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Testamentary Formalism in Louisiana: Curing Notarial Will Defects Through a Likelihood-of-Fraud Analysis

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INTRODUCTION

Before James Holbrook died, he thought that his last will and testament was valid.[1] The document that he prepared for probate appeared to have all of the requisite formalities for a notarial will required by Louisiana Civil Code article 1577.[2] Unfortunately for Mr. Holbrook's potential legatees, the date recorded on the attestation clause of the will included the year and the month, but not the day—contrary to the strict requirements of Louisiana law.[3] Although the will was properly dated on every other page, the omission of the date on the attestation clause was due to the fault of the notary who executed the document.[4] Mr. Holbrook's daughter challenged the validity of the will on the basis of its lack of form; she did not claim the existence of another will.[5] Although the document complied with the statutory formalities of a notarial will in every other respect, a Louisiana circuit court declared his will null for lack of form because of a seemingly minor flaw.[6]

Many people die leaving behind instruments that, although intended to be wills, contain errors that deviate from the statutory requirements. Much like the circuit court that decided Mr.

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1. *See In re* Succession of Holbrook, 144 So. 3d 845, 848 (La. 2014).
2. *See* LA. CIV. CODE art. 1577 (2014):

> The notarial testament shall be prepared in writing and dated and shall be executed in the following manner. If the testator knows how to sign his name and to read and is physically able to do both, then: (1) In the presence of a notary and two competent witnesses, the testator shall declare or signify to them that the instrument is his testament and shall sign his name at the end of the testament and on each other separate page. (2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: "In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this ____ day of _____, ____."

3. *Holbrook*, 144 So. 3d at 848.
4. *Id.* at 847–48.
5. *Id.* at 846–47.
6. *Id.* at 847. The purpose of this Comment is not to undermine the roles that various will formalities serve in succession law. Instead, this Comment presents Louisiana courts with the means to validate formally deficient wills in cases where the testator was properly protected against fraud or undue influence despite the defect. *See infra* Part IV.

Holbrook's case, courts across the United States have historically regarded any deviation from the formal requirements of wills as fatal to a will's validity.[7] One basis for these decisions is that will formalities exist to provide unequivocal evidence of testamentary intent.[8] A conflict arises, however, when the testator's intent is evident despite the testator's non-compliance with the formalities. In such cases, wills are often invalidated notwithstanding the clear intent of the testator to leave a will.[9]

Fortunately, the many inequities caused by strict adherence to testamentary formalities have led to a reform in the law.[10] Judges and scholars criticized the traditional approach—known as strict compliance—for prioritizing form over substance.[11] As a result of this criticism, state legislatures, scholars, and courts worked to devise methods to protect testamentary intent without belittling the importance of will formalities.[12] Those who advocated for reform offered two potential solutions: reduce the number of will formalities[13] or replace strict compliance with a more equitable doctrine.[14] Although reducing the number of formalities resulted in some success, a conflict still remained as to how courts should remedy the divide between testamentary intent and testamentary

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7. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) ("The law of wills is notorious for its harsh and relentless formalism. . . . The most minute defect in formal compliance is held to void the will, no matter how abundant the evidence that the defect was inconsequential.").

8. *See generally id.* at 492 ("When the court is asked to implement the testator's intention, he 'will inevitably be dead' and unable to authenticate or clarify his declarations, which may have been made years, even decades past. The formalities are designed to perform functions which will assure that his estate really is distributed according to his intention." (footnote omitted)).

9. *See infra* Part I.B.

10. *See generally infra* Part I.B (discussing the flaws of the strict compliance doctrine and subsequent reform).

11. *See generally infra* Part I.B; *see also* Leigh A. Shipp, Comment, *Equitable Remedies for Nonconforming Wills: New Choices for Probate Courts in the United States*, 79 TUL. L. REV. 723, 729 (2005) (citing Stevens v. Casdorph, 508 S.E.2d 610, 611 (W. Va. 1998)) ("The dissent criticized the majority for 'slavishly worshiping form over substance' . . . .").

12. *See, e.g.*, UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 218 (Supp. 2013).

13. *See, e.g.*, LA. CIV. CODE art. 1577 (2014). The notarial will is based on the Louisiana statutory will, which was enacted in the 1950s to create a will more simple in form. KATHRYN VENTURATOS LORIO, SUCCESSIONS AND DONATIONS § 12:1, *in* 10 LOUISIANA CIVIL LAW TREATISE 392 (2d ed. 2009).

14. *See* Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. (forthcoming 2014) (manuscript at 13), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341748, archived at http://perma.cc/EN9T-NA8Z.

formalities.[15] Thus, scholars in the last quarter of the 20th century attempted instead to formulate replacements for the strict compliance doctrine: the substantial compliance doctrine and the harmless error rule.[16]

As opposed to strict compliance, the substantial compliance doctrine provides courts with a method to validate wills even if the document deviates from the testamentary formalities required by state law.[17] Under substantial compliance, courts must analyze the formally invalid will and determine if the purpose of the formal requirement is adequately satisfied despite the defect.[18] The harmless error rule presents a simplified version of substantial compliance: instead of performing a functional analysis, courts may validate a formally defective will if the document reflects the intent of the testator through clear and convincing evidence.[19]

Unfortunately, the results under both the substantial compliance and harmless error doctrines have been underwhelming. Few courts apply these doctrines as scholars envisioned, perhaps because the doctrines, in some ways, present more complications than those presented by strict compliance.[20] The analyses required of courts in applying the curative doctrines do not lend themselves to hard rules; in theory, a court applying substantial compliance or harmless error must do so on a contextual, case-by-case basis.[21] As a result, courts have struggled to understand and consistently apply these doctrines.[22]

Nowhere has this failure been more pronounced than in Louisiana, where the Louisiana Supreme Court purportedly adopted the substantial compliance doctrine in *Succession of Guezuraga* in 1987.[23] In *Guezuraga*, the Court held that a formally defective will is in substantial compliance with the statutory requirements if the document adequately guards the testator against

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15. *See id.* at 13–16.
16. *Id.*
17. *See generally* Langbein, *supra* note 7, at 513.
18. *See generally id.*
19. *See* Glover, *supra* note 14, at 14. Both the *Restatement (Third) of Property: Wills and Donative Transfers* and the *Uniform Probate Code* adopted the harmless error rule. *Id.*
20. *See* Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP. PROB. & TR. J. 577, 600–02 (2007).
21. *See generally* Langbein, *supra* note 7, at 494.
22. On the failures of the substantial compliance doctrine and harmless error rule, see *infra* Part I.C.2 and accompanying discussion.
23. *See* Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance From the Past*, 70 TUL. L. REV. 1893, 1901–02 (1996); Succession of Guezuraga, 512 So. 2d 366 (La. 1987).

fraud.[24] Problematically, Louisiana courts have applied *Guezuraga* inconsistently and with mixed results.[25] One concern is that what some Louisiana courts call substantial compliance is, in application, more akin to a strict compliance standard;[26] many of these courts adhere to a rule that any deviation is fatal to the validity of the will.[27] Another issue is that some courts apply the *Guezuraga* standard inconsistently with the analysis articulated by the Louisiana Supreme Court.[28] These approaches leave the validity of the document, regardless of the evidence reflecting testamentary intent, contingent on arbitrary decisions by each court. Such violations of testamentary intent are precisely the types of injustices that the remedial doctrines of substantial compliance and harmless error were designed to prevent.[29] Moreover, this ambiguity in judicial approaches leads to conflicting decisions and uncertainty in the law.[30]

Considering the unfeasibility of the historically recognized curative doctrines, this Comment advocates for Louisiana courts to continue to apply the doctrine propagated by *Guezuraga*, but specifically to apply the standard *as articulated*. To properly understand *Guezuraga*, it should be noted that the Louisiana

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24. *See Guezuraga*, 512 So. 2d at 368 (citing Loretta Garvey Whyte, Note, *Donations—Imperfect Compliance With the Formal Requirements of the Statutory Will*, 15 LOY. L. REV. 362, 371 (1969)).

> 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.

Id.

25. *See infra* Part III.A.

26. *See* C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism* (pt. 1), 43 FLA. L. REV. 167, 239 (1991).

27. *See, e.g.*, *id.*

28. *See, e.g.*, Succession of Songne, 664 So. 2d 556 (La. Ct. App. 1995) (illustrating the use of a jurisprudential and quantitative approach, rather than a contextual one).

29. For a discussion of the remedial doctrines and their underlying purposes, see *infra* Part I.C.

30. For an illustration of the inconsistent standards and results reached by Louisiana circuit courts when analyzing formally defective wills, see *infra* Part III.

