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Law Of Evidence

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Chapter
3. Presumptions

§ 301:5. Evidentiary presumptions in Arizona

On the subject of presumptions, Arizona could be said to have no rule—Arizona simply determined not to adopt either of the two provisions from the Federal Rules of Evidence that address the subject.[1] Arizona statutes and judicial precedents, however, have created hundreds of evidentiary presumptions. Some Arizona evidentiary presumptions affect the burden of persuasion; some affect only the burden of production; and some have effects that cannot yet be determined. The balance of this Chapter will discuss only some illustrative examples.

A. *Presumptions that Affect the Burden of Persuasion*

A number of presumptions created by Arizona statutes and case law are of the Morgan variety—i.e., they impose on the party against whom they operate the burden of persuasion with respect to the presumed fact. For example, if a party proves that a use of real property was "open, visible, continuous and hostile for the necessary period," that party is entitled to a presumption that the possession also was adverse, and the opposing party has "the burden of showing that the use was permissive."[2] And when property is held jointly by a husband and wife, there is a presumption that it is community property, and "the burden of proof is upon the party seeking to establish that the jointly held property is in fact separate."[3]

A surprising number of presumptions in Arizona affect the burden of persuasion with a vengeance—they require the party against whom they operate to bear the burden of persuasion with respect to the presumed fact, not just by a preponderance of the evidence, but by clear and convincing evidence. For example, "[w]hen a third person seeks full custody of the child in a contest with a natural parent, the presumption in favor the natural parent may be overcome only by a *clear* showing that the natural parent is unfit."[4] In Kent K. v. Bobby M., 210 Ariz. 279, 110 P.3d 1013 (2005), the Arizona Supreme Court held that the preponderance of the evidence standard of proof governs a trial court's determination of the best interests of the child in a parental severance proceeding. Although the pertinent statute (A.R.S. § 8–533) is ambiguous, when viewed in context and in light of the legislative history, the statute requires that a party seeking termination of parental rights establish only the statutory grounds for termination by clear and convincing evidence, whereas the best interests of the child may be established by a preponderance of the evidence. Similarly, the presumption that property acquired during a marriage is community property can be overcome only by clear and convincing evidence.[5] A statutory example is A.R.S. § 25-814, which provides that a man is presumed to be the father of a child if he and the child's mother "were married at any time in the ten months immediately preceding the birth,"[6] and that this presumption can be rebutted by "clear and convincing evidence."[7]

B. *Presumptions that Affect Only the Burden of Production*

Arizona law also recognizes a number of evidentiary presumptions which affect only the burden of production,

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and which do not shift the burden of persuasion. For example, the presumption of undue influence that is created "when one who occupies a confidential relationship to the decedent is active in procuring the execution of the will and is a principal beneficiary" affects only the burden of production, and if the beneficiary denies exerting undue influence, the presumption disappears. The matter is then resolved on all the evidence in the case, with the burden remaining on the contestant to establish undue influence (as it happens, by clear and convincing evidence).[8] Arizona law also recognizes a presumption against suicide *if* there is no evidence about the cause of death; when there is such evidence, the presumption disappears.[9] And proof of identity of names raises a presumption of identity of persons that vanishes when the party against whom the presumption operates *produces* evidence to rebut it.[10]

In State v. McCann,[11] the Arizona Supreme Court held as follows:

> When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime, the State must first prove the existence of the prior conviction. At that time, the presumption of regularity attaches to the final judgment. If the defendant presents some credible evidence to overcome the presumption, the State must fulfill its duty to establish that the prior conviction was constitutionally obtained.

The fact that the defendant is only required to present "some credible evidence" to overcome the presumption that the prior conviction was valid means that the presumption shifts only the burden of production, and not the burden of persuasion.

