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1 Tennessee Law of Evidence CHAPTER 3.syn

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CHAPTER 3 ARTICLE III. TENNESSEE LAW OF EVIDENCE—PRESUMPTIONS

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§ 3.01 In General

[1] Text of Rule

3.01 In General

[Reserved]

2008 Advisory Commission Comment:

The Commission believed that presumptions were outside the scope of its present assignment from the Tennessee Supreme Court.

[2] Scope of Chapter Three

[a] Overview

The Tennessee Rules of Evidence, somewhat like their federal counterpart,[1] do not include rules defining the content or effect of presumptions. Accordingly, the Tennessee Rules of Evidence do not affect presumptions in this state. In an effort to assist the reader, this chapter briefly sketches the major presumptions under Tennessee law.

Tennessee statutes and judicial decisions contain a great number of presumptions. Unfortunately, it is impossible to determine the scope or impact of most of them, for the laws creating the presumptions are often incomplete. It is clear, however, that there is a vast difference between presumptions in civil and criminal cases. As described below,[2] presumptions are less frequently used in criminal cases because of constitutional limits on shifting the burden of proof by the use of a presumption that assists the prosecution in proving its case.

[b] Effect of Presumption

Because of the lack of precision used to describe presumptions under Tennessee law, it is often difficult to know the exact effect of some presumptions. Certain Tennessee presumptions are really *inferences* that permit, but do not require, a jury to find a "presumed" fact.[2.1] The side against whom the inference is used

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[1] *See* FED. R. EVID. 301–302 (describes general effect of presumptions, but does not recognize any specific presumption).

[2] *See below* *§ 3.02[1]*

[2.1] *See, e.g.*, *State v. Pickett, 211 S.W.3d 696 (Tenn. 2007)*, *cert. den.* confidential relationship has been shown and a presumption of undue influence arises, the burden shifts to ***Harwood v. Tennessee, 552 U.S. 973 (2007)*** (in criminal prosecutions, a permissive inference allows, but does not require, the triers of fact to infer the elemental fact from proof by the State of the basic fact and places no burden of any kind on the defendant); *Nelson v. Justice, 2019 Tenn. App. LEXIS 35 (Tenn. Ct. App. 2019)* (the "missing witness rule" does not create a presumption; it merely provides that a party's failure to call a witness gives rise to a permissible inference that the missing witness' testimony would have been unfavorable to the party who failed to call the witness). *See below* *§ 3.02[c]*.

may prevail on the issue without offering contrary proof, but ordinarily would present evidence on point since the presumption provides the jury with some evidence for the opponent's position.

A second variety of Tennessee presumptions shifts the burden of production to the other side. If the plaintiff relies on this presumption, the plaintiff will win unless the defendant produces countervailing proof. The presumption alone is sufficient to meet the plaintiff's burden of producing evidence on the fact presumed.[3] The presumption may disappear[4] or remain in the case[5] when countervailing evidence is introduced.

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[3] An example is the presumption of a bailee's negligence. *See below* *§ 3.05*.

[4] The presumption that registration of a car is *prima facie* evidence of ownership, for example. *See below* *§ 3.04*.

[5] Examples include the presumption that a bailee is negligent, *see below* *§ 3.05*, and the presumption against suicide, *see below* *§ 3.07*.

§ 3.02 Presumptions in Criminal Cases

[1] In General

Presumption of Innocence. In criminal cases, two presumptions are commonplace. The most obvious is that a person is presumed innocent until proven guilty. The primary impact of this is that the state has the burden of proving guilt beyond a reasonable doubt. Until that proof is provided, the defendant is legally innocent.

Presumption of Guilt. Once the accused is convicted, the presumption of innocence is replaced with a presumption of guilt in Tennessee.[6] On appeal, the defendant asserting the evidence was insufficient to convict bears the burden of proving the insufficiency.[6.1]

For other presumptions in criminal cases, the rules generally disfavor certain presumptions. The due process guarantee in the United States Constitution mandates that the state must prove every element of a crime beyond a reasonable doubt.[7] This has been interpreted to mean that the state may not rely on evidentiary presumptions that relieve the state of its burden of persuasion on an element of the crime.[8]

[a] Mandatory Irrebuttable or Conclusive Presumption

A *mandatory irrebuttable* or *conclusive* presumption relieves the state of its burden of proving a particular element by "removing the presumed element from the case entirely if the State proves the predicate facts."[9] According to *Francis v. Franklin*,[10] the leading United States Supreme Court decision, a mandatory presumption is unconstitutional in a criminal case because it permits the jury to presume the existence of an element of the crime, and, therefore, shifts the burden of proof to the defendant on that element.

[b] Mandatory Rebuttable Presumption

A mandatory rebuttable presumption:

> [D]oes not remove the presumed element from the case if the State proves the predicate facts, but it nonetheless relieves the State of the affirmative burden of persuasion on the presumed element by

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[6] *State v. Lewter, 313 S.W.3d 745, 747 (Tenn. 2010)*.

[6.1] *State v. Shane, 2017 Tenn. Crim. App. LEXIS 419 (Tenn. Crim. App. 2017)*.

[7] *See, e.g.*, *In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)*.

[8] *See, e.g.*, *Sandstrom v. Montana, 442 U.S. 510, 520–524, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)*. *See generally* Tenn. Atty. Gen. Opin. 95-117 (1995) (excellent analysis of constitutionality of presumptions and inferences in criminal cases).

[9] *Francis v. Franklin, 471 U.S. 307, 317, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)*.

[10] *471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)*. *See also* *State v. James, 315 S.W.3d 440 (Tenn. 2010)*.

> instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding.[11]

While conceding that a mandatory rebuttable presumption is less offensive than a mandatory irrebuttable one, the United States Supreme Court in *Francis v. Franklin* held that the mandatory rebuttable presumption is also unconstitutional, for it still shifts the burden of persuasion on a fact that the state must prove.[12] This rule even extends to jury instructions that "might reasonably have been understood by the jury as creating a mandatory rebuttable presumption."[13] In *Franklin* the Court struck down rebuttable presumptions that acts of a sane person are presumed to be the product of the person's will, and that a person of sound mind and discretion is presumed to intend the natural and probable consequences of the person's behavior.

[c] Permissive Presumption or Inference

A *permissive presumption* or *inference* "suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion."[14] According to the United States Supreme Court, a permissive presumption or inference in a criminal case does not necessarily violate the Constitution since it:

> [D]oes not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved.[15]

Not all permissive inferences are valid, however. In *Francis v. Franklin*, the United States Supreme Court held that:

> A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.[16]

The Tennessee Supreme Court, recognizing the doubtful legality of presumptions in criminal cases, has observed that "the use of the term 'presumption' in jury instructions has been constitutionally suspect, except for the presumption of innocence."[17] Accordingly, Tennessee courts have routinely been converting mandatory presumptions into permissive presumptions or inferences in criminal cases.[18] The Tennessee

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[11] *Francis v. Franklin, 471 U.S. 307, 317, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)*.

[12] *Id.*

[13] *Id. at 317*.

[14] *Id. at 314*. *See generally State v. Pickett, 211 S.W.3d 696 (Tenn. 2007)*, *cert. den.*, ***Harwood v. Tennessee, 552 U.S. 973 (2007)***; *State v. Trusty, 326 S.W.3d 582, 598–601 (Tenn. Ct. App. 2010)*. The Tennessee Supreme Court has also defined an inference as follows: "An inference is generally regarded as a permissible deduction from evidence which a jury may accept or reject or accord such probative value as it desires. Although a jury can permissibly draw an inference from the evidence before it, whether direct or circumstantial, it is well settled in Tennessee that an inference cannot be properly drawn from another inference. What is meant by this rule is that an inference can be drawn only from the facts in evidence, and cannot be based on surmise, speculation, conjecture or guess; it must be reasonably drawn from, and supported by, the facts on which it purports to rest, and must be made in accordance with correct and common modes of reasoning." *Benton v. Snyder, 825 S.W.2d 409 (Tenn. 1992)*.

[15] *Id. See also, State v. Pickett, 211 S.W.3d 696 (Tenn. 2007)*, *cert. den.*, ***Harwood v. Tennessee, 552 U.S. 973 (2007)*** (permissive inference is not a violation of due process because the State still has the burden of persuading the jury that the suggested conclusion should be inferred based on the predicate facts proved).

[16] *Id. at 315*.

[17] *State v. Sensing, 843 S.W.2d 412 (Tenn. 1992)*; *State v. Martin, 702 S.W.2d 560, 564 (Tenn. 1985)*.

Supreme Court has held that a jury should be instructed that the following matters, though at the time technically made presumptions by statute or common law, are really inferences: guilt may be inferred from possession of recently stolen property,[19] and fraudulent intent and knowledge of insufficient funds may be inferred if a drawee refuses a check.[20] In such cases, the jury should be instructed that the inference does not shift the burden of proof to the accused and that the jury is free to follow or disregard the inference.[21] The Tennessee Supreme Court stressed the importance of jury instructions on inferences:

> [N]o element of a criminal offense is to be presumed, and … jury instructions must not cause a reasonable juror to believe that the accused has the burden of proof as to any element of the offense on trial.[22]

Other inferences have been approved in Tennessee criminal cases.[23]

Another limit on such inferences in criminal cases is that Due Process mandates there must be a rational connection between the facts proved and the conclusion reached.[24] The inferred conclusion more likely than not must flow from the proved fact.[25]

Inferences are also created by statute.[25.1]

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[18] *See, e.g.,* State v. Sensing, 843 S.W.2d 412, 417 (Tenn. 1992) (juries should not be instructed on presumptions, except the presumption of innocence, in criminal cases; in place of presumptions, juries may be instructed that a permissible inference may or may not be drawn, but the inference places no burden of proof on the defendant). Where a jury instruction uses the phrase "presume" or "presumption", appellate courts may still uphold the instruction as valid if an anlaysis of the entire instruction reveals that the effect of the wording creates merely a permissible inference. See, e.g., McNish v. Bell, 2013 U.S. Dist. LEXIS 18388 (E.D. Tenn. 2013) (jury instruction stating "If it is shown beyond a reasonable doubt that the alleged victim was killed, the killing is presumed to be malicious in the absence of evidence which would rebut the implied presumption" was only a permissible inference, which jurors were free to draw or not draw from the evidence; accordingly, instruction did not impermissibly shift the burden of proof).

[19] State v. James, 315 S.W. 3d 440 (Tenn. 2010) (theft and burglary); Bush v. State, 541 S.W.2d 391 (Tenn. 1976) (burglary).

[20] State v. Merriweather, 625 S.W.2d 256 (Tenn. 1981). *See also* Lowe v. State, 805 S.W.2d 368 (Tenn. 1991) (under now-repealed Tennessee habitual offender statute, prior judgment of conviction created a permissive inference that the person named in the judgment was the same person being tried in the instant case).

[21] State v. Merriweather, 625 S.W.2d 256 (Tenn. 1981). *See also,* McNish v. Bell, 2013 U.S. Dist. LEXIS 18388 (E.D. Tenn. 2013) (trial court made it clear that it was for the jury to determine whether the presumption of malice was warranted based upon the facts of the case).

[22] State v. Martin, 702 S.W.2d 560, 564 (Tenn. 1985).

[23] *See, e.g.*, State v. Trusty, 326 S.W.3d 582, 597–601 (Tenn. Crim. App. 2010) (jury may infer murder was committed in the county where the body was found); State v. Pickett, 211 S.W.3d 696, 701 (Tenn. 2007) (jury may infer sexually exploited person is a minor if the person is portrayed as a minor); McNish v. Bell, 2013 U.S. Dist. LEXIS 18388 (E.D. Tenn. 2013) (malice instruction upheld). Regarding inferences related to premeditation, see State v. Whitaker, 2020 Tenn. Crim. App. LEXIS 397 (Tenn. Crim. App. June 9, 2020) (Tennessee courts have defined a non-exhaustive list of factors which, if present, may support the jury's inference of premeditation: defendant's declaration of an intent to kill the victim; the use of a deadly weapon upon an unarmed victim; the establishment of a motive for the killing; the particular cruelty of the killing; the infliction of multiple wounds; the defendant's procurement of a weapon, preparations to conceal the crime, and destruction or secretion of evidence of the killing; and the defendant's calmness immediately after the killing).

[24] *See, e.g.*, State v. James, 315 S.W.3d 440, 448 (Tenn. 2010)(*citing* Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943).

[25] State v. James, 315 S.W.3d 440, 448 (Tenn. 2010) (upholding inference that possession of recently stolen goods creates an inference the possessor stole the goods and committed the burglary in which the theft occurred).

[d] Harmless Error

Both the United States[26] and Tennessee[27] Supreme Courts have recognized that errors in jury instructions on presumptions may be "harmless error." In *State v. Bolin*,[28] for example, the Tennessee Supreme Court found harmless error beyond a reasonable doubt when a trial judge erroneously instructed the jury that it may presume malice if the state proves that the accused, acting with the intent to commit murder, assaulted another person with a deadly weapon.

[e] Defense Counsel Adequate

In a criminal case, when defense counsel's *Sixth Amendment* competence is challenged, there is a strong presumption counsel rendered adequate assistance and used reasonable professional judgment.[28.1]

[f] Sentencing

Under the Tennessee Criminal Sentencing Reform Act,[28.2] appeals challenging the length, manner, or range of a sentence are reviewed under an abuse of discretion standard with a presumption of reasonableness.[28.3] This standard also applies to consecutive sentences.[28.4] A trial court's misapplication of a mitigating or enhancement factor does not remove the presumption of reasonbleness.[28.5] But where a trial

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[25.1] *See, e.g.*, *TENN. CODE ANN. § 39-14-150(d)* (Supp. 2014) (in identity theft trafficking prosecution, it is permissible to infer the intent to sell, etc. information from evidence of possession of identifying information of five or more people). *TENN. CODE ANN. 39-14-121(b)* (passing or issuing worthless checks; fraudulent intent and knowledge may be inferred); *TENN. CODE ANN. § 39-15-503* (permissive inferences applicable to offense of financial exploitation of vulnerable or elderly person); *TENN. CODE ANN. § 39-17-419* (inferences applicable to distribution of controlled substance offenses); *TENN. CODE ANN. § 36-5-104* (inference of obligor's ability to pay arises from failure to comply with child support order).

[26] *Rose v. Clark, 478 U.S. 570 (1986)* (Tennessee case).

[27] *State v. Bolin, 678 S.W.2d 40 (Tenn. 1984)*.

[28] *678 S.W.2d 40 (Tenn. 1984)*. *See also* *State v. James, 315 S.W.3d 440, 446 (Tenn. 2010)* (upholding inference of guilt of theft and burglary from possession of recently stolen property; test of erroneous jury instruction is whether the erroneous instruction by itself so infected the entire trial that the conviction violates Due Process).

[28.1] *See, e.g.*, *Garcia v. State, 425 S.W.3d 248 (Tenn. 2013)*; *Bryant v. State, 460 S.W.3d 513 (Tenn. 2015)* (same), *overruled on other grounds by* *Moore v. State, 485 S.W.3d 411(Tenn. 2016)*; *Kendrick v. State, 454 S.W.3d 450 (Tenn. 2015)* (is strong presumption defense counsel provided adequate assistance and used reasonable professional judgment).

[28.2] *TENN. CODE ANN. 40-35-101 et seq.*

[28.3] *Tenn. Code Ann. 40-35-402(d)*. *See also* *State v. Bise, 380 S.W.3d 682 (Tenn. 2012)* (under the 2005 amendments to the Tennessee Criminal Sentencing Reform Act of 1989, the sentence imposed by the trial court is reviewed for abuse of discretion and is granted a presumption of reasonableness if it is within the range of permissible sentences and its imposition reflects a proper application of the purposes and principles of the Act); *State v. Derring, 2019 Tenn. Crim. App. LEXIS 32* (Tenn. Crim. App. Jan. 16, 2019; *State v. Buchanan, 2018 Tenn. Crim. App. LEXIS 844 (Tenn. Crim. App. 2018)*. The abuse of discretion standard also applies to questions related to probation or any other alternative sentence. Thus, in reviewing a trial court's denial of an alternative sentence, the denial is presumptively reasonable so long as the sentence reflects a decision based upon the purposes and principles of sentencing. The party appealing the sentence has the burden of demonstrating its impropriety. *State v. Derring, 2019 Tenn. Crim. App. LEXIS 32 (Tenn. Crim. App. 2019)*.

[28.4] *State v. Pollard, 432 S.W.3d 851, 2013 Tenn. LEXIS 1011 (Tenn. Dec. 20, 2013)* (appropriate standard of appellate review for consecutive sentencing is abuse of discretion accompanied by a presumption of reasonableness, because the Tennessee Criminal Sentencing Reform Act of 1989 contemplates the same standard of appellate review for the determination of the length, range, or the manner of service of a sentence as well as the imposition of consecutive sentences).

court fails to properly articulate its reasons for ordering consecutive sentences, the presumption of reasonableness no longer applies.[28.6]

[2] Self-Defense

A person who uses force likely to cause death or serious bodily injury in a residence, dwelling or vehicle against one who has unlawfully and forcibly entered is presumed to have held a reasonable belief of imminent death or serious bodily injury to himself or others validly present.[29] This presumption will provide substantial assistance to a self-defense argument by the person using the force. Unless an exception applies, the person using such force is immune from civil liability.[30]

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[28.5] *State v. Bise, 380 S.W.3d 682 (Tenn. 2012)*.

[28.6] *State v. Pollard, 432 S.W.3d 851 (Tenn. 2013)* (in the context of consecutive sentencing, the presumption of reasonableness applies, giving deference to the trial court's exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in *Tennessee Code Ann. § 40-35-115(b)*); *State v. Derring, 2019 Tenn. Crim. App. LEXIS 32 (Tenn. Crim. App. 2019)*.

[29] ***TENN. CODE ANN. § 39-11-611(c)*** (2010). The statute also defines specific circumstances in which the presumption does not apply. ***TENN. CODE ANN. § 39-11-611(d)***.

[30] *TENN. CODE ANN. § 39-11-622* (2010).

§ 3.03 Driving (DUI) and Boating (BUI) Under the Influence

Vehicles. Tennessee law has for many years prohibited the driving of a motor vehicle under the influence of alcohol or other intoxicant.[31] Often called DUI, this crime, today—and historically—invokes a presumption that may ease the prosecution's proof. By statute, there exists a presumption commonly called the *presumption of intoxication*.[31.1] This has historically been a rebuttable presumption, often expressed in terms of an inference, that a person, typically the criminal defendant accused of driving under the influence, who has at least *X*% of alcohol, by weight, in his or her blood is in fact under the influence of an intoxicant and has an impaired ability to drive sufficient to violate the criminal statute barring such impaired driving.[32]

For many years the Tennessee statute applied the presumption of intoxication to those persons with a blood alcohol level of .10% by weight.[33] In 1994, the legislature modified the statute. The presumption was retained for first-time DUI offenders at .10%, but lowered to .08% for repeat offenders.[34] In 1995, the rebuttable presumption or inference for defendants registering .10% or greater was replaced by a mandatory irrebuttable or conclusive presumption, essentially a rule of law, that a blood alcohol level of .10% is conclusive proof of intoxication.[35] There was a serious concern that the 1995 statutory amendment would fail to pass constitutional muster because it was a criminal statute containing a conclusive presumption.[36] In other words, by legislative mandate, the prosecution was relieved of the requirement to prove one of the elements of the crime, that having the specified blood alcohol level of .10% causes one to be intoxicated. To resolve this dilemma, the statute was again amended in 1996.[37]

Under the revised statutory scheme, it was unlawful to drive a motor vehicle either while under the influence of alcohol or other intoxicant or while having a blood alcohol concentration of .10% or greater.[38] *Tennessee Code Annotated § 55-10-408* was revised to remove the term "conclusive presumption."[39] Instead, a blood alcohol content of .10% simply created "a presumption that the defendant's ability to drive was sufficiently impaired thereby

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[31] *TENN. CODE ANN. § 55-10-401(a)(1)* (Supp. 2010).