Supreme Court's holding is *not* substantial compliance as understood by legal scholars.[31] In *Guezuraga*, the Court expressed a completely unique doctrine that streamlines the analysis of validating wills that are defective in form: taking all of the formal shortcomings into consideration, if the document properly protects the testator against fraud, the will should remain valid.[32] Despite this holding, Louisiana courts have still applied inequitable and inconsistent standards in determining the validity of formally deviant wills.[33] To better enforce testamentary intent and provide guidance to courts, practitioners, and Louisiana citizens, this Comment argues that Louisiana courts should apply the *Guezuraga* test as articulated—a court should validate a will unless there is a likelihood of fraud or undue influence.[34] Under this standard, courts must determine on a case-by-case, contextual basis whether the deviations in formality reflect the probability of fraud. This doctrine would provide fairness to potential legatees, while remaining faithful to testamentary intent. Moreover, a consistent standard would provide a more simplified process for courts and practitioners.

Accordingly, Part I of this Comment discusses the history of testamentary formalism and the various remedial doctrines adopted by courts in the United States. Part II outlines the history of will formalities in Louisiana, focusing on the Louisiana Supreme Court's decision in *Succession of Guezuraga*, which purported to adopt the substantial compliance doctrine. Part III then analyzes the Louisiana jurisprudence on substantial compliance and demonstrates the lack of a coherent standard. Currently, Louisiana courts inconsistently apply the applicable standards in examining formally invalid wills. Results vary from case to case, creating and perpetuating a lack of clarity for courts, practitioners, and testators alike. Finally, Part IV advocates for Louisiana courts to return to the *Guezuraga* rule. Moreover, this Part provides guidance as to how the rule may be applied with more consistency. Under *Guezuraga*, a testator's intent will not be invalidated by de

31. *See infra* Part IV.A.

32. *See* Succession of Guezuraga, 512 So. 2d 366, 368–69 (La. 1987).

33. On the inconsistent standards applied by Louisiana courts, see *infra* Part III and accompanying discussion.

34. This Comment does not intend to apply to testaments that contain defects that will, in nearly every circumstance, render the testament invalid. For example, a will that is not signed by the testator will almost certainly be invalidated under every circumstance. In theory, a major deviation in form is not evidence of testamentary intent because the deviation leaves the testator susceptible to fraud. This Comment instead addresses circumstances where the testator remains protected against fraud despite the deviation.

minimis errors, and courts are provided with a doctrine less subject to confusion.

I. THE HISTORY AND EVOLUTION OF WILL FORMALITIES

Most American wills statutes are based on two English sources: the Statute of Frauds of 1677 and the Wills Act of 1837.[35] The Statute of Frauds was remarkable because it—for the first time—required most testaments conveying personal property to be written.[36] Prior to the statute's enactment, such transfers could be executed orally.[37] Likewise, the Wills Act was very influential because it merged the formal requirements for devising real and personal property.[38] Both statutes required some combination of writing, signature, attestation, and the presence of witnesses.[39] These formalities, for the most part, carried over into modern American succession law.[40]

A. The Functions of Will Formalities

Scholars recognize four functions of testamentary formalities: evidentiary, channeling, cautionary, and protective.[41] The evidentiary function reflects an understanding that statutory formalities will serve as "probative safeguards,"[42] meaning that compliance with the required formalities serves as reliable evidence of testamentary intent.[43] For example, the requirement that witnesses be present at the execution of the will provides courts with firsthand testimony of the will's authenticity should the validity of the will be challenged.[44]

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35. James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 547 (1990) [hereinafter Lindgren, *Abolishing the Attestation Requirement*].
36. *Id.*
37. *Id.* at 547.
38. *Id.* at 548.
39. *Id.* at 550 tbl.1.
40. *See, e.g.*, UNIF. PROBATE CODE § 2-502 (amended 1997), 8 U.L.A. 212 (Supp. 2013) (requiring that the testament must be in writing, executed or signed in the presence of two witnesses, and signed by the testator and both witnesses); LA. CIV. CODE art. 1577 (2014) (requiring that the testament be executed in the presence of a notary and two witnesses, in writing, and signed by the testator, notary, and both witnesses).
41. Shipp, *supra* note 11, at 725.
42. Langbein, *supra* note 7, at 492.
43. *Id.* at 492–93.
44. Glover, *supra* note 14, at 30.

The channeling function allows for greater judicial efficiency in the probate of wills.[45] If all wills must meet a minimum formality standard, courts thereby require little "imagination" in determining what constitutes a valid will and what does not.[46] Again using the example of the witness requirement, a witness may provide unbiased testimony as to the legitimacy of the will execution. Each witness can attest to any formality and whether it was performed properly; without witness testimony, courts would have to rely heavily on less reliable extrinsic evidence, thereby slowing the judicial process.

The cautionary function impresses upon the testator the seriousness of the act of executing a testament.[47] Because the will becomes operative only upon death, formalities "caution the testator, and they show the court that he was cautioned."[48] The cautionary function also reflects the ceremonial or ritualistic nature of will execution.[49] Requiring the presence of witnesses "sets the execution of a will apart from ordinary transactions."[50] The gravity of the execution ceremony gives the testator the opportunity to consider what he wants to achieve by executing the will, especially because the will is primarily a donative, and not onerous, act.[51]

The protective function ensures "that the contents and execution of the will are the product of free choice of the testator, free of fraud or undue influence."[52] Just as the formalities protect the testator at the time of execution, that protection extends into probate.[53] The challenger to a will must overcome a difficult presumption to prove that the "duly executed will does not represent a genuine expression of testamentary intent."[54] The advantages of having witnesses attend the execution are evident: the presence of multiple witnesses protects the testator not only from fraudulent third parties but also from a potentially fraudulent witness.[55]

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45. Shipp, *supra* note 11, at 725.
46. *Id.*
47. Langbein, *supra* note 7, at 495.
48. *Id.*
49. Glover, *supra* note 14, at 23–24.
50. *Id.* at 25.
51. *See id.*
52. Shipp, *supra* note 11, at 725.
53. Glover, *supra* note 14, at 19.
54. *Id.* at 21.
55. *Id.* at 20–21.

B. The Strict Compliance Doctrine

Although formalities serve useful functions, they create problems in circumstances in which the intent of the testator is evident but the will is formally deficient. The "cornerstone of the law of wills" is that the testator should be given the freedom to dispose of his property and that the law should protect the "testator's intent to exercise this freedom."[56] Will formalities thus present a difficult question that courts and scholars struggle to answer: how should a court balance the intent of the testator against the functions of testamentary formalities? For centuries, courts applied a standard of strict compliance,[57] which dictates that *any deviation* from the statutory requirements, no matter how minor, renders the will invalid.[58] The benefit of strict compliance is that it encourages the testator to carefully comply with statutory requirements.[59] Moreover, a formally compliant document offers strong evidence of testamentary intent and thus can be routinely and efficiently processed by probate courts.[60]

However, the results of strict compliance can be harsh for the potential beneficiaries of the will, especially if the document accurately reflects the intent of the testator but contains a merely technical flaw.[61] Consider the Louisiana circuit court holding in *In re Succession of Holbrook*, where the testator's will was invalidated by a circuit court for merely omitting the day of the month on the testament's attestation clause.[62] Louisiana Civil Code article 1577 requires that a notarial will contain a statement similar, but not necessarily exact, to the following: "In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this _____ day of _____, _____."[63] The date the will was signed was uncontested in the case.[64]

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56. *Id.* at 9.
57. Shipp, *supra* note 11, at 728.
58. Langbein, *supra* note 7, at 489.
59. *Id.* at 494.
60. *Id. See also* Shipp, *supra* note 11, at 728 ("Conformity with statutory requirements presumably serves as a reliable indicator of testamentary intent.").
61. Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 457 (2002).
62. *In re* Succession of Holbrook, 144 So. 3d 845, 845 (La. 2014).
63. LA. CIV. CODE art. 1577 (2014).
64. *See Holbrook*, 144 So. 3d at 847.

