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Evidence Code: Presumptions

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FLORIDA LAW REVISION COUNCIL

PRELIMINARY WORKING DRAFT

Evidence Code

PRESUMPTIONS

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The ideas and conclusions set forth herein, including the draft of proposed legislation, have not been seen or approved by the Florida Law Revision Council. This material is being circulated to members of the bench and the Bar for the purpose of eliciting comments and suggestions for improvement. Any communication concerning this project should be sent in writing to the Law Revision Council, Holland Building, Room 346, Tallahassee, Florida 32304.

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INTRODUCTION

For several years, the Florida Law Revision Council has studied and considered the desirability and need for statutory adoption of most of the basic rules of evidence. At first, the Council carefully explored and received advice on the obvious threshold questions of whether the rules of evidence are appropriate for codification and, if so, whether this should be accomplished through legislative enactment or through court rules.

The need for codification has long been accepted by leading scholars in the field of evidence, see Morgan, Forward, A.L.I. Model Code of Evidence 6 (1942); Ladd, A Modern Code of Evidence, 27 Iowa L. Rev. 213, 214 (1942); McCormick, Evidence, xi (1954), and there is a clearly developing trend throughout the United States toward this effort, "Public discussion must concern itself with the merits, means and objectives of codifying the entire law of evidence.....Failure to do so is more than a failure in semantics-it is a failure in vision." Papale, Editorial: Reflections on the Proposed Louisiana Code of Evidence, 12 Loyola L. Rev. 51, 53 (1965-66). Growing caseloads continue to put strains on the time of trial judges and attorneys and on their ability to "find the Law" in the rapidly increasing number of reported cases. The pace of modern litigation does not allow the luxury of hours spent in the law library finding cases to support the many basic rules of evidence.

The need to aid bench and bar in the trial of lawsuits is

accompanied by a corollary need for uniformity within the state. Many of those urging the Council to undertake this project were motivated by a lack of uniformity in the application of the case law of evidence. Even those who have become comfortable with the present sources of evidence law must concede that uniformity does not now exist throughout the state.

The debate over whether the enactment of a comprehensive code of evidence should be accomplished by legislation or by court rules will continue, see, Green, To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?, 26 A.B.A. J. 482 (1940). The point was debated before adoption of the Federal rules by the Supreme Court, and several states have faced the issue, see Cal. Stat. Ann., Evidence, §§1-1605(1966); N.J. Stat. Ann. §§2A:66-81 through 2A:66-84; Kan. Stat. Ann. §§60-401 through 60-470 (1964); also see Note, Evidence Law in Wisconsin: Towards a More Practical, Rational and Codified Approach, 1970 Wisconsin L. Rev. 1178.

Florida's division of authority between the Legislature and the Supreme Court with respect to substantive law and procedural law would make the promulgation of a code of evidence impossible without the cooperation of these two branches of government. Fla. Const. Art. V, Sec. 2 (1972 revision). Questions of substance vs. procedure have been debated for years, and no one has ever been able to draw a clear dividing line. More important, even if a line could be drawn the substance and procedure of the law of evidence are often too interwoven to be separated. A code of evidence must contain both substance and procedure, so its promulgation must be

a cooperative effort between the Legislature and the Supreme Court. The Law Revision Council must find the avenue of cooperation between these branches of government which will allow the enactment of rules of evidence free from doubts concerning the constitutional authority of either the Court or the Legislature to promulgate this hybrid of substance and procedure.

In summary, the Council is attempting to draft an organized, orderly, statutory expression of the law of evidence, based on the opinions of our state courts and supplemented where necessary by the decisions of the Federal courts and those of our sister states. The Council recognizes that an evidence code cannot provide a clear answer to every question that may arise, and the courts will still be left with the job of interstitial development; but a code can provide the basic structure of the law of evidence. Members of the bench, the bar and the Legislature have been asked to help. Until its final recommendation to the Legislature the Council will continue to analyze and examine the tentative drafts. The Council solicits written comments from lawyers, judges, teachers, bar groups, and anyone else interested in the law of evidence.

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Section 90.301 Presumption defined.

(1) A presumption is an assumption of fact which the law ~~requires to be made~~ makes from the existence of another fact or group of facts found or otherwise established in a legal action.

(2) first sentence from 302

(3) Inference

COMMENT

This definition of presumption is similar to Calif. Evid. Code §600, and Uniform Rule of Evid. 13

"Inference," "prima facie case" and the doctrine of res ipsa loquitur are closely associated with the concept of a presumption, and many writers have tended to use the terms interchangeably or blur the distinctions. Presumptions differ in that when the basic fact giving rise to the presumed fact is established and there is an absence of contradictory testimony, the presumed fact must be found to exist.

