Rel: January 17, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180375

Helene Hoehn Taylor

v.

Margaret Hoehn

Appeal from Baldwin Circuit Court
(CV-16-901229)

WISE, Justice.

Helene Hoehn Taylor, the plaintiff below, appeals from a judgment on partial findings entered by the Baldwin Circuit

Court in favor of Margaret Hoehn, the defendant below.[1] We affirm.

Facts and Procedural History

Baldwin County resident John Alphonse Hoehn ("Hoehn") died on or about October 17, 2014. He was survived by his wife, Margaret Hoehn, and four daughters -- Helene Taylor, Barbara Roberts, Ann Self, and Roman Fitzpatrick.

On March 2, 2015, Helene filed a petition in the Baldwin Probate Court, requesting that a will of Hoehn's that was dated June 7, 2005, be admitted to probate and that letters testamentary be issued to her. She attached to the petition an unsigned copy of a the purported will, stated that she believed that Margaret had the original signed will in her possession, and requested that the probate court enter an order requiring Margaret to produce the signed will so it

[1]Margaret made what she called a motion for a judgment as a matter of law, pursuant to Rule 50, Ala. R. Civ. P., at the close of Helene's case. However, because the circuit court conducted a bench trial, Margaret's motion was actually a motion for a judgment on partial findings pursuant to Rule 52(c), Ala. R. Civ. P. See Burkes Mech., Inc. v. Ft. James-Pennington, Inc., 908 So. 2d 905, 910 (Ala. 2004); Construction Servs. Grp., LLC v. MS Elec., LLC, [Ms. 2171099, June 28, 2019] ___ So. 3d ___ (Ala. Civ. App. 2019).

could be properly probated. The petition was assigned probate case no. 32010.

On March 18, 2015, the probate court scheduled Helene's petition for a hearing on April 8, 2015. It also ordered Margaret "to produce the original [will] at or before said hearing." On April 7, 2015, Margaret's counsel filed an unopposed motion to continue the hearing. On April 24, 2015, Margaret filed a motion to dismiss Helene's petition. In the motion, she alleged that Hoehn had died intestate and requested that Helene's petition be dismissed.

On March 28, 2016, Helene filed a motion requesting that Margaret be required to produce Hoehn's executed will. She also filed a motion to set a hearing on her petition to probate Hoehn's will. On April 13, 2016, the probate court scheduled Helene's petition to compel production of the will for a hearing on May 4, 2016. It also ordered Margaret "to produce the original [will] at or before said hearing."

On May 3, 2016, Margaret filed a response in which she asserted that she had been married to Hoehn for 46½ years and that she was not aware of any will that Hoehn had executed.

In that response, she also again requested that the matter be dismissed.

On May 4, 2016, Margaret filed a "Motion to Dismiss for Lack of Jurisdiction." She alleged that the action in the probate court was barred under § 6-5-550, Ala. Code 1975, because, she said, there was a similar action pending in the circuit court. On May 5, 2016, the probate court denied the motion.

On June 1, 2016, Helene filed a document in probate case no. 32010 captioned "Petition to Probate Lost Will." On June 7, 2016, the probate court scheduled the "Petition to Probate Lost Will" for a hearing on July 12, 2016.

On July 6, 2016, Margaret filed a document captioned "Widow Margaret Hoehn's Initial Pleading Contesting the Petition to Probate a 'Lost Will.'" On that same date, she also filed a document captioned "Widow Margaret Hoehn's Motion for Order of Transfer to Circuit Court (Filed Concurrently with Initial Pleading)." In that motion, she purported to contest the allegedly lost will, arguing that the will was never executed and that, if it was executed, it had been revoked. Margaret also requested that the will contest be

transferred to the circuit court pursuant to § 43-8-198, Ala. Code 1975. On October 17, 2016, the probate court transferred the case to the circuit court.

On June 29, 2017, Roman, Helene, Ann, and Barbara filed a motion to intervene in the circuit-court action. In their motion, they asserted that they were the intended beneficiaries under Hoehn's will and a trust Hoehn had created. On that same date, they filed a complaint in intervention. Ultimately, the circuit court dismissed the claims by the intervenors, concluding that the only matter that was properly before it was the will contest.

