

DIVORCE LAW IN HAWAII

A PUBLIC EDUCATION PROGRAM
PRESENTED BY THE FAMILY COURT
OF THE FIRST CIRCUIT OF THE STATE OF HAWAII
AND THE MEDIATION CENTER OF THE PACIFIC

PROGRAM OVERVIEW

The “Divorce Law in Hawai‘i” program is presented by the Family Court of the First Circuit of the State of Hawai‘i and the Mediation Center of the Pacific. This program is designed to help spouses going through divorce prepare for divorce, understand their options, and resolve their issues with their spouses without unnecessary conflict or expense. The program covers the following topics.

- The Law of Divorce in Hawai‘i
- The Process of Divorce in Hawai‘i
- How to Have a Successful Divorce
- Available Divorce Options in Hawai‘i
- Additional Resources for Divorcing Couples

The program provides specific information about the option of a divorce mediation at the Mediation Center of the Pacific.

As a program participant, you will receive in addition to these handout materials copies of the Family Court’s form of Divorce Decree and Asset and Debt Statement, an application to engage in a divorce mediation at the Mediation Center of the Pacific, and a copy of the current public school calendar.

The opinions expressed in the program, and in these materials, do not necessarily reflect what the Family Court would do in a particular case, and they should not be construed as legal advice. If you need professional help with your divorce, you are encouraged to get it.

THE LAW OF DIVORCE IN HAWAII

A divorce involving children has four (4) legal parts.

Parts of a Divorce

- The first part of a divorce is the divorce itself.
- The second part of the divorce is custody and visitation. Custody includes legal custody (decision-making authority) and physical custody (time-sharing).
- The third part of a divorce is property division; the division and distribution of all assets and liabilities existing at the time the divorce.
- The fourth part of a divorce is support. Child support includes monthly child support, child education expenses, and child health care. Support can also involve alimony (spousal support).
- When negotiating a divorce, once it is agreed that a divorce will occur, the couple should address custody and visitation first, property division next, child support after that, and alimony (spousal support) last.

Granting of a Divorce

- Hawaii is a “no fault” state. The divorce itself is granted upon either spouse’s affirmation that “the marriage is irretrievably broken.”
- The requesting (Plaintiff) spouse must be a Hawaii resident. New residents must wait six months. There is also a three month Circuit (Island) residency requirement.
- If there is any realistic possibility of a successful reconciliation, stop all discussion of divorce, and seek the help of a marriage counselor or other appropriate professional.

Custody and Visitation

- Parents should always try to together decide what is best for their children.
- Fighting about custody is harmful to children.

- Custody disputes should not be litigated in Family Court except as a last resort.
- There are no Family Court custody time sharing guidelines.
- Hawai'i's child support guidelines define "normal" time sharing by non-primary caretaker as up to 143 days out of 365 days. That's about 5 out of every 14 overnights during the school year, with vacations shared equally.
- Previously the guidelines defined "normal" time sharing by the non-primary caretaker as up to 100 days.
- The parents can agree to any reasonable time sharing schedule which they together believe is in the best interest of the children, and the Family Court will enforce it.
- Family Court, if it must decide, has wide discretion.
- Children don't vote.
- Parenting coordinators, custody evaluators, and guardians ad litem can be appointed for minor children.
- Custody can be reviewed when circumstances change.
- Most custody orders have a limited life span.
- Fighting about custody can lead to more fighting.
- Usually the primary caretaker is the sole legal custodian.
- Parents can agree to joint legal custody, where all major decisions are made together.
- Joint legal custody can materially foster non-primary caretaker involvement and support.

Division of Property and Debt

- Best to start with property division when addressing divorce money issues because (1) existing rules cover most property division issues, and (2) property division affects cash flow, which is the key consideration in support negotiations.

