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*S upreme Court of the S tate of N ew Y ork*

*Appellate Division - S econd D epartment*

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**App. Div. No.  
2000-09263**

**RICHARD A. ALIANO,**

Plaintiff-Appellant,

*-against-*

**DON DAVID LUSTERMAN, Ph.D,**

Defendant-Respondent.

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**BRIEF OF AMICUS CURIAE, JUSTICE FOR CHILDREN**

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**Nassau County Clerk's Index No. 00-002963  
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**STATUTES**

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## **PRELIMINARY STATEMENT**

What is more important: a father's right to prosecute a civil lawsuit complaining of a psychologist's actions or a child's right to share her deepest feelings and fears with the psychologist without fear that her private revelations, including revelations about her family, will be disclosed to others, including family members? That is the question this Court must answer in this appeal. Courts nationwide have already answered this question consistently in favor of the child. For the benefit of each and every child who, for whatever reason is drawn into the justice system, this Court should do the same.

Children should not be afforded fewer protections or less dignity under the law than that enjoyed by other individuals. Indeed, the interest in protecting privileged conversations between a child and his or her psychologist is even greater than for adults because the privilege encourages children to disclose abusive or dangerous behavior by their parents. The appellant would have this Court renounce his children's psychologist-patient privilege solely because he believes the children's communications with their therapist might be relevant to his civil lawsuit against the Respondent. The psychologist-patient privilege is not so easily overcome for adults, nor should it be for children.

## **STATEMENT OF FACTS**

For purposes of this amicus brief, the amicus curiae adopts the Statement of Facts from the Brief of Elyse Sonnenshein-Aliano.

## ARGUMENTS AND AUTHORITIES

### I. The psychologist-patient privilege applies to minor children.

The Aliano children's conversations with their psychologist are privileged communications.<sup>1</sup> In the State of New York, as in many other jurisdictions, the psychologist-patient privilege is broader than the doctor-patient privilege and affords the same protections as the attorney-client privilege. *See* CPLR § 4507. Nothing in the New York statutes diminishes these rights or privileges for minors.

On the contrary, a child's communications with a psychologist are afforded the same (if not greater) protections than an adult's communications. *See Riccardi v. Tampax, Inc.*, 11 A.D.2d 880, 881, 493 N.Y.S.2d 798, 799 (2d Dept. 1985) (recognizing that a child has a psychologist-patient privilege under New York law). *See also Attorney ad Litem for D.K. v. Parents of D.K.*, \_\_\_ So.2d \_\_\_, 2001 WL 273834, \*6 (Fla. App. [4<sup>th</sup> Dist.] March 21, 2001) ("we conclude . . . that a child has a privilege in the confidentiality of her communications with her psychotherapist."); *In re Daniel C.H.*, 220 Cal. App. 3d 814, 828 (1990) (finding that a child has a right to assert the psychologist-patient privilege).

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<sup>1</sup> The term "Aliano children" as used in this brief refers to the three daughters of Robert and Elyse Sonnenshein-Aliano who attended therapy sessions with the Defendant-Respondent, Dr. Lusterman.

The United States Supreme Court has recognized the overarching need to create avenues that allow a child to come forward and report abuse by a parent “with the assurance of confidentiality.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S. Ct. 989, 1003 (1987).

The appellant does not challenge that the children’s communications with their therapist are privileged. Instead, he argues that he is entitled to discovery of the children’s privileged communications because he is their father and the information is relevant to his lawsuit against the respondent, Dr. Lusterman. There is no basis in law for piercing the privilege on either ground.

**A. The psychologist-patient privilege does not bow to “relevance.”**

Privileged information is not discoverable simply because it may be relevant to a lawsuit. *See, e.g., Brown v. Telerep Inc.*, 263 A.D. 378, 693 N.Y.S.2d 34 (1<sup>st</sup> Dept. 1999). In fact, the very purpose of a privilege is to protect information that is recognized by law to deserve protection even though it arguably is relevant. Thus, if relevance were the test, there would be no privileges. Absent the application of some exception or express waiver by the Aliano children of their psychotherapist-patient privilege, their private therapy sessions must not be disclosed. *See Brown v. Telerep, Inc.*, 693 N.Y.S.2d 34.

**B. A parent with interests adverse to the child cannot be permitted to waive the child’s psychologist-patient privilege.**

Likewise, the appellant cannot revoke the children's privilege simply by authorizing the release of the information as their father. Contrary to the appellant's position before this Court, a parent can waive a minor child's psychologist-patient privilege only when the parent is presumed to be acting in the best interest of the child.

Generally, "[s]ociety expects that a mother and father are the ones most likely to be concerned with the best interests and well-being of their child and, under normal circumstances, this is true." *Bond v. Bond*, 887 S.W.2d 558, 560 (Ky. 1994); *see also Attorney ad litem for D.K.*, 2001 WL 273834 ("It is generally presumed that when children lack the capacity to make certain decisions, their parents *as their natural guardians* make those decisions for them."). (Emphasis added). Accordingly, under normal circumstances, a minor child's parent or guardian is the appropriate person to determine whether to waive a privilege on behalf of the minor child. *See, e.g., Ellison v. Ellison*, 919 P.2d 1, 2-3 (1996).

However, when, as here, a parent's interests diverge from those of his children, the parent is no longer presumed to be acting in the best interests of the child. Under those circumstances, the parent should not be permitted to waive the child's psychologist-patient privilege. Indeed, courts nationwide have consistently held that a parent or guardian may waive a minor child's privilege only when waiver is in the child's best interest. When the parent's interests are adverse to those of the child, waiver must not be allowed.

