NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
40 NORTH PEARL STREET, ALBANY, NEW YORK 12243

CESAR A. PERALES
Commissioner

[An Informational Letter informs local districts of potential developments in the Social Services field, or of actual or potential developments in collateral fields of interest.]

INFORMATIONAL LETTER

TRANSMITTAL NO.: 85 INF-11
[Family & Children Services]

TO: Commissioners of Social Services
Societies for the Prevention of Cruelty to Children

SUBJECT: Matter of Marie B.
Unconstitutionality of Section 1039(e), Family Court Act
Chapter 601 of the Laws of 1985

DATE: September 19, 1985

SUGGESTED DISTRIBUTION: Child Protective Services Directors and Supervisors
Child Welfare Services Administrators
Family Court Judges
DSS Attorneys

CONTACT PERSON: Any questions regarding this release should be directed to John Stupp, Assistant Counsel, Office of Legal Affairs, 1-800-342-3715, extension 3-3272.

I. PURPOSE

The purpose of this release is to inform social service districts of the New York State Court of Appeals decision in Matter of Marie B., 62 N.Y.2d 352, 477 N.Y.S. 2d. 87 (June 12, 1984).

The court held that section 1039(e) of the Family Court Act which authorizes the removal of a child from parental custody on grounds of neglect without requiring that an actual finding of neglect be made is unconstitutional.

Chapter 601 of the Laws of 1985 amends Section 1039 of the Family Court Act to implement the court's decision.

FILING REFERENCES

Previous INFs/ADMs	Dept. Regs.	Social Services Law and Other Legal References	Bulletin/Chapter Reference	Miscellaneous References
		FCA 1039(e)		

DSS-329 (REV. 6/82)

II. BACKGROUND

In Matter of Marie B., the child protective agency filed a petition in Family Court alleging neglect of Marie B., an infant of 18 months. The petition charged the respondent mother with chronic intoxication and failure to provide the infant with necessities. The Family Court granted the agency temporary custody of the child.

Subsequently, at a hearing in which the parent was represented by counsel, the agency moved for an adjournment in contemplation of dismissal (ACD), pursuant to section 1039 of the Family Court Act.

Under the terms of the ACD, custody was to remain with the agency for a period of one year; however the infant was to reside with her mother. The mother was required to cooperate with the agency case worker, abstain from alcoholic beverages and receive treatment and counseling. The Family Court explained to the parent that if she violated any of the conditions, at any time during the one year period, she would be considered automatically to have admitted the allegations, would not be entitled to a hearing and her child would be taken away frm her. When the parent indicated her understanding of and consented to the agreement, the Family Court granted the motion and ordered the ACD.

Subsequently, the agency found the parent to be in substantial violation of the agreement. Pursuant to subdivision (e) of section 1039 of the Family Court Act, the agency requested that the ACD be revoked, and the child be removed from the parent's custody. Section 1039(e) provides:

> ...(e) Upon application of the petitioner or the child's attorney or law guardian, or upon the court's own motion, made at any time during the duration of the order, the court may restore the matter to the calendar, if the court finds after a hearing that the respondent has failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency. In such event, circumstances of neglect shall be deemed to exist, and the court may thereupon proceed to a dispositional hearing under this article and may, at the conclusion of such hearing, enter an order of disposition authorized pursuant to section one thousand fifty-two with the same force and effect as if a fact-finding hearing had been held and the child has been found to be an abused or neglected child.

In Matter of Marie B., the Court of Appeals, in a unanimous decision, held that the last sentence of section 1039(e) authorizes the removal of the child upon the "mere showing that the parent had failed to obey the

terms in the conditions of the ACD order, whether or not such act in fact amounted to neglect, unfitness, or any other constitutionally required practice." The Court determined that "such a constructive finding is a constitutionally inadequate justification for the drastic interference with parental rights permitted under the statute." In addition, the Court held that advising parents that they will be deemed neglectful and obtaining their consent does not cure a violation of fundamental due process rights.

III. PROGRAM IMPLICATIONS

Violations of ACD orders are not adjudications of parental neglect. Protection of parents' due process rights requires a formal hearing and demonstration that the child has been abused or neglected. The Court would allow such a finding to occur before or after the violation of the ACD order; however, the finding must be based on evidence that the child is abused or neglected as defined by the Family Court Act. Chapter 601 of the Laws of 1985 amended Section 1039 of the Family Court Act to implement the decision in Matter of Marie B. This chapter, which is effective November 25, 1985, is attached for your information.

