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of $8,176.84 and to Rachel in the amount of $1 million. In the parents' action, we modify the judgment in favor of Kelly and Timothy by combining the amounts and reducing the total to $1 million payable to them jointly; and we affirm as modified.

JUDGMENT IN NO. S-10-879 AFFIRMED.

JUDGMENT IN NO. S-10-880 AFFIRMED AS MODIFIED.

WRIGHT, J., not participating.

MCCULLY, INC., DOING BUSINESS AS MCCULLY RANCH COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. BACCARO RANCH, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLEE.

816 N.W.2d 728

Filed July 20, 2012. No. S-11-952.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
2. **Witnesses: Evidence: Appeal and Error.** An appellate court will not reevaluate the credibility of the witnesses or reweigh testimony but will review the evidence for clear error.
3. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. ____: ____. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
5. **Brokers: Contracts.** In determining whether a commission is due a broker, the court must look to the terms and conditions of the listing agreement.
6. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
7. ____. If a contract is unambiguous, the court will enforce the contract in accordance with the plain meaning of the words of the contract.
8. ____. Enforcement of a contract depends upon the terms of the contract and the facts that are applicable to the contract.
9. **Brokers: Real Estate: Contracts: Sales.** Ordinarily, a real estate broker who, for a commission, undertakes to sell land on certain terms and within a specified period is not entitled to compensation for his or her services unless he or she produces a purchaser within the time limit who is ready, willing, and able to buy upon the terms prescribed.

10. **Brokers: Property: Contracts: Sales.** When a broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed.
11. **Brokers: Property: Sales.** A seller is under no obligation to sell his or her property to a purchaser procured by a broker.
12. **Brokers: Property: Contracts: Sales.** The fact that a seller exercises his or her right not to sell the listed property to a purchaser produced by a broker does not relieve the seller of his or her obligation to pay the broker the agreed-upon commission.
13. **Contracts: Sales: Words and Phrases.** A prospective purchaser is financially able if he or she has the capability to make the downpayment and all deferred payments required under the proposed contract of sale.

Appeal from the District Court for Hooker County: DONALD E. ROWLANDS, Judge. Reversed and remanded for further proceedings.

Ward F. Hoppe and Colby Rinker, of Hoppe Law Firm, for appellant.

Steven P. Vinton, of Bacon & Vinton, L.L.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, McCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF THE CASE

McCully, Inc., a broker doing business as McCully Ranch Company (McCully), brought suit against its client Baccaro Ranch, L.L.C. (Baccaro), as seller, claiming that Baccaro breached the real estate listing agreement and that McCully was entitled to a commission from Baccaro under contract theory or, in the alternative, under the theory of unjust enrichment. In a previous appeal, we concluded that the listing agreement was enforceable and remanded the cause for further proceedings. *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010). After trial, the district court for Hooker County determined that McCully was not entitled to a real estate commission. McCully appeals. Following our review for clear error, we determine that

McCully produced a ready, willing, and able purchaser during the term of the listing agreement on terms acceptable to Baccaro and that McCully is entitled to a commission. Because the district court clearly erred, we reverse, and remand for further proceedings.

STATEMENT OF FACTS

This matter was tried to the court, and many facts taken from the record are not in dispute. The issue in the case is whether McCully was entitled to a real estate commission from Baccaro resulting from the exchange of the "Baccaro Ranch" for a ranch owned by the exchanger, Greg Stine.

McCully and Baccaro entered into an exclusive listing agreement on or about December 23, 2006. Baccaro wished to sell or exchange the Baccaro Ranch, also called the River Ranch, which is located in Hooker County. The listing agreement provided that the listing period began on December 23, 2006, and ended on December 1, 2007. The listing agreement further stated that the listing price for the Baccaro Ranch "shall be $1,600,000.00 on the following terms: cash or other terms acceptable to [Baccaro]." Paragraph 13 of the listing agreement provided a scale of the commission rate based on the purchase price to determine the commission owed to McCully. Paragraph 13 also provided:

> Commission rate based on the gross sale price of the property shall be payable to BROKER payable upon the happening of any of the following:
>
> a) If, during the term of the Listing, Seller, Broker or any other person:
>
> I. seller exchanges the Property; or
>
> II. finds a Buyer/Exchang[e]r who is ready, willing and able to purchase/exchange the Property at the above price and terms or for any other price and terms to [sic] which Seller agrees to accept or
>
> . . . .
>
> d) If Broker is unfairly hindered by Seller in showing or attempting to sell or exchange this Property; or
>
> e) If within 180 days after the expiration of this Listing Agreement, Seller sells/exchanges this Property

> to any person found during the term of this listing, or due to Broker[']s efforts or advertising, under this Listing Agreement[.]

