3.01 Presumptions in Civil Proceedings[1]

(1) This rule applies in civil proceedings to a "presumption," which as provided in subdivisions two and three is rebuttable; it does not apply to a "conclusive" presumption, that is, a "presumption" not subject to rebuttal, or to an "inference" which permits, but does not require, the trier of fact to draw a conclusion from a proven fact.

(2) A presumption is created by statute or decisional law, and requires that if one fact (the "basic fact") is established, the trier of fact must find that another fact (the "presumed fact") is thereby established unless rebutted as provided in subdivision three.

(3) Unless the court determines that a presumption is not applicable:

(a) The party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact.

(b) Upon presentation of rebuttal evidence, the court shall as provided by the statute or decisional law establishing the presumption, either:

(i) itself determine that the presumption has been rebutted, in which event the court shall not submit the presumption to the finder of fact; or

(ii) instruct the trier of fact to find that the presumed fact exists unless the trier of fact is persuaded that the presumed fact does not exist; or

(iii) proceed as set forth in subparagraph (ii) when the statute or decisional law

establishing the presumption does not otherwise dictate.

(c) Unless the applicable statute or decisional law provides otherwise, the burden of persuasion necessary to rebut a presumption is "substantial evidence."

Note

Subdivision (1) defines the scope of this rule. It begins by limiting the application of this rule to presumptions in civil proceedings.

(Presumptions in criminal proceedings are governed by a separate Guide to New York Evidence rule [3.03, 305] because constitutional principles as developed by the United States Supreme Court and the Court of Appeals limit the operation of a presumption in a criminal proceeding.)

The rule further limits its application to a "rebuttable" or "true" presumption as defined in subdivision (2). It expressly excludes a "conclusive" presumption and an "inference" from its scope.

A conclusive presumption (also known as an "irrebuttable" presumption) requires the trier of fact to draw a particular conclusion after certain specified facts are established, regardless of proof to the contrary (*Cordua v Guggenheim*, 274 NY 51, 57 [1937]; *Brandt v Morning Journal Assn.*, 81 App Div 183, 185 [1st Dept 1903], *affd* 177 NY 544 [1904]). It is not a true evidentiary presumption but in reality "a rule of substantive law expressed in terms of rules of evidence" (Prince, Richardson on Evidence § 3-103 [Farrell 11th ed 1995]; *see Derby v Prewitt*, 12 NY2d 100, 106 [1962] ["Irrebuttable presumptions have their place in the law but only where public policy demands that inquiry cease"]). Conclusive presumptions have been created under the common law and by statute (*see e.g. Cordua v Guggenheim*, 274 NY 51, 57 [1937] ["There is a conclusive presumption that the parties intended to integrate in the deed every agreement relating to the nature or extent of the property to be conveyed"]; RPTL 1168 [2] ["After two years from the issuance of such certificate (of sale) or other written instrument, no evidence shall be admissible in any court to rebut such presumption unless the holder thereof shall have procured such certificate of sale or such other written instrument by fraud or had previous knowledge that it was fraudulently made or procured"]).

An inference permits, but does not require, the trier of fact to draw a conclusion from a proven fact (*see Foltis, Inc. v City of New York*, 287 NY 108, 119-120 [1941]; *Kilburn v Bush*, 223 AD2d 110, 116 [4th Dept 1996] [noting the difference between an inference, which "merely allows the trier of fact to draw a conclusion from a proven fact," and a "true" presumption, which places a burden upon the adversary to produce evidence to rebut the presumed fact]). In this connection, the Court of Appeals has noted that "[a] study of the opinions of the appellate courts of this state reveals that judges have used the terms 'inference' and 'presumption' indiscriminately and without recognition that an 'inference' and a 'presumption' are not identical in scope or effect" (*Foltis, Inc.*, 287 NY at 121).

Subdivision (2). Subdivision (2) sets forth the traditional definition of a presumption (*see e.g. Ulrich v Ulrich*, 136 NY 120, 123 [1892] ["A presumption has been defined to be a rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of the inference is disproved"]; *Platt v Elias*, 186 NY 374, 379 [1906] [a presumption is "a particular inference (that) *must* be drawn from an ascertained state of facts"]; *see* Barker & Alexander, Evidence in New York State and Federal Courts § 3:18 [2d ed]).

Present New York law recognizes the existence of dozens of rebuttable presumptions, created by decisional law or statute. Each presumption sets forth the "basic fact(s)" that will give rise to a "presumed fact," which is then subject to rebuttal.

Decisional law presumptions include: presumption of mailing and delivery (*see Nassau Ins. Co. v Murray*, 46 NY2d 828, 829 [1978]); presumption of proper service of process (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *Wells Fargo Bank, N.A. v Leonardo*, 167 AD3d 816, 817 [2d Dept 2018]); presumption of negligence in rear-end collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]); presumption against suicide (*see Schelberger v Eastern Sav. Bank*, 60 NY2d 506, 509-510 [1983]); presumption of regularity (*see Matter of Driscoll v Troy Hous. Auth.*, 6 NY2d 513, 518 [1959]); presumption of the legitimacy of children (*see Matter of Matthews*, 153 NY 443, 448 [1897]).

