FLORIDA'S ANTI-SUICIDE PRESUMPTION: AN EVIDENTIARY CHAMELEON

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Florida evidence law recognizes a presumption against suicide. In operation and effect, the presumption requires that the party alleging suicide in civil litigation must affirmatively prove that someone has voluntarily ended his or her life. Historically, the presumption developed in life insurance cases and required, in most instances, that insurance companies allege and prove suicide as an affirmative defense. The proper role and weight of the presumption has, however, been less than clear throughout the doctrine's existence. This doctrinal ambiguity is systemic and pervasive. One leading commentator, Professor Charles Ehrhardt, has accurately described the decisions as "hopelessly confused."[1]

This Article will demonstrate that the confusion surrounding this doctrine has become systemic. Doctrinal uncertainty has generated confusion in three sub-issues concerning the anti-suicide presumption: (1) the effect of the presumption itself; (2) the burden of proof in civil litigation when suicide becomes an issue; and (3) the sufficiency of the evidence when the suicide defense is raised, and proof of death is purely circumstantial.

Therefore, this Article will first attempt to trace the doctrine's historical development through the case law; second, it will isolate the doctrine's proper role in litigation; and third, the Article will suggest that a proper doctrinal analysis is available to eliminate the existing uncertainty. Initially, the discussion will center on the decisions of the Florida Supreme Court that directly resulted in the uncertainty surrounding the entire suicide issue.

I. GENESIS: THE PRESUMPTION DEVELOPS

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1. CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 304.1, at 88 n.13 (1996).

Suicide, as an issue in insurance litigation, first surfaced in the seminal case of *Sovereign Camp of Woodmen of the World v. Hodges*.[2] Hodges, the insured under an ordinary life insurance policy, was found dead in his room. His death was apparently caused by a single gunshot to the head, and a pistol with one expended shell was found a short distance from his body.[3] Woodmen, the insurer, refused to pay Hodges' estate's claim based on a policy provision. That provision excluded coverage when "the member holding the certificate should die `by his own hand or act, whether sane or insane' . . . ."[4] The estate brought an action to recover the policy proceeds and prevailed in the trial court. The insurance company appealed, alleging that the evidence established only suicide, therefore, the jury verdict was incorrect as a matter of law.[5]

In affirming the trial verdict, the Florida Supreme Court applied contract law to characterize suicide as an affirmative defense which had to be proven by the party alleging it. The court, however, held that the party alleging suicide must prove it only by a preponderance of the evidence.[6] Suicide, the court stated, must be proved in the "same manner as other facts are determined in civil cases. . . . [Thus,] the evidence should preponderate in favor of that contention."[7] By characterizing the suicide defense as it did, the court also resolved another issue that had been somewhat unsettled. Some prior cases, most notably *Schultz v. Pacific Insurance Co.*,[8] had indicated that, even in civil cases, a party alleging a criminal act must prove the allegation beyond a reasonable doubt.[9] *Hodges* definitively removed any uncertainty on that issue.

The court then examined the evidence to determine whether it was sufficient to support the jury's verdict. In doing so, the court engaged in a two-pronged comprehensive evaluation of both the objective (physical) and subjective (motivational) evidence; with regard to the latter, the court found the deceased was essentially a normal,

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2. 73 So. 347 (Fla. 1916).
3. *Id*. at 352.
4. *Id*. at 349.
5. *Id*. at 351.
6. *Id*. (citing Abraham v. Baldwin, 42 So. 591 (Fla. 1906)).
7. *Hodges*, 73 So. at 351.
8. 14 Fla. 73 (1872).
9. *See, e.g., id*.

well-adjusted, family man.[10] He was not under any financial pressure or emotional strain. There was, in short, no financial, emotional, or social reason that pointed to suicide.[11]

The court then reviewed the physical (objective) evidence, which it termed circumstantial.[12] This enabled the court to apply the criminal circumstantial evidence rule. The criminal rule, first announced in *Whetston v. State*,[13] precluded a conviction based entirely on circumstantial evidence unless it excluded any hypothesis of innocence. If the evidence allowed one or several hypotheses of innocence, or a mere probability of guilt, then the evidence was not sufficient as a matter of law, no matter how "great the probability may be."[14]

Finally, the court, in *Hodges*, explicitly rejected a presumption of law or fact against suicide. The court squarely held that "although love of life may be strong in mankind and self-destruction be regarded as in the nature of a criminal act" no presumption of suicide in either law or fact existed.[15]

In summary, *Hodges* addressed three distinct but, in the suicide-insurance context, interrelated issues: (1) burden of proof; (2) sufficiency of the evidence; and (3) recognition in Florida law of a presumption of fact against suicide. The contractual analysis described by the court assigned the burden of proof to a civil litigant alleging suicide as a preponderance of the evidence. If the alleging party relied exclusively on circumstantial evidence to prove suicide, it must rebut any other reasonable hypothesis. Finally, the court rejected any notion of a presumption against suicide.[16]

Although the *Hodges*' decision theoretically made suicide subject to a lower burden of proof, the court's treatment of circumstantial evidence made proof of suicide arguably more difficult in fact. It is, after all, the rare suicide case that comes complete with suicide notes and witnesses. Additionally, such treatment of circumstantial evidence could easily allow appellate courts, under the guise of finding a reasonable contra-hypothesis, to actually reweigh the evidence

10. *Hodges*, 73 So. at 352.
11. *Id.*
12. *Id.* at 351–52.
13. 12 So. 661 (Fla. 1893).
14. *Id.* at 663.
15. *Hodges*, 73 So. at 351.
16. *Id.*

and substitute their own conclusions for those of the initial fact-finder.[17] Finally, as an aside, *Hodges* displayed a jurisprudential approach by the Florida Supreme Court that was characteristic of the period.[18] Such an approach rejected judicially-created concepts such as presumptions in favor of a fact-specific approach that gave great deference to the initial fact-finder.

