

DIVORCE

LAW IN HAWAII:

Second, Third, and Fifth judicial circuits, 5,583 were divorce cases.³

All the while, the legal process of divorce remains for the participant spouse a uniquely gut-wrenching personal experience, and for the lawyer advising him or her a uniquely challenging professional undertaking.

Fortunately, in the ten-plus years since the first "Divorce Law in Hawaii: An Update" article in the September 1993 issue of the Hawaii Bar Journal, there have been many positive developments in how the legal process of divorce is handled.

Perhaps nowhere is this more evident than in the way we marry, divorce, and then marry again.

Consider these statistics from the United States Census Bureau, the United States National Center for Health Statistics, and the Hawaii Department of Health:¹

- Married people live longer, happier lives.
- Nearly everyone marries.
- Nearly half of recent first marriages may end in divorce.
- First marriages ending in divorce last seven to eight years, on average.
- Most people remarry after divorcing from a first marriage; half do so within about three years.
- Most people who had ever divorced are currently married.
- In 2001, 55.8% of all brides married in Hawaii were older than age twenty-nine. Of them, 58.2% had previously been divorced at least once. Of the younger brides, 5.9% had been divorced before.
- In 2001, 65.9% of all grooms married in Hawaii were older than age twenty-nine. Of them, 52.5% had been divorced at least once. Of the younger grooms, 7.4% had been divorced before.
- In Hawaii, there are about two marriages for each divorce.

In Hawaii, divorces are relatively easy and cheap to get.² And there certainly is no shortage of them. In the 2002/2003 fiscal year, of a total of 36,034 new cases filed in the Family Courts of the First,

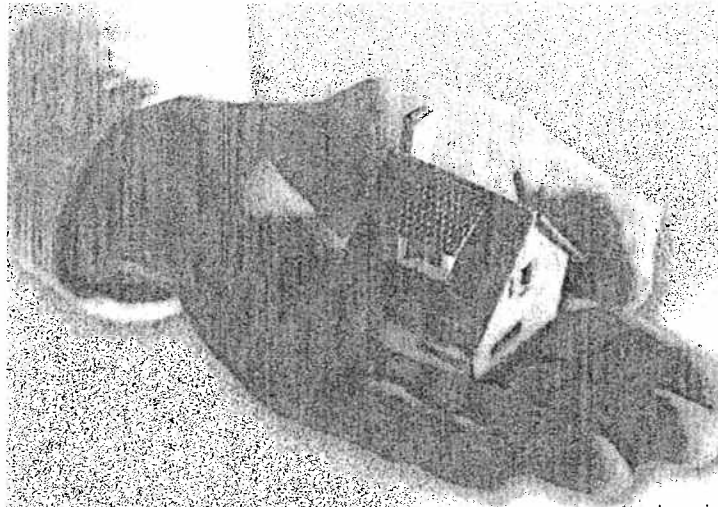
- Divorce law in Hawaii has continued to evolve in a mostly consistent, comprehensive, and decidedly "user friendly" manner.
- The actual mechanical process of getting a Hawaii divorce has become simpler.
- With divorce now so common, effective ways to successfully prepare for divorce and settle divorce issues (as well as definite "don'ts") have become generally evident.
- Divorce mediation has proven to be a great aid in settling divorces.
- The Family Court has responded well to the needs of the greatly increased number of pro se divorce litigants.
- There are more places than ever to get good current information about divorce in Hawaii.

One thing has not changed and probably never will: for the attorney representing a divorcing spouse, success requires a thorough knowledge of the law, a good understanding of the psychology of divorce, and command of a few helpful "tricks of the trade." In addition, particularly in these times at least, it also requires the ability to survive and operate within a legal system that is so starved for resources it is shocking.

"That which does not kill me, makes me strong."

Friedrich Nietzsche

AN UPDATE
by William C. Darrah



Current Divorce Law in Hawaii⁴

Every legal divorce concludes with the entry by the Family Court of a Divorce Decree, and the goal of every divorcing spouse is to get a good one.

The Divorce Decree, because of its impact on the parties, their children, other family members, and everyone else involved in the divorcing couple's financial affairs, is possibly the most all-encompassing single legal instrument in all of American law. A Divorce Decree for a family with minor children must necessarily address (a) custody, (b) property division, (c) child support, and (d) alimony. It defines in complete detail all of the property in the world each spouse does (and does not) own, what debt he or she does (or does not) owe, how much time he or she can (or cannot) spend with his or her children, what decisions he or she can (or cannot) make concerning his or her children, and what monetary support he or she must pay (or does not have to pay) for his or her children and former spouse following the divorce.

Custody, sometimes referred to as "timesharing and decision making authority for children," is about where a minor child will live for the balance of his or her minority (until age eighteen) and who will make legal decisions for him or her. Property division divides everything owned and owed by both spouses alone

or jointly at the time of the divorce. Child support involves monthly monetary support from the non-primary caretaker parent, child health care issues, and payment of the

educational expenses of both minor and adult children of divorce. Alimony is about whether or not one spouse must pay the other spouse following the divorce based on the financial circumstances in which the divorce will leave the spouses.