Statutory presumptions include: CPLR 4540-a (presumption of authentication for records produced pursuant to discovery demand); Correction Law § 753 (presumption of rehabilitation); EPTL 2-1.7 (presumption of death after three years' absence); Public Health Law § 10 (presumptions of fact from orders of Department of Health records and records of state and local health officials);

Vehicle and Traffic Law § 388 (1) (presumption of permissive use of motor vehicle); Vehicle and Traffic Law § 2108 (certificate of title of vehicle is presumptive evidence of vehicle's ownership). Some of the more important and frequently utilized presumptions are discussed in detail in Fisch on New York Evidence §§ 1122-1145 (2d ed); Martin, Capra & Rossi, NY Evidence Handbook § 3.2 (2d ed); and Prince, *supra* §§ 3-107, 3-138.

Subdivision (3). Subdivision (3) (a) restates the traditional view of a presumption, namely, that the party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact (*see* Barker & Alexander, Evidence in New York State and Federal Courts § 3:18 [2d ed]).

Unfortunately, as various commentators have observed, New York does not have a uniform approach on the effect of a presumption once rebuttal evidence is introduced (*see* Proposed NY Code of Evidence § 302, Comment [1991], available at https://www.nycourts.gov/judges/evidence/0-TITLE_PAGE/RESOURCES/1991_PROPOSED_NY_CODE_OF_EVIDENCE.pdf [there are "notorious difficulties and disparities concerning the effect of presumptions"]; Barker & Alexander, *supra* § 3:16 ["Searching for consistency in the law of presumptions in New York can be a frustrating exercise"]; Martin, Capra & Rossi, *supra* § 3.1; Prince, *supra* § 3-104 ["The operation and effect in New York of a presumption . . . is not free from doubt. No one principle explains all the New York cases"]).

The lack of a uniform rule may be traced to the works of two professors of law who advanced different theories on the procedural effect of a presumption (*see* Thayer, A Preliminary Treatise on Evidence at the Common Law 346 [1898]; Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv L Rev 909, 913 [1937]), as well as the public policy behind the different presumptions. As to the public policy issue, the Proposed New York Code of Evidence noted:

> "Some presumptions, *e.g.*, receipt of a regularly mailed letter, are mainly authoritative embodiments of natural probabilities drawn from logic and experience. Others, such as the presumption that anyone driving an automobile had the owner's permission to do so, reflect substantive social policies rather than, or in addition to, considerations of natural probability or probative worth. The presumption that fixes the time of death at the end of the [three] year death-from-unexp[l]ained-absence period is actually contrary to natural probabilities, and is a purely arbitrary solution to an impasse

> in proof. Still, other presumptions, *e.g.*, that as between connecting carriers the damage occurred on the line of the last carrier, serve the interests of fairness by seeking to elicit evidence from the party who has superior means of access to it" (Proposed NY Code of Evidence § 302, Comment).

Thayer's approach would remove a presumption from the case once the trial court finds that the party affected by the presumption produced evidence to support a finding of the presumed fact's nonexistence (Barker & Alexander, *supra* § 3:21). The "classic" Thayer example is found in the presumption of receipt of a properly mailed letter: once the mailing of the letter is proved, the party affected by the presumption need only take the stand and deny receipt and the presumption would not be charged to the jury (*id.*; *see also People v Langan*, 303 NY 474, 480 [1952] ["A presumption of regularity exists only until contrary substantial evidence appears. It forces the opposing party . . . to go forward with proof but, once he does go forward, the presumption is out of the case. . . . (I)t will be for the Trial Judge to pass on all questions of fact, including the credibility of defendant and of any other witnesses on either side" (citations omitted)]; *Fleming v Ponziani*, 24 NY2d 105, 111 [1969] [a presumption of a valid release from liability is "no longer in the case" once the party against whom the presumption is invoked puts in evidence to rebut, such as fraud or duress, in securing the release; then, the party claiming the release "must come forward with real evidence to sustain his burden as to the legality of the release or otherwise suffer a directed verdict"]). The Thayer approach is potentially unfair to the party for whom the presumption exists, and so appears ill-suited to the policy concerns behind various presumptions.

In moving away from the potential unfairness of the Thayer approach, the Court of Appeals explained, in a case involving the presumption that a driver operates with the consent of the owner, that statements by both the owner and the driver that the driver was operating without the owner's consent, without more, did not automatically rebut the presumption and warrant summary judgment for the owner: "Where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury" (*Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 178 [2006]; *see also Bornhurst v Massachusetts Bonding & Ins. Co.*, 21 NY2d 581, 586 [1968] ["Where the evidence rebutting a presumption presents an issue of credibility, it is for the jury to determine whether the rebuttal evidence is to be believed and, consequently, for the jury to determine whether the presumption has been destroyed" (internal quotation marks and citation omitted)]). That view approaches the Morgan theory of presumptions.