On November 14, 2018, the circuit court conducted a bench trial in the will contest. During the trial, Roman testified as a witness and identified Exhibit 1 as an unsigned copy of Hoehn's will. She testified that she was present when Hoehn signed his will, that Exhibit 1 was a true and accurate copy of the document she saw him sign, and that Exhibit 1 was dated June 7, 2005. Roman stated that in that will her father gave $125,000 to each of his four children and $10,000 to each of his grandchildren. She also stated that, in Article IV of the will, Hoehn directed that the remainder of his estate be

placed in the John Alphonse Hoehn Revocable Trust created by an agreement dated June 7, 2005. Roman identified Exhibit 2 as an unsigned copy of Margaret's will. She stated that, in Article IV of her will, Margaret directed that, after some specific devises, the remainder of her estate be placed in the John Alphonse Hoehn Revocable Trust.

Roman identified Exhibit 4 as an unsigned copy of the John Alphonse Hoehn Revocable Trust Agreement dated June 7, 2005, and she identified Exhibit 5 as a signed copy of the John Alphonse Hoehn Revocable Trust Agreement dated June 7, 2005. She testified that the trust was to be primarily funded by Hoehn's will. Roman identified Exhibit 6 as bank statements for the John Alphonse Hoehn Revocable Trust. Roman identified Exhibit 8 as the Margaret James Hoehn Revocable Trust Agreement dated June 7, 2005. Roman identified Exhibit 12 as an amendment to the John Alphonse Hoehn Revocable Trust Agreement and the Margaret James Hoehn Revocable Trust Agreement that both Hoehn and Margaret signed on June 5, 2009; the document was notarized by San Juanita Scarborough.

Roman stated that she met Hoehn and Margaret at attorney Deven Moore's office and that they insisted that she be in the

room when they signed their respective wills. She also stated that the signed wills for both Hoehn and Margaret were kept on top of a file cabinet in an office the family shared for many years. Roman testified that, when she remodeled the office, the wills were taken to her parents' house and placed on a dining-room table that Margaret used as a desk. She also testified that the last time she saw the wills was sometime around the beginning of November 2013.

Roman testified that Hoehn relied on her as a personal assistant. She admitted that, in February 2014, Hoehn revoked a power of attorney he had previously given her. However, she stated that Hoehn never expressed any intent to cancel or revoke his will and trust. She also stated that she did not believe that the notice of revocation of the power of attorney expressed Hoehn's actual intent or that Hoehn actually drafted the notice.

Finally, Roman admitted that Margaret had filed answers in response to discovery requests in which she had stated that she and Hoehn had "made the decision not to execute trust documents created by any lawyer" and that she was "not aware of any will executed by [Hoehn]."

Deven Moore, an attorney, identified Exhibit 1 as an unsigned copy of the will he had prepared for Hoehn. However, he stated that he did not remember any specifics regarding preparing the will and did not remember Hoehn actually signing the will. Moore admitted that the unsigned will was dated the same date as Hoehn's signed trust agreement, which would indicate that he had anticipated that Hoehn would sign both documents that same day. Moore stated that he did not have any reason to think that Hoehn did not execute the will at the same time he executed the trust.

Moore testified that his office normally keeps signed copies of the wills and trusts he prepares for clients. However, he testified that he did not have an executed copy of Hoehn's will, which he found strange, and that otherwise he would have assumed that Hoehn had signed the will. Moore testified that his office did not have a signed copy of Hoehn's trust agreement. He further testified that he was not aware of any other wills that Hoehn had ever executed and that he did not recall Hoehn ever asking him to change the will he had prepared. Moore stated that he could not dispute Roman's contention that she was present when Hoehn and Margaret

executed their wills and trusts. However, he stated that, "knowing what [he] knew about the family and the potential for subsequent litigation, it would have been unusual for [him] to have Roman or anybody else sitting right there" while the Hoehns signed the documents. Moore further stated that he normally tells children that it is best for them to wait outside while their parents sign such documents. He also stated that his practice in that regard has not changed materially since 2005.

Finally, Moore testified that, in early 2014, Hoehn sent him a letter regarding a "demand for records and revocation." In the letter, Hoehn stated that he had revoked the power of attorney he had given to Roman "as well as any other writing [he had] made which purports to gift any real property, business interest, cash, or anything of value to either Roman Kihano Fitzpatrick or Helene Taylor."

