Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **27th day of January, 2021** are as follows:

BY Hughes, J.:

2019-C-02011 *SUCCESSION OF JAMES CONWAY LINER, III (Parish of Ouachita)*

REVERSED IN PART. DISTRICT COURT JUDGMENT REINSTATED. SEE OPINION.

Retired Chief Justice Johnson participated in this decision, which was argued prior to her retirement.

Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

Weimer, C.J., dissents and assigns reasons.
Hughes, J., additionally concurs and assigns reasons.
Crichton, J., dissents and assigns reasons.
Crain, J., dissents and assigns reasons.

01/27/2021

SUPREME COURT OF LOUISIANA

No. 2019-C-02011

SUCCESSION OF JAMES CONWAY LINER, III

On Writ of Certiorari to the Court of Appeal,
Second Circuit, Parish of Ouachita

HUGHES, J.*

The primary issue in this case is whether the language of an attestation clause in a notarial testament, which failed to expressly state that the testator declared or signified that he signed the testament "at the end of the testament and on each other separate page," in accordance with the requirements of La. C.C. art. 1579, rendered the testament absolutely null under La. C.C. art. 1573 ("The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null.").

The testator herein executed two notarial testaments, one in 2013 and another in 2015 (which purported to revoke all prior testaments). The 2013 testament, executed under La. C.C. art. 1577 (for a testator who is able to read and sign his name), divided the testator's property equally among his three adult children (Conway, Jeffrey, and Laura). The 2015 testament, executed under La. C.C. art. 1579 (for a testator who is unable to read regardless of whether he is able to sign his name), divided the testator's property between only two of his children (Jeffrey and Laura), excluding the third child (Conway). After the testator's death on October 9,

*Retired Chief Justice Johnson participated in this decision, which was argued prior to her retirement. Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

2018, Conway challenged the validity of the 2015 testament on several bases, in response to his siblings' attempt to probate the testament.

The testator's 2015 notarial testament reads, in pertinent part:

> IN WITNESS WHEREOF, ***I have signed*** this, my Last Will and Testament, in the presence of the witnesses hereinafter named and undersigned.
>
> [signature of testator]
>
> * * *
>
> The foregoing instrument, consisting of eight (8) pages, and read aloud in the presence of the Testator and of each other, such reading having been followed on copies of the Will by Notary and witnesses, and the Testator declared that he had heard the reading of the Will by the Notary, and ***the Will was signed*** and declared by JAMES CONWAY LINER, III, Testator and 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 this 3rd day of June, 2015.
>
> [signature of witnesses, notary, and testator]
>
> * * *

(Emphasis added.)

Despite the fact that the testator actually signed on each separate page and at the end of the testament, Mr. Liner's testament stated only that it was "signed." However, La. C.C. art. 1579(2) provides as follows:

> In the presence of the testator and each other, the notary and witnesses must sign the following declaration, ***or one substantially similar***: "This testament has been read aloud in our presence and in the presence of the testator, such reading having been followed on copies of the testament by the witnesses [, and the notary if he is not the person who reads it aloud,] and in our presence the testator declared or signified that he heard the reading, and that the instrument is his testament, and that he ***signed*** his name ***at the end*** of the testament ***and on each other separate page***; and in the presence of the testator and each other, we have subscribed our names this ____day of ____, _____."

(Emphasis added.)

The district court invalidated the 2015 Liner testament, ruling that the provisions of the attestation clause were not substantially similar to those set forth in La. C.C. art. 1579. Jeffrey and Laura appealed, and the appellate court reversed

in part.[1] **Succession of Liner**, 53,138 (La. App. 2 Cir. 11/20/19), 285 So.3d 63. We granted the subsequent writ application to review the appellate court ruling. **Succession of Liner**, 19-02011 (La. 2/26/20), 294 So.3d 476.