A strict reading of the statute serves little purpose other than to reflect a belief that compliance with the formalities is paramount to testamentary intent. Thus, the doctrine can be inherently unfair for would-be legatees. This unfairness is especially magnified under the rules for Louisiana notarial wills, where fault is generally attributed to a third party attorney or notary and not to the testator.[65] If "[t]he first principle of the law of wills is freedom of testation," strict compliance appears to foster a system that is inconsistent with this principle.[66]

The doctrine has also proven to be less consistent in application than originally perceived.[67] Courts will often determine that statutory requirements have been met in certain cases, even though a strict interpretation of the statute might indicate otherwise.[68] For example, a Texas court in *Nichols v. Rowan* held a will to be valid even though one of the witnesses testified that the witnesses' signatures might not have been made in the presence of the testator.[69] The potential danger in validating such wills is that the deviations detract from the functions of formalities. Requiring that the signatures of the parties be made in the presence of each other is designed to protect the testator against fraudulent acts.[70] Furthermore, applying strict compliance in such a manner is doctrinally dishonest because the premise of strict compliance is that adherence to the formalities reflects testamentary intent; anything short of that standard, according to the doctrine, is

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65. *See infra* note 150 (illustrating that the role of the notary is more ceremonial than practical). Louisiana does recognize a cause of action for would-be legatees deprived of their potential shares of the decedent's estate due to the fault of an attorney or notary. *See* WILLIAM E. CRAWFORD, TORT LAW § 15:27, *in* 12 LOUISIANA CIVIL LAW TREATISE 374 (2d ed. 2009) (citing Woodfork v. Sanders, 248 So. 2d 419 (La. Ct. App. 1971)). Liability is based on a *stipulation pour autrui*—or third party beneficiary—theory. *See generally* Succession of Killingsworth, 292 So. 2d 536 (La. 1973). A full discussion of attorney or notary liability, however, is beyond the scope of this Comment.

66. Langbein, *supra* note 7, at 491. *See also* Miller, *supra* note 26, at 245 ("It could be argued that the rule of strict compliance is consistent with a system which favors the state's forced succession scheme, rather than a system which favors the 'individualistic institution' of private property and the principle of free testation." (citations omitted)).

67. Sherwin, *supra* note 61, at 457. *See also* Langbein, *supra* note 7, at 525–26.

68. Sherwin, *supra* note 61, at 457 (citing Cunningham v. Cunningham, 83 N.W. 58, 60 (Minn. 1900); *In re* Pridgen's Will, 107 S.E.2d 160, 163 (N.C. 1959); Nichols v. Rowan, 422 S.W.2d 21, 23–24 (Tex. Civ. App. 1967)). *See also* Langbein, *supra* note 7, at 525 ("The rule of literal compliance can produce results so harsh that sympathetic courts incline to squirm.").

69. *Nichols*, 422 S.W.2d at 23–24.

70. Shipp, *supra* note 11, at 725.

inadequate.[71] Courts may be implicitly recognizing the inequities of strict compliance in these doctrinally suspect holdings.

C. Attempted Reforms of Testamentary Formalism and the Continued Prevalence of the Strict Compliance Doctrine

Modern legal scholars criticize strict compliance of will formalities on a number of grounds. Critics believe that the doctrine "unnecessarily values the form of a will over the substance of the testator's intent"[72] and argue that strict compliance is not the most effective means of ensuring the evidentiary, channeling, cautionary, and protective functions of testamentary formalities.[73] If protecting testamentary intent is the overarching goal, strict compliance falls far short since a testator may still have intended for a formally defective will to be valid. Accordingly, scholars have proposed two methods of reform: the substantial compliance doctrine and the harmless error rule.

1. Minimizing the Statutory Requirements for a Valid Will

The first method of reform was to simplify the statutory requirements for valid wills.[74] By reducing the number of requirements to consider a will valid, it is less likely that the testator's intent will be invalidated for failing to conform to those requirements.[75] This approach was publicized on a national scale through the enactment of the Uniform Probate Code (UPC) in 1969, which was adopted in some form by roughly 20 states.[76] Nevertheless, even with fewer requirements, the UPC still required strict compliance with the listed requirements, which somewhat negated the effectiveness of the UPC's reform.[77] The movement toward simplification was also evidenced by the transformation in

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71. *See* Langbein, *supra* note 7, at 525–26 ("Many of the formalities have produced a vast, contradictory, unpredictable and sometimes dishonest case law in which the courts purport to find literal compliance in cases which in fact instance defective compliance. Is a wave of the testator's hand a publication or an acknowledgement? Was the signature 'at the end'? When the attesting witnesses were in the next room, were they in the testator's presence? The courts now purport to ask in these cases: did the particular conduct constitute literal compliance with the formality?" (citations omitted)).

72. Glover, *supra* note 14, at 9.

73. *See generally* Langbein, *supra* note 7, at 525–26.

74. Glover, *supra* note 14, at 12.

75. *Id.*

76. *Id. See also* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1011 (1992).

77. Glover, *supra* note 14, at 13.

individual state laws; many states have decreased the number of prescribed formalities in their statutory will requirements.[78] In Louisiana, the statutory—or notarial—will was enacted to minimize the requisites for a valid will.[79] However, although a reduction in the statutory requirements makes drafting a will simple for the testator, this method of reform still failed to provide courts with a framework to validate formally deficient wills.

2. The Scholarly Attempt to Replace Strict Compliance with a More Equitable Doctrine

The second method of reform, replacing strict compliance with a more relaxed doctrine for analyzing formal deficiencies, purported to provide courts with such a framework. As a result, many American courts adopted two doctrines in place of strict compliance: the substantial compliance doctrine and the harmless error rule.[80] Both substantial compliance and harmless error provide courts with a process to validate wills otherwise considered invalid under a strict compliance standard. However, many states that have adopted these doctrines apply them sparingly, thus failing to protect testamentary intent as initially intended.[81]

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78. *Id.*

79. LORIO, *supra* note 13, § 12:2, at 409–10. To provide an example of an overly complicated will, the former Louisiana nuncupative will by public act required seven special formalities:

> (1) the will must be dictated by the testator to the notary in the presence of three witnesses residing in the place where the will is executed or of five witnesses not residing in the place; (2) the will must be written by the notary as it is dictated; (3) the will must then be read to the testator in the presence of the witnesses; (4) there must be no interruptions or turning aside to other acts; (5) the testament must be signed by the testator or, if he cannot sign or does not know how to write, express mention of this fact must be made in the will; (6) the testament must be signed by the witnesses, or at least by one of them for all, if the others cannot write; (7) express mention of the accomplishment of [the] forms must be made in the testament.

LEONARD OPPENHEIM, SUCCESSIONS AND DONATIONS § 103, *in* LOUISIANA CIVIL LAW TREATISE 185–86 (1973). *See supra* note 2 (discussing requirements of Louisiana notarial will, which was created to simplify the statutorily required will formalities); LORIO, *supra* note 13, § 12:4, at 427–28.

80. *See* Langbein, *supra* note 7; 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 (1987) [hereinafter Langbein, *Excusing Harmless Errors*].

81. *See* Lester, *supra* note 20, at 600–01.

a. The Substantial Compliance Doctrine

In 1975, John Langbein authored *Substantial Compliance with the Wills Act*,[82] which quickly became the leading authoritative source on the scholarly shift away from testamentary formalism and strict compliance.[83] Langbein recognized the conflict between freedom of testation and the "stiff, formal requirements of the Wills Act."[84] Unlike other donative transferors, the testator is unavailable to affirm his intentions in court.[85] Rather, the will is the only evidence of the testator's dying wishes. Thus, according to Langbein, the formalities and their functions play a crucial role in determining testamentary intent.[86] However, at times, courts' insistence on adherence to formalities undercuts testamentary intent, especially in cases where it does not appear that the defect has denigrated any of the functions of formalities.[87]

Langbein argued, therefore, that a defective will should be found in substantial compliance with the statutory requirements if it reflects "the existence of testamentary intent and the fulfillment of the Wills Act purposes."[88] In other words, substantial compliance "permits the proponents of a defective will to rebut the traditionally irrebuttable presumption of invalidity arising from defective execution by producing extrinsic evidence of the facts and circumstances surrounding execution" sufficient to illustrate satisfaction of the functions of will formalities.[89] Langbein believed that courts had proved "competent" in determining whether a will adequately reflected testamentary intent and were "accustomed" to analyzing whether the formality functions were satisfied.[90] He concluded that, "substantial compliance . . . merely extends an established judicial technique."[91] However, despite Langbein's optimism, the substantial compliance doctrine gained little popularity among American courts.[92]

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82. Langbein, *supra* note 7.

83. Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1038 (1994).

84. Langbein, *supra* note 7, at 491–92 (internal quotation marks omitted).

85. *Id.* at 501–02.

86. *Id.* at 492.

87. *Id.* at 498–99.

88. *Id.* at 513.

89. Miller, *supra* note 26, at 303 (citations omitted).

90. Langbein, *supra* note 7, at 516.

91. *Id.*

92. Bonfield, *supra* note 23, at 1900 ("At least in America, the widespread adoption by courts of substantial compliance was not to be. In a number of jurisdictions, courts prior to 1990 were invited to apply it, but it has been argued that all courts which considered the Langbein brief ultimately declined.").