During the term of the listing agreement, the exchanger, Stine, made several offers on the Baccaro Ranch. Stine is trained as a lawyer, was active in a banking business which had recently been sold, and was interested in the Baccaro Ranch because of its recreational potential stemming from the fact that the Dismal River flowed through it. In December 2006, Stine initially offered to buy the Baccaro Ranch for $1,200,000 subject to a partial survey. Baccaro rejected that offer.

In February 2007, Stine purchased the "Pados Ranch," also called the Lake Ranch or the Lake and Baldwin Ranch, which is also located in Hooker County. The record shows that Baccaro had previously expressed interest in exchanging the Baccaro Ranch for the Pados Ranch because the latter was better for Baccaro's ranching needs and was approximately 2,000 acres larger than the Baccaro Ranch. In correspondence dated February 24, 2007, Stine offered to exchange his recently acquired Pados Ranch for the Baccaro Ranch with Baccaro paying an additional $180,000 "boot" to Stine. Stine indicated that he had paid $1,534,500 for the Pados Ranch. In this correspondence to Baccaro, Stine noted that there had evidently developed an understanding regarding boundary lines between the Baccaro Ranch and its only neighboring ranch and Stine suggested that a survey be done to facilitate the proposed exchange. Some evidence showed that Baccaro wished to avoid the expense of a survey. Stine did not receive a response from Baccaro. On March 25, Stine sent a letter to Garth Bullington, a managing member of Baccaro, stating that Stine was withdrawing this offer.

In May 2007, Baccaro and the owner of its only neighbor, the "Dismal River Ranch," executed corrective deeds so that the boundary lines of their ranches would "more accurately reflect the recognized boundary lines as established by the existing fences." Thereafter, on June 18, Baccaro offered to do a straight trade of the Baccaro Ranch for the Pados Ranch. Stine did not accept this offer.

During the summer of 2007, Kevin McCully, McCully's president, and Stine toured the Baccaro Ranch on four-wheelers. They were equipped with maps including a satellite aerial map and a section, township, and range map and were able to examine the placement of the fences relative to the boundaries. Garth Bullington testified at trial that the fences were not moved during all relevant periods. Kevin McCully testified at trial that during their summer 2007 visit, Stine gave Kevin McCully the impression that he was satisfied with the fence lines and the boundaries of the ranch.

Following this inspection of the Baccaro Ranch, on September 6, 2007, Stine offered a straight exchange of the Pados Ranch and the Baccaro Ranch in a document entitled "Real Estate Exchange Agreement." That document contains 5 articles in 11 pages, covering a range of terms including mutual representations and warranties, and was signed by Stine, whose signature was notarized. Following trial, the court found that the Real Estate Exchange Agreement which was actually signed by the parties "contains only minor modifications from Stine's original offer." In his September 2007, offer, Stine listed the two properties to be exchanged, with their legal descriptions. This offer did not require a survey.

The legal description in the exchange agreement for the Baccaro Ranch stated that it consisted of approximately 3,010 acres. The offer stated that the Baccaro Ranch was legally described as follows:

> All in Hooker County, Nebraska
>
> S5-T21-R31 N N1/2 SE1/4 NW1/4; N1/2 SW1/4 NE1/4; N1/2 NE1/4; NE1/4 NW1/4; Lot 4 (Four)
>
> S19-T22-R31 S1/2; S1/2 N1/2
>
> S20-T22-R31 SW1/4; NW1/4 SE1/4; S1/2 SW1/4 NW1/4
>
> S29-T22-R31 E1/2 NW1/4; W1/2 W1/2; Lot 2 (Two); Lot 3(Three); Lot 4 (Four); that part of Lot 1 (One) claim 38, except that part conveyed to Dismal Ranch Company described in that warranty deed recorded with the Hooker County Clerk, Book 14 Pages 74-75
>
> S30-T22-R31 ALL
>
> S31-T22-R31 N1/2; N1/2 SE1/4; NE1/4 SW1/4

S32-T22-R31 ALL, consisting of approximately 3,010 acres (the "Baccaro Property").

