

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

DIVORCE LAW IN HAWAII PRESENTATIONS

The monthly Divorce Law in Hawaii presentations, which are sponsored by the Family Court of the First Circuit of the State of Hawaii and the Mediation Center of the Pacific, and which began in 2002, are dedicated to the proposition that divorcing spouses must, in their best interest, and in the best interests of their children, strive to resolve their divorce issues in a peaceable and constructive manner, and avoid litigation, except as a last resort.

The following outline, prepared especially for the Divorce Law in Hawaii presentations, describes (a) the law and process of divorce in Hawaii, (b) the keys to a successful Hawaiian divorce, (c) available alternatives to divorce litigation including mediation, attorney settlement, collaborative divorce, cooperative divorce, and arbitration/private judging, and (d) additional resources for spouses in the process of a Hawaii divorce.

For a current schedule of the Divorce Law in Hawaii presentations, a description of, and application for, mediation services provided by the Mediation Center of the Pacific, and other information for spouses in the process of a Hawaii divorce, please go to the website for the State of Hawaii Judiciary at www.courts.state.hi.us.

Finally, nothing herein should be taken as legal advice, or a statement of the law, policy, or procedure by the Family Court of the First Circuit of the State of Hawaii. If you need legal advice, you are encouraged to consult with an attorney.

A. 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. Custody includes legal custody (decision-making authority) and physical custody (time-sharing).
- The third part of a divorce is property division. Property division is the distribution of all assets, and the allocation of all 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, for a variety of reasons, the couple will typically address custody and visitation first, property division next, child support after that, and alimony (spousal support) last.

Granting of a Divorce

- Hawai'i 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 Hawai'i resident. New residents must wait six months. There is also a three month Circuit (Island) residency requirement.
- If both spouses think there is a realistic possibility of a successful reconciliation, they should 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 overnights out of 365 overnights per year. That's about 5 out of every 14 overnights during the school periods, with vacations shared equally.
- 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 order and enforce it.
- Family Court, if it must decide, has very wide discretion.
- Children don't vote.
- Parenting coordinators, custody evaluators, and other professionals can help decide what custody arrangement would be best.
- Custody can be reviewed when circumstances change.
- 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

- It is best to start with property division when addressing divorce money issues because (1) Hawai'i's marital partnership principles (divorce property division formula) will apply if the couple can't agree, and (2) property division affects cash flow, which is a primary consideration in determining support.
- The completion of a joint Asset and Debt Statement showing all presently existing assets and liabilities without regard to title/obligated party(s) is, bar none, the most important part in the successful resolution of the financial issues in any divorce.

- Hawai'i recognizes and enforces premarital agreements, and post-nuptial agreements, made in compliance with the law.
- While the Family Court has wide discretion in dividing property, and there are no fixed rules, Hawaii's marital partnership principles for divorce property division guide and limit the division of all assets and debts at the time of the divorce.
- These principles calculate how much of the family's "net worth" each spouse gets in total assets post-divorce.
- These principles consider (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").
- These principles generally reimburse each spouse from the current marital estate assets equal in value to (a) their date-of-marriage net worth, and (b) (with significant limiting conditions) the date-of-acquisition value of gifts and inheritances received during the marriage, and divide all that remains 50/50.
- These principles apply only if couple can't agree. The couple can enforcibly agree to division of property and debt which is different than the formula result.
- Hawai'i law 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 marital partnership principles based on the present and projected circumstances of the parties.
- The division of many government and private sector retirement accounts and pensions requires a separate order signed by a Family Court judge, and the Divorce Decree alone is not enough. The couple must obtain backup documentation for each retirement account and plan they have, and determine if a separate order is required to divide it.