[31.1] *TENN. CODE ANN. § 55-10-411(a)*.

[32] *Id*.

[33] *See, e.g., id.* at § 55-10-408(b) (1988) (repealed).

[34] *Id.* at § 55-10-408(c) (Supp. 1995) (repealed); 1994 Tenn. Pub. Acts ch. 946.

[35] *Id.* at § 55-10-408(a) (Supp. 1995); 1995 Tenn. Pub. Acts ch. 517.

[36] *See* Opin. Tenn. Atty. Gen. 95-117 (conclusive presumption unconstitutionally relieves state of burden of proving each element of DUI beyond a reasonable doubt).

[37] 1996 Tenn. Pub. Acts ch. 915.

[38] *TENN. CODE ANN. § 55-10-401* (Supp. 1996).

[39] *TENN. CODE ANN. § 55-10-408* (2008).

to constitute a violation of § 55-10-401(a)(1)."[40] That presumption became less important than it had been because, under the revised statute, driving with the proscribed blood alcohol level was made a violation of the statute, whether or not it caused the driver to be under the influence of an intoxicant. The statutory scheme was amended again in 2002, lowering the critical presumptive blood alcohol level from ten-hundredths percent (0.10%) to eight-hundredths percent (0.08%).[41]

The prior statute regarding the rebuttable presumption of intoxication has regularly been applied in criminal cases.[42] In *McIntyre v. Ballentine*,[43] the Tennessee Supreme Court found no error in instructing the jury about this presumption in a civil case in which a plaintiff was injured in an automobile accident allegedly caused by a driver who was under the influence.

Boats. There is an analogous statute regarding the operation of boats while under the influence of an intoxicant.[44] *Tennessee Code Annotated § 69-9-217* prohibits the operation of any boat subject to registration or any commercial vessel "while under the influence of any intoxicant … ."[45] This "boating under the influence" or "BUI" statute has been modified to mirror its DUI counterpart, stating:

> Evidence that there was, at the time alleged, alcohol concentration in such person's blood or breath equal to or greater than the amount constituting the offense of driving under the influence of an intoxicant as provided in § 55-10-401(a)(2) shall constitute a violation of this section.[46]

Thus, the threshold alcohol level is the same as that required for the offense of driving under the influence, currently eight-hundredths percent (0.08%), and the reference to a presumption has been omitted.[47]

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[40] *TENN. CODE ANN. § 55-10-408* (2008).

[41] *TENN. CODE ANN. § 55-10-411(a)*.

[42] *See, e.g., State v. McKinney, 605 S.W.2d 842 (Tenn. Crim. App. 1980)* (in vehicular homicide case, blood alcohol content of .10% or more creates inference that person was under the influence of alcohol).

[43] *833 S.W.2d 52 (Tenn. 1992)*. *See also Brown v. J.C. Penney Life Ins. Co., 861 S.W.2d 834 (1992)* (in civil suit to recover life insurance proceeds where policy excluded loss from injury while intoxicated, application of presumption is appropriate, but plaintiff may introduce evidence to overcome presumption).

[44] *TENN. CODE ANN. § 69-9-217(a)* (Supp. 2010).

[45] *TENN. CODE ANN. § 69-9-217(a)* (Supp. 2010).

[46] *TENN. CODE ANN. § 69-9-217(j)(2)* (Supp. 2010).

[47] *TENN. CODE ANN. § 69-9-217(j)(2)* (Supp. 2010).

§ 3.04 Presumptions Involving Vehicles

[1] In General

Tennessee law contains several presumptions, discussed below, that are used to prove ownership and use of a motor vehicle involved in an accident. These presumptions are rebuttable, but until rebutted they are sufficient to overcome a motion for summary judgment or a motion for directed verdict.[48] They shift the burden of going forward with proof. When the other side introduces credible evidence rebutting the presumption, the presumption disappears[49] and is insufficient by itself to take the case to the jury, unless the side losing the benefit of the presumption produces its own proof on the issue.[50] If no such proof is offered and the presumption has been rebutted, the trial judge should direct a verdict. But the presumption is not rebutted by the testimony of a witness when there is substantial evidence, by the witness's own statements or by contradictory proof, that the witness's credibility is poor.[51] In such cases, the court should permit the jury to determine whether the testimony outweighs the statutory presumption.[52]

[2] Registration as *Prima Facie* Evidence of Ownership and Use for Owner's Benefit

A Tennessee statute states that proof that a motor-propelled vehicle is registered in a person's name is *prima facie* evidence that the same individual owns the vehicle.[53] The same statute also provides that proof of registration is *prima facie* evidence that the vehicle was being operated by the owner or the owner's servant for the use and benefit of the owner and within the course and scope of the servant's employment.[54]

This presumption hinges on proof of the registration of the vehicle.[55] Since the presumption is rebuttable, it can be "displaced by evidence to the contrary."[56] The trier of fact decides whether the presumption has been displaced.[57] However, uncontradicted and unimpeached evidence that rebuts the presumption causes it to

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[48] *Hamrick v. Spring City Motor Co., 708 S.W.2d 383 (Tenn. 1986)*.

[49] *See, e.g.*, *Ross v. Griggs, 41 Tenn. App. 491, 296 S.W.2d 641 (1955)*.

[50] *Wright v. Bridges, 16 Tenn. App. 576, 65 S.W.2d 265 (1933)*.

[51] *See, e.g.*, *Jones v. Ford Motor Co., 48 Tenn. App. 243, 345 S.W.2d 681 (1960)*.

[52] *Buck v. West, 58 Tenn. App. 539, 434 S.W.2d 616 (1968)*; *Holder v. Peggy Ann Wrecker & Repair Serv., 518 S.W.2d 770 (Tenn. Ct. App. 1973)*.

[53] *TENN. CODE ANN. § 55-10-312* (2008).

[54] *Id.*

[55] *Woodfin v. Insel, 13 Tenn. App. 493 (1931)*.

[56] *Terminal Transp. Co. v. Cliffside Leasing Corp., 577 S.W.2d 455, 458 (Tenn. 1979)*.

[57] *Id.* See also *Haggard v. Jim Clayton Motors, 216 Tenn. 625, 393 S.W.2d 292 (1965)*.

disappear and may support a directed verdict contrary to the presumed fact.[58] It is to be used in civil cases for personal injury and property damage.[59] Older Tennessee authorities hold that this statute is in derogation of the common law and is to be strictly construed.[60]

[3] Ownership as *Prima Facie* Evidence of Use with Owner's Consent and for Owner's Use and Employment Benefit

A Tennessee statute creates a presumption that, in civil personal injury or property actions based on the negligent operation of a motor-propelled vehicle, proof of ownership of the vehicle provides *prima facie* evidence that the vehicle was being used with the owner's consent, and that the vehicle was being used for the owner's use and benefit and was within the course and scope of employment.[61] This provision specifically applies to vehicles being test driven.[62] The statute instructs appellate courts to interpret the rule liberally.[63] This presumption can be rebutted by credible proof that the driver of the vehicle did not have express or implied permission to drive the vehicle involved in the accident.[64] Where the rebuttal witnesses are interested parties (for instance, the defendant or his or her family members), the court will generally view the evidence as not credible.[64.1] If the rebuttal proof is impeached, the case should be decided by the jury.[65]

[4] Uninsured Motorist

A helpful statutory rebuttable presumption in uninsured motorist cases is that a tortfeasor is presumed uninsured if the tortfeasor fails to file financial responsibility forms with the Department of Safety within 90 days of an accident.[66] Upon request and payment of a fee, the Commissioner of Public Safety provides a certified affidavit indicating whether the necessary forms have been filed.[67]

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[58] *Haggard v. Jim Clayton Motors, 216 Tenn. 625, 393 S.W.2d 292 (1965)*.

[59] ***Reece v. State, 197 Tenn. 383, 273 S.W.2d 475 (1954)***.

[60] *English v. George Cole Motor Co., 21 Tenn. App. 408, 111 S.W.2d 386 (1937)*.

[61] *TENN. CODE ANN. § 55-10-311(a)* (2008).

[62] *Id.*

[63] *Id.* at § 55-10-311(b) (2008).

[64] *See, e.g.*, ***Sadler v. Draper, 46 Tenn. App. 1, 326 S.W.2d 148 (1959)***.

[64.1] *See, e.g., Godfrey v. Ruiz, 90 S.W.3d 692, 696 (Tenn. 2002)*, (while the testimony of the defendants was uncontroverted, their status as interested witnesses placed their credibility in question; a registered owner's offer of testimony negating the issue of agency, standing alone, cannot overcome the statutorily created prima facie evidence of an owner-driver agency relationship created by *T.C.A. § 55-10-311(a)*); *Gray v. Mitsky, 280 S.W.3d 828 (Tenn. Ct. App. 2008)* (trial court's determination as to the credibility of witnesses is given deference on appeal; accordingly, where the defendant was the father of the driver, and the only rebuttal evidence offered was that of the father, mother, and son, all of whom claimed the father was not the driver at the time of the collision, trial court had discretion to rule against the father after finding testimony unpersuasive).

[65] *Haggard v. Jim Clayton Motors, 216 Tenn. 625, 393 S.W.2d 292 (Tenn. 1965)*.

[66] *TENN. CODE ANN. § 56-7-1201(g)* (2008). *See also Collazo v. Haas, 2011 Tenn. App. LEXIS 671 (Tenn. Ct. App. 2011)* (summary judgment to the insured's insurer in an uninsured motorist action was inappropriate because, although the insurer presented a prima facie case that the other vehicle was being used by its owner or with the consent of the owner, based on *T.C.A. §§ 55-10-311(a)* and *55-10-312*, the insured presented countervailing evidence that created a dispute of fact and, pursuant to *T.C.A. § 56-7-1201(g)*, the insured had the benefit of the rebuttable presumption that the unknown driver of the owner's vehicle at the time of the accident was uninsured).

[67] *Id.*

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§ 3.05 Negligence of Bailee

Sometimes a bailor sues a bailee to recover for loss or damage to personal property entrusted to the bailee. For example, a car at a parking lot may be stolen[68] or returned to the owner in a damaged condition,[69] or goods in a warehouse may be destroyed by fire,[70] or a rented airplane may be destroyed in a crash.[71] Tennessee law contains a presumption that, upon the presentation of the bailor's proof that the property was delivered to the bailee in good condition, but not returned at all or returned in a damaged condition, there is *prima facie* evidence that the bailee was negligent.[72] The presumption does not apply if the loss or damage was due to the inherent nature of the property entrusted to the bailee.[73]

This presumption is based on the premise that:

> [S]ince the bailee ordinarily should have within his peculiar knowledge such facts as will explain the circumstances causing the damage, then the burden of proof should shift to him when the bailor establishes the precedent facts of delivery in good condition and redelivery in bad condition.[74]

Accordingly, Tennessee case law holds that the presumption creates an inference of fact which is *prima facie* correct and will sustain the plaintiff's burden of proof until conflicting facts are proven.[75] In other words, this rule provides a presumption that the defendant bailee was negligent. The defendant can rebut this presumption by introducing evidence that the damages were not caused by the bailee's negligence.[76] This proof must deal directly with the cause of the damage to the property. For example, the owner of a parking lot where a car was stolen could not rebut the presumption simply by proving that the automobile was stolen; the parking facility had to establish that the theft was not caused by the defendant parking lot's carelessness.[77]

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[68] *See, e.g.*, *Savoy Hotel Corp. v. Sparks, 57 Tenn. App. 537, 421 S.W.2d 98 (1967)*. *See also* *Jones v. Allied Mut. Fire Ins. Co., 38 Tenn. App. 362, 274 S.W.2d 525 (1954)* (car stolen from car wash).

[69] *Steiner-Liff Iron & Metal Co. v. Woodmont Country Club, 480 S.W.2d 533 (Tenn. 1972)* (car left at country club for attendant to park).

[70] ***Crook v. Mid-South Transfer & Storage Co., 499 S.W.2d 255 (Tenn. Ct. App. 1973)***.

[71] ***Morton v. Martin Aviation Corp., 205 Tenn. 41, 325 S.W.2d 524 (1959)***.

[72] *TENN. CODE ANN. § 24-5-111* (2000).

[73] *Id.*

[74] *Steiner-Liff Iron & Metal Co. v. Woodmont Country Club, 480 S.W.2d 533, 537–538 (Tenn. 1972)*.

[75] *See, e.g.,* ***Morton v. Martin Aviation Corp., 205 Tenn. 41, 325 S.W.2d 524 (1959)***.

[76] *Steiner-Liff Iron & Metal Co. v. Woodmont Country Club, 480 S.W.2d 533, 538 (Tenn. 1972)*.

[77] *Savoy Hotel Corp. v. Sparks, 57 Tenn. App. 537, 421 S.W.2d 98 (1967)*.

Even when the defendant introduces proof that he or she was not negligent, the presumption of negligence remains in the case under Tennessee law.[78] The jury will weigh the presumption when it considers all the evidence in the case. Of course, if the proof contradicting the presumption is conclusive, the court should direct a verdict in favor of the defendant.[79]

This presumption is only applicable upon proof that the property was delivered in good condition. Since Tennessee courts have been hesitant to infer the condition of the property,[80] counsel relying on this presumption must carefully prove that the item was delivered in good condition.

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[78] ***Crook v. Mid-South Transfer & Storage Co., 499 S.W.2d 255, 257 (Tenn. Ct. App. 1973)***; ***Morton v. Martin Aviation Corp., 205 Tenn. 41, 325 S.W.2d 524, 528 (1959)***.

[79] ***Crook v. Mid-South Transfer & Storage Co., 499 S.W.2d 255 (Tenn. Ct. App. 1973)***.

[80] *See, e.g.,* *Steiner-Liff Iron & Metal Co. v. Woodmont Country Club, 480 S.W.2d 533 (Tenn. 1972)* (plaintiff failed to prove that car was delivered to bailee in good condition; presumption does not apply).

§ 3.06 Presumption of Death During Absence

At common law, there was a presumption that a person who had been absent for seven years was dead. In 1941 Tennessee rejected this presumption by adopting a modified version of the Uniform Absence as Evidence of Death and Absentees' Property Law.[81] In 2001 the legislature restored this presumption by providing that a person absent from his or her residence and unheard of for seven years or longer, whose absence is not satisfactorily explained, is presumed to be dead.[82] This statutory presumption is rebuttable.[83] The absence and other relevant factors may be presented.[84] Exposure to specific peril of death is also relevant.[85]

[81] *TENN. CODE ANN. § 30-3-101 et seq*. (1984).

[82] *TENN. CODE ANN. § 30-3-102(a)*(2007).

[83] *Id.*

[84] *Cf. Armstrong v. Pilot Life Ins. Co., 656 S.W.2d 18 (Tenn. Ct. App. 1983)* (insufficient evidence to establish death by a preponderance of evidence; extensive discussion of Tennessee's former repeal of presumption of death).

[85] *TENN. CODE ANN. § 30-3-102(b)* (2007).

§ 3.07 Presumption Against Suicide

When the cause of a person's death in a civil case[86] is an issue, Tennessee law creates a rebuttable presumption that death was not caused by suicide.[87] This presumption is based on the principle that people want to live and therefore will not kill themselves.[88] A more eloquent statement of this policy is contained in an old Tennessee case:

> [O]ut of deference to the well known fact that almost universally people love and will defend their lives vigorously, even desperately, rather than destroy it, there is a presumption against self-slaughter.[89]

Often this presumption will be used in cases where an insurance company seeks to deny liability on a life insurance policy by asserting that the insured's death was a suicide and therefore excluded from coverage.[90]

Rebuttable. The presumption against suicide is rebuttable and remains in the case even when the opponent produces evidence that the death was in fact a suicide.[91] While the presumption is sufficient to get the issue to the

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[86] *See* *Persons v. State, 90 Tenn. 291, 16 S.W. 726 (1891)* (presumption against suicide does not apply in criminal cases because of presumption of innocence). *See also* *Williams v. Can. Life Assur. Co., 2001 Tenn. App. LEXIS 520 (Tenn. Ct. App. July 24, 2001)* (in civil cases, the presumption against suicide is greater than the presumption against homicide, and it is the duty of the court to consider the probative force of the respective presumptions; thus, in civil cases, when one has been found dead, even with marks of violence, the presumption is that the deceased did not commit suicide, and also that he or she was not murdered).

[87] *See, e.g.,* *Maddux v. National Life & Acc. Ins. Co., 36 Tenn. App. 275, 254 S.W.2d 433 (1953)* (life insurance company denied coverage because of alleged suicide of insured); *Insurance Co. v. Bennett, 90 Tenn. 256, 16 S.W. 723 (1891)*.

[88] *Maddux v. National Life & Acc. Ins. Co., 36 Tenn. App. 275, 254 S.W.2d 433 (1953)*.

[89] *Metropolitan Life Ins. Co. v. Staples, 5 Tenn. App. 436, 441 (1927)*. *See also* *Kernodle v. Peerless Life Ins. Co., 213 Tenn. 631, 378 S.W.2d 744, 746 (1964)* ("There is a strong presumption in law against suicide based upon knowledge of man from time immemorial that all creatures within or upon the earth will fight for survival submitting only to death when the struggle appears useless and beyond hope of success."). *See also* *Williams v. Can. Life Assurance Co., 2001 Tenn. App. LEXIS 520, *24 (Tenn. Ct. App. July 24, 2001)* (although the presumption against suicide is based on the belief that self-destruction is contrary to human nature, the court is not required "to shut its eyes to the fact" that sometimes people do, for no apparent reason, commit suicide) (*quoting* *Bryan v. Aetna Life Ins. Co., 25 Tenn. App. 496, 160 S.W.2d 423 (1941))*.

[90] *See, e.g.,* *Maddux v. National Life & Acc. Ins. Co., 36 Tenn. App. 275, 254 S.W.2d 433 (1953)*.

[91] *See, e.g.,* *Nichols v. Mut. Life Ins. Co. of New York, 178 Tenn. 209, 156 S.W.2d 436 (1941)*. *See also* *Williams v. Can. Life Assurance Co., 2001 Tenn. App. LEXIS 520 (Tenn. Ct. App. July 24, 2001)* (if the facts and circumstances attending death leave it reasonably doubtful as to whether it was caused by accidental means or by suicide, the presumption against suicide comes to the aid of the plaintiff, and casts on the defendant the duty of going forward with the proof and establishing the defense of suicide by a fair preponderance of the evidence).

jury in many cases, the trial court may direct a verdict in favor of suicide if the proof shows conclusively that the death was a suicide.[92]

Jury Instruction. The presumption against suicide also is included in the jury charge if the case goes to the jury. Under the law as stated in the leading case of *Provident Life & Accident Insurance Company v. Prieto*,[93] it is quite easy to get to the jury on the issue of accidental death versus suicide. The plaintiff makes out a *prima facie* case simply by proving death by external and violent means under circumstances compatible with accident. The presumption against suicide assists in establishing the *prima facie* case. Where there is no proof indicating either accident or suicide or where the proof is equally balanced or conflicting, the presumption against suicide assists the plaintiff in proving accidental death.[94] The defendant can overturn the presumed fact of accidental death (as opposed to suicide) only by a preponderance of proof that death occurred by suicide.[94.1] The jury decides where the preponderance lies.

The following jury charge was specifically approved in the leading *Prieto* case:

> The Court, further instructs the jury that a man's natural instinct is to preserve his life and not to destroy it. Therefore, the presumption is that the insured did not commit suicide, and this presumption should be considered in deciding whether or not he did commit suicide.
>
> The Court further instructs the jury that one of the defenses in the case is that the insured did commit suicide. And you are instructed that this is an affirmative defense set up by the defendant, and the burden is upon the defendant to establish same by the preponderance of the evidence.
>
> The plaintiff is therefore entitled to recover unless the evidence introduced has overcome this presumption and satisfied you that death was voluntary. But this is only a disputable presumption, and if from the evidence in the case you find by a preponderance thereof that the insured came to his death by voluntarily and intentionally shooting himself, you must find for the defendant. The court further instructs the jury that when a man suffers injury which might have been caused by accident, or might have been intentionally inflicted upon himself, and there is no preponderance of evidence as to the cause of such injury, the presumption is that death occurred by accident.[95]

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[92] *Maddux v. National Life & Acc. Ins. Co., 36 Tenn. App. 275, 254 S.W.2d 433 (1953)*; *Bryan v. Aetna Life Ins. Co., 25 Tenn. App. 496, 160 S.W.2d 423 (1941)*; *Mutual Benefit Health & Acc. Ass'n v. Denton, 22 Tenn. App. 495, 124 S.W.2d 278 (1938)*.

