

State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: October 26, 2006

97126

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In the Matter of LORIANN  
DEUEL,

Appellant,

v

MEMORANDUM AND ORDER

FRANK T. DALTON,

Respondent.

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Calendar Date: September 11, 2006

Before: Cardona, P.J., Mercure, Spain, Carpinello and  
Mugglin, JJ.

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Loriann Deuel, Eagleville, appellant pro se.

Justin C. Brusgul, Voorheesville, for respondent.

Sandra J. Colatosti, Law Guardian, Albany.

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Mugglin, J.

Appeal from an order of the Family Court of Rensselaer County (Cholakis, J.), entered July 29, 2004, which dismissed petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

On April 20, 2004, respondent (hereinafter the father) was awarded sole legal and physical custody of the parties' daughter. Thereafter, on May 24, 2004, petitioner (hereinafter the mother) filed a petition in Family Court seeking custody. At the initial return date of the petition, the father served and filed a motion to dismiss asserting that the petition failed to make any factual showing of a substantial change in circumstances warranting

modification of the prior custody order. On July 29, 2004, without hearing argument, Family Court dismissed the petition without prejudice. At a Family Court hearing held September 30, 2004, the parties agreed to a consent order which granted the mother supervised visitation. The mother now appeals the July 20, 2004 dismissal of her custody petition.

We affirm. First, the instant matter should not be dismissed as moot since the consent order dealt only with the mother's rights of visitation, an issue distinct from the custody order in favor of the father (see Matter of Carella v Ferrara, 9 AD3d 605, 605 [2004]; Matter of Baker v Ratoon, 251 AD2d 921, 922 [1998]).

Turning to the merits, it is well settled that an existing custody arrangement will not be modified unless changed circumstances have occurred since the entry of the prior custody order impacting the child's best interests (see Matter of Oddy v Oddy, 296 AD2d 616, 617 [2002]). Here, the mother's petition for custody, filed 35 days after the custody order in favor of the father, fails to factually aver any change in circumstances within that 35-day period which would warrant modification, and Family Court properly dismissed the mother's petition (see Matter of Mathis v Parkhurst, 23 AD3d 923, 924 [2005]).

Next, the mother's contentions with respect to the untimely service of the notice of motion to dismiss her petition are not before us as there was no appropriate objection (see Matter of Borggreen v Borggreen, 13 AD3d 756, 757 [2004]). Notably, she was given adequate time to and did, in fact, respond prior to the issuance of the court's order. Lastly, issues raised by the mother for the first time in her reply brief are not properly before this Court for review (see Matter of Lupovici v Sobol, 223 AD2d 753 [1996]).

Cardona, P.J., Mercure, Spain and Carpinello, JJ., concur.

ORDERED that the order is affirmed, without costs.

ENTER:



Michael J. Novack  
Clerk of the Court