A disposition mortis causa may be made only in the form of a testament authorized by law. La. C.C. art. 1570. The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null. La. C.C. art. 1573. A notarial testament is one that is executed in accordance with the formalities of Articles 1577 through 1580.1. La. C.C. art. 1576. The codal provisions governing an attestation clause within a notarial testament state that the mandated attestation clause need only be "substantially similar" to the model declaration provided therein. See **Successions of Toney**, 16-1534, p. 5 (La. 5/3/17), 226 So.3d 397, 401. See also **In re Succession of Holbrook**, 13-1181, p. 9 (La. 1/28/14), 144 So.3d 845, 851 ("There must be an attestation clause, or clause of declaration. However, its form is not sacrosanct: It may follow the form suggested in the statute or use a form substantially similar thereto.") (citing **Succession of Morgan**, 257 La. 380, 385, 242 So.2d 551, 552 (1970)).

Our jurisprudence requires that the validity of a testament should be maintained through the liberal construction and application of the codal articles, rather than a strict interpretation, as long as there is substantial compliance with the codal provisions. See **In re Succession of Holbrook**, 13-1181 at pp. 8-9, 144 So.3d at 851; **Succession of Guezurag**a, 512 So.2d 366, 368 (La. 1987). This court held in **Successions of Toney** that "[t]here is a presumption in favor of the validity of

[1] We note that two issues were presented to the appellate court: (1) whether the 2015 testament was valid, and (2) whether Conway was appropriately appointed provisional administrator for the succession. Although the appellate court reversed the district court's invalidation of the 2015 testament, it affirmed the provisional appointment of Conway as administrator for the succession (finding that neither of the other siblings applied for the position, nor did they establish a valid basis for Conway's removal as provisional administrator). As only the former of these rulings has been presented to this court for review, we do not address the latter.

testaments in general, and proof of the nonobservance of formalities must be exceptionally compelling to rebut that presumption." **Successions of Toney**, 16-1534 at p. 5, 226 So.3d at 401.

Thus, the issue presented herein is whether an attestation clause verifying that the testator declared he "signed" the testament is substantially similar to the Article 1579 requirement that the attestation clause verify that the testator declared he signed his name "at the end" and "on each other separate page" of the testament.

We first examine the history of the relevant codal language in La. C.C. art. 1579.[2] Prior to 1980, the text of former Section 2443 only addressed limitations on the use of former Section 2442 (first stating in 1952, "Those who know not how or are not able to read, cannot make dispositions in the form of the will provided for in R.S. 9:2442."); Section 2443 was continued with substantially the same text, with only slight modifications, until 1980. See 1952 La. Acts, No. 66, § 2; 1964 La. Acts, No. 123, § 1; 1979 La. Acts, No. 241, § 1. Former Section 2443 was revised, in 1980, to change its subject matter and prior title of "Qualifications of testator and witnesses" to "Statutory will for those with sight impairment or those who are illiterate." As amended, former Section 2443 required a testator whose statutory will was executed under that section to sign his name "at the end of the will and on each other separate page of the instrument" and required the witnesses and notary to attest that the testator signed "at the end and on each other separate page." See 1980 La. Acts, No. 744, § 1. When 9:2443 was repealed and its substance re-enacted as La. C.C. art. 1579 (by 1997 La. Act No. 1421, §§ 1 & 8, eff. July 1, 1999), both of the requirements in this statute – directing where the testator was required to sign and what the witnesses and notary were required to attest about where the testator had

[2] See also **Succession of Bruce**, 20-00239 (La. 1/27/21), ___ So.3d ___ (rendered contemporaneously with the instant case) (wherein we discuss the legislative history of La. C.C. art. 1577, supra, which also requires an attestation that the testator declared he signed the testament "at the end and on each other separate page").

signed – employed the language "at the end" and "on each other separate page." The relevant language of La. R.S. 9:2443, as re-enacted in La. C.C. art. 1579, currently states that the testator must sign his name "at the end" of the testament and "on each other separate page" and that the witnesses and notary must attest that the testator signed his name "at the end" of the testament and "on each other separate page."