- The completion of a joint Asset and Debt Statement is, bar none, the most critical part in the successful resolution of any divorce financial issue.
- Hawai'i recognizes and enforces premarital agreements and post-nuptial agreements.
- Simple Family Court property division formula ("marital partnership principles for divorce property division") mathematically divides all assets and debts at the time of the divorce.
- Formula calculates exactly how much of current family "net worth" each spouse gets in total assets post-divorce.
- Formula considers (1) each spouse's assets and debts at the date of marriage, (2) each spouse's gifts and inheritances received during the marriage, and (3) all current assets and debts ("the marital estate"), and nothing else.
- Formula reimburses each spouse from the current marital estate assets equal in value to (a) date-of-marriage net worth, and (b) date-of-acquisition value of gifts and inheritances received during the marriage, and divide all that remains 50/50.
- Reimbursement credit for date-of-marriage net worth and date-of-acquisition value of gifts and inheritances received during the marriage may (?) be lost if expended for the benefit of the family.
- Formula applies only if couple can't agree. Couple can enforcibly agree to division of property and debt which is different than formula result.
- Hawai'i defines the marital estate broadly to include "everything of present and prospective value" including retirement, trusts, and intellectual property.
- Except for "waste" or "fiscal irresponsibility in the time of the divorce" the Family Court cannot consider fault by either party during the marriage in dividing property.
- The Family Court can "equitably" deviate from the formula result in certain exceptional circumstances.

- The division of some retirement requires a separate order approved by the plan. Exchange backup documentation and contact the plan before you begin.

Child Support, Education and Health Care

- Family Court's mandatory mathematical formula for child support considers (1) time sharing ratio, (2) gross incomes of both parents, (3) child care payments, and (4) medical insurance for children premium payments, and nothing else.
- Guidelines amount must be paid absent "exceptional circumstances."
- Guideline support in excess of a child's needs is "exceptional circumstances."
- Almost all else is not "exceptional circumstances."
- Support is paid through the Hawai'i Child Support Enforcement Agency (CSEA) by income withholding unless agreed and ordered otherwise.
- Divorce Decree must address responsibility for maintenance of health care insurance for children.
- Uninsured health care expenses are often shared pro rata based on income of parents.
- No Family Court guidelines exist for the payment of child health care.
- No Family Court guidelines exist for the payment of child educational expenses.
- Unless otherwise provided primary caretaker pays educational expenses (tuition, fees, books).
- There is a special rule for children already in private school.
- Either parent can ask for child support review when circumstances change after divorce, and at other times too.
- Family Court or CSEA can both decide on review and modification of child support.

- Go to the Judiciary’s website to run the Guidelines, and see all of the rules regarding child support.

Spousal Support (Alimony)

- Alimony and/or “equitable deviation” in property division can be used to compensate the less-financially-advantaged spouse.
- Temporary alimony is support received prior to divorce.
- Transitional alimony is support received while the less-advantaged spouse is adjusting to a lower standard of living.
- Rehabilitative alimony is support received while the less-advantaged spouse is acquiring new skills.
- Permanent alimony is support received for the rest of the life of the less-advantaged spouse.
- Alimony can be reserved.
- An alimony applicant must show cannot support self at marital standard.
- Applicant must show that other spouse has more than needed for his or her own marital-level expenses.
- Family Court must then decide in its discretion whether alimony is “just and equitable,” and if so, in what amount.
- No rules or guidelines governing the amount or duration of alimony exist.
- Alimony defeats the objective of a final and complete split. Alimony can be modified; property division cannot.

THE PROCESS OF DIVORCE IN HAWAII

Divorces are either uncontested or contested. They are classified by how they end.

Uncontested Divorce

- The legal process of divorce begins when one spouse (Plaintiff) files his or her complaint for divorce.
- In an uncontested divorce, the couple signs a Divorce Decree which states the agreed-to terms of the divorce, a joint Child Support Guidelines Worksheet (if there are dependent children), and a joint Asset and Debt Statement (unless each spouse files his or her own). Each spouse files his or her own Income and Expense Statement. There will be an order for income assignment or an affidavit for the direct payment of child support, depending on how child support will be paid. The non-filing (Defendant) spouse will file an appearance and waiver confirming the agreement. The Plaintiff files an affidavit confirming the agreement, and other key facts regarding the couple.
- An uncontested divorce can take as little as a couple of months.
- The forms for an uncontested divorce may be found on the Judiciary website.

Contested Divorce

- In a contested divorce, the Family Court is obliged to make one or more temporary or permanent orders affecting the couple and/or their children.
- There can be restraining orders (financial and personal conduct), discovery against the spouses (interrogatories, document requests, requests for admission, depositions), discovery against third parties (institutions and individuals), temporary orders (custody, child support, alimony, payment of debt, use/control of assets), settlement conferences, pretrial conferences, pretrial motions, a trial, post-trial motions, and appeals.
- A contested divorce is inevitably an expensive, risky, stressful, frustrating, unpredictable, time-consuming, and privacy invasive undertaking with the potential to do lasting damage to the participants.
- A contested divorce can take a year, or longer. If there are appeals, it can take years.
- A contested divorce should be undertaken only as a last resort.

