

SUPREME COURT OF NOVA SCOTIA

Citation: *Lawrence Estate v. Lawrence*, 2025 NSSC 369

Date: 20251201

Docket: *Yar*, No. 497594

Registry: Yarmouth

Between:

The Estate of Thelma Muriel Lawrence, represented by Personal Representatives
Corinne Elizabeth Lawrence and Ellsworth Leroy Lawrence Jr.

Applicants

v.

Elton Emmanuel Lawrence

Respondent

Judge: The Honourable Justice Muise

Heard: July 2, 3, & 4, 2025 in Yarmouth, Nova Scotia

Counsel: Gregory Barro, KC, for the Applicants
Matthew Fraser, for the Respondent

By the Court:

INTRODUCTION

[1] During a family gathering following Thelma Lawrence's funeral, her four children discussed the handling of her estate and signed an agreement. It stated, among other things, that they agreed to liquidate all assets at Thelma's death "to" an account, and that "any designated beneficiary, co-owner, joint owner or other bequest should be deposited in the account" and "any assets that arise or are discovered after this date [i.e. the date of the agreement] will be deposited to the account". It also provided that the net assets remaining after all liabilities had been satisfied were to be divided equally amongst all four of them.

[2] The four children are Ellsworth Leroy Lawrence Jr. (AKA Lee), Corinne Lawrence, Tony Lawrence and Elton Lawrence.

[3] They all have the last name Lawrence. Many of the other witnesses also have the last name Lawrence. After introducing them with their first and last name, I will refer to them by their first name to avoid confusion. I mean no disrespect in doing so.

[4] In addition, many of the persons involved in this case had nicknames which were used by various witnesses. However, I will avoid the use of nicknames except to distinguish Ellsworth Leroy Lawrence Jr. ("Lee") from Ellsworth Leroy Lawrence Sr. ("Leroy").

[5] Elton testified that he discovered, at some point after that meeting, that he was named as a joint tenant on the deed to the home his mother and father had been living in prior to their death ("the Homestead"). He was the only surviving joint tenant. He also testified that, when he signed the agreement, it was on the understanding that it was in relation to personal property assets only.

[6] The Estate takes the position that Elton holds the home in a resulting trust as he has not rebutted the presumption set out in *Pecore v Pecore*, 2007 SCC 17, and that, even if he has rebutted that presumption, the house was part of the agreement and is to be divided equally amongst all four children.

[7] The Estate brought the within action for a declaration of resulting trust and an order directing Elton to deed the homestead to the Estate, or, in the alternative,

for a determination that Elton has breached the said agreement and an order for specific performance.

[8] I heard the trial July 2, 3 and 4, 2025. This is my decision following trial.

ISSUES

[9] The issues to be determined are:

1. Is Elton holding legal title to the house in a resulting trust for the Estate as the beneficial owner?
2. Did the four children reach a binding agreement encompassing the Homestead, including whether the agreement was void under the law of mistake?

LAW AND ANALYSIS

ISSUE 1: IS ELTON HOLDING LEGAL TITLE TO THE HOUSE IN A RESULTING TRUST FOR THE ESTATE AS THE BENEFICIAL OWNER?

[10] The Supreme Court of Canada, in *Pecore v. Pecore, supra*, ruled that, where there is a gratuitous transfer from a parent to an adult child, the presumption of resulting trust applies, such that the child holds the transferred property in trust for the parent or their estate, as applicable. However, the child can rebut that presumption by establishing, on a balance of probabilities, that the parent did not intend that the child hold the property in trust for them, but rather, in the context of a jointly held asset, intended to gift the right of survivorship to the child. “[T]he presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.” It is the parent’s intention at the time of the transfer that is to be determined. Therefore, the evidence relating to it “ought to be contemporaneous, or nearly so” to it. Evidence of intention post-dating the transfer may be considered. However, “[t]he trial judge must assess the reliability of the evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.” [Paras 24, 40 - 44, 53, and 55 – 59.]

[11] As stated in *Fuller v. Harper*, 2010 BCCA 421, at paragraph 47:

The effect of the presumption only becomes evident after all the evidence, both direct and circumstantial, on the surrounding circumstances in which the transfer

was made, has been weighed. Only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of the transfer, will the presumption be applied to tip the scales in favour of the transferor or his estate...

[12] Lee, Tony and Corinne provided similar evidence regarding their understanding of a condition Elton had to fulfill to acquire the Homestead as a gift.

[13] Lee testified to that which follows:

- In 2012, their mother asked him if he wanted to move down, live with her, take care of her and their father, Ellsworth Leroy Lawrence, Sr. ("Leroy"), and become owner of the home, as their father's health was deteriorating and she could not do everything on her own.
- He told her it was not a good time for him.
- She said that Tony and Corinne were also unable to move but Elton said he would.
- He subsequently spoke to Elton, who lived $\frac{1}{2}$ to $\frac{3}{4}$ of a block from him. Elton told him their mother was giving him the house. He said to Elton: "Good for you. If you uproot your family and move, you deserve it."
- In 2018, their mother was still holding out hope Elton would move home.