An inference is a deduction of fact that the fact-finder, in its discretion, may logically draw from another fact or group of facts that are found to exist or otherwise established in the action.

The res ipsa loquitur doctrine constitutes a sufficient

basis for the submission of the issue of negligence to the jury in that it permits the jury to draw an inference of negligence. See American Dist. Elec. Protective Co. v. Seaboard Air Line R.R., 129 Fla. 518, 177 So. 294 (1937).

A prima facie case arises any time enough evidence is introduced to sustain a verdict for the plaintiff.

Section 90.302 Classification of Presumptions.

Except for presumptions which are conclusive under the rules of law from which they arise, a presumption is rebuttable. Every rebuttable presumption is either:

(1) A presumption affecting the burden of producing evidence, requiring the trier of fact to assume the existence of the presumed fact unless credible evidence, legally sufficient to sustain a finding of the nonexistence of the presumed fact, is introduced, in which case the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption, or

(2) A presumption affecting the burden of proof, which imposes upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.

Nothing in this section shall prevent the drawing of any inference that is appropriate.

COMMENT

This section recognizes that presumptions are either conclusive or rebuttable. Conclusive presumptions preclude the opposing party from showing by evidence that the presumed fact does not exist. See 9 Wigmore, Evidence §2492 (3rd ed. 1940). For example, Section 794.05 of the Florida Statutes conclusively presumes that a child under the age of eighteen years is incapable of consenting to sexual intercourse, and Section 736.05 provides that when two persons die simultaneously, each will be presumed to have survived the other for the purpose of title and devolution of property.

All presumptions that are not conclusive are rebuttable presumptions. For several decades, courts and legal scholars have wrangled over the purpose and function of these presumptions. The view espoused by Professor Thayer (Thayer, Preliminary Treatise on Evidence 313-352 (1898) and Wigmore [9 Wigmore, Evidence §§2485-2493 (3rd ed. 1940)], accepted by most courts [see Morgan, Presumptions, 10 Rutgers L. Rev. 512, 516 (1956)], and adopted by the American Law Institute's Model Code of Evidence, is that a presumption is a preliminary assumption of fact that disappears from the case upon the introduction of evidence sufficient to sustain a finding of the non-existence of the presumed fact.

Professors Morgan and McCormick argue that a presumption should shift the burden of proof to the adverse party. Morgan, Some Problems of Proof 81 (1956); McCormick, Evidence §317 (1945). They believe that presumptions are created for reasons of policy and argue that, if the policy underlying a presumption is of sufficient weight to require a finding of the presumed fact when there is no contrary evidence, it should be of sufficient weight to require a finding when the mind of the trier of fact is in equilibrium or if he does not believe the contrary evidence.

The Federal Rules of Evidence adopt the Morgan-McCormick rule, reasoning that "[t]he same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of the case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions," and that "these considerations are not satisfied by giving a lesser effect to presumptions." Advisory Committee Note, Fed. Rule Evid. 301.

This Code recognizes that presumptions have been created for different purposes. While the effect of presumptions and the weight of evidence required to rebut various presumptions cannot be allowed to widely differ, the policies behind the creation of each presumption are not well served by a single uniform rule. This section,

as does existing Florida law, provides an alternative and classifies rebuttable presumptions into two groups: those affecting the burden of producing evidence and those affecting the burden of proof. Whether a presumption affects the burden of producing evidence or affects the burden of proof is set forth in Sections 90.303 and 90.304.

A presumption affecting the burden of producing evidence is a procedural device which raises the assumption that a fact exists and shifts the burden of producing evidence. When evidence is introduced by the other party, the presumption disappears and the jury will not be told of it. However, an inference of the presumed fact may be found by the jury if one may logically be drawn. A presumption that affects the burden of proof is one which imposes on the other party the burden of proving the nonexistence of the presumed fact. See McCormick, Evidence §345 (2nd ed. 1972).

In a recent case, In re Estate of Carpenter 253 So. 2d 697, 703 (Fla. 1971), the Florida Supreme Court, in reversing a lower court ruling that evidence sufficient to raise a presumption of undue influence over a testator shifted the burden of proof to the proponent, reaffirmed the general rule and quoted Leonetti v. Boone, 74 So. 2d 551, 552 (Fla. 1954):

> A presumption of law which arises upon the pleading or during the course of the trial after the introduction of evidence may aid a party in the discharge of the burden of proof cast upon him and shift to his adversary the burden of explanation or of going on with the case, but does not, as a general rule, shift the burden of proof; a presumption simply changes the order of proof to the extent that one upon whom it bears must meet or explain it away . . . .

