DISSENTING OPINION BY GINOZA, J.

Based on the circumstances in this case and the requirements under Hawaii Revised Statutes (HRS) § 571-46 (Supp. 2014), I conclude that Plaintiff-Appellant Brelie Gail Balon Tumaneng (Mother) should have been allowed to present evidence regarding family violence in seeking to modify custody terms set out in the uncontested Divorce Decree. Therefore, I respectfully dissent.

I. Background

On April 4, 2013, Mother and Defendant-Appellee Brixon Andres Tumaneng (Father) entered into the uncontested Divorce Decree which *inter alia* awarded temporary physical custody of Child to Mother "until September 2013" and then physical custody to Father "starting September 2013." Both Mother and Father were unrepresented at that time.

On September 11, 2013, Mother filed a Motion and Declaration for Post-Decree Relief (Motion for Post-Decree Relief) seeking full physical custody of Child, asserting that Father was in the U.S. Air Force and planning to move Child to Arizona. In a declaration filed the following month, on October 22, 2013, Mother asserted *inter alia* that for almost two (2) years she and Child had lived with Father in Japan, where Father was stationed, and that she was physically abused by Father during that time. Mother's declaration states in pertinent part:

> 7. It was very difficult for us in Japan, as [Father] would often hit me and I would have to leave the house, quickly so I would not be hurt further, and if I had time I always tried to take [Child] with me so he would be safe, but sometimes I was forced to leave him behind, I was so scared.
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> 8. I spoke to my mother and she told me to come home, since there was no reason for me to stay there and let him hit me all the time.
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> 9. [Child] and I returned to Hawaii in September of 2012 and moved back in with my mother.
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> 10. When I got to Hawaii, I filed for divorce, but [Father] kept changing the papers. He would not sign the Divorce Decree I drafted and made his own Decree. He forced me to sign it by saying if I did not sign it, he would go to the judge and tell the judge that I was unfaithful during

> the marriage and that the judge would give [Child] to him and I would never see my child again. I believed him and I was afraid of him, so I signed the Divorce Decree he drafted.
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> 11. The Decree he drafted says I have custody of [Child] until September 2013. In September 2013 [Father] would get custody. [Father] told me he was leaving the military in September of 2013 and that he would raise [Child] here in Hawaii and that I could see him whenever I wanted. I believed him, I thought I had no choice.
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> 12. I want the judge to know that I did not sign the Decree of my own free will, I only did it because [Father] said he would take [Child] away from me forever if I didn't sign it. He said if I signed it, he would live here and raise [Child] here and I could see him anytime I wanted.

On November 13, 2013, the family court issued Pretrial Order No. 1, which temporarily continued physical custody of Child with Mother and set trial to further decide the matter.

Trial on Mother's Motion for Post-Decree Relief was held on March 3, 2014. The family court explained that the material change in circumstance warranting the trial was that the Divorce Decree was silent as to Father's relocation. Father's counsel then orally moved to limit the evidence to events occurring after April 4, 2013, the date the Divorce Decree was entered. Mother's counsel argued in response that Father's trial memorandum had introduced facts predating the Divorce Decree. The family court ruled, however, that the evidence would be limited to evidence after April 4, 2013. Trial proceeded with testimony from Mother, Child's maternal grandmother, and Father.

On April 14, 2014, the family court filed the "Orders Re Plaintiff's Motion and Declaration For Post-Decree Relief Filed September 11, 2013" (Order Regarding Post-Decree Relief), which awarded sole physical custody of Child to Father beginning on May 30, 2014 and allowed Father to relocate to Arizona at that time.

On April 24, 2014, Mother, through new counsel, filed a timely Motion for Reconsideration of the Order Regarding Post-Decree Relief (Motion for Reconsideration), in which she requested reconsideration and a new trial on the custody issue.

In particular, Mother argued that she had been precluded at the trial from presenting evidence of family violence and abuse by Father because it had occurred before the entry of the Divorce Decree, but that family violence is a substantial factor that should be considered in deciding custody. Mother further argued that under HRS § 571-46(a), there is a rebuttable presumption that it is detrimental to a child and not in the child's best interest to be placed in the custody of a perpetrator of family violence. Attached to the Motion for Reconsideration was a declaration by Mother which provided further details of the alleged physical abuse by Father against Mother while she and Child resided in Japan.

On May 20, 2014, the family court issued its order denying Mother's Motion for Reconsideration. On June 19, 2014, Mother timely appealed.

On appeal, Mother contends that the family court erred because the court should have considered evidence of family violence at the trial. Mother further asserts in her first point of error that she objected to the evidentiary limitation in her Motion for Reconsideration, in which she sought a new trial.