C. *Evidentiary Presumptions with Uncertain Effects*

Some Arizona cases and statutes create evidentiary presumptions without making it clear whether they affect the burden of persuasion or the burden of production (or have some other effect). For example, in Fremont Indemnity Co. v. Industrial Commission,[12] the Arizona Supreme Court held that a prior disability determination from another state would be accorded "presumptive validity" in an Arizona worker's compensation proceeding. The Court stated that this presumption was "subject to rebuttal," but it did not articulate—and it is not possible to infer from the facts and result in the case—what *kind* of rebuttal was necessary, persuasion or production.[13]

In the same vein, A.R.S. § 12-509(A) provides that "[a] person absenting himself from the place of his last domicile for five years successively shall be presumed dead in any action wherein his death comes in question, unless proof is made that he was alive within that time." The word "proof" in the second clause of this statute is ambiguous, since that word has been used as a synonym sometimes for persuasion, and sometimes for evidence; and the ambiguity is compounded by the use of the word "made." Thus, it is unclear whether the presumption created by § 12-509(A) imposes on the party against whom it operates the burden of persuasion or the burden of production.

Arizona's primary driving-under-the-influence statute also creates presumptions with uncertain effects.[14] It is not clear from the language of subsections (1) and (3) of § 28-1381(G) whether they create presumptions that shift the burden of persuasion or only the burden of production, or whether the word "may" means that those subsections only specify permissive inferences. State v. Gallow[15] seems to suggest that the § 28-1381(G)(3) does not shift the burden of persuasion from the prosecution, but that case does not clarify whether that subsection shifts the burden of production to the defendant or merely refers to a permissible inference.[16]

Another presumption with somewhat uncertain effects in Arizona is the classic presumption "that a letter properly addressed, stamped and deposited in the United States mail will reach the addressee."[17] That presumption had been recognized in two Arizona Supreme Court cases, but without any clear indication whether it affected the burden of persuasion or only the burden of production.[18] In McKinley v. Town of Fredonia,[19] the Arizona Court of Appeals did state that the presumption of receipt from mailing "disappears entirely" whenever "evidence contradicting the presumption is offered," which suggests that it shifts only the burden of production. The Supreme Court recently clarified (to some degree) the nature and status of this "presumption" in a case involving the "notice of claim" required by A.R.S. § 12-821.01, where a claimant desires to pursue claims against public entities or officers. In *Lee*

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v. State of Arizona,[20] the prospective plaintiff claimed to have mailed the notice, but the agency involved denied ever receiving it. The Court noted that the common law "mail delivery rule" had two components—one a presumption, and the other a rule regarding the sufficiency of evidence.[21] Under the "mail delivery rule," there is a presumption that a letter properly addressed, stamped and deposited in the mail will reach the addressee.[22] If, however, the addressee denies receipt of it, the presumption may cease to operate, but the fact of mailing retains its evidentiary value, and precluded dismissal of the suit for failure to file the required notice.[23]

D. *The Holy Grail: Should Arizona Have a Unified Theory of Evidentiary Presumptions?*

In light of the different types of evidentiary presumptions that are recognized in Arizona, and the attendant potential for confusion and uncertainty, it is natural to wish for a more unified and consistent approach. To some extent, at least, Federal Rules of Evidence 301 seeks to achieve that goal:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, 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.[24]

Thus, Federal Rule 301 chooses Thayer over Morgan[25]—although the qualifying phrase "not otherwise provided for by Act of Congress or by these rules" provides a potentially significant loophole through which the Morgan view might invade the federal courts.[26]

In any event, in light of the experience of the several decades during which scholars and courts have struggled with the question of whether there should be a single, unified theory for all presumptions, it would not be productive to attempt to devise and defend such a unified theory, at least in these pages. But there are two modest suggestions that can be made with a view toward promoting clarity and predictability: (1) That the Arizona courts, in recognizing new presumptions, should be careful to specify their effects on the burdens of persuasion and production; and (2) that the Supreme Court of Arizona should promulgate a Rule of Evidence—the number 301 is conveniently available—which provides that when the Legislature creates a presumption but fails to specify its effects, that presumption will have the effect of imposing on the party against whom it is directed the burden of producing evidence to rebut it, without shifting to that party the burden of persuasion.[27]

[FN1] Federal Rules of Evidence 301 is reproduced in Appendix A, *infra*.