For Morgan, it is "not enough that the opponent takes the stand and says she did not receive the letter. The jury will be instructed that, upon a finding that the letter was mailed, they must also find that it was received unless they are persuaded by the evidence favoring the opponent that it was not in fact received" (Barker & Alexander, *supra* § 3:22). Thus, the Morgan approach appears more suited to vindicate the policy considerations behind many presumptions, and its application "would be consistent in many cases with current practice" (*id.* § 3:23; s*ee e.g.* UCC 1-206, Presumptions ["Whenever this act creates a 'presumption' with respect to a fact, or provides that a fact is 'presumed,' the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence"]).

Subdivision (3) (a) and (b) recognizes that there is no uniform rule in New York on the effect of rebuttal evidence. Thus, subdivision (3) (a) and (b) (i) embodies the Thayer approach; subdivision (3) (a) and (b) (ii) encompasses the Morgan approach and the Thayer approach as modified by the Court of Appeals in *Country-Wide Ins. Co.* (6 NY3d at 178); and subdivision (3) (a) and (b) (iii) recognizes the Morgan approach so long as the law of the particular presumption does not set forth the procedure upon the presentation of rebuttal evidence (*see* Barker & Alexander, *supra* § 3:23 ["Across-the-board application of the Morgan rule would overcome the Thayer rule's inadequate promotion of the policies underlying presumptions, would be consistent in many cases with current practice, would be easy to apply by trial judges and 'would abolish the prevailing confusion and complexities' "]; Proposed NY Code of Evidence § 302, Comment [commenting in favor of the uniform adoption of the Morgan approach]).

Subdivision (3) (c) recognizes that there is no uniform rule in New York with respect to the burden of proof necessary to rebut a presumption. In "most, but not all, of the presumptions in New York," the burden of proof is by "substantial evidence" (Jerome Prince, Richardson on Evidence § 58 at 37 [Farrell 10th ed 1973]; *see e.g. Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 174–175 [2014] [the presumption of validity of the assessment of property made by a taxing authority requires the person challenging that assessment to come forward with "substantial evidence" that the property was overvalued by the assessor]; *Murdza v Zimmerman*, 99 NY2d 375, 380 [2003] ["proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied. Once the plaintiff meets its initial burden of establishing ownership, a logical inference of lawful operation with the owner's consent may be drawn from the possession of the operator. This presumption may be rebutted, however, by substantial evidence

sufficient to show that a vehicle was not operated with the owner's consent" (internal quotation marks and citations omitted)]; *People v Langan*, 303 NY at 480 ["A presumption of regularity exists only until contrary substantial evidence appears"]; *see generally* Prince, *supra* § 3-120).

On what constitutes "substantial evidence" to rebut a presumption, the Court of Appeals in *Matter of FMC Corp. (Peroxygen Chems. Div.) v Unmack* (92 NY2d 179, 187-188 [1998]) explained that

> "generally speaking:
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> "a determination is regarded as being supported by substantial evidence when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. . . . [I]t means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact . . . . Essential attributes are relevance and a probative character . . . . In final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically.
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> "The substantial evidence standard is a minimal standard. It requires less than 'clear and convincing evidence,' and less than proof by 'a preponderance of the evidence' " (citations and some internal quotation marks omitted).

In some instances, a presumption is subject to rebuttal by a preponderance of the evidence (*see e.g. Matter of Granger v Misercola*, 21 NY3d 86, 92 [2013] [a presumption in favor of visitation of children has been held subject to rebuttal by a preponderance of the evidence]; UCC 1-201 [b] [8] [" 'Burden of establishing' a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence"]; CPLR 4540-a ["Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility"]). Proposed New York Code of

Evidence § 302 favored a uniform burden of persuasion of "a preponderance of evidence."

In some instances, the law sets forth the "higher" standard of persuasion: "clear and convincing" evidence (Prince, *supra* § 3-104). "The clear and convincing evidence standard is satisfied when the party bearing the burden of proof has established that it is highly probable that what he or she has claimed is actually what happened" (*Home Ins. Co. of Ind. v Karantonis*, 156 AD2d 844, 845 [3d Dept 1989]; *see Green v William Penn Life Ins. Co. of N.Y.*, 12 NY3d 342, 347 [2009] [presumption against suicide requires evidence that shows suicide to be "highly probable"]; *Murtagh v Murtagh*, 217 AD2d 538, 539 [2d Dept 1995] [the presumption that a child born during marriage is presumed to be the biological product of the marriage may be rebutted by clear and convincing proof excluding the husband as the father or otherwise tending to disprove legitimacy]; *Matter of Jean P. v Roger Warren J.*, 184 AD2d 1072, 1072 [4th Dept 1992] [same]; *Matter of Penny MM. v Bruce MM.*, 118 AD2d 979 [3d Dept 1986] [same]).

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[1] In December 2022, the Note to subdivision (3) (c) was amended to add the paragraph defining "substantial evidence."