II. Discussion

A. Applicable Standards

At the trial on March 3, 2014, Mother's counsel briefly argued against Father's request to limit evidence to matters post Divorce Decree, asserting only that Father's trial memorandum had referenced matters prior to the Divorce Decree. Mother's counsel did not object based on the need to present evidence of family violence and therefore that ground for objecting was waived at the trial. See Kawamata Farms, Inc. v. United Agri Prods., 86 Hawaiʻi 214, 248, 948 P.2d 1055, 1089 (1997)(stating that "the making of an objection upon a specific ground is a waiver of all other objections.") (quoting State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976)). Thus, I agree with the majority that, with respect to whether the family court erred during the trial, plain error review applies.

However, as noted in Mother's first point of error, she did file a Motion for Reconsideration, asserting *inter alia* that a new trial was needed because evidence of family violence and abuse by Father should be considered in deciding the custody issue.[1] On appeal, a trial court's ruling on a motion for a new trial is reviewed for abuse of discretion. Doe v. Doe, 98 Hawaiʻi 144, 150, 44 P.3d 1085, 1091 (2002). In turn, the applicable standard for the family court's consideration of Mother's motion for a new trial was the "good cause" standard under Rule 59(a) of the Hawaiʻi Family Court Rules (HFCR).[2] Id. at 153, 44 P.3d at 1094.

In my view, there was good cause for granting Mother's motion for a new trial and I would hold that it was an abuse of discretion to deny that motion. See Doe, 98 Hawaiʻi at 155-56, 44 P.3d at 1096-97. I would not reach the question of plain error during the trial.

B. Custody Criteria and Considerations

The criteria for awarding child custody is set forth in HRS § 571-46, which provides in pertinent part:

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[1] In her opening brief, Mother references the motion for a new trial in her first point of error, but she does not thereafter provide specific argument about the motion for new trial. Thus, it is within the discretion of this court whether to deem that issue waived. See Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(7) ("Points not argued may be deemed waived."). However, because we seek to address cases on the merits where possible, and given the importance of the issues presented by this appeal, I believe the question of the motion for new trial should not be deemed waived. See Morgan v. Planning Dept., Cnty. of Kauai, 104 Hawaiʻi 173, 180-81, 86 P.3d 982, 989-90 (2004) (addressing issues of great importance notwithstanding a technical violation of HRAP Rule 28); AC v. AC, 134 Hawaiʻi 221, 235, 339 P.3d 719, 733 (2014) (Pollack, J., concurring) ("Few cases come before our courts with more important and long-lasting repercussions than child custody cases involving allegations of physical violence by a parent.").

[2] HFCR Rule 59(a) provides:

> **(a) Grounds**. A new trial may be granted to all or any of the parties and on all or part of the issues for good cause shown. On a motion for a new trial, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment.

(Emphasis added.)

> **§571-46 Criteria and procedure in awarding custody and visitation; best interest of the child**. (a) In actions for divorce . . . or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court, during the pendency of the action, at the final hearing, or any time during the minority of the child, may make an order for the custody of the minor child as may seem necessary or proper. In awarding the custody, the court shall be guided by the following standards, considerations, and procedures:
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> (1) Custody should be awarded to either parent or to both parents according to the best interests of the child . . .;
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> . . . .
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> (6) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify the modification or change . . .;
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> . . . .
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> (9) In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence. In addition to other factors that a court shall consider in a proceeding in which the custody of a child or visitation by a parent is at issue, and in which the court has made a finding of family violence by a parent:
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> (A) The court shall consider as the primary factor the safety and well-being of the child and of the parent who is the victim of family violence;
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> (B) The court shall consider the perpetrator's history of causing physical harm, bodily injury, or assault or causing reasonable fear of physical harm, bodily injury, or assault to another person; and
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> (C) If a parent is absent or relocates because of an act of family violence by the other parent, the absence or relocation shall not be a factor that weighs against the parent in determining custody or visitation[.]

(Emphasis added.)[3]

[3] The definition of "family violence" is provided in HRS § 571-2 (2006) as follows:

(continued...)