[14] Tony testified to that which follows:

- The conversation regarding one of the children coming home and taking care of their mother and father started around 2009, when their father started to fail with dementia.
- At the time, Elton was the better choice to go down and help their mother because he did not have a job.
- In 2011, their mother talked about Elton "possibly" coming down.
- Elton went down to look for a job.
- Elton expressed a willingness to fulfil the duty and get the Homestead as compensation for giving up his livelihood.
- When he came home for his father's funeral (which was in 2017 or 2018), his mother said it did not seem like Elton was coming home

because he had a good paying job in Edmonton. She said that, for the time being, her granddaughter, Brandy Jarvis, could fill the gap, and there might be a solution closer to her death.

- She kept voicing concerns that Elton was not coming down and asking when he was coming.

[15] Corinne testified to that which follows:

- Their mother said that Elton was willing to come live with her and agreed to take care of her. She estimated that was around 2012 but noted she was not good with years.
- Their mother would always ask when Elton was coming.

[16] Brandy Jarvis, Tony's daughter, testified to the following:

- She was very close with Thelma. She was raised by her and her husband, Leroy.
- Before Leroy moved to the Veterans Affairs Home, the topic of conversation was always: "Who would come home? Who would like the house?" Ms. Jarvis was told that which follows.
- Starting with the oldest, they asked each child whether they were willing to come home and take care of their mother. Taking care of her was always attached to the house.
- Elton said "yes" and that he was willing to come home.
- Before Thelma died, Elton came home a couple of times looking for an electrician's job. Thelma said it was not feasible at the time.
- She believed he was coming home and moving into the family home.
- Ms. Jarvis, on cross-examination, agreed with the suggestion that Thelma's purpose for wanting one of them to come home was that she wanted the house to remain in the family. She responded emphatically with "Exactly!"
- Thelma was looking to the future. She did not need anyone to look after her. However, towards the end she was getting to the point where she did need help.

- There was no specific timeframe during which Elton would be required to look after her. There were no specific chores that he would be responsible for.

[17] Section 45 of the *Evidence Act*, R.S.N.S. 1989, c. 154, provides that:

[I]n any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, award or decision therein on his own testimony, or that of his wife, or of both of them, with respect to any dealing, transaction or agreement with the deceased, or with respect to any act, statement, acknowledgement or admission of the deceased, unless such testimony is corroborated by other material evidence.

[18] The within action was brought against Elton by the Estate of Thelma Lawrence, represented by Lee and Corinne.

[19] Lee, Tony and Corinne, as well as Elton, are “interested” parties, as the outcome of the within proceeding will determine their entitlement to assets.

[20] Ms. Jarvis is Tony’s daughter and, as such, if her father acquires a $\frac{1}{4}$ interest in the Homestead, it increases the potential that she may inherit a portion of that value on her father’s passing. However, she does not stand to directly gain from the outcome of this litigation. Therefore, she is a sufficiently independent witness, and, following the approach outlined in *Harvey Estate, Re*, 2006 NSSC 118, at paragraphs 11 to 18, her evidence is sufficient, to provide Section 45 corroboration of Lee, Tony and Corinne’s evidence on what their mother told them regarding the acquisition of the Homestead by one of her children.

[21] Elton and the witnesses who testified in support of his case provided evidence that Thelma, and to a lesser extent, Leroy, stated that Elton would be getting the Homestead without any condition attached to the gift.

[22] Elton testified to that which follows:

- He was born December 19, 1974. He moved to the Homestead when he was 10 months old and was adopted by Thelma and Leroy, his biological mother being Corinne.
- He grew up in the Homestead as an only child at the time.

- Starting in the mid to late 1990s, when he had moved to Vancouver, over the years, his mother always told him the house was supposed to go to him.
- She said the others had been asked and said they did not want the house.
- She wanted it kept in the family.
- Occasionally, she would say “the house is here” and “it would be nice if you could come back home”. He agreed his mother would have been happy to see him move home and, right up to her passing, hoped that he would do so. However, no condition that he had to come home to get the house was mentioned to him.
- He and his wife did start looking for work in the Yarmouth area between 2009 and 2013 and advised his mother that they were doing so. He still does look for work in the area.

[23] Elton’s wife, Katrina Lawrence, testified to that which follows:

- At one point, Thelma did say she wanted Elton and her to move and live there. Then she said she wanted Elton to have the house so that it would stay in the family.
- They were unable to move because they had young children and she had to care for her mother because she was an only child. She told Thelma that.
- Leroy was in the Veterans’ Wing and Thelma had help.
- Thelma always wanted Elton to have the house “eventually”, and she did not say she wanted anything in exchange.
- As early as 2001, she was saying the house would be Elton’s.
- The reason she wanted Elton to have the house included that he grew up there, she had asked the others and they did not want it, and Elton did want it.
- Katrina volunteered that, in 2012, they were looking to move “home”, and that Thelma was excited about that.
- They are still planning to move here when they retire.

