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## Successions of Toney

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***SUCCESSIONS OF TONEY AND THE FORMAL  
REQUIREMENTS OF NOTARIAL TESTAMENTS***

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*Successions of Toney* presents a rich debate over the requirements of form mandated for notarial testaments in the Louisiana Civil Code. The case lays bare the encroachment of common law testaments into Louisiana courts and the possible erosion of the civil law emphasis on adherence to legislation.

I. BACKGROUND

Mr. Ronnie Robert Toney passed away on January 19, 2015.<sup>1</sup> He was predeceased by his wife, Jeanette Rena Toney. Both died testate, with both leaving their entire estates to Mrs. Toney’s brother, Richie Glenn Gerding, in the event one predeceased the other. On April 13, 2015, Mr. Gerding sought to file and probate both testaments.

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\* J.D./D.C.L. (May 2021) Paul M. Hebert Law Center, Louisiana State University. The author would like to thank Professor Elizabeth R. Carter for her help with research and editing.

1. *Successions of Toney*, 226 So. 3d 397, 399 (La. 2017).

Mr. Toney's testament, dated August 2, 2014, consisted of three numbered pages, to which an affidavit was attached. The first two pages of the will were initialed in print by Mr. Toney in the bottom left corner. The third page consisted of the testator's signature and a clause in which three witnesses certified that the testator signed the will and declared it his last will and testament. The affixed affidavit included a similar clause by which the testator verified that, in the presence of witnesses, he signed and executed the testament freely as his last will and testament. Following a similar clause by the witnesses is a certification by the notary that the testator "signed, swore to and acknowledged" and the witnesses "subscribed and sworn to" the affidavit. Notably, the affidavit included a space to mark the "county" in which the testament was executed.<sup>2</sup>

On May 6, 2015, John Huey Pierce Jenkins, Mr. Toney's uncle, filed a petition to annul Mr. Toney's testament, alleging that the notarial testament failed to comply with the requirements prescribed by Louisiana Civil Code article 1577. In seeking to annul the testament, Mr. Jenkins alleged several deficiencies in the form of Mr. Toney's notarial testament. First, the testament lacked Mr. Toney's signature on each separate page. Rather, the first two pages were initialed in print, a departure from article 1577(1)'s requirements.<sup>3</sup> Further, the code-mandated attestation clause was in a form inconsistent with article 1577(2).<sup>4</sup> The final deficiency alleged was that the notary, witnesses, and testator were not in each other's presence at the time the testament was executed.<sup>5</sup>

Upon review of the testament, the trial court judge found the testament to be absolutely null for want of form for the reasons alleged by Mr. Jenkins. This decision was affirmed by the Court of Appeal. Upon application to the Louisiana Supreme Court, Mr. Gerding

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2. *Id.* at 399-400. The affidavit seems to have been of a standard form common in other states.

3. LA. CIV. CODE ANN. art. 1577(1) (2018) ("the testator . . . shall sign his name at the end of the testament and on each other separate page").

4. *Id.* at art. 1577(2).

5. *Toney*, 226 So. 3d at 399.

argued that the deficiencies found in Mr. Toney's testament were minor and that the testament was overall sufficiently compliant with the formal requirements prescribed by the Civil Code.<sup>6</sup>

## II. THE DECISION OF THE COURT

The Louisiana Supreme Court affirmed the decisions of the prior courts, holding that the testament significantly and materially deviated from the formal requirements set forth in the Civil Code.<sup>7</sup> While acknowledging that there is normally a general presumption in favor of the validity of testaments and substantial burden of proof to rebut it, the court adheres to the mandatory language contained in article 1573.<sup>8</sup> The court found that the printed initials at the bottom of the first two pages of the document did not satisfy article 1577's requirements. As to the attestation clause, the court found that, even taking all the various clauses found in the testament and affidavit in aggregate, there was nothing substantially similar to the attestation clause in article 1577 sufficient to find one present in the testament.