This initial clarity would prove to be short-lived. The uncertainty surrounding the issue would, in a series of cases, evolve from a trickle of uncertainty into a raging flood of confusion. The series began with the l936 case of *Mutual Life Insurance Co. v. Johnson*.[19]

II. EXODUS: HARD CASES MAKE BAD LAW

Johnson, a Jacksonville police officer, was described as a family man, married, and father of four who "owed very little, and had no financial or domestic troubles."[20] He was experienced in the use of firearms and on the night of his death was acting normally. He had, in short, no ostensible motive for suicide. After an apparently normal conversation with his wife, Johnson went to bed. At 11:00 P.M., or shortly thereafter, his wife heard a pistol shot and found him lying on his right side. The entry wound was apparently on the left side of his forehead (he was right-handed).[21] Johnson, at his death, was insured under both an ordinary life and double indemnity policy, which meant that in certain cases the insurance company would pay double the face value of the policy.[22] The company paid on the ordinary life policy but declined to honor the double indemnity provision because that provision required proof by the beneficiary that death occurred as a result of "external, violent and accidental

17. It could be argued that this treatment of circumstantial evidence arises from a court's desire to do justice in the particular case. Llewellyn, in *The Common Law Tradition*, described this approach as an appellate court's inarticulate focus on the "court's known duty to justice — to what is right and fair — on the particular case and on the particular parties who happen to be in hand. . . . [I]t is for all that a half-baked technique and one which strains toward both discontinuity and unwisdom." KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 43–44 (1960).

18. John E. Fennelly, *Up From* Carpenter: *Undue Influence in Will Contests*, 16 NOVA L. REV. 515, 515–16, 519 (1991).

19. 166 So. 442 (Fla. 1935), *on reh'g*, 166 So. 444 (Fla. 1936).

20. *Id*. at 445.

21. *Id*.

22. *Id*. at 444.

means."[23] Johnson's beneficiaries, his wife and four children, sued for payment on the double indemnity clause. After they prevailed in the trial court, the insurance company appealed.

Justice Terrell, writing for the Florida Supreme Court, first turned to the burden of proof issue. As did the *Hodges* court, he employed contract law to the issue, writing that:

> Pleas denied that the [insured] came to his death by accidental means and asserted that it was produced by self-destruction. Such was the clear issue presented at the trial. With the issue thus drawn, the burden was on respondent, plaintiff [beneficiaries] in the action, to prove that death resulted from accidental means.[24]

Then, without discussion of *Hodges*, Justice Terrell created an anti-suicide presumption out of whole cloth. He wrote that:

> To invoke the *presumption* of law against suicide in support of this issue, some evidence must be introduced consistent with the hypothesis of death by accidental means. The presumption of law against suicide is *rebuttable* and gives way when the cause of death is known and when the physical facts and circumstances are *wholly inconsistent* with any theory or hypothesis of death by accidental means.[25]

The shift from *Hodges* was actually two pronged. First, and most importantly, Justice Terrell created an evidentiary presumption against suicide which *Hodges* had explicitly rejected. The presumption was also burden-shifting since the burden against suicide would stand "until overcome by evidence sufficient to outweigh it."[26]

Second, Terrell seemed to contradict *Hodges*' treatment of circumstantial evidence. *Hodges*, it should be recalled, *precluded* a finding of *suicide* on circumstantial evidence if any other reasonable hypothesis could be gleaned from the evidence.[27] *Johnson* allowed an affirmative finding of accidental death from circumstantial evidence if the jury's verdict "is one that reasonably prudent men could have

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23. *Id.* at 445.
24. *Johnson*, 166 So. at 445.
25. *Id.* (emphasis added).
26. *Id.* at 446.
27. See *supra* notes 2–16 and accompanying text for a discussion of *Hodges*.

reached and is consistent with death by accidental means . . . ."[28] Circumstantial evidence would now be sufficient to establish accidental death, if *reasonable*. In contrast, to prove an affirmative defense of suicide under *Hodges*, circumstantial evidence had to *exclude* any other hypothesis. This was, then, a double volte-face.

The newly-minted presumption, Terrell concluded,

> [C]annot stand against uncontroverted evidence direct or circumstantial, which points *conclusively* to self-destruction, but when the cause of death is unexplained or if the evidence tends to establish death by accidental means, or some of the evidence is *consistent with a reasonable hypothesis* that death was not self-imposed, the presumption against self-destruction may prevail.[29]

This aspect of the opinion completely reversed *Hodges*' earlier treatment of the probative force and effect of circumstantial evidence. In suicide cases, it would be sufficient, if reasonable, to no longer exclude any other reasonable conclusion or finding by the fact-finder. This characterization of the anti-suicide presumption was arguably defined as one of fact not of law as though shifting the burden.

Johnson was and is troubling from a jurisprudential standpoint. The creation of the presumption clearly violated basic concepts of *stare decisis*. Its creation marked a major shift in Florida case law without discussing or explaining *Hodges*' shortcomings or without any policy imperatives that dictated a change. It is, of course, true, as Cardozo noted, that "in the main there shall be adherence to precedent. There shall be symmetrical development . . . . But symmetrical development may be bought at too high a price."[30] It is equally true, as Justice Cardozo stated, that a judge "is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to `the primordial necessity

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28. *Johnson*, 166 So. at 446.

29. *Id*. at 446–47 (emphasis added) (citing New York Life Ins. Co. v. Anderson, 66 F.2d 705 (8th Cir. 1933)). This issue will be the subject of further discussion. Two things should also be observed at this point. First, the general tenor of Justice Terrell's definition of the anti-suicide presumption supports a conclusion that he viewed it as arising only in completely circumstantial cases. Second, this portion of the opinion arguably blurs the distinction between the operation and effect of a presumption and the ultimate burden of proof.

30. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921).

of order in the social life.'"[31] In any event, *Johnson* clearly erected the presumption and arguably cast it in terms of a burden-shifting presumption of fact.[32]

Gulf Life Insurance Co. v. Weathersbee[33] accelerated the *Johnson* trend. Weathersbee was also insured under both an ordinary life policy and a double indemnity policy.[34] The evidence in this case concerning accidental death or suicide was entirely circumstantial.[35] Gulf Life tendered the ordinary life policy but declined payment on the double indemnity provision.[36] The beneficiaries, under the terms of the policy, had the burden of proving that death was caused "`by external, violent and accidental means.'"[37] The beneficiaries presented their evidence on those issues, and the trial court directed a verdict for them after the defendant insurance company offered no evidence.[38] Justice Terrell, writing for the Florida Supreme Court, affirmed.

It should be noted at the outset that *Weathersbee* is a very difficult case to analyze. It clearly continued the march away from *Hodges*' clear analytical format. Justice Terrell, arguably, confused two distinct issues: first, which party had the burden of proof on the issue of suicide; and second, what is the sufficiency of the evidence, as a matter of law, necessary to support a finding of suicide.

With regard to the first issue, Justice Terrell concluded that circumstantial evidence could, indeed, support a conclusion that the death was accidental within the meaning of the policy. The presumption against suicide while not evident, "controls the result when there is lack of competent evidence to show death by suicide . . . ."[39] This presumption "also controls in cases of death by unexplained violence . . . ."[40] The presumption, in Terrell's view, was a burden-shifting, substantive rule of law. The insurer, in circumstantial cases, must prove suicide against the presumption's weight.

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31. *Id*. at 141.

32. The distinction between the two types of presumptions will be the subject of later discussion. *See infra* text accompanying section III.B.

33. 172 So. 235 (Fla. 1936).

34. *Id*. at 235.

35. *Id*. at 236–37.

36. *Id*. at 236.

37. *Id*. (quoting the policy).

38. *Weathersbee*, 172 So. at 236.

39. *Id*. at 237.

40. *Id*.

The insurer must also overcome the anti-suicide presumption in unexplained cases of violent death. This portion of the opinion in effect rewrote the policy on the issue of the double indemnity provision.

Turning to the second issue, sufficiency of the evidence, Terrell found it inconclusive, or circumstantial.[41] The evidence pointed to death by accidental means with the presumption against suicide to preclude a finding of suicide. The presumption, in this aspect of the case, also determined the sufficiency of the evidence.[42]

Weathersbee also blurred the burden of proof issue. This occurred when Terrell observed that in determining if the death is caused by suicide or accident, "courts are not bound by either a preponderance of the evidence" standard or proof beyond a reasonable doubt standard.[43] This would subsequently lead to the reimposition of a criminal standard of proof beyond a reasonable doubt. This standard had been specifically rejected in *Hodges*.[44]

Finally, *Weathersbee* extended the reach of the presumption so that proof of external and violent death would trigger its operation (arithmetically speaking, E[xternal] proof plus V[iolent] means equals A[ccidental]).[45] In double indemnity cases, the result was a judicially-created shift in the burden of proof. This shift placed the burden of proof in a suicide case with the insurer. The insurance beneficiary need not prove anything. This arguably rewrote the policy.

To summarize this difficult and somewhat tangled case, the anti-suicide presumption placed the *burden of proof* in all instances on the party alleging it. This presumption also controlled the result in circumstantial evidence cases. The presumption in such cases required a finding of non-suicide unless the evidence overcame the presumption to the extent that it excluded any hypothesis other than suicide. Finally, *Weathersbee* seemed to blur the distinctive na-

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41. *Id*.

42. *Id*. *See infra* note 45 and subsequent text.

43. *Weathersbee*, 172 So. at 237. *See supra* notes 6–7 and accompanying text.

44. *See* Sovereign Camp of Woodmen of the World v. Hodges, 73 So. 347 (Fla. 1916).

45. This implicit expansion of the reach and effect of the presumption was made explicit in a subsequent case, Metropolitan Life Ins. Co. v. Jenkins, 12 So. 2d 374, 378 (Fla. 1943). "The law is that where death by external and violent means is established a presumption is thereby created, or prima facie proof is thereby made, that death was likewise by accidental means." *Id*. In other words, E + V = A.

ture of the burden which is the preponderance of the evidence versus beyond a reasonable doubt. These problems became explicit in an equally remarkable decision.

The *Johnson* shift reached its high watermark in 1943 with the Florida Supreme Court case of *New York Life Insurance Co. v. Satcher*.[46] *Satcher* transformed the anti-suicide presumption into a virtually impregnable doctrinal fortress. *Satcher* was remarkable from several standpoints. Unlike the earlier *Johnson* and *Hodges* cases, it is almost silent on the facts. Save for a cryptic reference to Satcher's illness,[47] the opinion contains no discussion of the cause of death.

The *Satcher* opinion initially restates the *Johnson* presumption as expanded by *Weathersbee*. The presumption is rebuttable but can, in double indemnity cases, be triggered by externally-caused, violent death.[48] Justice Terrell stated that "the presumption against suicide is not evidence but is a rule of law which in the event of an unexplained death by violence *requires the conclusion* that the death was not self imposed until credible evidence of suicide is offered."[49] If such evidence is offered, "the presumption vanishes and the court or the jury is at liberty to pass on the issues in the usual manner."[50]

Justice Terrell then suddenly shifted analytical gears. Turning from the presumption itself, he centered next on the burden of proof. In one precedent-shattering sweep, he reintroduced a criminal burden of proof in insurance cases when suicide was an issue.[51] This, as in *Johnson*, was done without discussion or analysis of conflicting and, arguably, controlling precedent. Justice Terrell held that "[t]he rule [in suicide cases] is generally approved that when the defendant comes forward with a plea of suicide *he must prove it beyond a reasonable doubt just as he would the defense in a criminal case. The evidence must exclude every other reasonable hypothesis of death*."[52] This latest reformulation of the presumption fused the criminal burden of proof (reasonable doubt) with the circumstantial evidence