[24] Louise Crawford, Thelma’s sister, testified to the following:

- She lives a 5-to-10 minute walk from the Homestead. She saw Thelma every day.
- She heard Thelma and Leroy talk about the house, saying it was offered to all the other children and they did not want it.
- After Leroy went into the Veterans' Home, Thelma was saying she wanted Elton to have the house and that he was going to move home "someday". She never ever heard Thelma say that Elton would get the house if he came home and looked after her. He was to get it whether he came home or not.

[25] William Crawford, Louise's husband, testified to the following:

- He and his wife spent a lot of time with Thelma and Leroy, in their home and on holidays or adventures with them.
- Their house came up in discussion quite a few times. The other children did not want it. So they decided to leave it to Elton.
- The discussions were sometimes with Leroy, sometimes with Thelma, and sometimes with both together. In addition, Mr. Crawford was present when they spoke with the children about the house. This occurred at different times. They did not speak with all the children together.
- The first such discussion came up when Elton was still school-aged.
- There was no mention of anything Elton had to do to get the house, including any condition that he had to come home to get the house.
- They were "most concerned about the house remaining in the family".
- Leroy and Thelma did not say anything about Elton looking for work in Yarmouth. However, he remembered when Elton did come home looking for work.
- He added that a lot of "black folk" from the area "had to move away to make a living".

[26] Wendy Lawrence, Tony's common-law wife from 1978 to September 2010, testified to the following:

- Thelma became a second mother to her.

- In May or June 2010, Thelma asked Tony if he was okay with her leaving the home to Elton because she was not sure Elton wanted to stay in the city and “may” wish to move home. She said she felt the home would mean more to Elton and wanted to leave the home to him in case he wanted to move home “someday”.
- Wendy was opposed to the idea. She told Tony that they had five children and he should not be giving up an inheritance. Tony told her to relax as they had plenty.
- Thelma did not say that there were any conditions attached to Elton receiving the home. She just wanted to ensure that they were all “on board with what she wanted to do”.
- Thelma and Leroy had sent Elton “out west” to expose him to city life and give him opportunity. They were not sure if he was moving home.

[27] Conswello Lawrence, Leroy’s niece, testified to the following:

- She lives in Montreal and her and Thelma visited each other’s home many times.
- She came down and stayed with Thelma for three months when Thelma had surgery, taking care of her and cooking and cleaning for her.
- Thelma told her she asked all her children if they wanted the house. She said it would probably go to Elton because the rest of them did not want it.
- It was not because Elton was going to move back that he was to get the house.

[28] Elizabeth Csukor, Conswello’s daughter, testified to the following:

- In April 2019, Thelma went to visit them in Montreal.
- She said she had asked Lee, Tony and Corinne if they wanted the house and they all said “no”, so she was giving the house to Elton.
- There was nothing Elton had to do to get the house.
- Elton was looking to come home “way in the future, when he retired”.

[29] Patricia Caldwell, the lawyer who represented Thelma and Leroy in the preparation of wills and in real property transactions, testified to the following:

- Thelma and Leroy had been her clients since 1985. She met with them about five times between then and 2014 or 2015. In 1985 she prepared a will for Leroy. In 1995 she prepared wills for both. In 2009 she prepared powers of attorney for them. In 2008 she represented them in the transferring their interest in Elton's home in Edmonton (for which they had cosigned). In 2012, she prepared the deed in question conveying the Homestead from Thelma and Leroy to themselves and Elton as joint tenants.
- It was Thelma who asked her to draft that deed.
- Thelma said that she was concerned that several of her children would want to sell the Homestead when she passed. She wanted to avoid that. She wanted "to see that Elton got the property".
- She believed that the children, apart from Elton, would sell the property immediately after they inherited it.
- Ms. Caldwell explained to Thelma that she would have no control over what Elton did with the property. Thelma replied that he could do what he wanted with it but anticipated that he would maintain it in case other family members needed it.
- They discussed the fact that the 1995 will split her estate equally amongst the four children. Ms. Caldwell explained that the joint tenancy deed would make it such that the property would not be part of her estate and expressed concern that treating the children differently in that way may create difficulty when she passed.
- She probed as to why Thelma believed the others would sell the property on her passing, but not Elton. She did not feel Thelma was completely forthcoming and she is not sure why Thelma believes the other children would sell the house.
- However, Thelma was "very much convinced" the others would sell it and wanted to prevent that from happening. "She felt Elton would keep the house at least as long as he could."

- Even after the probing and the raising of concerns associated with the deed adding Elton as a joint tenant, “Thelma could not be deterred from her thought”.
- Thelma gave her the impression that she trusted Elton to do the right thing and keep the family home.
- Thelma wanted to make sure Elton got the property.
- Thelma did not say anything about any condition that Elton had to come home to get the property.

