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## Practitioners' Notes: Evidentiary Presumptions

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# PRACTITIONERS' NOTES

## Evidentiary Presumptions

Keith B. Hall\*

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In its 1997 regular session, the Louisiana Legislature enacted a major addition to the Louisiana Code of Evidence—a new chapter dealing with evidentiary presumptions.<sup>1</sup> The new chapter became effective August 15, 1997,<sup>2</sup> and consists of eight articles that define “presumption,” establish the effects of presumptions, and regulate jury instructions regarding presumptions. The addition becomes Chapter 3, filling a blank chapter that had been reserved for the topic of presumptions. This Practitioner’s Note provides an introduction to the new chapter.

### I. WHAT IS AND WHAT IS NOT AN EVIDENTIARY PRESUMPTION?

An evidentiary presumption is an inference that the law requires the trier of fact to draw, if it finds the existence of a “predicate fact,” unless the presumption is rebutted.<sup>3</sup> An example of an evidentiary

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1. See Act No. 577, 1997 La. Acts 918.

2. See LA. CONST. art. III, § 19.

3. See LA. EVID. CODE ANN. art. 302 (West Supp. 1998). This article provides definitions to be used in conjunction with the new Chapter.

(1) The “burden of persuasion” is the burden of a party to establish a requisite degree of belief in the mind of the trier of fact as to the existence or nonexistence of a fact. Depending on the circumstances, the degree of belief may be by a preponderance of the evidence, by clear and convincing evidence, or as otherwise required by law.

(2) A “predicate fact” is a fact or group of facts which must be established for a party to be entitled to the benefits of a presumption.

presumption is the Civil Code's provision that the husband of the mother is presumed to be the father of all children born during the marriage.<sup>4</sup> If little Johnny's mother proves that big John was her husband during the appropriate time (the predicate fact), the trier of fact must infer that big John is the father (the required inference), even if there is no actual evidence of paternity, unless the presumption of paternity is rebutted.<sup>5</sup>

In contrast, the word "presumption" also has been used to describe various legal rules and conventions that are not evidentiary presumptions. For example, Civil Code Article 1851, which was repealed with the enactment of Chapter 3, recognized "conclusive legal presumption(s)" that could "not be controverted."<sup>6</sup> However, the Louisiana Code of Evidence provides that true evidentiary presumptions are rebuttable<sup>7</sup> and that irrebuttable or conclusive presumptions actually are rules of substantive law.<sup>8</sup> For example, the

(3) A "presumption" is an inference created by legislation that the trier of fact must draw if it finds the existence of the predicate fact unless the trier of fact is persuaded by evidence of the nonexistence of the fact to be inferred. As used herein, it does not include a particular usage of the term "presumption" where the content, context, or history of the statute indicates an intention merely to authorize but not to require the trier of fact to draw an inference.

(4) An "inference" is a conclusion that an evidentiary fact exists based on the establishment of a predicate fact.

*Id.* The new chapter also defines its use of the term "prima facie" in relation to the provisions:

A. Legislation providing that a document or other evidence is prima facie evidence or proof of all or part of its contents or of another fact establishes a presumption under this Chapter. When, however, the content, context, or history of the legislation indicates an intention not to shift the burden of persuasion, such legislation establishes only an inference and in a jury case, the court on request shall instruct the jury that if it finds the existence of the predicate fact it may but need not find the inferred fact.

B. Other uses of the term "prima facie", such as those that merely provide for the admissibility of specified evidence, do not create presumptions or inferences and are not regulated by this Chapter.

*Id.* art. 308.

4. See LA. CIV. CODE ANN. art. 184 (West 1993).

5. See *id.* arts. 184, 186-187.

6. See LA. CIV. CODE ANN. art. 1851 (West 1993), *repealed by* Act No. 577 § 1, 1997 La. Acts 918. Act No. 577 also repealed Civil Code Articles 1849-50 and 1852. See Act No. 577 § 3, 1997 La. Acts 918.

7. See LA. EVID. CODE ANN. art. 304. Article 304 governs presumptions and provides that "[p]resumptions regulated by this Chapter are rebuttable presumptions and therefore may be controverted or overcome by appropriate evidence." *Id.*; see also *id.* art. 303 cmt. (differentiating between evidentiary (rebuttable) presumptions and conclusive presumptions).