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46. 12 So. 2d 108 (Fla. 1943).
47. *Id*. at 108.
48. *See supra* text accompanying note 45.
49. *Satcher*, 12 So. 2d at 108 (emphasis added).
50. *Id.* This choice of language also seems to contradict clear indications in both *Johnson* and *Weathersbee* that the presumption is factual and burden-shifting.
51. *Satcher*, 12 So. 2d at 108–09.
52. *Id.* (emphasis added).

rule. Hereafter, evidence must not only rebut every hypothesis other than suicide, but must do so beyond and to the exclusion of every reasonable doubt. *Satcher* and *Weathersbee*, in effect, rewrote double indemnity insurance policies by judicial fiat. *Weathersbee* expanded the anti-suicide presumption to include any externally-caused violent death, while *Satcher* required that suicide be proved beyond a reasonable doubt. All that remained of *Hodges* was its treatment of circumstantial evidence, which as indicated, was fused into the criminal burden of proof.

Thus, at the conclusion of this second period, Florida's law on this issue had been totally reformulated. Yet, this reformulation had been accomplished with almost no discussion of prior precedent or elaboration of the reasons for doctrinal change.

To reiterate, *Hodges* initially allowed suicide to be proven by a preponderance of the evidence. *Satcher* required proof beyond a reasonable doubt. *Hodges* rejected any presumption for or against suicide. *Johnson* recognized an anti-suicide presumption which was subsequently expanded in *Weathersbee*. *Satcher*, in turn, made the presumption virtually impregnable. Cases after *Hodges* continued to blur conceptual analysis of these three related but distinct issues: burden of proof; sufficiency of evidence; and the evidentiary status of the presumption itself. Given this long-standing and systemic confusion, it is not surprising that uncertainty is still as pervasive as previously indicated.[53] It is not, however, confined to the operation and effect of the presumption. It also involves the burden of proof as well as the circumstantial evidence rule. The balance of the discussion will address the anti-suicide presumption, the burden of proof, and the application of the circumstantial evidence rule. In addition, it will suggest a methodology that could remove the present uncertainty.

III. REDEFINITION: AN EVIDENTIARY CODE ANALYSIS AND RESOLUTION

As previously indicated, the anti-suicide presumption developed without significant doctrinal analysis and in apparent violation of principles of *stare decisis*.[54] The *Johnson* majority apparently over-

53. *See supra* text accompanying note 1.
54. *See supra* text accompanying note 30.

looked or ignored *Hodges*.[55] *Hodges*, for its part, categorically rejected any presumption against suicide.[56] With regard to doctrinal analysis, the presumption, in its early phases, was rooted in what was usually termed the common experience that "love of life may be strong in mankind . . . ."[57] This was, of course, an example of the common law as the law was shaped with conformity through customary morality.[58] One could argue that contemporary attitudes might cast doubt on the continuing validity of the anti-suicide presumption given the right to die movement, the Hemlock Society, and resistance to what is perceived as undue technological prolongation of human life.

A presumption, however, may also be rooted in notions of "fairness, public policy, and probability, as well as judicial economy . . . ."[59] In that regard, where suicide is raised in life insurance litigation, the company has already received the benefit of its bargain, such as the payment of premiums and the profits gained from investment of those premiums. In addition, the insurance company certainly has superior resources, ability and capacity to determine whether a suicide has taken place. Thus, it is not unreasonable to require that the company, at least in ordinary life cases, shoulder this initial burden.

Also, the anti-suicide presumption, despite its questionable pedigree, is firmly established in Florida law and serves a useful purpose. The true challenge is not the validity of the presumption, but a clear recognition of when it should arise, and what its probative force and effect should be when it properly becomes a factor in litigation.

A. The Presumption Rising

A close reading of *Johnson*, *Weathersbee* and other early cases reveals that the presumption was used only when there was no direct evidence of the mechanism of death — that is, in a purely circumstantial case. In such cases, the immediate cause of death, like

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55. *See supra* note 32 and accompanying text.

56. Sovereign Camp of Woodmen of the World v. Hodges, 73 So. 347, 353 (Fla. 1916).

57. *Id.* at 351.

58. *See generally* Mutual Life Ins. Co. v. Johnson, 166 So. 442 (Fla. 1935).

59. EHRHARDT, *supra* note 1, § 301.1, at 68.

firearms or poison, is known, but the actor's intent is not. In contrast, where there is direct evidence of an intentional act, the anti-suicide presumption simply should not play any role. Thus, in situations in which there are witnesses to an intentional or criminally negligent act, the presumption should not play any role in the case.

Justice Terrell, author of *Johnson* and the anti-suicide presumption, implicitly recognized this in the later decision *Kincaid v. World Insurance Co.*[60] In *Kincaid*, another circumstantial evidence case, Terrell reiterated his position that the presumption stands until evidence sufficient to overcome it is introduced.[61] This evidence can consist of myriad considerations such as powder marks, habits and temperament of the decedent, or financial, social or domestic environment.[62] Thus, whatever ultimate effect it might have had on a given case, the presumption only arose when there was no direct evidence of intent, and the issue of suicide was to be determined solely by circumstantial evidence. The presumption in such a case would "tip the scales" in favor of an accidental death conclusion. Given the equivocal historical pedigree of the anti-suicide presumption, it is apparent that the presumption must be reassessed to conform to the evidence code provisions governing presumptions.