[30] The evidence of Mr. and Ms. Crawford, Wendy, Conswello, Ms. Csukor, and even more particularly that of Patricia Caldwell, provides clear Section 45 corroboration for the evidence of Elton and his wife in relation to his mother’s statements regarding acquisition of the Homestead. None of them have any direct interest in the outcome of the within proceeding. In Wendy’s case, her evidence supports a finding that would make it such that Tony would inherit less, which would potentially make it such that their children would inherit less from his estate. As such, she gave evidence against that indirect interest.

[31] None of the witnesses from either side appeared to be deliberately lying or attempting to deceive in relation to the arrangement regarding the house. They all appeared to be presenting their interpretation or recollection of their interpretation of that arrangement.

[32] Lee, Tony, Corinne, Elton and Katrina all had a clear reason to interpret or recall in a way which favoured their side of the case, as they stand to gain or lose depending on the outcome of this proceeding.

[33] Lee, Tony and Corinne’s version was supported by Ms. Jarvis. However, Ms. Jarvis, being Tony’s daughter, has a greater potential of eventually inheriting more from his estate if this matter is decided in favour of the Estate. In addition, following the meeting in which the Agreement was signed, Elton changed the locks on the Homestead and only provided a key to Louise. That made it such that Ms. Jarvis, who had provided a lot of help to Thelma, was joint account holder on some of her bank accounts and had previously enjoyed unfettered access to the Homestead, could no longer access it. That would have a natural tendency to turn her against Elton and be less inclined to perceive or recall things in his favour.

[34] Ms. Jarvis was also, more likely than not, mistaken about Thelma having approached the children starting with the oldest and proceeding to the youngest. Lee, who is the oldest, testified that, when his mother spoke to him, Tony and Corinne had already declined her “offer”.

[35] The multiple witnesses who supported Elton and Katrina’s version of the arrangement did not have a real or obvious potential of future benefit from the outcome of the proceedings, as Ms. Jarvis did. As noted, Wendy’s evidence supported a result that was contrary to the interests of her children and there was no indication she had anything but a normal parent-child relationship with them. There was no evidence that the other witnesses who provided evidence in support of Elton’s case had any closer relationship with him than with Lee, Tony and Corinne, or any reason to favour one side over the other, with the possible exception of Louise who was given a sofa set from the Homestead. Elton explained that he gave it to her because Lee’s plan to take it for himself and give Louise his old set did not make sense and it was the only asset of any significant value that remained. Louise testified that she had the key to the Homestead until Tony’s other daughter, Kristen, moved in, so that she could check on it. That would provide an extra reason to let her have the sofa set. I find that, their evidence is a more independent and objective interpretation of Thelma’s intent, than that of Ms. Jarvis. In effect, they provided a voice for Thelma.

[36] In addition, the evidence of Lee, Tony and Corinne was informed by what they understood their mother was offering them. They were not present when she offered the Homestead to Elton. So, they cannot know what was said to him.

[37] At that point, the three oldest children had already declined Thelma’s “offer”. There was repeated evidence from multiple witnesses, and it was not disputed by anyone, that it was important to Thelma that the home stay in the family. Once the three oldest had already said they did not want the house, there was only Elton left.

[38] The Estate characterized the three older siblings’ response to Thelma’s inquiry as them having “waived” the gift of the house or their interest in the house. However, I agree with Elton that they did not have anything to waive as they had no interest in the house. As noted by Ms. Caldwell during her testimony, at that point, all they had was a potential of inheriting an interest in the house. I also agree with Elton that the answers Thelma received would not be determinative. For instance, even if the first child she approached said they wanted to come home and

take care of her in exchange for the house she would not be bound to choose that route. So, by approaching them, she was “gathering information to make a decision that was hers to make”.

[39] Also, Elton was the only one who grew up in that house. He lived there from the age of 10 months to when he left for Vancouver at the age of 18. Therefore, the house would naturally mean more to him than to the others and he would be more likely to keep it. Those were amongst the reasons related by the witnesses for why Thelma chose to convey the Homestead to Elton.

[40] A further reason that was relayed was that Elton would move home “someday”, such as when he retired. Even Ms. Jarvis testified that Thelma was “looking to the future” and did not need anyone to look after her, and that her purpose for wanting one of the children to come home and move into the house was because she wanted the house to remain in the family.

[41] These are reasons that make sense in the circumstances and support a finding that Thelma intended Elton to acquire the Homestead by right of survivorship, irrespective of whether he moved home and provided her care and assistance.

[42] Another potential reason that was not articulated by Thelma but was established by the evidence and could reasonably be expected to have influenced Thelma’s decision is that Elton was the one who kept in contact with her the most frequently and regularly.

[43] Elton testified that, in addition to reciprocal visits, one of them called the other almost every day and at least every other day. Conswello testified that Elton called Thelma regularly, sometimes twice a day, especially when she had surgery, he would call morning and evening. She described him as calling “constantly”. She noted that Thelma complained to her that Lee and Tony did not communicate regularly with her. Corinne testified that she or her mother would call the other “whenever”. It could have been weekly or bi-weekly.

