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§ 83-4,111, we also affirm the district court's decision that he was not entitled to mandamus. However, because Meis' request for review was not timely filed with the district court under the Administrative Procedure Act, we lack jurisdiction to review the Appeals Board decision and vacate the district court's order to the extent it reviewed this decision. Finally, because Meis did not raise the issue of constitutionality before the district court, we do not consider his challenge to § 83-4,111 and 68 Neb. Admin. Code, ch. 7, § 008.

AFFIRMED IN PART, AND IN PART VACATED AND DISMISSED.

DONNA BENELL, GUARDIAN AND CONSERVATOR OF LESTER MCMURRY, AN INCAPACITATED PERSON, APPELLEE, V. MARY ROSS, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHERI KOINZAN, DECEASED, APPELLANT.

808 N.W.2d 657

Filed February 7, 2012. No. A-11-279.

1. **Deeds: Equity.** An action to set aside a deed sounds in equity.
2. **Deeds: Mental Competency: Proof.** To set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing.
3. **Deeds: Contracts: Mental Competency.** In determining the mental capacity of the grantor to execute an instrument, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of the property dealt with and what he proposed to do with it, and had the capacity to decide intelligently whether or not he intended to make the conveyance, it cannot be found that the grantor was incompetent to execute the instrument.
4. ____: ____: ____. The test for capacity to execute a deed is not whether the grantor understood all the legal phraseology of a contract.

Appeal from the District Court for Custer County: KARIN L. NOAKES, Judge. Reversed.

Tim W. Thompson and Angela R. Shute, of Kelley, Scritsmier & Byrne, P.C., for appellant.

Julianna S. Jenkins, of Sennett, Duncan & Jenkins, P.C., L.L.O., for appellee.

IRWIN, MOORE, and CASSEL, Judges.

IRWIN, Judge.

I. INTRODUCTION

Donna Benell (Donna), the guardian and conservator of Lester McMurry (Lester), brought an action to set aside a 2005 deed of a farm located in Logan County, Nebraska. In the deed, Lester reserved a life estate in the farm for himself and gave the farm to his longtime friend, Cheri Koinzan (Cheri), upon his death. Donna alleged, among other things, that Lester lacked the mental capacity to execute such a deed. After a trial, the district court entered an order finding that Lester "lacked the requisite mental capacity to execute" this particular deed. The court granted Donna's motion and set aside the deed. A few weeks after the trial, Cheri died. The personal representative of Cheri's estate, Mary Ross, appealed from the district court's order.

Upon a de novo review, we conclude that although there was conflicting evidence presented concerning Lester's capacity to execute the deed, the district court found that he was capable of understanding "the concept of giving property away" and the effect of a simple deed of conveyance. Such a finding is sufficient to establish that Lester had the capacity to execute the deed. As such, we reverse the district court's order setting aside the deed.

II. BACKGROUND

Lester has been diagnosed with moderate mental retardation. He is able to live on his own and is capable of carrying out various farming work. However, as a result of his mental status, he does require assistance with such things as managing his finances, dealing with certain health issues, and making plans for the future.

Lester's longtime friend, Cheri, assisted him for many years. She handled his financial affairs, helped him deal with his diabetes, and assisted him with furnishing and decorating his home. She also assisted him with his estate planning. In 2005,

Cheri took Lester to a lawyer to discuss Lester's executing a will and other estate planning documents. As a result of his meeting with the lawyer, on April 21, 2005, Lester executed a deed giving Cheri his farmland in Logan County, subject to a life estate he reserved for himself.

A few years after Lester executed this deed, Cheri became very ill and was unable to continue to assist him on a regular basis. As a result of Cheri's illness, Donna, Lester's niece, began to assist him with his affairs and was eventually appointed as his guardian and conservator. Donna learned about the deed Lester executed in April 2005 "[t]hrough the grapevine" and filed an action to set aside the deed on the grounds that Lester was not mentally competent to execute such a document, that Cheri exercised undue influence over Lester, and that Cheri induced Lester to execute the deed through fraudulent misrepresentation.

In February 2011, a trial was held concerning Donna's allegations about the deed to the farm. At the trial, both Donna and Cheri presented a great deal of evidence which focused primarily on whether Lester had the mental capacity to execute a deed in April 2005. We have reviewed the evidence presented by the parties in its entirety. However, because all of the parties are familiar with the facts of the case, we decline to provide a detailed recitation of that evidence here. Instead, we will refer to the evidence as necessary in our analysis below.