Custody and Visitation

By statute, all custody issues must be based on what is in the "best interest of the child" by the Family Court.⁵ Although the Family Court may have to decide custody, the Family Court operates under the presumption that most parents can and should together decide what custody arrangement is best for their children, and not fight in Family Court, because fighting about custody is harmful to children.

In most Hawaii divorces, one parent becomes the primary physical custodian and the sole legal custodian following the divorce. Timesharing schedules can vary greatly depending on the age and needs of the children and the abilities of the parents, and there are various forms of shared legal custody.

The parents may agree to any timesharing schedule and decision-making arrangement which they believe to be in the best interest of the children, and the Family Court typically will order it. The Family Court, if it must decide custody, has very wide discretion, and a Family Court's custody determination will almost never be reversed on appeal. Custody, like child support and alimony, may be reviewed when circumstances change.

There are no Family Court custody timesharing guidelines. Because the

Family Court Child Support Guidelines provide an adjustment for "excessive visitation," what the Guidelines describe to be "normal" timesharing is noteworthy. The 1998 Child Support Guidelines define "normal" timesharing by the non-primary caretaker as up to 143 days per year.⁶ Before 1998 "normal" timesharing was up to 100 days.

It is generally believed that joint legal custody fosters greater non-primary caretaker parent involvement and support for the children. It is also generally thought that joint legal custody in fact confers very little actual veto power on the non-primary caretaker, and that sole legal custody has limits. For example, a sole legal custodian cannot unilaterally change the child's residence to another state without unlawfully interfering with the non-primary caretaker's visitation rights.

Children have no vote concerning custody, consistent with the Family Court's view that involving children in a custody battle is harmful to them. Parenting counselors, custody evaluators, and guardians ad litem may be appointed by the Family Court to assist in resolving custody issues.

Divorce Property Division

In construing Hawaii Revised Statutes § 580-47, which provides that divorce property division shall be "just and equitable," Hawaii appellate case law has effectively created a formula for divorce property division that is now used in every case.⁷

Hawaii divorce property division law enforces premarital agreements and post-nuptial agreements. Property covered by a premarital agreement or a post-nuptial agreement is classified as "Marital Separate Property." Marital Separate Property also includes a certain kind of gift or inheritance which seems to be so rare that there is still no reported case involving one.⁸ Hawaii divorce property division law describes everything else as "Marital Partnership Property."

For the vast majority of couples who have no Marital Separate Property, and

whose estates consist entirely of Marital Partnership Property, Hawaii's formula for divorce property division is exquisitely simple, and involves just two steps.

First, from the marital estate existing at the time of the divorce⁹ rather than some earlier date of separation or filing, each divorcing spouse gets assets worth what he or she was worth at the time of the marriage, plus assets equal in value to any gifts or inheritances which he or she received during the marriage, valued at the time of receipt. No tracing is required, and the asset which is the basis for the credit need not still exist. Even the transfer of such an asset from sole ownership to joint ownership does not defeat the credit, unless the recipient spouse can prove that the donor spouse intended a gift even in the event of a divorce.

Second, all that remains is divided fifty/fifty. As a consequence, all appreciation on premarital property, and all appreciation on during-marriage-received gifts and inheritances, is divided equally between the divorcing spouses. For just cause, based on almost exclusively forward-looking considerations, the Family Court can "equitably deviate" in divorce property division away from the fifty/fifty formula result in favor of the lower-earner spouse. In reality, equitable deviation is the exception, not the rule.

In Hawaii divorce property division parlance, date-of-marriage personal net worth is "Category 1 property," appreciation on still-owned premarital property is "Category 2 property," date-of-acquisition value of gifts and inheritances is "Category 3 property," appreciation on gifts and inheritances is "Category 4 property," and everything else (the totality of everything in most estates) is "Category 5 property." Unfortunately, the

nomenclature for Hawaii divorce property division law perpetuates the misconception that it is a system oriented to individual assets, when in fact it has everything to do with net worth at the time of marriage and at the time of the divorce and, except in the case of the acquisition date values of during-marriage-acquired gifts and inheritances, nothing to do with individual assets.

While decidedly "user friendly" in its simplicity, the Hawaii formula for divorce property division is criticized on two grounds. First, the owner of a substantially-appreciated premarital asset or separate gift or inheritance received during the marriage does not get any benefit for the natural accrual in value which would have been realized independent of the marriage, and which is, as often as not, in no way a consequence of anything that happened during the marriage. Second, the continuation of the marital partnership for divorce property division purposes after one spouse has filed for divorce, or a physical separation has occurred, right up until the time of the divorce prejudices the spouse who accumulates assets in the separation period, and benefits the spouse who incurs lifestyle debt in the separation period.

Generally, except for "waste," the Family Court cannot consider fault by either party during the marriage in dividing property. Other than cases holding that one cannot give property to a relative during a divorce, Hawaii case law does not define specifically what constitutes "waste." It is thought that material expenditures on romantically-involved third parties, expenditures on illegal activities, gambling losses, and excessive travel and recreation, especially in the post-separation period, might be found to constitute "waste."