[44] Given these circumstances, more likely than not, Thelma never intended that there be any condition attached to Elton receiving the Homestead by right of survivorship if he survived her and Leroy.

[45] Even assuming for a moment that the evidence did establish that Thelma initially had that intention, it is her intention at the time of the signing of the deed that is determinative.

[46] The most independent, contemporaneous and compelling evidence of Thelma's intention at the time of the signing of the deed is that of Ms. Caldwell.

[47] She has no connection with any of the parties or interested persons, except to the extent that she represented Thelma and Leroy before they passed. So, as with the other independent witnesses, she is effectively a voice for Thelma.

[48] The information she obtained from Thelma immediately preceded the execution of the 2012 deed adding Elton as a joint-tenant. It was obtained for the purposes of Ms. Caldwell providing Thelma legal advice in relation to that transaction.

[49] Though she did not make contemporaneous notes, she clearly recalled the meeting and discussion.

[50] She was not just a passive recipient of the information from Thelma. She probed into the reasons why Thelma wanted to leave a large asset such as the Homestead to one child and warned her that such a "favouring" of one child could cause difficulty after her death.

[51] Yet, she testified "Thelma could not be deterred from her thought."

[52] That is consistent with the undisputed evidence from Ms. Jarvis and Tony, that Thelma:

- "was very persistent in having things she wanted";
- "did what she wanted to do"; and,
- "was strong willed".

[53] Ms. Caldwell's evidence that Thelma was "very much convinced" the others would sell the house as soon as they inherited it and that she "felt Elton would keep the house ... as long as he could" is consistent with and borne out by the respective interpretations of what they agreed to following the funeral. Lee, Tony and Corinne testified they agreed to liquidate all assets, including the house, and split the net assets equally amongst the four of them, while Elton testified that he did not agree to the house being included, and would not have agreed to it because

he knew his mother did not want the house sold. So, it appears Thelma may have known her children well.

[54] Thelma giving Ms. Caldwell those reasons for “favouring” Elton with a gift of the Homestead is very compelling evidence that there was no condition attached to the conveyance. Saying that she was adding Elton as a joint tenant on the deed because he promised to move home and help her out would have been an easy and clear explanation and answer to Ms. Caldwell’s concerns about leaving such a large asset to one child. It would have been much easier for a mother to give that explanation than to say she only trusted one of her children not to sell the house as soon as it was inherited.

[55] Thelma obviously, as readily conceded by Elton, would have liked for him to move home and live with her. However, that does not mean that she intended it to be a precondition to him getting the Homestead. Such an intention would be inconsistent with what the extended family witnesses, apart from Ms. Jarvis, testified she and Leroy told them.

[56] I also note that Ms. Jarvis’s evidence on the point was not unequivocal as she emphatically agreed that the reason Thelma wanted one of them to come home and move into the house was because she wanted the house to remain in the family.

[57] Many of the statements those witnesses related were made by Thelma after the execution of the deed. However, they do not “reflect a change in intention”. Therefore, the reason for the caution in *Pecore* about considering such post-transfer statements does not obtain.

[58] Conswello’s evidence that Thelma told her Elton would “probably” get the house can be explained by the uncertainty regarding whether he would survive her.

[59] I also note that, if there had been a precondition that Elton move home and take care of her to get the Homestead, it would have been obvious to Thelma years before she passed away that he would not be doing so. She had plenty of time to raise the issue with him or go back to Ms. Caldwell to see what she could do, such as conveying her interest to the other three children to rupture the joint tenancy.

[60] She did not do so.

[61] She did close the educational account she was holding for Elton's daughter, Monissa, which at some point had \$20,000 in it. The reason she gave for doing so was that Monissa had not continued on to post-secondary education. However, that was due to health issues. Thelma used the money for a trip to Vancouver and gifts for the grandchildren. In addition, the account on which Elton was joint with her had no money in it, while joint accounts with other children, or with all four children, did. It would not be unreasonable if she had deliberately arranged that to attempt to effect a more equal division amongst the children, or their families, in response to the concerns raised by Ms. Caldwell. However, there is no evidence she expressed that to anyone as being part of her reasons.

[62] For the foregoing reasons, I find that Elton has established that his mother, when she signed the deed adding him as a joint tenant, intended to gift him the right of survivorship without him having to fulfill any precondition. Therefore, he has rebutted the presumption of resulting trust and is the legal and beneficial owner of the Homestead.

ISSUE 2: DID THE FOUR CHILDREN REACH A BINDING AGREEMENT ENCOMPASSING THE HOMESTEAD, INCLUDING WHETHER THE AGREEMENT WAS VOID UNDER THE LAW OF MISTAKE?

[63] As noted in the Introduction, the Estate takes the position that the agreement signed by the four children regarding liquidating all their mother's assets at her death and dividing the net proceeds equally includes the Homestead.