[93] *169 Tenn. 124, 83 S.W.2d 251 (1935)*.

[94] *Kernodle v. Peerless Life Ins. Co., 213 Tenn. 631, 378 S.W.2d 744 (1964)*.

[94.1] *Williams v. Can. Life Assur. Co., 2001 Tenn. App. LEXIS 520 (Tenn. Ct. App. 2001)* (the presumption against suicide is rebuttable; if the facts and circumstances attending death leave it reasonably doubtful as to whether it was caused by accidental means or by suicide, the presumption against suicide comes to the aid of the plaintiff, and casts on the defendant the duty of going forward with the proof and establishing the defense of suicide by a fair preponderance of the evidence).

[95] *Provident Life & Acc. Ins. Co. v. Prieto, 169 Tenn. 124, 139–140, 83 S.W.2d 251, 257 (1935)*.

§ 3.08 *Res Ipsa Loquitur*

[1] In General

Res ipsa loquitur is a tort doctrine that provides the plaintiff with an inference enabling the jury to find that the defendant was negligent if the plaintiff proves certain elements.[95.1] The doctrine is applicable if "the circumstances surrounding the injury would cause a reasonable person to conclude that the injury would not have occurred had it not been for the defendant's negligence."[96] While often this doctrine is described as stating that "The thing speaks for itself," the Tennessee Supreme Court eloquently noted that the strength of the *res ipsa loquitur* inference differs in each case, so that sometimes the circumstances "may not speak much above a whisper," while in other cases "they may speak in thunderous tones."[97]

[2] Elements

[a] Accident Usually Occurs by Negligence

Res ipsa loquitur is applicable if the plaintiff can prove two elements.[98]

First, plaintiff must prove that the accident is a kind which usually does not happen in the absence of negligence. In one case, the court refused to apply the doctrine when an 82-year-old woman fell while a

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[95.1] The Tennessee Supreme Court has explained the application of the doctrine as follows: "The evidentiary principle of res ipsa loquitur assists a plaintiff by furnishing circumstantial evidence of negligence when direct evidence may be lacking. When res ipsa loquitur applies, it allows, but does not require, the fact finder to infer negligence from the circumstances of the injury. The plaintiff, by relying on ipsa loquitur to establish an inference of negligence, does not get a free pass on the burden of proof, nor does the burden of proof shift to the defendant. The plaintiff must submit evidence that establishes a rational basis for finding that the plaintiff's injury was probably the result of the defendant's negligence. The plaintiff need not eliminate all other possible causes but must show that the defendant's negligence was more probable than any other cause. The trial court determines if the plaintiff has established a sufficient foundation for res ipsa loquitur to apply." *Jenkins v. Big City Remodeling, 515 S.W.3d 843 (Tenn. 2017)*. *See also Puller ex rel. Puller v. Roney, 2019 Tenn. App. LEXIS 80 (Tenn. Ct. App. Feb. 13, 2019)* (applying *Puller*).

[96] *Underwood v. HCA Health Services, 892 S.W.2d 423 (Tenn. Ct. App. 1994)*.

[97] ***Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 443, 230 S.W.2d 659, 663 (1950)***.

[98] ***Seavers v. Methodist Med. Center of Oak Ridge, 9 S.W.3d 86, 91 (Tenn. 1999)*** (plaintiff must demonstrate injury by instrumentality in defendant's exclusive control and that injury would not ordinarily have occurred in absence of negligence); *Psillas v. Home Depot, U.S.A., 66 S.W.3d 860, 864 (Tenn. Ct. App. 2001)* (*res ipsa loquitur* requires proof of two elements: that instrument causing the harm was within defendant's exclusive control, and that plaintiff's injury could not have occurred without the defendant's negligence); *Burton v. Warren Farmers Co-Op, 129 S.W.3d 513 (Tenn. Ct. App. 2002)* (res ipsa requires proof that injury was probably the result of negligence and it was probably the defendant who was negligent). *Boykin v. Chase Bottling Works, 32 Tenn. App. 508, 524, 222 S.W.2d 889 (1949)*, adds a third element: The harm must not have been due to any voluntary action or contribution on the part of the plaintiff. In addition to these two elements, the plaintiff must also prove that the negligence is within the scope of the defendant's duty to the plaintiff. *See Jenkins v. Big City Remodeling, 515 S.W.3d 843, 2017 Tenn. LEXIS 191 (Tenn. 2017)*.

resident of the defendant nursing home.[99] The court took judicial notice of the fact that an elderly person may fall even without the negligence of anyone else. Another Tennessee case refused to apply *res ipsa loquitur* in a medical malpractice case because the injuries to the plaintiff's teeth during surgery could not have been prevented by any technique known to the medical profession.[100] In a third case, involving a dead and somewhat decayed tree which fell on a truck, the court refused to apply *res ipsa loquitur* because the tree could have fallen without any negligence.[101]

Another illustration involved a child who fell off a roll of carpet at Home Depot and sustained a cut.[102] The Court of Appeals refused to apply the doctrine of *res ipsa loquitur* because plaintiff could not establish that Home Depot's negligence was the only cause of the child's injury. There were other possible explanations: another customer could have left a sharp object in the aisle, the child could have found a sharp object from a shelf and injured himself, and the child could have been injured by a fixture where customers would not reasonably be expected to be present.

[b] Control by Defendant

The second—and more difficult—element of *res ipsa loquitur* requires the plaintiff to establish that the cause was an agency or instrumentality exclusively controlled by the defendant.[102.1] Tennessee follows the view that a clear preponderance of the evidence must exclude an intervening cause when a third party has had physical possession of the item in question.[103]

Tennessee courts have taken a realistic view of who has control over the instrumentality involved in the accident. In *Southeastern Aviation, Inc. v. Hurd*[104] an airplane on a routine scheduled passenger trip crashed into a mountain. The defendant airline argued that *res ipsa loquitur* should not apply because the airline shared control of the plane with the company operating the control tower near the airport where the accident occurred. The Tennessee Supreme Court rejected this argument, holding that the defendant airline's employees did have exclusive physical control over the airplane.

[3] Effect

Although the doctrine of *res ipsa loquitur* is often referred to as creating a presumption, many Tennessee cases actually consider it to be an inference which the jury is free to accept or reject,[105] and to give as much weight as the jury deems appropriate.[106] One Tennessee case describes *res ipsa loquitur* as furnishing "a permissible, but

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[99] *Brown v. University Nursing Home, Inc., 496 S.W.2d 503 (Tenn. Ct. App. 1972)*. *See also Cannon v. McKendree Village, 295 S.W.3d 278, 284 (Tenn. Ct. App. 2008)* (nursing home fall by Alzheimer's patient; *res ipsa* not applied).

[100] *Hughes v. Hastings, 225 Tenn. 386, 469 S.W.2d 378 (1971)*.

[101] *Walls v. Lueking, 46 Tenn. App. 636, 332 S.W.2d 692 (1959)*.

[102] *Psillas v. Home Depot, U.S.A., 66 S.W.3d 860, 866 (Tenn. Ct. App. 2001)*.

[102.1] *Jenkins v. Big City Remodeling, 515 S.W.3d 843 (Tenn. Apr. 2017)* (insufficient evidence to prove general contractor's exclusive control of cause of fire).

[103] *Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1942)*.

[104] *209 Tenn. 639, 355 S.W.2d 436 (1962)*. *See also Burton v. Warren Farmers' Co-Op, 129 S.W.3d 513 (Tenn. Ct. App. 2002)* (exclusive control element of *res ipsa* is overly restrictive if read too literally; exclusive control is not always required for *res ipsa* to apply, but is one fact used to determine whether it applies).

[105] *See, e.g., Sullivan v. Crabtree, 36 Tenn. App. 469, 258 S.W.2d 782 (1953)*;

[106] *Greer v. Lawhon, 600 S.W.2d 742 (Tenn. Ct. App. 1980)*.

not compulsory inference of negligence."[107] Another indicates *res ipsa* "is a form of circumstantial evidence that permits, but does not compel, a jury to infer negligence from the circumstances of an injury."[108]

The doctrine of *res ipsa loquitur* does not change the plaintiff's burden of proving negligence by a preponderance of the evidence; it merely shifts the burden of going forward with evidence to the defendant, who risks losing the case if insufficient proof is submitted to counter the inference created by *res ipsa loquitur*.[109]

According to a jury charge approved by the Tennessee Court of Appeals:

> [T]he maxim of *res ipsa loquitur* means that the facts of the occurrence evidence negligence; that "circumstances" unexplained justify an inference of negligence.
>
> This principal [*sic*] of proof applied, a case of *res ipsa loquitur* does not differ from an ordinary case of circumstantial evidence. *Res ipsa loquitur* is not an arbitrary rule, but rather a common sense appraisal of a probative finding of circumstantial evidence. A *res ipsa loquitur* case is a circumstantial evidence case which permits the Jury to infer negligence from the mere occurrence of the accident itself. It warrants an inference of negligence, which the Jury may draw or you may not draw as your judgment dictates.
>
> It raises a presumption of negligence which requires the Defendant to come forward to prove, to explain, or show, or to rebut the presumption.[110]

If the plaintiff establishes the facts necessary to invoke the doctrine of *res ipsa loquitur*, the plaintiff has produced enough evidence to survive a summary judgment motion and to get the case to the jury,[111] unless the defendant offers such compelling evidence that the court directs a verdict for the defense.[112]

Once *res ipsa loquitur* is invoked, the defendant must then produce evidence to prove that he or she was not negligent.[113] However, it should be noted that the defendant must do so not because the plaintiff would automatically win otherwise, but because the doctrine of *res ipsa loquitur* provides the plaintiff with some proof that the jury could use to support a finding for the plaintiff if the defendant produces no proof.[114] In rare cases,

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[107] *Scarbrough v. City of Lewisburg, 504 S.W.2d 377, 382 (Tenn. Ct. App. 1973)*.

[108] *See Kennedy v. Holder, 1 S.W.3d 670, 673 (Tenn. Ct. App. 1999)*, overruled in part, on other grounds, by ***Seavers v. Methodist Med. Ctr., 9 S.W.3d 86 (Tenn. 1999)***; *above § 3.08* (*res ipsa loquitur*).

[109] *Id. See also Jenkins v. Big City Remodeling, 515 S.W.3d 843, 848, 2017 Tenn. LEXIS 191 (Tenn. 2017)*, which summarized the evidentiary burden as follows: "The plaintiff, by relying on res ipsa loquitur to establish an inference of negligence, does not get a free pass on the burden of proof, nor does the burden of proof shift to the defendant. The plaintiff must submit evidence that establishes a rational basis for finding that the plaintiff's injury was probably the result of the defendant's negligence. The plaintiff need not eliminate all other possible causes but must show that the defendant's negligence was more probable than any other cause").

[110] *Lassetter v. Henson, 588 S.W.2d 315, 319 (Tenn. Ct. App. 1979)*. *See also Shivers v. Ramsey, 937 S.W.2d 945 (Tenn. Ct. App. 1996)* (*quoting* Lassetter v. Henson).

[111] *See Burton v. Warren Farmers' Co-Op, 129 S.W.3d 513 (Tenn. Ct. App. 2002)* (*res ipsa* is framework to determine whether plaintiff's evidence is sufficient to submit the case to a jury). *Cf. Scarbrough v. City of Lewisburg, 504 S.W.2d 377, 382 (Tenn. Ct. App. 1973)*.

[112] *See, e.g., Kidd v. Dunn, 499 S.W.2d 898, 899 (Tenn. Ct. App. 1973)*.

[113] *See, e.g., Greer v. Lawhon, 600 S.W.2d 742 (Tenn. Ct. App. 1980)*.

[114] *See Lassetter v. Henson, 588 S.W.2d 315, 320 (Tenn. Ct. App. 1979)*. *Cf. Union Planters Corp. v. Harwell, 578 S.W.2d 87, 93 (Tenn. Ct. App. 1978)* (*res ipsa loquitur* creates a *prima facie* case for the plaintiff; the defendant may or may not go forth with

the strength of the inference of *res ipsa loquitur* is so strong that the judge may direct a verdict for the plaintiff.[115]

[4] Pleading

The plaintiff need not allege *res ipsa loquitur* in a complaint in order to have it applied at trial.[116] In addition, most Tennessee decisions hold that the plaintiff may use *res ipsa loquitur* even if the complaint alleges both general negligence and specific acts of negligence, but then does not prove the specific acts.[117]

[5] Types of Litigation

Res ipsa loquitur applies in a wide variety of factual situations. It applies to negligence cases involving personal injury or death,[117.1] including automobile[118] and airplane[119] accidents. It also is applicable if a soft-drink bottle explodes[120] or contains foreign matter,[121] if plants die following the application of chemicals,[122] if a gas line explodes[123] or a gas heating system explodes soon after installation,[124] and if bleachers collapse during a wrestling match.[125]

Medical Malpractice. The traditional Tennessee rule was that the doctrine of *res ipsa loquitur* rarely applied in medical malpractice cases because scientific testimony was usually necessary to determine causation, and *res ipsa loquitur* involved only a common sense appraisal of facts.[126] In exceptional malpractice cases, however,

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proof to counter this case; even if defendant produces no proof, the jury still decides if plaintiff has met its burden of proof; judgment for plaintiff not automatic).

[115] *Sullivan v. Crabtree, 36 Tenn. App. 469, 258 S.W.2d 782 (1953)*.

[116] *Greer v. Lawhon, 600 S.W.2d 742 (Tenn. Ct. App. 1980)*.

[117] *Id.; Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962)*.

[117.1] *See, e.g.*, *Puller ex rel. Puller v. Roney, 2019 Tenn. App. LEXIS 80 (Tenn. Ct. App. Feb. 13, 2019)* (where plaintiff-widow attempted to invoke *res ipsa loquitur* in negligence action arising from the death of her husband, after he fell while performing work on defendant's roof; plaintiff argued that it was a reasonable inference that the ladder was the instrumentality that caused the injury, but the court held that since no one saw the accident there was insufficient evidence to eliminate various responsible causes, including the conduct of the plaintiff himself; therefore, the doctrine was inapplicable).

[118] *See, e.g., Roberts v. Ray, 45 Tenn. App. 280, 322 S.W.2d 435 (1958)* (parked car rolled down hill); *Sullivan v. Crabtree, 36 Tenn. App. 469, 258 S.W.2d 782 (1953)* (truck swerved off road without apparent cause); *Shivers v. Ramsey, 937 S.W.2d 945 (Tenn. Ct. App. 1996)* (tow truck on wet road at curve slid to right and driver lost control).

[119] *See, e.g., Lassetter v. Henson, 588 S.W.2d 315 (Tenn. Ct. App. 1979)*; *Southeastern Aviation, Inc. v. Hurd, 209 Tenn. 639, 355 S.W.2d 436 (1962)*; ***Capital Airlines, Inc. v. Barger, 47 Tenn. App. 636, 341 S.W.2d 579 (1960)***.

[120] *Boykin v. Chase Bottling Works, 32 Tenn. App. 508, 222 S.W.2d 889 (1949)*.

[121] *Coca-Cola Bottling Works v. Sullivan, 178 Tenn. 405, 158 S.W.2d 721 (1942)*.

[122] *See, e.g., Greer v. Lawhon, 600 S.W.2d 742 (Tenn. Ct. App. 1980)*; *Burton v. Warren Farmers' Co-Op, 129 S.W.3d 513 (Tenn. Ct. App. 2002)* (soybean crop damaged by defendant's spraying of herbicide).

[123] *Scarbrough v. City of Lewisburg, 504 S.W.2d 377 (Tenn. Ct. App. 1973)*.

[124] *Southern Gas Corp. v. Brooks, 50 Tenn. App. 1, 359 S.W.2d 570 (1961)*.

[125] *Parker v. Warren, 503 S.W.2d 938 (Tenn. Ct. App. 1973)*.

negligence was so obvious that the doctrine of *res ipsa loquitur* was held to apply,[127] but scientific evidence could rebut the presumption.[128] The latter category was represented by several examples cited by a Tennessee court: plaintiff awoke from an anesthetic with a leg burn, a patient's tongue was partially cut off in an adenoid operation, and a patient's eye was cut during an appendicitis operation.[129] In another case where the doctrine applied, plaintiff was burned while receiving an x-ray treatment.[130]

In *Seavers v. Methodist Medical Center of Oak Ridge*,[131] the Tennessee Supreme Court modified the traditional Tennessee rule and expanded the reach of *res ipsa loquitur* in medical malpractice cases. Recognizing that the *res ipsa* doctrine is best suitfved for cases where the nature of the injury is within the common knowledge of lay persons, the court held it was also applicable when expert testimony is appropriate to establish or rebut *res ipsa's* inference of negligence. *Seavers* involved a woman who suffered nerve damage to her arm while a patient in defendant hospital. Departing from the traditional view, the *Seavers* Court held that *res ipsa* applied even though expert testimony was necessary to establish the doctrine's elements.

Tennessee has codified a rebuttable presumption of *res ipsa loquitur* in healthcare liability actions.[131.1] The statute expressly provides that "injury alone does not raise a presumption of the defendant's negligence."[131.2] Thus, a health care provider will not be found liable for negligence merely because the treatment was unsuccessful.[131.3] Where the case involves complex medical issues, expert testimony is required to prove the applicable standard of care, causation, or that the injury does not ordinarily occur in the absence of negligence. Expert testimony is not required, however, where the act of alleged wrongful conduct lies within the common

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[126] *See, e.g.,* ***Seavers v. Methodist Med. Center of Oak Ridge, 9 S.W.3d 86, 92 (Tenn. 1999)***; *Quinley v. Cocke, 183 Tenn. 428, 192 S.W.2d 992 (1946)*; *Hughes v. Hastings, 225 Tenn. 386, 469 S.W.2d 378 (1971)*. *Cf.* ***Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 230 S.W.2d 659 (1950)***. *See* *TENN. CODE ANN. § 29-26-115* (Supp. 2004) (codification of *res ipsa loquitur* in medical malpractice cases).

[127] *See, e.g., Lewis v. Casenburg, 157 Tenn. 187, 7 S.W.2d 808 (1928)* (extensive third-degree burn of abdomen during X-ray treatment, with flesh sloughed off almost to abdominal lining); *Meadows v. Patterson, 21 Tenn. App. 283, 109 S.W.2d 417 (1937)* (loss of eye during appendectomy).

[128] *See, e.g.,* ***Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 230 S.W.2d 659 (1950)*** (plaintiff suffered fractured shoulder and compressed vertebra following childbirth, but medical testimony showed that post-natal convulsions, while rare, would cause fractures).

[129] ***Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 230 S.W.2d 659 (1950)***.

[130] *Lewis v. Casenburg, 157 Tenn. 187, 7 S.W.2d 808 (1928)*.

[131] ***9 S.W.3d 86 (Tenn. 1999)***.

[131.1] *TENN. CODE ANN. § 29-26-115(c)*, providing that there shall be a rebuttable presumption that the defendant was negligent where it is shown by the proof that the instrumentality causing injury was in the defendant's (or defendants') exclusive control and that the accident or injury was one which ordinarily doesn't occur in the absence of negligence). *See also* *Anderson v. Wang, 2018 Tenn. App. LEXIS 590 (Tenn. Ct. App. Oct. 5, 2018)* (a plaintiff proceeding under a *res ipsa loquitur* claim is only required to prove the elements in *TENN. CODE ANN. § 29-26-115(c)*; purpose of the doctrine is to provide patients with an avenue to the jury when they have been harmed during a medical procedure while either unaware or unconscious, since claimants often have no knowledge of what happened during the course of medical treatment, aside from the fact that an injury occurred during that time).