At the close of Helene's case, Margaret made an oral motion for a judgment on partial findings. See note 1, supra. At that time, the circuit court suspended the trial and ordered the parties to file briefs addressing Margaret's

motion. Subsequently, the circuit court entered a judgment in favor of Margaret. This appeal followed.

Standard of Review

> "The trial court received ore tenus evidence without a jury, and, in such a case, a motion for a 'judgment as a matter of law' is properly referred to as a motion for a 'judgment on partial findings.' See Rule 52(c), Ala. R. Civ. P.; Lawson v. Harris Culinary Enters., LLC, 83 So. 3d 483, 495 n.7 (Ala. 2011). See also City of Prattville v. Post, 831 So. 2d 622, 627 (Ala. Civ. App. 2002) ('A motion for a "judgment as a matter of law" asserted in a bench trial is actually a motion for a judgment on partial findings by the trial court.'). A motion for a judgment as a matter of law, formerly referred to as a motion for a directed verdict, in a nonjury action was formerly treated as a Rule 41(b), Ala. R. Civ. P., motion for an involuntary dismissal until Rule 41(b) was replaced by Rule 52(c), Ala. R. Civ. P. Hales v. Scott, 473 So. 2d 1028 (Ala. 1985) (treating a 'motion for a directed verdict' as a Rule 41(b) motion); Stroupe v. Beasley, 549 So. 2d 15, 16-17 (Ala. 1989) (same). Our supreme court has explained:
>
> > "'Rule 52(c), Ala. R. Civ. P., supplanted the involuntary-dismissal procedure in nonjury trials set forth in Rule 41(b), Ala. R. Civ. P. Loggins v. Robinson, 738 So. 2d 1268 (Ala. Civ. App. 1999). Thus, we will treat ... [a] motion for involuntary dismissal as one for a judgment on partial findings under Rule 52(c). Rule 52(c) provides:
> >
> > > "'"If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue,

> the court may enter judgment against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence."

"'Caselaw addressing involuntary dismissals under former Rule 41(b) is equally applicable to a judgment on partial findings entered pursuant to Rule 52(c). Loggins, supra. This court in Loggins set forth the applicable standard of review in such a case, as follows:

> "'"'[S]ince the Judge is the trier of fact in a nonjury action, he or she may weigh and consider the evidence on a motion for an involuntary dismissal. The normal presumptions of correctness attach to a trial court's ruling on an involuntary dismissal. The trial court's ruling need only be supported by credible evidence and will not be set aside unless it is clearly erroneous or palpably wrong or unjust.'"

"'738 So. 2d at 1271, quoting Feaster v. American Liberty Ins. Co., 410 So. 2d 399, 402 (Ala. 1982).'

> "King Power Equip., Inc. v. Robinson, 777 So. 2d 723, 726 (Ala. Civ. App. 2000)."

Reeves v. Fancher, 210 So. 3d 595, 598 (Ala. Civ. App. 2016).

Discussion

Helene argues that the circuit court erred in entering a judgment in favor of Margaret in the will contest. In entering the judgment in favor of Margaret, the circuit court entered a written order in which it thoroughly set forth the law and the facts and the basis for its judgment. Specifically, it explained:

> "The proponent of an unsigned will filed the will for probate as a 'lost will' in the probate court of Baldwin county. The case was properly transferred to this circuit court concurrently with the answer of the widow, Margaret Hoehn, who contested the admission of the will to probate. By statute, this court's only power is to determine whether the will should be admitted to probate, as set forth in [§] 43-8-198, Ala. Code 1975.
>
> "Contestant Margaret Hoehn, the wife of the deceased, moved for judgment [on partial findings] at the conclusion of the proponent's case seeking admission to probate of the 'lost will.' The contestant widow asserted that the 'lost will' could not, as a matter of law, be admitted to probate. After a bench trial in this matter, the court requested briefs. The court has carefully considered all evidence presented at the trial, the exhibits, the briefs submitted by the parties, and the applicable law.

"The Statute of Frauds declares that '[e]very agreement, contract or promise to make a will or to devise or bequeath any real or personal property or right, title or interest therein' is void unless in writing. Ala. Code [1975, §] 8-9-2. The proponent of the will in this case asserts the rare exception to that rule, that of the 'lost' will.