HOW TO HAVE A SUCCESSFUL DIVORCE

Many would say that the maintenance of a good attitude, education, assistance of others when appropriate, and the free exchange of information with one's spouse are the keys to a successful divorce.

Maintenance of a Good Attitude

- A divorcing spouse has complete control over his or her attitude about the divorce; a divorcing spouse has no control over his or her spouse's attitude about the divorce.
- The typical causes of delay and conflict in divorce are (a) an insufficient base of shared information, (b) an insufficient understanding of the normal way of doing things, and (c) a lack of respect and dignity in personal dealings.
- Many would say that a spouse who adopts a positive and even forgiving attitude about his/her divorce tends to do better; those spouses who are overcome with anger, or play the victim role, tend to do less well.

Educating Oneself

- Get educated about the law and the process of divorce.
- Read about the special needs of divorcing children all ages, and go to Kids First, if you haven't done so already.
- Consider the materials on the Judiciary's website for divorcing spouses.

Seeking Assistance of Others

- While one should try to do as much as one can by oneself, the assistance of others may be necessary.
- Lawyers can further educate spouses about the law and the process of divorce. Lawyers can negotiate on behalf of clients, and represent clients in a mediation, an arbitration with a private judge, or a litigation before the Family Court. Some lawyers act as collaborative practitioners.
- Mental health professionals can educate spouses about the special needs of children in divorce. Mental health professionals can help

with the stress of a divorce, and help one make the decisions one must make.

- Accountants can prepare new tax returns, evaluate previously filed tax returns, and advise as to the tax consequences of the divorce. The existing accountant should be informed of the impending divorce.
- Financial planners can assist with asset management and post-divorce budgetary concerns.
- Mediators, arbitrators/private judges, and collaborative practitioners offer an alternative to litigation.
- Plan administrators, account advisors, and human resource supervisors can provide documentation with respect to the division and distribution of retirement incident to divorce. Some retirement assets cannot be divided without special paperwork, which can generally be obtained from the involved employer/plan sponsor.

Exchange of Information

- The free and open exchange of information between spouses is essential to informed settlement.
- Couples exchange information regarding family assets and liabilities through the presentation of Family Court Asset and Debt Statements.
- Couples exchange information regarding income and expenses through the presentation of Family Court Income and Expense Statements.
- The division of retirement presents special challenges. Exchange backup documentation for all retirement before discussing its disposition.
- Obtain tax returns for all of the years of the marriage, or at least the last five years.

AVAILABLE DIVORCE OPTIONS IN HAWAII

Resolution options for couples divorcing in Hawai'i include the "kitchen table settlement option", mediation, attorney settlement, collaborative practice, arbitration/private judging, and litigation before the Family Court.

"Kitchen Table Settlement"

- In the kitchen table settlement option, the couple, usually over a series of meetings, proceeds to exchange necessary information, discuss settlement options, reach an agreement, and then complete their uncontested paperwork, all without the presence or active involvement of lawyers.
- The kitchen table settlement option is often best in the simplest of situations, where there are no complicated issues, and the couple is on friendly terms.

Mediation

- In a divorce mediation, with the assistance of a neutral mediator, divorcing spouses exchange necessary information, openly discuss their interests, identify and explore settlement options, and hopefully reach a settlement without litigation.
- Mediation is not judging.
- Settlement offers made in mediation are confidential.
- The Family Court favors mediation, and requires a good faith effort at mediation before trial.
- Community mediation center service providers like MCP provide low-cost mediation services in less complicated situations. Private practice mediators with a greater depth of subject matter specific skill and experience provide assistance in more complicated situations.
- The mediation option is often best where there are potentially more complicated issues and/or the couple has some difficulty communicating.

Attorney Settlement

- In the attorney settlement option, each spouse has his or her own lawyer advocating his or her own interests.
- No lawyer can represent both spouses in any situation.
- The lawyers obtain/exchange information, counsel/advise their respective clients, and negotiate with each other on behalf of their respective clients.
- No mediator is involved.
- Once an agreement is reached, the lawyers prepare the Divorce Decree and the other uncontested divorce settlement documents, for approval by the Family Court.
- The attorney settlement option is best where there are more complicated/potentially complicated issues, and mediation is not necessary/appropriate.