[FN2] Brown v. Ware, 129 Ariz. 249, 251, 630 P.2d 545, 547 (Ct. App. Div. 2 1981).

[FN3] Mitchell v. Mitchell, 152 Ariz. 317, 732 P.2d 208, 77 A.L.R.4th 633 (1987); Eng v. Stein, 123 Ariz. 343, 346, 599 P.2d 796, 799 (1979); Elia v. Pifer, 194 Ariz. 74, 977 P.2d 796 (Ct. App. Div. 1 1998); Heinig v. Hudman, 177 Ariz. 66, 865 P.2d 110 (Ct. App. Div. 1 1993); Bianco v. Patterson, 159 Ariz. 472, 768 P.2d 204 (Ct. App. Div. 2 1989); Delozier v. Evans, 158 Ariz. 490, 763 P.2d 986 (Ct. App. Div. 1 1988); Valladee v. Valladee, 149 Ariz. 304, 718 P.2d 206 (Ct. App. Div. 1 1986). For other presumptions that affect the burden of persuasion, *see* In re General Adjudication of All Rights to Use Water in Gila River System and Source, 198 Ariz. 330, 343, 9 P.3d 1069, 1082 (2000) (proper determination by Arizona Department of Water Resources that well is in subflow zone or is pumping subflow creates presumption of that fact, subject to rebuttal by a preponderance of the evidence); Piner v. Superior Court In and For County of Maricopa, 192 Ariz. 182, 188–89, 962 P.2d 909, 915–16 (1998) (once plaintiff proves that multiple defendants' conduct contributed to plaintiff's injuries, burden of proof shifts to defendants to apportion damages); State v. Medina, 193 Ariz. 504, 975 P.2d 94 (1999) ("A trial judge is presumed to be free of bias and prejudice; to rebut this presumption, a party must set forth a specific basis for the claim of partiality and prove by a preponderance of the evidence that the judge is biased or prejudiced"); State v. Schackart, 190 Ariz.

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238, 257, 947 P.2d 315, 334 (1997) (presumption that court is free from bias and prejudice); State v. Henry, 189 Ariz. 542, 944 P.2d 57 (1997) (same); Miller v. Superior Court, 189 Ariz. 127, 129, 938 P.2d 1128, 1130 (Ct. App. Div. 1 1997); In re Jorge D., 202 Ariz. 277, 281, 43 P.3d 605, 609 (Ct. App. Div. 1 2002) (confessions "are presumed to be involuntary, and the State must rebut this presumption by a preponderance of the evidence"); State v. Hurley, 197 Ariz. 400, 404–405, 4 P.3d 455, 459–60 (Ct. App. Div. 1 2000) (trial judge presumed to be free of bias and prejudice); A.R.S. § 12-2802(G) (good faith of health care provider that complies with statutes governing genetic testing is presumed, subject to rebuttal by a preponderance of the evidence); A.R.S. § 25-403(P) (proof that parent has committed act of domestic violence imposes burden on that parent to prove "to the court's satisfaction" that preventing time will not endanger the child or significantly impair the child's emotional development); Save Our Public Lands Coalition v. Stover, 135 Ariz. 461, 662 P.2d 136 (1983) (presumptions applicable to initiative petitions); Flood Control Dist. of Maricopa County v. Hing, 147 Ariz. 292, 709 P.2d 1351 (Ct. App. Div. 1 1985) (presumption that statutory rate of interest is reasonable).

A debt incurred by one spouse during marriage for the benefit of the marital community is presumed to be a community obligation absent clear and convincing evidence to the contrary. Arab Monetary Fund v. Hashim, 219 Ariz. 108, 193 P.3d 802 (Ct. App. Div. 1 2008).

