

**ABSOLUTELY ESSENTIAL
NON-NEGOTIABLE CASES
ALL AFC MUST KNOW
MICHELE A. BROWN**

There is a long set of cases and statutes attached to this memorandum, which are part of your materials. The cases attempt to cover all issues which an AFC may face in a custody or access proceeding. However, some are non-negotiable – you must read and know these cases.

Basic custody concepts are covered in the three classic cases, *Eschbach*, *Friederwitzer* and *Nehra v Uhlar* which together basically stand for there are no absolutes in custody, and the court must consider any and all factors which affect the best interest of the child. Note that although statutes provide decisions must be in the best interest of the child, it is decisional law which provides meaning to the best interest standard. These cases also set forth the modification standard to be applied when there is a prior judgment or stipulation. A prior judgement after trial is given greater weight when considering modification, but to modify either, there must be a showing of a sufficient change in circumstances to warrant an inquiry into the ongoing best interests of the child.

Access or visitation must be ordered by a court unless there is a showing of danger to the child. Arrangements for access cannot be delegated to a custodial parent or therapist. See *Katz*, *Culver*, and *Granger v Misercola*.

Tropea applies when a prior decree or agreement exists, and the custodial parent wants to relocate. The standards in *Tropea* do not apply per se on a de novo proceeding. However, many of the same considerations should be raised when a parent seeks custody and as part of the application wishes to move.

When domestic violence is pled and proved, the court must consider the domestic violence in fashioning an order of custody and access. *Wissink* is a good example of domestic violence and the trial court not giving that violence the proper consideration.

The *Bennett v Jeffreys* standard of persistent neglect abuse abandonment or such other extraordinary circumstances as equity would see fit to intervene must be pled and proved for any 3rd party to obtain custody of a child. DRL Section 72 provides a statutory definition of abandonment for only grandparents when a child has resided with the grandparents for two years. Once extraordinary circumstances are

proved, the court must find it is in the best interest of the child to award custody to a third party. If there has been a judicial finding of extraordinary circumstances (as compared to a consent order), the standard for modification is a sufficient change as set forth above. *Guinta v Doxtader*. If the order was on consent, there still needs to be a finding of extraordinary circumstances. The logic is that parents should not be penalized for seeking assistance on a temporary basis.

The extraordinary circumstances test does not apply to third party applications for visitation. Only parents, grandparents and siblings (half or full) have standing to apply for and be granted visitation with a child. All other third parties (step parents, aunts, godparents, etc.) do not have standing and cannot be awarded access, although those same third parties could be awarded custody on a showing of extraordinary circumstances. See *E.S. v P.D.* which discusses the constitutional rights of fit parents to determine with whom their child has a relationship in light of *Troxel v Granville*, 530 US 57 (2000).

Who is a parent becomes an issue for custody and access litigation. The traditional model of a biological mother and father has been modified by the doctrine of equitable estoppel in *Shondel J. v Mark D* and its progeny. Parenthood can also be achieved by an agreement to conceive and raise a child together as set forth in *Brooke SB v Elizabeth ACC*.

AFC should also be aware of *Figueroa v Lopez* and *McDermott v Bale*, which together hold that when parents reach an agreement, the court will not allow an AFC to force a trial when the agreement does not reflect the child's wishes. To accept an agreement over the objection of the AFC, the legitimate concerns of the AFC must be addressed (such as domestic violence) and the court must find the agreement to be in the child's best interests.

In camera proceedings are held pursuant to *Lincoln*. The proceedings are confidential, only the judge, the child, a stenographer and the AFC should be present. The court should not disclose the contents of the *in camera*. An *in camera*, or *Lincoln* hearing, is designed to determine the wishes, preferences and feelings of the child involved. It is not a fact-finding hearing and should not be used to establish facts in a family offense, abuse or neglect proceeding. One may be appropriate in a dispositional hearing after the fact finding is complete in those proceedings.

Finally, read and understand the guidelines. Under no circumstances should you be the AFC in *Silverman v Silverman*, 1866 AD3d 123 (2nd Dept 2020) or *Matter of Brian S.*