The district court entered an order in this matter on March 17, 2011. In the order, the court concluded that Lester lacked the capacity to execute the April 21, 2005, deed. The pertinent language of the trial court's order reads as follows:

> This court believes [Lester] is legally capable of understanding the nature and effect of a simple deed of conveyance. Despite the legalese often contained in transfer documents, the concept of giving property away would not have been too difficult for [Lester] to understand.
>
> However, the deed at issue was a little more complicated. This was a nonrevocable deed that reserved a life estate in [Lester]. It is certainly clear to this court that [Lester] wanted [Cheri] to have his land when he died. However, this court does not believe [Lester]

> could comprehend what would happen to his land if [Cheri] predeceased him. The evidence clearly shows that [Lester] has limited mental abilities. [Lester has been diagnosed] with mental retardation and [there was evidence presented] that persons with moderate mental retardation function at the level of a 2nd grader. [Lester] might understand simple concepts like giving away property but it is doubtful [he] had a full comprehension of the effect of his signing this particular deed. Therefore, the court finds that [Lester] lacked the requisite mental capacity to execute this deed.

The court granted Donna's request to set aside the April 21, 2005, deed.

A few weeks after the trial, Cheri died. The personal representative of Cheri's estate, Ross, filed this appeal from the district court's order setting aside the April 21, 2005, deed. In order to eliminate any confusion, however, we will continue to refer to Cheri as the party who is opposing the motion to set aside the deed.

III. ASSIGNMENT OF ERROR

We consolidate and restate Cheri's three assignments of error into one. Cheri contends that the district court erred when it ruled that because this particular deed, executed by Lester, contained a life estate reserved for him, he lacked the requisite mental capacity to execute the deed.

IV. STANDARD OF REVIEW

[1] An action to set aside a deed sounds in equity. *Schmidt v. Feikert*, 10 Neb. App. 362, 631 N.W.2d 537 (2001). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

V. ANALYSIS

On appeal, Cheri argues that the district court erred in finding that Lester lacked the requisite mental capacity to execute the April 21, 2005, deed and in granting Donna's motion to set aside that deed. Specifically, Cheri asserts that Donna did not present sufficient evidence to demonstrate that Lester lacked the mental capacity to execute the deed because there was overwhelming evidence presented to the contrary. Cheri also asserts that the district court erred in determining that this deed, in particular, was too difficult for Lester to adequately understand.

Upon our de novo review of the record, we conclude that Cheri's assertions have merit. Although there was conflicting evidence presented concerning Lester's capacity to execute the deed, the district court found that Lester was capable of understanding "the concept of giving property away" and the effect of a simple deed of conveyance. Such a finding is sufficient to establish that he had the capacity to execute the April 21, 2005, deed. As such, we reverse the district court's order setting aside that deed.

[2,3] The Nebraska Supreme Court has held that in order to set aside a deed on the ground of want of mental capacity on the part of the grantor, it must be clearly established that the mind of the grantor was so weak or unbalanced at the time of the execution of the deed that he could not understand and comprehend the purport and effect of what he was then doing. *Marston v. Drobny*, 166 Neb. 747, 90 N.W.2d 408 (1958). The court has further explained that in determining the mental capacity of the grantor to execute an instrument, if it clearly appears that when the instrument was executed the grantor had the capacity to understand what he was doing, knew the nature and extent of the property dealt with and what he proposed to do with it, and had the capacity to decide intelligently whether or not he intended to make the conveyance, it cannot be found that the grantor was incompetent to execute the instrument. *Id.*

The parties presented conflicting evidence concerning Lester's capacity to execute the April 21, 2005, deed. Cheri presented evidence which demonstrated that Lester understood

the nature and extent of the farm at issue, that he wanted to give his farm to Cheri after his death, and that he understood what he was doing when he signed the deed. At the trial, Jon Schroeder, the attorney who assisted Lester with the execution of the deed, testified that he went to great lengths to ensure that Lester understood what he was doing when he signed the deed. Schroeder indicated that he spent a great deal of time with Lester and explained the various options for the farm after Lester's death. Schroeder testified that Lester understood these options and chose to keep a life estate and grant the farm to Cheri upon his death. Schroeder also testified that when Lester returned to his office a second time to sign all of the documents, Schroeder again explained to Lester in great detail the effect of the deed and all of his other options. In addition to Schroeder's testimony, various members of Lester's community, including Cheri, testified that Lester often talked about wanting to ensure that Cheri received the farm upon his death. A psychologist who examined Lester indicated that he is capable of understanding the concept of giving something away.