The Pados Ranch was described in the proposed exchange agreement as consisting of approximately 5,040 acres as follows:

> E ½ SW ¼, Lots 3-4, Section 7 Township22 Range 31, All Section 13 Township22 Range 32, E 1/2 , E ½ NW ¼, SW ¼ NW ¼, SW ¼ Section 14 Township 22 Range 32, S ½ NE ¼, SE ¼ Section 15 Township22 Range 32, NE ¼; N ½ SE ¼, Section 22 Township 22 Range 32, All Section 23 Township 22 Range 32, S ½ SE ¼ Section 12 Township 22 Range 32 Hooker County Nebraska and All Section 2 Township 22 Range 32, N ½ NE ¼; NE ¼ NW ¼ Section 11 Township 22 Range 32, All Section 1 Township 22 Range 32, S ½ Section 6 Township 22 Range 31, NW ¼ Section 7 Township 22 Range 31 and N ½; SW ¼; N ½ SE ¼ Section 12 Township 22 Range 32 all in Hooker County Nebraska, consisting of approximately 5,040 acres (the "Pados Property").

Due to the importance of Stine's September 7, 2007, exchange offer, the members of Baccaro, with one exception, met on September 28 at the office of their attorney, George Vinton, to discuss Stine's offer. There is evidence that the full membership had not previously met. The members of Baccaro include Alma Bullington and her eight children. The three managing members of Baccaro are Alma Bullington, Garth Bullington, and Valma Smith. At the meeting, the members discussed Stine's exchange offer. They also discussed the real estate commission which would be owed to McCully if they accepted Stine's offer, and Garth Bullington testified that he believed that the commission would be $30,000. Garth Bullington called Kevin McCully to ask what the commission would be, and Kevin McCully advised him that the commission would be approximately $90,000. Vinton advised the members of Baccaro to wait on Stine's offer until they found out what the commission to McCully would be. Vinton testified he had also advised Baccaro that a fair market value needed to be assigned for exchange purposes and that it would be prudent to include a term which in effect

indicated that the fences did not necessarily coincide with the legal boundaries.

On October 2, 2007, Vinton sent McCully's attorney a letter discussing formulas by which to calculate a commission. The letter indicates that Baccaro had tabled the exchange. The letter acknowledged that Stine valued the Pados Ranch at $1,534,500.

On October 31, 2007, Vinton sent McCully's attorney a letter stating that the terms of the September 2007 Real Estate Exchange Agreement presented to Baccaro by Stine were acceptable. Vinton also stated that Baccaro wished to add two terms, and this October 31 correspondence has been referred to as the "counteroffer" tendered by Baccaro. Baccaro wished to add a provision stating that the fair market values of both the Pados Ranch and the Baccaro Ranch were $1,532,160 and that each party "accept[ed] the real estate to be conveyed to it subject to the location of existing fences." The letter recognized the issue regarding McCully's commission, but stated that it was premature to resolve it. For purposes of the listing agreement, the October 31 counteroffer contained the terms that Baccaro agreed to accept.

The Real Estate Exchange Agreement was not signed during the listing period, which expired on December 1, 2007. Vinton testified he did not know of his own knowledge "why we didn't get a response" to the counteroffer. Stine testified that he was ready to exchange based upon the proposed exchange agreement in the fall of 2007 and that he never withdrew his September 2007 proposal. Stine testified that the exchange agreement language regarding fences was added for assurance for the members of Baccaro and that the disagreement between McCully and Baccaro regarding the commission "led to just a total lack of progress" in the fall of 2007.

Garth Bullington testified at trial that in January 2008, he arranged for an employee of the Natural Resources Conservation Service to come to the Baccaro Ranch. The employee used a global positioning system (GPS) instrument to plot coordinates along the fence lines of the Baccaro Ranch and created a map using the coordinates which indicated that the acreage inside the fence lines of the ranch was 3,226.6 acres.