[FN4] Bryan v. Bryan, 132 Ariz. 353, 357, 645 P.2d 1267, 1271 (Ct. App. Div. 2 1982) (disapproved of on jurisdictional issue by, *Finck v. O'Toole*, 179 Ariz. 404, 880 P.2d 624 (1994)), citing Woodford v. Superior Court In and For Graham County, 82 Ariz. 181, 309 P.2d 973 (1957) (emphasis added). However, the court in Bryan suggested that the burden created by the presumption in favor of a natural parent might not be so heavy when the party contesting custody was a stepparent. 132 Ariz. at 358, 645 P.2d at 1272, citing and discussing Clifford v. Woodford, 83 Ariz. 257, 320 P.2d 452 (1957).

[FN5] Mitchell v. Mitchell, 152 Ariz. 317, 732 P.2d 208, 77 A.L.R.4th 633 (1987); Cockrill v. Cockrill, 124 Ariz. 50, 52, 601 P.2d 1334, 1336 (1979); State ex rel. Indus. Com'n of Arizona v. Wright, 202 Ariz. 255, 259–260, 43 P.3d 203, 207–208 (Ct. App. Div. 1 2002); Schlaefer v. Financial Management Service, Inc., 196 Ariz. 336, 339, 996 P.2d 745, 748 (Ct. App. Div. 1 2000); Delozier v. Evans, 158 Ariz. 490, 763 P.2d 986 (Ct. App. Div. 1 1988).

[FN6] A.R.S. § 25-814(A)(1).

[FN7] A.R.S. § 25-814(C). Arizona courts also have recognized the related presumption that a husband is the father of a child born during wedlock, and have required clear and convincing evidence to rebut the presumption. State v. Mejia, 97 Ariz. 215, 399 P.2d 116 (1965); Coffman v. Coffman, 121 Ariz. 522, 523, 591 P.2d 1010, 1011 (Ct. App. Div. 2 1979). In Coffman, the Court of Appeals upheld the trial court's finding that the husband had met his clear-and-convincing-evidence burden by testifying, without contradiction, that he did not have sexual relations with his wife during the relevant time period. *See also* State ex rel. Munoz v. Bravo, 139 Ariz. 393, 678 P.2d 974 (Ct. App. Div. 2 1984). Other presumptions that must be rebutted by clear and convincing evidence include the presumption that "[p]risoners who are sentenced to death are … competent to be executed," A.R.S. § 13-4022(E); the presumption that when blood tests indicate that the likelihood of an alleged father's paternity is ninety-five per cent or greater, the alleged father is in fact the father, A.R.S. § 25-807(D); the presumption that when genetic testing indicates that the likelihood of an alleged father's paternity is ninety-five per cent or greater, the alleged father is in fact the father, A.R.S. § 25-816(B); the presumption that a testator "intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate," A.R.S. § 14-2507(C); the presumption that an entire watercourse was nonnavigable as of February 14, 1912, if any determination of nonnavigability in a public proceeding exists for the watercourse or any portion or reach thereof, A.R.S. § 37-1128(B); the presumption that a voter's registration is valid, McDowell Mountain Ranch Land Coalition v. Vizcaino, 190 Ariz. 1, 3, 945 P.2d 312, 314 (1997); the presumption that a mar-