[131.2] *TENN. CODE ANN. § 29-26-115(d)*.

[131.3] *Bradley v. Bishop, 2017 Tenn. App. LEXIS 219 (Tenn. Ct. App. 2017)*.

knowledge of a layperson.[131.4] Tennessee courts have held that the common knowledge exception for expert testimony applies "only to the most obvious forms" of medical negligence.[131.5]

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[131.4] *Zink v. Rural/Metro of Tenn., L.P., 2017 Tenn. App. LEXIS 276 (Tenn. Ct. App. 2017)* (it is within common knowledge of a layperson whether an EMT's alleged negligent, reckless, or intentional striking of a patient's face while the patient is strapped to a gurney would fall below the applicable standard of care and, therefore, no expert testimony was necessary); *Osunde v. Delta Med. Ctr., 505 S.W.3d 875, 2016 Tenn. App. LEXIS 94 (Tenn. Ct. App. 2016)* (where plaintiff was injured after stepping down from a "wobbly" stool that a radiology technician gave her to use while undergoing an x-ray, the court held that although there is a general requirement that an action filed under the Tenn. Health Care Liability Act be supported by expert proof, it is not absolute, and expert proof is not required where the claim falls within the "common knowledge" exception).

[131.5] *Jackson v. Burrell, 2019 Tenn. App. LEXIS 21, *18 (Tenn. Ct. App. Jan. 16, 2019)*. *See also* *Graniger v. Methodist Hosp. Healthcare Sys., 1994 Tenn. App. LEXIS 513, *9 (Tenn. Ct. App. 1994)* (the common knowledge exception applies to cases in which the medical negligence "is as blatant as a 'fly floating in a bowl of buttermilk' so that all mankind knows that such things are not done absent negligence"). In *Burrell*, the Court of Appeals held that the common knowledge exception did not apply to plaintiff's negligence and vicarious liability claims against a day spa, which were based on the massage therapist's sexual assault of plaintiff. The Court reasoned that such negligence claims require expert proof to establish the recognized standard of acceptable professional practice in the massage service industry. The dissent questioned the majority opinion's conclusion that expert testimony was required to determine whether the employer committed negligence, noting that negligent hiring, supervision and firing claims normally do not require expert testimony, and the particular tort at issue was not based on whether the massage therapist violated a particular profession standard of medical practice, but rather, on common-law vicarious liability for an intentional tort (sexual assault): "The notion that an employer should be concerned about allegations of sexual harassment by one of its employees is not a complex idea limited to 'the massage industry.' Rather, this is a simple concept applicable to virtually all workplaces and industries. Nothing in the nature of the massage industry or the fact that this case involves the provision of health care services alters the fact that employers have a duty to exercise due care in the hiring and retention of their employees … [T]o impose an expert proof requirement in this case would be akin to requiring expert proof in all negligent hiring, retention, and supervision cases, a holding at odds with decades of Tennessee jurisprudence." Id. (dissenting opinion, *32–33).

§ 3.09 Presumptions Involving Marriage, Family, and Children

[1] Validity of Marriage

Because of the strong public interest in the validity of marriages, Tennessee has long recognized a presumption that a regularly solemnized marriage is valid.[132] The presumption is rebuttable rather than conclusive. The party challenging the validity of the marriage may rebut the presumption by providing cogent and convincing evidence that the marriage is invalid.[133]

[2] Presumption of Parentage

Tennessee law provides a number of presumptions relating to paternity.[134] A man is rebuttably presumed to be the father of a child born to the child's mother while she is married to him or within 300 days after the marriage ends due to death, divorce, annulment or declaration of invalidity.[135] The presumption of parentage is also raised if, before the child's birth, the man and the mother attempted to marry in compliance with the law, even if done in a void or voidable manner.[136]

A presumption will also arise if, after the child is born, the mother marries a man who has previously acknowledged paternity through the putative father registry, consented in writing to be named as father on the child's birth certificate, or is obligated to support the child, either through court order or a written voluntary promise.[137] The presumption is also triggered by the man receiving the minor child into the man's home and openly holding the child out as his own.[138] Furthermore, a presumption of parentage arises if genetic testing performed pursuant to *Tennessee Code Annotated § 24-7-112* not only fails to exclude the man, but shows a statistical probability of parentage of at least ninety-five percent.[139]

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[132] *Guzman v. Alvares, 205 S.W.3d 375. 380 (Tenn. 2006)*.

[133] *Guzman v. Alvares, 205 S.W.3d 375. 380 (Tenn. 2006)* (because wife's first divorce was not final at time of second marriage, latter marriage was void, bigamous marriage from which no divorce action could lie).

[134] *See TENN. CODE ANN. §§ 36-2-304* (2010). The former provisions, TENN. CODE ANN. §§ 36-2-101-115 (1996) and 36-2-201-210 (1996), were repealed.

[135] *TENN. CODE ANN. § 36-2-304(a)(1)* (2010).

[136] *TENN. CODE ANN. § 36-2-304(a)(2)* (2010).

[137] *TENN. CODE ANN. § 36-2-304(a)(3)* (2010).

[138] *TENN. CODE ANN. § 36-2-304(a)(4)* (2010). *See also, In re Michael J., S.W.3d , 2018 Tenn. App. LEXIS 52 (Tenn. Ct. App. 2018)* (because the report showed a statistical probability of paternity of ninety-nine percent or greater, the putative father had an extremely high burden of proof to rebut the statutory presumption of paternity and failed to meet that burden).

[139] *TENN. CODE ANN. § 36-2-304(a)(5)* (2010). *See also*, *In re Michael J., 2018 Tenn. App. LEXIS 52 (Ct. App. Jan. 31, 2018)* (because the lab report showed a statistical probability of paternity of 99% percent or greater, the putative father had an extremely high burden of proof to rebut the statutory presumption of paternity; he failed to meet that burden).

Regardless of which of the foregoing factual scenarios gives rise to the presumption, it is rebuttable. The burden of proof for rebutting the presumption is a preponderance of the evidence standard.[140] The statute specifically provides that all paternity and legitimation presumptions established under prior statutes and case law are abolished.[141] These statutory changes resolve some inconsistencies in prior cases regarding whether a presumption of paternity arising under certain circumstances is rebuttable and what standard of proof is required.

Artificial Insemination. A child born as the result of a donated embryo transfer is presumed to be the legal child of the recipient of the embryo if certain contracts have been entered.[141.1]

[3] Alimony Recipient's Support from Third Person

A Tennessee statute creates a rebuttable presumption that the recipient of alimony in futuro or transitional alimony who is living with a third person is either receiving support from the third person or contributing to that third person's support and that the amount of alimony awarded is excessive and should be reduced or terminated.[142]

[4] Child Support Guidelines

A Tennessee statute provides a rebuttable presumption that a court should order child support to be paid in an amount established by official guidelines.[143] If the court finds that evidence rebuts the presumption, the judge must make written findings to explain why the guidelines are unjust or inappropriate.[143.1] Once an order has been entered, the parties are required by statute to promptly update certain information, including changes in income and employment, with the court and, if appropriate, the local IV-D child support office.[144] Unless the information has been updated as required, at a subsequent modification hearing, a rebuttable presumption exists that the information has not changed.[145]

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[140] *TENN. CODE ANN. § 36-2-304(b)(3)* (2010).

[141] *TENN. CODE ANN. § 36-2-304(c)* (2010).

[141.1] *TENN. CODE ANN. § 36-2-403(d)* (Supp. 2013).

[142] *TENN. CODE ANN. § 36-5-121(f)*, *(g)* (2010). *See also, Talley v. Talley, ___S.W.3d___, 2017 Tenn. App. LEXIS 272 (Tenn. Ct. App. 2017)* (wife rebutted presumption that the parties' daughter, who was attending college, financially contributed to or received significant support from the wife's household because the wife testified that the parties' daughter paid no rent and did not otherwise substantially contribute to the household); *Scherzer v. Scherzer, ___S.W.3d___, 2017 Tenn. App. LEXIS 849 (Tenn. Ct. App. 2017)* (although divorcing parties may contract to forego the statutory cohabitation exception to the nonmodifiability of transitional alimony provided in *TENN. CODE ANN. § 36-5-121(g)(2)*, they need not include the exception in their marital dissolution agreement for the statute to apply).

[143] *TENN. CODE ANN. § 36-5-101(c)* (2010). This provision is now found at *TENN. CODE ANN. § 36-5-101(e)(1)(A)*. *See also, Berryhill v. Rhodes, 21 S.W.3d 188, 192 (Tenn. 2000)* (child support guidelines apply as a rebuttable presumption regarding the amount of child support to be paid). For text of the guidelines, see Tennessee Compilation of Rules and Regulations, Chapter 1240-2-4, which may be accessed at *https://publications.tnsosfiles.com/rules/1240/1240-02/1240-02-04.20080815.pdf*). *See,* in particular, Rule 1240-2-4-.01(1)(d), Rules of the Tennessee Department of Human Resources (child support guidelines established by a state must be applied as a rebuttable presumption regarding the amount of child support to be awarded and must result in a presumptively correct award).

[143.1] *TENN. CODE ANN. § 36-5-101(e)(1)(D)*. In certain circumstances defined by the statute, deviation from the guidelines is prohibited. *TENN. CODE ANN. § 36-5-101(e)(1)(E)*.

[144] *TENN. CODE ANN. § 36-5-101(c)(2)(B)* (2010).

[145] *TENN. CODE ANN. § 36-5-101(c)(2)(B)(v)* (2010). *See also, TENN. CODE ANN. § 36-5-101(a)(8)* (final child support order creates inference in any subsequent proceeding that the obligor has the ability to pay the ordered amount).

In any civil proceeding under the Uniform Interstate Family Support Act,[145.1] a party's refusal to answer a question on the ground that the testimony may be self-incriminating allows the trier of fact to draw an adverse inference from that refusal.[145.2]

[4A] Knowledge of Support Obligation

Every parent in Tennessee over age 17 is presumed to know his or her legal obligation to support the parent's children.[145.3]

[4B] Custody Based on Gender

At one time it was recognized in a custody dispute that a child would fare best in the mother's custody. This understanding supported the "tender years doctrine" which created a presumption of maternal custody. Because of changes in social norms, this presumption is now rejected in Tennessee.[145.4]

[5] Joint Child Custody

In a custody proceeding, if the parents agree that they should have joint custody of their minor child or children, there is a presumption created by statute that joint custody is in the children's best interest.[146] To rebut this presumption, the court must find by clear and convincing evidence that joint custody is not in the children's best interest.[147] This statute is intended to allow parents to be awarded joint custody when they agree to it, even

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[145.1] *TENN. CODE ANN. § 36-5-2301 et seq.*

[145.2] *TENN. CODE ANN. § 36-5-2316(g)*. The **Commentary** accompanying subsection (g) explains as follows: "Subsection (g) codifies the rule in effect in many states that in civil litigation an adverse inference may be drawn from a litigant's silence—that restriction of the *Fifth Amendment* does not apply. A related analogy is that a refusal to submit to genetic testing may be admitted into evidence and a trier of fact may resolve the question of parentage against the refusing party on the basis of an inference that the results of the test would have been unfavorable to the interest of that party." *See also, State ex rel. Malmquist v. Malmquist, ___S.W.3d___, 2018 Tenn. App. LEXIS 698 (Tenn. Ct. App. 2018)* (because mother's claim involved a request to modify a Tennessee child support order, not an order from another jurisdiction, the Uniform Interstate Family Support Act and the special evidence rules arising thereunder did not apply).

[145.3] ***TENN. CODE ANN. 36-1-102(1)(H)***. *See also*, *In re Ava M., 2020 Tenn. App. LEXIS 226, *44 (Tenn. Ct. App. May 20, 2020)* (parents are presumed to know they have a legal obligation to support their children under ***Tenn. Code Ann. 36-1-102(1)(H)***, and the parental duty of visitation is separate and distinct from the parental duty of support; thus, attempts by others to frustrate or impede a parent's visitation do not justify the parent's failure to support the child financially, unless the conduct "actually prevents" the parent from performing his or her duty, or creates a "significant restraint of or interference with the parent's efforts" to maintain a relationship with the child) (*quoting In re Audrey S., 182 S.W.3d 838, 864 (Tenn. Ct. App. 2005)*; *In re Taylor C., 2018 Tenn. App. LEXIS 490 (Tenn. Ct. App. 2018)* (parents are presumed to know that they have a legal obligation to support their children pursuant to ***TENN. CODE ANN. § 36-1-102(1)***, and this exists regardless of whether a court order exists or whether the parents were ever married, *TENN. CODE ANN. § 34-1-102(a)*; accordingly, the fact that the mother was not under a court order to provide support did not relieve her of that obligation); *In re Malaysia C., ___S.W.3d___, 2015 Tenn. App. LEXIS 66 (2015)* (same).

In 2018, the legislature removed the willfulness requirement for a finding of abandonment based on the failure to pay child support, amending the language of ***Tenn. Code Ann. § 36-1-102(1)*** to delete "willfully" preceding "failed" wherever it occurs in (1)(A)(i), (1)(A)(iii), (1)(a)(iv), (1)(D), and (1)(E); in (1)(A)(i). Thus, a finding of abandonment based on a failure to pay support no longer requires the State to prove that the parent's failure was willful. Lack of willfulness remains an affirmative defense, however, under ***Tenn. Code Ann. 36-1-102(1)(I)*** and ***Tenn. R. Civ. P. 8.03***. *See In re Ava M., 2020 Tenn. App. LEXIS 226 (Tenn. Ct. App. May 20, 2020)*.

[145.4] *Kelly v. Kelly, 445 S.W.3d 685, 695 (Tenn. 2014)*; *Gooding v. Gooding, 477 S.W.3d 774, 777 n.1 (Tenn. Ct. App. 2015)*; *TENN. CODE ANN. § 36-6-101(d)*.

[146] *TENN. CODE ANN. § 36-6-101(a)(2)* (2010).

though the trial judge is not a proponent of joint custody. However, the presumption applies only if both parents agree; it has no effect in a contested custody case.

[6] Other Custody Presumptions

In certain circumstances, the legislature has determined that a presumption should exist against allowing a parent to have custody, or serve as the primary residential parent of a minor. For example, a parent who has been convicted of criminal sexual assault of a child under age 18 is presumed to be an inappropriate person to be named custodian of a minor, absent clear and convincing evidence to the contrary.[148] A natural parent is presumed to have superior parental rights to a non-parent.[148.1]

In custody proceedings to determine grandparent visitation, parents "enjoy a strong presumption that they are entitled to the physical custody of their children."[148.2] But this presumption does not extend to a proceeding to modify or terminate a custody order.[148.3]

Similarly, if a parent has willfully abandoned a child for a period of 18 months, it is presumed that his or her residential time with the child should be limited, absent clear and convincing evidence to the contrary.[149]

Parent's Disability. A parent's disability creates no presumption for or against an award of child custody but may be a factor in the custody decision.[149.1]

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[147] *Id.*

[148] *TENN. CODE ANN. § 36-6-101(a)(2)(A)(ii)* (2010) (applicable only to those convicted after July 1, 2006; supervised visitation permissible). Delete text after 1st sentence in note 148 and substitute: *See also TENN. CODE ANN. §§ 36-6-406(c)* (restraining contact between child and parent convicted of certain sexual offenses); § 36-6-112(c)(2) (parent presumed to be substantial risk if under indictment for aggravated child abuse, child sex abuse, or severe child sexual abuse); § 36-6-101(A)(2)(v) (parent shall not be awarded custody during pendency of indictment unless presumption in *TENN. CODE ANN. § 36-6-112(c)(2)* is overcome).

[148.1] *Sikora ex rel. Mook v. Mook, 397 S.W.3d 137 (Tenn. Ct. App. 2012)*. *See also Harper v. Harris, 2017 Tenn. App. LEXIS 144 (Tenn. Ct. App. 2017)* (citing *Blair v. Badenhope, 77 S.W. 3d 137, 146 (Tenn. 2002)* (the Tennessee Constitution requires that courts deciding initial custody disputes give natural parents a presumption of superior parental rights regarding the custody of their children; thus, in an initial custody proceeding, a court cannot award custody to a non-parent over a natural parent unless the third party can demonstrate that the child will be exposed to substantial harm if custody is awarded to the biological parent).

[148.2] *Blair v. Badenhope, 77 S.W.3d 137, 146 (Tenn. 2002)*, *abrogated by statute on other grounds as recognized* by *Armbrister v. Armbrister, 414 S.W.3d 685, 704 (Tenn. 2013)*.

[148.3] *Id. at 146*. *See also Lovlace v. Copley, 418 S.W.3d 1, 27, 29 (Tenn. 2013)*. *Holley v. Ortiz, 2017 Tenn. App. LEXIS 126 (Tenn. Ct. App. 2017)*. In *Harper v. Harris, 2017 Tenn. App. LEXIS 144 (Tenn. Ct. App. 2017)*, the court summarized how the presumption applies in modification proceedings: "A parent is generally not entitled to invoke the doctrine of superior parental rights when seeking to modify a valid order placing custody with a non-parent. In such cases, trial courts apply the standard typically applied in parent-vs-parent modification cases: that a material change in circumstances has occurred, which makes a change in custody in the child's best interests … . A child's natural parent can retain his or her superior parental rights to the child's custody despite the fact that a non-parent has been awarded custody in certain instances. The Tennessee Supreme Court [in *Blair v. Badenhope*] has identified four such circumstances: (1) when no order exists that transfers custody from the natural parent, (2) when an order transferring custody from the natural parent is accomplished by fraud or without notice to the parent, (3) when the order transferring custody from the natural parent is invalid on its face, and (4) when the natural parent cedes only temporary and informal custody to the non-parents." *See also Brown v. Farley, 2019 Tenn. App. LEXIS 104 (Tenn. Ct. App. Feb. 28, 2019)* (applying *Blair v. Badenhope*; because the father was not a party to the prior temporary custody order transferring custody from the mother to the grandmother and did not receive notice of the proceeding, he never voluntarily relinquished his superior parental rights).

[149] *TENN. CODE ANN. § 36-6-101(a)(2)(A)(iv)* (2010).

[149.1] *TENN. CODE ANN. § 36-6-106(e)*.

[7] Grandparent Visitation

In a suit by a grandparent seeking visitation rights with a grandchild, if the child's parent is deceased there is a rebuttable presumption that the child would suffer substantial harm from a cessation of the relationship between the child and the grandparent.[149.2] This presumption applies to great-grandparents,[149.3] but it does not apply to great aunts or great uncles.[149.4] There is also a presumption that in grandparent visitation cases, a fit parent is acting in the child's best interest.[149.5]

[8] School Delinquent Child Should Attend

When a child is adjudicated delinquent for certain offenses, the juvenile court, working with school officials, may change the school which the child shall attend. There is a presumption that the child should not attend the same educational placement as the victim of the delinquent act.[149.6]

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[149.2] *TENN. CODE ANN. § 36-6-306(a)* (2018). The 2018 amendment revised the language of subsection (a) to expand its application to "other courts with domestic relations jurisdiction." See also, *Chamberlain v. Brown, 2016 Tenn. App. LEXIS 965 (Tenn. Ct. App. 2016)* (presumption under *TENN. CODE ANN. § 36-6-306(a)(5)* was not rebutted where grandmother proved that the child had resided in her home for a period of more than twelve months and had subsequently been removed from her home by his parents; although the mother and father also lived with the grandmother during this time period and the grandmother was not the primary caregiver, a grandparent is not required to be the primary or only caregiver in order for the statutory presumption to apply).

[149.3] *In re Dayton R., ___ S.W.3d ___, 2015 Tenn. App. LEXIS 229 (Tenn. Ct. App. Apr. 21, 2015)* (the Tennessee General Assembly did not intend to enact the type of grandparent visitation statute that would grant standing to only four grandparents, and the legislature's wording of the statute indicates an intent to provide standing to lineal ancestors, or grandparents who are biologically related to the child).

[149.4] *In re Claire C., ___ S.W.3d ___, 2020 Tenn. App. LEXIS 66 (Tenn. Ct. App. Feb. 14, 2020)* (great uncle and great aunt did not qualify as grandparents under the statute).

