



# VIVID

*Voices, Idea, Views, Insights and Dialogues for  
Professionals working with Families in Transition*

**SPRING 2006**

## THE NEW YORK CHAPTER OF AFCC-NY MISSION STATEMENT

The well-being of children and families is a fundamental goal of our society and its legal system. The New York State Chapter of the Association of Family and Conciliation Courts is dedicated to using the experience, knowledge, and resources of judges, mental health professionals, attorneys, law guardians, mediators, and other professionals, to improve that well-being through cooperative efforts that seek new, less adversarial approaches to the resolution of child centered legal matters.

## PRESIDENT'S MESSAGE

by **Hon. W. Dennis Duggan.**

Dear Colleagues:

This past week I was taking testimony from a psychologist in a termination of parental rights case. As I looked about the courtroom at the attorneys, law guardian and caseworkers, and then at the mother, it struck me how helpless she was at this point in her life. The question of whether she would ever see her children again was completely out of her hands and would be in mine—once both sides had produced their “evidence.” I put the word evidence in quotes because, upon reflection, one must think hard to figure out how one goes about proving to another that a parent’s parental rights should be terminated. When can you be confident that it is best for the children to apply the parental death penalty.

So, the psychologist was making the point that the kids had been in foster care for so long and the mother had relapsed so often that the kids had no trust left in their mother and could not be put at risk of her failing again. The mother’s attorney, on cross-examination, was trying to make some dents in the psychologist’s testimony in the usual way, like showing that he could not vouch for the truth of all of the reports that he relied on. Then the lawyer went further out on a limb and started talking about proximate cause.

The term “proximate cause” is familiar to all lawyers and it is one of those “I know it when I see it,” concepts. It is introduced to lawyers in their first year law school torts class. Volumes have been written about it and the Rosetta Stone of proximate cause is Judge

Benjamin Cardozo’s opinion in *Palsgraf v. Long Island Railroad*. Every lawyer and Judge in America recognizes this case and virtually none of them could explain it. So, I might as well give it a try.

The mother’s attorney was trying to get the psychologist to admit that because, over the years, the children were in three or four different foster homes, couldn’t this, be the “proximate cause” of the children’s angst. The psychologist replied that he did not know what the lawyer meant by the term proximate cause. The lawyer started to describe the *Palsgraf* case to the psychologist and I promptly sustained an objection that had not yet been made.

The lawyer was in a proper area of cross-examination and I thought an answer to this line of questioning would be helpful to me as the trier of fact. So I thought I would give it a shot. I said to the psychologist to assume that someone was careless with matches and started a fire in the attic which burned a hole in the roof. Then suddenly, a torrential rain storm came about and three floors of the house sustained water damage. The direct cause of the damage to the house was the rain coming through the hole in the roof but the proximate cause of the damage was the fire started by the careless person. With this explanation the psychologist explained that moving the children from foster home to foster home did not improve their circumstances, but the cause of that was the failure of the mother to progress in her treatment for so many years so she could safely parent her children.

The file in this case is about nine inches thick. My rule of thumb is that services for a neglectful parent cost the taxpayers about \$100,000 per inch of file. The taxpayers in this case are closing in on an expenditure of \$1,000,000 and the outcome is uncertain. It is a measure of the failure of the Family Court process in the face of the power of drugs to keep a mother from her children.

### Inside this issue:

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- ♦ Relocation-Relocation-Relocation: When the Kid Goes to Vegas, the Kid Stays in Vega, by W. Dennis Duggan, F.C.J.
- ♦ Announcements

## Member profile

### Steven Demby, Ph.D.

Steven Demby, Ph.D., a graduate of Columbia College, received his Ph.D. in clinical psychology from Long Island University and completed his training in psychoanalysis at the New York Freudian Society. He has been engaged in the private practice of psychotherapy with adults, children, and adolescents for twenty three years in Brooklyn and opened his Manhattan office two years ago. Devoting a significant portion of his private practice to dealing with divorce, Dr. Demby performs forensic evaluations for the courts, offers parenting coordination, and conducts psychotherapy with children whose parents are divorcing or divorced. Looking at divorce from these different perspectives has strengthened his work. To expand his knowledge of ADR interventions, he recently completed a three day training in the interdisciplinary collaborative practice model sponsored by the NY Collaborative Law group and is currently training in mediation.