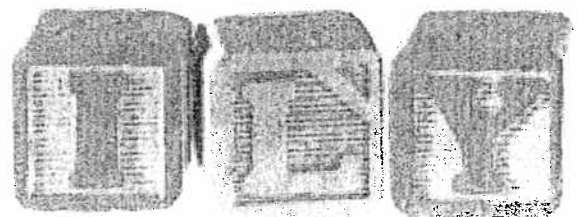
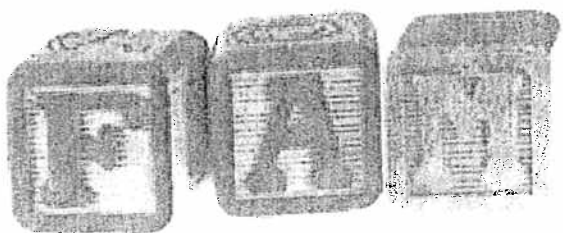
On the other hand, in what may be the best opinion on during-marriage fault in a divorce, the Hawaii Intermediate Court of Appeals in *Hatayama v. Hatayama*, held as follows:

Divorce is not a vehicle by which one spouse is compensated for having given more than he or she received during the marriage or for having had to suffer during the marriage from the other spouse's inadvertent, negligent, or intentional inadequacies, failures, or wrongdoings, financial or otherwise. In other words, evidence that the husband or the wife was a bad mate, spouse, lover, sex partner, conversationalist, protector, cook, housekeeper, washer, ironer, gardener, host, social or traveling companion, provider, income producer, investor, manager of money, handyperson, parent, in-law, or the like, is not relevant to the issue of the division and distribution of property. If such evidence was relevant, each spouse would be well advised to prepare from the date of marriage for the possibility of a divorce by meticulously keeping score in a daily diary. The trial would be a contest of diaries and experts. Allowing it to be such a vehicle would be contrary to the public policy in favor of loving, trusting, harmonious marriages, and no-fault divorces.¹⁰

Child Support

A Divorce Decree involving any minor child, and some adult children, will provide for: (a) the payment of monthly child support, and (b) the maintenance of child health care insurance and the payment of health care expenses not covered by insurance. A Divorce Decree may also include provisions concerning the educational expenses of minor or adult children of divorce.¹¹

The Hawaii Child Support Guidelines are as simplistic as Hawaii's formula for divorce property division. They consider only: (a) the custody timesharing arrangement, (b) the gross incomes of both parents, (c) child care payments



incurred to enable employment, and (d) medical insurance for children premium payments. The Guidelines have no income ceiling, consider the effect of individual income taxes on the parents only very little, and are dominated in their calculations by the gross income of the non-primary caretaker parent. For very high earners, the Guidelines can calculate lofty child support.

Child support must be in accordance with the Guidelines unless there are "exceptional circumstances." An exceptional circumstance exists where Guidelines-calculated support is in excess of a child's reasonable needs. An exceptional circumstance also exists where there is an agreement between the parents for child support in excess of the Guidelines. An agreement between the parents for less than Guidelines support is not an exceptional circumstance.

A Divorce Decree involving a minor child must also address both the maintenance of child health care insurance and the payment of child health care expenses not covered by insurance. Usually, the best available insurance coverage for the children is maintained post-divorce by the parent eligible to maintain it, with an allocation of responsibility for uninsured health care expenses for the children between the parents on a pro-rata or some other basis. There are no Family Court guidelines governing child health care insurance or the apportionment of the cost of child health care expenses not covered by insurance.

A Divorce Decree involving a minor child may or may not address child education expenses. If not addressed, they are "reserved." The Guidelines provide that, in limited circumstances, the obligation of the non-primary caretaker parent to provide support to a minor or adult child may include a separate required contribution to private school tuition, fees, and book expenses (known as "PEX"). Otherwise, there are no Family Court guidelines regarding the payment of

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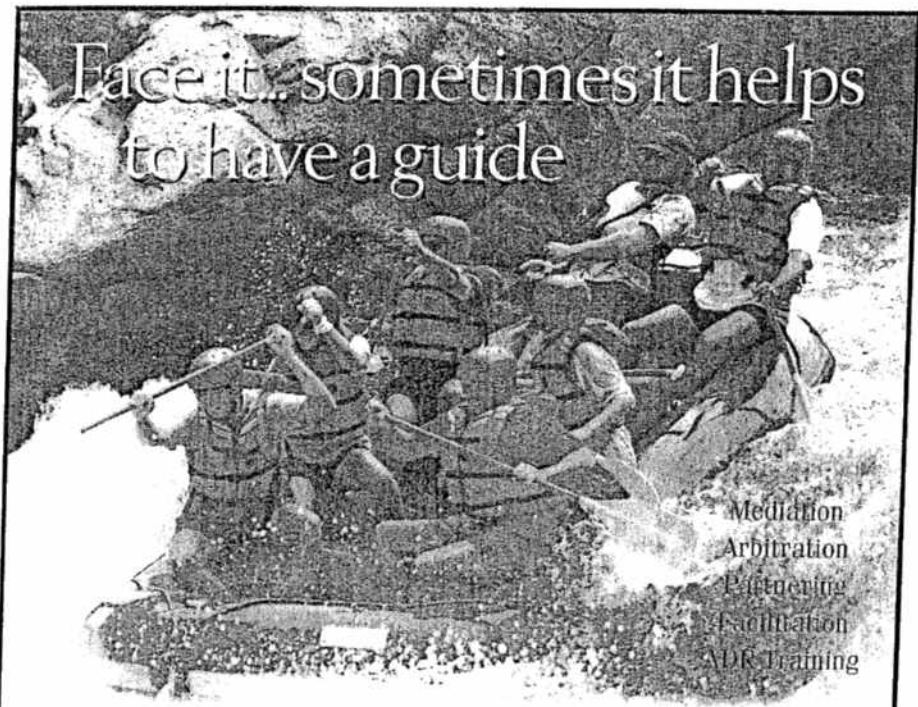