B. The Presumption's Role Under the Florida Evidence Code

The evidence code recognized two types of presumptions which no doubt will continue to enliven what Professor Ehrhardt describes as a decades-long wrangle.[63] The first is Thayer, or "bursting bubble," presumption which addresses the burden of producing evidence.[64] It required the fact-finder to find the presumed fact in the absence of evidence to the contrary.[65] The second type recognized is a Morgan, or burden-shifting, presumption. This second type operates in a much more significant manner; it shifts the burden of proof to the opposite party to prove the non-existence of the presumed fact.[66] This distinction has direct and practical implications for the

60. 157 So. 2d 517, 519 (Fla. 1963) (Terrell, J., dissenting).
61. *Id*. at 523.
62. *See generally* EHRHARDT, *supra* note 1, § 301.1.
63. *Id*. § 302.1.
64. *Id.*
65. *Id.* § 302.1, at 78.
66. *Id.* § 302.2.

present discussion.

The Thayer, or "bursting bubble," presumption disappears when it is rebutted.[67] The Morgan, or burden-shifting, presumption remains in the case even when rebutted, and it requires the opponent to overcome its effect.[68] As Ehrhardt notes, "[w]hen evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case."[69]

Before the adoption of the evidence code, Florida courts displayed a marked preference for the Thayer, or "bursting bubble," presumption.[70] A presumption, as it were, for a presumption. This preference for a Thayer-type presumption was not clearly expressed in Justice Terrell's early decisions concerning the presumption.[71] Unfortunately, there has not been a definitive resolution of this issue.

With respect to analytical evaluation of presumptions in accordance with the evidence code, Gard, a leading commentator on Florida evidence law, noted that "[i]t will be up to the courts to sort out the presumptions and determine which presumptions fall into each class."[72] In his conceptual framework, "[p]resumptions which owe their existence only to facilitating the determination *of the action* actually can be expected to have very little to support them on the basis of the strong probative value of the basic facts."[73] The foregoing or facilitating types are the traditional "bursting bubble" or vanishing type of presumption. Ehrhardt, author of Florida's Evidence Code, shares this view.[74] He classified the Thayer presumption as a "procedural device which shifts the burden of first producing evidence."[75]

Morgan's burden-shifting presumptions, Ehrhardt notes, in

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67. EHRHARDT, *supra* note 1, § 302.1, at 78.
68. *Id*. § 302.2.
69. *Id.* § 302.2, at 79 n.4.
70. *See, e.g.*, *In re* Estate of Carpenter, 253 So. 2d 697, 703–04 (Fla. 1971).
71. *See supra* note 32 and accompanying text.
72. SPENCER A. GARD, FLORIDA EVIDENCE § 3:05, at 76 (2d ed. 1980).
73. *Id.* (emphasis added).
74. EHRHARDT, *supra* note 1, § 302.1.
75. *Id.* § 302.1, at 78.

contrast, "are recognized because they express a policy that society deems to be desirable. Because of the harm that would result to society and the individual if the presumed fact is disproved, a greater burden is placed upon a party to disprove the presumed fact."[76]

Therefore, it would seem imperative that Florida's appellate courts address this issue and definitively classify the anti-suicide presumption as either a Morgan or Thayer presumption. Because the evidence code recognizes the validity of both presumptions, Florida appellate courts also have a clear responsibility to give clear, cogent, and definitive direction to trial courts and lawyers. Unfortunately, this has not always been the case. As Ehrhardt notes, "decisions have not clearly enumerated the specific presumptions which will operate in this manner," for example the burden of proof versus burden of production issue.[77] This entire area is, as Ehrhardt notes, badly in need of systematic, evidence code-based analysis.

C. Burden of Proof: *Satcher* Revisited

Satcher[78] reintroduced a criminal burden of proof — beyond a reasonable doubt — in civil litigation when suicide was an issue. This marked a clear departure from *Hodges*, which had rejected this elevated standard. *Hodges* held that when suicide, or any allegations of a criminal act, became a material issue, it need only be proven by the normal burden of proof, which is a preponderance of the evidence.[79] *Satcher*, however, actually addressed three distinct evidence issues,[80] while ignoring the underlying policy issues raised by the presumption itself. This will require a two-staged analysis of both the evidence and insurance law issues.

As previously indicated, *Satcher* when read closely would support a conclusion that the reasonable doubt language was purely dicta.[81] Justice Terrell almost conceded this in the initial phase of the opinion by stating that "[w]e have examined the record and

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76. *Id.* § 304.1, at 84–85.

77. *Id.* § 304.1, at 86.

78. 12 So. 2d 108 (Fla. 1943).

79. Sovereign Camp of Woodmen of the World v. Hodges, 73 So. 347, 351 (Fla. 1916).

80. *Satcher*, 12 So. 2d at 108 (describing the anti-suicide presumption itself, the force and effect of the presumption, and the burden of proof).

81. *See id*.

think the case might be affirmed on the authority of *Mutual Life Insurance Co. v. Johnson*."[82] He went on, however, and characterized the presumption as "a rule of law which in the event of an unexplained death by violence requires the conclusion that the death was not self imposed until credible evidence of suicide is offered."[83] When the party offers this evidence, "the presumption vanishes and the court or the jury is at liberty to pass on the issues in the usual manner."[84] The opinion then concluded that "[t]he state of the evidence was such that it was within the province of the jury to give it such weight as it deemed proper."[85] Unfortunately, much more followed within this opinion.

Justice Terrell also indicated that "[t]he rule is generally approved that when the defendant comes forward with a plea of suicide he must prove it beyond a *reasonable doubt just as he would the defense in a criminal case*."[86] Justice Terrell argued that the party's evidence "must exclude every other reasonable hypothesis of death."[87] When evidence exists to support both a suicide and accidental death, the evidence against suicide must "*be overcome*, [and] the evidence must leave room for no other reasonable hypothesis than that of suicide."[88] Dicta aside, Terrell was, in reality, dealing with two distinct issues simultaneously: burden of proof and sufficiency of the evidence. Blending these distinct issues created the doctrinal confusion that still remains. The *Satcher* opinion also failed to discuss both the policy and substantive issues that were necessarily intertwined with the evidentiary issues.