For instance, the Maryland Supreme Court in *Nagle v. Hooks*, 294 Md. 123, 460 A.2d 49 (Md. 1983), recognized the need for a child to have a guardian ad litem on issues of privilege when the child's parents were engaged in a heated divorce proceeding and custody battle. The Court reasoned that:

[I]t is inappropriate in a continuing custody 'battle' for the custodial parent to control the assertion or waiver of the privilege of nondisclosure.

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Keeping in mind 'the best interest of the child,' we believe the appointment of an attorney to act as the guardian of the child in the instant matter is required. Furthermore, the appointment of a neutral third party would eliminate the very real possibility, as may exist in this case, of one of two warring parents exercising the power of veto for reasons unconnected to the . . . 'best interests of the child.'

*Id.*, 296 Md. at 127-28, 460 A.2d at 54. Similarly, the Supreme Court of Massachusetts has reasoned:

In such a case as this, where the parent and child may well have conflicting interests, and where the nature of the proceeding itself implies uncertainty concerning the parent's ability to further the child's best interests, it would be anomalous to allow the parent to exercise the privilege on the child's behalf.

*In re adoption of Diane*, 400 Mass. 196, 508 N.E.2d 837, 840 (Mass. 1987). *See also Ellison v. Ellison*, 919 P.2d 1, 2-3 (1996) (holding that a parent cannot waive a child's psychologist-therapist privilege unless it is in the best interests of the child to do so).

Many other courts likewise have refused to give a parent the right to waive a child's privilege when the parent may not be capable of acting in the child's best interest. *See, e.g.*,

*Attorney ad litem for D.K.*, 2001 WL 273834 at \*6 (“where the parents are involved in litigation themselves over the best interests of the child, the parents may not either assert or waive the privilege on their child’s behalf.”); *Arias v. Urban*, 595 So.2d 230, 232 (Fla. App. [3<sup>rd</sup> Dist.] 1992). *See also Bond*, 887 S.W.2d at 56 (“parents involved in a custody dispute should not be allowed to assert any privilege on behalf of their child simply because their interests are divergent from the child's interest.”)

The Missouri Court of Appeals explained that “[w]here the privilege is claimed on behalf of the parent rather than that of the child, or where the welfare and interest of the minor will not be protected, a parent should not be permitted to either claim the privilege [citations omitted] or for that matter, to waive it.” *In re M.P.S.*, 342 S.W.2d 277, 283 (Mo. App. 1961). In *M.P.S.*, the court specifically noted that a parent’s interests may diverge from the child’s interests where the child is not a litigant in the proceedings. 342 S.W.2d at 283. *See also Attorney ad Litem for D.K.*, 2001 WL 273834 at \*6.

**C. The appellant admits that he seeks to waive his children’s privilege for his own interests, not theirs.**

In this case, the parent’s interests are sharply divergent from the interests of their children; therefore, neither should be permitted to waive the children’s psychologist-therapist privilege. Appellant concedes in his briefing before this Court that “[t]he essence of the [underlying] conflict is between plaintiff and his children,” and he bases his claim that the children’s records are

material on that fact. (See Brief of Plaintiff-Appellant at 20.) The existence of this conflict, standing alone, is sufficient basis for denying appellant's request.

The appellant also admits that his primary interest in this proceeding is pursuing his lawsuit against the children's psychologist. He does not even attempt to argue that disclosure of the privileged information would be in the best interest of the children, arguing instead that the interest of his children should take a back seat to his own claims against the respondent. Specifically, appellant urges this Court to ignore entirely the best interests of the children in considering the issues in this appeal. (See Brief for Plaintiff-Appellant at 13-18.)

Moreover, appellant has been removed from the home because he was deemed abusive and harmful to his children. He and Mrs. Aliano are engaged in seemingly bitter divorce proceedings, in which Mrs. Aliano has asserted her own claims of abuse. As a result, both parents have their own agendas, a situation that presumably does not serve the best interests of the Aliano children. *Cf. Bond*, 887 S.W.2d at 560 (noting in custody battle that “[w]e have considered this case with deep concern about the apparent oversight of the children’s rights. . . .”).

Finally, appellant's position before this Court highlights his disregard for the children's best interest. Indeed, appellant's solution to the issue is to disregard the privilege, reveal the children's confidences and then simply conceal the fact that their trust has been breached from the children. To that end, he would have this Court hold that his children—indeed all children

generally—cannot be harmed, even when their fundamental rights are violated, so long as no one tells them about the violation. (Brief for Plaintiff-Appellant at 26.) Any such ruling would put all children at risk.

**II. The law guardian’s decision not to waive the children’s psychotherapist-patient privilege should be upheld.**

The appellant is not in a position to represent the best interests of the Aliano children and should not be allowed to waive any privileges on their behalf. Any other ruling would threaten to undermine the right of all children to trust in those professionals who are dedicated to helping and protecting them. In turn, it will cut children off from the protection and support they so desperately need in situations such as this. The trial court recognized these significant concerns and properly appointed a law guardian to protect the children’s interests. The law guardian has determined that the children’s psychologist-therapist privilege should not be waived. This Court should uphold the law guardian’s decision and, in so doing, honor the children’s rights and their wishes.

## CONCLUSION

Children are entitled to the same, if not greater, protections under the law as adults. While parents are charged with the responsibility of making decisions for their minor children, a parent's authority is not absolute and should not be used to the disadvantage of the child. Appellant would have the Court ignore the rights and privileges afforded his children for his own personal gain. Amicus curiae Justice for Children urges this Court to reject the appellant's request and instead, uphold, preserve and protect the children's privileges.

Dated: May 3, 2001  
Houston, Texas

Respectfully submitted,

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