

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

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CAF 22-01285

PRESENT: SMITH, J.P., BANNISTER, GREENWOOD, NOWAK, AND DELCONTE, JJ.

IN THE MATTER OF TARA J. MELISH,
PETITIONER-RESPONDENT-APPELLANT,

V

MEMORANDUM AND ORDER

JEFFREY J. RINNE,
RESPONDENT-PETITIONER-RESPONDENT.
(APPEAL NO. 1.)

TARA J. MELISH, PETITIONER-RESPONDENT-APPELLANT PRO SE.

MICHELE A. BROWN, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered July 18, 2022, in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the motion of the Attorney for the Children to dismiss the amended modification petition of petitioner-respondent.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion of the Attorney for the Child, reinstating the amended petition of petitioner-respondent, and vacating the fourth ordering paragraph, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: In these proceedings pursuant to Family Court Act article 6 to modify a prior consent order regarding custody and visitation of the parties' children, petitioner-respondent mother appeals from three orders. Initially, we dismiss the appeals from the orders in appeal Nos. 2 and 3 because those orders are duplicative of the order in appeal No. 1 (*see Matter of Machado v Tanoury*, 142 AD3d 1322, 1322-1323 [4th Dept 2016]; *Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

We agree with the mother in appeal No. 1 that Family Court erred in granting the motion of the Attorney for the Children (AFC) to dismiss the mother's amended petition seeking to modify the existing custody and visitation order. To survive a motion to dismiss for facial insufficiency, a petition seeking to modify a prior order of custody and visitation must contain sufficient "factual allegations of a change in circumstances" (*Machado*, 142 AD3d at 1323; *see Matter of Kriegar v McCarthy*, 162 AD3d 1560, 1560 [4th Dept 2018]). On such a motion, the court "must give the pleading a liberal construction, accept the facts alleged therein as true, accord the nonmoving party

the benefit of every favorable inference, and determine only whether the facts fit within a cognizable legal theory" (*Machado*, 142 AD3d at 1323; see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, we conclude that, contrary to the court's determination, the amended petition contains sufficient allegations of a change in circumstances, namely, that since the entry of the existing consent order, the mother and respondent-petitioner father have been unable to successfully parent with respect to, among other things, the children's education and after-school care (see generally *Matter of Little v Little*, 175 AD3d 1070, 1072 [4th Dept 2019]). We therefore modify the order in appeal No. 1 by denying the AFC's motion and reinstating the mother's amended petition. In light of our determination, we further conclude that the court erred in directing that the father's petition seeking to modify the existing consent order is withdrawn based on the father's statements indicating that he would withdraw his petition in the event that the mother's amended petition were withdrawn or dismissed. We therefore further modify the order in appeal No. 1 by vacating the fourth ordering paragraph, and we remit the matter to Family Court for a hearing on the mother's amended petition and the father's petition (see *id.*; *Kriegar*, 162 AD3d at 1561).

Finally, the mother failed to preserve her contention that the court was biased against her inasmuch as she failed to make a motion for the court to recuse itself (see *Matter of Tartaglia v Tartaglia*, 188 AD3d 1754, 1756 [4th Dept 2021]). In any event, contrary to the mother's contention, our review of the record does not indicate the existence of any such bias that would warrant remittal before a different judge (see *id.*; see also *Matter of Dawn M. [Michael M.]*, 151 AD3d 1489, 1493 [3d Dept 2017], *lv denied* 29 NY3d 917 [2017]).