To the contrary, Donna presented evidence that Lester did not understand or appreciate the effect of signing the April 21, 2005, deed. Donna presented evidence to establish that Lester could not understand the intricacies of signing the deed no matter how much explanation was provided to him. In addition, there was evidence that Lester did not even remember signing the deed. At trial, Lester seemed unsure about whether he wanted to give the farm to Cheri and could not provide a clear answer about his understanding of the deed. In addition, there was evidence that Lester was easily manipulated and would often agree to do things simply to please others.

As we explained above, where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Schmidt v. Feikert*, 10 Neb. App. 362, 631 N.W.2d 537 (2001). Here, after considering the conflicting evidence presented by the parties, the district court found that Lester is "legally capable of understanding

the nature and effect of a simple deed of conveyance" and that "the concept of giving property away would not have been too difficult for [Lester] to understand." The court also found that it is clear that Lester wanted Cheri to have the farm when he died. There is sufficient evidence in the record to support these findings.

Despite the district court's findings that Lester was capable of understanding and comprehending the purport and effect of giving away property and that he knew what he was doing when he gave the farm to Cheri, the trial court determined that Lester did not have the capacity to execute the April 21, 2005, deed because that deed was more complicated than a simple deed of conveyance and Lester is not capable of understanding "what would happen to his land if [Cheri] predeceased him." Essentially, the district court concluded that even though Lester had the capacity to execute a deed giving his farm to Cheri, he did not have the capacity to execute this particular deed because it involved Lester's retaining a life estate in the farm prior to giving it away to Cheri upon his death.

[4] We conclude that the district court erred in determining that although Lester had the mental capacity to execute a deed, he did not have the capacity to execute this deed. It appears that in making its determination, the district court applied a more stringent test for capacity than is warranted by the case law discussed thoroughly above. We note that the parties do not point us to any authority to support the district court's conclusion that Lester must understand every possible future circumstance concerning the farm's disposition in order to have the capacity to execute the deed. In addition, the Illinois Supreme Court in *Bordner v. Kelso*, 293 Ill. 175, 186-87, 127 N.E. 337, 341 (1920), put it accurately and succinctly when it held that the test for capacity to execute a deed is not whether the grantor understood all the "legal phraseology of a contract." Whether a grantor appreciates the meaning of "legal phraseology is a matter of education rather than mental competency." *Id.* at 187, 127 N.E. at 341. We are convinced Lester knew what his rights were in executing the April 21, 2005, deed and that the farm would pass to Cheri upon his death, even though

he may not have been able to provide the legal definition of the terms "life estate" or "remainder."

Upon our de novo review, we conclude there is sufficient evidence in the record to establish that Lester understood that by signing the April 21, 2005, deed, he was giving his farm away upon his death, and that he wanted to give the farm to Cheri. In addition, there was ample testimony to demonstrate that Lester understands what it means to give something away. The fact that he executed a more "complicated" deed in order to retain possession of the farm until his death does not, by itself, demonstrate that he lacked the mental capacity to appreciate what he was doing when he signed the deed.

In light of the district court's factual findings, we conclude that the district court erred in finding that Lester lacked the mental capacity to execute the April 21, 2005, deed and, as a result, erred in setting aside that deed.

VI. CONCLUSION

Upon our de novo review of the record, we conclude that although there was conflicting evidence presented concerning Lester's capacity to execute the April 21, 2005, deed, the district court found that Lester was capable of understanding "the concept of giving property away" and the effect of a simple deed of conveyance. Such a finding is sufficient to establish that Lester had the capacity to execute the deed. As such, we reverse the district court's order setting aside the deed.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
PAUL W. MICK, APPELLANT.
808 N.W.2d 663

Filed February 14, 2012. Nos. A-11-235, A-11-236.

1. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.