We previously reviewed whether an attestation clause could simply state that the testator "signed" a notarial testament in **Succession of Hanna**, 19-01449 (La. 11/25/19), 283 So.3d 493 (per curiam). In **Succession of Hanna**, 52,664, pp. 2-3 (La. App. 2 Cir. 6/26/19), 277 So.3d 438, 439-40, the trial court found that the attestation clause of the testament at issue materially deviated from the model attestation clause, set forth in La. C.C. art. 1577(2),[3] because it did not state that the testator signed the testament at its end and on each of its separate pages. In **Hanna**, the testament at issue consisted of four pages, and the testator did in fact sign on every page. However, the **Hanna** attestation clause stated:

> ***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.

Succession of Hanna, 52,664 at p. 5, 277 So.3d at 441 (emphasis added).

Even though the **Hanna** district court found that the phrase "signed . . . by testator" was not substantially similar to the codal language so as to constitute a valid testament, the appellate court reversed, emphasizing that the omitted language was the sole deviation from the codal requirements and noting that the testator's signature did actually appear at the end of his testament and on each other separate page, as required by La. C.C. art. 1577. **Succession of Hanna**, 52,664 at p. 8, 277 So.3d at

[3] Although **Hanna** dealt with the requirements of La. C.C. art. 1577(2) and the instant case is concerned with the provisions of La. C.C. art. 1579(2), the discussion therein is relevant herein as these two codal articles both state that the notary and witnesses must attest that the testator declared or signified that he signed the testament "at the end" and "on each other separate page."

442. The **Hanna** appellate court reasoned that, while the absence of the words "at the end and on each other separate page" deviated from the sample attestation language of Article 1577(2), the deviation was "minor and immaterial" in light of the fact that the testator did in fact sign his full signature at the end and on each other separate page of the testament. **Id.**, 52,664 at p. 8, 277 So.3d at 442-43. The **Hanna** appellate court found that the attestation clause in the testament was substantially similar to the one in La. C.C. art. 1577 and, since there was no indication or allegation of fraud, the court concluded that the language "substantially complie[d] with the formalities prescribed for the execution of a notarial testament." **Id.**, 52,664 at pp. 8-9, 277 So.3d at 442-43.

In granting a subsequent writ application in **Hanna**, this court ruled:

> Pursuant to this Court's ruling in **Successions of Toney**, 16-1534 (La. 5/3/17), 226 So.3d 397, we find the trial court correctly concluded the attestation clause in the subject testament materially deviated from the requirements of La. C.C. art. 1577(2) so as to render the testament invalid. Consequently, the ruling of the Court of Appeal is reversed, and the trial court's judgment is hereby reinstated.

Succession of Hanna, 19-01449 at p. 1, 283 So.3d at 493. Thus, this court found that the failure of the **Hanna** testament to comply with the codal requirement – that the attestation clause state that the testator signed the testament at its end and on each of its separate pages – was a material deviation that rendered the testament invalid.

As indicated hereinabove, La. C.C. art. 1579(2) requires that the notary and witnesses sign a declaration, "or one substantially similar," stating the testator declared or signified in their presence that, *inter alia*, "he signed his name at the end of the testament and on each other separate page"; however, in the instant case, the attestation clause of Mr. Liner's 2015 testament, on this point, stated only that "the Testator declared that . . . the Will was signed . . . ." The statement in the instant 2015 testament that the testament "was signed," as in **Hanna**, is not substantially similar to the model phrase set forth in Article 1579(2) because it does not establish

that the testament was signed at the end and on every page of the multiple-page testament. A statement verifying only that the "[w]ill was signed" establishes only that the will was signed *once* and does not establish that the testament was signed at the end and on each other separate page, as required by La. C.C. art. 1579(2).

"The attestation clause is designed to evince that the facts and circumstances of the confection and execution of the instrument conform to the statutory requirements." **In re Succession of Holbrook**, 13-1181 at p. 9, 144 So.3d at 851 (citing **Succession of Morgan**, 257 La. at 385, 242 So.2d at 552)). Further, 1997 Revision Comment (b) for Article 1579 states:

> In light of the fact that the person who executes a testament under this Article lacks the ability to verify its provisions for himself, the assurance of accuracy is achieved by the reading of the testament by the notary to the testator and the witnesses, while the latter follow the reading on copies of the testament. In this instance, the attestation by the witnesses is not only that the testator indicated that the instrument was his testament, but also that the witnesses assured themselves through the reading that the document that the testator signed was the same one that was read aloud.

