

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

863

**CAF 08-00936**

PRESENT: SCUDDER, P.J., HURLBUTT, MARTOCHE, SMITH, AND CENTRA, JJ.

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IN THE MATTER OF TAMMY SHAW,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

FRANK CANNATA, RESPONDENT-RESPONDENT.

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BERNADETTE M. HOPPE, BUFFALO, FOR PETITIONER-APPELLANT.

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Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered April 3, 2008 in a proceeding pursuant to Family Court Act article 6. The order modified a prior custody order.

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

Memorandum: Petitioner mother contends that Family Court erred in failing to conduct a hearing before modifying a prior custody order by altering her visitation rights when she in fact sought a change of custody. We agree. The record establishes that the mother sought a change of custody based upon allegations of a volatile relationship between the parties' 16-year-old son and respondent father. Based upon the allegations in the petition, the court ordered that an investigation be conducted by Child Protective Services (CPS) pursuant to Family Court Act § 1034. The court did not grant the motion of the Law Guardian to dismiss the petition prior to receiving the report from CPS but, rather, modified the prior order with respect to the mother's visitation rights upon the oral request of the father. We conclude that the mother made a sufficient evidentiary showing of a change of circumstances to warrant a hearing (*cf. Jean v Jean*, 59 AD3d 599, 600), and that the mother was thereby denied her opportunity to prove that it is in the best interests of the child to modify the order of custody by awarding custody to her (*see generally Matter of Lisa B.I. v Carl D.I.*, 46 AD3d 1451). We therefore reverse the order and remit the matter to Family Court for a hearing on the petition.

Entered: July 2, 2009

Patricia L. Morgan  
Clerk of the Court