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riage that has been celebrated is valid, Gamez v. Industrial Commission, 114 Ariz. 179, 559 P.2d 1094 (Ct. App. Div. 1 1976), Roy v. Industrial Commission, 97 Ariz. 98, 397 P.2d 211 (1964), Hodges v. Industrial Commission, 73 Ariz. 326, 241 P.2d 431 (1952); the presumption that an agent who has obtained an advantage from a fiduciary relationship did so fraudulently, In re Guardianship of Chandos, 18 Ariz. App. 583, 585, 504 P.2d 524, 526 (Div. 2 1972); the presumption that an increase during marriage in the value of separate property is community property, Cockrill v. Cockrill, 124 Ariz. 50, 52, 601 P.2d 1334, 1336 (1979); the presumption that when a husband pays for real property and causes it to be given in the name of the husband and wife, the husband has made a gift to the wife, Cooper v. Cooper, 130 Ariz. 257, 259, 260, 635 P.2d 850, 852, (1981); the presumption that when community property and separate property are commingled, the entire fund is community property, id.; and the presumption that when separate funds of one spouse were used to purchase real property and title has been taken in joint tenancy, a gift to the non-contributing spouse was intended, Battiste v. Battiste, 135 Ariz. 470, 472, 662 P.2d 145, 147 (Ct. App. Div. 2 1983), Sloane v. Sloane, 132 Ariz. 414, 415, 646 P.2d 299, 300 (Ct. App. Div. 2 1982). *But see* In re Marriage of Berger, 140 Ariz. 156, 680 P.2d 1217 (Ct. App. Div. 1 1983) (presumption of gift not applied to improvements to real property paid for with separate property); Stevenson v. Stevenson, 132 Ariz. 44, 46, 643 P.2d 1014, 1016 (1982) (noting that under A.R.S. § 14-6103(A), "we must conclude that there is no presumption of gift merely because one spouse places funds in a joint account with the other spouse. Unlike the situation in real property where there is a presumption of gift, the legislature has placed the burden on the one claiming a gift to establish that fact by clear and convincing evidence"). *See also* UNUM Life Ins. Co. of America v. Craig, 200 Ariz. 327, 26 P.3d 510 (2001) (beneficiary of insurance policy presumed to have predeceased the insured unless clear and convincing evidence shows survival for 120 hours, based on A.R.S. §§ 14-1201(21), 14-2702(B), 14-6101, and 20-1127).

[FN8] Evans v. Liston, 116 Ariz. 218, 220, 568 P.2d 1116, 1118 (Ct. App. Div. 1 1977). *See also* Parrisella v. Fotopulos, 111 Ariz. 4, 522 P.2d 1081 (1974); In re Vermeersch's Estate, 109 Ariz. 125, 506 P.2d 256 (1973); In re Harber's Estate, 102 Ariz. 285, 428 P.2d 662 (1967).

[FN9] Wood v. Industrial Commission, 108 Ariz. 50, 51, 492 P.2d 1157, 1158 (1972).

[FN10] State v. Hadley, 114 Ariz. 86, 88, 559 P.2d 206, 208 (Ct. App. Div. 1 1977) ("The presumption obtains until it is repudiated by some evidence."). Evidence of identity of names is not sufficient to prove identity beyond a reasonable doubt. State v. Pennye, 102 Ariz. 207, 427 P.2d 525 (1967); State v. Terrell, 156 Ariz. 499, 753 P.2d 189 (Ct. App. Div. 2 1988). Other presumptions that affect only the burden of production include the presumption of due care, Glodo v. Industrial Com'n of Arizona, 191 Ariz. 259, 955 P.2d 15 (Ct. App. Div. 1 1997), Englehart v. Jeep Corp., 122 Ariz. 256, 259, 594 P.2d 510, 513 (1979) ("The presumption of due care … disappears when rebutted by any competent evidence"), Seiler v. Whiting, 52 Ariz. 542, 84 P.2d 452 (1938), Sheehan v. Pima County, 135 Ariz. 235, 238, 660 P.2d 486, 489 (Ct. App. Div. 2 1982); the presumption that a victim who refused a request by the defense for a pretrial interview did so solely because he had a constitutional right to do so, State v. Riggs, 189 Ariz. 327, 331, 942 P.2d 1159, 1163 (1997); the presumption that a governmental entity's valuation of property for tax purposes was correct, Graham County v. Graham County Elec. Co-op., Inc., 109 Ariz. 468, 469–70, 512 P.2d 11, 12–13 (1973), A.R.S. § 42-178; the presumption that a defendant in a criminal case is sane, State v. Grilz, 136 Ariz. 450, 454–456, 666 P.2d 1059, 1063–1065 (1983); the presumption [created by A.R.S. § 13-411(C)] that a criminal defendant was justified in threatening or using physical or deadly force against another if he was acting to prevent the other's commission of certain specified offenses, State v. Martinez, 202 Ariz. 507, 509, 47 P.3d 1145, 1148–1149 (Ct. App. Div. 1 2002); and the presumption, in a proceeding to determine child-support, that "a parent is capable of full-time employment at least at the applicable state or federal adult minimum wage, which is higher" A.R.S. § 25-320(N).