8. See *id.* art. 303. "A 'conclusive presumption' is a rule of substantive law and is not regulated by this Chapter." *Id.*; see also MCCORMICK ON EVIDENCE § 342 (John William Strong ed., 4th ed. 1992) (suggesting that courts apply a rule of law when they use a

irrebuttable or conclusive presumption that someone under the age of ten cannot form criminal intent is a substantive rule that persons under the age of ten bear no criminal responsibility.<sup>9</sup>

The word "presumption" also is used sometimes to describe an allocation of the burden of proof, as in the "presumption of innocence." However, such use of the word "presumption," and several other uses that sometimes are found in cases,<sup>10</sup> do not describe evidentiary presumptions, because those uses do not describe rebuttable inferences that must be drawn upon proof of a "predicate fact."<sup>11</sup>

## II. EFFECTS OF PRESUMPTIONS

The Louisiana Evidence Code establishes two effects of presumptions by specifying what one must do to rebut presumptions. The first effect of an evidentiary presumption, created by the new Code of Evidence Article 305, is that a party contesting the presumption must present some evidence tending to rebut the required inference.<sup>12</sup> This requirement is called the burden of production.<sup>13</sup>

The second effect of an evidentiary presumption, created by the new Code of Evidence Article 306, is that a party contesting the presumption also must present enough rebuttal evidence to persuade the fact-finder that the inferred fact is not true.<sup>14</sup>

The requirement that the contesting party present evidence that convinces the trier of fact is called the burden of persuasion.<sup>15</sup> Although Article 306 speaks of "persuad[ing]" the trier of fact, attorneys should note that jurisprudence provides that certain legislative presumptions are rebutted only by clear and convincing

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conclusive presumption); CHARLES ALLAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5124 (1977) (noting that "[a] conclusive presumption is universally recognized as a rule of substantive law, not a rule of evidence").

9. See, e.g., LA. REV. STAT. ANN. § 14:13.

10. See 1 MICHAEL H. GRAHAM, HANDBOOK ON FEDERAL EVIDENCE § 301.6 (4th ed. 1996).

11. See MCCORMICK ON EVIDENCE, *supra* note 8, § 342.

12. See LA. EVID. CODE ANN. art. 305. Article 305 provides that "[i]f the trier of fact finds the existence of the predicate fact, and there is no evidence controverting the fact to be inferred, the trier of fact is required to find the existence of the fact to be inferred." *Id.*

13. See *id.* art. 302 cmt. b.

14. See *id.* art. 306. "If the trier of fact finds the existence of the predicate fact, and if there is evidence controverting the fact to be inferred, it shall find the existence of the inferred fact unless it is persuaded by the controverting evidence of the nonexistence of the inferred fact." *Id.*

15. See *id.* art. 302.

evidence.<sup>16</sup> Article 302 has not overruled such jurisprudence, given the article's statement that "the degree of belief [required to satisfy the burden of persuasion] may be by a preponderance of the evidence, by clear and convincing evidence, or as otherwise required by law."<sup>17</sup>

The burdens of production and persuasion almost always are placed on the same party.<sup>18</sup> Typically, both burdens are collectively called the burden of proof and are placed on the plaintiff in civil cases.<sup>19</sup>

### III. APPLYING PRESUMPTIONS

Suppose that a client walks into your office. He complains that his television quit working the day after he bought it. You know that the client has a good claim in redhibition if the television was defective at the time of purchase.<sup>20</sup> Although you know when the television quit working, you do not know whether the television was defective at the time of purchase, and the size of the claim does not justify hiring an expert. Your case, however, is aided by the Civil Code's rebuttable presumption that the defect existed at the time of purchase (the required inference) if it appears within three days from that time (the predicate fact).<sup>21</sup>

At trial, you establish the predicate fact, because your client convincingly testifies that the defect appeared one day after purchase. You should win on a directed verdict, unless your adversary satisfies his burden of production by presenting evidence to rebut the presumption.<sup>22</sup> The evidence needed to satisfy the burden of production need not be strong, it merely must be some evidence tending to rebut the presumption.<sup>23</sup> Perhaps your adversary could satisfy his burden of production by showing that your client's house is dusty and that, in sufficient quantities, dust is bad for a television.

However, satisfying the burden of production only lets your adversary escape a directed verdict. Your client still is entitled to the benefit of the presumption, unless your adversary satisfies his burden of persuasion by convincing the trier of fact that the required inference

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16. See, e.g., *Major v. Major*, 671 So. 2d 571, 578 (La. Ct. App. 4th Cir. 1996) (discussing the presumption that property possessed by a spouse during marriage is community property).

