DISSENTING OPINION BY NAKAMURA, C.J.

I believe the family court went too far and abused its discretion in imposing a blanket prohibition that precluded Plaintiff-Appellant Catina L. Beam, now known as Catina L. Stefanik, (Mother) from introducing any evidence at trial of facts and circumstances that pre-dated August 25, 2008. In my view, this error affected the fairness of the trial and requires vacating the family court's October 13, 2009, post-trial custody order which awarded sole physical custody of the children to Defendant-Appellee Bruce W. Beam (Father).[1] On this basis, I respectfully dissent.

I.

On February 23, 2007, the family court issued a "Decree Granting Absolute Divorce and Awarding Child Custody" (Divorce Decree), which awarded the parties joint legal custody and awarded Mother primary physical custody of the children. On June 26, 2007, Father filed a "Motion and Affidavit for Post-Decree Relief," seeking legal and physical custody of the children. The family court declined to modify custody but ordered the parties to comply with the specific wording of the Divorce Decree.

On August 1, 2008, Father filed a second "Motion and Affidavit for Post-Decree Relief," requesting sole legal and physical custody of the children. In conjunction with this second motion for post-decree relief, Father also filed on August 1, 2008: 1) a "Motion for Award of Temporary Sole Legal and Physical Custody, for Establishment of a Parental Alienation Case Management Protocol, and for Immediate Psychological Evaluation of Children (Motion for Award of Temporary Custody); and 2) an ex parte motion for temporary restraining order that would permit Father to maintain custody of the children, who were on a scheduled visitation with him in Hawaiʻi, until the Motion for Award of Temporary Custody could be heard. On that same day, the family court granted Father's ex parte motion and issued an order

[1] Both Mother and Father appear pro se in this appeal.

restraining Mother from interfering with or disturbing the children's present physical custody arrangements until the hearing on the Motion for Award of Temporary Custody, and the family court advanced the hearing on that motion to August 13, 2008.

In his Motion for Award of Temporary Custody, Father sought, among other things: 1) sole legal and physical custody of the children until a trial on his accompanying motion for post-decree relief; 2) that a case management protocol for cases involving alienated children be established; 3) restrictions on Mother's interim access, visitation, and communication with the children; 4) appointment of a special master and child therapist; and 5) psychological evaluations of the children and therapy for Mother.

After an August 13, 2008, hearing on Father's Motion for Award of Temporary Custody, the family court issued an order on August 25, 2008. This order provided, among other things, that physical custody of the children shall remain with Father until further order of the family court; that Mother shall not have visitation with the children while she was in Hawaiʻi; and that Dr. Marvin Acklin, Ph.D., was appointed to conduct an immediate psychological evaluation of the children and prepare a report, with the family court to schedule a further hearing at which the report could be considered. Dr. Acklin completed his report on or about August 23, 2008, and a further hearing on Father's Motion for Award of Temporary Custody was held on August 25, 2008.

On October 24, 2008, the family court issued a further order regarding Father's Motion for Award of Temporary Custody that, among other things, set the trial for Father's motion for post-decree relief for the week of January 12, 2009; awarded temporary sole legal and physical custody of the children to Father; and restricted Mother to supervised visitation and communications with the children, with no communication by text messaging or e-mail. In support of this order, the family court

found that there had been a material change in circumstances since the entry of the Divorce Decree in that Mother, and others associated with her, have failed to facilitate a positive and harmonious relationship with Father, and that its temporary custody award and restrictions on Mother's access to the children were in the best interests of the children.

Although originally set for the week of January 12, 2009, the trial on Father's motion for post-decree relief was continued several times and was ultimately held on September 14 and 15, 2009. On September 10, 2009, the family court issued an order granting Father's motion in limine and precluding Mother from introducing at trial any evidence of facts and circumstances that pre-dated August 25, 2008. The family court's in limine order provided that "[t]he evidence which may be adduced by either party is limited and restricted only to the facts and circumstances which may have arisen after August 25, 2008." The order also barred each party from re-litigating any claims 1) related to Mother's allegations of sexual abuse by Father prior to August 25, 2008, and 2) that Father was responsible for the breakdown of his relationship with his older daughter. The in limine order further provided that the family court's October 24, 2008, order was conclusive as to all claims which existed prior to that date, including claims that: 1) there was a material change of circumstances since the entry of the Divorce Decree; 2) Mother and persons associated with her have failed to facilitate a positive and harmonious relationship between the children and Father; and 3) it is in the best interests of the children that temporary legal and physical custody of the children be awarded to Father.