"The primary purpose of the kind of notarial testament authorized in this article is to provide safeguards to protect persons who are illiterate or otherwise unable to read . . ." La. C.C. art. 1579, 1997 Revision Comment (c).

An attestation clause that fails to state that the testament was signed at the end and on each other separate page fails to inform the testator and witnesses that the testator has a responsibility to sign every page of a multiple-page testament, and "signing one's name on each page of the will undoubtedly offers more heightened protection from surreptitious replacement of pages." See **Successions of Toney**, 16-1534 at p. 10, 226 So.3d at 404. See also **Succession of Guezuraga**, 512 So.2d at 367 (recognizing that the purpose of the requirement that the testator sign his name on each separate page is "to prevent fraud by the substitution of one typewritten page for another after the execution of the will by the testator").

Having found in **Succession of Hanna** that an attestation clause declaring only that the testator "signed" an Article 1577 testament, rather than stating he signed at the end of the testament and or each other separate page, is a material deviation that renders such a testament invalid, we now hold, consistently with **Hanna**, that the nearly-identical defect in Mr. Liner's 2015 testament likewise fails to be substantially similar to the language of La. C.C. art. 1579(2) and, therefore, the 2015 testament is rendered invalid and absolutely null under La. C.C. art. 1573. Accordingly, we reverse the appellate court ruling to the contrary.[4]

We distinguish the case of **Succession of Bruce**, 20-00239 (La. 1/27/21), ___ So.3d ___, in which the notarial testament at issue stated in the attestation clause that the testator had "[s]igned on each page." In **Bruce**, since the phrase "signed on each page" necessarily encompasses the fact that the testator has signed on the page containing the end of the testament, as well as every other separate page, we held that the attestation language was substantially similar to the La. C.C. art. 1577(2) model language, requiring that the witnesses and notary attest that the testator had signed "at the end and on each other separate page." Whereas in the instant case the attestation clause states simply that the testator "signed" the testament, which could only establish that the testator signed the eight-page testament once, rather than "at the end" and "on each other separate page," as required by La. C.C. art. 1579(2).

DECREE

Accordingly, we reverse the appellate court decision, in part, as indicated herein, and we reinstate the district court judgment.

REVERSED IN PART; DISTRICT COURT JUDGMENT REINSTATED.

[4] Having decided the matter on this basis, we find it unnecessary to discuss the parties' remaining contentions.

01/27/2021

SUPREME COURT OF LOUISIANA

No. 2019-C-02011

SUCCESSION OF JAMES CONWAY LINER, III

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF OUACHITA

WEIMER, C.J., dissents and assigns reasons.

The majority frames the issue as "whether an attestation clause verifying that the testator declared he 'signed' the testament is substantially similar to the Article 1579 requirement that the attestation clause verify that the testator declared he signed his name 'at the end' and 'on each other separate page' of the testament." **Succession of Liner**, 19-2011, slip op. at 4 (La. 1/___/21). Relying primarily on the three-sentence per curiam in **Succession of Hanna**, 19-1449 (La. 11/25/19), 283 So.3d 493, the majority concludes, "consistent[] with **Succession Hanna**, that the nearly-identical defect in Mr. Liner's 2015 testament likewise fails to be substantially similar to the language of La. C.C. art. 1579(2),"[1] thereby rendering Mr. Liner's testament invalid and absolutely null. I respectfully dissent.

This court has long adhered to a policy of liberally interpreting the law in order to give effect to the testator's wishes. See, e.g., **Succession of Crouzeilles**, 106 La. 442, 447-48, 31 So. 64, 67 (1901) ("[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"). Courts must liberally construe and apply the law to maintain the validity of a testament if at all possible, as long as it is in substantial compliance with the requirements set forth in the law. See **Succession of Morgan**, 257 La. 380, 385, 242

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[1] **Succession of Liner**, 19-2011, slip op. at 8.