[64] Elton takes the position that it included all assets except for the house and the money in the bank accounts their mother held jointly with Ms. Jarvis. As an alternative position, he submits that the agreement is void for mistake because none of the children were aware that their mother had executed a deed conveying joint ownership of the house to him.

[65] All agree that the meeting leading to the signing of the agreement occurred in the downstairs or basement area of Lee's house, where family had met following their mother's funeral, and were sharing memories, food, and drinks, including, for some of them, alcoholic beverages.

[66] Lee, Tony and Corinne gave evidence regarding the agreement and the meeting leading to it that was consistent on the point that it included the house, but inconsistent on multiple other points.

[67] Lee provided evidence which includes the following:

- Tony, Corinne, Elton and himself were present when the meeting started.
- The whole concern of the meeting was whether the house would be split four ways.
- They discussed whether any family members who might want to buy the property would be paying less than fair market value.
- They determined that if none of the children were interested it could go to an extended family member.
- They also discussed bank accounts. All agreed that any money in the accounts which their mother had held jointly with Ms. Jarvis would go to Ms. Jarvis because of the assistance she had provided to their mother.
- Ms. Jarvis came down after they had agreed to the splitting of the house, and Angela, Tony's wife, was writing out the agreement. They wanted her as a witness. She did not participate in the house conversation.
- However, when she did come down, she mentioned a deed to the house. Elton said he did not know about a deed.
- The meaning of the agreement was that all their mother's assets would be split four ways, except for the joint account funds which were to go to Ms. Jarvis and any items gifted to Tony, Corinne or himself during her lifetime, including the aluminum boat and motor gifted to him.
- Before his siblings left the next day to go back to their respective provinces, he liquidated a bank account and divided it four ways.
- The next day, while he was driving Corinne and Elton, as well as Elton's immediate family, to the airport there was a heated confrontation in the car during which Elton yelled at them and threw the deed for the Homestead into the front seat for them to see that he owned it.

[68] Corinne provided evidence which includes the following:

- During the meeting, they said put every kind of asset together.
- They called Angela down to write what was being agreed upon and Ms. Jarvis was called down a little later. Angela was already writing the agreement when Ms. Jarvis came down.

[69] Tony provided evidence which includes the following:

- Lee, Corinne, Elton, Ms. Jarvis, himself and his wife were present at the meeting.
- Ms. Jarvis was there the whole time because she was part of the legal requirements. There was no discussion of bank accounts. Ms. Jarvis was not called down for that.
- The meeting was basically about how the executors could pay their mother's debts.
- The primary discussion at the meeting was the house. Part of this discussion was that, if anyone wanted the house, they should let Lee and Corinne know and pay off the other stakeholders, because their mother wanted it in the family. They were ready to give a break to anyone who wanted it. Thelma's grandson, Brandon, had approached Lee about buying the home. As he is Ms. Jarvis's son, and he had helped their mother, they all thought that would be appropriate.
- There was no discussion at the meeting about Elton being an owner of the house by way of a deed.
- There was no discussion about Elton having not upheld his end of the bargain. They just all agreed to share the assets equally. It was not an extensive meeting.
- They also discussed the contents of the house. Not all the contents of the home have been divided equally. The guns he removed were his except for one rifle which his brothers did not want.
- Afterwards, everyone picked up their \$4000-\$5000 disbursement from the joint bank account Lee liquidated.
- Their mother's will was not available at the meeting. They received a copy of that shortly after.

[70] Tony's evidence included the most inconsistencies with that of the other witnesses, including Ms. Jarvis, who provided evidence which includes the following:

- She was not there for the entire meeting.

- She was brought down at some point because her name was attached to some of the bank accounts.
- She sat in a different section of the basement.
- She did not hear any discussion about the contents of the house.
- The agreement to split assets four ways did not include the joint bank accounts with her name because they all agreed that whatever was left in them would go to her.
- As the paper said “all assets”, she brought up to Elton that his name was on the deed to the house. He said “no”.

[71] Elton provided evidence that differed significantly from his siblings and Ms.

Jarvis, including the following:

- He listed the 17 people who were at Lee’s house, all immediate or extended family.
- His older siblings wanted to go downstairs to go over the will.
- When he got downstairs Lee, Corinne, Tony and Ms. Jarvis were already there and the agreement was already written up.
- It was a short meeting, no more than 20 minutes.
- They went over the will.
- They talked about the assets in the house and splitting them four ways.
- They talked about the bank accounts. He noted there was no money in the account that was joint with him.
- He asked about the educational account for his daughter Monissa. They said they had not seen any other accounts and Lee advised he would check.
- They did not discuss the house and there was no mention of the deed to the house.
- The others all knew the house was going to him. Lee and Tony had both previously told him that the house was his.

