

DIVORCE

LAW IN HAWAII:

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

Friedrich Nietzsche

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,

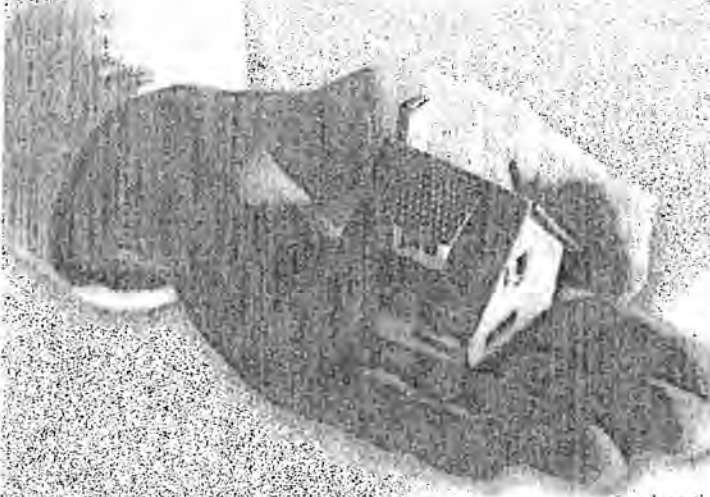
Second,
Third, and Fifth
judicial circuits,
5,583 were divorce
cases.³

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.

- 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.



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."

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