"The proponent of the 'lost will' submitted an unexecuted will which had been prepared by attorney Deven Moore more than 10 years ago. At the outset, the Court notes that it finds the testimony of attorney Deven Moore, as quoted in this opinion, to be fully credible in all respects.

"The elements necessary to 'prove' a 'lost' or 'destroyed' will are set forth in Tyson v. Tyson, 521 So. 2d 956 (1988):

> "1. The existence of a will -- an instrument in writing, signed by the testator or some person in his presence, and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator.
>
> "2. The loss or destruction of the instrument.
>
> "3. The nonrevocation of the instrument by the testator.
>
> "4. The contents of the will in substance and effect.

"Regarding element 1, the existence of a will, the Alabama Code has specific requirements for proof of execution of a self-proving will. Alabama Code [1975, §] 43-8-132[,] requires that each witness sign affirming that 'We, _____, the witnesses, sign our names to this instrument, being first duly

sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is 18 years of age or older, of sound mind, and under no constraint or undue influence.' [Section] 43-8-132 further requires notarization: 'Subscribed, sworn to and acknowledged before me by _____, the testator and subscribed and sworn to before me by _____, and_____, witnesses, this _____ day of _____, 19__.' The same requirement of two witnesses applies to a non-self-proving will under Alabama Code [1975, §] 43-8-131: 'Except as provided within section 43-8-135, [Ala. Code 1975,] every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.'

"Roman Fitzpatrick testified only that she saw her father sign a will. She testified:

> "'Q. Okay. I'd ask that you review the next page, and I would ask you if Exhibit 1 represents a true and accurate copy of the will that you observed your father execute?
>
> "'A. Yes, sir.
>
> "'BY MR. RAINEY [counsel for Helene]: Your Honor, we would offer Plaintiff's Exhibit 1.
>
> "'THE COURT: Exhibit 1 will be admitted.

> "(PLAINTIFF'S EXHIBIT 1 WAS OFFERED AND ADMITTED INTO EVIDENCE.)
>
> "'BY MR. CASSADY [counsel for Margaret]: Admitted into evidence but not into probate at this point?
>
> "'THE COURT: Correct.'

"Attorney Moore testified that he had no personal recollection of any of the required signatures actually occurring, or the notarization:

> "'Q. All right. So, Mr. Moore, you make it clear for the record that you have no personal recollection whatsoever of Mr. Hoehn signing a will in your office?
>
> "'A. That is true.
>
> "'Q. You have no personal recollection whatsoever of any witness signing the will?
>
> "'A. That's true.
>
> "'Q. You have no personal recollection whatsoever of a notary public notarizing it?
>
> "'A. That's true.
>
> "'Q. You have no recollection whatsoever of Roman [Fitzpatrick] being present -- Roman [Fitzpatrick] being present, as an adult child, with her parents?
>
> "'A. None.'

"Roman Fitzpatrick's testimony does not prove the statutory standard of two witnesses signing the

will. In fact her testimony did not identify any signatory witnesses to the execution of the will, or the necessary element that those signatory witnesses observed John Hoehn sign the will, and therefore, her testimony does not prove the existence of a will. This is in addition to the fact that Attorney Moore testified his business habit would have been to exclude Roman Fitzpatrick in the room when a will leaving property to her was being executed, due to undue influence considerations. The court finds Attorney Moore's testimony regarding his habit of excluding devisees under a will from the will's execution to be fully credible in this case.

"The case of Tyson v. Tyson, 521 So. 2d 956[, 957] (1988), is dispositive, and prohibits admission of the will to probate. In that case, the failure to prove that the will was executed in the presence of two witnesses defeated the lost will claim. The opinion reasoned:

> "'In the case at bar, proof of the execution of the "lost" will is at issue. At the hearing on the motion for summary judgment, Mr. Eugene Hankins testified that he was a Survivor's Assistance Officer with the United States Army. His job included assisting the widows of retired or active duty soldiers in the management of their affairs. He further testified that he assisted Mrs. Tyson following the death of her husband and that while he was helping her get the decedent's affairs in order, he saw a will. According to Mr. Hankins, the alleged will was signed by the testator and two witnesses, although he could not remember the names of these witnesses nor the date of execution of the document. When questioned further regarding the contents of the will, Mr. Hankins was unable to recall the specific devises.

