SLS 25RS-252 **ORIGINAL**

2025 Regular Session

SENATE BILL NO. 93

BY SENATOR LAMBERT (On Recommendation of the Louisiana State Law Institute)

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i) of the Constitution of Louisiana.

SUCCESSIONS. Provides for enforceability of penalty clauses in wills. (8/1/25)

AN ACT

To enact Civil Code Art. 1519.1, relative to penalty clauses; to provide for the enforceability of penalty clauses; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Civil Code Art. 1519.1 is hereby enacted to read as follows:

Art. 1519.1. Penalty clauses

A provision in a juridical act that purports to penalize a person for filing an action to challenge an *inter vivos* or *mortis causa* donation, an action related to a succession, or an action related to a trust administration is unenforceable if, at the time of instituting the action to challenge, a factual basis existed that would lead a reasonable person to conclude that there is a substantial likelihood that the challenge would be successful.

Revision Comments – 2025

(a) Penalty, no-contest, or in terrorem clauses have traditionally been dealt with by Louisiana courts under Article 1519. In the absence of more specific and clearer legislation, however, the courts have not developed a consistent approach to determine when penalty clauses are enforceable. See, e.g., Succession of Maloney, 392 So. 3d 302 (La. 2024); Succession of Maloney, 353 So. 3d 267 (La. App. 5 Cir. 2022); Succession of Gardiner, 366 So. 2d 1065 (La. App. 3 Cir. 1979); Succession of Kern, 252 So. 2d 507 (La. App. 4 Cir. 1971); Irina Fox, Comment, Penalty Clauses in Testaments: What Louisiana Can Learn from the Common Law, 70 La.

L. Rev. 1265 (2010). The Louisiana Supreme Court, in fact, has invited legislative clarity on the issue of penalty or in terrorem clauses. Succession of Maloney, 392 So. 3d 302 (La. 2024) ("We leave this question for another day noting that – in the interim – our legislature may wish to evaluate whether public policy dictates that specific statutory exceptions precluding the operation of no-contest clauses should exist based on the nature of a legatee's action in contesting a will."). The approach of this revision balances the donor's interest in preventing vexatious and frivolous lawsuits with the interest of a donee or other person in ensuring that a provision in a donation is fully free. This provision accords with the modern approach in the United States regarding penalty or in terrorem clauses in donations. See, e.g., Unif. Prob. Code §3-905; Restatement (Third) Property: Wills and Other Donative Transfers §8.5.

(b) This revision adopts the approach of the Restatement (Third) Property and the Uniform Probate Code but declines to codify the term "probable cause" in the text of this Article due to a concern for confusion of concepts between this special "civil" conception of probable cause and the more common concept of probable cause prevalent in criminal law. The Restatement (Third) Property explains the civil standard of probable cause thusly: "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer normally involves representation by legal counsel." Restatement (Third) Property: Wills and Other Donative Transfers §8.5, cmt c. In the criminal context, affidavits of probable cause are required in certain contexts. See, e.g., Code of Criminal Procedure Article 230.2. In those circumstances, probable cause exists "when the facts and circumstances known to the officer and of which he has reasonably trustworthy information are sufficient to justify a man of ordinary caution in believing the person to be arrested has committed a crime." State v. Wilson, 467 So. 2d 503, 515 (La. 1985).

(c) Although different states may have slight variations on the details of civil probable cause, the use of probable cause in evaluating penalty, no-contest, or in terrorem clauses is the dominant approach throughout the United States. See, e.g., Alaska Stat. §13.16.555; Ariz. Stat. §14-2517; Cal. Prob. Code §21311; Colo. Rev. Stat. §15-12-905; Haw. Rev. Stat. §560:3-905; Idaho Code §15-3-905; In re Estate of Foster, 376 P.2d 784 (Kan. 1962); Maine Tit. 18-C: §3-905; MD Estates and Trusts Code §4-413; Mich. Comp. Laws Ann. §700.3905; Minn. Stat. Ann. §524.2-517; Mont. Code Ann. §72-2-537; Neb. Rev. Stat. §30-24, 103; N.J. Stat. Ann. §3B:3-47; N.M. Stat. Ann. §45-2-517; N.D. Cent. Code §30.1-20-05; 20 Pa. Stat. §2521; S.C. Code Ann. §62-3-905; S.D. Codified Laws §29A-3-905; Utah Code Ann. §75-3-905; Wis. Stat. §854.19. Common-law concepts have sometimes been borrowed and transplanted into the Civil Code when helpful. See, e.g. Article 1479 (adopting the common-law concept of "undue influence" after the change in forced heirship). The explanation in the Restatement and the jurisprudence of other states should be informative to Louisiana courts. In explaining when no-contest clauses should be applied, the North Carolina Supreme Court explained as follows: "In our opinion, a bona fide inquiry whether a will was procured through fraud or undue influence, should not be stifled by any prohibition contained in the instrument itself. In fact, our courts should be as accessible for those who in good faith and upon probable cause seek to have the genuineness of a purported will determined, as they are to those who seek to find out the intent of a testator in a will whose genuineness is not questioned. Forfeiture clauses are usually included in wills to prevent vexatious litigation, but we should not permit such provisions to oust the supervisory power of the courts over such conditions and to control them within their legitimate sphere. There is a very great difference between vexatious litigation instituted by a

