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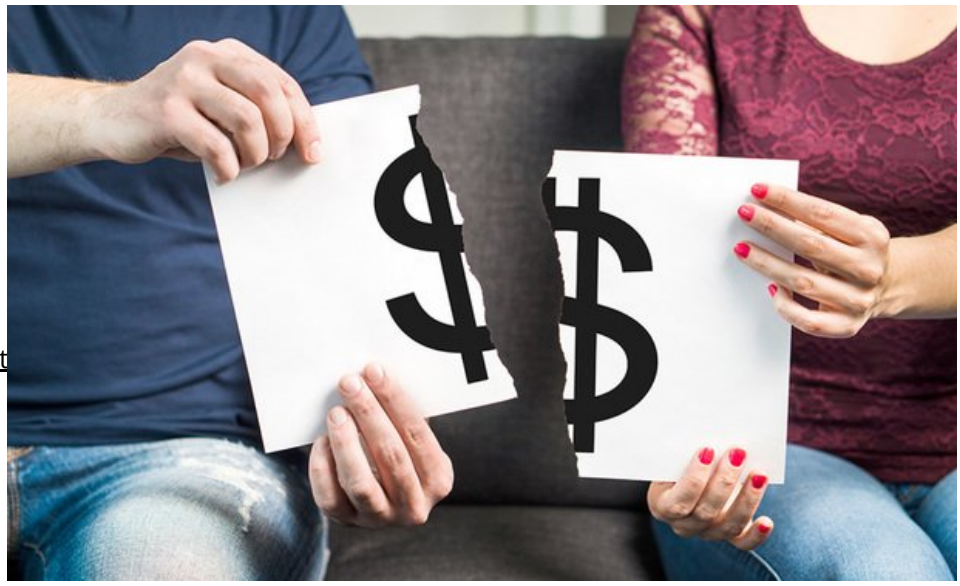
The Burden of Proof and Presumptions in Matrimonial Actions

An attorney preparing for the trial of a matrimonial action must know all of the applicable presumptions and be prep to meet her burden of proof on each issue. Joel R. Brandes discusses some of the presumptions in this edition of N Law and the Family column.

By **Joel R. Brandes** | December 31, 2019 at 12:00 PM



The burden of proof in an action is determined by the public policy of the law to which the action relates, while a presumption relieves a party from having to actually prove a fact. Unlike most other types of actions, the parties to a matrimonial action have many different burdens of proof to meet, depending upon the ancillary relief they seek, or oppose. The plaintiff in a divorce action has the burden of proof with regard to the allegations of her complaint for divorce and her requests for ancillary relief, such as maintenance, custody, child support, equitable distribution and counsel fees. The defendant has the burden of proof with regard to his affirmative defenses, counterclaims, and requests for ancillary relief. Domestic Relations Law §211. The parties are aided in meeting their burden of proof by presumptions. An attorney trying a matrimonial action cannot competently try the case without knowing the burdens of proof and presumptions that are applicable in that action.

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The function of a standard of proof is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The Supreme Court has described three standards of proof for different types of cases. At one end of the spectrum is the civil case involving a dispute between private parties. Since society has a minimal concern with the outcome of private suits, plaintiff's burden of proof is a preponderance of the evidence. The litigants share the risk of error in roughly equal fashion. In a criminal case the interests of the defendant are of such magnitude that the standard of proof is designed to exclude as nearly as possible the likelihood of an erroneous judgment. This is accomplished by requiring that the state prove the guilt of an accused beyond a reasonable doubt. An intermediate standard of proof, "clear, unequivocal and convincing" is used in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing. The interests at stake in those cases are deemed to be more substantial than mere loss of money. *Addington v. Texas*, 441 U.S. 418 (1979)

To say that a party to a civil action has the burden of proof on a particular issue means that the party's claim on that issue must be established by "a preponderance of the credible evidence", or in some cases, by "clear and convincing evidence." N.Y. Pattern Jury Instr. Civil 1:23 (3d ed.). A preponderance of the evidence means the greater part of the credible evidence. The credible evidence means the testimony or exhibits that is worthy of belief, referring to the convincing quality of the evidence. Id. Clear and convincing evidence means evidence that satisfies the trier of fact that there is a high degree of probability that what he claims is what actually happened. Id. at 1:64.