In its most basic form, substantial compliance allows a formally defective will to be probated if the deviations are found to be in substantial compliance with the functions of testamentary formalities.[93] Langbein posed the question that he believed courts should ask: "[D]id the conduct serve the purpose of the formality?"[94] Put another way, taking the formal deviations and available extrinsic evidence into consideration, did the document still serve the four functions of will formalities to a satisfactory level? However, this notion assumes that courts are familiar with the functions of will formalities and can properly "evaluate their relative significance" when resolving issues of testamentary intent.[95] Nevertheless, courts have failed to demonstrate this familiarity and effectively wield substantial compliance. One potential cause of the doctrine's failure is the apparent gap between the expectations of legal scholarship and the practicality of judicial application of the substantial compliance doctrine.

Perhaps another reason for the failure of the doctrine is that scholars provided little guidance to courts as to how the substantial compliance doctrine should be applied. Twelve years after the publication of *Substantial Compliance with the Wills Act*, Langbein wrote that only one court had utilized the doctrine appropriately.[96] The case was *Estate of Joseph Kajut*, from the Court of Common Pleas of Pennsylvania.[97] The court held that although the testator's name had been typed on the will prior to execution, rather than handwritten by the testator at the time of execution, the will remained valid. The court conducted an "exploration of the purposes" of will statutes and determined that the intent of the testator was evident and that "no useful purpose" would be served by invalidating the will "by a technical adherence to the [statute]."[98] The principal purpose of the will statute, according to the court, "is to make certain that the intent of a testator is effectuated."[99] Although Langbein praised this case, it is worth noting that the case is strikingly lacking in the breadth of the court's analysis regarding the will's validity.

Another possible explanation for the lack of popularity can be found in the name of the doctrine itself.[100] One scholar, C. Douglas

93. Lester, *supra* note 20, at 579–80.
94. Langbein, *supra* note 7, at 526.
95. Miller, *supra* note 26, at 304.
96. Langbein, *Excusing Harmless Errors*, *supra* note 80, at 8.
97. *Id.* (citing Estate of Joseph Kajut, 22 Pa. D. & C.3d 123 (Pa. C.P. 1981)).
98. *Estate of Joseph Kajut*, 22 Pa. D. & C.3d at 136.
99. *Id.*
100. Miller, *supra* note 26, at 306–08.

Miller, argued that "'[s]ubstantial compliance' implies a quantitative or yardstick standard of compliance which if not achieved is not 'substantial.'"[101] According to Miller, courts applied the doctrine using a quantitative analysis, analyzing the "size" of each defect as opposed to analyzing the whole document against the testamentary functions.[102] In other words, some courts' interpretation of substantial compliance is that the document cannot substantially comply with the statutory formalities unless the deviation is minimal.[103] Like Langbein, Miller believed that most courts purporting to use substantial compliance were using a different analysis altogether.[104] Miller suggested that "functional compliance" would be a less misleading title to courts than "substantial compliance."[105]

Moreover, the substantial compliance doctrine, as applied, is somewhat at odds with itself. The doctrine purports to protect the formality functions of will execution, but does so at the expense of one of those functions: channeling.[106] Substantial compliance inherently presents courts with a greater challenge in analyzing formally invalid wills. The reasoning behind the channeling function is that the presence of formalities provides courts with clear evidence of testamentary intent such that they can rubber stamp a will as valid or invalid simply by comparing the document to the statutory requirements.[107] By adopting a rule that not all formalities must be followed strictly, the courts are left to make the difficult determination of whether the functions have been substantially satisfied.

This internal conflict additionally presents a circular problem. Without court consistency in articulating minimum criteria, the evidentiary value of the document diminishes as well. If the probate of a will lacking in form is contingent upon a court's determination of compliance with the functions of formalities, then the evidentiary function of those formalities is undermined. Thus,

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101. *Id.* at 307.

102. *Id.* Miller's hypothesis is derived from an analysis of Australian courts and at least one court in the United States. *Id.*

103. *Id.*

104. *Id.* at 308.

105. *Id.* at 307.

106. Langbein acknowledged that the success of the doctrine depended on whether or not it would provide clarity to the law or further confuse the courts. *See* Langbein, *supra* note 7, at 523–24. Langbein personally thought that substantial compliance would apply overwhelmingly to handwritten wills because they constituted the majority of wills executed without counsel. *Id.*

107. Shipp, *supra* note 11, at 725–26.

the success of the doctrine remains somewhat contingent upon whether its application is consistent.

b. The Harmless Error Rule

Langbein, perhaps out of frustration due to the lack of success of the substantial compliance doctrine, modified his position in 1987.[108] Langbein admitted the flaws of substantial compliance and instead advocated for the second of the curative doctrines, a "harmless error" rule.[109] Like the substantial compliance doctrine, harmless error is designed to be a purposive, non-technical approach.[110] However, instead of determining whether the document complies with each of the functions of testamentary formalism, the court must determine whether the document is an accurate reflection of testamentary intent.[111] Harmless error does not require a quantitative analysis: "A judge using the harmless error rule may examine both the noncomplying document as a whole and the circumstances surrounding the document's execution."[112] Harmless error comes with a higher standard of proof: the document must demonstrate through clear and convincing evidence that the testator intended the document to be his will.[113] Also, unlike the judicially adopted doctrine of substantial compliance, harmless error is generally promulgated through legislation.[114]

Undoubtedly persuaded by Langbein and the success of the doctrine in foreign jurisdictions, the drafters of the Uniform Probate Code adopted the harmless error rule in their 1990 revisions.[115] The UPC adopted Langbein's definition almost verbatim: a formally defective document will be treated as statutorily compliant "if the proponent of the document establishes

108. Langbein, *Excusing Harmless Errors*, *supra* note 80. Langbein admitted the "snail's pace of progress" of non-statutory substantial compliance in United States courts. *Id.* at 8–9. Moreover, Langbein determined that substantial compliance was a "flop" in application in Australian courts. In Langbein's view, the courts read "substantial" to mean "near perfect," invalidating wills that suffered from minor formal deviations. *Id.* at 1.

109. *Id.* Langbein adopted the doctrine from the South Australian "dispensing power." *Id.*

110. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.3 cmt. b (1998).

111. Lindgren, *Abolishing the Attestation Requirement*, *supra* note 35, at 568.

112. Lester, *supra* note 20, at 580.

113. Langbein, *Excusing Harmless Errors*, *supra* note 80, at 53.

114. *Id.*

115. Shipp, *supra* note 11, at 727; UNIF. PROBATE CODE § 2-503 editors' cmt. (amended 1997), 8 U.L.A. 218 (Supp. 2013).

with clear and convincing evidence" that the testator "intended the document . . . to constitute" his will.[116] Likewise, the *Restatement (Third) of Property: Wills and Other Donative Transfers* endorses the harmless error rule.[117] The *Restatement* provides further guidance on the application of the doctrine, explaining that each error should be analyzed "in relation to the purpose of the statutory formalities, not in relation to each individual statutory formality scrutinized in isolation."[118] According to the comments to the *Restatement*, analyzing the formalities in isolation would require a "technical" and "non-purposive" analysis.[119]

Although harmless error is perhaps accepted more favorably than substantial compliance, as evidenced by the *Restatement* and the Uniform Probate Code's adoption of the rule, only ten states have enacted some form of the harmless error provision of the Uniform Probate Code.[120] Within these states, even fewer courts have actually applied harmless error in cases involving facially defective wills.[121] The reasoning behind the doctrine's failure remains somewhat unclear. Perhaps, like substantial compliance, intent is not a clearly defined concept, and both scholars and courts have provided too little guidance on how the doctrine should be appropriately applied. Even with the failure of the harmless error doctrine, very few courts use substantial compliance in practice.[122] By mostly rejecting the substantial compliance doctrine and the harmless error rule, courts are perhaps implicitly recognizing the

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116. UNIF. PROBATE CODE § 2-503 (amended 1997), 8 U.L.A. 218 (Supp. 2013).

117. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 3.3 (1998).

118. *Id.* § 3.3 cmt. b (1998).

119. *Id.*

120. Those states are: California, Colorado, Hawaii, Michigan, Montana, New Jersey, Ohio, South Dakota, Utah, and Virginia. Glover, *supra* note 14, at 15 n.105. *See also In re* Will of Palecki, 920 A.2d 413, 426–27 (Del. Ch. 2007) ("In this regard, it is notable that New Jersey was hardly part of a state law stampede when it recently revised its law to eliminate a strict signature requirement. Although there has been scholarly support for changes of the kind New Jersey made for some time and even though the UPC was itself amended in 1990 to provide for a harmless error provision analogous to that which New Jersey later adopted, only a very few states have adopted that model rule." (citations omitted)).

