

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

1313.1

CAF 10-01087

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND GREEN, JJ.

---

IN THE MATTER OF AARON M. NICHOLS,  
PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

TINA L. NICHOLS-JOHNSON, RESPONDENT-APPELLANT.

---

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR  
RESPONDENT-APPELLANT.

VIVIAN CLARA STRACHE, ATTORNEY FOR THE CHILDREN, BATH, FOR MONTANA N.,  
MICHAELA N., AND KEEGAN M.N.

---

Appeal from an order of the Family Court, Steuben County (Timothy K. Mattison, J.H.O.), entered May 6, 2010 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified a previous order of custody.

It is hereby ORDERED that the order so appealed from is unanimously vacated without costs and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following Memorandum: Respondent paternal grandmother appeals from an order granting the petition seeking to modify a prior order of custody and visitation by awarding petitioner father primary physical custody of his three children with visitation to the grandmother. The Attorney for the Children has submitted new information, obtained during the pendency of this appeal, indicating that the father no longer wishes to pursue the petition. Although that information is not included in the record on appeal, we may "take notice of the new facts and allegations to the extent they indicate that the record before us is no longer sufficient for determining [the father's] fitness and right to [primary physical custody] of [the children]" (*Matter of Michael B.*, 80 NY2d 299, 318; *see also Matter of Shad S.*, 67 AD3d 1359; *Matter of Chow v Holmes*, 63 AD3d 925). We therefore vacate the order and remit the matter to Family Court for further proceedings.

Entered: November 19, 2010

Patricia L. Morgan  
Clerk of the Court