Filling in the Gaps in Marital Agreements
By Joel R. Brandes

The noted Astronomer Carl Sagan and his wife married in 1968. In 1977, they signed a handwritten document entitled “Preliminary agreement, Marriage settlement,” which contained property disposition and custody provisions. There was a subsequent handwritten addendum purporting to modify the preliminary agreement. It was never signed. Neither party adhered to the terms of the preliminary agreement. Subsequently, both Carl Sagan and Linda retained separate counsel. A separation agreement was drafted but not signed by the parties. The terms of the proposed separation agreement contained provisions significantly different from those of the handwritten document. Linda brought an action seeking, *inter alia*, a declaration that a valid separation agreement existed. Carl moved for dismissal of the complaint on the ground that no contract existed between the parties and that the preliminary agreement was in any event abandoned. Supreme Court denied his motion. However, the Appellate Division reversed, granted his motion, and directed entry of judgment in his favor dismissing the complaint. It found that the preliminary writing Linda sought to be enforced was at best an agreement to agree. All the essential terms were not fully set forth. Even in her complaint, the document was characterized as “referring to Certain of the parties' understandings”. This conclusion was substantially confirmed by the conceded fact that, after the parties retained counsel, a substantially different arrangement was proposed but never agreed upon by the parties. (Sagan v Sagan (73 A.D.2d 509, 422 N.Y.S.2d 98 (1st Dep't 1979).

The Court of Appeals (53 N.Y.2d 635, 420 N.E.2d 974, 438 N.Y.S.2d 782 (1981)) modified the order of the Appellate Divison by granting judgment on the second cause of action declaring that there was no valid agreement between the parties and, affirmed as modified. It found that “the internal material indices of incompleteness in the conditioned so-called “Preliminary Agreement” and the parties' conceded subsequent unsuccessful efforts to flesh it out together supported the conclusion of the Appellate Division that there was no enforceable agreement between the parties. Concordantly, the request for a declaration of rights should have been granted and a declaration made that since there was no valid agreement between the parties, no rights inured to the plaintiff thereunder.”

Sagan v Sagan is the leading matrimonial case dealing with the proposition that an agreement to agree is not an agreement at all. An agreement to agree is unenforceable because it is indefinite and uncertain.(See Silverman v. Silverman, 249 A.D.2d 378, 671 N.Y.S.2d 145 (2d Dep't 1998)). A contract is incomplete and unenforceable when there has been no agreement as to some essential term, but only an agreement to agree in the future. (May Metropolitan Corp. v. May Oil Burner Corp., 290 N.Y. 260, 49 N.E.2d 13).

To qualify as a binding agreement there must be a definite promise or agreement. A mere declaration of intent to make a settlement is not sufficient. To create a binding contract, there must be a meeting of the minds as to the essential terms of the agreement (see, Kentucky Fried Chicken v Rockland Lease Funding Corp.,173 AD2d 1066); May v Wilcox, 182 A.D.2d 939, 582 N.Y.S.2d 294 (3 Dept., 1992)).

Former Chief Judge Fuld wrote in Willmott v Giarraputo, (5 N.Y.2d 250, 253, 184 N.Y.S.2d 97 (1959)) that "Few principles are better settled in the law of contract than the proposition that, "If a material element of a contemplated contract is left for future negotiations, there is no contract enforceable under the Statute of Frauds or otherwise." And in Cobble Hill Nursing Home v. Henry & Warren Corp., (74 N.Y.2d 475, 548 N.Y.S.2d 920), former Chief Judge Kaye wrote that: "Few principles are better settled in the law of contracts than the requirement of definiteness. If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract." (citing Martin Delicatessen v. Schumacher, 52 N.Y.2d 105, 109, 436 N.Y.S.2d 247, 417 N.E.2d 541; Restatement [Second] of Contracts § 33 [1981]).