So.2d 551, 552 (1970). Furthermore, in "adopt[ing] the statutory will from the common law," the legislature sought "to avoid ... rigid formal requirements." **Succession of Guezuraga**, 512 So.2d 366, 368 (La. 1987). In determining whether there was "substantial compliance," this court has historically focused on whether deviations in form suggests fraud because the purpose of the formal requirements is to guard against fraud. ***Id.*** (quoting Casenote, *Donations–Imperfect Compliance with the Formal Requirements of the Statutory Will*, 25 Loy.L.Rev. 362, 371 (1968-69)). ("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.") More recently, in **In re Succession of Holbrook**, 13-1181 (La. 1/28/14), 144 So.3d 845, this court considered whether an incomplete date in an attestation clause invalidates a testament when the full date appears in the first paragraph of the testament and on every page of the testament, including the page of the attestation clause. ***Id.*** at 846. In finding the attestation clause was in substantial compliance, the court noted "[t]here is no indication of fraud in the record before us, and in all other respects, Mr. Holbrook's testament and the attestation clause comply with La. Civ.Code art. 1577." ***Id.*** at 853.

However, in **Successions of Toney**, 16-1534 (La. 5/3/17), 226 So.3d 397, the court began to deviate from its prior jurisprudence and demand more rigid adherence to the formal requirements of the attestation clause. The majority in **Successions of Toney** found multiple minor deviations from the required testamentary form to be "significant and material" and, thus, not in substantial compliance with Civil Code requirements. ***Id.*** 16-1534 at 15, 226 So.3d at 407-08. Moreover, contrary to the court's earlier opinions, the **Successions of Toney** majority did not find the lack of

any indication of fraud to be decisive. See ***id.*** 16-1534 at 9-12, 226 So.3d at 404-05. I dissented in **Successions of Toney**, noting the legislature has indicated that the notarial testament "does not require exactitude, only that the testator, notary, and witnesses declare what is 'substantially similar' to the attestation clause provided in the Civil Code." ***Id.*** 16-1534 at 3, 226 So.3d at 410 (Weimer, J., dissenting). I additionally concluded:

> In the instant case, Mr. Toney's own attestation clause indicates the testament was signed by Mr. Toney, who declared it to be his last will and testament in the presence of the witnesses, but fails to attest that Mr. Toney or the witnesses signed the will in the presence of the notary. Additionally, the signature of Mr. Toney attests that he declares to the "undersigned authority" (*i.e.*, the notary) that he is signing, but does not attest that he is signing in the presence of the notary. However, the notary signed an attestation clause stating that the testament was subscribed, sworn, and acknowledged by Mr. Toney and by the three witnesses. When all the attestation clauses are considered together–an approach consistent with La. C.C. arts. 1611 and 1612 and with the liberal interpretative standard described by this court in **Guezuraga**–there was substantial compliance with the requirements of La. C.C. art. 1577.
>
> . . . .
>
> In conclusion, Mr. Toney's intent to donate his estate to his brother-in-law, Richie Gerding, is unrefuted. There has been no allegation of fraud regarding the drafting or the execution of his testament. Even so, under the majority's ruling, the result for Mr. Toney's estate will be the same as if fraud had been actually proven, as this testament will be annulled and, it appears, his estate will lapse into intestacy. This result not only defeats Mr. Toney's intent, but it runs contrary to the substantial compliance standard embodied in La. C.C. art. 1577, a standard which has previously been recognized by this court's jurisprudence.

Id., 16-1534 at 3, 5, 226 So.3d at 410, 411.

This court further retreated from its policy of liberal interpretation in **Succession of Hanna**, *supra*. In **Succession of Hanna**, the court–without analysis–summarily expanded the holding in **Successions of Toney** to render a testament invalid as a result of a single, minor deviation from the codal requirements.

Succession of Hanna, 283 So.3d at 493.[2] I dissented in **Succession of Hanna**, finding the weighty issue involved necessitated full consideration by this court by a granting and docketing of the case. In so doing I expressed concern that this court may be elevating form over the substance of what the testator intended. ***Id.***, 16-1534 at 1, 226 So.3d at 493 (Weimer, J., dissenting). The majority's opinion here affirms my previously expressed concern.