[149.5] *McGarity v. Jerrolds, 429 S.W.3d 562, 570 (Tenn. Ct. App. 2013)*; *Troxel v. Granville, 530 U.S. 57, 70, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000)* (plurality opinion).

[149.6] *TENN. CODE ANN. § 37-1-131(c)(2)*.

§ 3.10 Presumption of Continuation of Condition

Tennessee law recognizes a number of presumptions that permit the trier of fact to find that a fact, if found to exist, continues to exist until the opponent proves the contrary.[150] For example, in a will contest the insanity of the alleged testator, once shown, raises the presumption that the insanity continued.[151] Similarly, there is a presumption of the continuance of life. In a bigamy prosecution, however, when the state must prove that the first wife was alive at the time of the second marriage, a presumption of the continuance of life is insufficient to carry that burden.[152]

Sometimes the presumption of continuation of a condition comes into conflict with another presumption. The best example is the conflict with the presumption of the validity of a second marriage. If a person marries different spouses in succession, there is a presumption that the latest marriage is valid, which is to say that the earlier marriages are presumed to have been dissolved by divorce or death.[153] This presumption can be rebutted only by cogent and convincing proof,[154] normally consisting of a court record search of any county of any state where the spouse marrying the second time was domiciled and could have procured a divorce. In unusual circumstances, the record search is unnecessary.[155]

How is the conflict between continuation of a condition (continuation of the first marriage) and the validity of a second marriage to be resolved? Tennessee had adopted the general proposition that the "stronger" of the two presumptions should prevail,[156] but there is no decision directly on point.[157] Most of the holdings emphasize the

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[150] *See, e.g.,* Bolling v. Anderson, 63 Tenn. 550 (1874); Hardin v. Independent Order of Odd Fellows, 51 Tenn. App. 586, 370 S.W.2d 844 (1963).

[151] *See, e.g.,* Puryear v. Reese, 46 Tenn. 21 (1868). Where the incapacity to execute a will is based on the testator's habit of intoxication, the presumption does not apply. *See, e.g.*, Russell v. Russell, 197 S.W.3d 265 (Tenn. Ct. App. 2005) (there is no presumption of the continuance of incapacity resulting from "inebriety or disease"; thus, unless the testator's habits of intoxication render him "habitually incompetent", the party setting up his or her incapacity on the ground of intoxication must show its existence at the time the will was executed). Similarly, there is no presumption that a person was incompetent on a particular date simply because he or she suffered from mental difficulties at other, non-material times. *See* ORNL Fed. Credit Union v. Estate of Turley, 2020 Tenn. App. LEXIS 142 (Tenn. Ct. App. Apr. 3, 2020) (in the absence of showing mental deterioration or senility, the mere fact that decedent had dealt with mental health problems in the 1990s did not create a presumption that mental problems existed in 2010 when she designated appellee as the payable-on-death beneficiary on her credit union account).

[152] Dunlap v. State, 126 Tenn. 415, 150 S.W. 86 (1912).

[153] *See* Gamble v. Rucker, 124 Tenn. 415, 137 S.W. 499 (1911). *See, e.g.*, Guzman v. Alvares, 205 S.W.3d 375, 380 (Tenn. 2006) (in cases involving a subsequent marriage, courts presume that the previous marriage ended in divorce, but the presumption is not conclusive and may be rebutted).

[154] *Id.*

[155] *See* Payne v. Payne, 142 Tenn. 320, 219 S.W. 4 (1920) (first wife lived with husband except during his trips, gave him no ground for divorce, and did not believe in divorce).

strength of the presumption of a valid second marriage,[158] but contrary implications are justifiable on peculiar facts.[159] In ordinary circumstances, the validity of a later marriage should be presumed as against continuation of an earlier marriage. It is generally held, however, that the presumed validity of a second marriage is inapplicable to bigamy prosecutions.[160] It should be noted that the foregoing cases predate the computerized record keeping of modern times. In most cases, it will be easy to prove whether the prior marriage was legally terminated, either by death, divorce or annulment. If the proof shows that it was not, the subsequent marriage is void.

[156] *See, e.g.,* Nichols v. Mutual Life Ins. Co., 178 Tenn. 209, 156 S.W.2d 436 (1941) (presumption against suicide stronger than presumption against murder in civil case, and, in dictum, presumption of innocence is stronger than presumption against suicide in a criminal case).

[157] *Cf.* Payne v. Payne, 142 Tenn. 320, 219 S.W. 4, 7 (1920) (court found rebuttal proof, rather than a conflicting presumption, overcame presumption of valid second marriage).

[158] *See* Gamble v. Rucker, 124 Tenn. 415, 137 S.W. 499 (1911); ***Troxel v. Jones, 45 Tenn. App. 264, 322 S.W.2d 251 (1958)***.

[159] In Payne v. Payne, 142 Tenn. 320, 333, 219 S.W. 4 (1920), the court emphasized that the presumption of divorce from the first spouse was not intended to "allow the bigamous wife or a bigamous husband to prevail over the legal wife or a legal marriage, when the result of such presumption would benefit only the bigamous wife." Such reasoning is circuitous, but in fairness it should be added that the proof was convincing that there had been no divorce and that the second "wife" was aware of that fact.

[160] *Annot., 14 A.L.R.2d 7* at §§ 6, 12 (1950).

1 Tennessee Law of Evidence § 3.11

Tennessee Law of Evidence > CHAPTER 3 ARTICLE III. TENNESSEE LAW OF EVIDENCE—PRESUMPTIONS

§ 3.11 Presumptions Involving Communications

From testimony that a letter was mailed, a presumption arises that the addressee received the letter in due course in the mail.[161] The presumption requires proof that the item was mailed, which means it was properly addressed, stamped, and deposited with the post office.[162] This presumption can be overturned by proof that the letter was not received,[163] but not by testimony that the addressee does not remember receiving it or that one company officer did not receive it if other officers were not called as witnesses.[164] A properly dispatched telegram affords the same presumption under general legal principles.[165] Once rebuttal evidence is presented, the question of receipt becomes an issue for the trier of fact.[166]

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[161] *W. E. Richmond & Co. v. Security Nat'l Bank, 16 Tenn. App. 414, 64 S.W.2d 863 (1933)*. *See, e.g.*, *Board of Professional Responsibility v. Curry, 266 S.W.3d 379, 389 (Tenn. 2008)* (rebuttable presumption that properly mailed letter was delivered to and received by addressee).

[162] *Warmath v. Payne, 3 S.W.3d 487, 492 (Tenn. Ct. App. 1999)*; *Wilson v. Blount County, 207 S.W.3d 741, 749 n.2 (Tenn. 2006)* (in Tennessee there is a rebuttable presumption that mail was received upon proof that the letter was properly addressed and stamped and deposited with the post office); *Auto Credit of Nashville v. Wimmer, 231 S.W.3d 896, 901 (Tenn. 2007)* (same).

[163] *Cf. Cherokee Ins. Co. v. Hardin, 202 Tenn. 110, 302 S.W.2d 817 (1957)*. *See Board of Professional Responsibility v. Curry, 266 S.W.3d 379, 389 (Tenn. 2008)* (to overcome presumption, addressee must present credible evidence of non-receipt).

[164] *See, e.g.*, *Board of Professional Responsibility v. Curry, 266 S.W.3d 379, 389 (Tenn. 2008)* (presumption not rebutted by proof that addressee rarely opened the mail delivered to his office where the letter was allegedly sent, two other people who worked in the office did not recall receiving the letter, and the addressee testified he did not receive the letter).

[165] *See Annot., 24 A.L.R.3d 1434 (1969)*.

[166] *Board of Professional Responsibility v. Curry, 266 S.W.3d 379, 389 (Tenn. 2008)*.

§ 3.12 Presumptions Involving Property and Gifts

[1] Ownership from Payment of Taxes

Tennessee law contains a statutory presumption that a person holding a legal or equitable interest in real estate is the *prima facie* owner of that property if the person has paid state and county taxes on it for twenty years and has had the interest recorded in the county register's office for that same twenty-year period.[167] The presumption is rebuttable,[168] and has been used in a variety of cases, including a criminal case to prove that a victim owned the property from which timber was stolen.[169] Once the presumption arises, the burden shifts to the other party to rebut the presumption.[169.1]

[2] Ownership from Possession

There is a rebuttable presumption of ownership of property from possession of that property.[170] A Tennessee statute also provides for ownership after lengthy possession.[171] On the other hand, when adverse possession is asserted, Tennessee case law has stated that "any presumption is in favor of the holder of legal title" rather than the person claiming adverse possession.[171.1]

[2A] Establishment of Private Property Rights

For purposes of criminal trespass, when the Tennessee Secretary of State publishes a "no trespass public notice list," there is a presumption that the "general public have notice of the establishment of private property rights" in the properties listed.[171.2]

[3] Abandoned Property

In order to provide a procedure for disposing of unclaimed property, Tennessee law creates a presumption that various kinds of property are presumed to be abandoned if not claimed or dealt with as prescribed by statute

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[167] *TENN. CODE ANN. § 28-2-109* (2000).

[168] *Welch v. A.B.C. Coal Co., 41 Tenn. App. 208, 293 S.W.2d 44 (1956)*. *Conder v. Salyers, 421 S.W.3d 589, 596 (Tenn. Ct. App. 2013)* (payment made over 20 years); Fogerty, Kuney & Lyon, *Fortify Thyself: Know Tennessee's Real Property Rules and Tools Before Charging into Boundary Battles*, ***48 TENN. B.J. 14, 20–21 (Oct. 2012)***.

[169] *Poag v. State, 567 S.W.2d 775 (Tenn. Crim. App. 1978)*.

[169.1] *Conder v. Salyers, 421 S.W.3d 589, 597 (Tenn. Ct. App. 2013)*.

[170] *Induction Technologies, Inc. v. Justus, 295 S.W.3d 264, 266 (Tenn. Ct. App. 2008)* (proof rebutted presumption).

[171] *TENN. CODE ANN. § 66-3-103* (2004).

[171.1] *Foust v. Metcalf, 338 S.W.3d 457, 466 (Tenn. Ct. App. 2010)*.

[171.2] *TENN. CODE ANN. § 39-14-405(f)(4)* (Supp. 2014).

within a specified number of years.[172] Intangible personal property distributed during dissolution of a business or financial organization is presumed abandoned if unclaimed after the date for final distribution.[173] Property is not presumed abandoned if the apparent owner indicates an interest in the property during the applicable period prescribed by statute.[173.1] Under Tennessee law, persons holding presumptively abandoned property must report this fact to the Tennessee State Treasurer,[174] who provides formal notice of the presumed abandonment.[175] A set of Tennessee statutes provides rules concerning the disposition of abandoned property.[176]

[4] Tenancy by Entirety

When property is conveyed by a deed to a husband and wife and the deed does not establish a specific ownership relationship, there is a rebuttable presumption that the conveyance created a tenancy by the entirety.[177] Moreover, although Tennessee is a "dual property" state because its domestic relations law recognizes both marital property and separate property,[177.1] where separate property has been commingled

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[172] *See, e.g.*, *TENN. CODE ANN. §§ 66-29-103* (2004) (unclaimed intangible property); 66-29-104 (2004) (property held by financial organizations or business organizations); 66-29-105 (2004) (unclaimed funds held by life insurance companies); 66-29-106 (2004) (undistributed assets and obligations of business associations and utilities); 66-29-107 (Supp. 2010) (undistributed dividends and distributions of business associations); 66-29-109 (2004) (property held by fiduciaries); 66-29-110 (2004) (property held by courts, public officers and agencies); 66-29-111 (2004) (property held by federal government); 66-29-112 (2004) (miscellaneous property held for another person). Former title 66, ch. 29, part 1, §§ 66-29-101 to 69-29-112, was repealed by Acts 2017, ch. 457, § 1, effective July 1, 2017. *See now* *TENN. CODE ANN. §§ 66-29-105* (2017) (presumption of abandonment of various types of property); 66-29-106 (2017) (presumption of abandonment of tax-deferred retirement account); 66-29-107 (2017) (presumption of abandonment of tax-deferred accounts); 66-29-108 (2017) (presumption of abandonment of custodial account for minor); 66-29-109 (2017) (presumption of abandonment of contents of safe deposit boxes); 66-29-110 (2017) (presumption of abandonment of stored-value card); 66-29-111 (2017) (presumption of abandonment of security); 66-29-112 (2017) (presumption of abandonment of related property). For presumptions governing other types of property under the Unclaimed Property Act, see *Tenn. Code Ann §§ 66-29-117 to 66-29-121*. The Abandoned Cultural Property Act, *Tenn. Code Ann. § 66-29-203*, provides that cultural property in possession of a museum is deemed abandoned if not claimed within 65 days of published notice. A similar statute governs abandoned aircraft. *See* *Tenn. Code Ann. § 66-29-301* (aircraft deemed abandoned if not claimed within 45-days).

[173] *TENN. CODE ANN. § 66-29-108* (2004). Former *TENN. CODE ANN. § 66-29-108* (2004) was repealed by Acts 2017, ch. 457, § 1, effective July 1, 2017. *See now* *TENN. CODE ANN. § 66-29-105(a)(8)*.

[173.1] *TENN. CODE ANN. § 66-29-113* (2017) (indication of apparent owner's interest in property).

[174] *Id.* at § 66-29-113 (2004). Former *TENN. CODE ANN. § 66-29-113* (2004) was repealed by Acts 2017, ch. 457, § 1, effective July 1, 2017. See now *TENN. CODE ANN. §§ 66-29-123 to 66-29-125*.

[175] *Id.* at § 66-29-114 (Supp. 2010). Former *TENN. CODE ANN. § 66-29-113* (2004) was repealed by Acts 2017, ch. 457, § 1, effective July 1, 2017. *See now* *TENN. CODE ANN. § 66-29-130*.

[176] *See id.* at §§ 66-29-115 to 132 (2004). Former *TENN. CODE ANN. § 66-29-113* (2004) was repealed by Acts 2017, ch. 457, § 1, effective July 1, 2017. *See now* *TENN. CODE ANN. §§ 66-29-117* (treasurer's custody of property presumed abandoned), 66-29-130 (notice by treasurer), 66-29-134 (payment or delivery of property to treasurer), 66-29-136 (recovery of property by holder from treasurer), 66-29-137 (income or gain realized or accrued on property), 66-29-138 (treasurers option as to custody), 66-29-139 (disposition of property having no substantial value), 66-29-141 (public sale of property), 66-29-142 (disposal of securities), 66-29-146 (disposal of funds by treasurer).

[177] *See* *Smith v. Sovran Bank Cent. South, 792 S.W.2d 928, 930 (Tenn. Ct. App. 1990)*. *See also* *Langschmidt v. Langschmidt, 81 S.W.3d 741 (Tenn. 2002)* (marital residence acquired by the parties during the marriage and owned by the parties jointly should be classified as marital property; even a marital residence that was separate property prior to the marriage or that was purchased using separate property should generally be classified as marital property if the parties owned it jointly, because joint ownership gives rise to a rebuttable presumption that the property is marital property).

with marital property,[177.2] or where transmutation of the property occurs,[177.3] a rebuttal presumption arises that the assets are a gift to the marital estate.[177.4] Similarly, there is a rebuttal presumption that a gift acquired during the marriage is marital property.[177.5] This presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.[177.6] The mere fact that the source of funds used to purchase property during the marriage can be traced back to separate property, however, does not rebut the presumption of a gift to the marital estate created by transmutation.[177.7]

[177.1] *Snodgrass v. Snodgrass, 295 S.W.3d 240 (Tenn. 2009)*. *See also, TENN. CODE ANN. § 36-4-121*.

[177.2] *See, e.g.*, *Darnell v. Darnell, 2019 Tenn. App. LEXIS 388 (Tenn. Ct. App. Aug. 12, 2019)* (where wife deposited her teaching income into a savings account held in her name and withdrew money from the account during the marriage, the money in the account became inextricably mixed with marital property, creating a rebuttable presumption of a gift to the marital estate).

[177.3] The Tennessee Supreme court has transmutation as follows: "Transmutation occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property. One method of causing transmutation is to purchase property with separate funds but to take title in joint tenancy. This may also be done by placing separate property in the names of both spouses. Dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate." *Langschmidt v. Langschmidt, 81 S.W.3d 741, 747 (Tenn. 2002)*; *Snodgrass v. Snodgrass, 295 S.W.3d 240 (Tenn. 2009)*. *See also Jannerbo v. Jannerbo, 2012 Tenn. App. LEXIS 155 (Tenn. Ct. App. 2012)* (no transmutation of student loan funds, where the record did not clearly delineate which student loans funds were utilized prior to the marriage and which ones were utilized during the marriage; barring such clear evidence, trial court did not err in assigning entire student debt to husband in divorce proceeding). In determining intent, the ultimate test in determining whether transmutation has occurred is how the property was treated by the parties, including (1) the use of the property by the family or to support the marriage; (2) shared control, maintenance, or management of the property; (3) titling the property jointly; and (4) use of the non-owner spouse's credit or separate funds to pay for or improve the property. *Keeble v. Keeble, 2020 Tenn. App. LEXIS 264 (Tenn. Ct. App. June 3, 2020)* (finding a transmutation of property where the parties treated property purchased by the husband before their marriage as their marital residence; wife's occupancy of the property as her residence at the time of divorce further supported the finding of transmutation); *Anderson v. Anderson, 2019 Tenn. App. LEXIS 397 (Tenn. Ct. App. Aug. 16, 2019)* (discussing transmutation in the context of an improvement to land).

[177.4] *Snodgrass v. Snodgrass, 295 S.W.3d 240 (Tenn. 2009)*; *Batson v. Batson, 769 S.W.2d 849 (Tenn. App. 1988)* (separate property may become marital "if its owner treats it as such"). *See also, Phipps v. Phipps, 2015 Tenn. App. LEXIS 36 (Tenn. Ct. App. 2015)* (although retroactive VA benefits were awarded for husband's service prior to the marriage, the husband used the funds to purchase a joint certificate of deposit with wife, thereby creating a rebuttable presumption that the certificate of deposit was marital property; since the certificate of deposit allowed wife equal access to the money throughout the husband's lifetime and required both signatures for either party to access the money, the evidence supported the trial court's determination that the certificate of deposit purchased with the VA benefits was marital property); *Jannerbo v. Jannerbo, 2012 Tenn. App. LEXIS 155 (Tenn. Ct. App. 2012)*; *Burns v. Burns, 1997 Tenn. App. LEXIS 772 (Tenn. Ct. App. 1997)* (where husband purchased house with separate funds, but title was in both husband's and wife's names, and there was no proof that husband clearly intended that house would remain his separate property, property was deemed marital).

[177.5] *Potter v. Potter, 2013 Tenn. App. LEXIS 538 (Tenn. Ct. App. 2013)* (it is well settled that assets acquired during a marriage are presumed to be marital property, and a party desirous of disputing this classification has the burden of proving by a preponderance of the evidence that the asset is separate property); *Thomas v. Thomas, 2000 Tenn. App. LEXIS 774 (Tenn. Ct. App. 2000)* (property acquired using funds given to husband during the marriage by his parents were deemed marital property on appeal; although father testified that cash gifts given to his son during marriage were intended to benefit the son alone, not son's wife, the court held that the father's intent did not alter the fact that the funds were used to acquire other property during the marriage and that the property was treated by both parties as marital property during the marriage; there was no evidence in the record to rebut the presumption that all of the assets acquired during the marriage should be classified as marital property).

[177.6] *See Snodgrass v. Snodgrass, 295 S.W.3d 240, 2009 Tenn. LEXIS 677 (Tenn. 2009)*; *Jannerbo v. Jannerbo, 2012 Tenn. App. LEXIS 155 (Tenn. Ct. App. 2012)*. *See also Keown v. Keown, 2015 Tenn. App. LEXIS 407 (Tenn. Ct. App. 2015)* (the presumption of a gift to the marital estate may be rebutted by establishing that one of the legal requirements of a gift is missing).

