probate in Connecticut. It would, however, later require Connecticut to admit the will to probate if it was signed remotely while the testator lived in Nevada, which recognizes such wills.[673]

Despite the deemed presence statement in Nevada and Florida law, it is possible—perhaps probable—that a Louisiana court would not give effect to the fiction created by Florida or Nevada law that a Louisiana domiciliary is deemed to be in Florida or Nevada at the time of execution. Thus, a court would not apply Louisiana's general conflicts rule and would not give effect to the electronic will. Be that as it may, pursuant to Nevada Revised Statutes § 133.088, the Louisiana domiciliary is "subject to the jurisdiction of the courts of this State"—that is, Nevada—suggesting that

671. NEV. REV. STAT. § 133.088.
672. FLA. REV. STAT. § 732.522(4).
673. Walsh, Berry, & Gary, *supra* note 660.

a Nevada court would probate the Louisiana domiciliary's electronic will. Of course, under Louisiana law, the Louisiana domiciliary's movable property would be subject to the law of Louisiana—that is, "the law of the state in which the deceased was domiciled at the time of death"[674]—as would his immovable property—that is, "the law of this state."[675] The Uniform Electronic Wills Act recognizes that "some states will seek to enforce [a] no remote wills policy by amending their wills acts not only by prohibiting the remote execution of electronic wills in their state, but also by refusing to recognize those that were validly executed out of state."[676] To date, Louisiana has not undertaken this approach.

CONCLUSION

Although the above assessment has, in many ways, been critical of the current law, many beneficial developments have occurred. The legislature is to be commended for moving away from the Procrustean traditional form requirements that dominated the law for most of the 20th century and adopting, based largely upon comparative research, the simpler and easier statutory and, eventually, notarial will. The courts have, in many instances, grafted doctrines of flexibility, such as "substantial compliance," that have aided testators in enforcing their intent without at the same time jeopardizing the virtues and purposes of form requirements.

Over the last 50 years, however, the positive law on form requirements for wills has developed very little. The notarial and olographic wills are, to a very great extent, the statutory and olographic wills of the 1950s. The statutory will, which was adopted to provide a simpler form than had previously been available for nuncupative wills, has now become a rigid procedure that is applied in an inflexible, formalistic way. Requirements, such as the date, the attestation clause, and the signing of every page of a will—which serve little to no practical purpose—have served as a shibboleth to allow only the initiated and chosen ones to successfully make wills while, at the same time, denying the benefits to many. To make matters worse, in the context of notarial wills, decedents are being forced to die intestate not because of mistakes they make themselves but because of errors on the part of their lawyers in the drafting of wills. The current Louisiana law is not only ill-suited for modern day practice, but it is also ill-equipped to contend with matters such as electronic wills and other forms of wills that may develop in the future.

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674. LA. CIV. CODE art. 3532.
675. *Id*. art. 3533.
676. Walsh, Berry, & Gary, *supra* note 660.

Indeed, today—perhaps more than in the recent past—the purposes of will formalities should be keenly kept in mind as an increasing number of jurisdictions begin to reevaluate will formalities, such as the attestation requirement, in light of the COVID-19 pandemic and the new importance of social distancing. The Ministry of Justice in the United Kingdom, for example, is currently reported to be "urgently look[ing] to change requirements around witnessing wills in the wake of the coronavirus outbreak."[677] Additionally, U.S. governors in a great number of states have issued executive orders purporting to relax certain will formalities, such as in-person witnessing.[678] Even in Louisiana, several bills have been introduced to allow for remote notarization of legal acts,[679] and at least one such bill would include wills within its ambit.[680]

When assessing the relevance of form requirements—whether during a pandemic or not—the key consideration with form requirements should never be blind obeisance; rather, it should always be that the requirements be applied to the extent that their enforcement furthers their rationale or underlying purposes.[681] As one commentator aptly observed many years ago, form requirements are not an end in themselves but only a means to an end.[682] As such, they should always be viewed by courts as "a vehicle

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677. Jemma Slingo, *Coronavirus: Talks Ongoing over Wills Witness Requirements*, LAW SOC. GAZETTE (Mar. 25, 2020), *available at* https://www.lawgazette.co.uk/news/coronavirus-talks-ongoing-over-wills-witness-requirements/5103625.article [https://perma.cc/CT9M-UZU2]; *see also* Harry Brennan, *Rules to Be Relaxed to Allow Quick Military-Style Wills to Be Drawn Up Amid Covid-19 Surge*, TELEGRAPH (Apr. 1, 2020), *available at* https://www.telegraph.co.uk/money/consumer-affairs/rules-relaxed-allow-quick-military-style-wills-drawn-amid-covid/ [https://perma.cc/39BH-WUKF].

678. *See, e.g.*, N.Y. Exec. Order 202.14 (April 7, 2020) (providing that the act of witnessing can be performed using certain types of audio-visual technology). For a comprehensive and up-to-date listing of the various laws and executive orders regarding remoted witnessing and notarization, see *Emergency Remote Notarization and Witnessing Orders*, ACTEC (April 10, 2020), *available at* https://www.actec.org/resources/emergency-remote-notarization-and-witnessing-orders/?utm_source=Informz&utm_medium=Email&utm_campaign=ACTEC&_zs=ThpAX&_zl=JKd32 [https://perma.cc/394K-RMQU].

679. H.B. 122, 2020 Leg., Reg. Sess. (La. 2020), subsequently enacted into Act No. 131, 2020 La. Acts; H.B. 274, 2020 Leg., Reg. Sess. (La. 2020), subsequently enacted into Act No. 254, 2020 La Acts; S.B. 472, 2020 Leg., Reg. Sess. (La. 2020).

680. S.B. 472, 2020 Leg., Reg. Sess. (La. 2020).

681. Kolkman, *Testamentary Formalities in the Netherlands*, *in* TESTAMENTARY FORMALITIES, *supra* note 44, at 173.

682. Hawsey, *supra* note 270, at 461.

which protects the testator and those inheriting under him from imposition, fraud, and undue influence. When none of these evils are present, form has served its function and the testament should not be struck with nullity."[683]

Yet it would be unfair to lay all the blame at the feet of courts. As one branch of government, the courts are charged with interpreting the laws, not writing them. The legislature, too, must be cognizant of whether the formalities adopted are not only serving the purposes for which they are designed but also whether there are better ways to serve those purposes without imposing an unjustifiable risk upon testators. As James Lindgren has written, "If we required a secret handshake for willmaking that only lawyers knew, that would serve the cautionary or ritual function."[684] It is time for the secret handshake for will-making in Louisiana to change. It is hoped that the above contribution will modestly serve to advance that goal.

683. *Id*.

684. Lindgren, *supra* note 23, at 1033; *see also* Fassberg, *supra* note 146, at 627.