Rather than "avoid ... rigid formal requirements"[3] and adhere to the codal provision requiring only a "substantially similar" attestation clause to the one provided in the Civil Code,[4] the majority here effectively disregards Mr. Liner's intent and ignores the undisputed fact that Mr. Liner did actually sign the testament on every page and at the end. Moreover, the witnessed notarized attestation states that Mr. Liner signed the testament, and Mr. Liner's signature has not been called into question. The sole defect alleged in this case is that the notary and witnesses did not declare the testator signed each page. Although the attestation clause differs from the codal language, it did not create any significant danger of fraud because Mr. Liner signed each page as required by law. The testament should not be rendered invalid merely "because the attestation clause does not state that obvious fact." See **Succession of Dawson**, 51,005 (La.App. 2 Cir. 11/16/16), 210 So.3d 421, 425. This court has long held that the purpose of the attestation clause is to emphasize that the legal formalities are satisfied at the time the testament was executed. **Succession of Porche**, 288 So.2d 27, 29 (La. 1973). Thus, "[w]hen, in fact, the instrument as a

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[2] The words "at the end and on each other separate page" did not appear in the attestation clause. Notably, testator's full signature appeared at the end of his testament and on each other page. And the attestation clause clearly indicated the witnesses, notary, and testator were all present during the declaration and signing of the testament. **Succession of Hanna**, 52,664, p. 8 (La.App. 2 Cir. 6/26/19), 277 So.3d 438, 442, rev'd, 19-1449 (La. 11/25/19), 283 So.3d 493.

[3] **Succession of Guezuraga**, 512 So.2d at 368.

[4] See La. C.C. art. 1579(2).

whole shows that these formalities have been satisfied, [there is] 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." ***Id.***

While I recognize the best practice might be for an attestation clause to mirror that provided in the Civil Code, such a practice is not what the legislature requires. At the end of the day, this court should not void a testament which clearly evinces the testator's intent based on a meaningless technicality. As noted by Professor Ronald Scalise:

> 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. 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. **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." 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." 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." 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." Today, however, the notarial will seems to have taken on a rigid stricture of its own.

Ronald J. Scalise, Jr., *Will Formalities in Louisiana: Yesterday, Today, and Tomorrow*, 80 La. L. Rev. 1331, 1414 (2020) (footnotes omitted).

The majority in this case erroneously requires rigid compliance with codal provisions. Finding the attestation clause in Mr. Liner's testament to be in substantial

compliance with La. C.C. art. 1579 when the entirety of the will is viewed, I must respectfully dissent.

SUPREME COURT OF LOUISIANA

No. 2019-C-02011

SUCCESSION OF JAMES CONWAY LINER, III

On Writ of Certiorari to the Court of Appeal,
Second Circuit, Parish of Ouachita

HUGHES, J., additionally concurring.

The will of the testator refers to the interpretation of the substantive dispositions made in a last will and testament. In Louisiana all testaments are subject to certain formalities. A testament that does not comport with the requisite formalities is null and void. Thus the law elevates form over substance.

In the case of a statutory or notarial will, the testator must declare the instrument is his testament and sign at the end and on each other separate page, and a declaration to this effect must be signed by testator, the notary, and the witnesses. If one presumes that the purpose of the declaration is to prevent fraud, the requirement that the testator declare that he has signed each page of the testament is the heart of the matter, not a minor technicality. The declaration is a separate requirement that must be met, in addition to the actual signing of the testament. It is an enduring mystery why the form provided in the Civil Code is deviated from.

01/27/2021

SUPREME COURT OF LOUISIANA

No. 2019-C-02011

SUCCESSION OF JAMES CONWAY LINER, III

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF OUACHITA

Crichton, J., dissents and assigns reasons:

I dissent to the majority opinion finding that Mr. Liner's 2015 testament was invalid and absolutely null pursuant to C.C. art. 1573. The standard for evaluating testamentary deviations is, and has always been, that courts "liberally construe and apply the statute, maintaining the validity of the will if at all possible" as long as the will *substantially complies* with statutory requirements. *Succession of Guezuraga,* 512 So.2d 366 (La. 1987); *see also Succession of Holbrook*, 13-1181 (La. 1/28/14); 144 So. 3d 845 ("The question presented, however, is whether the attestation clause signed by the witnesses and the notary is "substantially similar" to the form found in Art. 1577(2)."). "There is a presumption in favor of the validity of testaments in general, and proof of the nonobservance of formalities must be exceptionally compelling to rebut that presumption." *Successions of Toney*, 2016-1534 (La. 5/3/17), 226 So. 3d 397, 401 (citing *Holbrook*, 144 So. 3d at 853).