IV. RECOMMENDED ACTION

As a result of the Court of Appeals decision in the Matter of Marie B., child protective agencies should review their practices regarding adjournments in contemplation of dismissal (ACDs). Parental failure to observe the terms of an ACD shall not automatically constitute a factual finding of child abuse or neglect. There must be a formal hearing and demonstration that the child is abused or neglected as defined by the Family Court Act. Recipients of this document should review Section 1039 of the Family Court Act in light of the decision in Matter of Marie B. and the enactment of Chapter 601 of the Laws of 1985.

Joseph Semidei
Deputy Commissioner
Division of Family and Children Services

Attachment

Chapter 601, Laws of 1985

STATE OF NEW YORK

Cal. No. 160

2111--B

1985-1986 Regular Sessions

IN SENATE

February 6, 1985

Introduced by Sens. GOODHUE, LACK, TRUNZO, JOHNSON, TULLY, SKELOS, MEGA, E. LEVY, SCHERMERHORN, McHUGH, KNORR -- read twice and ordered printed, and when printed to be committed to the Committee on Child Care -- reported favorably from said committee, ordered to first and second report, amended and ordered reprinted, retaining its place in the order of second report -- ordered to a third reading, amended and ordered reprinted, retaining its place in the order of third reading

AN ACT to amend the family court act and the social services law, in relation to adjournment in contemplation of dismissal of child abuse and neglect proceedings

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivisions (a), (e) and (f) of section one thousand
2 thirty-nine of the family court act, as added by chapter seven hundred
3 seven of the laws of nineteen hundred seventy-five, are amended to read
4 as follows:
5 (a) Prior to or upon a fact-finding hearing, the court may upon a
6 motion by the petitioner with the consent of the respondent and the
7 child's attorney or law guardian or upon its own motion with the consent
8 of the petitioner, the respondent and the child's attorney or law guar-
9 dian, order that the proceeding be "adjourned in contemplation of
10 dismissal". *Under no circumstances shall the court order any party to*
11 *consent to an order under this section.* The court may make such order
12 only after it has apprised the respondent of the provisions of this
13 section[, particularly subdivision (e),] and it is satisfied that the
14 respondent understands the effect of such provisions.
15 (e) Upon application of the petitioner or the child's attorney or law
16 guardian, or upon the court's own motion, made at any time during the

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [ ] is old law to be omitted.

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duration of the order, the court may restore the matter to the calendar, if the court finds after a hearing that the respondent has failed substantially to observe the terms and conditions of the order or to cooperate with the supervising child protective agency. In such event, [circumstances of neglect shall be deemed to exist, and] unless the parties consent to an order pursuant to section one thousand fifty-one of this act or unless the petition is dismissed upon the consent of the petitioner, the court [may] shall thereupon proceed to a [dispositional] factfinding hearing under this article [and may, at the conclusion of such hearing, enter an order of disposition authorized pursuant to section one thousand fifty-two with the same force and effect as if a factfinding hearing had been held and the child had been found to be an abused child or a neglected child].

(f) If the proceeding is not so restored to the calendar, the petition is, at the expiration of the adjournment period, deemed to have been dismissed by the court in furtherance of justice unless an application is pending pursuant to subdivision (e) of this section. If such application is granted the petition shall not be dismissed and shall proceed in accordance with the provisions of such subdivision (e).

§ 2. Section four hundred twenty-seven of the social services law, as added by chapter one thousand thirty-nine of the laws of nineteen hundred seventy-three, is amended to read as follows:

§ 427. Regulations of the commissioner. 1. The commissioner shall adopt regulations necessary to implement this title.

2. The commissioner shall establish, by regulation, standards and criteria under which the child protective service of the appropriate local department of social services as petitioner in abuse and neglect proceedings pursuant to article ten of the family court act shall not consent to an order pursuant to section one thousand thirty-nine of the family court act.

§ 3. This act shall take effect on the one hundred twentieth day after it shall have become a law, except that any rules and regulations necessary for the timely implementation of this act on its effective date shall be promulgated on or before such date and shall apply to all proceedings theretofore or thereafter commenced.