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Jim Hoenig specializes in mediating difficult matters like complex divorce, business dissolution, estate and inheritance, medical and financial surrogate decision-making, employment, real estate and construction. He is a **full-time professional mediator** for Dispute Prevention & Resolution, a mediator for the Supreme Court's Appellate Conference Program, and has served as *Kokua Kanawai* for Probate Court.

Jim Hoenig graduated first in his class from Stanford University and Stanford Law School, was Law Review President, Law Clerk to the Chief Justice of the United States; formerly in private practice as an attorney, real estate developer, and a psychologist. He is author of "Divorce Mediation Basics," "The Complete Guide to Mediation," and numerous other works about mediation and dispute resolution.



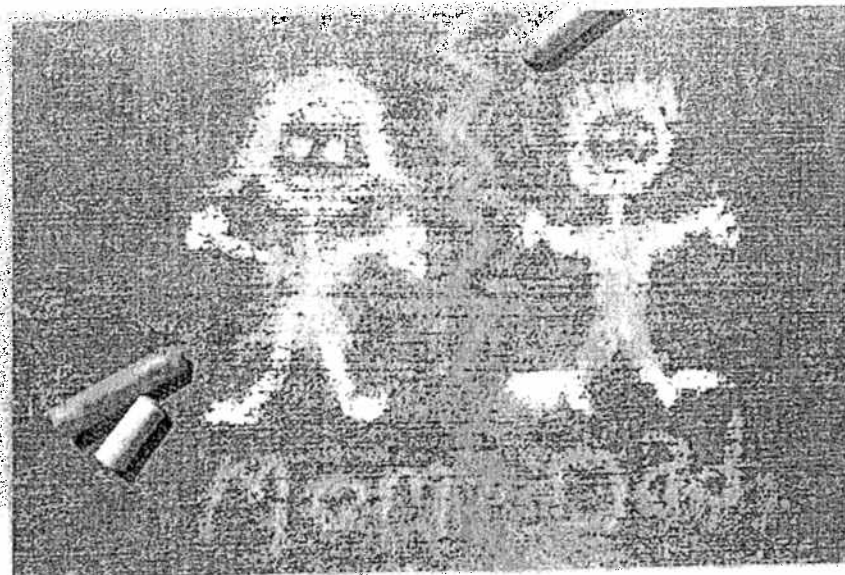
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Dispute
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child educational expenses.

An adult educationally-dependent child may be entitled to educational support in the form of: (a) child support, (b) contribution to tuition, fees, book expenses, and/or (c) contribution to room and board and other living expenses. Such support will customarily continue for as long as the child is a full time student and not yet age twenty-three. In deciding educational support, the Family Court will consider the child's earnings, property, and needs, as well as both parents' resources. In appropriate circumstances, a dependent adult child receiving educational support will be expected to contribute to his or her own self-support through part-time employment not harmful to the child's



academic progress and other appropriate school-related pursuits, and through grants, scholarships, and loans.

Although most child support is paid through the Child Support Enforcement Agency by income assignment, when there are no historic arrearages the parties may stipulate to the direct payment of child support, and the Family Court can order it. Payments of child support may

be made directly to an adult child by agreement of the parents or by order of the Family Court.

As with custody and alimony, child support may be revised when circumstances change. The threshold for child support review is very low.

Alimony

Alimony and equitable deviation in property division are the two ways to favor a lower-earning spouse in consideration of his or her anticipated post-divorce economic circumstances.¹² Like the decision to equitably deviate in property division, the decision whether to award alimony, and if so, for how long and in what amount, is within the wide discretion of the Family Court, subject to significant legal limitations.

There are four types of alimony: (a) temporary alimony is support received in the pre-divorce period, (b) post-divorce transitional alimony is support received while the less financially advantaged former spouse is adjusting to a lower standard of living, (c) rehabilitative alimony is support received while the less financially advantaged spouse is acquiring new skills in the work place, and (d) permanent alimony is support received for the rest of the life of the less financially advantaged spouse. Alimony may also be reserved for later decision by the Family Court, either for a period of time, or indefinitely.

Although there are scores of divorce property division cases decided by the Hawaii appellate courts in the last two decades, alimony has been the principal subject of only two appellate opinions in the last twenty years, both of which say only a limited amount about the appropriate amount of alimony, and nothing about the proper term of alimony.¹³

To potentially qualify for alimony, an applicant for it must show that he or she cannot support himself or herself at the marital standard, and that the other spouse has more than is needed for his or her own marital-level expenses. A spouse also can be ordered to pay alimony based on the property he or she receives from the divorce.