During the term of the listing agreement, Baccaro had also received offers from other potential buyers, including one for $1,320,000 and another for $1,400,000. However, the parties agree that Stine was the only possible ready, willing, and able exchanger presented during the term of the listing agreement, and the record as a whole shows that early on, Baccaro expressed an interest in exchanging the Baccaro Ranch for the Pados Ranch.

On July 10, 2008, a closing was held whereby the Baccaro Ranch was exchanged for the Pados Ranch. It is obvious that the actual closing between Baccaro and Stine took place after the real estate listing agreement had expired on December 1, 2007, and outside the protected period, which was 180 days after the expiration of the listing agreement. The Real Estate Exchange Agreement signed by Baccaro and Stine is the actual agreement tendered by Stine in September 2007 with only the date on the first page changed in handwriting from September 2007 to June 18, 2008, and the addition of Alma Bullington's, Garth Bullington's, and Valma Smith's notarized signatures dated June 18, 2008. Stine's notarized signature on the executed agreement remained dated September 6, 2007.

Vinton prepared an addendum to the Real Estate Exchange Agreement, dated July 1, 2008, which Baccaro and Stine signed. Stine did not participate in the creation of the addendum. The addendum stated that the fair market values of the Pados Ranch and the Baccaro Ranch were both $1,532,160, which approximates the amount Stine had paid to purchase the Pados Ranch in February 2007. The addendum provided that the parties accept the properties subject to the location of existing fences and to any claims of third parties resulting from fences' not being on the legal boundary lines and that neither party warranted an exact number of acres that were being exchanged.

Baccaro never paid a real estate commission to McCully. McCully filed its complaint in the district court for Hooker County on August 11, 2008, seeking a commission. Baccaro responded with an August 21 motion to dismiss, which was granted, along with leave to amend. McCully filed an amended complaint on November 3, alleging both breach

of contract and unjust enrichment by Baccaro. Baccaro filed a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6). Other motions and rulings were filed. The district court determined that the listing agreement was unenforceable under the statute of frauds, determined that McCully could not circumvent the statute of frauds by pleading unjust enrichment, and granted Baccaro's motion to dismiss.

McCully appealed the dismissal and claimed, inter alia, that the district court erred when it found that McCully failed to state a claim for breach of contract or unjust enrichment. In *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010), we concluded that the listing agreement was enforceable and that McCully's amended complaint alleged a claim and a set of facts upon which relief could be granted. We reversed the decision of the district court granting Baccaro's motion to dismiss, reinstated McCully's amended complaint, and remanded the cause for further proceedings.

On February 23, 2011, the district court overruled both parties' motions for summary judgment. A trial to the court was conducted commencing in June 2011. On August 17, the court filed a memorandum opinion and judgment in which it found generally in favor of Baccaro and against McCully. Regarding the claim based on an alleged breach of the listing agreement, the court found that McCully failed to find a ready, willing, and able buyer to purchase or exchange the Baccaro Ranch at a price and on the terms which were acceptable to Baccaro during the term of the listing agreement or within the 180-day protected period under paragraph 13(e) of the listing agreement. Regarding the claim based on unjust enrichment, the court found that Baccaro did nothing to hinder or impede McCully's ability to show or attempt to sell or exchange the Baccaro Ranch. Although both parties had introduced evidence regarding valuation for purposes of determining a commission, if any, in view of its disposition of McCully's claims, the court made no ruling on the amount of a commission. The court dismissed both claims with prejudice.

McCully sought a new trial. On October 13, 2011, the district court denied McCully's motion. McCully appeals.

ASSIGNMENTS OF ERROR

McCully claims that the district court erred when it found (1) that no ready, willing, and able exchanger was procured during the term of the listing agreement between McCully and Baccaro and (2) that Baccaro did not unfairly hinder or impede McCully's ability to affect an exchange.