However, in a few situations the Florida courts hold that a presumption shifts the burden of proof. In Eldridge v. Eldridge, 153 Fla. 873, 16 So. 2d 163 (1944), the court stated that "[w]here the legitimacy of a child born in wedlock is questioned by the husband and reputed father, one of the strongest rebuttable presumptions known to the law is required to be overcome before the child can be bastardized . . . . The better rule is that the husband is not required to prove his contention beyond all reasonable doubt, yet his proof must be sufficiently strong to clearly remove the presumption of legitimacy." In a case where the existence of common-law marriage was in dispute, In re Estate of Alcala, 188 So. 2d 903, 907 (Fla. 3rd Dist. 1966), the court stated that "[t]he appellant's evidence, properly weighed, presents a prima facie case of marital consent and raises the strong presumption of marriage. The burden then shifted to the appellee, who asserted the illegality of the marriage, to rebut the presumption."

For a similar provision, see Calif. evid. Code §§601, 604, 606.

Section 90.303 Presumption affecting the burden of producing evidence defined. Unless otherwise provided by statute, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement social policy, is a presumption affecting the burden of producing evidence.

Section 90.304 Presumption affecting the burden of proof defined. Unless otherwise provided by statute, a presumption established because of the social desirability of the presumed fact, rather than simply to facilitate the determination of the particular action in which the presumption is applied, is a presumption affecting the burden of proof.

COMMENT

Sections 90.303 and 90.304 define the two types of rebuttable presumptions. Section 90.302 sets forth the manner in which each presumption affects a proceeding.

Presumptions affecting the burden of producing evidence are defined in Section 90.303 as established primarily to facilitate the determination of the action, rather than to implement social policy. A presumption affecting the burden of producing evidence is a procedural device designed to dispense with unnecessary proof of facts that are likely to be true if not disputed.

The presumptions described in Section 90.303 are not expressions of policy; they are expressions of experience. They are intended solely to eliminate the need for the trier of fact to reason from the proven or established fact to the presumed fact and to forestall argument over the existence of the presumed fact when there is no evidence tending to prove the nonexistence of the presumed fact. These presumptions are typically those that are so likely to be true that the law requires a fact to be assumed in the absence of contrary evidence, e.g., the presumption that a member of the family of the owner of an automobile was driving with the consent of the owner. In other situations, such as the presumption of due care of a decedent in an accident when there are no eyewitnesses, there may be no direct evidence of the existence or nonexistence of the presumed fact, but, because the case must be decided, a presumption is created as a procedural

convenience. Other presumptions of the type defined in Section 90.303 are: a letter correctly addressed is presumed to have been received in the ordinary course of mail, see Brown v. Giffen Industries, Inc., 281 So. 2d 897 (1973); Snell v. Mayo, 84 So. 2d 581 (1956), the things which a person possesses are presumed to be owned by him, see Boynton Beach State Bank v. J.I. Case Co., 99 So. 2d 633 (Fla. 2nd Dist. 1957).

When a party relies on a presumption affecting the burden of producing evidence, the basic fact must be proved before the presumption becomes operative. If the adversary offers evidence going only to the existence of the basic facts giving rise to the presumption and not to the presumed fact, the jury will be instructed that if they find the existence of the basic fact, they must also find the presumed fact. If the existence of the basic fact is not subject to dispute, i.e., it has been established by the pleadings or by judicial notice, so that it is not a question of fact for the jury, unless sufficient evidence has been presented to sustain a finding of the nonexistence of the presumed fact, the court should instruct the jury that it must also find the presumed fact.

The court must make a determination of whether sufficient evidence has been presented to sustain a finding of the nonexistence of the presumed fact. If such evidence has not been presented, the court should instruct

the jury that if it finds the basic fact, it must also find the presumed fact. If sufficient evidence to sustain the finding of the nonexistence of the presumed fact has been presented, the presumption disappears and the court should say nothing about the presumptions in his instructions.

Even though a judge does not instruct the jury concerning a Section 90.303 presumption because sufficient evidence is presented to sustain a finding of the nonexistence of the presumed fact, any logical inferences that may be drawn from the basic fact may still be argued to the jury by counsel.

The presumptions affecting the burden of proof, which are defined in Section 90.304, place a greater burden on the one asserting the nonexistence of the presumed fact because of the greater harm to the individual or to societal stability that would ensue, should the presumed fact be disproved. Examples of this type of presumption are as follows:

1. Legitimacy

   Eldridge v. Eldridge, 153 Fla. 873, 875, 16 So. 2d 163, 164 (1944). ("[P]roof must be sufficiently strong to clearly remove the presumption of legitimacy.")

2. Validity of marriage

   McMichael v. McMichael, 158 Fla. 413, 415,

28 So. 2d 692, 693 (1947). ("[T]he law will presume a marriage to be legal until otherwise shown.")

3. Acts of public officials

Hillsborough County Aviation Authority v. Taller & Cooper, Inc., 245 So. 2d 100 (Fla. 2nd Dist. 1971). (Presumption exists that public officials properly performed their duties in accordance with the law. It is incumbent upon those challenging such performance to overcome presumption.)