[177.7] *Langschmidt v. Langschmidt, 81 S.W.3d 741 (Tenn. 2002)*; *Potter v. Potter, 2013 Tenn. App. LEXIS 538 (Tenn. Ct. App. 2013)*.

Income from, or appreciation of, premarital separate property is presumed to be separate unless a statutory or common law exception (such as transmutation) applies. For instance, an increase in value of separate property that accrues during the marriage may be deemed marital property "if each party substantially contributed to its preservation and appreciation."[177.8]

[5] Improvement Located at Center of Easement

When a utility does not establish the location of the boundaries of an easement, there is a presumption that the intended structure or easement is located in the center of the easement, and the boundaries are equidistant from the center line of the structure or improvement.[178] This presumption is overcome by facts establishing overt acts showing a clear and irrevocable election to establish boundaries other than those presumed to exist.

[6] Undue Influence from Confidential Relationship

In a number of contexts, Tennessee law creates a rebuttable presumption of undue influence when two parties enter a confidential relationship and the dominant party receives a benefit from it. There must be proof that there was a confidential relationship[178.1] and that one party is able to dominate and exercise undue influence of the other.[179] Undue influence occurs when the will of the person alleged to have exercised undue influence is substituted for that of the other person in the confidential relationship.[180]

This presumption of undue influence extends to all dealings between persons in fiduciary and confidential relationships and includes wills, gifts, contracts, sales, releases, mortgages, and other transactions when the dominant party obtains a benefit from the other party.[181] The presumption of undue influence is read as also embracing a presumption that the transaction is invalid.[182]

[177.8] *TENN. CODE ANN. § 36-4-121(b)(1)(B)(i)*.

[178] *McArthur v. East Tenn. Nat. Gas Co., 813 S.W.2d 417, 419 (Tenn. 1991)*.

[178.1] Whether a confidential relationship exists depends on the relationship of the parties: "Confidential relationships can assume a variety of forms, and thus the courts have been hesitant to define precisely what a confidential relationship is. In general terms, it is any relationship which gives one person dominion and control over another. It is not merely a relationship of mutual trust and confidence, but rather it is one where confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with ability, because of that confidence, to influence and exercise dominion and control over the weaker or dominated party." *In re Estate of Caldwell, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. 2019)*. See also, *In re Estate of Link, 542 S.W.3d 438 (Tenn. Ct. App. 2017)*.

[179] *In re Estate of Price, 273 S.W.3d 113, 126 (Tenn. Ct. App. 2008)* (will contest). *See also, In re Estate of Caldwell, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. 2019)* (a confidential relationship is any relationship that gives one person dominion and control over another); *In re Estate of Link, 542 S.W.3d 438 (Tenn. Ct. App. 2017)* (for undue influence purposes, a confidential relationship need not involve the beneficiary, as undue influence may be exercised by someone other than a beneficiary).

[180] *Id.*

[181] *Parish v. Kemp, 179 S.W.3d 524, 531 (Tenn. Ct. App. 2005)* (*citing Gordon v. Thornton, 584 S.W.2d 655, 658 (Tenn. Ct. App. 1979)*); *Parish v. Kemp, 308 S.W.3d 884, 889 (Tenn. Ct. App. 2008)*; *Cartwright v. Jackson Capital Partners, 478 S.W.3d 596, 620 (Tenn. Ct. App. 2015)* (grantor trust); *Bottorff v. Sears, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. 2018)* (power of attorney).

[182] *Martin v. Moore, 109 S.W.3d 305, 310 (Tenn. Ct. App. 2003)* (attorney-in-fact's withdrawal of money from bank account); *Richmond v. Christian, 555 S.W.2d 105 (Tenn. 1977)* (transfer of real estate prior to death); *Basham v. Duffer, 238 S.W.3d 304 (Tenn. Ct. App. 2007)* (gift to relatives in confidential relationship by having unrestricted power of attorney from donor); *Bottorff v. Sears, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. 2018)* (daughter's transfer of mother's assets to herself, combined with power of attorney, created a rebuttable presumption of undue influence).

Proof. The party alleging a confidential relationship has the burden of proof. Once this party establishes the elements of the presumption, the burden shifts to the alleged "dominant" party to rebut the presumption by demonstrating through clear and convincing evidence[183] that the transaction at issue was fair.[184] One way of rebutting the presumption is to prove that the donor received independent legal advice concerning the consequences and advisability of the transaction.[185] On occasion, such independent legal advice has been required to overcome the presumption.[186] This could occur when it "would otherwise be difficult to show the fairness of the transaction."[187] An example is where "a feeble donor impoverishes herself by the gift or the conveyance seems unnatural given the circumstances."[188]

Wills. In the context of a will, Tennessee law provides detailed factors used to assess whether there was undue influence sufficient to invalidate the will.[189] In *Reynolds v. Day*,[190] for example, a holographic will naming a

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[183] *In re Estate of Price, 273 S.W.3d 113, 125 (Tenn. Ct. App. 2008)*; *Parish v. Kemp, 308 S.W.3d 884, 889 (Tenn. Ct. App. 2008)*; *In re Estate of Caldwell, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. 2019)* (once a confidential relationship has been shown and a presumption of undue influence arises, the burden shifts to the dominant party to rebut the presumption by proving the fairness of the transaction by clear and convincing evidence).

[184] *See, e.g.*, *Parish v. Kemp, 179 S.W.3d 524, 531 (Tenn. Ct. App. 2005)* (will contest); *Martin v. Moore, 109 S.W.3d 305 (Tenn. Ct. App. 2003)* (attorney-in-fact's withdrawal of money from bank account; proof of independent advice is ordinarily required when it is a reasonable requirement and the circumstances are such that it would be difficult to show the fairness of the transaction without proof of such advice, particularly in gift cases when the donor is impoverished by the gift or the gift seems unnatural under the specific circumstances); *Delapp v. Pratt, 152 S.W.3d 530, 540 (Tenn. Ct. App. 2004)* (will contest; confidential relationship between son and mother).

[185] *See, e.g.*, *Richmond v. Christian, 555 S.W.2d 105, 107 (Tenn. 1977)* (transfer of real estate prior to death); *Bottorff v. Sears, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. 2018)* (proof that the donor received independent advice concerning the consequences and advisability of the gift or transaction can serve as proof of fairness; thus, where daughter failed to seek advice about the consequences and advisability of revoking power of attorney, trial court properly considered this fact in evaluating fairness of the revocation and daughter's subsequent transfer of assets).

[186] *Richmond v. Christian, 555 S.W.2d 105, 108 (Tenn. 1977)* (transfer of real estate prior to death). See also, *Bottorff v. Sears, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. 2018)* (citing *Richmond v. Christian*).

[187] *Parish v. Kemp, 308 S.W.3d 884, 890 (Tenn. Ct. App. 2008)*.

[188] *Id.*

[189] *See, e.g., In re Estate of Caldwell, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. 2019)* (to invalidate a will based on undue influence, the contestant must prove the existence of a confidential relationship that was surrounded by one or more "suspicious circumstances"). There are a variety of "suspicious circumstances" that may give rise to a finding of undue influence, but Tennessee Courts have "have refrained from prescribing the type or number of suspicious circumstances" that may be used to establish undue influence and invalidate a will. *Id.* Common "suspicious circumstances" include the existence of a confidential relationship between testator and beneficiary, testator's physical or mental deterioration, and beneficiary's active involvement in procuring a will; secrecy concerning the will's existence, testator's advanced age, lack of independent advice in preparing the will, testator's illiteracy or blindness, unjust or unnatural nature of the will's provisions, testator's emotionally distraught state, discrepancies between the will and the testator's expressed intentions, and fraud or duress directed toward the testator. *Id.,* citing *Delapp v. Pratt, 152 S.W.3d 530 (Tenn. Ct. App. 2004)*. Regardless of the suspicious circumstances relied upon, the circumstances must warrant a conclusion that the person allegedly influenced did not act freely and independently. *Delapp v. Pratt, 152 S.W.3d 530 (Tenn. Ct. App. 2004)*; *ORNL Fed. Credit Union v. Estate of Turley, 2020 Tenn. App. LEXIS 142 (Tenn. Ct. App. Apr. 3, 2020)* (no suspicious circumstances or evidence of dominion and control, where decedent exercised her own free will in designating appellee as the payable-on-death beneficiary on the account, without appellee's knowledge; fact that decedent had mental health problems in the 1990's did not mean she was incompetent on the material date in 2010, and the court could not presume decedent was incompetent simply because she dealt with mental illness at other, non-material times in her life).

[190] *792 S.W.2d 924, 927 (Tenn. Ct. App. 1990)*, overruled as stated in *Matlock v. Simpson, 902 S.W.2d 384 (Tenn. 1995)*.

cousin as beneficiary was challenged as being the product of undue influence by the cousin-beneficiary. The Tennessee Court of Appeals held that there was sufficient proof of a confidential relationship between the testator and the cousin to merit a jury charge on the confidential relationship presumption. That decision was later overruled by the Tennessee Supreme Court,[190.1] which held that the *Reynolds* court applied the incorrect evidentiary standard, preponderance of the evidence. The evidence necessary to overcome a presumption of undue influence arising out of confidential and fiduciary relationships must be clear, convincing, and satisfactory.[190.2]

Confidential Relationship. This presumption requires a *confidential relationship*. According to the Tennessee Supreme Court, "[th]e core definition of a confidential relationship requires proof of dominion and control."[191] Once a confidential relationship has been shown and a presumption of undue influence arises, the burden shifts to the dominant party to rebut the presumption by proving the fairness of the transaction by clear and convincing evidence.[191.1] The existence of a familial relationship between the parties does not, by itself, create a confidential relationship.[192] But the execution of a power of attorney creates a confidential or fiduciary relationship between the attorney-in-fact and the grantor of that power.[193] However, there are exceptions to this rule. An unexercised power of attorney does not create a confidential relationship.[194] Similarly, a confidential relationship does not exist when the power of attorney never came into effect and the person granting the power of attorney may alter or revoke it at any time.[195]

[7] Gifts

[190.1] *Matlock v. Simpson, 902 S.W.2d 384 (Tenn. 1995)*.

[190.2] *Id.*

[191] *Childress v. Currie, 74 S.W.3d 324, 326–327 (Tenn. 2002)*. *See also* *Matlock v. Simpson, 902 S.W.2d 384 (Tenn. 1995)*. *In re Estate of Farmer, 2017 Tenn. App. LEXIS 286 (Tenn. Ct. App. 2017)* (a confidential relationship is any relationship which gives one person dominion and control over another); *In re Estate of Caldwell, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. 2019)* (a confidential relationship "is not merely a relationship of mutual trust and confidence, but rather it is one where confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with ability, because of that confidence, to influence and exercise dominion and control over the weaker or dominated party").

[191.1] *Childress v. Currie, 74 S.W.3d 324, 326–327 (Tenn. 2002)*; *In re Estate of Caldwell, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. 2019)*; *In re Estate of Farmer, 2017 Tenn. App. LEXIS 286 (Tenn. Ct. App. 2017)*; *In re Estate of Farmer, 2017 Tenn. App. LEXIS 286 (Tenn. Ct. App. 2017)*.

[192] *In re Estate of Caldwell, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. 2019)* (a normal relationship between a mentally competent parent and an adult child is not *per se* a confidential relationship, and it raises no presumption of invalidity of the transaction); *Parish v. Kemp, 179 S.W.3d 524, 533 (Tenn. Ct. App. 2005)*.

[193] *Martin v. Moore, 109 S.W.3d 305, 309 (Tenn. Ct. App. 2003)* (attorney-in-fact's withdrawal of money from bank account); *In re Estate of Price, 273 S.W.3d 113, 125 (Tenn. Ct. App. 2008)* (confidential relationship generally exists when a dominant party is granted an unrestricted power of attorney); *Bottorff v. Sears, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. 2018)* (daughter breached fiduciary duty owed under power of attorney when she transferred mother's assets to herself).

[194] *Childress v. Currie, 74 S.W.3d 324 (Tenn. 2002)*; *Parish v. Kemp, 179 S.W.3d 524, 531 (Tenn. Ct. App. 2005)* (no confidential relationship arises when an unrestricted power of attorney is executed but has not been exercised; will contest); *In re Estate of Price, 273 S.W.3d 113, 125 (Tenn. Ct. App. 2008)* (unrestricted power of attorney that has not been exercised does not of itself create a confidential relationship; will contest); *In re Estate of Caldwell, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. 2019)* (when an unrestricted power of attorney is executed but has not yet been exercised, there exists no dominion and control and, therefore, no confidential relationship based solely on the existence of the power of attorney).

[195] *Parish v. Kemp, 179 S.W.3d 524, 531 (Tenn. Ct. App. 2005)*.

A confidential or fiduciary relationship between two parties raises the presumption of invalidity of a gift.[196] This presumption can be overcome only by "clear and convincing" proof of fairness in the transaction.[197]

[8] Fees of Trustee

Fees in a published fee schedule of a trustee, trust advisor, or trust protector regulated by the department of financial institutions or other specified regulatory agencies are presumed to be reasonable.[197.1]

[9] Presumption of Knowledge of Breach of Trust

The statute of limitations for certain actions against a current or former trustee[197.2] or trust advisor or trust protector[197.3] for breach of trust is triggered by the date the potential defendant was sent a report adequately disclosing the facts indicating the potential claim. The report creates a presumption of knowledge of the potential claim if the report contained sufficient information.[197.4]

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[196] *Richmond v. Christian, 555 S.W.2d 105 (Tenn. 1977)*; *Gordon v. Thornton, 584 S.W.2d 655 (Tenn. Ct. App. 1979)*.

[197] *Gordon v. Thornton, 584 S.W.2d 655 (Tenn. Ct. App. 1979)*.

[197.1] *TENN. CODE ANN. § 35-15-708* (Supp. 2013).

[197.2] *TENN. CODE ANN. § 35-15-1005* (Supp. 2013). *See also, Meyers v. First Tenn. Bank, N.A., 503 S.W.3d 365, 2016 Tenn. App. LEXIS 371 (Tenn. Ct. App. May 27, 2016)*, *appeal denied*, *___ S.W.3d ___, 2016 Tenn. LEXIS 694 (Tenn. Sept. 22, 2016)* (one-year period listed in *TENN. CODE ANN. § 35-15-1005(a)* is not triggered by a beneficiary being put on notice through any means to inquire into the existence of a breach of trust; instead, the statute provides that the one-year period begins to run on the date a report is sent to the beneficiary that provides sufficient information to put the beneficiary on notice to inquire into the existence of a potential claim for breach of trust).

[197.3] *TENN. CODE ANN. § 35-15-1206(e)* (Supp. 2013) (action by a trustee against a trust advisor or trust protector); -1206(h) (action by trust advisor or trust protector against another trust advisor or trust protector).

[197.4] *TENN. CODE ANN. § 35-15-1206(b)*, *(e)*.

§ 3.13 Presumptions Involving Wills

In a will contest, proof of genuine signatures of the testator and the subscribing witness along with an attestation clause creates a rebuttable presumption of due execution[197.5] and makes a *prima facie* case for the proponent of the will. This presumption does not collapse upon the introduction of rebuttal evidence, but makes a question for the jury. Thus, in *Whitlow v. Weaver,*[198] the jury was allowed to find that the will was validly executed even though the attesting witnesses denied the recitation of the attestation clause.

A person is presumed to be acquainted with applicable rules of law when executing a will,[198.1] and thus, a testator is presumed to know of a spouse's right to take an elective share.[199] Yet another recognized presumption is the presumption against intestacy or partial intestacy.[200] The presumption against partial intestacy applies only in the absence of a contrary intent and when the words in the will fully embrace the property not otherwise devised.[201]

A related presumption is that a testator understands that a gift to a beneficiary will descend to the beneficiary's issue if the beneficiary dies before the testator.[202]

[197.5] *See In re Estate of Harris, 2018 Tenn. App. LEXIS 714 (Tenn. Ct. App. 2018)* (proof of genuine signatures of the testator and attesting witnesses, along with an attestation clause reciting that the will was properly executed, creates a rebuttable presumption of due execution; proponents of a will are not obliged to prove each fact essential to a will by direct evidence, and in the absence of any satisfactory evidence to the contrary the presumption is that the formalities required have been met).

[198] *63 Tenn. App. 651, 478 S.W.2d 57 (1970)*.

[198.1] *In re Estate of McFarland, 167 S.W.3d 299 (Tenn. 2005)*.

[199] *Hamilton Bank v. Milligan College, 821 S.W.2d 591 (Tenn. Ct. App. 1991)*.

[200] *See In re Estate of McFarland, 167 S.W.3d 299 (Tenn. 2005)* (when a person makes a will there is a presumption that the person did not intend to die intestate as to any part of his or her property; under *TENN. CODE ANN. § 32-3-101*, the court must read the will as if it had been executed immediately prior to the testator's death); *Estate of Hamilton v. Morris, 67 S.W.3d 786, 796 (Tenn. Ct. App. 2001)* (recognizing statutory and common law presumption against intestacy; used to uphold validity of prior will after subsequent one ruled invalid because of undue influence). *See also In re Walker, 849 S.W.2d 766 (Tenn. 1993)*; *In re Estate of Dye, 565 S.W.2d 219 (Tenn. Ct. App. 1977)*.

[201] *In re Estate of Dye, 565 S.W.2d 219, 221 (Tenn. Ct. App. 1977)* (holographic will, where portion disposing of realty was crossed out, was inadequate to invoke presumption against partial intestacy). *See also In re Estate of Snapp, 233 S.W.3d 288, 292 (Tenn. Ct. App. 2007)* (when a person makes a will, there is a presumption that the testator "did not intend to die intestate as to any part of his or her property"; this presumption is applicable only when there is no contrary intent and when the words used in the will embrace the property not otherwise devised; the presumption does not apply in situations where the testator has simply failed to make a complete disposition of the estate).

[202] *In re Estate of Snapp, 233 S.W.3d 288, 292 (Tenn. Ct. App. 2007)* (relying on the Tennessee anti-lapse statute, *TENN. CODE ANN. § 32-3-105*). See also, *In re Estate of McFarland, 167 S.W.3d 299 (Tenn. 2005)* (court must presume that testator knew several of the beneficiaries had predeceased her, and that their lapsed gifts would pass by intestate succession to her

The law presumes that a testator has the capacity to execute a will.[204] When a person signs an affidavit as a witness on the same day that the testatory signed the will, Tennessee law recognizes a presumption that the witness and testator signed at the same time.[204.1]

heirs, in the absence of any evidence in the record that she attempted to redraft or revise the will to provide for an alternative distribution of the lapsed gifts).

[204] *In re Estate of Price, 273 S.W.3d 113, 133 (Tenn. Ct. App. 2008)*.

[204.1] *TENN. CODE ANN. § 32-1-104(b)(1)(B)(2)* (for wills executed before July 1, 2016).

§ 3.14 Presumptions Involving Reasonableness of Bills and Payment

[1] Reasonableness of Medical Bills

In personal injury actions against the party responsible for the injuries, a plaintiff's medical, hospital and physician's bills up to $4000 listed in pleadings, with copies attached, are "*prima facie* evidence" of necessity and reasonableness.[205] Similarly, a rebuttable presumption of reasonableness arises without monetary limit for itemized medical, hospital and physicians' bills served upon the other party at least ninety days before trial; parties offering evidence to rebut this presumption must give the other side notice to this effect at least 45 days before trial.[206] The second presumption does not include the necessity element.

[2] Reasonableness of Repair Bills

Bills for payments for repair of real or personal property up to $1000 may be itemized in a pleading, with copies attached if possible.[207] This creates a rebuttable presumption that the amounts paid were reasonable and the repairs were necessary. At trial, any such payments may be introduced into evidence as though there had been testimony that the amounts were reasonable and the repairs were necessary, but not as proof of the defendant's wrongdoing.[208]

[3] Damages in Sessions Court Subrogation Action

If an automobile insurance carrier brings an action in general sessions court to recover from the tortfeasor certain amounts paid to or on behalf of its insured, an affidavit from the plaintiff-carrier or its agent as to the total damages paid or incurred is presumptive evidence of the damages.[209] The defendant may then attempt to rebut the presumption as to liability, the extent of the damages, or both.[210] However, if the defendant fails to appear, this statutory scheme simplifies the obtaining of a default judgment.

