

Mediation Agreement to Agree = Disagreement
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Often, the parameters of a mediated dispute are finite and known, making the final agreement comprehensive and complete. There are occasions, however, where the dispute or its resolution process is somewhat amorphous, complicating efforts to mediate an agreement. While it is wise to whittle down the scope of the dispute by resolving as many issues as possible, counsel must be ever mindful that a less-than-comprehensive agreement may end up being no agreement at all.

Such was the case in a rather bizarre divorce proceeding, reported in Marlowe v. Brown, et.al., 944 So. 2d 1036 (Fla. 4th DCA 2006). Mr. and Mrs. Brown entered into a mediated agreement as to the equitable distribution of their marital estate, calling for equal division of all property that was deemed to be marital. The parties resolved most of what was encompassed in this agreement, leaving the court to determine whether four real property parcels were marital assets or not.

What followed was a tortuous proceeding involving multiple hearings, many interim orders, the death of the husband, followed by the death of the wife, the intervention of personal representatives, and the opening of two probate cases. However, what did not occur during this process was any final determination of the disputed land parcels or a Final Judgment of Dissolution of Marriage. At one point in the proceeding, the husband challenged the sufficiency and enforceability of the mediated agreement, calling it nothing more than “an agreement to agree”.

The appeal court ultimately accepted this proposition, but to the detriment of the husband’s estate. By finding that the mediation agreement was too tentative and preliminary to control the disposition of property after the death of the husband, the court declared that all marital assets and liabilities pass to the wife’s estate, despite the mediated agreement that hinted toward a different intent.

So, how does this case (and article) apply to you? If you are considering an agreement that is dependent on some future contingencies, include terms that the Browns did not. Identify the “who”, “how” and “when” of those contingencies. Determine who is ultimately responsible for the contingency, and what will happen if that person is not available or willing. Next, spell out how the contingency will be triggered, so that there is no disagreement as to whether it occurred. Lastly, consider inserting a deadline for the contingency, after which the agreement will be nullified.

Parties often agree to disagree. Beware of the fact that an agreement to agree, without sufficient contingency parameters, may end up being no different.

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