

HAYNES AND BOONE  
REC'D 5/22/01  
MATTER NO. 12808-1196  
APPROVED BY \_\_\_\_\_

To Be Argued By:  
**Robert J. Aliano**  
Time Requested:  
**10 Minutes**

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# Supreme Court of the State of New York

Appellate Division - Second Department

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App. Div. No.  
2000-09263

**RICHARD ALIANO,**

*Plaintiff-Appellant,*

-against-

**DON DAVID LUSTERMAN, PH.D.,**

*Defendant-Respondent.*

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## REPLY BRIEF FOR PLAINTIFF-APPELLANT TO AMICUS CURIAE BRIEF

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### PRELIMINARY STATEMENT

This Reply Brief is respectfully submitted in response to the points raised in the Amicus Curiae Brief. Said brief is submitted pursuant to the order of this Court which permitted the submission of an amicus curiae brief.

The amicus curiae brief fails to refute the fact that the law guardian and the mother failed to assert the privilege in Family Court. It fails to address the fact that the mother affirmatively used the information and the communications in the file of the defendant-respondent in her Article 8 Family Court petition (which pre-dates the Supreme Court action) to oust plaintiff-appellant from his home.

One of the problems of the amicus curiae is a failure to understand the specific issues on appeal or in the underlying litigation. Instead of addressing the specific legal issues on this appeal, it is written in the context of a sociological treatise.

The question is not as posed in the amicus curiae brief, that is, whether the plaintiff-appellant's right to prosecute his case is more important than the children's right to share their innermost feelings, emotions, and thoughts. The issues are inter alia was the privilege waived and is there a discovery exemption entitled "best interests of the child."

The general goals and agenda of Justice for Children may be admirable. However, where was this Texas organization when the children's innermost feelings, emotions, thoughts, and communications were revealed in the defendant-respondent's affirmation submitted by him in support of the mother's agenda in Family Court? Where was the law guardian's concern for the privilege in Family Court when this information was revealed? It is interesting to note that Justice for Children, the law guardian and the mother who are now all concerned with asserting a privilege were silent on this issue in Family Court and were nowhere to be found at that time in promoting the children's best interests. This present concern for the children's best interests is not genuine. The amicus curiae brief which presents the plaintiff-appellant as a selfish litigant with no regard for the children is intellectually dishonest. Where is the outrage on the part of Justice for Children vis a vis the mother for revealing the children's communications in the Family Court proceeding when it suited her needs? The children were used by the mother in Family Court when it promoted her personal agenda in ousting plaintiff-appellant. No one spoke on their behalf at that time. The silence in the amicus curiae brief on this particular issue speaks volumes.

It is also important to note that Justice for Children refers to the wrong privilege. The privilege at issue is called

the psychologist-client privilege. It is not the psychologist-patient privilege or the psychotherapist-patient privilege as mistakenly referred to in the amicus curiae brief.

POINT I

A PRIVILEGE EVEN IF NOT WAIVED CAN BE  
REVEALED ON THE GROUNDS OF RELEVANCE.

The argument that a privilege cannot bow to relevance is simply wrong.

Where invasion of a privilege is required to determine the validity of a claim or defense and access would deprive a litigant of vital information, a waiver may be found. Connell v. Bernstein-MaCaulay Inc., 407 F. Supp. 420; Hearn v. Rhay, 68 F.R.D. 574; Jakobleff v. Cerrato, Sweeney & Cohn, 97 A.D.2d 834, 68 N.Y.S.2d 895 (a privilege is waived with respect to those communications which are placed); Paruch v. Paruch, 110 A.D.2d 18, 528 N.Y.S.2d 119 (2nd Dept. 1988).

Selective disclosure is not permitted. One cannot rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications (see, United States v. Jones, 696 F.2d 1069, 1072; In re Sealed Case, 676 F.2d 83; Handgards v. Johnson and Johnson, 413 F.Supp. 926, 929; United States v. Exxon Corp., 94 F.R.D. 246); Village Board of the Village of Pleasantville v. Rattner, 130 A.D.2d 654; 515 N.Y.S.2d 2d 585 (2nd Dept. 1987).

Here, we have selective disclosure. Information obtained from the children was utilized in Family Court. Other or related

information which is clearly relevant is now being withheld in  
the Supreme Court action.

POINT II

**THE ISSUE IS NOT WHETHER PLAINTIFF-APPELLANT  
SHOULD BE ALLOWED TO WAIVE THE  
PRIVILEGE. IT WAS PREVIOUSLY WAIVED  
BY THE MOTHER AND LAW GUARDIAN.**

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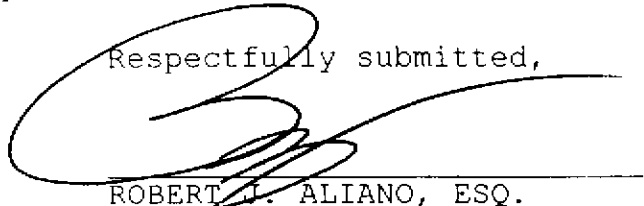
Contrary to the amicus curiae brief, the issue is not whether the plaintiff-appellant should be permitted to waive the children's privilege. It was previously waived by the mother and law guardian by the affirmative use of the information in Family Court against plaintiff-appellant. There is nothing for the plaintiff-appellant to waive. There is nothing left to protect on behalf of the children. People v. Edney, 39 N.Y.2d 620, 385 N.Y.S.2d 23 (1976).

CONCLUSION

For the reasons stated in the main brief and in this reply brief, the order of the trial Court must be modified and reversed.

Dated: May 9, 2001  
Westbury, New York

Respectfully submitted,



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