121. Lester, *supra* note 20, at 600.

122. *Id.* at 602. Texas has adopted a narrow form of substantial compliance by statute. *See* TEX. PROB. CODE ANN. § 251.101 (West 2014). Lester also mentions one case from New Jersey, *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991), decided prior to the adoption of the harmless error rule in 2004 that is the "most widely cited example of substantial compliance." Lester, *supra* note 20, at 601.

necessity for a new approach to validating formally defective wills. Thus, considering the current lack of acceptance of the curative doctrines, "strict compliance clearly continues to dominate United States policy."[123]

II. LOUISIANA AND THE SUBSTANTIAL COMPLIANCE DOCTRINE

Louisiana courts have historically applied strict compliance when analyzing formally defective wills.[124] Over time, however, both the Louisiana Legislature and Louisiana courts have recognized the overwhelming support for adopting a relaxed approach towards will formalities.[125] The Legislature modernized the forms of testaments by enacting the statutory will, a form of wills derived from the common law with minimal formalities.[126] The statutory will evolved into the notarial will, which is currently described in Civil Code article 1577.[127] The movement away from stringent formality reached its pinnacle when the Louisiana Supreme Court decided *Succession of Guezuraga*, where the Court purported to adopt the substantial compliance doctrine.[128]

A. The Evolution from Strict Compliance to Relaxation of Formalities

In Louisiana, the traditional judicial understanding was that even if a document evidenced testamentary intent, deviation from the statutory formalities was fatal to the will.[129] As it was in the rest of the United States, this understanding was based on the concept of strict compliance—that statutory formalities serve as evidence of testamentary intent.[130] In 1938, the Louisiana Supreme Court held in *Soileau v. Ortego* that "the intention to make a will,

123. Lester, *supra* note 20, at 602.

124. *See, e.g.*, Soileau v. Ortego, 180 So. 496, 497 (La. 1938).

125. The Legislature adopted the notarial will to simplify the formal requirements for wills. *See* LA. CIV. CODE art. 1577 (2014). Additionally, the Louisiana Supreme Court purported to adopt the substantial compliance doctrine. *See* Succession of Guezuraga, 512 So. 2d 366, 368 (La. 1987).

126. *See* LORIO, *supra* note 13.

127. LA. CIV. CODE art. 1577 cmt. a (2014).

128. *Guezuraga*, 512 So. 2d at 368.

129. LORIO, *supra* note 13, § 12:1, at 393–94. *See also* LA. CIV. CODE art. 1573 (2014) ("The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null."); OPPENHEIM, *supra* note 79, § 101, at 184–85 ("No matter how well the substantive provisions of the testament effectuate his client's wishes, if the attorney does not draft his testament carefully and execute it correctly, his work will be in vain.").

130. LORIO, *supra* note 13, § 12:1, at 393–94.

although clearly stated or proved, will be ineffectual unless the execution thereof complies with the statutory requirements."[131] The Court further provided that the purpose of formalities is to "guard against and prevent mistake, imposition, undue influence, fraud, or deception, to afford means of determining . . . authenticity, and to prevent the substitution of some other writing in place thereof."[132] According to the Court, even if "there is no fraud, or even [a] suggestion or imitation of it, [courts are not justified] in departing from the statutory requirements, even to bring about justice . . . since any material relaxation in the statutory rule will open up a fruitful field for fraud, substitution, and imposition."[133] Nevertheless, scholars also maintain that the traditional "cardinal rule" when interpreting testaments in Louisiana is to uphold the intent of the testator.[134] Keeping this cardinal rule in mind, "proof of non-compliance must be 'particularly strong' to overcome the presumption of validity associated with testaments."[135]

Modern Louisiana law reflects a shift away from testamentary formalism in a manner similar to movements in the common law. Like the revision of the Uniform Probate Code in 1969, Louisiana took steps to simplify the will-making process.[136] The Louisiana Civil Code of 1870 provided four forms of testaments:[137] nuncupative by public act,[138] nuncupative by private act,[139] mystic,[140] and

131. Soileau v. Ortego, 180 So. 496, 497 (La. 1938).
132. *Id.*
133. *Id.*
134. LORIO, *supra* note 13, § 12:1, at 393.
135. *Id.* at 394.
136. On the various approaches of reform to curing invalid testaments, see *supra* Part I.C and accompanying discussion.
137. LORIO, *supra* note 13, § 12:1, at 392.
138. For a discussion of the requirements of the nuncupative will by public act, see *supra* note 79.
139. "The nuncupative will by private act must be written either by the testator or by another person from the testator's dictation in the presence of five witnesses who reside in the place where the will is made or of seven who reside outside that place." OPPENHEIM, *supra* note 79, § 105, at 191. Moreover, "the testator must either read his will to the assembled witnesses or cause it to be read to the witnesses in his presence." *Id.* § 105, at 192. Then, the testator must sign the will if capable. *Id.* § 105, at 192.
140. The requirements for the mystic will were as follows:

> [T]he testator must sign his dispositions, whether he wrote them himself or caused them to be written by another person at his direction. The document must then be closed and sealed. The testator must then present the will, closed and sealed, to the notary and three witnesses or close it and seal it in their presence, and must declare to the notary, in the presence of the witnesses, that the document contains his testament written by himself or by another at his direction and is signed by him.

olographic.[141] In 1952, Louisiana adopted the statutory will directly from common law sources to provide an "efficient, simpler alternative" to the four separate forms of wills provided in the Civil Code.[142] Moreover, in the 1997 revision of successions law in the Civil Code, all but two forms of testaments were discarded: the olographic[143] and the notarial wills.[144]

The notarial will, described in Civil Code article 1577, is a codified version of the common law statutory will.[145] However, many of the formalities within the Code article itself derive from the civil law.[146] The article provides that the testament must be in writing.[147] Additionally, the testator must, in the presence of a

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> The notary must then draw up an act of superscription which must be written on the document itself or upon the envelope which contains it and the superscription must be signed by the testator, the notary, and the witnesses. All the formalities must be performed without interruption or turning aside to other acts. Since the testator must sign the will and the superscription, those who do not know how to write or are not able to write cannot make dispositions in the form of a mystic will. The act of superscription must be signed by at least two of the witnesses and if any of the witnesses cannot write, express mention of that fact must be made in the act itself . . . [I]t is essential that the act of superscription recite that all the formalities have been complied with or the will is null.

Id. § 107, at 195–96.

141. Article 1575 of the Louisiana Civil Code currently prescribes the requirements for the olographic will:

> An olographic testament is one entirely written, dated, and signed in the handwriting of the testator. 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 olographic testament is subject to no other requirement as to form. 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.

LA. CIV. CODE art. 1575(A) (2014).

142. *Id.*

143. This Comment does not focus on the applicability of the curative doctrines to the olographic will due to the Louisiana Supreme Court's limitation of *Succession of Guezuraga* to the notarial will. A discussion on the olographic will is beyond the scope of this Comment.

144. *See* LA. CIV. CODE art. 1576 (2014).

145. *See* LORIO, *supra* note 13, § 12:2, at 409–10; *see also* LA. CIV. CODE art. 1577 cmt. a (2014) (explaining that the notarial will is equivalent to the statutory will under former Louisiana Revised Statutes Section 9:2442).

146. *See* RONALD J. SCALISE JR., *Testamentary Formalities in the United States of America*, *in* COMPARATIVE SUCCESSION LAW VOLUME 1: TESTAMENTARY FORMALITIES 369 (Kenneth G. C. Reid et al. eds., 2011).