> "'The only other evidence offered by the proponent of the lost will was the testimony of Louis Tyson [the decedent's brother] himself. Mr. Tyson testified that he had seen the alleged original will and that it had been dated and signed by two witnesses. He likewise could not recall the names of those witnesses nor the date of execution.
>
> "'Following the hearing on the evidence in the case, the judge granted summary judgment to Mrs. Tyson, stating that "the proponent of the probate of the alleged lost will of Shelly Tyson will never be able to prove execution as required by law under the evidence offered [at the hearing] on summary judgment." We agree. Nowhere in the record is there any evidence that would indicate that the alleged witnesses to the will signed in the presence of the testator. Furthermore, because the names of the witnesses are admittedly unknown, it would obviously be impossible to offer evidence regarding whether they signed in Shelly Tyson's presence. The two people who testified in this regard were unable to say whether the signatures of the witnesses were valid. In fact, they could not even remember the names of the witnesses.
>
> > "'"Of course, an essential to the availing, or the establishment, of a lost deed or will, is that the instrument in question should have been, and, in consequence, is shown to have been, executed as the law requires as to instruments of the character here under inquiry, that it was 'signed by the

> testator or some person in his presence, and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator.' Code, § 6172 [(1907)]."

> "'Allen v. Scruggs, 190 Ala. 654, 659, 67 So. 301 (1914). Because we find from the materials before the court on the summary judgment motion that the appellant would not be able to prove due execution of the will, we find that the summary judgment was properly granted. That judgment is due to be affirmed.'

"The only witness who claimed to have seen John Hoehn sign a will was Roman Fitzpatrick. Attorney Moore testified he would not have allowed her in the room at the time of execution:

> "'Q. And, in fact, it would be your practice not to allow someone who's receiving a gift under the will to be present at the time of the execution of the will?
>
> "'A. Correct.'

"Mr. Moore further testified that his firm has no ordinary course of business evidence of the execution of the will by John Hoehn:

> "'Q. And so, if you don't have a signed copy of a will that you prepared, then that is, in terms of your business practice of maintaining documents in the ordinary course of business, it indicates that that document did not exist in the ordinary course of business in your -- in your office, correct?

"'A. Yes.'

"He testified again during the proponent's case as to his habit:

"'Q. And for the -- It is your habit as a lawyer to keep a copy of a signed will if it is executed in your -- if it's executed in your office, your assistant goes and gets a photocopy and before -- and puts it in your file, correct?

"'A. That is definitely our habit, yes.'

"Thus, the lawyer that drafted the will, who testified as to his habit and business practice of maintaining a copy, testified he could not testify under oath as to the execution of the will.

"On this basis alone, the lack of proof of execution of the will, the judgment [on partial findings] is due to be granted. However, it should also be granted on other equally conclusive grounds. Specifically, the proponent did not prove non-revocation.

"Regarding non-revocation, a signed copy of the will did not exist. Mr. Moore agreed that even if he had a properly executed copy in his file, the lack of any original will with original signatures created a presumption that John Hoehn revoked his will:

"'Q. All right. And even if you had a signed copy in your file, and the original could not be located, what would that indicate under the law? It would indicate revocation, wouldn't it?

"'A. If the original could not be located, yeah, it would -- it would

> indicate that somebody had destroyed the original, done away with it, yes.
>
> "'Q. A presumption under the law arises when someone -- when all that's existent is a copy of a will, and it may be in a lawyer's file, but when the original cannot be located, a presumption arises that it was revoked by the testator, Correct?
>
> "'A. That's correct. That's correct.'

"Further regarding the failure of proof by the proponent of non-revocation, Roman Fitzpatrick was the only witness who testified that she had seen a will signed by her father, John Hoehn. She also admitted that [Hoehn] sent her a notarized letter stating the following, which she read into evidence:

> "'Q. This Defendant's Exhibit 2 is an exhibit you have also introduced. And you've described that letter to the Court, but I would like you to, please, read that letter, what your father wrote to you on that day.
>
> "'A. Dear Roman: Due to your theft of our hard earned money out of an account on which your name was added simply for convenience, as well as your other actions of theft and betrayal, your mother and I have revoked the powers of attorney previously given you. Further, I am taking all actions to remove your name from my properties, accounts and the like. I wrote you a letter of forgiveness of debt on November or December 2013. You procured this letter from me through fraud when you kidnapped me. That letter was void and was -- is without effect. Further, I revoke any other writings I have given you in the past

> which reflect[] my intent to gift accounts or properties to you.
>
> "'Specifically I revoke any letter whereby I have previously expressed my intention to give you an interest in my home in Glen Lakes. You have betrayed and destroyed the trust your mother and I had in you.'

