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SUPREME COURT OF ARKANSAS

No. CV-09-1169

TROY BUTCHER AS GUARDIAN OF
THELMA L. HEALY, AN
INCAPACITATED PERSON
APPELLANT

V.

DIANE BEATTY AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF JOHN HEALY
APPELLEE

Opinion Delivered March 18, 2010

APPEAL FROM THE HOT SPRING
COUNTY CIRCUIT COURT,
[NO. PR2006-186-2]

HON. PHILLIP H. SHIRRON, JUDGE

CIRCUIT COURT REVERSED AND
REMANDED; COURT OF APPEALS
REVERSED.

JIM HANNAH, Chief Justice

Troy Butcher, as guardian of the person and estate of Thelma L. Healy, an incapacitated person, appeals the July 9, 2008 order of the Hot Spring County Circuit Court finding that the estate of Thelma’s husband, John Healy, was entitled to specific performance of an agreement between Butcher and John. Under that agreement, Thelma’s estate was to pay John, then living, the sum of \$40,000 in return for full title to the couple’s rental property held in tenancy by the entirety. Butcher argues that the circuit court erred in applying specific performance and in requiring payment of the \$40,000 because John died prior to performance of the agreement. According to Butcher, upon John’s death, sole title vested in Thelma rendering performance of the agreement impossible. Diane Beatty, personal representative of the estate of John Healy, deceased, argues that the circuit court correctly applied specific performance based on the promise to perform.

Butcher first appealed the circuit court’s decision to the Arkansas Court of Appeals,

which affirmed the decision of the circuit court. See *Butcher v. Beatty*, 2009 Ark. App. 662, 345 S.W.3d 216. Butcher petitioned this court for review, and the petition was granted. When we grant a petition for review, we consider the appeal as though it had originally been filed in this court. See *Fletcher v. Scorza*, 2010 Ark. 64, at 1, 359 S.W.3d 413, 415. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 2-4.

Thelma and John married in 1979. On December 27, 2006, the circuit court found that Thelma was incapacitated and appointed Butcher as the guardian of Thelma's person and Butcher and John as co-guardians of her estate. Butcher subsequently filed a petition to sell real property. By a September 26, 2007 order, the circuit court ordered that the couple's two rental properties be sold and the proceeds divided equally between Thelma and John. The circuit court also ordered that title to Thelma and John's residence be vested solely in John and that John pay \$21,000 to Thelma, half the value of the residence. Thelma received the \$21,000, and John obtained sole ownership of the residence.

But, sale of the rental properties proved difficult. An attempted auction did not produce a bid within the appraised value as required by the court order. Further, Butcher refused to accept an offer below the appraised value.

A December 4, 2007 order memorialized a new agreement reached by the parties. Thelma was to pay John \$40,000 in return for sole ownership of the properties. A deed dissolving the tenancy by the entirety and vesting sole title in Thelma was drafted and executed by Butcher as Thelma's guardian; however, the deed was never executed by John. He passed away on January 24, 2008. Arguing that John's death vested sole title in Thelma, Butcher refused to pay the \$40,000. On March 25, 2008, Diane Beatty, as executor of

John's estate, moved to enforce the agreement. On July 29, 2008, the circuit court entered an order finding that specific performance applied to compel Thelma to pay the \$40,000 to John's estate. This appeal followed.

At the time of John's death, he and Thelma were husband and wife.¹ Title to the rental property was held in tenancy by the entirety with right of ownership.

Tenancy by the entirety is a joint tenancy modified by the common law doctrine that husband and wife are one person in law, and cannot take by moieties. *Parrish v. Parrish*, 151 Ark. 161, 235 S.W. 792. Thus neither spouse owns an undivided one-half interest in any entirety property – the entire entirety estate is vested and held in each spouse.

Wood v. Wright, 238 Ark. 941, 945, 386 S.W.2d 248, 251 (1965). “An estate by the entirety is peculiar to marriage and entails the right of survivorship. The right of survivorship to the whole can only be dissolved in a divorce proceeding, by death, or by the voluntary action of both parties.” *Lowe v. Morrison*, 289 Ark. 459, 461, 711 S.W.2d 833, 834 (1986).

Under court authority, Butcher, as guardian, certainly had the authority to convey Thelma's interest in real property. See Ark. Code Ann. § 28-65-314(a)(1) (Repl. 2004). A fully executed and delivered deed is valid between the parties to the deed. See, e.g., *Sterlin v. Everett*, 209 Ark. 590, 593, 191 S.W.2d 949, 950 (1946). But, at the time of John's death, the deed had not been fully executed and delivered because John had not executed it. As a result, upon John's death, the rental property was held by John and

¹John had initiated divorce proceedings but there was no divorce at the time of his death.

Thelma as husband and wife, and Thelma became the sole owner of the rental property.

Still, Beatty argues that there was an agreement, and Butcher should be compelled to perform under the terms of that agreement. The circuit court agreed and applied specific performance. “Specific performance is an equitable remedy which compels the performance of an agreement or contract on the precise terms agreed upon.” *Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 307, 149 S.W.3d 325, 351 (2004). But, specific performance is not available where performance is impossible. *Dennis v. Binz*, 230 Ark. 1010, 1012, 328 S.W.2d 85, 87 (1959). At John’s death, title to the rental property vested solely in Thelma, and his estate had no interest in the property. Performance was impossible. The circuit court erred in the application of the equitable remedy of specific performance. The decision of the Hot Spring County Circuit Court is reversed, and this case is remanded for further action consistent with this opinion.

Southern & Allen, by: *Byron S. Southern*, for appellant.

Phyllis J. Lemons, for appellee.