147. LA. CIV. CODE art. 1577 (2014).

notary and two witnesses, declare that the document is intended to be his testament and sign his name at the end of the document and on each page.[148] Finally, the notary and the witnesses must sign and date an attestation clause in the presence of the testator and each other.[149] The Louisiana notarial will is unique from other will execution statutes in the United States in that it is the only statute that requires the will to be notarized.[150] Louisiana is also one of the few states that requires the testator to sign each page of the will.[151]

B. Succession of Guezuraga

In 1987, the Louisiana Supreme Court established the current formulation of the applicable doctrine of will formalities in *Succession of Guezuraga*.[152] Reasoning that the Louisiana Legislature adopted the statutory will from the common law in order to lessen the strict will formalities, the Court noted that it was "not required to give the statutory will a strict interpretation."[153] The Court further held that a will should be upheld "as long as it is in substantial compliance with the statute."[154] Interestingly, the Court remarked that when determining what constitutes substantial compliance, courts should look to only one purpose of the formal

148. *Id.*
149. *Id.*
150. *See* SCALISE JR., *supra* note 146, at 369 n.103. The lessened role of the notary may also contribute to the shift from formalism in Louisiana as applied to notarial wills. In other civil law jurisdictions, such as France, the notary is an officer of the court and performs duties unique from those of an attorney. SAUL LITVINOFF, OBLIGATIONS § 12:15, *in* 6 LOUISIANA CIVIL LAW TREATISE 296–97 (2d ed. 2001). In colonial Louisiana, the notary played a pronounced role equivalent to that of other civilian jurisdictions. *Id.* § 12:15, at 297. However, over time, the importance of the Louisiana notary diminished. The common law equivalent of the notary, the attorney, now performs many of the notarial duties in Louisiana. *Id.* Furthermore, even non-attorneys are capable of becoming notaries. *See* LA. REV. STAT. ANN. § 35:191(A) (2006) (the requisites for achieving notary status include a high school diploma and being mentally sound). Thus, the requirement of the presence of the notary in article 1577 appears more ceremonial than practical.
151. *See* SCALISE JR., *supra* note 146, at 364 n.62.
152. 512 So. 2d 366 (La. 1987). The Louisiana Supreme Court used the phrase "substantial compliance" prior to *Guezuraga* in *Succession of Porche*, 288 So. 2d 27, 29 (La. 1973) ("We agree with the intermediate court that the present will substantially complies with the statutory formalities required and is therefore valid."). However, because *Porche* was decided prior to Langbein's article—which provides the clearest articulation of the doctrine—and because *Guezuraga* provides the standard currently recognized by most Louisiana courts, this Comment focuses on *Guezuraga* and its progeny.
153. *Guezuraga*, 512 So. 2d at 368.
154. *Id.*

requirements: namely, "to guard against fraud."[155] In other words, if the deviation from the will formalities does not expose the testator to fraud, "ordinary common sense dictates that such departure should not produce nullity."[156] Conversely, if the defect "indicate[s] an increased likelihood that fraud may have been perpetrated [the defect] would be considered substantial and thus a cause to nullify the will."[157]

The Louisiana Supreme Court reaffirmed *Guezuraga* in 2014 in *In re Succession of Holbrook*.[158] In *Holbrook*, the Court overturned the lower court's decision to grant summary judgment in favor of the party challenging the will's validity.[159] The Court held that it "need not strictly adhere to the formal requirements of the statutory will, to the extent of elevating form over function."[160] Quoting *Guezuraga*, the Court confirmed that the underlying goal is to "guard [the testator] against fraud" and that the proper analysis is to determine whether the lack of formal compliance "indicate[s] an increased likelihood that fraud may have been perpetrated."[161]

The Court's approach in both *Guezuraga* and *Holbrook* is significant in its uniqueness. Although the Court is correct in stating that courts should look to the purposes of formality when applying substantial compliance,[162] avoidance of fraud is but one of these functions.[163] Therefore, the Louisiana approach represents a truncated interpretation of substantial compliance. Regrettably,

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155. *Id.*

156. *Id.* (quoting Loretta Garvey Whyte, Note, *Donations—Imperfect Compliance With the Formal Requirements of the Statutory Will*, 15 LOY. L. REV. 362, 371 (1969)). The Court's entire analysis is as follows:

> 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.

Id.

157. *Id.*

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

159. *Id.* at 847.

160. *Id.* at 851.

161. *Id.*

162. *See* Lester, *supra* note 20, at 578–79.

163. The protective function is meant to ensure that the document is free from fraud or undue influence. *See* Shipp, *supra* note 11, at 725.

the resulting applications by Louisiana lower courts have been extremely inconsistent.

III. THE SUBSTANTIAL COMPLIANCE DOCTRINE AS APPLIED BY LOUISIANA COURTS

Despite the Louisiana Supreme Court's articulation of the substantial compliance doctrine in *Guezuraga*, Louisiana circuit courts have applied a wide variety of standards when analyzing the formal validity of wills. Many courts follow *Guezuraga* to varying degrees, whereas some courts apply a different standard altogether.[164] Furthermore, the holdings of some cases indicate that, regardless of the doctrine that courts purport to apply, strict compliance is the actual standard employed.[165] By relying strictly on rules created by precedent or applying language like "material deviation," the implication is that courts are applying a quantitative standard and disregarding contextual evidence of testamentary intent.[166]

A. The Inconsistent Standards Applied by Louisiana Courts

When analyzing formally defective wills, some courts follow the *Guezuraga* rule and analyze the statutory deviations against fraud in order to determine whether the substantial compliance standard is satisfied.[167] The Second Circuit provided perhaps the best articulation of the *Guezuraga* standard in *Succession of Bilyeu*.[168] The court held that "when the instrument shows that the formalities have been satisfied, technical deviations in the attestation clause should not defeat the dispositive portions of an otherwise valid will."[169] Consequently, "[i]f there exists an indication of the increased likelihood of fraud, the variations would be considered substantial and thus a cause to nullify a will. If not, they should be disregarded."[170] Outside of *Bilyeu*, other courts merely cite the

164. *See infra* Part III.A.

165. *See, e.g.*, *In re* Succession of Dunaway, 92 So. 3d 555, 557–58 (La. Ct. App. 2012).

166. *See, e.g.*, *In re* Succession of Holbrook, 115 So. 3d 1184, 1188 (La. Ct. App. 2013), *rev'd*, 144 So. 3d 845 (La. 2014).

167. *See, e.g.*, Successions of Eddy, 664 So. 2d 853, 855 (La. Ct. App. 1995) ("A liberal construction of the statutory will law requires us to maintain the validity of a will as long as it is in substantial compliance with the statute. In deciding what constitutes substantial compliance, we must look to the purpose of the formal requirements—to guard against fraud." (citation omitted)).

168. Succession of Bilyeu, 681 So. 2d 56, 59 (La. Ct. App. 1996). In *Bilyeu*, the attestation clause referred to the male testator as "she" and "her." *Id.* at 58.

169. *Id.* at 59.

170. *Id.* The court ultimately upheld the validity of the will. *Id*.

language verbatim or nearly identical language from *Guezuraga* instead of providing their own interpretation of the *Guezuraga* doctrine.[171]

However, other courts claim to use substantial compliance—or some other form of relaxed standard—without mentioning either the formality functions or fraud.[172] The result is some hybrid standard between *Guezuraga* and strict compliance. In *In re Succession of Richardson*, for example, the First Circuit provided a discussion on the policy behind the statutory will similar to the *Guezuraga* Court's discussion.[173] The court stated, in analyzing the attestation clause requirement, "we will not require strict, technical, and pedantic compliance in form or language."[174] The court followed this seemingly relaxed standard by iterating that "all of the formal requisites for confection of a notarial testament must be observed, under penalty of nullity."[175] Such language is more indicative of strict compliance. Ultimately, the court in *Richardson* held that the defect was not in "substantial compliance" with the statutory requirements.[176] Nevertheless, the court failed to cite language concerning protection of the testator against fraud when considering the validity of the will.[177]

Additionally, many cases make no mention of *Guezuraga* or substantial compliance at all and apply a standard more suggestive of strict compliance.[178] For example, the court in *In re Hendricks*

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171. *See, e.g.*, Succession of Hogan, 666 So. 2d 684, 685 (La. Ct. App. 1995) (quoting *Guezuraga* directly); Succession of Squires, 640 So. 2d 813, 814–15 (La. Ct. App. 1994) (quoting *Guezuraga* directly).

172. *See, e.g.*, *In re* Succession of Sampognaro, 865 So. 2d 307, 309 (La. Ct. App. 2004) ("[T]he Louisiana Supreme Court observed that in accordance with the legislative intent, courts liberally construed and applied the statutory will statute, maintaining the validity of a will if at all possible, as long as the will was in substantial compliance with the statute."); *In re* Succession of Richardson, 934 So. 2d 749, 750 (La. Ct. App. 2006).

173. *Richardson*, 934 So. 2d at 751. In *Richardson*, the will did not contain an attestation clause. *Id.*

174. *Id.* (internal quotation marks omitted).