Because we determine that McCully found Stine as a ready, willing, and able exchanger during the listing period on terms acceptable to Baccaro, and because the district court clearly erred when it found to the contrary, we find merit to McCully's first assignment of error and reverse the court's decision and remand the cause on this basis. Accordingly, we do not consider McCully's second assignment of error. See *In re Interest of Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (stating that appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

STANDARDS OF REVIEW

[1-4] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010). An appellate court will not reevaluate the credibility of the witnesses or reweigh testimony but will review the evidence for clear error. *Id.* Similarly, the trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Smalley v. Nebraska Dept. of Health & Human Servs.*, 283 Neb. 544, 811 N.W.2d 246 (2012). In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Hooper, supra*.

ANALYSIS

McCully generally claims that the district court erred when it found that McCully was not entitled to a commission for the exchange of the Baccaro Ranch with the Pados Ranch.

McCully claims in particular that the district court clearly erred when it found that no ready, willing, and able exchanger was procured during the term of the listing agreement between McCully and Baccaro; McCully contends the evidence showed that Stine was found by McCully and that Stine was a ready, willing, and able exchanger during the listing period on terms acceptable to Baccaro. In response, Baccaro asserts that no ready, willing, and able purchaser or exchanger was produced during the term of the listing agreement and that therefore, the district court correctly determined that McCully was not owed a commission. For the reasons which follow, we determine that the district court clearly erred when it found that no ready, willing, and able exchanger was procured during the term of the listing agreement, and therefore, we find that McCully is entitled to a commission.

[5-8] We have stated that in determining whether a commission is due a broker, the court must look to the terms and conditions of the listing agreement. *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004). When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). If a contract is unambiguous, the court will enforce the contract in accordance with the plain meaning of the words of the contract. *Trimble, supra*. Enforcement of a contract depends upon the terms of the contract and the facts that are applicable to the contract. *Id*.

The contract which controls our analysis with respect to whether McCully is entitled to a commission is the listing agreement quoted earlier in this opinion. By its terms, the listing agreement between McCully and Baccaro began on December 23, 2006, and expired on December 1, 2007. The relevant portion of the listing agreement at paragraph 13(a) provided that a commission would be payable to McCully if, during the term of the listing period, McCully found a buyer or exchanger who was ready, willing, and able to purchase or exchange the property at the price and on the terms contained in the listing agreement or for any other price and on

any other terms which Baccaro agreed to accept. The listing agreement also provided at paragraph 13(e) that McCully would receive a commission if within 180 days after the expiration of the listing agreement, Baccaro sold or exchanged the property to any person found during the term of the listing or due to McCully's efforts or advertising under the listing agreement.

[9-12] We have previously stated that ordinarily, a real estate broker who, for a commission, undertakes to sell land on certain terms and within a specified period is not entitled to compensation for his or her services unless he or she produces a purchaser within the time limit who is ready, willing, and able to buy upon the terms prescribed. *Coldwell Banker Town & Country Realty v. Johnson*, 249 Neb. 523, 544 N.W.2d 360 (1996). Furthermore, we have stated:

> "When the broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted, and the broker's right to compensation cannot be impaired by either the subsequent inability or unwillingness of a purported owner to consummate the sale on the terms prescribed."

Agri Affiliates, Inc. v. Bones, 265 Neb. 798, 811-12, 660 N.W.2d 168, 179 (2003) (quoting *Marathon Realty Corp. v. Gavin*, 224 Neb. 458, 398 N.W.2d 689 (1987)). A seller is under no obligation to sell his or her property to a purchaser procured by a broker. *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977). The fact, however, that the seller exercises his or her right not to sell the listed property to the purchaser produced by the broker does not relieve the seller of his or her obligation to pay the broker the agreed-upon commission. *Id.* See, similarly, *Dworak v. Michals*, 211 Neb. 716, 320 N.W.2d 485 (1982) (stating that broker is entitled to commission where failure of completion of deal results from wrongful act or interference of seller). Thus, although Baccaro was under no obligation to sell or exchange its property to Stine or any other purchaser or exchanger procured by McCully, if Stine or another purchaser was actually a ready, willing, and able purchaser procured by McCully during the

term of the listing agreement on terms acceptable to Baccaro, McCully is entitled to its commission.