Child Support, Education and Health Care

- The Family Court's mandatory mathematical formula for calculating child support ("the Guidelines") considers (1) the time sharing ratio for the children, (2) the gross incomes of both parents, (3) certain child care payments, and (4) the cost of medical insurance for the children.
- The amount calculated by the Guidelines must be paid absent "exceptional circumstances."
- Guideline support in excess of a child's needs is an "exceptional circumstance."
- The Guidelines describe other "exceptional circumstances."
- Support is paid through the Hawai'i Child Support Enforcement Agency (CSEA) by income withholding unless agreed and ordered otherwise.
- The Divorce Decree must address the parents' responsibility for the maintenance of health care insurance for their children, and their uninsured health care expenses.
- No Family Court guidelines exist for the payment of child health care expenses.
- The Divorce Decree will address the parents' responsibility for the education expenses of their children.
- No Family Court guidelines exist for the payment of child educational expenses.
- Either parent can ask for a review of child support when circumstances change, and in other circumstances as well.
- One should 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 assist 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 generally must show that he or she cannot support himself or herself at the marital standard of living.
- An alimony applicant generally must also show that the other spouse has more income than is needed for his or her own marital-standard level expenses.
- If he or she can show both things, the Family Court must then decide in its discretion whether alimony is “just and equitable,” and if so, in what amount, and for how long.
- 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.

B. 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 (the Plaintiff) files his or her complaint for divorce. At the same time, an automatic mutual restraining order enters.
- 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 few months.
- The forms for an uncontested divorce, and instructions for their completion, may be found on the Judiciary website.

Contested Divorce

- In a contested divorce, the Family Court is obliged to decide all of the issues in the divorce. The Family Court may also be obliged to make one or more temporary or permanent orders affecting the couple and/or their children.
- There can be restraining orders in addition to the initial automatic restraining order, 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, and their children.
- A contested divorce can easily take a year, or longer. If there are appeals, they can take years.
- A contested divorce should be undertaken only as a last resort.

Mutual Restraining Order

- When someone files for divorce the Family Court must issue a mutual restraining order which, with some exceptions, prohibits both parties from disposing of assets, incurring of debts, changing insurance, changing beneficiary designations, or changing a child's

school or residence. The restraining order remains in effect until the divorce.

C. HOW TO HAVE A SUCCESSFUL DIVORCE

The maintenance of a good attitude, education, assistance from 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 spouse who does not act out of anger or fear will do best.
- 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 courtesy, respect and dignity in personal dealings.

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.
- Refer to the HSBA's Divorce Manual as needed (see below).

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, or as mediators.
- Child experts can educate spouses about the special needs of children in divorce. Mental health professionals can help one cope

with the stress of a divorce, and successfully make the important 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(s) 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 the necessary documentation with respect to the division and distribution of retirement incident to divorce. Some retirement assets cannot be divided without separate Family Court orders.

Exchange of Information

- The free and open exchange of information between spouses is essential to informed settlement.
- Couples provide information regarding family assets and liabilities through the exchange of Family Court Asset and Debt Statements.
- Couples provide information regarding their income and expenses through the exchange of Family Court Income and Expense Statements.
- The division of retirement presents special challenges. Backup documentation for all retirement must be exchanged before discussing its disposition.

D. 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 gather and exchange necessary information, openly discuss their interests, identify and explore settlement options, and hopefully reach a settlement without litigation.
- Mediation is not judging. Mediators do not give legal advice. Nor do they predict what a judge might do.
- 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.
- A mediator may or may not be 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 potentially complicated issues, and mediation alone is not appropriate.

Collaborative Practice

- 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. All involved experts must also resign. In this way, attorneys become problem solvers, rather than adversaries.
- 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) elect not to mediate.

Cooperative Divorce

- In a cooperative divorce, each spouse has his or her own lawyer advocating his or her own interests.
- The ground rules in a cooperative divorce with respect to exchange of information, identification and exploration of settlement options, and emphasis on agreement in the best interest of the family, are the same as a collaborative divorce.
- In a cooperative divorce, the couple selects both the negotiating model and the dispute resolution mechanism which they are most comfortable with.

- The choices of negotiating models include mediation, summary jury trial, neutral evaluation, nonbinding arbitration, presentation to a focus group, and four-way meetings.
- The choices of dispute resolution mechanisms include litigation before the Family Court, private judging, and binding arbitration.
- Unlike collaborative divorce, if the couple cannot settle they are not required to get new lawyers.

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 arbitrator can also decide custody, child support, and alimony by agreement of the couple.
- 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.

E. ADDITIONAL RESOURCES FOR DIVORCING COUPLES IN HAWAII

There are numerous resources available to help divorcing spouses who 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, 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. It has been updated through August 31, 2019.

Family Court Self Help Centers

- During normal times, 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. Otherwise, contact information for various Family Court services can be found on the Judiciary's website.

Dispute Prevention and Resolution (DPR)

- 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)

- The 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.