175. *Id.*

176. *Id.*

177. *See id.* The court held that the absence of the attestation clause was fatal to the will's validity. *Id.*

178. *See In re* Succession of Dunaway, 92 So. 3d 555, 557–58 (La. Ct. App. 2012) ("Moreover, although the intention of the testator as expressed in the testament must govern, the intent to make a testament, although clearly stated or proved, will be ineffectual unless the execution thereof complies with codal requirements. A material deviation from the manner of execution prescribed by the code will be fatal to the validity of the testament. The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null." (citations omitted)); *In re* Succession of Holbrook, 115 So. 3d 1184, 1188 (La. Ct. App. 2013) ("Moreover, although the intention of the testator as

provided that a testament is "ineffectual unless the execution thereof complies with the codal requirements."[179] The court further stated that a "material deviation from the manner of execution prescribed by the code will be fatal to the validity of the testament."[180] Not surprisingly, other courts often cite similar language in cases where the court chooses to invalidate the testament.[181] What most of these cases have in common is the lack of language regarding upholding testamentary intent, a fundamental principle underlying Louisiana succession law.

B. "Substantially Strict" Compliance

As a result, these patchwork analyses often force courts to conduct the very types of quantitative analyses against which Langbein advocated.[182] For example, in *Succession of Songne*, the testator included different years in the dates on different pages of the document.[183] Without citing any doctrinal standard such as *Guezuraga*, the court in *Songne* merely cited to a rule, established by precedent, that a will containing two different dates "is not stricken with invalidity."[184] Applying this rule, the *Songne* court upheld the validity of the will.[185] The court accepted the testimony of the notary and the witnesses not to determine the will's validity but to determine the correct date.[186]

Similarly, when *In re Succession of Holbrook* was before the First Circuit, Mr. Holbrook's widow attempted to use *Songne* as dispositive precedent governing the challenge to her husband's

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expressed in the testament must govern, the intent to make a testament, although clearly stated or proved, will be ineffectual unless the execution thereof complies with codal requirements. A material deviation from the manner of execution prescribed by the code will be fatal to the validity of the testament." (citations omitted)), *rev'd*, 144 So. 3d 845 (La. 2014).

179. *In re* Hendricks, 28 So. 3d 1057, 1060 (La. Ct. App. 2009).

180. *Id.*

181. *See*, *e.g.*, *In re* Succession of Wade, No. 2012-CA-0808, 2012 WL 6681706 (La. Ct. App. Dec. 21, 2012) (invalidating will because testator did not sign the document); *In re* Succession of Seal, No. 2010-CA-0351, 2010 WL 3527597 (La. Ct. App. Sept. 10, 2010) (invalidating will because notary and witnesses failed to sign an adequate attestation clause); *Hendricks*, 28 So. 3d at 1057 (invalidating will because testator failed to sign one of the dispositive provisions of the will).

182. *See* Langbein, *supra* note 7.

183. *See* Succession of Songne, 664 So. 2d 556, 558 (La. Ct. App. 1995).

184. *Id.*

185. *See id.* at 558–59

186. *See id.* at 558.

will.[187] After all, the differences were minor: in *Songne*, the years on the document were different and in Mr. Holbrook's will, the day of the month was merely omitted from the attestation clause.[188] The court also acknowledged that "the intention of the testator as expressed in the testament must govern."[189] However, the First Circuit found Mr. Holbrook's will to be invalid.[190] In making this determination, the court cited language stating that a "material deviation" from statutory formalities renders the will invalid.[191] Similar to the *Songne* court's reasoning, the First Circuit's holding was based almost exclusively on rules established by precedent; not once did it mention substantial compliance or protecting the testator from fraud.[192] The court also distinguished the facts of the case from *Songne*, even though the differences were relatively insignificant.[193] Moreover, the court neglected to consider the testimony of the notary and one of the witnesses in support of the will's validity.[194]

Cases like *Songne* and *Holbrook* illustrate both the lack of a coherent standard and the potentially inequitable results produced by this doctrinal void. Although the *Songne* court upheld the will, a blanket rule that all wills that contain two different dates should be considered valid misconstrues the purpose of the curative doctrines. Substantial compliance requires a functional analysis.[195] Therefore, precedent should be mostly irrelevant because each defect should be analyzed in light of the circumstances surrounding the execution.[196] In theory, the curative doctrines require a

187. *In re* Succession of Holbrook, 115 So. 3d 1184, 1189 (La. Ct. App. 2013), *rev'd*, 144 So. 3d 845 (La. 2014). While the lower court's holding was overturned by the Louisiana Supreme Court, the lower court's analysis is still relevant. The Louisiana Supreme Court merely overturned the lower court's decision to grant summary judgment in favor of the party opposing the will; the case was not decided on its merits. *Holbrook*, 144 So. 3d at 845. Moreover, the lower court's analysis illustrates that some courts still prefer to use a stricter compliance standard.

188. *Holbrook*, 115 So. 3d at 1185.

189. *Id.* at 1188.

190. *Id.* at 1189.

191. *Id.* at 1188.

192. *Id.* at 1185–90.

193. *Id.* at 1189.

194. *Id.*

195. For a discussion of the substantial compliance doctrine and its proper analysis, see *supra* Part I.C.

196. *See* Miller, *supra* note 26, at 303–04 ("Langbein characterizes substantial compliance as essentially a litigation doctrine that permits the proponents of a defective will to rebut the traditionally irrebuttable presumption of invalidity arising from defective execution by producing extrinsic evidence of the facts and circumstances surrounding execution sufficient to prove testamentary intent by a

contextual determination, considering both the testament and the available extrinsic evidence, of whether the document adequately serves the formality functions or represents an accurate reflection of testamentary intent.[197] Subscribing to precedential rules indicates that the analysis is quantitative. In other words, courts believe that certain defects always "substantially comply" with the will statute and others do not.

Conversely, the lower court's analysis in *Holbrook* bypasses *Guezuraga* altogether, providing evidence that many courts prefer utilizing stricter criteria when analyzing formally defective wills. Such courts may implicitly be recognizing the perceived shortcomings of the curative doctrines. Accordingly, there is not only jurisprudential confusion as to the proper standard, but there is also jurisprudential ambiguity as to what constitutes a formally compliant will and what does not. The result appears to be that strict compliance maintains a prevalent role in Louisiana law.

IV. THE *GUEZURAGA* TEST AS A UNIQUE CURATIVE APPROACH

Louisiana courts are left with few practical or desirable solutions to cure the current ambiguity. The overwhelming academic and jurisprudential sentiment indicates that the inequities of strict compliance are unsustainable in modern succession law. Although both substantial compliance and harmless error, when applied according to the scholarly articulation, may potentially achieve a more equitable result than strict compliance, neither has had much success as applied in other states.[198] Thus, neither substantial compliance nor harmless error presents an ideal solution. Consequently, this Comment argues for a continuing application of the *Guezuraga* standard, supplying Louisiana courts with a curative doctrine uniquely distinct from those applied in other jurisdictions. Moreover, this Comment provides guidance as to the proper application of this standard.

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preponderance of the evidence. In contrast to the quantitative or sufficiency notion of substantial compliance sometimes applied in the courts, application of the functional substantial compliance doctrine does not depend on the court's determining that the conduct of the testator or witnesses was sufficiently close to the statutory standard to be deemed in actual compliance with the wills act.").

197. *Id*. at 302–11.

198. *See supra* Part I.C.2 (discussing the lack of success of the curative doctrines).

A. The Guezuraga *Test*

In light of the limitations of the historical approaches, this Comment advocates for courts to maintain the *Guezuraga* standard: if the formalities present in a document, taking all formal deviations into consideration, sufficiently protect the testator against the probability of fraud, the will remains valid.[199] Like the underlying purposes of substantial compliance, the functions of testamentary formalities remain properly preserved under this doctrine. However, the *Guezuraga* standard is distinct from the substantial compliance doctrine as understood by Langbein.[200] Perhaps one source of confusion in Louisiana is that referring to *Guezuraga* as a substantial compliance case is a misnomer. First, the scholarly understanding of substantial compliance is that courts must apply a functional analysis.[201] *Guezuraga*, on the other hand, requires courts to look only to the likelihood of fraud, taking into account only one of the functions of statutory formalities: the protective function.[202] Second, the name substantial compliance leads courts to believe that the doctrine requires a quantitative, as opposed to a contextual, analysis.[203] Thus, this Comment rejects the continued use of referring to the *Guezuraga* standard as "substantial compliance" and chooses instead to refer to the standard simply as the "*Guezuraga* test."