From a substantive law standpoint, it must be noted that life insurance is only a species of the contract genus. Thus, courts must look initially to the contractually-allocated burdens of proof. In con-

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82. *Id.* (citations omitted).

83. *Id.*

84. *Id.* This portion of the opinion arguably defined the anti-suicide presumption, in evidence code terms, as a Thayer "bursting bubble." *See supra* notes 67–71 and accompanying text.

85. *Satcher*, 12 So. 2d at 108.

86. *Id.* (emphasis added). Thus, it is a burden of proof issue.

87. *Id.* This is a sufficiency of the evidence issue and involves the circumstantial evidence rule.

88. *Id*. at 109 (emphasis added). This language supports a conclusion that the anti-suicide presumption is burden-shifting according to the evidence code. The language also blends the circumstantial evidence rule into the presumption. Thus, it is a type of double strength presumption.

tractual terms, suicide is a condition that affects the duty of performance. As the *Restatement Second of Contracts* notes:

> [A]n obligor will often qualify his duty by providing that performance will not become due unless a stated event, which is not certain to occur, does occur. Such an event is called a condition. An obligor may make an event a condition of his duty in order to shift to the obligee the risk of its non-occurrence.[89]

Turning to life insurance, a distinction must be drawn between ordinary life and double indemnity policies in accordance with the *Restatement Second of Contracts*' conceptual analysis of conditional duty. In most instances, the ordinary life insurance policy treats suicide as a condition that must be demonstrated by the insurer. The insurer does not, in *Restatement Second of Contracts* terms, shift the burden of proving the non-occurrence of suicide to the obligee-beneficiary. Thus, the obligor-insurance company assumes this obligation of proof.

In the context of double indemnity life insurance, the reverse is true. The obligor-insurance company shifts the burden of proving the non-occurrence of suicide to the obligee-insured. This is but a recognition of contractual risk, defined as a condition. The *Restatement Second of Contracts* noted that

> Whether the reason for making an event a condition is to shift to the obligee the risk of its non-occurrence, or whether it is to induce the obligee to cause the event to occur, . . . there is inherent in the concept of condition some degree of uncertainty as to the occurrence of the event.[90]

Unfortunately, for purposes of this discussion, both *Hodges* and *Satcher* failed to discuss the substantive contractual burden of proof issues as set forth in the policies.

The parties themselves, as they are free to do, have contractually allocated the burden of proof. Therefore, based on that language, suicide becomes a condition that discharges a duty to pay on the policy. The obligor-insurer must then prove suicide in accor-

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89. RESTATEMENT (SECOND) OF CONTRACTS §§ 224–30, Topic 5, at 159 (1979) [hereinafter CONTRACTS].

90. *Id*. § 224 cmt. b, at 161.

dance with the terms of the contract. If, however, the obligor shifts the burden to the insured to prove the non-occurrence of the condition, the obligee-beneficiary must prove that suicide did not occur. The risk of proving the non-occurrence or occurrence of the condition of suicide is contractually allocated by the insurance contract itself. As indicated previously, the decisions in this area are uniformly silent on the underlying contractual issues.[91]

From a policy standpoint, a burden of production presumption within a contract for ordinary life insurance is appropriate, due to the superior resources of the insurer and its receipt of the benefit of the bargain — the paid premiums. As indicated previously, this classification is even more appropriate in the double indemnity context because the anti-suicide presumption is triggered by a showing of external violent death.[92] In addition, if the presumption is authoritatively defined as burden-shifting, it could be persuasively argued that the net effect would be a judicial rewriting of the insurance contract. This presumption could have the effect of negatively impacting the premium rates, the availability of double indemnity insurance, or both.

Turning to the burden of proof issue, both *Hodges* and *Satcher* also failed to discuss this issue from a policy standpoint. Judicial construction of an elevated burden of proof, which is unique to life insurance litigation, could also have the same negative impact on both premium rates and availability of life insurance.

Finally, suicide in the context of insurance is not actually the central issue of the case. Unlike civil theft or intentional torts, there are no heavy penalties, like punitive damages, apart from the loss of the policy proceeds. The former generally require a more elevated burden of proof to prevent injustice. Thus, the normal civil burden of proof is appropriate and in accordance with almost a century of Florida jurisprudence.

IV. CIRCUMSTANTIAL EVIDENCE AND THE ANTI-SUICIDE PRESUMPTION: FUSION AND POSSIBLE RESOLUTION

The confusion in suicide cases is further exacerbated by the operation and effect of one of the true sacred cows of Florida evi-

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91. *See supra* text accompanying notes 81–88.
92. *See supra* note 45.

dence law: the circumstantial evidence rule.[93] Florida appellate courts have traditionally cast a jaundiced eye on what has come to be called the "circumstantial case" (a case that relies totally on circumstantial evidence). On the criminal side, the aversion is long-standing and had its genesis almost one hundred years ago in *Whetston v. State*.[94] As previously discussed, this rule requires that completely circumstantial evidence must be consistent with, and exclude every other reasonable hypothesis than, the one it is offered to prove.[95]

Hodges, as indicated, extended the circumstantial evidence rule to the civil arena, at least when a criminal act is alleged.[96] Justice Ellis cited *Whetston* and held that circumstantial evidence must "'actually exclude every hypothesis but the one proposed to be proved.'"[97] *Hodges* then recognized the then vaguely-defined presumption against suicide when evidence of death was circumstantial.[98] The two doctrines have, therefore, operated in tandem almost from the outset. Both doctrines, however, predated the evidence code's more systematic development of the proper role of Thayer-type presumptions.[99] The codal developments have also been supplemented by extensive discussion by commentators on the proper role of the Thayer, or "bursting bubble," presumption.[100] Furthermore, as previously shown, the circumstantial evidence rule should play no role in the case of suspected suicide.[101] In conjunction, both the evidence code and the later explanations provide an adequate analytical framework to resolve the latent confusion generated by the twin operation of these doctrines.