The immediate past Co-President of the New York Chapter of the Association of Family and Conciliation Courts, Dr. Demby currently represents AFCC-NY on the Interdisciplinary Forum on Mental Health and the Law. He is on the faculty of the Family Forensic Program of the Washington Square Institute and is an Adjunct Associate Professor in the School Psychology Ph.D. program at Pace University. He is a member of the American Psychological Association and the International Psychoanalytical Association. In addition, he participates in the PEACE (Parent Education and Custody Effectiveness) programs in Manhattan and Brooklyn. Dr. Demby is a frequent lecturer at presentations and workshops, speaking primarily on the topic of interdisciplinary approaches to helping parents and children better cope through separation and divorce. Dr. Demby participated in a panel on "Turning Down the Heat: New Approaches to Resolving High Conflict Divorce" at Brooklyn Law School and gave a talk at the Third Annual Conference of AFCC-NY Chapter on "Understanding Children's Communications in Custody Disputes: Lincoln Hearing and Beyond." He is looking forward to presenting with his colleague and AFCC-NY Board Member, Elayne Greenberg, at AFCC's annual conference in Tampa on "Assessing and Resolving Religious Conflicts in Child Custody Disputes." Another upcoming presentation is called "Divorce at the Movies," being offered at the Jewish Community Center of the Upper West Side in May and June.

Dr. Demby has published a number of articles on topics including "Working with Divorcing and Divorced Couples," which appeared in the Newsletter

of Division 39, Section 8, of the American Psychological Association, "Reflections on the Treatment of Adults Who Grew Up With Divorce," which appeared in the Psychologist-Psychoanalyst Newsletter, and "Assessing Pathological Hatred and Its Impact on Parenting in Forensic Custody Evaluations," which is in press.

During his tenure as Co-President of AFCC-NY, Dr. Demby worked to expand AFCC-NY as a force for progressive change in NYS and enjoyed the collegial relationships he made along the way.

Dr. Demby has found that straddling the worlds of psychoanalysis and of the courts and high-conflict divorce creates a stimulating professional synergy. His psychoanalytic training helps him to listen with close and finely-tuned attention to the life stories told to him by parents or children of divorce. He has learned to appreciate the multi-layered, multi-determined nature of parents' and children's behavior in divorce. He has also found his divorce work influencing his psychoanalytic work. He is apt to intervene more actively with his psychoanalytic patients and to focus more sharply on the lasting psychological impact of parent-child relationships.

## AFCC-NY Chapter Board Members

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President: Hon. W. Dennis Duggan

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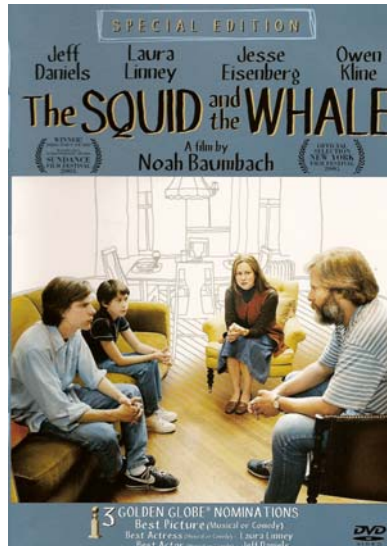
Rod Wells

Alayne Katz

### Introducing New Board Member:

Eric Tepper, Esq. is a partner at Gordon Tepper & DeCoursey, practicing in the areas of family law, custody and matrimonial law in the Albany, Schenectady and Saratoga regions.

ASSOC. of FAMILY & CONCILIATION COURTS  
New York Chapter  
PRESENTS  
AN EVENING OF CHALLENGING DISCUSSION



**“The Squid and The Whale”**  
**How to Keep Parents From Going Off the Deep End.**

STARRING:

As the Mediator:	Rod Wells
As Dad’s Psychologist:	Steven Demby, Ph.D.
As Mom’s Psychologist:	Lauren Behrman, Ph.D.
As the Litigator-Lawyer:	Steven Abel, Esq.
As the Collaborative-Lawyer:	Teresa Ombres, Esq.
As the Judge and Moderator:	W. Dennis Duggan, F.C.J.

**June 14<sup>th</sup>, 2006, Networking Reception, 6 to 7 P.M. Program 7 to 9 P.M.**

**Fordham Law School  
Columbus & West 62<sup>nd</sup> Street, Room 203  
Price: \$30, Lite Fare Served, Casual Dress**

**CLE Credits Available.**

**Rod Wells** is a divorce mediator, certified financial planner and family therapist from Orange County.

**Steven Demby** is a clinical psychologist in Brooklyn working with divorcing families and children and doing forensic custody evaluations.

**W. Dennis Duggan** is a Family Court Judge in Albany. He is past president of the NYS Family Court Judges Assoc. And current President of AFCC-New York.