The "preponderance of the evidence" standard of proof is utilized in most matrimonial actions. However, the "clear and convincing evidence standard must be met where the issue is adultery (*George v. George*, 34 A.D.2d 888 (4th Dept. 1970)) or to establish fraud (*Simcuski v. Saeli*, 44 N.Y.2d 442 (1978)). It is also used where a spouse attempts to prove that conveyance of property to the parties as tenants by the entirety was not intended to create an ownership interest in the property in the co-tenant, but was merely for the sole purpose of convenience. *Campfield v. Campfield*, 95 A.D.3d 1429 (3d Dept. 2012). Other situations in which it is applicable is where a party seeks to establish a violation of an order or subpoena in a proceeding to punish for civil contempt (*Yalkowsky v. Yalkowsky*, 93 A.D.2d 834 (2d Dept. 1983)), or where the plaintiff seeks to establish paternity (*Matter of Commr. of Social Services v. Philip De G.*, 59 N.Y.2d 137 (1983)) or an acknowledgment of paternity (*Vicki B. v. David H.*, 57 N.Y.2d 427 (1982)).

A spouse's conveyance of inherited property (which is separate property) to herself and her husband as tenants by the entirety creates a presumption that the property was marital. *Chiotti v. Chiotti*, 12 A.D.3d 995, 996 (3d Dept. 2004). In order to rebut this presumption, that spouse must come forward with clear and convincing proof that she did not intend plaintiff to have an ownership interest in the property, but merely placed his name on the deed for the sole purpose of convenience. *Campfield v. Campfield*, 95 A.D.3d 1429 (3d Dept. 2012). A spouse's entitlement to a credit for separate property contributions to marital property must be established by clear and convincing evidence. See *Stavans v. Stavans*, 207 A.D.2d 392, 393 (2d Dept. 1994).

Presumptions

A presumption provides a method where certain facts are deemed to be prima facie proof of other facts. *People v. Robinson*, 97 Misc.2d 47, 61-64 (Sup. Ct. 1978). A "presumption of law" is a rule which requires that a particular inference must be drawn from an ascertained state of facts. A "presumption of fact" allows a particular inference to be drawn from a state of facts, but does not require that such an inference be drawn from that fact. *Platt v. Elias*, 186 N.Y. 374 (1906). A rebuttable presumption places the burden upon the adversary to come forward with evidence to rebut the presumption, to negative the existence of the fact. *People v. Robinson*, 97 Misc.2d 47, 61-64 (Sup. Ct. 1978). A "presumption of fact" is rebuttable. When substantial evidence to the contrary is produced, the presumption disappears and ceases to be a legal factor in the case. *Kennell v. Rider*, 225 A.D. 391 (3d Dept. 1929), aff'd, 252 N.Y. 602 (1930).

A presumption does not affect the ultimate burden of proof. It places a burden on the adversary to come forward with evidence to the contrary. The burden of going forward with evidence to rebut the presumption is upon the adversary. *People v. Robinson*, supra.

For example, Banking Law §675(a) provides that both depositors named on a joint account presumptively have an undivided one-half interest in the moneys deposited. That presumption may be rebutted by direct proof or substantial circumstantial proof which is clear and convincing and sufficient to support an inference that the joint account had been opened in that form only as a matter of convenience. *Lagnena v. Lagnena*, 215 A.D.2d 445 (2d Dept. 1995).

The presumption that separate funds are transmuted into marital property when commingled with marital property may be rebutted by establishing by clear and convincing proof that the account was created only as a matter of convenience. *Crescimanno v. Crescimanno*, 33 A.D.3d 649 (2d Dept. 2006).

