

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1387

CAF 08-01244

PRESENT: MARTOCHE, J.P., SMITH, FAHEY, CARNI, AND PINE, JJ.

IN THE MATTER OF LAKICIA M. HUGHES,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

LIONEL L. DAVIS, RESPONDENT-RESPONDENT.

CHARLES J. GREENBERG, BUFFALO, FOR PETITIONER-APPELLANT.

CHRISTOPHER J. BRECHTEL, LAW GUARDIAN, BUFFALO, FOR SHAKA D.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered April 29, 2008 in a proceeding pursuant to Family Court Act article 6. The order granted respondent's motion and dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the petition is reinstated, and the matter is remitted to Family Court, Erie County, for further proceedings on the petition.

Memorandum: Upon her return from active military duty, petitioner mother filed a petition seeking to modify a prior order of custody. Family Court granted respondent father's motion to dismiss the petition without conducting a hearing based on its determination that the mother had "failed to show a change of circumstances." We conclude, based on the recent enactment of Family Court Act § 651 (f), that the petition should be reinstated.

It is well settled that, in seeking to modify an existing order of custody, "[t]he petitioner must make a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418 [internal quotation marks omitted]). Pursuant to Family Court Act § 651 (f) (3), "the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances. Upon the request of either parent, the court shall determine on the basis of the child's best interests whether the custody judgment or order previously in effect should be modified" (see Domestic Relations Law § 75-1 [3]; § 240 [1] [a-2] [3]). Here, the mother alleged that she had returned from active military duty and thus made a sufficient evidentiary showing of a substantial change in circumstances (see

generally Di Fiore, 2 AD3d 1417).

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court