The plain language of C.C. art. 1579(2) reiterates this standard of substantial compliance, requiring that the notary and witnesses must sign the form attestation clause provided therein "or one substantially similar." Further, in the context of the attestation clause this Court has stated:

> There must be an attestation clause, or clause of declaration. However, **its form is not sacrosanct: It may follow the form suggested in the statute or use a form substantially similar thereto**. The attestation clause is designed to evince that the facts and circumstances of the confection and execution of the instrument conform to the statutory requirements. In construing the attestation clause of this type of will, this court has been most liberal in its determination of whether the

> clause complies in form and whether it evidences the requisites to supply validity to the instrument. In *Succession of Thibodeaux,* 238 La. 791, 116 So.2d 525, we reiterated **a basic principle of construction of wills, that the validity of a will is to be maintained if possible. In construing an attestation clause we will not require strict, technical, and pedantic compliance in form or in language. Rather, we will examine the clause to see whether there is substantial adherence to form and whether it shows facts and circumstances which evidence compliance with the formal requirements for testamentary validity.**

Succession of Morgan, 242 So.2d 551, 552–53 (1970) (emphasis added).

Where, as here, the deviation from notarial form is minor, the Court may only find that substantial compliance has not been met where the nonobservance of formality fails to protect the testator from fraud. In *Guezeraga*, this Court explained:

> 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 the 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. Thus testators and estate planners will have the security that the legislature intended to give them.

Guezuraga, 512 So.2d at 368 (citations omitted). Thus, both jurisprudence and the plain language of C.C. art. 1579 establish that strict compliance with formal requirements is not required unless the noncompliance fails to guard against fraud. Despite this well-established standard, this Court deviated from the rule of substantial compliance in *Succession of Hanna*, 19-1449 (La. 11/25/19), 283 So.3d at 493. In *Hanna*, the Court found that the use of the word "signed" in the attestation clause, without inclusion of the C.C. art. 1579(2)'s proposed language "at the end of the testament and on each other separate page," rendered the otherwise compliant will invalid and absolutely null, citing *Toney*, *supra*.[1] I would revisit *Hanna* or find

[1] While I agreed with the majority's conclusion in *Toney*, I note that the formal deviations in that case were quite distinguishable from those present herein. *Toney*, 226 So. 3d at 411 (Crichton, J., additionally concurring) (highlighting "my concern about the proliferation of widely available and generic legal templates, which may substantially deviate from form requirements set forth in the Civil Code."). In *Toney*, the dispositive portion of the will failed to comply with C.C. art. 1577(1) because the testator did not sign but merely initialed the first two pages of the will. *Id*. at 404

that, as a brief writ grant without reasons, the ruling has little precedential value to the Court.[2] In a critique of this Court's trend from "substantial compliance" to "substantially strict compliance," Professor Ronald Scalise highlights that scholars have rightly criticized Louisiana's approach, lamenting that the appellate courts have "unfortunately continued the approach of rigid adherence to the wording of the attestation clause found in the Civil Code" in the wake of *Toney* and *Hanna*. Ronald J. Scalise, Jr., Will Formalities in Louisiana: Yesterday, Today, and Tomorrow, 80 La. L. Rev. 1331, 1351 (2020) (internal citations omitted)

Continuing this trend of strict compliance, the majority finds that the word "signed" is not substantially similar to the form attestation clause provided in C.C. art. 1579(2) because it establishes only that the will was signed *once*, not at the end and on each separate page. *Succession of Liner*, 19-2011, p. 7 (La. 1/27/21), -- So. 3d --. In my view, this reasoning fails to follow this Court's longstanding rule that the formal requirements for notarial wills are to be liberally construed in light of the presumption of a will's validity. *Holbrook*, *supra*. Applying this principle of liberal construction, I believe that an attestation clause's indication that it was "signed" satisfies the statutory requirements, as "signed" may be interpreted to mean the