To be enforceable, an agreement must contain all of the material terms and evince a clear mutual accord between the parties. In Joseph Martin, Jr., Delicatessen v Schumacher (52 N.Y.2d 105, 436 N.Y.S.2d 247 (1981)) Judge Fuchsberg wrote for the Court of appeals: " [B]efore the power of law can be invoked to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained. Otherwise, a court, in intervening, would be imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which they have mutually committed themselves. Thus, definiteness as to material matters is of the very essence in contract law. Impenetrable vagueness and uncertainty will not do …Dictated by these principles, it is rightfully well settled in the common law of contracts in this State that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable (Willmott v Giarraputo, 5 NY2d 250, 253; Sourwine v Truscott, 17 Hun 432, 434)."

In Flanel v Flanel, (152 A.D.2d 536, 536–37, 543 N.Y.S.2d 50 (2 Dept., 1989)) the plaintiff brought an action to recover from the defendant, his son, the monies expended by him for his son's college education. It was the father's position that the son had agreed to repay him. This alleged agreement was not in writing, and the father relied primarily on letters in which the son had acknowledged an obligation to repay him. The Appellate Division found that it was apparent from the father's deposition testimony that, if such an oral promise was made, it was no more than an agreement to agree since the terms of repayment were to be "worked out in the future depending upon circumstances". It held that where an essential element of a contract is left for future negotiations, there is no enforceable contract.

In Cohen v. Cohen, (120 A.D.3d 1060, 993 N.Y.S.2d 4 (1st Dep't 2014)) an on-the-record agreement was too incomplete and indefinite to be enforceable and was merely a non-binding agreement to agree. (See also Bernstein v. Felske, 143 A.D.2d 863, 533

N.Y.S.2d 538 (2d Dep't 1988); Anderson v. Kernan, 133 A.D.3d 1234, 20 N.Y.S.3d 489 (4th Dep't 2015)).

While an agreement to agree is unenforceable because it is indefinite and uncertain, where the parties have completed their negotiations and agreed on the essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation.

In Metro-Goldwyn-Mayer v Scheider (40 N.Y.2d 1069, 392 N.Y.S.2d 252, 252–53 (1976)) following a nonjury trial the court found that actor Roy Scheider of “Jaws” fame had entered into an oral contract by which he had agreed to be the principal actor in a pilot film and in the television series which might develop. After performing in the pilot and being fully compensated, he refused to perform in the subsequent television series. The issue on the appeal was whether there was a complete contract between the parties. The negotiations extended over many weeks. Initially, the broad outlines of the contract and its financial dimensions were agreed to, with explicit expectations that further agreements were to follow. Additional important provisions were negotiated over the following weeks. It was during this period that he went to Europe for the filing of the pilot. All culminated in supplemental agreements. The only essential term as to which there was no finding of articulated understanding was the starting date for filming the television series. This term was supplied by a finding of the trial court based on proof of established custom and practice in the industry, which both parties were aware of, set in the context of the other understandings reached by them. The Court of Appeals affirmed the finding that there was a contract. It held that “(W)here the parties have completed their negotiations of what they regard as essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement, if some objective method of determination is available, independent of either party's mere wish or desire. Such objective criteria may be found in the agreement itself, commercial practice, or other usage and custom. If the contract can be rendered certain and complete, by reference to something certain, the court will fill in the gaps. “ (To the same effect see Cobble Hill Nursing Home v Henry and Warren Corp., 74 N.Y.2d 475, 483, 548 N.Y.S.2d 920, 923 (1989) citing *Metro–Goldwyn–*Mayer v. Scheider*,* supra; Four Seasons Hotels v. Vinnik, 127 A.D.2d 310, 515 N.Y.S.2d 1 (1st Dept. 1987)).

In Four Seasons Hotels v. Vinnik, (127 A.D.2d 310, 515 N.Y.S.2d 1 (1st Dept. 1987)) the First Department explained that “the writing, other writings, usage and custom, the parties' situation, objectives, acts and utterances — a wide array of facts and circumstances can be relevant, and is admissible … in deciding whether gaps in a purported agreement are material, and, if not, how they should be filled in.”