Collaborative Practice

- On July 1, 2012, Hawai'i adopted the Uniform Collaborative Law Act (HUCLA).
- In collaborative practice, each spouse and their respective attorneys agree to freely and openly share information, and strive to resolve all issues in the best interests of the family and the children without litigation, and if they can't settle, the lawyers are discharged. In this way, attorneys become problem solvers, rather than adversaries.
- Collaborative practice is not new. For more than twenty (20) years, collaborative divorce practice has thrived in other states, and other countries.
- Collaborative practice is usually most appropriate for couples who (a) would likely each otherwise hire counsel in a traditional representation, (b) have the temperament and ability to openly, cooperatively, and agreeably address and resolve their divorce issues, (c) wish to use their lawyers as problem solvers rather than as "gladiator/litigators," (d) are willing to take the risk of having to hire new lawyers if they can't settle, and (e) prefer not to mediate.

Arbitration/Private Judging

- In the arbitration/private judge option, the divorcing couple agrees to let an arbitrator or private judge decide their property division issues, subject to limited review.
- The couple can likewise agree to let an arbitrator decide alimony, again subject to limited review.
- By agreement of the couple, an arbitrator should also be able to decide child custody (subject to review for best interest) and child support (if consistent with the Child Support Guidelines).
- An arbitrator/private judge can also be retained to address discovery (fact-finding) issues.
- The arbitration/private judging option is usually most appropriate for couples who have counsel, have more complex/pressing issues which can't wait for a Family Court determination, or which require presentation time beyond that available at Family Court, and do not opt for mediation or collaborative practice.

Litigation

- In the litigation option, the divorcing couple asks the Family Court to make one or more temporary or permanent orders affecting the couple and/or their children.
- The litigation option is most appropriate for those couples who have tried all appropriate other options without success, and have no alternative.

ADDITIONAL RESOURCES FOR DIVORCING COUPLES IN HAWAII

There are numerous resources available to help divorcing couples, recognizing that the majority of divorcing spouses do not have attorneys.

Judiciary Website

- The Hawai'i State Judiciary's website at www.courts.state.hi.us includes all statutes and appellate cases concerning divorce, divorce practice forms for all circuits, the Hawai'i Child Support Guidelines in interactive format, and numerous other resources for divorcing spouses.

Mediation Center of the Pacific

- The Mediation Center of the Pacific is Hawai'i's largest provider of affordable divorce mediation services. For more information regarding MCP's divorce mediation services go to www.mediatehawaii.org.

HSBA Family Law Section

- The attorney members of the Family Law Section of the Hawai'i State Bar Association are pledged to uphold the highest standards of divorce law practice. For more information regarding the activities of the Family Law Section, and a list of Section members, go to www.hawaiifamilylawsection.org.

Hawai'i Divorce Manual

- Since 1975 the Hawai'i State Bar Association's Hawai'i Divorce Manual has been the most widely used and judicially recognized resource on divorce in Hawai'i. Included are practical discussions of every aspect of divorce, an extensive set of practice forms, digests of all divorce cases, Family Court policy memoranda, and a large collection of other resources. It is available in the Supreme Court Library, and certain public libraries, and it can be purchased at the offices of the HSBA.

Family Court Self Help Centers

- The Family Court has two (2) self-help centers to assist divorcing couples. They are at the Circuit Court at 777 Punchbowl in downtown Honolulu, and at the Family Court at 4675 Kapolei Parkway in Kapolei.

Other Resources

- The American Academy of Matrimonial Lawyers (AAML) is the oldest organization of divorce lawyers in America. On the AAML website at www.aaml.org you can find a large collection of helpful materials.
- Dispute Prevention and Resolution (DPR) is Hawai'i's largest provider of specialized services through its DPR Family Law Tribunal, an association of retired Family Court judges, and senior matrimonial practitioners, who serve as mediators, arbitrators,

private judges and special masters. For more information go to the DPR website at www.dprhawaii.com.

- The International Association of Collaborative Professionals (IACP) is the leader in collaborative divorce practice in the United States, and throughout the world. On the IACP website at www.collaborativepractice.com you can find a large collection of materials describing collaborative practice.