Alimony is taxed unless otherwise agreed, while payments made in connection with property division are not. Alimony cannot be discharged in bankruptcy, unlike most property division obligations. For as long as it is owed or reserved, alimony can be modified post-divorce on a showing of changed circumstances, even if the parties agree otherwise. Property division, once made by the Divorce Decree, cannot be modified except in very limited circumstances.

Both the payor and the recipient of alimony can continue to investigate his or her former spouse's personal and

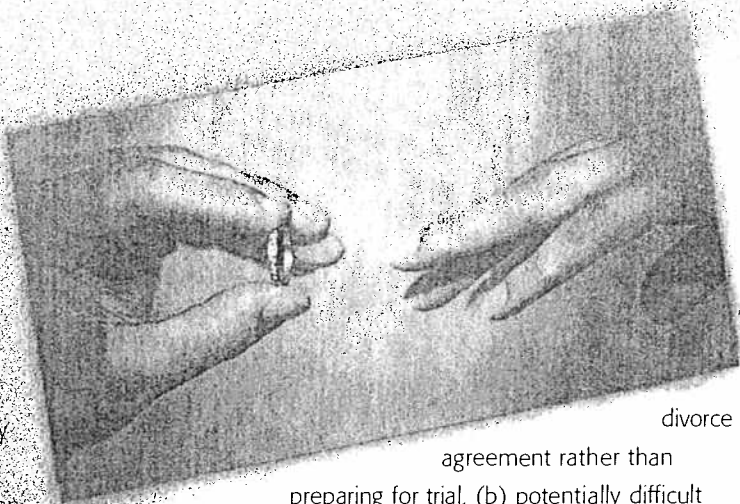
business financial situation on an ongoing basis through the duration of the alimony period, through every means of formal and informal discovery available during the divorce itself.

Alimony is the exception, not the rule. Most lower-earner spouses getting divorced in Hawaii do not legally qualify for alimony because most higher-earner divorcing spouses do not have enough income to pay their own debts, support their children, and live at the marital standard themselves. Also, because it can be modified post-divorce, alimony interferes with the goal of a complete and final resolution of the financial issues between the spouses.

Getting a Hawaii Divorce

The vast majority of all Hawaii divorces are uncontested. The Family Courts of all the circuits have developed standard procedures and forms for contested and uncontested divorce cases.¹⁴ The legal process of divorce

begins when one spouse files a Complaint for Divorce. Divorcing parents participate in Family Court educational programs about custody and money issues in divorce.



divorce

agreement rather than

The Family Court can grant temporary pre-divorce custody, child support, alimony, debt payment and asset use orders. The Family Court can also enter various kinds of restraining orders, either by stipulation of the parties or on a motion from either of them. The Family Court may hold conferences and trials. The Family Court grants uncontested divorces (generally by affidavit) and contested divorces (following a trial). The Family Court may grant post-divorce orders, modify some of its orders, and enforce all of its orders.

Because Hawaii's divorce property division rules uniquely require a consideration of the marital estate at the time of the divorce rather than at some earlier point of separation or filing, there is a premium on getting a case to settlement or trial quickly to avoid the need for repeated and costly reaccumulation of the family financial data required to run Hawaii's property division formula.

There are three typical causes of delay and conflict in the efforts to settle a divorce: (a) insufficient financial data shared by the spouses, (b) incorrect beliefs both as to likely Family Court-ordered outcomes in the event of a dispute and the true costs of litigation, and (c) lack of respect and dignity in personal dealings between the spouses and an unwillingness to place the "kids first."

Preparing for a Successful Divorce

Generally, success in navigating the divorce process occurs for a couple where: (a) the focus remains on negotiating a fair

preparing for trial, (b) potentially difficult situations are effectively controlled, and (c) adequate financial information is gathered, maintained, and periodically exchanged between the spouses.

For a spouse going through divorce, preparation for a successful divorce agreement requires education about the law, a good support system of friends and loved ones, a realistic assessment of his or her own financial abilities and needs, a thorough inventory of the family's assets and debts, a commitment to a free exchange of information and an open line of communication with his or her spouse, and a commitment to negotiate and mediate a fair settlement, and not litigate except as a last resort.

The effective control of difficult situations can involve making express pre-divorce understandings preserving assets, controlling debt, and barring potentially harmful unilateral actions (like canceling health care or car insurance, changing life insurance or retirement beneficiaries, and so forth), making express understandings about sharing time with children and making important decisions for them in the pre-divorce period, and getting Family Court personal conduct or financial restraining orders if necessary in difficult cases.

The key to the money issues is paperwork. There are specific financial documents necessary to apply Hawaii's guidelines for divorce property division and child support. A careful maintenance and exchange of these documents will greatly facilitate settlement efforts, while the lack of these documents will frustrate even the best intentioned efforts at settlement.¹⁵

Divorce Mediation

For years, the Family Court has favored the use of mediation to settle divorce cases. In divorce mediation, one or more trained impartial mediators help divorcing couples exchange information and explore "win-win" solutions. Contrary to general public misconception, it is not arbitration or "private judging." The couple makes its own decisions with the mediator's help. Under the Hawaii Rules of Evidence, it is privileged and confidential.