In *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004), a real estate broker brought a breach of contract claim to recover a commission on the sale of land. Because the potential buyers were not able to go forward with an exchange during the listing period and the sale was not consummated during the protection period, the broker was not entitled to a commission. In *Trimble*, we indicated that where the terms of the listing agreement are clear and unambiguous, the broker is entitled to a commission where he or she obtains a ready, willing, and able buyer during the term of the listing agreement or a sale of the property to such buyer is consummated during the protection period provided for in the listing agreement. We apply the framework in *Trimble* to the present case.

In the instant action, the exchange of the property occurred in July 2008. A sale or exchange was not consummated during the term of the listing agreement, which expired on December 1, 2007, or within the 180-day protection period provided for in the listing agreement between McCully and Baccaro. Therefore, the question before us is whether McCully found a ready, willing, and able buyer or exchanger during the term of the listing agreement. If McCully did obtain a ready, willing, and able buyer or exchanger during the term of the listing agreement, it was entitled to a commission.

[13] In explaining what is meant by a ready, willing, and able buyer, it has been stated:

> Each of the words "ready," "willing," and "able" expresses an idea that the others do not convey. All three of these elements must exist in the customer, in order to entitle the broker to a commission. It is not sufficient that the customer is ready and willing, but he or she must also have the ability to carry out the loan, sale, purchase, or exchange. So also, the procurement of a ready, willing, and able purchaser by a broker involves not only a showing that the purchaser has the financial ability to complete the contract, but also that the purchaser is ready and willing to purchase at a price and on terms prescribed by the vendor.

12 C.J.S. *Brokers* § 225 at 295 (2004). The Iowa Supreme Court has stated that "to be ready means to be ready to purchase on such terms as are agreeable to the owner at the time." *Jones v. Ford*, 154 Iowa 549, 554, 134 N.W. 569, 571 (1912). The Iowa Supreme Court has further stated that "to be willing means to be willing to make the purchase upon such terms." *Id.* We have stated that a prospective purchaser is financially able if he or she has the capability to make the downpayment and all deferred payments required under the proposed contract of sale. *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977).

The district court generally found that McCully failed to find a ready, willing, and able buyer to purchase or exchange the Baccaro Ranch at the price and on the terms that were acceptable to Baccaro during the term of the listing agreement or within the 180-day protected period and denied McCully's claim for a real estate commission. The district court did not make specific factual findings as to the individual terms "ready," "willing," or "able"; nor did it identify the items which composed the terms acceptable to Baccaro. Even after considering the evidence in a light favorable to Baccaro, we nevertheless determine that the district court clearly erred when it found that Stine was not a ready, willing, and able buyer during the term of the listing agreement.

There is no question that McCully found Stine as a potential buyer or exchanger for the Baccaro Ranch during the term of the listing agreement. There is no question that Stine was an "able" purchaser during the term of the listing agreement. He was financially able. Furthermore, he was ably positioned because he had purchased the Pados Ranch in February 2007 and owned it when he offered to complete a straight exchange of the Pados Ranch and the Baccaro Ranch. Given that Stine was an "able" exchanger, the issue becomes whether Stine was "ready" and "willing" to exchange his property for the Baccaro Ranch during the term of the listing agreement on terms which Baccaro agreed to accept.

Stine testified without contradiction that he remained agreeable throughout the listing period to the terms contained in the signed Real Estate Exchange Agreement he submitted to

Baccaro in September 2007. It is clear that Baccaro was agreeable to the terms contained in Stine's September 2007 agreement, as evidenced, in part, by Vinton's letter of October 31 to that effect. This letter further stated that Baccaro wished to include two additional terms, to wit: setting the fair market value of each of the ranches at $1,532,160 and providing that the parties accept that the real estate would be conveyed subject to the location of existing fences. The letter noted the absence of a survey requirement and explained that there was some question whether the fences were on proper legal boundary lines on both ranches. With respect to the fence term in the context of the sale of ranchland, Vinton testified that he advised Baccaro to be vigilant regarding fences because he had previously been involved with lawsuits over fences' not being on legal boundary lines.

Given Stine's September 2007 Real Estate Exchange Agreement and Baccaro's October 31 counteroffer containing two additional terms, the evidence shows that for purposes of the listing agreement's paragraph 13(a)(II), the "terms to [sic] which Seller [Baccaro] agrees to accept" consisted of (1) Stine's September 6, 2007, Real Estate Exchange Agreement; (2) a term regarding value; and (3) a term regarding fences. If Stine, who was undisputably "able," was agreeable to these three items during the term of the listing agreement, he was "ready" and "willing" and McCully was entitled to a commission.

