Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Submitted - October 17, 2008

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
JOSEPH COVELLO
JOHN M. LEVENTHAL, JJ.

2007-09090 DECISION & ORDER

In the Matter of Michael J. Hughes, appellant,
v Donna B. Lane, respondent.

(Docket No. V-693-00)

Blumberg & Bongermino, Central Islip, N.Y. (Ernest M. Bongermino of counsel), for appellant.

Jan Murphy, Huntington, N.Y., attorney for the child.

In a child custody proceeding pursuant to Family Court Act article 6, the father appeals from an order of the Family Court, Nassau County (Phillips, Ct. Atty. Ref.), dated August 13, 2007, which, without a hearing, dismissed, with prejudice, his petition to modify a prior order of the same court dated August 1, 2005.

ORDERED that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Family Court, Nassau County, for an evidentiary hearing and thereafter a new determination of the petition.

At a proceeding on August 9, 2007, the court questioned the mother under oath. The court then relied, at least in part, on her testimony to resolve the allegations in father's petition, without also questioning the father under oath, or permitting him to cross-examine the mother. Given the factual discrepancies between the father's petition and the mother's testimony, the court erred in dismissing father's petition without conducting a full evidentiary hearing (*see Metzger v Metzger,* 240 AD2d 642, 642-643; *Matter of Klang v Klang,* 235 AD2d 476, 477; *Hizme v Hizme,* 212 AD2d 580, 580-581). Accordingly, we remit the matter to the Family Court, Nassau County, for an evidentiary

hearing to explore whether a material change in circumstances exists warranting a modification of the custody provision of the order dated August 1, 2005, and thereafter a new determination of the petition.

MASTRO, J.P., RIVERA, COVELLO and LEVENTHAL, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court