**Lauren Behrman** is a clinical psychologist in Westchester County working with high-conflict parents in a focused co-parenting intervention.

**Teresa Ombres** was Director of the Custody Mediation Program for the Community Mediation Services in Queens and now concentrates on divorce mediation and collaborative law.

**Steven Abel** is a divorce attorney in Rockland County and is with the Center for Family and Divorce Mediation In New City.

**R.S.V.P.: wduggan@courts.state.ny.us. Pay at the door. Subway: Take the A, B, C, D or the 1 to Columbus Circle. Go two blocks north and one block west, it’s just behind Lincoln Center.**

# reLOCATION-reLOCATION-reLOCATION

## When The Kid Goes To Vegas, The Kid Stays In Vegas

W. Dennis Duggan, F.C.J.

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The law of relocation of children reared its ugly head recently in California and that State's Supreme Court delivered it another body blow. This is an area of law which was still in recovery from the last time that Court grasped this nettlesome issue. Every year, our Court of Appeal's decision in **Tropea** looks better and better.

In 1996, the Court of Appeals decided to reform the law of relocation in New York. In the **Tropea** case, they looked at a mother's request to move from Syracuse to Schenectady and in the **Browner** case, another mother's request to move from Westchester County to Pittsfield, MA. Up to this point, the Appellate Divisions had developed a three-step analysis to resolve relocation cases. Stated most succinctly in **Radford v. Propper** (190 AD2d 93 [1993]), the moving parent was required to show exceptional circumstances to justify a move away with the kids.

The legal analysis went like this: First, would the relocation deprive the non-custodial parent of "regular and meaningful access" to the child? Second, if the answer to the first question is yes, the custodial parent must then show "exceptional circumstances to justify the move." Third, once exceptional circumstances are shown, the Court would consider the overall best interests of the child.

Judge Titone, in perhaps the most significant opinion of his career, wrote that the three-step approach was difficult to apply, that the lower courts had not settled on a uniform method of defining meaningful access, and that the three-step approach erected "artificial barriers" to the courts' consideration of all relevant factors. Actually, none of those observations were true. The three-step approach was quite easy to apply and had a high degree of predictability. Also, the trial courts had no trouble defining "meaningful access." Finally, the test did erect a barrier but it was hardly artificial. What was true was that the three-step approach was not fair because it set the bar too high for a moving parent and did prevent the court in many cases from considering the overall best interest of the child. In short, the Court of Appeals used its common law authority to reset the standard, requiring an inquiry into the overall best interest of the child.

Three weeks after the **Tropea** decision, the California Supreme Court handed down the **Burgess** decision. (913 P.2d 473) This case involved two parents who worked at the same prison and the mother wanted to move forty miles away. The court held that the mother was not required to prove the "necessity" of the move. The **Burgess** court formulated its holding three or four ways, variously using terms such as "derogate the child's best interest," "detrimental to the child," "inconsistent with the child's welfare," and "prejudicial to the [child's] rights or welfare. In a round about way, the Court set up a presumptive right of the custodial parent to move. And, to make things perfectly clear, the Court held that; "The dispositive issue is not whether relocating is itself 'essential or expedient' either for

the welfare of the custodial parent or the child but whether a change in custody is 'essential or expedient for the welfare of the child.'" Got that? Expedient, huh? Get that Court a dictionary.

Eight years later, the California Supreme Court had to revisit **Burgess** in the **Lamusga** case (88 P.3d 81) because the trial and intermediate courts were not sure what **Burgess** meant (especially the "essential or expedient" rule).<sup>1</sup> Not so the California Legislature, however. In 2003, the Legislature added a new provision to the California Family Code which stated; "It is the intent of the Legislature to affirm the decision in **In Re marriage of Burgess** and to declare that ruling to be the public policy and law of this state." With that deft piece of precise legislative draftsmanship, the California Supreme Court was in a real pickle. The California Legislature had affirmed one of their decisions that they now wanted to overrule. The California Supreme Court would now have to overrule **Burgess** to save it.

First, the Court held that the phrase "essential or expedient" meant nothing more than what is in the child's best interest. Second, it held that there was no presumptive right of a custodial parent to move. "Rather, the non-custodial parent bears the initial burden of showing that the proposed relocation of the children's residence would cause detriment to the children, requiring a reevaluation of the children's custody." When the Supreme Court was finished, there was little left to **Burgess**, although they told us that they were reaffirming **Burgess**, which was, of course, reaffirmed by the Legislature. So, I guess, it's their way of sticking it to the man. In the end, except for where they placed the burden of proof, the **Lamusga** Court essentially adopted **Tropea**.

