

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

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CAF 11-01012

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND MARTOCHE, JJ.

IN THE MATTER OF KELLY DIPAOLO,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

MATTHEW K. AVERY, RESPONDENT-RESPONDENT.

EDWARD G. KAMINSKI, UTICA, FOR PETITIONER-APPELLANT.

DOREEN M. ST. THOMAS, ATTORNEY FOR THE CHILDREN, UTICA, FOR BREANA A.
AND TRYSTA A.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered April 11, 2011 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a prior custody order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Oneida County, for a hearing on the petition in accordance with the following Memorandum: Petitioner mother contends on appeal that Family Court erred in sua sponte dismissing her petition seeking modification of a prior custody order by awarding her primary custody of the children without conducting a hearing and after a judicial hearing officer had denied respondent father's motion to dismiss the petition. We agree. The petition alleged that modification of the existing custody arrangement, pursuant to which the father had primary custody, was warranted because, inter alia, the mother and her current husband have completed counseling and have a stable home. In her bill of particulars, the mother added the allegation that the father was not involved in the children's schooling and had refused to obtain counseling for the children to enable them to address their adjustment and coping issues. We thus conclude that the mother "made a sufficient evidentiary showing of a change in circumstances to warrant a hearing" (*Matter of Mayer v Londraville*, 26 AD3d 758; cf. *Matter of Di Fiore v Scott*, 2 AD3d 1417, 1417-1418). We therefore reverse the order, reinstate the petition and remit the matter to Family Court for a hearing on the petition before a different judge.

Entered: March 16, 2012

Frances E. Cafarell
Clerk of the Court