



# BAYLOR LAW REVIEW

THE USE OF PRESUMPTIONS IN SUMMARY JUDGMENT  
PROCEDURE IN TEXAS AND FEDERAL COURTS

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I. INTRODUCTION

There are many presumptions in the law that allow a party to prove one fact and presume another. A presumption shifts the burden of production from the party relying upon it to the other party regarding the presumed fact. This article addresses whether a party can rely upon a presumption to shift the burden of production to the other party in a summary judgment proceeding in Texas state and federal court. As one commentator has stated: "Whenever a party to a lawsuit invokes a presumption in order to prevail on a motion for summary judgment, the litigation assumes a complex posture; indeed, the laws of evidence and procedure, as well as substantive law, are simultaneously called into question."<sup>1</sup>

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\*The Author would like to dedicate this Article to his parents Judge and Mrs. Derwood Johnson of Waco, Texas.

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<sup>1</sup>See Steven David Smith, Comment, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101, 1103 (1984).

With the use of a presumption, a summary judgment movant can shift the burden of production to the non-movant so that the non-movant will have the burden to offer summary judgment evidence to contradict the presumed fact. Alternatively, a non-movant can respond to a motion for summary judgment by relying upon a presumed fact. In other words, the non-movant can respond to a motion for summary judgment by proving one fact and presuming the other.

For example, a brother and sister get involved in a will dispute. Their mother passes away and her last will cannot be found. The sister attempts to probate a copy of the mother's last will. The brother, however, wants to probate the second to last will executed by his mother. He files a traditional motion for summary judgment alleging that the last will was revoked and attaches as summary judgment evidence an affidavit from his mother's attorney stating that the will was last seen with his mother and that the will currently cannot be found. There is a presumption that if a will was last seen with the decedent and later turns up missing that the decedent revoked the will. The brother argues that this presumption suffices to meet his initial burden of production as the movant and shifts the burden to his sister to present summary judgment evidence that her mother did not revoke the will. The issue is whether the brother is allowed to file a traditional motion for summary judgment on the ground that his mother revoked the will where he files no direct evidence that his mother revoked it.

Alternatively, two companies get involved in a contract dispute. Company A sues Company B for breach of contract. Company B alleges that the contract is not enforceable because of a lack of consideration. Company B files a no-evidence summary judgment alleging that Company A has no evidence that the contract was supported by consideration. There is a presumption that a properly executed contract is supported by consideration. Company A files a response and files as summary judgment evidence the properly executed contract and argues that the presumption of consideration suffices to meet its burden of production and that the summary judgment should therefore be denied. The issue is whether Company A should be allowed to respond to a no-evidence summary judgment by the use of a presumption and not by evidence.

This article will describe the current state of the law regarding the use of presumptions in state and federal court in Texas, describe summary judgment procedure as it applies to the burden of persuasion and production, and describe the relevant precedent regarding the use of presumptions in summary judgment procedure.

## II. PRESUMPTIONS

## A. Use of Presumptions in State Court

A presumption is a procedural rule of law that attaches specific probative value to particular facts.<sup>2</sup> A court has defined a presumption as a rule of law "by which the finding of a basic fact gives rise to the existence of the presumed fact, until the presumption is rebutted."<sup>3</sup> Procedurally, a presumption is a device that guides a trial court in locating the burden of production at a particular time.<sup>4</sup> Some examples of presumptions are: (1) a child born in wedlock is presumed legitimate;<sup>5</sup> (2) agents are presumed to act in good faith on behalf of their principals;<sup>6</sup> (3) a party is presumed to know the terms of a signed contract;<sup>7</sup> (4) a party is presumed to intend an act's consequences where he willfully committed it;<sup>8</sup> (5) a presumption arises that evidence would have been unfavorable to a party where he deliberately destroys it;<sup>9</sup> and (6) a person who dies is presumed not to have committed suicide.<sup>10</sup>

A presumption is not evidence—it takes the place of evidence.<sup>11</sup> There are two types of presumptions: conclusive and rebuttable. A conclusive presumption cannot be rebutted, and once it is established, the opposing

<sup>2</sup>See *Forder v. State*, 456 S.W.2d 378, 387 (Tex. Crim. App. 1970); *Combined Am. Ins. Co. v. Blanton*, 163 Tex. 225, 353 S.W.2d 847, 849 (1962); *Vise v. Foster*, 247 S.W.2d 274, 277 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.); *Fox v. Grand Union Tea Co.*, 236 S.W.2d 561, 563 (Tex. Civ. App.—Austin 1951, mand. overruled).

<sup>3</sup>*Hunter v. Palmer*, 988 S.W.2d 471, 473 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

<sup>4</sup>See *Tex. A&M Univ. v. Chambers*, 31 S.W.3d 780, 784 (Tex. App.—Austin 2000, pet. denied); *Allred v. Harris County Child Welfare Unit*, 615 S.W.2d 803, 806 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

<sup>5</sup>See *Gravley v. Gravley*, 353 S.W.2d 333, 336 (Tex. Civ. App.—Dallas 1961, writ dism.'d w.o.j.).

<sup>6</sup>See *Reynolds v. Reynolds*, 224 S.W. 382, 384 (Tex. Civ. App.—Amarillo 1920, no writ).

<sup>7</sup>See *Cities Serv. Oil Co. v. Brown*, 119 Tex. 242, 27 S.W.2d 115, 115 (1930).

<sup>8</sup>See *Norris v. Stoneham*, 46 S.W.2d 363, 366 (Tex. Civ. App.—Eastland 1932, no writ).

<sup>9</sup>See *Wal-Mart Stores, Inc. v. Middleton*, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied).

<sup>10</sup>See *Reserve Life Ins. Co. v. Estate of Shacklett*, 412 S.W.2d 920, 922 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.).

<sup>11</sup>See *Green v. State*, 893 S.W.2d 536, 545 (Tex. Crim. App. 1995) (Clinton, J., dissenting); *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 558 (Tex. 1976); *Empire Gas & Fuel Co. v. Muegge*, 135 Tex. 520, 143 S.W.2d 763, 767-68 (1940); *Still v. Liberty Leasing Co., Inc.*, 570 S.W.2d 93, 94 (Tex. Civ. App.—Waco 1978), *aff'd*, 582 S.W.2d 255 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