disappointed heir, next of kin, legatee or devisee, without probable cause, and litigation instituted in good faith and with probable cause, which leads the contestant to believe that a purported will is not in fact the will of the purported testator. We think it is better to rely upon our trial courts to ascertain the facts in this respect." Ryan v. Wachovia Bank & Trust Co., 70 S.E.2d 853, 856-57 (N.C. 1952). See also Cal. Prob. Code §21311(b) ("[P]robable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.").

(d) This Article applies broadly to provisions in juridical acts that attempt to discourage or prevent actions challenging the effectiveness of donations, successions, or trust administrations. A juridical act is "a licit act intended to have legal consequences." See Article 3506 (2025) and Article 3483, cmt (b). The term includes contracts, such as donations inter vivos, and a unilateral juridical act, such as donations mortis causa. See Articles 1468 and 1469. This Article applies even if the provision discouraging challenge or contest appears in a juridical act that is not a part of but rather is related to the donative disposition.

(e) This Article does not purport to specify exhaustively what types of actions do or do not constitute contests sufficient to invoke a properly drafted penalty clause. Succession of Maloney, 392 So. 3d 302 (La. 2024) ("As a threshold matter, a court must determine whether a no-contest clause is triggered by the actions of a legatee, i.e., is the no-contest clause applicable."). A good faith action for interpretation of a disposition should not invoke a penalty clause in a will, nor should a compromise between parties. See, e.g., Article 3071. This approach is consistent with the law of some other states. See, e.g., Ga. Code Ann. §53-4-68(c)(1) (excluding settlement agreements and providing that "[a] condition in terrorem shall not be enforceable against an interested person for … [b]ringing an action for interpretation or enforcement of a will"). A variety of other types of actions may also not invoke the application of a penalty clause. For example, the following are some examples of actions that may not invoke application of a no-contest clause: a request for an accounting, a challenge to the appointment of an executor, a suit to remove or compel a fiduciary to perform duties, a suit against a fiduciary for the nonperformance of duties, and an action for the probate of an alternative testament. See, e.g, Successions of Rouse, 80 So. 229 (La. 1918); Succession of Rosenthal, 369 So. 2d 166 (La. App. 4 Cir. 1979); Succession of Robinson, 277 So. 3d 454 (La. App. 2 Cir. 2019). Courts should apply discretion and good judgment in ascertaining the purpose of an action by a donee and evaluating the nature of the action in light of the no-contest clause. Because no-contest clauses operate as penalties or forfeitures, they should be strictly construed by courts. See, e.g., In re Succession of Scott, 950 So. 2d 846 (La. App. 1 Cir. 2006); Estate of Newbill, 781 S.W.2d 727, 728 (Tex. App. 1989); Calvery v. Calvery, 55 S.W.2d 527 (Tex. App. 1932).

(f) This Article does not displace the application of other prohibitions in the Civil Code, including the application of Article 1519 to other aspects of penalty clauses. See, e.g., Succession of Kern, 252 So. 2d 507 (La. App. 4 Cir. 1971) (holding that a clause in a will providing that the entire will was "null and void" if "any heir" challenges the will "in any way" was "repugnant to law and good morals and cannot be sanctioned by the courts"). Of course, a donor also may not in a testament subject a forced heir's receipt of his legitime to a no-contest clause. Such a restriction would be violative of Article 1496 and long-standing Louisiana public policy. See Article 1496 ("No charges, conditions, or burdens may be imposed on the legitime except those expressly authorized by law, such as a usufruct in favor of a surviving spouse or the placing of the legitime in trust."); see also Hoggatt v. Gibbs, 12 La. Ann. 770 (1857).

The original instrument and the following digest, which constitutes no part of the legislative instrument, were prepared by Senate Legislative Services. The keyword, summary, and digest do not constitute part of the law or proof or indicia of legislative intent. [R.S. 1:13(B) and 24:177(E)]

DIGEST

SB 93 Original 2025 Regular Session Lambert

Proposed law provides that a provision in a juridical act that purports to penalize a person for filing an action to challenge the act is unenforceable if there is a substantial likelihood that the challenge would be successful.

Effective August 1, 2025.

(Adds C.C. Art. 1519.1)