[FN11] State v. McCann, 200 Ariz. 27, 31, 21 P.3d 845, 849 (2001). The Court's holding in McCann overruled State v. Reagan, 103 Ariz. 287, 440 P.2d 907 (1968), and State v. Renaud, 108 Ariz. 417, 499 P.2d

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712 (1972).

[FN12] Fremont Indem. Co. v. Industrial Com'n of Arizona, 144 Ariz. 339, 345, 697 P.2d 1089, 1095 (1985).

[FN13] In PFS v. Industrial Com'n of Arizona, 191 Ariz. 274, 277–78, 955 P.2d 30, 33–34 (Ct. App. Div. 1 1997), the Court of Appeals held that proof of an unadjudicated prior out-of-state industrial injury that would have been scheduled in Arizona created a rebuttable presumption of permanent earning capacity disability, but again failed to specify whether this presumption shifted the burden of persuasion or the burden of production.

[FN14] Arizona Revised Statutes § 28-1381(G) provides that:

In a trial, action or proceeding for a violation of this section or § 28-1383 other than a trial, action or proceeding involving driving or being in actual physical control of a commercial vehicle, the defendant's alcohol concentration within two hours of the time of driving or being in actual physical control as shown by analysis of the defendant's blood, breath or other bodily substance gives rise to the following presumptions:

1. If there was at the time 0.05 or less alcohol concentration in the defendant's blood, breath or other bodily substance, it may be presumed that the defendant was not under the influence of intoxicating liquor.

2. If there was at that time in excess of 0.05 but less than 0.10 alcohol concentration in the defendant's blood, breath or other bodily substance, that fact shall not give rise to a presumption that the defendant was or was not under the influence of intoxicating liquor, but that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

3. If there was at that time 0.10 or more alcohol concentration in the defendant's blood, breath or other bodily substance, it may be presumed that the defendant was under the influence of intoxicating liquor.

[FN15] State v. Gallow, 185 Ariz. 219, 221, 914 P.2d 1311 (Ct. App. Div. 2 1995). Note that § 28-1381(G)(3) was then designated as § 28-692(E)(3).

[FN16] In part because of frequent amendments to § 28-1381 and its predecessors, earlier decision are not helpful in determining what kind of "presumption" is created by § 28-1381(G).

A recent amendment to A.R.S. § 28-1381(G) replaced "0.10" with "0.08" in sub-sections (2) and (3). Forty-Fourth Legislature, Second Session, Chapter 95, S.B. 1089 (effective August 31, 2001). A.R.S. § 5-395(F) creates the same presumptions as A.R.S. § 28-1381(G) with respect to the operation and control of motorized watercraft.

[FN17] State v. Mays, 96 Ariz. 366, 368, 395 P.2d 719, 721 (1964); Merchants' & Manufacturers' Ass'n v. First Nat. Bank, 40 Ariz. 531, 539, 14 P.2d 717, 720 (1932). McKinley v. Town of Fredonia, 140 Ariz. 189, 680 P.2d 1250 (Ct. App. Div. 1 1984). Inferences of this sort have been held to survive despite the decline in the performance of the United States Postal Service. *See* U.S. v. Hayes, 631 F.2d 593 (8th Cir. 1980). *See also* Reddell v. Industrial Commission, 111 Ariz. 313, 315, 528 P.2d 1254, 1256 (1974) (judicial notice taken of declining reliability of the postal service).