17. LA. EVID. CODE ANN. art. 302.

18. See *Succession of Talbot*, 530 So. 2d 1132, 1135 (La. 1988).

19. See LA. EVID. CODE ANN. art. 302 cmt. b.

20. See LA. CIV. CODE ANN. arts. 2520, 2530 (West 1996).

21. See *id.* art. 2530.

22. See LA. EVID. CODE ANN. art. 305.

23. See *id.* art. 302 cmt. b.

is not true.<sup>24</sup> Because the trier of fact is not likely to believe that dust caused a television to quit working in one day, your adversary will attempt to present stronger rebuttal evidence. He might introduce testimony that your client accidentally dropped the television shortly after making his purchase. If such testimony convinces the trier of fact that the defect did not exist at the time of purchase, the presumption is rebutted.<sup>25</sup> You may believe, however, that your adversary's witness was not convincing. Assuming that you somehow obtained a jury trial on such a small claim, your client has a right to have the jury instructed on the effects of the presumption.<sup>26</sup>

#### IV. WHERE ARE PRESUMPTIONS FOUND?

Many presumptions are created by statute. For example, the Louisiana Civil Code creates a presumption that property possessed by a spouse during marriage is community property.<sup>27</sup> A listing of several presumptions created by statute is given in a special index to one handbook on Louisiana evidence law.<sup>28</sup> Several other presumptions are created by jurisprudence, such as the presumption that a testator who intentionally destroys one multiple original of a will intended revocation.<sup>29</sup> Thus, presumptions are created both in statutes and in jurisprudence. Presumptions are not found in the Code of Evidence. The new Chapter 3 merely regulates the effect of evidentiary presumptions.

#### V. WHY HAVE PRESUMPTIONS?

Evidentiary presumptions serve several purposes.<sup>30</sup> One purpose is to allocate the burden of production or persuasion to the party in the better position to have the evidence.<sup>31</sup> The common law presumption that a letter reaches its addressee if it is properly addressed, stamped, and deposited in the United States mail serves such a purpose.<sup>32</sup> Obviously, the sender usually will be in no position to prove receipt.

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24. *See id.* art 306.

25. *See id.*

26. *See id.* art. 307. Article 307 provides that "[i]n jury cases, upon request, the jury shall be instructed of the existence of a presumption and instructed as to its effect in accordance with Articles 305 and 306." *Id.*

27. *See* LA. CIV. CODE ANN. art. 2340 (West 1985).

28. *See* GEORGE W. PUGH ET AL., HANDBOOK ON LOUISIANA EVIDENCE LAW 715-21 (1997).

29. *See* Succession of Talbot, 530 So. 2d 1132, 1135 (La. 1988).

30. *See* MCCORMICK ON EVIDENCE, *supra* note 8, § 343.

31. *See id.*

32. *See id.*

Only the addressee can affirmatively prove receipt or testify that he did not receive the letter. A second purpose is "to avoid an impasse, to reach some result, even though it is an arbitrary one."<sup>33</sup> Louisiana's rule of commorientes<sup>34</sup> serves such a purpose. Finally, most presumptions coincide with what probably is true.<sup>35</sup> For example, the husband of the mother usually is the father of the child.

## VI. SCOPE

Article 301 expressly provides that Chapter 3 of the Louisiana Code of Evidence applies only to "civil cases."<sup>36</sup> Thus, the chapter does not apply to criminal cases, in which serious constitutional issues are raised by the use of presumptions.<sup>37</sup> Also, Chapter 3 does not apply to presumptions created by jurisprudence.<sup>38</sup> Additionally, it is noteworthy that, while Article 101 provides that the Code of Evidence governs "proceedings" in Louisiana courts<sup>39</sup> and while Article 1101 apparently distinguishes between "cases" and "proceedings,"<sup>40</sup> Chapter 3 applies to "cases."<sup>41</sup> Thus, it is arguable that Chapter 3 does not apply if a civil proceeding is not a case.

In addition to governing the effects of presumptions in state court civil cases, Louisiana's Chapter 3 also will govern in some federal cases. Federal Rule of Evidence 302 provides that "the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is

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33. *Id.*

34. *See* LA. CIV. CODE ANN. arts. 936-938 (West 1991 & Supp. 1998).

35. *See* MCCORMICK ON EVIDENCE, *supra* note 8, § 343.