4. Sanity

Alexander v. Estate of Callahan, 132 So. 2d 42, 43 (Fla. 3rd Dist. 1961). ("In order to overturn the presumption of sanity . . . there must be proof showing that insanity . . . existed."); Schaefer v. Voyle, 88 Fla. 170, 102 So. 7 (1924). (Every person is presumed sane. Generally, in civil actions the burden of proof of insanity rests upon the party who alleges it.)

When a party relies on a presumption affecting the burden of proof, the court must determine whether sufficient evidence has been presented to sustain a finding of the nonexistence of the presumed fact. If the court determines that sufficient evidence has not been presented, the jury should be instructed that if the basic fact is found, it

must also find the presumed fact. However, if sufficient evidence has been presented to sustain a finding of the nonexistence of the presumed fact, the court should instruct the jury on the manner in which the presumption affects the fact-finding process. The basic facts must, of course, be proved before the presumption becomes operative. If the basic fact from which the presumption arises is so established that the existence of the basic fact is not a question of fact for the jury, the court should instruct the jury that the existence of the presumed fact is to be assumed unless the jury is persuaded to the contrary by the requisite degree of proof (preponderance of the evidence, clear and convincing, etc.). If the basic fact may be found by the jury, the court should instruct the jury that if it finds that the basic fact exists, it must also find the presumed fact unless persuaded of the nonexistence of the presumed fact by the requisite degree of the evidence.

Sec 302

Sections 90.304 and 90.305 recognize that situations which would be included in the definition of that presumption may be given a different effect by statute.

Even if they would be included within the definition of a presumption, an existing Florida statute providing that one fact or set of facts is prima facie evidence of

another fact is not affected.

See Calif. Evid. Code §§603, 605.

Section 90.305 Effect of Presumptions in Criminal Actions. When a presumption operates in a criminal case to establish presumptively any fact that is essential to the defendant's guilt, or to negative a defense, the presumption operates only if a reasonable juror could find the existence of the basic fact that gave rise to the presumption beyond a reasonable doubt. When a defendant raises a reasonable doubt as to the existence of the basic fact, the jury shall ~~determine the presumed fact without regard to~~ NOT consider the presumption.

COMMENT

Under this section when a presumption is relied upon by the prosecution in a criminal case to establish a fact which is essential to the defendant's guilt or to negative a defense, the presumption operates only if a reasonable juror could find that the basic fact exists beyond a reasonable doubt. If the defendant raises a reasonable doubt as to the existence of the basic fact, the presumption does not operate.

When the basic fact has been established and no evidence has been introduced to show the nonexistence of the presumed fact, the court should instruct the jury that, if it finds beyond a reasonable doubt the basic facts giving rise to the presumption, it may regard the basic facts as sufficient evidence of the presumed fact. If the presumption is one affecting the burden of producing evidence, the presumption vanishes if the defendant presents contrary evidence of such persuasion that a reasonable juror could have a reasonable doubt as to the existence of the presumed fact.

If the presumption is one affecting the burden of proof, when the defendant has introduced some evidence of the nonexistence of the presumed fact, the jury should be instructed that, if it finds beyond a reasonable doubt the basic facts giving rise to the presumption, it should also find the presumed fact unless the contrary evidence has raised a reasonable doubt as to the existence of the presumed fact.

The charge should specify that a presumption is rebutted by any evidence that raises a reasonable doubt as to the presumed fact. In the absence of the qualification, the jury may believe that the defendant has the burden of disproof of the presumed fact by a preponderance of the evidence and the instruction would be erroneous.

This section does not change the existing Florida law on the sanity of a defendant in a criminal case. In Mitchell v. State, 104 So. 2d 84, 86 (Fla. 2nd Dist. 1958), the court stated that: "where there is testimony of insanity sufficient to present a reasonable doubt of sanity, the presumption vanishes and the burden is on the state to overcome it." However, this rule would not be affected because:

> The so-called 'presumption' is simply a rule stating that the defendant has the burden of producing evidence (or of proving) his insanity at the time of the offense. The use of the term presumption is only confusing.

McCormick, Evidence §346 (2nd ed. 1972). See Calif. Evid. Code §607.

Presumption I sanity in criminal cases

Section 90.306 Conflicting Presumptions.

If two presumptions arise which conflict with each other, the presumption will prevail which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions are disregarded.

COMMENT

Under this section whenever two presumptions conflict, rather than cancel each other, the court, with whatever help he can get from case precedents, determines which presumption has the preponderance of public policy in its favor and instruct the jury accordingly.

See Uniform Rule Evid. 15.

If this is stricken both presumptions go to the jury