As argued previously,[102] the presumption against suicide, properly defined, is one that merely facilitates resolution of an issue in a given case. It is not rooted in notions of public policy like the pre-

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93. *See generally* EHRHARDT, *supra* note 1, §§ 301.1–304.1.

94. 12 So. 661 (Fla. 1893).

95. *See supra* text accompanying notes 7–14.

96. Sovereign Camp of Woodmen of the World v. Hodges, 73 So. 347, 351–52 (Fla. 1916).

97. *Id*. at 352 (citing Kennedy v. State, 12 So. 858 (Fla. 1893)).

98. *Id*. at 351–52.

99. THE FLORIDA EVIDENCE CODE was adopted in 1978. Laws 1977, ch. 77-77, § 1, effective July 1, 1978 (codified as amended at FLA. STAT. ANN. § 90 (West 1979)).

100. *See* EHRHARDT, *supra* note 1, § 302.1.

101. *See supra* text accompanying notes 60–62.

102. *See* discussion *supra* text accompanying notes 72–77.

sumption of legitimacy of a child born during marriage.[103] The presumption should be treated as a Thayer, or "bursting bubble," presumption which becomes a permissive inference if rebutted. As Ehrhardt notes, "[i]f the presumption bursts and disappears because the opposing party has introduced evidence to disprove the presumed fact, *the jury is still able to draw a logical inference from those facts if the underlying facts are probative of the inferred fact*."[104] Ehrhardt also makes a critical distinction between inferences and presumptions.

> A presumption differs from an inference. An inference is a logical deduction of fact that the trier of fact draws from the existence of another fact or group of facts. A presumption is stronger; it compels the trier of fact to find the presumed fact if it finds certain facts to be present.[105]

The anti-suicide presumption when properly raised would still present an issue for the ultimate fact-finder, even if rebutted. In such a situation, the circumstantial evidence rule is simply not applicable. In fact, its use invades the proper province of the fact-finder. Ehrhardt's present position is eminently correct and was actually presaged in the landmark case of *In re Estate of Carpenter*.[106] While *Carpenter* dealt with the issue of undue influence, the case provides a cogent and convincing analytical framework to resolve the confusion generated by the dual operation of the circumstantial evidence rule and the anti-suicide presumption. For Justice Cardozo noted that:

> [S]ometimes [a precedent] by a process of analogy . . . is carried even farther. This is a tool which no system of jurisprudence has been able to discard. A rule which has worked well in one field, or which, in any event, is there whether its workings have been revealed or not, is carried over into another.[107]

Before *Carpenter*, the presumption of undue influence had also

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103. *See* EHRHARDT, *supra* note 1, § 304.1.
104. *Id.* § 302.1, at 78 (emphasis added).
105. *Id.* § 301.1, at 70 (footnotes omitted).
106. 253 So. 2d 697 (Fla. 1971).
107. CARDOZO, *supra* note 30, at 49 (footnote omitted).

been the source of considerable confusion.[108] In probate cases, the presumption of undue influence arose upon proof of (1) a confidential relationship; (2) an active procurement of a will by the person who had the relationship with the decedent; and (3) a benefit to that person.[109] Since its initial recognition,[110] the presumption of undue influence had meandered through the appellate decisions largely undefined and undiscussed. Over a thirty-year period, this presumption also had been treated as both a burden-shifting and a "bursting bubble" presumption and had engendered considerable uncertainty and confusion.[111]

Justice McCain, in *Carpenter*, faced the task of unscrambling doctrinal confusion[112] which is remarkably similar to the present situation. Justice McCain responded to this challenge with a brilliant analysis of the proper role of the fact-finder as well as brilliantly analyzing the origin and purposes of presumptions in the fact-finding process. Justice McCain sensed the very real conceptual danger posed by the burden-shifting presumption. In essence he argued that "the practical effect of shifting the burden of proof is to raise the presumption virtually to conclusive status and require a finding of undue influence . . . ."[113] This, to Justice McCain, was undesirable from a policy standpoint because it actually distorted the fact-finding process. The burden-shifting distortion was undesirable because "much of the discretion of the trial judge [or jury] to evaluate and weigh the evidence . . . is lost, and with it one of the most valuable services we call on trial judges [or juries] to perform . . . ."[114]

Justice McCain recognized the proof difficulties in undue influence cases. Thus, "in will contests the testator is not available as a witness to tell his version of such dealings, that in fact usually the only person who is available to testify is the confidential advisor whose self-interest furnishes a motive for him to take advantage of his superior position."[115] This difficulty did not alter Justice

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108. Fennelly, *supra* note 18, at 528.
109. *Id.* at 522.
110. *In re* Aldrich's Estate, 3 So. 2d 856 (Fla. 1941).
111. Fennelly, *supra* note 18, at 528.
112. *See generally id*.
113. *In re* Estate of Carpenter, 253 So. 2d 697, 703–04 (Fla. 1971).
114. *Id.* at 704.
115. *Id.* at 703.

McCain's view of the proper role of a presumption in the majority of cases. A proper presumption, he argued, "may aid" a party in discharging that party's burden of proof.[116] When that occurs, the adversary must then give an explanation to avoid the effect of the presumption.[117] In this sense, he recognized most presumptions really affect the order of proof not the burden of proof.[118]

In most instances, according to Justice McCain, the proper doctrinal balance was found in a vanishing presumption simply because "the facts giving rise to the presumption are themselves evidence of undue influence, those facts will remain in the case and will support a permissible inference of undue influence, depending on the credibility and weight assigned by the trial judge to the rebuttal testimony."[119]

In *Carpenter*, Justice McCain recognized that presumptions are, in most instances, simply logical constructs that perform a functional purpose.[120] These presumptions should not be elevated into transcendental dogmas that overwhelm fact-finding and fact-finders. Justice Holmes also recognized the danger of blind application of historical doctrine and warned against a tradition that "not only overrides rational policy, but overrides it after first having been misunderstood and having been given a new and broader scope than it had when it had a meaning."[121]

What was true concerning the presumption of undue influence before *Carpenter* is presently true of the anti-suicide presumption. Properly defined and historically examined, the presumption performs a useful function in the fact-finding process. As indicated,[122] it is properly rooted in fairness and facilitates trial. The insurance company has had, after all, the benefit of premiums. It also has the opportunity to rebut the presumption. The anti-suicide presumption, defined as a Thayer-type production, would therefore comport with Justice McCain's view of the importance of the fact-finding process and the proper role of the presumption in that process.