36. *See* LA. EVID. CODE ANN. art. 301 (West Supp. 1998). This chapter defines and clarifies the foundation, weight, and other effects of presumptions and prima facie evidence or proof as used in legislation but does not apply where more specific legislation provides otherwise. It does not create new presumptions, nor does it apply to or directly affect mixed questions of law and fact, such as the inference of negligence arising from the doctrine of *res ipsa loquitur*. *See id.*

37. *See* *Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979) (finding that a conclusive presumption is inconsistent with the guarantee of the presumption of innocence); *Ulster County v. Allen*, 442 U.S. 140, 156-63 (1979) (holding that a particular permissive presumption does not violate the Due Process Clause because it does not effect the reasonable doubt standard); *State v. Lindsey*, 491 So. 2d 371, 374-77 (La. 1986) (same).

38. *See* LA. EVID. CODE ANN. art. 302 cmt. d. Note also that Article 302(3) defines "presumption" in terms of an inference created by statute. *See id.* art. 302(3). That definition, however, does not mean that judicially created presumptions are not true evidentiary presumptions. Rather, the definition merely limits the scope of Chapter 3 to presumptions created by legislation. *See id.*

39. *See id.* art. 101.

40. *See id.* art. 1101.

41. *See id.* art. 301.

determined in accordance with State law.”<sup>42</sup> Attorneys should note that the rule quoted above is not the same as requiring that the state law of presumptions govern in diversity cases. Sometimes, state law governs a claim for which subject matter jurisdiction is based on a federal question or supplemental jurisdiction. Also, federal law will govern some claims or defenses in diversity cases. Another complication is that commentators have disagreed over whether Rule 302’s use of the term “element of a claim or defense” means that all presumptions will be governed by state law when a claim is governed by state law, or whether only those presumptions directly affecting an element of a claim will be governed by state law.<sup>43</sup> Nevertheless, it is clear that Louisiana law sometimes will determine the effect of presumptions in some federal cases.

The determination of which law will govern a presumption could be significant in some cases, because Louisiana and federal law specify different effects of presumptions. Federal Rule of Evidence 301 provides:

[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.<sup>44</sup>

Most commentators and courts have concluded that the only effect of presumptions under federal law is to put the burden of producing evidence on the party that opposes a presumption.<sup>45</sup> Those commentators and courts believe that, unlike Louisiana law, the federal rule does not shift the burden of persuasion.<sup>46</sup> Instead, the rule establishes a “bursting bubble” presumption that disappears and has no further effect once some evidence is presented to rebut the presumption.<sup>47</sup>

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42. FED. R. EVID. 301.

43. Compare MCCORMICK ON EVIDENCE, *supra* note 8, § 349, with WRIGHT & GRAHAM, *supra* note 8, § 5134.

44. FED. R. EVID. 302.

45. One prominent treatise argues that the presumption survives even after the party opposing the presumption presents rebuttal evidence; the purported purpose is to allow the party benefiting from the presumption to survive a motion for a directed verdict. See WRIGHT & GRAHAM, *supra* note 8, § 5126. That view, however, has attracted little support. See *infra* note 46.

46. See, e.g., 1 GRAHAM, *supra* note 10, §§ 301.1, 301.6; *Legille v. Dann*, 544 F.2d 1, 7 n.37 (D.C. Cir. 1976).

47. See *Legille*, 544 F.2d at 6.



## VII. SIGNIFICANCE OF CHAPTER 3

A survey of the pre-Chapter 3 jurisprudence indicates that the Louisiana Supreme Court expressed clear preference that the effect of presumptions be to shift the burdens of production and persuasion,<sup>48</sup> the very effect that is codified in the new chapter.<sup>49</sup> However, the jurisprudence did not declare a definitive rule. Further, as is recognized by Comment (c) to Article 302 of the Evidence Code, confusion has resulted from the different uses of the word "presumption."<sup>50</sup> Therefore, by expressly defining "presumption" and codifying the effects of presumptions, Chapter 3 brings a welcome clarification to Louisiana law.

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48. *See* Succession of Talbot, 530 So. 2d 1132, 1135 (La. 1988) ("A presumption shifts the burden of producing evidence and, under the preferable view, serves to assign the burden of persuasion as well.").

49. *See* LA. EVID. CODE ANN. art. 306 (West Supp. 1998). Article 306 and the accompanying comment explain that Louisiana has adopted what is commonly referred to as the "Morgan" approach, which shifts both the burdens of production and persuasion. *See id.* art. 306 cmt.

50. *See id.* art. 302 cmt. c.