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("[W]e 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."). The attestation clauses also omitted *any* indication that the testator signed the will before the notary as required by C.C. art. 1577(1) and, in fact, appeared to indicate the notary was not present. *Toney*, 226 So. 3d at 405. Since the primary purpose of an attestation clause is to ensure the testament was executed per the formal requirements set forth in C.C. art. 1577(1), the deviation as to the notary being present was not substantially compliant with the form attestation clause provided in C.C. art. 1577(2). *Cf Succession of Porche*, 288 So. 2d 27, 29 (La. 1973) ("When, in fact, the instrument as a whole shows that [the statutory] 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.").

In sum, the Court in *Toney* did not rely on a singular deviation in reaching its opinion, and it does not stand for the proposition that inclusion of the words "at the end" or "on each other separate page" in the attestation clause is a threshold requirement for a will to be valid. I accordingly would find that *Hanna*'s reliance on *Toney* was in error.

[2] In any case, *Hanna* is distinguishable from the facts at present because the attestation clause of Mr. Liner's 2015 will, unlike the testament deemed invalid in *Hanna*, provides the number of pages contained in the will, which provides additional protection against fraud.

testament was signed *completely*, including "at the end" and "on each other separate page" necessitating signature. Coupled with the fact that the 2015 will was actually signed at the end and on each other separate page, its failure to copy word-for-word the C.C. art. 1579(2) form attestation clause does not indicate "an increased likelihood that fraud may have been perpetrated." *Guezuraga*, *supra*. Nor is the deviation present "exceptionally compelling" such that it rebuts the presumption of the will's validity. *Toney*, *supra*. Finding that the majority has elevated form over substance in this instance, I dissent.

SUPREME COURT OF LOUISIANA

NO. 2019-C-02011

SUCCESSION OF JAMES CONWAY LINER, III

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF OUACHITA

CRAIN, J., dissenting.

For the reasons assigned by Chief Justice Weimer, I respectfully disagree with the majority's conclusion the subject attestation clause is not substantially similar to the provision in Louisiana Civil Code article 1579(2). I additionally find further support in the language of the attestation clause, which specifically identifies "the Will" as the "foregoing instrument, consisting of eight (8) pages." The witnesses and notary attested "the Will was signed . . . by Testator . . . in our presence." Because "the Will" is expressly identified as consisting of eight pages, one can reasonably infer the witnesses and notary saw the testator sign *all eight pages* comprising "the Will." Giving meaning to all of its terms, the attestation clause substantially complies with Article 1579(2). At a minimum, the clause does not present the type of "exceptionally compelling" nonobservance of formalities necessary to rebut the presumption of the testament's validity. *See Successions of Toney*, 16-1534 (La. 5/3/17), 226 So. 3d 397, 401.

Louisiana adopted the statutory will, the predecessor to the notarial will, from the common law

> as a means of evading the rigid standards of form required of civil law testaments, any deviation from which caused a will to be declared null. The minimal formal requirements of the statutory will are only designed to provide a simplified means for a testator to express his testamentary intent and to assure, through his signification and his signing in the presence of a notary and two witnesses, that the instrument was intended to be his last will.

Succession of Porche, 288 So. 2d 27, 30 (La. 1973). The majority's rigid application of Article 1579(2) continues this court's recent jurisprudential trend back to the "rigid standards" for testamentary formalities that our legislature sought to avoid. We should not embrace overly technical applications of those formalities when there is no suggestion of fraud or undue influence in the execution of the will. As recalled by Justice Tate, "When the intent of the testatrix is clearly manifest . . . the law and the evidence in will cases should not be confined in the Bastille of a technical judicial construction." *Succession of Porche*, 288 So. 2d at 30 (*quoting Succession of Eck*, 233 La. 764, 775, 98 So. 2d 181, 185 (1957)). The subject testament complies with the statutory formalities and clearly expresses the testator's intent. We should honor that intent and uphold the will.