[FN18] *See* cases cited in the preceding footnote.

[FN19] McKinley v. Town of Fredonia, 140 Ariz. 189, 192, 680 P.2d 1250, 1253 (Ct. App. Div. 1 1984).

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[FN20] Lee v. State, 218 Ariz. 235, 182 P.3d 1169 (2008).

[FN21] *Id.*

[FN22] *Id.*

[FN23] *Id.* For other examples of presumptions with uncertain effects on the burdens of persuasion and production, *see* Energy Control Services, Inc. v. Arizona Dept. of Economic Sec., 135 Ariz. 20, 23, 658 P.2d 820, 823 (Ct. App. Div. 1 1982) (with regard to whether an item is a "fixture" for purposes of unemployment insurance statutes, "it is presumed that where the owner of the merchandise is also the owner of the realty, permanent accession to the freehold is intended"); A.R.S. § 3-713 (possession by entity engaged in sale of eggs creates presumption that the eggs are for sale); A.R.S. § 5-702(E) (with regard to ski areas, "rebuttable" presumption that "all passengers and skiers saw and understood the signs if evidence exists that the signs required by subsection B or that were posted pursuant to subsection C were posted and the signs were maintained"); A.R.S. § 10-2701(8) (ownership of ten per cent or more of voting power of corporation's outstanding securities creates presumption of control of corporation); A.R.S. § 13-108(B) ("If the body of a homicide victim is found in this state it is presumed that the result occurred in this state"); A.R.S. § 13-1805(B) ("A person is presumed to have the necessary culpable mental state pursuant to subsection A of this section if the person does either of the following: 1. Knowingly conceals on himself or another person unpurchased merchandise of any mercantile establishment while within the mercantile establishment. 2. Uses an artifice, instrument, container, device or other article to facilitate the shoplifting" for shoplifting statute); A.R.S. § 13-1808(A) (knowledge of issuer of check of insufficient funds may be presumed if issuer had no account with bank, or if payment was refused by bank for lack of funds within thirty days after issue and issuer failed to pay holder amount due on check, with reasonable costs, within twelve days after receiving notice); A.R.S. § 14-2606(B) (presumption that agent's actions within durable power of attorney are on behalf of incapacitated principal); A.R.S. § 25-408(H) ("rebuttable" presumption that provision from parenting plan or other written agreement by parents is in child's best interests); A.R.S. § 28-7056(B) (if trash dumped from motor vehicle or aircraft, driver or pilot is presumed to be offender); A.R.S. § 32-1558(B) (presumption that damage or injury results from practicing naturopathic medicine without a license); A.R.S. § 44-1799.07(A) ("rebuttable" presumption that illness or congenital or hereditary defect in cat or dog existed at time of sale if cat or dog dies within fifteen days after purchaser takes possession); A.R.S. § 47-8114(2) (signature on certificated security presumed to be genuine or authorized).

Additional statutory presumptions with uncertain effects on the burdens of production and persuasion include A.R.S. § 5-407(B) (presumption that operation of bingo game is against public policy if net proceeds from game do not amount to at least 50% of adjusted gross receipts for six-month period); A.R.S. § 6-1302(B) (certain persons who solicit loans or extensions of credit for advance fees presumed to be engaged in business of advance fee loan broker); A.R.S. § 12-1810(J) (copy of injunction against workplace harassment presumed to be valid existing order of court for one year after date on which defendant was served); A.R.S. § 13-822(F)(1) (proof that individual with substantial supervisory authority in enterprise participated in an offense creates rebuttable presumption that enterprise did not have effective program to prevent and detect violations of law); A.R.S. § 14-7402(B) (determination by administrator of trust or estate in accordance with Revised Uniform Principal and Income Act "is presumed to be fair and reasonable to all of the beneficiaries"); A.R.S. § 14-7417 (allocation between principal and income presumed to be "insubstantial" if either (1) the amount of the allocation would increase or decrease net income in an accounting period by less than ten per cent, or (2) the value of the asset producing the receipt for which the allocation would be made is less than ten per cent of the total value of the trust's assets at the beginning of the accounting period); A.R.S. § 15-773(D) (notarized instrument signed or assented to by pupil and in substantially the form prescribed by the statute presumed to satisfy requirements for valid delegation of right to make educational decisions); A.R.S. § 23-901.01(B) (impairment of firefighter's health caused by certain