Generally, mediation in divorce cases is cheaper than litigation and it is usually successful on one or more materially significant issues. Mediated agreements are more durable and less susceptible to further litigation, and mediated agreements are more complete and comprehensive than litigated outcomes. Perhaps best of all, mediation allows the spouses to control their (and their children's) future, rather than turning decision-making over to a judge.

Places to Get Help and More Information

The Family Court, the Hawaii State Bar Association, and the Hawaii State Bar Association's Family Law Section have in recent years done much to educate spouses going through divorce, and those helping them, about the rules and procedures for divorce in Hawaii. These days good education is even more important, as an ever larger population of divorce cases involve no lawyers, and the tax, retirement, and other technical and financial issues in divorce have become even more complex.

Hawaii State Bar Association's Divorce Manual

First published in 1975¹⁶ by a small group of committed family law professionals in the then rapidly-expanding Hawaii family law community, the Hawaii State Bar Association's Hawaii Divorce Manual has become the most respected and judicially recognized resource available

to those going through a Hawaii divorce and those helping them. Now expanded to three volumes and three CD-ROMs with almost 5,000 pages of carefully indexed and organized materials, it includes a complete discussion of every aspect of divorce law in Hawaii. It describes the Hawaii Family Court Rules governing divorce, and the latest Hawaii and U.S. laws affecting Hawaii divorce. All current divorce policy memoranda from the First, Second, Third, and Fifth Circuit Family Courts are included, as are digests of all Hawaii Appellate divorce cases issued since 1953. There are also Family Court issued and Hawaii State Bar Association Family Law Section created divorce practice forms for use in every divorce-related legal situation, as well as numerous practice aids and resource materials.¹⁷

Family Court Information Center

The First Circuit Family Court operates a "Self-Help Information Center" on the second floor (mauka, ewa corner) of the Circuit Courthouse at 777 Punchbowl Street for anyone needing divorce information. "Pro se" form packages both for uncontested divorces with children and without are available.

State of Hawaii Judiciary Website

From the State of Hawaii Judiciary's nationally-recognized website at <http://www.courts.state.hi.us>, one can download most divorce forms used in the First Circuit Family Court, current divorce case law, and docket lists and lists from present and past divorce cases in the State of Hawaii. An automated version of the Child Support Guidelines is also on the website.

"Kids First" and "Divorce Law in Hawaii"

For years the Family Courts of all four circuits have sponsored educational programs to teach better parenting at the time of a divorce.¹⁸ The First Circuit Family Court's monthly "Divorce Law in Hawaii"

public education program on money issues in divorce also provides advice about getting ready for divorce, making reasonable and fair proposals to settle divorce money issues, and resolving divorce concerns without conflict or needless cost.

Mediation/Special Master Divorce Pilot Project

In October 2003, the First Circuit Family Court adopted a policy directing spouses and attorneys involved in all still unresolved divorces to engage in a good faith effort to mediate their still remaining divorce issues either at the Mediation Center of the Pacific or with some other qualified provider of mediation services. The adoption of the policy requiring a good faith effort at mediation in all but the most unusual cases reflects the generally-held belief that mediation is the best way to create successful divorce resolutions that are durable and fair, while avoiding harm to children, pointless conflict, or needless expense.

In a similar much earlier November 1988 similar effort by the Family Court to promote the informed and responsible settlement of divorce cases, then First Circuit Family Court Senior Judge Dan Heely appointed a group of divorce lawyer special masters to "assist the Family Court [in divorce] matters," with "the power to make recommendations to Family Court judges to assist them in resolving [divorce] issues." Through their help and the assistance of the Family Court, many pending cases agreeably settled.

As a second part in its effort to promote the successful and expeditious resolution of divorce cases, the First Circuit Family Court will again be appointing a new group of special masters to provide settlement assistance in cases where they are asked by the parties or the Family Court to help.

The Psychology of Divorce

For a human being going through divorce, and for those helping him or her,

the essence of the situation and the challenge might best be described as follows:¹⁹

The loss of a love relationship arouses your most primitive instincts. It overloads your emotional circuits. It taxes the capacity for rational thought. It puts you face-to-face with pain you didn't know existed. However, with pain comes choices. What kind of survivor are you going to be? What path will you choose to make your way through this period? Whenever we face a crisis, we all have choices about whether to draw on the survivor or victim tendencies within ourselves, whether to put our energies into self-healing or hurting back. There are going to be times when you are going to feel sorry for yourself, times when you will blame your spouse for your misery, times when you will feel defeated by the weight of a lost dream, by how hard it all is, and by how alone you feel. But there can be no recovery if you succumb to the role of pure victim. Ultimately, you have to stop and ask yourself how you want to see this period of life when you look back on it. Do you want to feel ashamed over your immature and destructive behavior, do you want your children angry at you when they become adults for estranging them from the other parent? Or do you want to look back and say, I handled this crisis with integrity.

A good divorce client is an often frightened and angry person with an instinct for "revenge" who nevertheless takes responsibility for his or her own actions, and learns the value of good counsel in a time of legal and personal conflict. A good divorce lawyer is a person well-trained in legal conflict with the opportunity to fight, win, and perhaps get "revenge," who nevertheless looks for every chance to broker a durable peace on terms advantageous in some way to everyone. Together, it is a perfect marriage.