Not being able to leave well enough alone, the California Supreme Court revisited the law of relocation once more in February 2006, in **Yana v. Brown**. In this case, the custodial parent applied to move with the child from San Luis Obispo County to Las Vegas, which would be like a parent on the east coast wanting to move from, say, Cape Cod to Atlantic City. A summary judgment in favor of the Father you say. Not so fast. This is, after all, the California Supreme Court we are talking about.

In **Yana**, the Court decided to consider whether the father was even entitled to an evidentiary hearing. No, they concluded. California has a statute that addresses part of this question. Family Code § 7501 states: "A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." The **Yana** Court holds, in sum and substance, that § 7501 merely states that a parent wishing to successfully oppose a move-away must show that a "change in circumstances" justifies an award of custody to him. In other words, a non-custodial parent can successfully oppose a

move-away petition only by successfully challenging the custody itself. Sounds like California has returned to the **Burgess** rule—a presumptive right of the custodial parent to move.

What they held is that no evidentiary hearing is required “if the non-custodial parent’s allegation or showing of detriment to the child is insubstantial in light of all the circumstances presented in the case.” A silly person might wonder how one could tell if the allegations or showing of detriment were insubstantial in light of all the circumstances if no hearing was held to establish all the circumstances.

**Yana** establishes in California a summary judgment lite standard in favor of custodial parents. Not a word is mentioned about the right of a non-custodial parent to parenting time with his child or any fundamental right to parent.

In this case, the Father had filed a petition to modify the current order to give him joint custody. After that, the mother filed a petition seeking approval to move to Las Vegas. So what did the Father allege in his petition that was so insubstantial that it deserved a summary dismissal with no evidentiary hearing? His son was twelve and in the sixth grade. After an acrimonious divorce, things had settled down and he had a close relationship with his son and a good working relationship with the mother to the extent that they sat next to each other at school events. The boy was doing well in school and expressed a desire to spend more time with his father. The Father was fully involved with his son’s schooling and his extracurricular activities. The Father’s parenting time schedule included alternate weekends from Friday until Tuesday and an off-week overnight plus holiday and vacation time. The move to Las Vegas was prompted by the mother’s new husband losing his job in the hospitality industry in California and moving to Las Vegas to manage a Best Western Hotel. The Mother disputed all these “facts” but isn’t that what hearings are for? Yes, except in California, I guess.

The defect in the **Yana** decision is that it states no rule of law to guide the trial bench or bar. It allows a judge to review a short petition, ask a bunch of questions at the arraignment, and then decide that the non-custodial parent’s claims are insubstantial. This is asking a lot of a Family Court Judge. Some cases may be susceptible to this type of review, such as a mother who wants to relocate and the father is in prison for the next ten years. However, for most other cases, a judicial divining rod is not good enough. The chance of error is too high. In endorsing decisions by judicial dictate, the **Yana** court also truncates the parent resolution process. If relocation decisions can be made on papers, what incentive is there for parents to negotiate a resolution. Finally, in the category of be careful of what you ask for, there is no reason that trial courts could not deny a relocation on papers on the grounds that the reason for the move is insubstantial.

Alas, all was not lost for the Father. His home is a 474 mile drive to Las Vegas, about the same distance from Albany to Pittsburgh. However, the Mother did tell the Father he could meet the boy at the airport. Yes, get me a ticket for an airplane or a big ol’ jet airliner. California, here I come!<sup>2</sup>

1. For evidence that the best laid plans of mice and parents go astray, consider this: Within two years of the **Tropea** decision, which allowed the mother to move from Syracuse to Schenectady, the mother was living back in Syracuse. In **Lamusga**, the mother was seeking permission to move to Cleveland but while the appeal was pending, she decided to move to Arizona and she did so in violation of the court order.

2. How lucky could the Father get? Effective January 26, 2006, Allegiant Air began non-stop flights twice a week between Las Vegas and Santa Maria, CA, where he lives.

## ANNOUNCEMENTS

The December 2, 2005 AFCC – NY Chapter Fourth Annual Conference ‘Easing the Pain, Containing the Conflict in Divorce: New Research and Approaches’ was a great success. Dr. Robert Emery’s presentation on the latest research findings on divorce, the Panel discussion on integrating research into practice and the afternoon workshops were very well received.

### Save The Date:

The next AFCC-NY Annual Conference is tentatively scheduled for December 1, 2006 and its focus will be the recently issued Matrimonial Commission Report.