Fairness and the fact-finder's central role in the trial are strong

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116. *Id*. (citing Leonetti v. Boone, 74 So. 2d 551 (Fla. 1954)).
117. *Id*.
118. *Carpenter*, 253 So. 2d at 703.
119. *Id.* at 704.
120. *See id*. at 704–05.
121. OLIVER W. HOLMES, COLLECTED LEGAL PAPERS 192 (1920).
122. *See supra* text accompanying note 76.

arguments against a burden-shifting, anti-suicide presumption. Suicide, like undue influence, is in most instances difficult to prove. The anti-suicide presumption is, as Justice McCain noted of undue influence, "as difficult to disprove . . . as to prove."[123] Motive, family relations, finances, health and myriad other factors are all potentially relevant to a proper determination of the suicide issue. The responsibility to properly weigh those facts and draw the proper conclusion should rest, as Justice McCain convincingly reasoned, with the ultimate fact-finder.

V. A POST SCRIPT

Any future consideration of the issues raised in this discussion must recognize that these are judicially-created doctrines.

From a historical vantage point, many of these doctrines developed during what Professor Karl Llewellyn described as the "formal style"[124] of appellate decisionmaking. To Llewellyn, this period was characterized by appellate courts that "sought to do their deciding without reference to much except the rules, sought to eliminate the impact of sense, as an intrusion, and sought to write their opinions as if wisdom (in contrast to logic) were hardly a decent attribute of a responsible appellate court."[125]

Justice Cardozo put it in his characteristically gentle fashion when he described the period as reflecting the nineteenth century view of law as "`one of eternal legal conceptions involved in the very idea of justice and containing potentially an exact rule for every case to be reached by an absolute process of logical deduction.'"[126]

In contrast, Llewellyn argued for what he conceived of as the grand style as "the on-going, careful readjustment of doctrine to needs by way of overt recourse to the sense which ought to control in the given type-situation."[127] The resulting analysis should result in "constant use, in application of doctrine, and also in choosing among the branching doctrinal possibilities, of the best sense and wisdom it

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123. *Carpenter*, 253 So. 2d at 703.

124. LLEWELLYN, *supra* note 17, at 5–6.

125. *Id*. at 5–6 (emphasis omitted).

126. CARDOZO, *supra* note 30, at 77–78 (quoting Roscoe Pound, *Juristic Science and the Law*, 31 HARV. L. REV. 1047, 1048 (1918)).

127. LLEWELLYN, *supra* note 17, at 5.

can muster . . . ."[128]

This area needs the type of analysis advocated by Llewellyn and exhibited by Justice McCain in *Carpenter*, which is an examination that substitutes reasoned analysis for labels that give a false impression of certainty. This reasoned analysis must consciously arrive at a synthesis of precedents that presently are working at cross purposes. The doubt, disarray, and doctrinal uncertainty are long standing and entrenched. Florida's appellate courts should address these issues and provide a systematic, policy-based adjustment of their separate basis and proper role. It is time to respond to Justice Holmes' stinging indictment of unthinking application of outworn dogma:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[129]

Justice Holmes also thought that judges often fail to weigh social considerations in decisionmaking. This duty, he felt, was inevitable since failure to address policy considerations left the foundations of judgement unconscious.[130]

Finally, the analysis of the presumption against suicide should proceed first from a policy standpoint that is rooted in contract law. The parties to that contract have allocated the burden of proof with regard to the issue of suicide. Policy considerations, therefore, dictate that the bargained-for exchange on the issue of suicide be enforced.[131] That is, unless countervailing policy considerations dictate a contrary result. At present they do not. Therefore, the parties should receive the benefit of their bargained-for exchange.

Use of the presumption against suicide should be confined to cases of unexplained and violent death. It should play no role in cases in which there is direct evidence of the immediate cause of death, for example, in a case of self-inflicted gun shot in the presence of witnesses. When the presumption against suicide does properly arise in a case, contractual principles dictate that it should not

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128. *Id.*
129. HOLMES, *supra* note 121, at 187.
130. *Id.* at 184.
131. *See supra* text accompanying notes 89–90.

shift the burden of proof that is allocated by the insurance contract. Rather, the presumption should disappear when rebutted. This would allow, but not require, an inference to be properly drawn by the fact-finder.[132] This would, in turn, allow the fact-finder to properly weigh all the evidence in a given case.

Finally, again relying on contract principles, criminal law concepts should not be utilized in what is essentially a civil or contractual dispute. This change would eliminate application of the essentially criminal circumstantial evidence rule, as well as the criminal burden of proof. This would also strengthen the central role of the fact-finder in the manner envisioned by Justice McCain in *Carpenter*.[133]

Florida case law on the question of suicide is, at this juncture, tangled in a knot of conflicting concepts. The analysis offered in this discussion would: (1) seek to separate or untangle the knot; (2) proceed to a proper doctrinal analysis drawn from each area of law in both contracts and evidence; and (3) seek to enhance the role of the fact-finder and reduce reliance on conceptual constructs that at present obstruct just resolution of what are admittedly difficult cases.

Carpenter represents the proper balance struck when a presumption collides with the circumstantial evidence rule. Both doctrines should give way to an even higher imperative: the central role and duty of the fact-finder in any litigation.

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132. *See supra* text accompanying notes 113–18.
133. *See supra* text accompanying note 114.