This case included two dissents and a concurring opinion. Chief Justice Johnson argued that the strict adherence to the codal requirements constitutes an elevation of form over function. In her view, in the absence of an allegation of fraud, Mr. Toney's intent should have prevailed, and the attestation clause was sufficient for formal purposes.<sup>9</sup> Justice Weimer also criticized the elevation of form over substance, arguing that the majority ignored the clear testamentary intent by refusing to piece together the elements of a valid attestation clause. The court also ignored long-standing lower court decisions in finding the initialing of the first two pages of the testament to be a significant deviation from form.<sup>10</sup> Justice Crichton concurred in

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6. *Id.* at 401.

7. *Id.* at 407.

8. LA. CIV. CODE ANN. art. 1573 (2018) ("The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null.").

9. *Toney*, 226 So. 3d at 409.

10. *Id.* at 410-411.

the majority opinion but wrote to express his concern over the “proliferation of widely available and generic legal templates” that present major deviation from codal form requirements. He stated that it is the court’s duty to uphold the law as it is absent legislative change in order to prevent the “metastization” of legal error in codal interpretation.<sup>11</sup>

### III. COMMENTARY

This commentary aims to address several issues raised in *Succession of Toney*. First, consideration is given to the dissent’s argument that an allegation of fraud or something similar is necessary to properly consider formal deficiencies in notarial testaments. Next under consideration is the issue of “substantial compliance” with article 1577’s attestation clause requirement and recent developments on the issue. Then, Justice Crichton’s concurrence will be further addressed. Finally, a proposal will be made for a path to avoid absolute nullity by formal deficiency, based on trends in other civil and mixed-law jurisdictions.

#### *A. The Necessity of Alleging Fraud to Raise Issues of Form*

In this case, both the appellate and Supreme Court decisions carried dissents arguing that, because no fraud was pled, the intent of the testator should have prevailed over the formal deficiencies.<sup>12</sup> While the desire to adhere to testamentary intent is a proper goal, the willingness to ignore multiple formal deficiencies in the absence of alleged fraud defeats the purpose of the code articles governing notarial testaments.

It is accepted that the articulated purpose of testamentary formalities is to safeguard against, among other things, fraud and undue influence.<sup>13</sup> If this is the purpose, it follows necessarily that

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11. *Id.* at 411-412.

12. *Id.* at 401, 409.

13. KATHRYN VENTURATOS LORIO, 10 LOUISIANA CIVIL LAW TREATISE SERIES: SUCCESSIONS AND DONATIONS § 12.1 (2d ed., West 2009).

deviation from these formal requirements is a threshold indicator of fraud or something similar. As it relates to the actual testament, a fault in form that materially deviates from those formal requirements laid out in the code articles necessarily indicates potential fraud without the need for pleading it or providing evidence to support it. While this may be a somewhat strict interpretation of legislative intent, it is compatible with the language of the relevant articles.

As a practical matter, the parties challenging a facially deficient testament may benefit from not having to allege fraud or similar vices. Such allegations can cause a tremendous amount of family conflict and lead to expensive, drawn-out litigation. Nullifying the deficient testament based on form prevents any inquiry into issues of potential fraud and allows a certain measure of judicial efficiency. Based on these considerations, the majority in *Toney* ruled correctly in affirming the decisions of the lower courts.

It is important to remember that, where a testament may fail as a notarial form, it may still be upheld if it meets the formal requirements of another testamentary form.<sup>14</sup> Given that Louisiana only allows for olographic and notarial testaments, a notarial testament that deviates from the necessary form may still be upheld if it satisfies the requirements for an olographic will as laid out in article 1575,<sup>15</sup> which is not the case here.