"Attorney Moore also testified that John Hoehn wrote him a notarized letter entitled 'Revocation' which applies to any writing he had signed:

> "'Q. First of all, that letter['s] to you, correct?
>
> "'A. It is.
>
> "'Q. And that doesn't just cover a power of attorney, does it; it covers any writing, doesn't it?
>
> "'A. It terms of what he's asking for?
>
> "'Q. Yes.
>
> "'A. Yes.
>
> "'Q. And that is a -- And what is the re: line, revocation?
>
> "'A. Demand for records and revocation, yes.
>
> "'Q. And so, when he says, please be advised I have revoked my prior power of attorney, as well as any other writing I have made which purports to gift any real property, business interest, cash, or anything of value to either Roman Kihano Fitzpatrick or Helene Taylor, clearly that

> is a reference to any writing -- a will, a deed, anything that can be revoked -- he's revoking it; true?
>
> "'A. As well as any other writing I have made which purports to gift any real property, business interest, cash, or anything else to Roman or -- Yeah. I mean, it says what it says.'

"Section 43-8-136(b), Ala. Code 1975, provides, in relevant part: 'A will is revoked by being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in his presence by his consent and direction.' Mr. Moore agreed that John Hoehn (had he signed a will) did not need to write anything to anyone to revoke that will:

> "'Q. And a will may be revoked in any number of ways; they can tear it up?
>
> "'A. Uh-huh. (Witness indicates affirmatively.)
>
> "'Q. They can throw it in a trash can?
>
> "'A. Uh-huh. (Witness indicates affirmatively.)
>
> "'Q. They can do -- Anything that makes it -- the original disappear, is indication of revocation, right?
>
> "'A. Uh-huh. (Witness indicates affirmatively.)
>
> "'Q. If you would say yes?
>
> "'A. Yes. I'm sorry.
>
> "'Q. Okay. Thank you.'

"Revocation of a power of attorney, however, does require a writing, and it is undisputed that John Hoehn met that requirement:

"'Q. I believe I just handed you Exhibit 14. What is that document entitled?

"'A. Notice of Revocation of Power of Attorney of John A. Hoehn.

"'Q. Okay. And what's the date of that?

"'A. January 15, 2014.

"'Q. Okay. And that document does not reference a revocation of his will or trust anywhere in there, does it?

"'A. No, sir.'

"The importance of the revocation of the Power of Attorney by John Hoehn is consistent with other evidence demonstrating his intent to be certain that Roman Fitzpatrick did not obtain his property when alive, or after he died.

"As was noted by Attorney Moore in his testimony, even if a signed copy (not original) of a properly executed will existed, revocation would still be presumed in this case. In Stiles v. Brown, 380 So. 2d 792 (Ala. 1980) and in Bond v. McLaughlin, 229 So. 3d 760 (Ala. 2017), the Supreme Court discussed the presumed fact that a will has been revoked when only a signed copy exists:

"'The fact that the will left in the testator's possession cannot be found after his death creates a presumption that the will was destroyed by the testator animo revocandi, or with intent to revoke. The presumption referred to is not an

> irrebuttable conclusion of law; it is a mere inference of fact. Our cases clearly hold that this presumption of revocation or inference of fact is rebuttable and the burden of rebutting the presumption is on the proponent of the will.'

"Roman Fitzpatrick testified that her father had possession of his will and that he was a decisive man and that he was in possession of his will and was 'absolutely' aware of where his will was located:

> "'Q. Was your dad decisive in his decisions?
>
> "'A. Oh, yes, sir.
>
> "'Q. How was your dad with regard to keeping up with things; I mean, was he organized or was he unorganized?
>
> "'A. He was fairly organized, but he leaned a lot on his personal assistant. (Witness indicating.)
>
> "'Q. You?
>
> "'A. Myself.
>
> "'Q. Okay.
>
> "'A. And Helene.
>
> "'Q. All right. With regard to the will and the trust documents, who did he rely upon to maintain those documents?
>
> "'A. He and my mother's possession, yeah.
>
> "'Q. He was aware of where they were?

