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Something Old Is New Again

The pros and cons of divorce from bed and board

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During these tough economic times it becomes even more important for litigants to settle their divorce matters quickly and keep the costs of litigation down. Often times there is not enough money to go around. After all, intact families live cheaper in one household than when they are split up into two households. Thinking outside the box and considering a divorce from bed and board instead of a traditional absolute divorce may be a viable option that offers a real economic incentive and could be the perfect missing link to settle the appropriate case.

All issues of equitable distribution, alimony, custody and child support can be finalized in a divorce from bed and board. However, unlike a final divorce application, each of the parties must consent to obtain a divorce from bed and board, as parties who enter into such a divorce remain legally married.

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Divorce from bed and board offers an economic divorce but does not dissolve the marital bond. Pursuant to N.J.S.A. 2A-34-3, a divorce from bed and board is granted for the same causes as a final divorce application.

Historically, especially in the 1950s and 1960s, divorce was not morally accepted and could leave one or both parties cloaked in shame and divested of respect from the religious community and the community at large. Also, New Jersey did not recognize "legal separation"; instead, it recognized its close cousin: a divorce from bed and board, also known as a divorce a mensa et thoro, or a limited divorce. This limited divorce gave couples the ability to divide marital assets and live separately while retaining a legally married status; thereby avoiding this religious and cultural stigma. However, over time, divorce became normalized. This normalization relieved divorcing couples of the need to avoid the social stigma of divorce. As a result, divorce from bed and board fell to the wayside, for the most part. However, it was never removed from the statutes and remains an appropriate tool for attorneys to utilize when negotiating a settlement for their clients.

You may ask yourself why anyone in his or her right mind would agree to stay legally tethered to someone when they are concurrently seeking to flee the

relationship. Good question. This article will highlight the major pros and cons of a divorce from bed and board to get you thinking, as this downward economy demands that attorneys think outside the box. It is to your advantage to add a divorce from bed and board to your toolbox of options, if you have not done so already.

Pros

1. A spouse who is divorced from bed and board can continue to obtain medical insurance coverage from the other spouse's employee health plan. An absolute divorce cuts off a spouse's right to continue to obtain health insurance from the other spouse's employer-provided plan because they are no longer husband and wife. In a divorce from bed and board, since the marital bond is not dissolved, the spouse can continue to share the perquisite reserved for spouses. This is a tremendous benefit in this downward economy. Today's unemployment rates are staggering and divorced people, like everyone else, are finding themselves out of work longer and unable to obtain their own employer-provided health insurance or pay for their own private health insurance. Also, COBRA costs can be exorbitant. Obtaining a divorce from bed and board allows parties to take advantage of a loophole as it pertains to health insurance which can make all the difference when trying to settle a case.

The caveat to this is that some medical insurance providers are becoming savvy and are beginning to close

the loophole. Some plans exclude coverage where a couple has obtained a "legal separation." Remember: New Jersey does not recognize legal separation. A divorce from bed and board is an economic division of joint marital assets. Prior to guaranteeing your client this benefit, you should request a copy of the insurance provider's provisions of coverage and read it carefully.

2. A substantial incentive to settlement: In a situation where a divorcing spouse needs to pay his or her own health insurance after the divorce, the logistics and the poignant economical reality facing the parties becomes a serious issue. Since both parties have to consent or agree to obtain a divorce from bed and board, the party with the employer-provided health insurance in place possesses a trump card for settlement negotiation. In exchange for agreeing to a divorce from bed and board for a specific amount of time and providing the employer-based health insurance, perhaps that spouse will obtain something else in the settlement, such as lower alimony or other consideration in equitable distribution. A spouse continuing to maintain health insurance coverage through his/her employer for his/her "family's benefit" is a nominal charge compared to the cost of private insurance or COBRA. The trade off can make all of the difference between settling the case and going to trial.

3. Can be easily revoked or suspended if the parties reconcile.

4. A conversion to an absolute judgment of divorce is, statutorily, a matter of right. Also, if all issues pertaining to the dissolution of the marriage have been resolved and reduced to writing, it is not onerous to convert a divorce from bed and board to an absolute divorce.

5. For federal income tax purposes, a transfer of property incident to the cessation of marriage will be a taxable event, if that the transfer occurs after six years from the date of the final judgment. Treasury Regulation § 1.1041-1T(b)Q-7. In a divorce from bed and board, the

couple can continue to jointly retain the marital residence without an externally imposed time line. Advantage? It allows time for the market to recover so that the parties can hopefully regain and/or increase their equity in their residence. In addition, if the party receiving the residence sells it in the future, the time period during which both husband and wife owned the property will be credited to the property recipient for purposes of the gain exclusion rules. Internal Revenue Code, Section 121. Treasury Regulations §1.121-4(b).

6. A limited divorce does not terminate survivorship benefits for most pension plans while an absolute divorce does. Like the medical coverage, make sure to ask for the plan's description and review it thoroughly to ascertain whether or not the plan has inserted exclusionary language.

7. Under applicable federal law parties divorced from bed and board continue to be legally married. See 1 U.S.C. Section 7 and 28 U.S.C. 1738c. For purposes of Social Security retirement benefits, therefore, a divorce from bed and board does not preclude a claim by either party. See 42 U.S.C. 416(d)(8). Similarly, a divorce from bed and board does not terminate a spouse's right to claim a veteran's property tax exemption under New Jersey State law. N.J.A.C. 18:28-2.3, N.J.S.A. 2A:34-3, N.J.S.A. 54:4-3.30. See also *Jackson v. Twsp. of Neptune*, 15 N.J. 498 (Tax Ct. 1996).

8. Terminates each party's right to claim an elective share against the estate of their spouse, thereby giving parties closure on the economic issue. N.J.S.A. 3A:38A-1.

9. Revokes any dispositions or appointment of property made by the will of one spouse to the former spouse. N.J.S.A. 3A:2A-13.

10. For federal income tax purposes, a divorce from bed and board results in each party being considered to be "unmarried," which may result in income tax benefits to each of them through

lower tax rates (thereby avoiding the so-called "marriage penalty"). Internal Revenue Code Section 7703(a) (2), *Garsaud v. Commissioner*, 28 TC 1086 (Aug. 30, 1957).

Cons

1. A divorce from bed and board nullifies the marital privilege so that communications are no longer privileged. N.J.S.A. 2A:84A-22.

2. The court will not grant a divorce from bed and board unless both parties have requested it or consent to a divorce from bed and board.

3. The parties are not free to remarry, as they remain legally married to each other.

4. The parties must make an application to the court, incurring additional fees, to convert a divorce from bed and board to an absolute divorce.

When analyzing a divorce from bed and board, clearly the pros far outweigh the cons. The most significant benefit of obtaining a divorce from bed and board is that it allows the spouse to continue to be able to receive health insurance from the other spouse's employer-provided health insurance plan just as they enjoyed during the marriage. If one of the parties does not have a full-time job that offers health insurance, the cost of obtaining health insurance or COBRA can be cost prohibitive. A divorce from bed and board can offer tremendous economic incentive that can be used to settle the right case. Here's the rub — the marital bond is not severed. Therefore, it is not an appropriate divorce for those intending to get remarried anytime soon. While the divorce from bed and board can easily be converted to an absolute divorce, it does require another application to the Court. Otherwise, for the right case, dusting off and using the antiquated divorce from bed and board option maybe the perfect fit for settlement. Divorce from bed and board is proving to be something old made new again.■