On September 14, 2009, Mother filed a motion for reconsideration of the family court's order granting Father's motion in limine and other adverse pre-trial rulings. Mother argued:

> Under H.R.S. 571-46(b), in assessing the child's best interests, the court shall consider, *inter alia*, (3) the overall quality of the parent-child relationship, (4) the

> history of care giving or parenting by each parent prior and subsequent to any type of separation, (7) the emotional needs of the child, (8) the safety needs of the child, (12) each parent's actions demonstrating that they separate the child's needs from the parent's needs, (14) the mental health of each parent, (15) the areas and levels of conflict present within the family. As a result of the Court's rulings on these motions, the Court has effectively and improperly prevented [Mother] from presenting any relevant and admissible evidence on these mandatory statutory considerations. The Court cannot meet its duty, as a matter of law, to consider these factors when [Mother's] side of the case is shut out.

The family court denied Mother's motion for reconsideration at the beginning of the trial.

II.

Hawaii Revised Statutes (HRS) § 571-46 (Supp. 2009) sets forth the standards, considerations, and procedures that shall guide the family court in awarding custody in divorce actions. HRS § 571-46(a)(1) provides:

> (1) Custody should be awarded to either parent or to both parents according to the best interests of the child, and the court also may consider frequent, continuing, and meaningful contact of each parent with the child unless the court finds that a parent is unable to act in the best interest of the child[.]

(Emphasis added.) HRS § 571-46(b) further provides that in determining what constitutes the best interests of the child, the family court shall consider a variety of factors, including: "(3) The overall quality of the parent-child relationship; [and] (4) The history of caregiving or parenting by each parent prior and subsequent to a marital or other type of separation[.]" (Emphasis added.)

In its order granting Father's motion in limine, the family court imposed a blanket prohibition against the introduction of any evidence at trial of facts and circumstances that pre-dated August 25, 2008. It also gave conclusive effect to its prior October 24, 2008, order that was entered in response to Father's Motion for Award of Temporary Custody -- a motion for temporary custody of the children pending the trial. The family court thus made conclusive its rulings on Father's preliminary motion for temporary custody pending trial even though the trial

itself was set to resolve Father's post-decree motion for sole custody of the children.

By August 25, 2008, the family court, pursuant to its temporary custody rulings, had already transferred physical custody of the children from Mother to Father pending trial. The family court's August 25, 2008, order prohibited Mother from having visitation with the children while she was in Hawaiʻi, and its October 24, 2008, order imposed significant constraints on Mother's ability to visit and communicate with the children. By precluding Mother from introducing at trial facts and circumstances that pre-dated August 25, 2008, the family court prevented Mother from introducing evidence regarding the quality of her relationship with the children and her caregiving and parenting during times that she had custody of the children. Instead, in her attempt to defeat Father's post-decree motion for sole custody, Mother was limited to introducing evidence arising during a one-year period in which Father enjoyed sole custody of the children and Mother's access to the children was significantly constrained. The family court's blanket prohibition against pre-August 25, 2008, evidence imposed substantial restrictions on Mother's ability to introduce relevant evidence regarding "[t]he overall quality of the parent-child relationship" and Mother's "history of caregiving or parenting" -- factors that the family court was required by statute to consider in rendering its custody decision. HRS § 571-46(b)(3) and (4).

In my view, the family court's in limine order, which precluded Mother from introducing any evidence at trial of facts and circumstances that pre-dated August 25, 2008, was unduly restrictive and constituted an abuse of discretion. It deprived Mother of a fair opportunity to present her case and defend against Father's post-decree motion for sole custody of the children. I therefore respectfully dissent.