"'A. Absolutely, yes.'

"Roman Fitzpatrick was the sole witness who claimed to have personal knowledge that her father signed a will. She was also the person who had extremely upset her father by removing $400,000 from his bank account. When she did that, John Hoehn wrote Roman Fitzpatrick a notarized letter stating:

> "'[Due to] your theft of our hard earned money out of an account on which your name was added simply for convenience, as well as your other actions of theft and betrayal, your mother and I have revoked the powers of attorney previously given you. Further, I am taking all actions to remove your name from my properties, accounts and the like. I wrote you a letter of forgiveness of debt on November or December 2013. You procured this letter from me through fraud when you kidnapped me. That letter was void and was -- is without effect. Further, I revoke any other writings I have given you in the past which reflect[] my intent to gift accounts or properties to you. Specifically I revoke any letter whereby I have previously expressed my intention to give you an interest in my home in Glen Lakes. You have betrayed and destroyed the trust your mother and I had in you.'

"The proponent placed this letter into evidence as part of the proponent's case. As noted in the Supreme Court's published opinion in the prior case involving these parties [262 So. 3d 613 (Ala. 2018)], Roman Fitzpatrick claimed that she had removed $400,000 from her father John Hoehn's bank account at his direction but returned it. She had also withdrawn $395,000 from a joint account with her mother and refused to return it. The jury in the prior case determined that no amount of the $395,000

> was Roman Fitzpatrick's money and that the money was, as John Hoehn wrote in the above letter, an account on which Roman Fitzpatrick's name 'was added simply for convenience.' The jury ordered that the $395,000 be returned to Margaret Hoehn.
>
> "The Court finds the testimony of Roman Fitzpatrick not credible on the issue of observing her father sign the will, based on the Court's ore tenus observation of her as a witness in this trial, but equally because the Court finds fully credible Attorney Moore's testimony that he would not have allowed Roman Fitzpatrick in the room for the execution of the will. Regardless, however, there was no testimony of the proper execution by two witnesses.
>
> "It was the burden of the proponent to prove execution and to prove non-revocation. This burden was not met.
>
> "Accordingly, it is ORDERED that the proponent's alleged will of John Hoehn shall not be admitted to probate."

The record supports the circuit court's findings. Roman testified that she was present at attorney Deven Moore's office and that she saw Hoehn sign the will that Helene sought to have admitted to probate. Moore testified that the will he prepared was self-proving. However, Roman did not testify, or present any other evidence to establish, that Hoehn signed the will in the presence of two witnesses and a notary public, that two witnesses also signed the will, and that a notary public notarized those signatures. Further, Moore could not

support Roman's testimony because he did not recall the execution of the will and because he did not have an executed copy of the will in his office files. Finally, the circuit court found that Roman was not credible as to the issue whether Hoehn signed the will. Therefore, the circuit court could have reasonably concluded that Helene did not establish that Hoehn ever properly executed the purportedly lost will.

Moreover, there was also evidence from which the circuit court could have reasonably concluded that, even if Hoehn had signed the will, that will had been revoked. Although Roman testified that the signed will had been kept in the family office and later on the dining-room table in Hoehn and Margaret's house, that will could not be located after Hoehn died. Also, there was evidence indicating that Hoehn sent letters or notices to both Roman and Moore stating that he had revoked the power of attorney he had given to Roman and that he was revoking any other writings that had reflected an intent on his part to give her money or property. Therefore, the circuit court could have reasonably concluded that Helene did not rebut the presumption that, if Hoehn had signed the will, he later revoked it.

The circuit court heard ore tenus evidence and had the best opportunity to evaluate the demeanor and credibility of the witnesses. It specifically found that Moore was a credible witness and that Roman was not. Based on our review of the record before us, we hold that the circuit court's conclusions were not clearly erroneous.

Conclusion

For the above-stated reasons, we conclude that the circuit court properly entered a judgment on partial findings in favor of Margaret as to the will contest. Accordingly, we affirm the circuit court's judgment.

AFFIRMED.

Parker, C.J., and Bolin, Sellers, and Stewart, JJ., concur.