[4] Payment of Obligation by Check

Tennessee law has long accepted the presumption that a creditor does not accept a check as absolute payment; rather the check constitutes conditional payment until honored by the bank.[211] Thus, an insurance

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[205] *TENN. CODE ANN. § 24-5-113(a)(3)* (2000). *See also Cox v. Cox, 2017 Tenn. App. LEXIS 822 (Ct. App. Dec. 20, 2017)* (the statute aids plaintiffs for whom the expense of deposing an expert may exceed the value of the medical services for which recovery is sought).

[206] *Id.* at § 24-5-113(b) (2000). *See Wilson v. Monroe County, 411 S.W.3d 431 (Tenn. Ct. App. 2013)*.

[207] *Id.* at § 24-5-114 (2000).

[208] *Id.*

[209] *TENN. CODE ANN. § 24-5-115(a)* (Supp. 2010).

[210] *TENN. CODE ANN. § 24-5-115(b)* (Supp. 2010).

premium paid by worthless check is presumptively deemed to be a conditional payment. The presumption can be rebutted.[212]

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[211] *See* *Sizemore v. E.T. Barwick Indus., 225 Tenn. 226, 465 S.W.2d 873 (1971)*.

[212] *Tallent v. Tennessee Farmers Mut. Ins. Co., 785 S.W.2d 339 (Tenn. 1990)*.

§ 3.15 Presumptions Involving Health

[1] Coal Worker's Pneumoconiosis

Tennessee worker's compensation law utilizes federal presumptions about a coal worker's pneumoconiosis and its effects on the worker's health.[213]

[2] Silicosis

Tennessee law provides specific remedies, and related limitations thereof, to employees who develop silicosis as the result of exposure to silica. The governing law, which has been interpreted by some as a limited form of tort reform, contains a presumption that the levels of silica or mixed dust used in products to which the plaintiff was exposed after January 1, 1972, were safe.[214] A rebuttal of this presumption requires a showing by the plaintiff, by a preponderance of the evidence, that "the levels of silica or mixed dust in the immediate breathing zone of the plaintiff regularly exceeded the threshold limit values adopted by this state … ."[215]

[3] Municipal Employee's Heart Disease, Hypertension, or Cancer

Tennessee worker's compensation law creates a presumption that heart disease, hypertension, and certain types of cancer acquired by certain municipal employees are work related.[216] Recent Tennessee decisions have markedly reduced the applicability of this presumption.[217] The presumption can be rebutted by competent

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[213] *TENN. CODE ANN. § 50-6-302* (2008). *See Gibson v. Consolidation Coal Co., 588 S.W.2d 290 (Tenn. 1979)* (discussion of federal presumption and methods of rebutting it).

[214] *TENN. CODE ANN. § 29-34-307* (2006).

[215] *TENN. CODE ANN. § 29-34-307* (2006).

[216] *TENN. CODE ANN. §§ 7-51-201(a)(1)* (law enforcement workers), 7-51-201(b)(1) (firefighters), 7-51-201(c)(1) (EMTs and paramedics). A somewhat similar provision covers firefighters if certain government entities so provide by ordinance. *TENN. CODE ANN. § 7-51-205* (covering impairment of health caused by disease or cancer resulting in hospitalization, medical treatment, or any disability; rebuttable presumption that such impairment was caused by accidental injury in the course of employment). The 2019 amendment to *Tenn. Code Ann. § 7-51-201* added subsection (d), which provides that there is a presumption that any condition or impairment of health of firefighters caused by all forms of Non-Hodgkin's Lymphoma cancer, colon cancer, skin cancer, or multiple myeloma cancer resulting in hospitalization, medical treatment, or any disability, has arisen out of employment, unless the contrary is shown by competent medical evidence.

[217] *See, e.g., Krick v. City of Lawrenceburg, 945 S.W.2d 709 (Tenn. 1997)* (person claiming presumption must show he or she suffered from hypertension or heart disease in course of employment, was employed by a regular law enforcement department, and prior to the injury had a physical exam which did not reveal the heart disease or hypertension). Despite the limited application of the presumption, a municipality cannot impose additional evidentiary requirements that are not required under the statute and which conflict with its purpose. *See, e.g.*, *Pryor v. City of Memphis, 2020 Tenn. App. LEXIS 41 (Tenn. Ct. App. Jan. 31, 2020)* (the presumption under *Tenn. Code Ann. § 7-51-201* does not require that the claimant procure an autopsy to receive the benefit of such presumption, but rather, the statute presumes causation so long as the firefighter suffered from one of the health conditions in the statute and the condition was not present at the time of employment; the city's autopsy policy shifted the

medical evidence that there was no causal connection between work and the injury.[218] If the presumption is rebutted, the law enforcement officer's claim is analyzed under the general provisions of the Workers' Compensation Act.[218.1] This requires proof that the heart problem was immediately precipitated by a specific acute or sudden stressful event.[219]

[3A] Emergency Rescue Worker's HIV or Heart Disease

When an emergency rescue worker or firefighter working as a paramedic suffers a health impairment caused by HIV, hepatitis C, infectious disease, or heart disease and that results in death or a partial disability, Tennessee law presumes that the disability was suffered in the line of duty, unless the contrary is shown by a preponderance of the evidence.[219.1]

[4] Sanity and Competence

[a] Sanity

In accordance with the common law, Tennessee law creates a presumption of sanity in civil cases. The burden of proving insanity rests on the person alleging insanity.[220] In criminal cases, a defendant is presumed sane. Insanity is now an affirmative defense that may be raised by the defendant, who must prove insanity by clear and convincing evidence.[221] Although expert testimony is not permitted on whether the defendant was or was not insane, an expert may state whether the defendant could have appreciated the nature or wrongfulness of his conduct at the time of the offense, or that the defendant suffered from a severe mental disease or defect.[222]

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initial burden to show causation to the claimant/employee, and because the policy usurped the statute by placing a greater burden on the claimant, the policy was in conflict with the statute and, therefore, unenforceable).

[218] *See generally* Bohanan v. City of Knoxville, 136 S.W.3d 621 (Tenn. 2004); Krick v. City of Lawrenceburg, 945 S.W.2d 709 (Tenn. 1997); Stone v. McMinnville, 896 S.W.2d 548 (Tenn. 1995); Jeffrey v. City of Memphis, 2013 Tenn. App. LEXIS 151 (Tenn. Ct. App. 2013) (firefighter).

[218.1] Bohanan v. City of Knoxville, 136 S.W.3d 621 (Tenn. 2004) (once the presumption has been overcome, it disappears, and the employee must then prove causation by a preponderance of the evidence as in any other workers' compensation case); Jeffrey v. City of Memphis, 2013 Tenn. App. LEXIS 151 (Tenn. Ct. App. 2013).

[219] Benton v. City of Springfield, 973 S.W.2d 936 (Tenn. 1998).

[219.1] TENN. CODE ANN. §§ 7-51-209, 7-51-201. In order to be entitled to the presumption, the worker must satisfy the pre-conditions set forth in TENN. CODE ANN. § 7-51-209(f).

[220] Roberts v. Roberts, 827 S.W.2d 788, 794 (Tenn. Ct. App. 1991).

[221] TENN. CODE ANN. § 39-11-501 (2010). This changes prior Tennessee law, which required the prosecution to prove the defendant was sane beyond a reasonable double if the defendant put on some proof of his or her insanity. *See, e.g.,* ***State v. Hammock, 867 S.W.2d 8 (Tenn. Crim. App. 1993)***. *See also,* State v. Woodley, 2019 Tenn. Crim. App. LEXIS 151 (Tenn. Crim. App. 2019) (evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence; on appeal, the court should reverse a jury verdict rejecting the insanity defense only if, considering the evidence in the light most favorable to the prosecution, no reasonable trier of fact could have failed to find that the defendant's insanity at the time of the offense was established by clear and convincing evidence); State v. Parker, 2019 Tenn. Crim. App. LEXIS 127 (Tenn. Crim. App. 2019) (TENN. CODE ANN. § 39-11-501(a) places the burden on the defendant to prove by clear and convincing evidence that he was insane at the time of the offense; because sanity is not an element of any crime and the defendant bears the burden of proving insanity, the erroneous failure to provide an instruction on the defense of insanity is non-constitutional error, which should be analyzed using the framework provided by Tenn. R. App. P. 36(b)).

[222] TENN. CODE ANN. § 39-11-501(c) (2010). *See, e.g.*, State v. Perry, 13 S.W.3d 724 (Tenn. Crim. App. 1999).

[b] Competence

Tennessee law also recognizes a presumption that a person is mentally competent.[223] The party asserting lack of mental capacity has the burden of proving incapacity by "clear, cogent, and convincing" proof.[224] Lay witnesses may provide evidence of an individual's competency or capacity.[224.1] In a criminal case, the defendant asserting incompetency has the burden of proving it by a preponderance of evidence.[224.2]

In Tennessee a person sentenced to death is also presumed competent to be executed and must overcome this presumption by a preponderance of evidence.[225] Proof of a mental illneses affecting competency may be admissible.

Although a party may seek post-judgment relief to set aside a judgment under the Tennessee Rules of Civil Procedure based on mental incompetency, such relief is rarely granted.[225.1]

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[223] *See, e.g.*, *Ralston v. Hobbs, 306 S.W.3d 213, 219 (Tenn. Ct. App. 2009)* (mental capacity to maintain civil action; *Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291 (Tenn. Ct. App. 2001)* (mental capacity to enter into a contract). *See, e.g., Mitchell v. Kindred Healthcare Operating, 349 S.W.3d 492, 501 (Tenn. Ct. App. 2008)* (competence to execute ADR contract waiving right to jury trial); *State v. Johnson, 401 S.W.3d 1 (Tenn. 2013)* (in Tennessee, a criminal defendant is presumed to be legally competent). *See also Tenn. Code Ann. § 68-11-1812* (presumption of competency under Tennessee Health Care Decisions Act to make a health care decision, to give or revoke an advance directive, and to designate or disqualify a surrogate); *Blackmon v. LP Pigeon Forge, LLC, 2011 Tenn. App. LEXIS 473 (Tenn. Ct. App. Aug. 25, 2011)* (personal autonomy—an adult's right to live independently and in accordance with his or her own personal values—is a fundamental right; the right is of sufficient importance that the law presumes that adults have the capacity to be autonomous, and the Tennessee General Assembly has codified that right in the Tennessee Health Care Decisions Act, § 68-11-1812(b)).

[224] *Ralston v. Hobbs, 306 S.W.3d 213, 220 (Tenn. Ct. App. 2009)* (test is whether "cognitive impairments or disease rendered the contracting party incompetent to engage in the transaction at issue"). *See also Bockelman v. GGNSC Gallatin Brandywood, LLC, 2015 Tenn. App. LEXIS 753, *10 (Tenn. Ct. App. Sep. 18, 2015)* (clear, cogent, and convincing proof permits "no serious or substantial doubt about the correctness of the conclusions drawn from the evidence"; although portions of certain records could be argued to suggest recovered capacity, they were insufficient to overcome the determination of the patient's designated physician, who had primary responsibility for her health care). Many cases address the presumption of competency in the context of capacity to contract. *See, e.g.*, *In re Estate of Mayfield, 2019 Tenn. App. LEXIS 445 (Tenn. Ct. App. Sep. 9, 2019)* (discussing presumption of competence and the degree of mental capacity an individual must possess to enter into an enforceable contract; fact that the seller of estate was taking particular medications was not enough, by itself, to prove that he lacked mental capacity to execute the agreement, since the evidence established that he was "oriented to person, time, place, and situation" and was aware of what he was doing); *Mitchell v. Kindred Healthcare Operating, 349 S.W.3d 492, 501 (Tenn. Ct. App. 2008)* (party seeking to prove incapacity to execute contract must show either that the person was unable to understand in a reasonable manner the nature and consequences of the transaction or was unable to act in a reasonable manner in relation to the transaction and the other party had reason to know of the condition); *Richards v. Richards, 2016 Tenn. App. LEXIS 712 (Tenn. Ct. App. 2016)* (capacity to execute marital dissolution agreement).

[224.1] *In re Estate of Elam, 738 S.W.2d 169 (Tenn. 1987)*; *In re Estate of Mayfield, 2019 Tenn. App. LEXIS 445 (Tenn. Ct. App. Sep. 9, 2019)*.

[224.2] *State v. Johnson, 401 S.W.3d 1 (Tenn. 2013)* (criminal accused may prove incompetency with evidence of irrational behavior, trial demeanor, and any prior medical opinion on competence to stand trial; defense counsel's opinion is a factor the court may consider).

[225] *State v. Irick, 320 S.W.3d 284, 292 (Tenn. 2010)* (test is whether the prisoner has a rational understanding of the conviction, impending execution, and the relationship between the two).

[225.1] *See Tenn. R. Civ. P. 60.02(5)* (motion to set aside judgment for "any other reason" justifying relief from the operation of the judgment). *See also Wheeler v. Wheeler, 2020 Tenn. App. LEXIS 267, *9 (Tenn. Ct. App. June 3, 2020)* (noting that "[i]t is rare indeed for a court to find that a contract is unenforceable based on the unsound emotional state of a contracting party", the Court of Appeals denied a husband relief under Rule 60.02(5) to set aside the parties' marital dissolution agreement based on his lack of mental capacity; the husband's claim relied entirely on his own testimony and, although the Court recognized that expert proof is not always required when mental incapacity is raised, "some proof" beyond the assertions of the litigant is "often required" to meet the clear and convincing standard); *Beem v. Beem, 2010 Tenn. App. LEXIS 294 (Tenn. Ct. App. Apr. 28, 2010)* (denying

[5] Amnesiac Presumption

A little known presumption in Tennessee law deals with the amnesia victim. In a negligence action, it is presumed that the amnesiac acted with due care in the absence of evidence to the contrary.[226]

[6] Medical Review: Presumption of Good Faith

A member of a medical review committee, or a person reporting information to that committee, is presumed to have acted in good faith and without malice. The person alleging lack of good faith has the burden of proving bad faith or malice.[227]

[7] Presumption Medical Practitioner Has Performed Duty to Patient

Tennessee law presumes that a medical practitioner has discharged his or her full duty to a patient. Negligence is not presumed simply because treatment was unsuccessful.[228] However, there is a rebuttable presumption of negligence when proof establishes that the instrumentality causing injury was in the defendant's exclusive control and the accident or injury is one that ordinarily does not occur in the absence of negligence.[229]

[8] Healthcare Quality Control

In order to encourage communications that would improve patient safety and healthcare, there is a privilege protecting disclosure of various records, testimony and statements involved in the quality improvement process by healthcare organizations.[229.1]

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relief where the husband argued that his MDA should be set aside under *Tenn. R. Civ. P. 60.02(5)* because he signed it under duress and "without a clear mind" due to depression; although a psychologist testified that the husband had suffered from a major depressive episode after the MDA, he could not provide relevant testimony concerning the husband's condition at the time he signed the agreement; a mediator and the husband's attorney during the divorce also testified that they believed the husband had capacity). Occasionally, the motion to set aside will be granted. *See, e.g., Middendorf v. Middendorf, 2019 Tenn. App. LEXIS 323 (Tenn. Ct. App. June 27, 2019)* (finding no abuse of discretion and affirming trial court's decision to set aside divorce decree, since the evidence could support more than one conclusion; both the husband and a psychiatrist who treated the husband during the divorce testified that he could not reasonably understand the manner and consequences of signing the MDA).

[226] *Jeffreys v. Louisville & N.R. Co., 560 S.W.2d 920 (Tenn. Ct. App. 1977)* (presumption that plaintiff with amnesia acted with due care when crossing railroad tracks is rebutted by substantial evidence to the contrary).

[227] *TENN. CODE ANN. § 63-6-219(d)(3)*. This former subsection is now found at § 68-11-272(f).

[228] *Roddy v. Volunteer Med. Clinic, 926 S.W.2d 572, 578 (Tenn. Ct. App. 1996)*.

[229] *See TENN. CODE ANN. § 29-26-115(c)*(Supp. 2010); ***Seavers v. Methodist Medical Center, 9 S.W.3d 86 (Tenn. 1999)***. *See above*, *§ 3.08[5]*, for a discussion of res ipsa locquitur and its application to healthcare liability claims under the statute.

[229.1] *TENN. CODE ANN. §§ 68-11-272*; 63-1-150. *See also Reynolds v. Gray Med. Inv'rs, LLC, 578 S.W.3d 918, 2018 Tenn. App. LEXIS 716 (Tenn. Ct. App. Dec. 11, 2018)* (while most of what happens during a quality improvement committee meeting is protected under the statute from disclosure, the peer review privilege does not extend to allowing healthcare providers to threaten or coerce employees so as to suborn perjury or commit fraud); *Pinkard v. HCA Health Servs. of Tenn., 545 S.W.3d 443, 2017 Tenn. App. LEXIS 418 (Tenn. Ct. App. June 21, 2017)*, appeal denied, *Pinkard v. HCS Health Servs. of Tenn., Inc., ___ S.W.3d ___, 2017 Tenn. LEXIS 817 (Tenn. Nov. 16, 2017)* (evidentiary privilege for Quality Improvement Committee proceedings did not offend separation of powers, as applied to a physician's contest of a hospital's termination of the physician's privileges, because the privilege (1) was reasonable and workable within existing evidentiary rules, as the privilege was created to promote the safety and welfare of Tennessee citizens; and (2) had an "original source" exception under which the physician could obtain relevant information from other sources).

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§ 3.16 Presumptions Involving Employment

[1] Good Faith in Employment Reference

When an employer or former employer gives a truthful, fair and unbiased evaluation of an employee's job performance, such as when giving a reference or responding to an inquiry from a potential employer, there is a statutory presumption that the employer is acting in good faith and thus is entitled to qualified immunity.[230] The presumption of good faith can be rebutted by proof that the disclosed information was knowingly false, deliberately misleading, disclosed for a malicious purpose or in reckless disregard for its falsity or defamatory nature, or violative of the employee's civil rights.[231] Thus, mere negligence is not enough to rebut the presumption in favor of the employer's good faith.[231.1]

[2] Family Service Rule

Tennessee law maintains that when a person provides personal, domestic, or household services to another person, the one furnishing the services may file a quantum meruit action to recover for the value of those services in some circumstances.[232] However, when the services are provided to a family member, the family services rule creates a rebuttable presumption that the services were gratuitous, "motivated more by love and affection than by expectation of compensation."[233] The presumption may be rebutted by proof that the deceased family member expressly agreed to pay for the services or that the deceased family member knew or should have known that the family member providing the services expected compensation or reimbursement.[234]

The concept of "family" is somewhat broad, including not only blood relatives but also those related by marriage and even those contemplating marriage or merely living together.[235]

[3] Working Under the Influence

Under the Workers' Compensation Reform Act of 1996, if an employer has implemented the Act's provisions for a drug-free workplace program and an employee injured on the job has a blood alcohol content of .08% (.04% if

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[230] *TENN. CODE ANN. § 50-1-105* (2008).

[231] *Id.*

[231.1] *Sullivan v. Baptist Mem. Hosp., 995 S.W.2d 569 (Tenn. 1999)*.

[232] *See, e.g.*, *In re Estate of Marks, 187 S.W.3d 21, 29 (Tenn. Ct. App. 2005)*.

[233] *In re Estate of Marks, 187 S.W.3d 21, 29 (Tenn. Ct. App. 2005)*.

[234] *In re Estate of Marks, 187 S.W.3d at 29–30*.

[235] *In re Estate of Marks, 187 S.W.3d at 30–31*.

in a safety-sensitive position), there is a rebuttable statutory presumption that the intoxicant was the proximate cause of the injury.[236]

[4] Fidelity Bond Insurer's Liability

A Tennessee case has recognized a presumption that a bank employee's admission of fraud constitutes a *prima facie* case of dishonest conduct and raises a presumption that a fidelity bond has been breached.[237] The presumption disappears if contrary evidence is introduced.

