

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

1350

CAF 12-01211

PRESENT: CENTRA, J.P., FAHEY, SCONIERS, VALENTINO, AND MARTOCHE, JJ.

IN THE MATTER OF DEBORAH A. AVOLA,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

CHRISTOPHER W. HORNING, RESPONDENT-RESPONDENT.

MAI LUTTERUS LIINVE, ATTORNEY FOR THE CHILD,
APPELLANT.

PROVEN AND QUENCER, WATERTOWN (LISA A. PROVEN OF COUNSEL), FOR
PETITIONER-APPELLANT.

MAI LUTTERUS LIINVE, ATTORNEY FOR THE CHILD, WATERTOWN, APPELLANT PRO
SE.

RUTHANNE G. SANCHEZ, WATERTOWN, FOR RESPONDENT-RESPONDENT.

Appeals from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered October 18, 2011 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: Petitioner mother and the Attorney for the Child appeal from an order that dismissed the mother's petition seeking to modify the prior joint custody order entered upon the parties' stipulation by awarding her sole custody of the parties' child. We affirm. "[T]here is a sound and substantial basis in the record for Family Court's determination that the mother failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the best interests of the subject child would be served by modifying the existing custody arrangement" (*Matter of Wawrzynski v Goodman*, 100 AD3d 1559, ___; see generally *Matter of Yaddow v Bianco*, 67 AD3d 1430, 1431; *Matter of Chrysler v Fabian*, 66 AD3d 1446, 1447, lv denied 13 NY3d 715). Contrary to the mother's contention, the parties' communication problems did not constitute a change in circumstances. Although the record reflects that the parties experience some difficulty in communicating with each other, there does not appear to have been a change in the parties' communication issues since the prior custody order was entered (see *Matter of Chant v Filippelli*, 277 AD2d 741, 742). Moreover, the

record reflects that the parties' communication issues have not meaningfully interfered with the child's emotional and intellectual development, health, or success in school (see *Marcantonio v Marcantonio*, 307 AD2d 740, 741). Contrary to the mother's further contention, the father's alleged failure to spend time with the child when the child was in his physical custody also did not establish the requisite change in circumstances (see generally *Matter of Kerwin v Kerwin*, 39 AD3d 950, 951).

Entered: December 28, 2012

Frances E. Cafarell
Clerk of the Court