In matrimonial actions there is a statutory "presumption of law" that all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, is marital property regardless of the form in which title is held. The structure of Domestic Relations Law §236 creates a statutory presumption that 'all property, unless clearly separate, is deemed marital property' and the burden of proof rests with the titled spouse to rebut that presumption. *Fields v. Fields*, 15 N.Y.3d 158 (2010).

There is a presumption that separate assets commingled with other property acquired during the marriage are marital property. The party seeking to rebut that presumption must adequately trace the source of the funds. Separate property which is commingled with marital property or subsequently titled in both names is presumed to be marital property. *Chiotti v. Chiotti*, 12 A.D.3d 995 (3d Dept. 2004).

Equitable distribution encompasses a partnership, and a wife's marital contributions as a homemaker are presumed equal in value to a husband's contribution as an income earner. *Conner v. Conner*, 97 A.D.2d 88 (2d Dept. 1983).

A disability pension is presumptively marital property. A spouse who claims that the disability portion of his pension is separate property has the burden of proof that the disability portion is separate property. *Palazzolo v. Palazzolo*, 242 A.D.2d 688, 689 (2d Dept. 1997).

There is a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. Domestic Relations Law §237(a).

Burden of Proof

The burden of establishing that property is "separate" rests on the spouse who claims that it is separate. *Conner v. Conner*, 97 A.D.2d 88 (2d Dept. 1983); *Sclafani v. Sclafani*, 178 A.D.2d 830 (3d Dept. 1991); *Heine v. Heine*, 176 A.D.2d 77 (1st Dept. 1992). A spouse seeking an equitable distribution, or a distributive award of property titled in the name of the other spouse has the burden of establishing that it is "marital property" and the value of this property (*Davis v. Davis*, 128 A.D.2d 470 (1st Dept. 1987); *D'Amato v. D'Amato*, 96 A.D.2d 849 (2d Dept. 1983)) at the appropriate valuation date (*Antoian v. Antoian*, 215 A.D.2d 421, 422 (2d Dept. 1995)).

A spouse seeking a share of the appreciation of a spouse's separate property business during the marriage, owing to his own contributions to it, has the burden of proof of establishing "the baseline value of the business and the extent of its appreciation. *Morrow v. Morrow*, 19 A.D.3d 253 (1st Dept. 2005). If he fails to meet the burden of proof in establishing the value of the property he is not entitled to a distributive award in lieu of a share of it. *Hirschfeld v. Hirschfeld*, 96 A.D.2d 473 (1st Dept. 1983); *Rodgers v. Rodgers*, 98 A.D.2d 386 (2d Dept. 1983).

The party seeking an equitable distribution, or a distributive award, of marital property titled in the name of the other spouse, has the burden of proving its value. In *Capasso v. Capasso*, 129 A.D.2d 267 (1st Dept. 1987), the burden was on wife to prove the amount of the appreciation in value of the husband's business' during the marriage, a burden which necessarily required her to prove its value as of the beginning of the marriage. Since she did not do this, she was not entitled to an equitable share of this property.

A spouse who claims that the post-commencement appreciation in value of separate property was due to active appreciation, and, therefore, separate property, must show that the increase in value was due solely to his or her efforts. *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 421-22 (2009).

The party alleging that his or her spouse has engaged in wasteful dissipation of marital assets bears the burden of proving the waste by a preponderance of the evidence. *Epstein v. Messner*, 73 A.D.3d 843 (2d Dept. 2010). The party seeking a credit for payment of debts claimed to be a marital expense has the burden of proving that the debt was a marital expense. See *Stavans v. Stavans*, 207 A.D.2d 392, 393 (2d Dept. 1994).

Conclusion

There are many other presumptions which are applicable in matrimonial actions—too many to discuss in this article. For example, there is a rebuttable presumption that a noncustodial parent will be granted visitation with his child, even a parent who is incarcerated. *Matter of Granger v. Misercola*, 21 N.Y.3d 86 (2013). An attorney preparing for the trial of a matrimonial action must know all of the applicable presumptions and be prepared to meet her burden of proof on each issue.

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