#### *B. Substantial Similarity in Art. 1577's Attestation Clause Requirement*

Louisiana Civil Code article 1577(2) provides a sample of a proper attestation clause. This, however, is not required. Rather, an attestation clause is accepted so long as it is “substantially similar” to the form provided.<sup>16</sup> In *Toney*, the court looks favorably upon the

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14. *Id.*

15. LA. CIV. CODE ANN. art. 1575 (2018).

16. *Id.* at art. 1577(2).

summary provided by the First Circuit in *Succession of Brown*, which listed three necessary elements in an attestation clause:

(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 presence of the testator and each other, they (the notary and witnesses) signed their names on a specific date.<sup>17</sup>

So long as these elements are satisfied, the attestation clause is substantially similar so as to withstand scrutiny under the article. In approving this list of elements, the Supreme Court upholds the “substantially similar” language of article 1577 and rejects a strict adherence standard found in prior jurisprudence.

Recently, the Louisiana Supreme Court issued two decisions regarding “substantial similarity” in article 1577. In *Succession of Bruce*, the testament at issue contained an attestation clause that failed to state that the testament was signed by the testator “at the end;” rather, it only stated that the testator signed “on each page.”<sup>18</sup> The Third Circuit Court of Appeals found that the lack of the phrase “at the end” in the attestation clause constituted a material deviation sufficient to nullify the testament based on “strict adherence.”<sup>19</sup> In so doing, the lower courts accepted the argument that an attestation clause must strictly adhere to the language provided in article 1577(2).

The Louisiana Supreme Court rejected the strict adherence argument, finding that strict adherence is in direct conflict with 1577(2)’s “substantial similarity” language. Noting that the only defect in the attestation clause at issue was the lack of “at the end,” the court looked to the legislative history of article 1577 and its statutory predecessor, La. R.S. 9:2442. Prior to the codification of 1577, an iteration of La. R.S. 9:2442 included sample attestation clause language stating that the will was signed “on each page,” rather than

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17. *Toney*, 226 So. 3d at 405.

18. *Succession of Bruce*, No. 2020-C-00239, 315 So. 3d 193, 2021 WL 266390 (La. 2021).

19. *Succession of Bruce*, 289 So. 3d 121 (La. App. 3 Cir. 2020).

“on each page and at the end.” The latter phrasing was added in 1980 as a matter of semantics rather than substantive change.<sup>20</sup> Accordingly, the court found that “on each page” necessarily indicated that the testament was signed at the end and was therefore substantially similar to the sample clause provided in article 1577(2).<sup>21</sup>

In *Succession of Liner*, issued on the same day as *Bruce*, the court ruled that an attestation clause stating that the testator “signed” was not substantially similar to the sample clause found in article 1579(2),<sup>22</sup> invalidating the testament at issue. The court found that “signed” “did not establish that the testament was signed at the end and on every page” of the testament at issue, instead only certifying that the will was signed at least once.<sup>23</sup>

These cases add some nuance to the *Toney* decision by delving further into what constitutes “substantial similarity” to the codal requirements for the attestation clause. As the cases indicate, it is sufficient to state that the testament is signed on each page, as that inherently indicates the final page is signed at the end. However, it is not enough to simply say that the testament is signed, as that only guarantees that the document is signed at least once, be it on the final page or any other page. These decisions also serve to rebut the contention that strict adherence is required in attestation clauses. Such an interpretation of article 1577(2) goes directly against the “substantially similar” language found in the article. In ruling as it did in these cases, the Louisiana Supreme Court upholds 1577(2)’s more permissive “substantial similarity” requirement as opposed to a fundamentally incompatible strict adherence standard.

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20. Succession of Bruce, 2021 WL 266390 at \*3.

21. *Id.* at \*4.

22. This article dictates the requirements for a notarial testament where the testator is unable to read. Section 2 of this article provides for an attestation clause similar to that found in art. 1577.

23. Succession of Liner, No. 2019-C-02011, 2021 WL 266394 (La. 2021).



*C. The “Metastization” of Legal Error in Notarial Testaments*

As mentioned above, Justice Crichton concurred in the opinion to raise the issue of the proliferation of generic testament formats that, while permissible in common law jurisdictions, fail in light of Louisiana’s formal requirements. This was plainly the case in *Toney*, as the record supports that the testament in question followed a common law format. As this issue is unlikely to go away any time soon, it is worth further discussing the problems this issue presents.