With regard to the first term, regarding the proposed Real Estate Exchange Agreement, as noted, Stine testified that he remained agreeable to his September 2007 offer and did not withdraw it and there was no evidence that that document was unacceptable to Baccaro; to the contrary, the October 31 counteroffer embraced it.

With regard to the second term, concerning the value to be placed on the ranches, the record indicates that there was no real dispute about Baccaro's additional term listing the fair market values of the ranches for exchange purposes at $1,532,160. This value approximates the amount that Stine paid for the Pados Ranch in February 2007, as Vinton had acknowledged in his October 2 correspondence on behalf

of Baccaro. Both Baccaro and Stine were agreeable to this term.

With regard to the third term, pertaining to "fences," there was considerable testimony offered by Baccaro at trial and much emphasis placed on it in Baccaro's appellate brief. Baccaro argues that because Stine had concededly expressed concern about the actual acreage of the Baccaro Ranch, Stine was not agreeable during the term of the listing agreement to the fence term, which essentially provided that the parties acknowledge that the fences might not coincide with the legal boundaries. Baccaro asserts in its brief that "the primary reason the Counteroffer was not accepted is because . . . Stine had to have assurance of acreage which included knowing where the fence lines were in connection with the described boundary lines." Brief for appellee at 23. Baccaro further contends that Stine would not have participated in the exchange without having received the GPS map prepared in January 2008. The admitted testimony does not support this. On the contrary, Stine testified that Garth Bullington wanted the GPS map produced because Garth Bullington, not Stine, had an issue with the fences.

It appears from its findings that the district court accepted Baccaro's argument equating acreage and fences and that it confused the topics of acreage and fences. However, the subject of actual acreage and the issue of fences are two separate matters, and they should not have been conflated. The court found that Stine was concerned as to the actual acreage of the Baccaro Ranch, which was a nonissue, but failed to make a finding regarding Stine's view of the fence term, which was an issue vis-a-vis being a ready and willing exchanger.

In his September 2007, offer, Stine provided the legal descriptions for the Pados Ranch and the Baccaro Ranch, the latter being described as approximately 3,010 acres. In his testimony, Stine was asked if he needed to know the acreage of the Baccaro Ranch before he traded for it. Stine answered that he would not have been concerned with 3 or 4 acres more or less than what was listed, but he "wanted some assurance that [he] was getting essentially what [he] had bargained for." When questioned about the fence term, Stine testified that the

parties understood the properties would be conveyed subject to the existing fences and "that [the fence term] was really something that maybe Garth or the Bullingtons wanted." Stine's testimony is consistent with Vinton's. The record thus indicates that Baccaro was concerned with the issue of fences and that although Stine was concerned with acreage, he was not hesitant to exchange because of the fence term.

The evidence from the record shows that Stine was agreeable to the term regarding fences. In his previous offers to Baccaro, Stine had included a requirement that Baccaro conduct a survey of the Baccaro Ranch; a survey would have indicated, inter alia, whether the fences were on the legal boundary lines. However, Stine purposely and with reason did not include a survey requirement in his signed September 2007 offer, which included a legal description of the ranches and approximate acreages and became the basis for the actual exchange.

Stine testified that he was aware of the corrective deeds that Baccaro had completed with its only neighbor, the Dismal River Ranch. These corrective deeds alleviated the most problematic boundary issue. Kevin McCully testified at trial that during the summer of 2007, after Stine had rejected Baccaro's straight-trade offer and before Stine's September 2007 straight-trade offer, Kevin McCully took Stine for a drive on four-wheelers around the Baccaro Ranch. Kevin McCully testified that Stine wanted to see all of the boundary fences. Kevin McCully testified that during the visit to the ranch, Stine gave him the impression that he was satisfied with the fence boundaries of the ranch. Because Stine was aware of the corrective deeds with Baccaro's only neighbor and dropped the survey requirement from his September 2007 offer, and because Stine toured the fence lines of the Baccaro ranch and was satisfied, it is clear that Stine was agreeable to a term that the property was to be conveyed subject to the location of the existing fences.