"[I]n custody proceedings, the paramount consideration . . . is the best interests of the child." Doe, 98 Hawaiʻi at 156, 44 P.3d at 1097 (citation and internal quotation marks omitted); HRS § 571-46(a)(1). As the majority notes, however, Hawaiʻi cases have held that a "material change in circumstance" is required for modifying a child custody award. See Turoff v. Turoff, 56 Haw. 51, 55, 527 P.2d 1275, 1278 (1974); Hollaway v. Hollaway, 133 Hawaiʻi 415, 421, 329 P.3d 320, 326 (App. 2014); In re Guardianship of Doe, 93 Hawaiʻi 374, 388, 4 P.3d 508, 522 (App. 2000); Nadeau v. Nadeau, 10 Haw. App. 111, 121, 861 P.2d 754, 759 (1993). In this case, the family court recognized that there was a material change in circumstance because the Divorce Decree did not contemplate or address Father's relocation to Arizona. The crucial question on appeal is whether, in this circumstance, Mother should have been allowed to present evidence of family violence that occurred before entry of the Divorce Decree. In this regard, I respectfully disagree with the majority's conclusion that, because the alleged family violence is not related to Father's relocation to Arizona, the evidence was properly excluded.

Because Mother and Father entered into an uncontested Divorce Decree, the family court did not initially need to resolve any custody disputes and no evidence of family violence was presented or addressed before the entry of the Divorce Decree. Mother was also unrepresented when the Divorce Decree

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[3](...continued)

> "Family violence" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:
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> (1) Attempting to cause or causing physical harm to another family or household member;
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> (2) Placing a family or household member in fear of physical harm; or
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> (3) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.

was filed and claims to have been afraid of Father. Mother attests that she agreed to the custody terms in the Divorce Decree based on Father's representations that he would raise Child in Hawaiʻi and Mother could see Child whenever she wanted. She expressed concern for Child's safety if he relocated to Arizona to be raised alone by Father. Once Father decided to relocate to Arizona with Child, the circumstances were significantly altered.

Requiring a material change in circumstance generally serves the important purpose of preventing continual re-litigation of issues. However, the cases articulating the need for a material change in circumstance to modify custody orders have not involved a claim, as in this case, that evidence of family violence needed to be considered. See generally Turoff, 56 Haw. 51, 527 P.2d 1275; Hollaway, 133 Hawaiʻi 415, 329 P.3d 320; In re Guardianship of Doe, 93 Hawaiʻi 374, 4 P.3d 508; Nadeau, 10 Haw. App. 111, 861 P.2d 754. Moreover, HRS § 571-46(a)(6), which specifically addresses modification of custody, does not require a material change in circumstance, stating instead that "[a]ny custody award shall be subject to modification or change whenever the best interests of the child require or justify the modification or change." (Emphasis added.)

Additionally, HRS § 571-46(a)(9) expresses a particular concern about family violence, providing that when there has been "a determination by the court that family violence has been committed by a parent[,]" there is a rebuttable presumption that it is not in the best interests of a child to be placed in the custody of the perpetrator of the violence. Relying in part on this provision in HRS § 571-46,[4] the Hawaiʻi Supreme Court in Doe held that the family court abused its discretion in denying a motion for a new trial, where *inter alia* there were allegations

[4] At the time relevant to Doe, the provision relating to family violence and the rebuttable presumption was contained in HRS § 571-46(9), as there was no subsection (a).

of domestic violence and the mother claimed she was prevented from presenting evidence of the father's abusive personality. 98 Hawaiʻi at 148, 156, 44 P.3d at 1089, 1097. Doe did not deal with modifying a custody order, but it underscores the importance of allowing parties to a custody dispute to present evidence of alleged family violence. See also AC, 134 Hawaiʻi 221, 230-34, 339 P.3d 719, 728-32.

Given the circumstances in this case, where the family court did not previously have occasion to consider family violence and Mother was unrepresented when the Divorce Decree was entered, I believe evidence of family violence should have been considered in determining the best interests of Child and whether to modify custody, even if the evidence pertained to incidents prior to the Divorce Decree. As Mother points out in her opening brief, the Supreme Court of Alaska reached a similar conclusion in McAlpine v. Pacarro, 262 P.3d 622 (Alaska 2011), stating:

> Although a party moving for custody modification must generally demonstrate "a substantial change in circumstances since the last custody order was entered," we have relaxed this rule in custody matters involving domestic violence, directing the superior court to look back to events that occurred before the initial custody order if not adequately addressed at the initial custody determination or subsequent proceedings. Taking prior domestic violence into consideration is particularly important in cases where a settlement agreement deciding custody was made by pro se parties with a history of domestic violence.

Id. at 626 (footnotes omitted).

There certainly may be contrary evidence that Father will want to present. However, given Mother's declarations alleging family violence and because the family court has not previously addressed family violence in this case, I would hold that there was good cause to grant Mother's motion for a new trial and that it was an abuse of discretion to deny the motion.

III. Conclusion

Based on the above, I would vacate the family court's denial of Mother's motion for a new trial and remand for further proceedings to consider evidence of family violence and its impact on the best interests of Child.