This principle has been applied in actions involving marital agreements, where the essential elements of the contract have been agreed upon.

In Darius v Darius, (245 A.D.2d 663, 665 N.Y.S.2d 447 (3 Dept., 1997)) the parties entered into a postnuptial agreement which provided, *inter alia,* that the real and personal property owned by the parties jointly or separately would be held equally by the parties as joint tenants or tenants in common. The postnuptial agreement stated: "Property, both real and personal, now owned by either of the parties jointly or separately as set forth in the *attached schedules*, as well as any and all assets acquired by [defendant] from the Estate of [decedent], shall be held, used, and owned by them as joint tenants, or as tenants in common in equal interest during their lives." However, the attorney who drew the agreement did not have the financial data available to him to prepare the requisite schedules. Supreme Court which found that the postnuptial agreement was null and void. The Appellate Division affirmed. Since the agreement was premised upon specifically identifiable real and personal property which was to be identified in the schedules which were never included in the agreement Supreme Court found that an "essential term" was omitted, thus precluding enforcement. (citing *Sagan v. Sagan,* supra). It rejected the defendant's reliance on, inter alia, Cobble Hill Nursing Home v. Henry & Warren Corp., supra because it did not find evidence that the parties agreed to refer to any objective extrinsic standard. Moreover, the record reflected that Pontiff, as counsel to both parties, continuously informed them that they should consult independent counsel and that full financial disclosure before the inclusion of the referenced schedules was required to make the agreement enforceable. During such times, the attorney continuously advised them that he did not have the financial data available to him to prepare the requisite schedules.

Recently, in Bradley v Bakal, (--- N.Y.S.3d ----, 2022 WL 17490833, 2022 N.Y. Slip Op. 06988 (1st Dept., 2022) the Appellate Divison, First Department appeared to apply Metro-Goldwyn-Mayer v Scheider, supra, in a matrimonial action. It rejected the defendant's contention that the judgment of divorce should be vacated in its entirety because the parties had not yet agreed to all the ancillary issues to the divorce, and the judgment did not reflect the parties' in-court oral stipulation. A review of the record made it clear that the parties' in-court oral stipulation was intended to resolve all ancillary issues of the divorce. Upon review of the oral stipulation, the Appellate Divison concluded that even if the judgment of divorce included terms that were not expressly agreed to by the parties, the parties agreed upon the essential elements to create an enforceable contract, notwithstanding that certain discrete issues were left open to future negotiation. It held that: "Since the parties are unable to reach an agreement on these remaining issues, the court is entitled to fill in the gaps based on objective criteria (*see Four Seasons Hotels v. Vinnik,* 127 A.D.2d 310, 317–318, 515 N.Y.S.2d 1 [1st Dept. 1987]). Accordingly, we remand the matter to the court for a determination that the terms of the judgment of divorce not expressly agreed to by the parties comport with some objective criteria (*id.*)."

Conclusion

A marital agreement is incomplete and unenforceable when there has been no agreement as to an essential term, but only an agreement to agree to the missing term in the future. An agreement to agree is unenforceable because it is indefinite and uncertain. Where the parties have agreed upon the essential elements of their agreement, and the

performance of the agreement has begun on the good faith understanding that agreement on the unresolved matters will follow, the court will find and enforce an agreement if some objective method of determination is available, independent of either party's mere wish or desire. Objective criteria may be found in the agreement itself, commercial practice, other usage, and custom. If the contract can be rendered certain and complete, by reference to something certain, the court will fill in the gaps. The writing, other writings, usage and custom, the parties' situation, objectives, acts and utterances, and a wide array of facts and circumstances can be relevant, and is admissible in deciding whether gaps in a purported agreement are material, and, if not, how they should be filled in. Where the parties have not agreed upon the essential elements of their agreement the court may not fill in the gaps.

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