Some Helpful Tricks of the Trade

Because a divorce situation has so many

"moving parts," and such "explosive potential," attention to detail and the ability to respond quickly to a crisis are critical. As concerns the money issues in particular, the preparation of good Income and Expense and Asset and Debt Statements is key, and for ease of organization, and ready command of the facts in a divorce negotiation, mediation, and trial, a well-maintained settlement binder and, if it gets to that, an equally well-maintained trial binder will help a lot.

Family Court Asset and Debt Statement

The Family Court requires all spouses going through divorce to complete Asset and Debt and Income and Expense Statements.

The Asset and Debt Statement is undeniably the most important document prepared in the successful resolution of the money issues in a Hawaii divorce. Without it, Hawaii's rules and guidelines for divorce property division cannot be applied. With it, and little else, divorce property division can in almost every case be settled easily. The couple who can together prepare a joint Asset and Debt Statement will immeasurably promote the expeditious resolution of their divorce.

The use of asset and liability "identifying numbers" for each asset and debt in the Asset and Debt Statement allows quick and accurate reference to all assets and debts existing at any time from marriage to divorce. Through the use of extensive endnotes in the Asset and Debt Statement, a wealth of

relevant information about the marital estate can be made a part of the record without the need for time-consuming oral testimony.

Family Court Income and Expense Statements

The Income and Expense Statement is the companion to the Asset and Debt Statement. It shows the present and forward-looking cash flow of its maker. It is an essential tool in resolving child support and alimony issues in a divorce. It provides the information necessary to run the Child Support Guidelines, and it also shows what support is actually needed, and what support actually can be paid, as the case may be.²⁰

Settlement Binders and Trial Binders

A "Divorce Settlement Binder" contains all one needs to settle a divorce case. It includes each spouse's most recent Income and Expense Statement, Asset and Debt Statement, Property Division Chart, Child Support Guidelines Worksheet, and proposed Divorce Decree. It also includes a regularly updated "To Do List" of things still to be done in the case, and a copy of every chart and summary which has been prepared to reflect important information in the case.

The "Divorce Trial Binder" is created once one spouse files a Motion to Set to obtain a conference before the Family Court. It includes each spouse's Position Statements, Settlement Conference Statements, Lists of Witnesses, Lists of Exhibits, and expert reports, all of the Pre-Trial Orders in the case, and summaries of all of the witness testimony in the case.

Practicing in a Resource-Starved System

Divorce affects spouses and families in virtually every aspect of their lives. Thus, the impact of a typical Family Court determination in a divorce case is much greater than the impact of a typical contract, tort, or even criminal judicial determination. Yet, for a variety of

reasons, for way too many years the Family Court has been challenged by a severe lack of resources.

On the pre-divorce calendar, where important temporary custody and financial issues are decided, because of a shortage of judges and space, the total time for evidentiary presentations, examination and cross-examination, and summary and argument, is routinely limited to "fifteen minutes a side." Even in a divorce case involving a marital estate worth tens of millions of dollars, or a difficult custody issue, trials must occur in short increments of no more than two days at a time, separated by many months of inactivity.

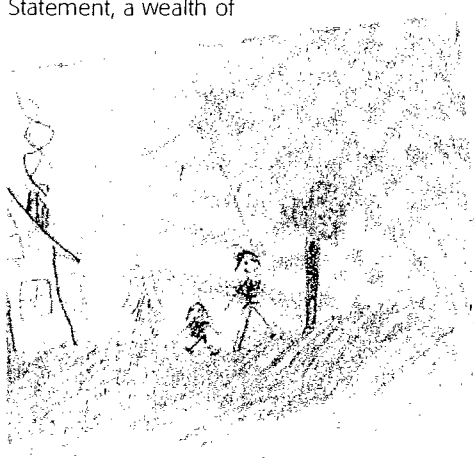
The situation has become so bad that because of time constraints lawyers have been forced to resort to presentation devices which in fact violate the Hawaii Rules of Evidence.²¹

Hawaii Divorce Law: Where Things Now Stand

Although lack of resources remains an overwhelming concern, there is good news. Improved and simplified procedures for divorce on a statewide basis make it easier and less expensive. Family Court programs and many other sources now provide useful information to those going through divorce. Mediation has proven very successful in divorce cases. And, best of all, the strength and commitment of the Family Court and Hawaii's family law professionals to help is as great now as it ever was in the past.

¹ The statistics from the United States Census Bureau are from its February 2002 publication "Number, Timing, and Duration of Marriages and Divorces: 1996." The statistics from National Center for Health Statistics are from its July 2002 publication "Cohabitation, Marriage, Divorce, and Remarriage in the United States." The statistics from the State of Hawaii Department of Health are from its vital statistics website www.hawaii.gov/health/stats/vr_vital.html.

² The divorce durational residency requirement in Hawaii is only six months in the state, and three months in the circuit. In Hawaii, a divorce is granted on the allegation that "the marriage is irretrievably broken" or other grounds based on two years of separation. There is no mandatory counseling or waiting period for the divorce to be effective. Because of the proliferation of unrepresented divorcing spouses, the Hawaii



Family Court has developed "pro se packets" which contain all of the forms needed for a "do-it-yourself" divorce. The Family Court filing fee to get a divorce in Hawaii is \$175.00 without children. If either party has a child, whether from the marriage or any prior relationship, the Family Court filing fee is \$225.00.