Louisiana, like every civil law jurisdiction, recognizes legislation and custom as the sources of law.<sup>24</sup> As legislation is the solemn expression of legislative will,<sup>25</sup> it follows that legislation should be followed above all else. Articles 1573 and 1577 are such expressions of legislative will and must be adhered to in the absence of other legislation to the contrary. Accordingly, any notarial testaments that materially deviate from article 1577 will be absolutely null in light of 1573. To grant validity to deficient common law testamentary formats is to undermine the civilian nature of Louisiana law by allowing judicial fiat to validate codal noncompliance.

To avoid such issues, perhaps further legislation is necessary. At the very least, there needs to be a clear indication (beyond codification) to the public that Louisiana has specific formal requirements in the preparation of notarial testaments. It is almost certain that one is able to find a Louisiana-compliant testament format online.

The prevalence of this issue regarding attestation clauses also speaks to a concerning trend among Louisiana attorneys and notaries. Article 1577 has been codified in the Louisiana Civil Code since 1997; prior to that, it had existed as a creature of statute since 1952. The language has changed very little over its life, with only small semantic alterations conducted when changes were made. This article provides clear, unambiguous wording and a sample clause. With such a clear requirement, usable language, and the

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24. LA. CIV. CODE ANN. art. 1 (2018).

25. *Id.* at art. 2.

penalty of absolute nullity for deviation, there is no valid reason for the exclusion of a compliant attestation clause. The fact that this issue keeps coming up speaks to a lack of basic diligence in the drafting and notarizing of notarial testaments that rises to the level of legal malpractice or notarial liability. Those parties to a testament found null on these grounds should have a clear cause of action against these attorneys or notaries who fail to comply with clear codal mandate.

*D. Comparing Approaches to Formal Deficiency: Louisiana and Quebec*

In a recent Louisiana Law Review article, Professor Ronald J. Scalise, Jr. noted that many civil law and mixed-law jurisdictions are moving away from strict formalism in testamentary form.<sup>26</sup> Specifically, many of these jurisdictions have been trending away from absolute nullity as a consequence of deviation. While it is unnecessary to go into the weeds on the trend, it would be beneficial to compare Louisiana's approach with that of Quebec, a similarly situated mixed-law jurisdiction.

Article 1573 of the Louisiana Civil Code, as already observed, requires that formal requirements must be satisfied on pain of absolute nullity. Quebec Civil Code article 713, an equivalent to article 1573, is similar to the extent that formal requirements must be satisfied; however, it does not have absolute nullity as the consequence for failure to meet requirements.<sup>27</sup> Rather, article 714 allows for a testament to survive formal deficiency if it meets the essential requirements of the given form and if it "unquestionably and unequivocally contains the last wishes of the deceased."<sup>28</sup> By this article, a notarial testament that fails for certain flaws in form can otherwise be valid if 1) the essential aspects of the form are observed, and 2)

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26. Ronald J. Scalise, Jr., *Will Formalities in Louisiana: Yesterday, Today, and Tomorrow*, 80 LA. L. REV. 1331, 1352-56 (2020).

27. QUEBEC CIVIL CODE art. 713.

28. *Id.* at art. 714.

it can be demonstrated that the testament indisputably contains the testator's intent.

As can be seen, the Quebec approach is more permissive than Louisiana's. It leaves a certain amount of discretion to judges in determining the validity of a testament and strikes a seemingly fair balance between requiring legal form requirements and upholding the testamentary intent of the testator. What remains unclear from article 714 is what is defined as an "essential requirement." The lack of absolute nullity is certainly more forgiving than Louisiana's near "all-or-nothing," strict formal requirements.

The comparison between the approaches of Quebec and Louisiana is drawn in order to demonstrate a possible path forward for a more forgiving Louisiana law on notarial testament form requirements. Such an approach may be to the benefit of Louisiana testators. It is unclear how exactly article 714's standards would deal with attestation clauses but, as a purely scholarly matter, Louisiana may wish to consider such an approach.