

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

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CAF 09-00622

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND PINE, JJ.

IN THE MATTER OF JENNIFER R. KNUTH,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

TROY J. WESTFALL, RESPONDENT-RESPONDENT.

ANDREW J. CORNELL, WELLSVILLE, FOR PETITIONER-APPELLANT.

FERN S. ADELSTEIN, LAW GUARDIAN, OLEAN, FOR LOGAN W.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered February 25, 2009 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Contrary to the contention of petitioner mother, Family Court properly granted respondent father's motion to dismiss the petition seeking to modify a prior custody order without conducting a hearing on the petition. "A hearing is not automatically required whenever a parent seeks modification of a custody order" (*Matter of Wurmlinger v Freer*, 256 AD2d 1069; see *David W. v Julia W.*, 158 AD2d 1, 6-7). Where, as here, the petitioner fails to demonstrate a sufficient "change in circumstances . . . , there is no basis for modification and dismissal of [the] petition is warranted" (*Matter of Reese v Jones*, 249 AD2d 676, 677; see *Matter of Di Fiore v Scott*, 2 AD3d 1417).

The mother failed to preserve for our review her further contention that the court abused its discretion in dismissing the petition without conducting a *Lincoln* hearing inasmuch as she failed to request such a hearing (see *Matter of Lopez v Robinson*, 25 AD3d 1034, 1037; *Matter of Picot v Barrett*, 8 AD3d 288, 289). In any event, we reject that contention (see *Matter of Charles M.O. v Heather S.O.*, 52 AD3d 1279; *Matter of Thompson v Thompson*, 267 AD2d 516, 519).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court