³ At the end of the 2003 fiscal year, 3,663 divorce cases were still pending in all of the Family Courts.

⁴ The legal propositions in this article are based entirely on the statutes and case law on divorce in Hawaii. For a complete discussion of them, please refer to the Hawaii State Bar Association's *Hawaii Divorce Manual* (2003 edition) (hereinafter referred to as "the Divorce Manual").

⁵ For a discussion of the law on custody in divorce in Hawaii, see Sections 2, 3, 7, and 14 of the Divorce Manual.

⁶ Although the Guidelines do not define what a "day" is for these purposes, the simplest approach is to count overnights.

⁷ For a discussion of the law of divorce property division in Hawaii, see Sections 2 (pages 24-43), 5, and 6 of the Divorce Manual.

⁸ *Hussey v. Hussey*, 77 Haw. 202, 881 P.2d 1270 (App. 1994) describes three categories of Marital Separate Property. The first and second are, respectively, property covered by a valid premarital agreement, and property covered by a valid post-marital agreement. The third is all property that was "inherited by the spouse-owner during the marriage by gift or inheritance, was expressly classified by the donee/heir-spouse-owner as his or her separate property, and after acquisition, was maintained by itself and/or sources other than one or both of the spouses and was funded by sources other than by marital partnership income or property." It is both the "funded by other sources" and the "expressly classified" requirements which together make this kind of property so rare. First of all, most inherited and gifted property produces taxable income, and as all income-producing property is lumped together in the couple's tax returns, it's impossible to say that the taxes on income-producing gifts and inheritances were not paid by marital funds. Second, practically no spouse in a functional marriage, upon receiving a gift or inheritance, is going to say to the other spouse: "Honey, I just got a gift/inheritance and if/when we divorce, it's my separate property."

⁹ 9 Haw. App. 1, 11, 818 P.2d 211 (1991). Hawaii law defines the marital estate subject to division broadly to include everything of "present and prospective value." Non-mature and even non-vested pension benefits are included in the marital estate, as are beneficial interests in irrevocable trusts which haven't yet vested, patents, trademarks, and other less tangible property.

¹⁰ Some observe that the *Hotayama* holding should be embossed on every Hawaii marriage certificate, and initialed by each prospective spouse.

¹¹ For a complete description of the law of child support in Hawaii divorces, see Sections 2 (pages 45-55), 4 and 7 of the Divorce Manual.

¹² For a discussion of the law of alimony in Hawaii, see Sections 2 (pages 55-61), and 5 of the Divorce Manual.

¹³ *Cassiday v. Cassiday*, 6 Haw. App. 207, 716 P.2d 1145 (1985), *aff'd in part, rev'd in part*, 68 Haw. 383, 716 P.2d 1133 (1986); *Vorfeld v. Vorfeld*, 8 Haw. App. 391, 804 P.2d 891 (1991).

¹⁴ All forms and policy memoranda issued by all of the Family Courts may be found in Sections 19 and 21 of the Divorce Manual.

¹⁵ The key paperwork almost always is: (a) the federal and state individual income tax returns for at least the last three years and ideally for all of the years of the marriage, (b) any pre-existing personal financial statements (loan applications, balance sheets, and so forth), (c) all account statements (credit union, bank, checking, securities, mutual funds, insurance, retirement, credit card, car loan, mortgage, and other debt) on an ongoing basis, (d) pay statements since the last tax returns, (e) W-2 and 1099 forms since the last tax returns, (f) records for date-of-marriage assets and debts, and (g) records for gifted and inherited property when received.

¹⁶ The original 1975 Divorce Manual has been followed with its subsequent second through sixth editions in 1984, 1988, 1991, 1996, and 2000, and its 2001, 2002, and 2003 supplements.

¹⁷ The Hawaii Divorce Manual is available to the general public in the Hawaii Supreme Court Law Library and other places. It can be obtained from the Hawaii State Bar Association. It is updated every year at the Annual Divorce Law Update Program at the Bar Association's convention.

¹⁸ Presently, the First Circuit Family Court's "Kids First" divorce education program for parents and children ages six through eighteen occurs each Wednesday evening at the Circuit Courthouse. The program features the award-winning "Purple Family" video about a family with children going through divorce which recognizes, and then reconciles, its differences.

¹⁹ Unfortunately, the identity of the author of this quote is not known.

²⁰ As with the Asset and Debt Statement, the use of endnotes in the Income and Expense Statement is a convenient and expeditious way to present relevant financial data which otherwise would come in through time-consuming oral testimony. Such endnotes can include information about current and historic employment and income, projected cash flow from all sources including anticipated property division, tax calculations, the status of health care insurance, current and historic levels of expenditures and income, and everything else you would want known with respect to past, current, and projected cash flow as it would effect alimony and child support.

²¹ See *Kie v. McMahel*, 91 Haw. 438, 984 P.2d 1264 (App. 1999).

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**IF YOU OR YOUR FAMILY ARE IN
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