- He did not think the agreement included the house and he would not have signed it if they had told him the house was included because he knew his mother did not want it sold and, to him, it was the most important asset his mother had. He understood it included the household contents and bank accounts.
- He did not become aware that his mother had already signed a deed adding him as a joint tenant until after the meeting when he found it in a filing cabinet while looking for documents regarding the educational account for Monissa.

[72] With the exception of Elton's evidence that Ms. Jarvis was already there when he went down to join the meeting, Ms. Jarvis' evidence of when she joined the meeting is consistent with that of Lee, Corinne and Elton, and clearly inconsistent with that of Tony.

[73] In addition, it appears strange that Tony would not recall the discussion regarding the bank accounts which their mother held jointly with Ms. Jarvis, especially since all other witnesses indicate they agreed she could keep any money that was still in those joint accounts. He may have been attempting to avoid that discussion as it shows some favouritism towards his own daughter, even though it was to compensate her for the assistance she provided to their mother.

[74] These points raise obvious concerns regarding the reliability of Tony's evidence in relation to what transpired at that meeting.

[75] The whole of the evidence demonstrates that, more likely than not, Ms. Jarvis did not bring up the subject of the deed to the house until after the agreement had been reached and the drafting of it had begun. Therefore, her comment regarding the deed, assuming it was made, would have no impact on what was agreed to.

[76] There was no evidence indicating that this meeting had been preplanned and that all siblings had been given advance notice of it. More likely than not, it arose spontaneously during the family gathering. It was obviously an emotional time for everyone. It was not a long or extensive meeting. At least two people joined part way through.

[77] There are differing versions of the discussion.

[78] The written agreement itself does not support the contention that the house was the primary focus of the discussion as it is not mentioned.

[79] The agreement reads:

“We the heirs of Thelma Lawrence agree that all assets at her death be accumulated in an account for the estate.

Any designated beneficiary, co-owner, joint owner or other bequest should be deposited to the account.

Any assets that arise or are discovered after this date will be deposited to the account.

Once the executors are satisfied that the assets have been liquidated to the account and all liabilities have been satisfied the net estate account will be divided equally amongst the four heirs.”

[80] It is dated February 27, 2020, and signed by each of the four children.

[81] The Estate argues that, because the agreement refers to “all assets” and does not exclude any particular assets, its wording clearly includes the Homestead. However, there are multiple personal property assets that were excluded and not mentioned as having been excluded.

[82] In addition, the agreement emphasizes by repetition that the assets in question are to be deposited into an account and ultimately describes that as “liquidated to the account”. Real property is not easily conducive to the process described.

[83] So, the wording of the agreement itself is ambiguous on whether the Homestead was included. It was drafted by Tony’s wife, more likely than not on behalf of Tony, Corinne and Lee. Therefore, applying the *contra proferentum* rule, it would have to be given the meaning the least favourable to them.

[84] If the Homestead was the primary topic of discussion during the meeting, and agreement was reached regarding immediate family having first opportunity to purchase it, potentially at less than fair market value, one would reasonably have expected the Homestead and the terms related to its purchase by family members to have been mentioned in the agreement. The fact that there is no mention of it suggests that it was not the primary topic of discussion, and, as testified to by Elton, may not have been discussed at all in his presence.

[85] During the meeting, Elton had asked his siblings about the bank account he had understood his mother was holding as an educational fund for his daughter, Monissa. The personal representatives of the estate, Lee and Corinne, stated that they did not know what happened to it. However, the next day, after Elton and Katrina had located pre-2016 documentation regarding the account and asked what happened to the money in it, Corinne advised him their mother had taken the money out of the account to pay for the trip to Vancouver and for gifts for the grandchildren in December 2019. Therefore, they had not been forthcoming about what happened to that account even though they knew what happened to it.

[86] It would not be a stretch that they would remain similarly secretive or coy about their own intentions regarding what the reference in the agreement to all their mother's assets meant, to avoid the risk of Elton not signing the agreement.

[87] I also note that, apart from the fact that he has a clear interest in the outcome of this proceeding, there were no factors that caused me to question the credibility or reliability of Elton's evidence.

[88] He testified in an un-evasive and straightforward manner. He maintained a proper attitude and demeanour throughout. It did not change from direct examination to cross-examination.

[89] He readily acknowledged the assistance that Ms. Jarvis and her son, Brandon, had provided to their mother. He also volunteered that other people had helped out a lot as well, including his mother's brother, Glenn, along with Glen's wife, and her sisters Rosa and Louise.

[90] He readily agreed to or volunteered statements against interest. A notable example is the following. After he discovered, following the meeting, that his mother had executed a deed to the Homestead adding him as joint tenant, and that the educational account for Monissa had been cashed out, he played along for a while then let Lee and Corinne have it in the car on the drive to the airport, cursing and swearing at them, as he was upset that they had lied to him regarding the account and about them having taken most of his personal belongings from the attic at the Homestead, as well as tools and equipment from the garage. For the same reason he did not want them at the house and was "giving them the runaround".

[91] He readily acknowledged an error he made during his discovery examination.