[5] Termination of Employment Without Cause

Tennessee employment law recognizes a presumption that employment for an indefinite term may be terminated at any time by either the employer or the employee without cause.[237.1] A contract may eliminate the presumption.

[6] Discrimination and Wrongful Discharge Cases

Tennessee law recognizes a number of presumptions in civil cases involving discrimination or wrongful termination. Generally they provide for a presumption that is created once the plaintiff presents sufficient proof to satisfy a prima facie case of the prohibited conduct.[237.2]

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[236] ***TENN. CODE ANN. § 50-6-110(c)(1)*** (Supp. 2010). There is also a presumption that the intoxicant was the proximate cause of the injury if the employee refuses to take a blood alcohol test. ***Id. at 50-6-110(c)(2)***.

[237] *Union Planters Corp. v. Harwell, 578 S.W.2d 87 (Tenn. Ct. App. 1978)*.

[237.1] *Yardley v. Hosp. Housekeeping Sys., LLC, 470 S.W.3d 800 (Tenn. 2015)*; *Woods v. Metro. Dev. & Hous. Auth. Bd. of Comm'rs, 345 S.W.3d 903, 909 (Tenn. Ct. App. 2011)*.

[237.2] *See TENN. CODE ANN. §§ 4-21-311(e)* (presumption of discrimination or retaliation of applies to civil actions arising under Tennessee Human Rights Act and the Tennessee Disability Law); 50-1-304(f) (presumption of discrimination in retaliatory discharge or retaliation for refusal to participate in or remain silent about illegal activities); 50-1-801 (presumption of discrimination for wrongful discharge in violation of Tennessee public policy, including a retaliation for the exercise of rights under the Tennessee workers' compensation law). *See also Williams v. City of Burns, 465 S.W.3d 96 (Tenn. 2015)* (establishing prima facie case of retaliatory discharge creates a rebuttable presumption that employer unlawfully retaliated against employee); *Templeton v. Macon Cty., 2018 Tenn. App. LEXIS 694 (Tenn. Ct. App. 2018)* (the phrase "prima facie case" in an employment discrimination case denotes "the establishment of a legally mandatory, rebuttable presumption").

§ 3.17 Presumptions Involving Jurors, Public Officials and Attorneys

[1] Jury Follows Instructions

Tennessee appellate cases have long engaged in a presumption that the jury does not disregard the trial judge's jury instructions.[238] The presumption is overcome only by clear and convincing evidence that the instructions were not followed.[239]

[2] Public Officials Perform Duties in Good Faith

Tennessee officials, including the governor, are presumed to perform their duties in good faith.[240] When there is a question whether an original trial judge served as thirteenth juror and approved a jury verdict in a criminal case, Tennessee law recognizes a presumption that the trial judge made this decision.[240.1] There is also a rebuttable presumption that a successor judge is able to act as a thirteenth juror.[240.2]

[3] Public Officials Know and Act in Accordance with Law

There is a presumption that public officials know the law and act in accordance with it.[241] This presumption is extended to the General Assembly. Courts may presume the General Assembly "is aware of its own prior enactments and knows the state of the law when it enacts a subsequent statute."[241.1]

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[238] *See, e.g.,* *State v. Newsome, 744 S.W.2d 911, 915 (Tenn. Crim. App. 1987)* (jury instructed to ignore earlier erroneous jury instruction). *State v. Johnson, 401 S.W.3d 1, 22 (Tenn. 2013)* ("this Court presumes that the jury follows the trial court's instructions").

[239] *Id.*

[240] State *ex rel. Witcher v. Bilbrey, 878 S.W.2d 567 (Tenn. Ct. App. 1994)*. *See also* ***Michelsen v. Stanley, 893 S.W.2d 941 (Tenn. Ct. App. 1993)*** (after a new trial motion is filed, a trial judge approving a verdict without comment is presumed to have properly performed the role as thirteenth juror); *State v. Medicine Bird, 63 S.W.3d 734, 735 (Tenn. Ct. App. 2001)* (courts must always presume that public officials will discharge their duties in good faith) (attorney general); *Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., 244 S.W.3d 302, 315 (Tenn. 2007)* (presumption that teacher transfers are made in good faith); ; *Heyne v. Metro. Nashville Bd. of Pub. Educ., 380 S.W.3d 715, 729 (Tenn. 2012)* (administrative decisions of local school officials carry a presumption that they were made in good faith); *West v. Schofield, 468 S.W.3d 482 (Tenn. 2015)*.

[240.1] *TENN. CODE ANN. § 40-18-119* (Supp. 2014).

[240.2] *State v. Ellis, 453 S.W.3d 889, 907 (Tenn. 2015)*.

[241] State *ex rel. Witcher v. Bilbrey, 878 S.W.2d 567 (Tenn. Ct. App. 1994)*; *Jackson v. Aldridge, 6 S.W.3d 501, 503 (Tenn. 1999)*; *State v. Medicine Bird, 63 S.W.3d 734, 735 (Tenn. Ct. App. 2001)* (courts must always presume that public officials will discharge their duties in accordance with law) (attorney general) ; *West v. Schofield, 468 S.W.3d 482, 493 (Tenn. 2015)* (Tennessee public officials are presumed to discharge their duties in good faith and in accordance with the law).

[241.1] *Womack v. Corr. Corp. of Am., 448 S.W.3d 362 (Tenn. 2014)* (same); *Young v. City of LaFollette, 479 S.W.3d 785 (Tenn. 2015)* (Supreme Court presumes legislature knows the law and makes new laws accordingly); *Sneed v. City of Red Bank, 459 S.W.3d 17 (Tenn. 2014)* (same).

[4] Person Knows the Law

A person is presumed to know the law.[242]

[5] Presumption of Prejudiced Juror

If a juror wilfully conceals or fails to disclose information on voir dire that reflects on the juror's lack of impartiality, in criminal cases there is a presumption that the juror is biased.[243] This presumption extends to a juror's silence when asked a question reasonably calculated to produce an answer and to willful concealment of a close personal or familial relationship with one of the parties in the trial.[243.1]

A similar rebuttable presumption arises when a juror has been exposed to extraneous prejudicial information or an improper influence. If the jury was not sequestered, there is a rebuttable presumption that shifts the burden to the state to explain the conduct or demonstrate it was harmless.[243.2]

[6] Presumption that Statutes Are Constitutional

Tennessee courts engage in a presumption that statutes enacted by the legislature are constitutional and appellate courts will resolve every doubt in favor of constitutionality.[243.3]

[6A] Presumption Against Absurdity

A somewhat related presumption is that the general assembly "did not intend an absurdity."[243.4] This approach to statutory interpretation would prevent a literal interpretation that would produce a clearly unintended result.

[6B] Presumptions in Construing Rules and Statutes

A number of presumptions are used in statutory construction. One is that in construing the meaning of a court rule, the court presumes every word was used deliberately and each word has a specific meaning and purpose.[243.4a]

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[242] *See, e.g.,* State v. Anderson, 894 S.W.2d 320 (Tenn. Crim. App. 1994) (escapee presumed to know escape statute); Burks v. Elevator Outdoor Advertising, LLC., 220 S.W.3d 478, 492 (Tenn. Ct. App. 2006) (every citizen is presumed to know the law); Madden Phillips Constr. v. GGAT Dev. Corp., 315 S.W.3d 800, 823 (Tenn. Ct. App. 2009) (contract case).

[243] State v. Akins, 867 S.W.2d 350 (Tenn. Crim. App. 1993); Smith v. State, 357 S.W.3d 322, 348 (Tenn. 2011) (in Tennessee, a presumption of juror bias arises when a juror willfully conceals or fails to disclose information on voir dire which reflects on the juror's lack of impartiality)..

[243.1] Smith v. State, 357 S.W.3d 322, 348 (Tenn. 2011).

[243.2] State v. Smith, 418 S.W.3d 38, 46 (Tenn. 2013). To shift the burden of proof to the state, something more than a bare showing of a mingling with the general public is required. State v. Todd, 2019 Tenn. Crim. App. LEXIS 250 (Tenn. Crim. App. 2019).

[243.3] State v. McCoy, 459 S.W.3d 1 (Tenn. 2014) (presumption that a statute is constitutional); Randstad N. Am., L.P. v. Tenn. Dep't of Labor & Workforce Dev., 372 S.W.3d 98, 101 (Tenn. Ct. App. 2011) (workers' compensation statute); Comm'rs v. Util. Mgmt. Review Bd., 427 S.W.3d 375 (Tenn. Ct. App. 2013); State v. Burgins, 464 S.W.3d 298 (Tenn. 2015) (legislative acts are presumed constitutional).

[243.4] State v. Aguilar, 437 S.W.3d 889 (Tenn. Crim. App. 2013). *See also* The Tennessean v. Metro Gov. of Nashville, 485 S.W.3d 857, 872 (Tenn. 2016) (courts are to avoid construction leading to absurd results); State v. Brown, 479 S.W.3d 200, 205 (Tenn. 2015) (presumption that there was no intent to enact a useless or absurd procedural rule).

[243.4a] State v. Brown, 479 S.W.3d 200, 205 (Tenn. 2015); Ellithorpe v. Weismark, 479 S.W.3d 818, 827 (Tenn. 2015); (same); Metro Gov. v. Bd. Of Zoning, 477 S.W.3d 750, 756 (Tenn. 2015) (statute); Yardley v. Hospital Housekeeping Systems, 470

Another presumption is that the legislature knows about its own prior enactments and their judicial constructions.[243.4b]

[7] Presumption Against Preemption

When state and federal law conflict, there is a presumption that federal law does not preempt state law. This presumption is especially strong in areas historically within the police powers of the state.[243.5]

[8] Presumption of Openness Under Public Records Act

There is a presumption of openness under the Tennessee Public Records Act favoring disclosure of government records and, therefore, any citizen who has been denied access to records has the statutory right to petition for access and to seek judicial review of the denial.[243.6] The burden of proving a justification for nondisclosure is on the official of the records, and the justification for the nondisclosure must be shown by a preponderance of the evidence.[243.7]

[9] Presumption That Attorney Provided Adequate Assistance

There is a strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions during the representation of his or her client, and the party claiming ineffective assistance of counsel bears the burden of overcoming this presumption.[243.8]

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S.W.3d 800, 805 (Tenn. 2015) (same); Foster v. Chiles, 467 S.W.3d 911, 915 (Tenn. 2015) (same). *See also*, Moreno v. City of Clarksville, 479 S.W.3d 795, 804 (Tenn. 2015) (in construing statues, is a presumption that the legislature says what it means and means what it says); Sun Trust Bank v. Burke, 491 S.W.3d 693, 697 (Tenn. Ct. App. 2015) (same).

243.4b Chartis Cas. Co. v. State, 475 S.W.3d 240, 246 (Tenn. 2015).

243.5 Giggers v. Memphis Hous. Auth., 363 S.W.3d 500, 506 (Tenn. 2012).

243.6 TENN. CODE ANN. § 10-7-505(a). *See also* The Tennessean v. Metro. Gov't of Nashville & Davidson Cnty., 485 S.W.3d 857, 864 (Tenn. 2016) (there is a presumption of openness for government records); Friedmann v. Marshall County, 471 S.W.3d 427, 433 (Tenn. Ct. App. 2015) (presumption of openness under the Tennessee Public Records Act); Patterson v. Convention Ctr. Auth. of the Metro. Gov't of Nashville, 421 S.W.3d 597 (Tenn. Ct. App. 2013) (residential addresses of third-party contractors not exempt from disclosure).

243.7 TENN. CODE ANN. § 10-7-505(c).

243.8 Kendrick v. State, 454 S.W.3d 450 (Tenn. 2015); Rogers v. State, 2018 Tenn. Crim. App. LEXIS 669 (Tenn. Crim. App. 2018). *See also* Strickland v. Washington, 466 U.S. 668, 699 (1984) (reviewing courts should try to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time); Mobley v. State, 397 S.W.3d 70 (Tenn. 2013) (reviewing courts should resist the urge to judge counsel's performance using 20-20 hindsight).

§ 3.18 Miscellaneous Presumptions

[1] Products Liability Presumption

Under Tennessee law, there is a rebuttable presumption that a manufacturer's product is not unreasonably dangerous if the manufacturer complied with an applicable state or federal statute governing design or manufacture. However, the presumption is limited to matters covered by the standards in the state or federal statute.[244]

[2] Presumptions Involving Limited Liability Company

If a certificate of formation of a limited liability company is not filed within 120 days from the date of the initial filing of the articles of organization, there is a rebuttable presumption that the effective date is the 90th day after the filing of the articles.[245] The same rebuttable presumption is present for the filing of articles of conversion to a limited liability company.[246]

[3] Concurrent Jurisdiction

When a federal claim could possibly be cognizable in either state or federal courts, Tennessee recognizes a rebuttable presumption of concurrent jurisdiction. The presumption can be rebutted by explicit federal statutory language or federal legislative history so stating, or by incompatible state and federal interests.[247]

[4] Presumption of Sufficient Evidence

Sometimes a Tennessee appellate court is unable to provide a full review because the record lacks a transcript, statement of the evidence, or other similar information in violation of appellate rules.[248] In such cases, there is a presumption the parties presented sufficient evidence to support the trial court's decision.[249]

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[244] *Tuggle v. Raymond Corp., 868 S.W.2d 621 (1992)* (interpreting *TENN. CODE ANN. § 29-28-104*).

[245] *TENN. CODE ANN. § 48-203-102(c)* (2002).

[246] *Id.* at § 48-204-101(d) (2002).

[247] *Watson v. Cleveland Chair Co., 789 S.W.2d 538, 542 (Tenn. 1989)*.

[248] *TENN. R. APP. P. 24*.

[249] *See, e.g.*, *Byars v. Young, 327 S.W.3d 42, 48 (Tenn. Ct. App. 2010)*; *Ramsay v. Custer, 387 S.W.3d 566, 568 (Tenn. Ct. App. 2012)* (absent a transcript or statement of the evidence, a conclusive presumption arises on appeal that the parties presented sufficient evidence to support the trial court's judgment); *State v. Cassell, ___ S.W.3d ___, 2015 Tenn. Crim. App. LEXIS 396 (Tenn. Crim. App. 2015)* (same); *Gibbs v. Gibbs, 2016 Tenn. App. LEXIS 661 (Tenn. Ct. App. 2016)* (same); *Burris v. Burris, 2016 Tenn. App. LEXIS 698 (Tenn. Ct. App. 2016)* (trial court's findings of fact were presumed to be correct because a appellant filed no transcript or statement of the evidence from the trial court proceedings); Baugh v. Moore, Tenn. App. LEXIS 90 (Tenn. Ct. App. 2015) (absence of transcript or statement of the record meant appellate had no way to determine that the evidence was insufficient to support the trial court's findings and conclusions, and it had to be conclusively presumed that the findings supported the evidence).

[5] Presumption of Lack of Causation by Department of Transportation and Its Agents, Consultants, and Contractors

In a civil action involving personal or property injury against the Tennessee Department of Transportation or its agents, consultants, or contractors, alleging a harm occurring in a motor vehicle crash in a construction zone, there is a presumption that the Department and its agents, consultants, and contractors are not the cause of the accident if the driver of one of the vehicles was under the influence of an intoxicant at the time of the crash.[250] This presumption can only be overcome if the malicious, intentional, fraudulent or reckless misconduct of the department of transportation, or of its agents, consultants, or contractors, was a proximate cause of such person's death, injury, or damage.[251]

[6] Presumption that Engineer Properly Prepared Plans for Construction or Repair of Transportation facility for Department of Transportation

There is a presumption, subject to exceptions, that a person or entity who contracted with the Tennessee Department of Transportation to prepare engineering plans for a transportation facility, such as a highway or bridge, prepared the plans using the degree of skill ordinarily exercised by other engineers in the field and with due regard for acceptable engineering standards and principles.[252] This presumption can be overcome only upon a showing of the person's or entity's gross negligence in the preparation of the engineering plans.[253]

[7] Presumption of Intent to Change Rule When Rule Amended

When a rule of procedure or statute is amended, Tennessee law recognizes a presumption of an intent to change the rule.[254] This presumption is useful in interpreting the rule in existence before the change because the rule after the change may provide insight into the meaning of the pre-change rule.

[8] Presumptions Involving Contracts

Tennessee recognizes a number of presumptions concerning contracts. In order to prove that there was consideration, an essential element of a contract, there is a presumption that a contract signed by the party sought to be bound was supported by consideration.[255] The party opposing the contract has the burden of overcoming the presumption.[256]

There is also a presumption that a person who signs a contract is presumed to have read the contract and is bound by its contents.[257]

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[250] *TENN. CODE ANN. § 54-5-145(a)(2)*.

[251] *Id.*

[252] *TENN. CODE ANN. § 54-5-145(c)*.

[253] *Id*.

[254] *Lockett v. Bd. of Prof'l Responsibility, 380 S.W.3d 19, 25 (Tenn. 2012)* (rule amendment); *State v. Gomez, 367 S.W.3d 237, 244 (Tenn. 2012)* (statute amendment).

[255] *Regions Bank v. Bric Constructors, LLC, 380 S.W.3d 740, 761 (Tenn. Ct. App. 2011)*. This presumption has been codified under *TENN. CODE ANN. 47-50-103* (all contracts in writing signed by the party to be bound, or the party's authorized agent and attorney, are prima facie evidence of a consideration).

[256] *Atkins v. Kirkpatrick, 823 S.W.2d 547 (Tenn. Ct. App. 1991)*.

[257] *84 Lumber Co. v. Smith, 356 S.W.3d 380, 383 (Tenn. 2011)*; *Kiser v. Wolfe, 353 S.W.3d 741, 749 (Tenn. 2011)* (an insured person who signs but fails to read an insurance contract or otherwise to ascertain its provisions will be conclusively presumed to

A related presumption is that, absent fraud or misrepresentation, an insured person who signs an insurance policy is presumed to have knowledge of its contents.[258]

[9] Presumption That Corporation Is Distinct Legal Entity

Tennessee recognizes a presumption that a corporation should be treated as a distinct legal entity separate from its shareholders, officers, directors, or affiliate corporations.[259] This is a strong presumption that "should be disregarded only with great caution and not precipitively."[260]

[10] Presumption Involving Taxes

In construing tax laws, there is a presumption in Tennessee against taxpayers claiming exemptions from taxes. One court observed, "Every presumption is against the exception."[261]

[11] Knowledge of Law

There is a long-recognized presumption that people know the law.[262]

know the contents); *Regions Bank v. Bric Constructors, LLC, 380 S.W.3d 740 (Tenn. Ct. App. 2012)* (a person is charged with knowing the contents of contracts which they sign, irrespective of whether they read the document or not.); *Stokely v. Stokely, 2018 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 19, 2018)* (ordinarily, one having the ability and opportunity to inform himself of the contents of a writing before he executes it will not be allowed to avoid it by showing that he was ignorant of its contents or that he failed to read it).

[258] *Kiser v. Wolfe, 353 S.W.3d 741, 749 (Tenn. 2011)*.

[259] *Collier v. Greenbrier Developers, LLC, 358 S.W.3d 195, 200 (Tenn. Ct. App. 2009)*; *H.G. Hill Realty Co., L.L.C. v. /Max Carriage House, Inc., 428 S.W.3d 23, 32 (Tenn. Ct. App. 2013)* (same).

[260] *Collier v. Greenbrier Developers, LLC, 358 S.W.3d 195, 200 (Tenn. Ct. App. 2009)*.

[261] *Najo Equip. Leasing v. Comm'r. of Revenue, 477 S.W.3d 763, 767 (Tenn. Ct. App. 2015)*.

[262] *Roberts v. Bailey, 470 S.W.3d 32 (Tenn. 2015)*. *See also In re Charles T., 2018 Tenn. App. LEXIS 501 (Tenn. Ct. App. 2018)* (a person is presumed to know the law, and parents should know that they have a responsibility to visit their children; a parent's choice to continue to use drugs constitutes willful failure to visit a child within the meaning of ***TENN. CODE ANN. § 36-1-102(1)(A)(iv)***).