The legal significance of the foregoing facts supports the determination that Stine was a ready, willing, and able buyer during the listing period. The fact that he signed the Real Estate Exchange Agreement in September 2007 indicated that he was ready and willing to enter into a binding agreement

with Baccaro. See *McAllister Hotel, Inc. v. Porte*, 98 So. 2d 781 (Fla. 1957) (stating that buyer was not ready and willing when buyer declined to sign memorandum prepared by seller's attorney). See, also, *East Kendall Inv. v. Bankers Real Estate*, 742 So. 2d 302, 305 (Fla. App. 1999) (stating that nonbinding letter of intent or "'agreement to agree'" was insufficient to demonstrate that buyer was ready and willing). The fact that the exact legal descriptions of the properties to be traded were contained in the September 2007 offer shows evidence of the certainty of Stine's readiness and willingness. See *Kenerly v. Yancey*, 144 Ga. App. 295, 241 S.E.2d 28 (1977) (stating that buyer was not ready and willing when sales contract and, in particular, description of land were impermissibly vague). But see *Whitefield v. Haggart*, 272 Ark. 433, 615 S.W.2d 350 (1981) (determining that vague description of property in offer was enough to show buyer was ready and willing). The fact that Stine dropped the requirement that a survey be conducted from his September 2007 offer, which survey he had required in his previous two offers, further indicated his readiness and willingness. See *Renfro v. Meacham*, 50 N.C. App. 491, 274 S.E.2d 377 (1981) (determining that buyer was not ready and willing when sales price in offer was contingent on conducting survey).

The essential terms of the exchange were assented to by both parties during the listing period. See *D. M. Kaufman Assoc. v. Lake Co. Tr. Co.*, 157 Ill. App. 3d 926, 510 N.E.2d 919, 109 Ill. Dec. 851 (1987) (stating in brokerage commission case that agreement can be determined by assent and that if terms objected to by sellers were incidental terms, rather than essential terms, then prospective buyer was ready, willing, and able). The words and acts of Stine showed that he was a ready, willing, and able exchanger. See *Dziga v. Muradian Business Brokers, Inc.*, 28 Ark. App. 241, 773 S.W.2d 106 (1989) (determining in brokerage commission case that acts and deeds of buyer can show readiness and willingness). The deal Baccaro and Stine agreed to in June 2008 was in every important respect what Stine had bargained for in September 2007, and indeed, the final Real Estate Exchange Agreement signed in June 2008 is the very document Stine tendered in

September 2007. It has been observed that in the context of evaluating whether a broker is entitled to a commission, the contract of sale is evidence that contract terms were "satisfactory and acceptable . . . elsewise the [parties] would not have agreed to them." Arthur R. Gaudio, Real Estate Brokerage Law § 145 at 201 (1987). The addition of an exchange value for the ranches was an important term given the structure of the deal, but was not contentious; the addition of the fence term, while prudent, was unremarkable in the context of the sale or exchange of ranchland.

Enforcement of a real estate brokerage contract depends on the terms of the contract and the facts that are applicable to the contract. See *Trimble v. Wescom*, 267 Neb. 224, 673 N.W.2d 864 (2004). Given the contract and the facts that are applicable to it, it is clear based on the admitted evidence that Stine was ready, willing, and able to exchange on terms acceptable to Baccaro during the term of the listing agreement. The district court clearly erred when it determined that McCully failed to find a ready, willing, and able buyer or exchanger during the term of the listing agreement between McCully and Baccaro and erred when it dismissed McCully's amended complaint. Because McCully produced a ready, willing, and able buyer to Baccaro during the term of the listing agreement on terms agreeable to Baccaro, it was entitled to receive a commission.

CONCLUSION

McCully found an exchanger during the term of the listing agreement between McCully and Baccaro who was ready, willing, and able to exchange on terms acceptable to Baccaro. Therefore, the district court clearly erred when it found to the contrary and determined that McCully was not entitled to a real estate commission. Accordingly, we reverse the dismissal and remand the cause for further proceedings to determine the amount of the commission owed to McCully.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.