[92] The reference in the agreement to the “executors” being satisfied is consistent with his evidence that they went over the will during the meeting. It is inconsistent with Tony’s evidence that they did not have the will. Lee’s evidence that, in his capacity as executor, he cashed out a joint account and divided the funds equally amongst the four of them the next day, and that he was planning on taking inventory of the contents of the Homestead, is also consistent with them having gone over the will during the meeting, as he had to have at least seen the will to know he was an executor.

[93] Also, the four children would be more likely to sign the agreement as worded if they had seen the will as it did not have any specific gifts to them, only an equal four-way split of the residue.

[94] Elton’s explanation that he would not have signed the agreement if it included the house because their mother did not want it sold, as she wanted to keep it in the family, makes sense and is consistent with the undisputed evidence that keeping the house in the family was very important to their mother.

[95] In the circumstances that existed at the time, it would also be reasonable that Elton could go down for the meeting a little later than the others. There were many immediate and extended family members there, including Elton’s wife and two children. They were in a gathering following their mothers funeral. It would make sense that Elton could get held up talking to someone and be the last to go downstairs. That is made even more likely by Katrina’s evidence that she asked if she could go down with them and Tony said she could not. Tony denied that. However, he also testified that there was no discussion regarding bank accounts which their mother held jointly with Ms. Jarvis, which is contradicted by all other witnesses who were present. Katrina being refused admittance would naturally make Elton inclined to have a discussion with her about it, which would delay him from joining the meeting.

[96] If Tony’s evidence that Ms. Jarvis was there from the beginning is accurate, more likely than not, she was there before Elton as he testified.

[97] As such, there could easily have been discussion about the house prior to Elton being there.

[98] The fact the older siblings kept, from Elton, that their mother had cashed in the educational account for his daughter reveals a disregard for his interests and an attitude that it was unimportant to them whether he was fully informed of matters

related to his mother's estate. That same dismissive attitude could easily have caused them to start the meeting without paying attention to whether he was there or not.

[99] For these reasons I cannot reject Elton's evidence that he was not made aware that the assets being referred to in the agreement were meant to include the Homestead, and that he signed it on the understanding that it did not.

[100] Even if his siblings did mention the Homestead as being included in the agreement, if it did not register with Elton, because of the circumstances in which the meeting took place or for some other reason, it could not be said that the parties had reached a consensus regarding the agreement encompassing the Homestead.

[101] I find that, more likely than not, Elton signed the agreement on the understanding that it did not include the Homestead and did not agree to it being liquidated and divided along with the personal property assets.

[102] Even if I am wrong in this conclusion, all four children testified that they were unaware, when they signed the agreement, that their mother had signed a deed adding Elton as joint tenant with her and Leroy.

[103] The effect of that deed was that the Homestead never formed part of the Estate. It is deemed to have passed directly to Elton immediately before their mother's passing, by right of survivorship.

[104] So, none of the parties to the agreement were aware that the Homestead did not form part of the Estate. It is likely the single most valuable asset that Thelma had possessed before her passing, even considering that, when Leroy passed, Elton had already become 50% owner.

[105] Since all of them were under the mistaken impression that the Homestead was still part of the Estate, even if the agreement encompassed it, they would have entered it under common mistake.

[106] As noted in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Company Limited*, 2003 ABCA 221, at paragraphs 10 to 13, if a common mistake is so fundamental, in the sense that it goes to an essential term of the alleged contract, such that it results in the agreement being "robbed of all efficacy", the agreement will be rendered void or unenforceable.

[107] In addition to the Homestead being the single most valuable asset, it is the only source of contention amongst the parties. Thelma's will already provides for a four-way split of the residue of her estate. The account in the joint names of the four children and their mother has already been divided amongst them. There was evidence from Tony that he and other siblings have already provided funds from such joint accounts, and perhaps from life insurance, to the Estate to cover liabilities. That would be consistent with the approach that personal property bequests are called upon to pay liabilities before real property bequests and with joint accounts being more commonly set up for convenience than joint tenancy of real property. There are many personal property assets that have been excluded or exempted from the agreement, either by agreement, because they have already been alienated or are claimed as having been the personal property of the recipient or a gift to them from Thelma while she was living.

[108] So, the only purpose the agreement might serve is to avoid a potential after-the-fact dispute regarding whether certain joint bank account assets were for the benefit of the surviving joint account holders or the Estate. Therefore, the common mistake in question is a fundamental mistake that does effectively "rob the agreement of all efficacy".

Consequently, even if the Homestead was included in the agreement, I would find the agreement void or unenforceable.

CONCLUSION

[109] For the foregoing reasons, the Estate's claim for a declaration that Elton holds the Homestead in trust for the Estate, and its alternate claim for specific performance of the alleged agreement, are dismissed.

[110] I ask Counsel for Elton to prepare the order.

[111] If the parties are unable to agree on costs I invite written submissions on the issue.

Muise, J.