The *Guezuraga* test, as articulated, essentially serves a similar role as the harmless error rule by providing a simplified version of substantial compliance. The goal of the *Guezuraga* test—to guard against fraud—provides the same function as that underlying harmless error: the protection of testamentary intent. Of the four functions of testamentary formalities, the protective function is the function most directly tied to testamentary intent. In other words, evidence of fraud or undue influence indicates that the testator did not truly intend for the document to be his or her will. The test's advantage over harmless error is that its analysis is more targeted

199. Succession of Guezuraga, 512 So. 2d 366, 368 (La. 1987).

200. Langbein believed that every function of will formalities should be considered when analyzing defective wills. Langbein, *supra* note 7, at 513 ("The substantial compliance doctrine would permit the proponents in cases of defective execution to prove what they are now entitled to presume from due execution—the existence of testamentary intent and the fulfillment of the [statutory functions]."). *Guezuraga* provides that wills should be validated only after analyzing the defect against the protective function. *See Guezuraga*, 512 So. 2d at 368.

201. *See generally* Langbein, *supra* note 7, at 523.

202. *See Guezuraga*, 512 So. 2d at 368.

203. *See* Miller, *supra* note 26, at 306–08.

and simplified: instead of looking to evidence of intent, courts look to the potential for fraud. Courts are also likely to be more suited for analyzing the potential for fraud than for determining testamentary intent, thus fulfilling the channeling function more effectively than the other curative doctrines.

Maintaining the *Guezuraga* test achieves the goals of the curative doctrines and requires no change in the law. The doctrine adequately serves the four functions of testamentary formalities. The protective function is best served by courts looking to the likelihood of fraud in the testament's formalities. The channeling function is more effective than in substantial compliance or harmless error: courts are better equipped to make determinations of fraud rather than conduct analyses of testamentary functions, thereby streamlining the judicial process. The cautionary and evidentiary functions are unaffected by the *Guezuraga* test because the formalities themselves remain unchanged. Certainly, this approach is both equitable and practical. Moreover, the doctrine is entirely unique in United States succession law, providing Louisiana courts an opportunity to implement an entirely new curative doctrine that may well prove to be far more successful than those employed by other states.

However, the *Guezuraga* test, as currently applied by Louisiana courts, appears to be more comparable to strict compliance.[204] Accordingly, courts should utilize a functional framework as opposed to a quantitative standard. Instead of asking whether a deviation is "material" or establishing rules through precedent to determine the validity of a document, courts must look instead to see if a will's formalities, taken as a whole, adequately guarded the testator against the prospect of fraud. This must be done on a contextual, case-by-case basis. Certainly, the more insignificant the formal deviation is, the greater the likelihood the testament's formalities protected the testator from fraud. On the other hand, if the deviation is great, the more likely it is that the testament is fraudulent.[205]

B. The Advantages of the Guezuraga *Test*

A question remains as to whether the *Guezuraga* test should analyze each formal deviation against the occurrence of actual

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204. For discussion of *Guezuraga*'s inconsistent applications, see *supra* Part III.

205. *See, e.g.*, Succession of Bilyeu, 681 So. 2d 56, 59 (La. Ct. App. 1996). *Succession of Bilyeu* appears to be the closest that a court has come to applying the standard advocated by this Comment.

fraud or, alternatively, the likelihood of fraud. The purpose of the protective function, the function best served by the *Guezuraga* test, is to ensure that the contents and execution of the will are the products of the testator's free choice.[206] Requiring evidence of actual fraud places a strong burden on the challenger to the testament and also undermines the purposes of the formalities. For example, every time a testator's signature is omitted from the testament, the only means of invalidating the will would be to produce evidence that the signature was missing due to actual fraud or undue influence, thus negating the effectiveness of the signature requirement. The testator cannot be adequately protected under this standard. Furthermore, the Court in *Guezuraga* supported analyzing each document against the mere probability of fraud: "If [the deviations] indicate an increased likelihood that fraud may have been perpetrated they would be considered substantial and thus a cause to nullify the will."[207] By looking to the likelihood of fraud, the functions of the formalities are protected and the *Guezuraga* test remains a relaxed and contextual standard.

At first glance, the likelihood-of-fraud standard might appear to be quantitative; a missing signature of the testator will almost always carry with it the probability of fraud or undue influence. Nevertheless, likelihood of fraud does not necessarily create a blanket rule akin to strict compliance. If other evidence indicates that the lack of a signature was not the product of fraud and that the document accurately reflected the intent of the testator, the testament can still be validated. However, some Louisiana courts have precluded the introduction of testimony or affidavits of the notary or witnesses to "cure" an attestation clause that does not comport with the statutory requirements.[208] Excluding such

206. Shipp, *supra* note 11, at 725.

207. *Guezuraga*, 512 So. 2d at 368 (citing Loretta Garvey Whyte, Note, *Donations—Imperfect Compliance With the Formal Requirements of the Statutory Will*, 15 LOY. L. REV. 362, 371 (1969)). *See also Bilyeu*, 681 So. 2d at 59 ("If there exists an indication of the increased likelihood of fraud, the variations would be considered substantial and thus a cause to nullify a will. If not, they should be disregarded.").

208. *See, e.g.*, Succession of English, 508 So. 2d 631, 633 (La. Ct. App. 1987) ("The affidavit used to probate the will cannot 'cure' the total lack of an attestation clause. Such an interpretation would render meaningless the mandatory requirements of the statute and do violence to the jurisprudentially recognized purpose of the attestation clause."); *In re* Succession of Richardson, 934 So. 2d 749, 752 (La. Ct. App. 2006) ("We further conclude that, unfair as it seems, there is no procedure that would allow the witnesses to testify as to the validity of the will."); *In re* Succession of Holbrook, 115 So. 3d 1184, 1189 (La. Ct. App. 2013) ("Although Mrs. Holbrook attempted to remedy this defect in the

evidence is inequitable and inconsistent with *Guezuraga* and should not be followed. To disregard the testimony of the notary or witnesses renders their roles in the execution ceremony somewhat useless considering one of the purposes of testamentary formalities is to serve an evidentiary function.[209] Consequently, Louisiana courts should abandon the rule that some courts have utilized that precludes admission of witness testimony or affidavits in support of a will invalidated for lack of compliance with all form requirements.

C. The Guezuraga *Test in Application*

To provide an example of the proposed analysis in practice, consider the facts of the Louisiana Supreme Court's recent holding in *In re Succession of Holbrook*.[210] The will was properly signed and witnessed by the appropriate parties.[211] On the attestation clause of Mr. Holbrook's will, the notary neglected to place the day, the 8th, next to the month and year, April 2009.[212] Standing alone, with no other statutory deviations, the omission provides little evidence that the testament was likely the product of fraud or undue influence. The date would be relevant if the opponent of the will sought to introduce another testament written in the same month and year as the contested will. Here, though, the only document available for probate was the disputed will.[213] Furthermore, the proponent of the will's validity, the decedent's widow, attempted to introduce affidavits supplying the testimony of the notary and one of the witnesses to demonstrate that the will had been properly executed.[214] Moreover, every other page on the document contained the full date.[215] Such evidence, combined with the minor nature of the defect, would indicate the likelihood of fraud to be

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attestation clause by submitting affidavits stating that Mr. Holbrook executed his will before the notary and two witnesses on April 8, 2009, and that the '8' in the date of the attestation clause was inadvertently omitted, additional evidence on this issue is precluded."), *rev'd*, 144 So. 3d 845 (La. 2014); *In re* Succession of Seal, No. 2010-CA-0351, 2010 WL 3527597, at *4 (La. Ct. App. Sept. 10, 2010) ("Further, such defects constitute a substantive defect fatal to the validity of the will and cannot be cured through the subsequent testimony of the witnesses and the notary.").

209. Glover, *supra* note 14, at 23.
210. *In re* Succession of Holbrook, 144 So. 3d 845 (La. 2014).
211. *Id.* at 846–47.
212. *Id.* at 848.
213. The court makes no mention of an alternative testament. *Id.*
214. *Id.* at 847.
215. *Id.* at 848.

minimal in Mr. Holbrook's case. Hence, under the *Guezuraga* test, a court would likely validate the will under such circumstances.

CONCLUSION

The struggle that Louisiana courts face with respect to will formalities transcends many jurisdictions throughout the United States. The effort to reform the law of will execution as a means to protect testamentary intent has been laudable, albeit flawed. This area of the law is still evolving; until courts apply one of the remedial doctrines with success, uncertainty will continue. This Comment contends that courts and scholars should recognize a new approach: the *Guezuraga* test. If the document, with all formal requirements and evidence taken into consideration, reflects that the testator was adequately protected against the likelihood of fraud, the will should be considered valid. If the formal deviation increases the probability that the document is fraudulent, the will is null. By applying a likelihood-of-fraud analysis, Louisiana courts have the opportunity to pioneer in this area of the law by validating formally defective wills with logic and consistency through a unique approach utilized by no other jurisdiction in this country.

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