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specified diseases presumed to be occupational disease under A.R.S. § 23-901(12)(C)); A.R.S. § 23-902(D) (written agreement that complies with requirements of subsection creates "rebuttable presumption" of independent contractor relationship between parties if agreement includes disclosure statement that independent contractor is not entitled to workers' compensation benefits); A.R.S. § 35-187 (certain monies held for payment of void warrants deemed property presumed abandoned under A.R.S. § 44-302(A)(11)); and A.R.S. § 44-7033(B) (rebuttable presumption that "secure" electronic signature is electronic signature of party to whom it relates). *See also* McDonald v. Thomas, 202 Ariz. 35, 42, 40 P.3d 819, 826 (2002) (presumption should be that state official did not act absent evidence showing that official did act; but once such a showing is made, presumption of regularity applies to official's acts).

[FN24] For a useful explication of the operative import of Federal Rule 301, *see* St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407, 62 Fair Empl. Prac. Cas. (BNA) 96, 61 Empl. Prac. Dec. (CCH) P 42322, 37 Fed. R. Evid. Serv. 581 (1993).

[FN25] As originally proposed by the Supreme Court, Federal Rules 301 made precisely the opposite choice. The extant version of the Rule is the product of Congressional action. Report of the Senate Committee on the Judiciary, S.Rep. No. 1277, 93d Cong., 2d Sess., at 9 (1974); 1974 U.S. Code Cong. & Ad. News 7051, 7055.

[FN26] In addition, Federal Rule 302 provides that "[i]n civil actions and proceedings, 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 determined in accordance with State law." An important example of a civil proceeding "otherwise provided for by Act of Congress" within the meaning of Federal Rule 301 is a federal habeas corpus case instituted by a state prisoner. Under 28 U.S.C. § 2254(e)(1), in such a proceeding "a determination of a factual issue made by a State court shall be presumed to be correct," and the prisoner has the burden of "rebutting the presumption by clear and convincing evidence." Thus, § 2254(e)(1) creates a presumption that shifts the burden of persuasion—rather than the burden of production.

[FN27] Thayer is chosen over Morgan primarily because burden-of-production-shifting presumptions are simpler and less confusing to administer than burden-of-persuasion-shifting presumptions. *See* Lilly (3d ed.) § 3.4; §§ 301:4, *supra*. In Golonka v. General Motors Corp., 204 Ariz. 575, 588–89, 65 P.3d 956, 969–70, Prod. Liab. Rep. (CCH) P 16561 (Ct. App. Div. 1 2003), the Court of Appeals held that a finding by the jury that a manufacturer's safety warning was inadequate created a presumption that the plaintiff would have read and heeded an adequate warning, but that this "heeding presumption" shifted only the burden of production, and not the burden of persuasion, to the manufacturer. In arriving at that holding, the Court of Appeals stated that the Supreme Court had "consistently applied the [Thayer] 'bursting bubble' theory to its treatment of presumptions," but then also noted (somewhat curiously) that the Supreme Court had "not differentiated between the types of presumptions that shift the burden of production from those that shift the burden of persuasion to the party opposing the presumption." *Id.* at 589, 65 P.3d at 970 (citing to Treatise § 301.4). The Court of Appeals ultimately arrived at its holding by following a "general rule" (ironically, a kind of presumption) in favor of burden-of-production-shifting presumptions, *id.* at 590, 65 P.3d at 971.

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1 AZPRAC § 301:5

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