

could have been placed in the abortion law (see, also, Hawaii Revised Statutes, § 453-16, requiring that all abortions be performed in licensed hospitals), it nevertheless enacted a statute without the restrictions sought to be imposed by the village.

We recognize, of course, that considerations of health and safety may well lead to the conclusion that abortions should be performed in hospitals. There is no doubt that the State could impose such a restriction. All that we are now deciding is that the Village of Hempstead lacked the power to enact the ordinance before us.

The order appealed from should be affirmed, with costs.

BERGAN, BREITEL, JASEN and GIBSON, JJ., concur with FULD, C. J.

BURKE, J., concurs without accepting chapter 127 of the Laws of 1970 as a valid exercise of legislative power.

SCILEPPI, J., dissents and votes to reverse.

Order affirmed.



30 N.Y.2d 352

In the Matter of Ella R. B., a Child Alleged to be Neglected.

Louis P. KURTIS, as Commissioner of Social Services of Westchester County, Respondent,

v.

Jeri B., Appellant.

Court of Appeals of New York.

June 8, 1972.

Child neglect proceeding. The Family Court, Anthony J. Cerrato, J., adjudicated

child to be neglected and ordered child placed in custody of Commissioner of Social Services. The Supreme Court, Appellate Division, affirmed, and leave to appeal was granted. The Court of Appeals, Fuld, Chief Judge, held that an indigent parent, faced with loss of a child's society, as well as the possibility of criminal charges is entitled to assistance of counsel in child neglect proceedings and is required to be advised of such right.

Modified and remitted for further proceedings.

1. Infants ¶16.9

An indigent parent, faced with loss of a child's society, as well as the possibility of criminal charges is entitled to assistance of counsel in child neglect proceedings and is required to be advised of such right. Family Ct. Act, §§ 1014, 1043(a), 1052, 1055; Executive Law § 71; CPLR 5601(b), par. 1; Penal Law 1965, § 260.10.

2. Infants ¶16.9

Where Family Court, in child neglect proceedings, advised indigent mother that if she desired an attorney she must obtain one herself and pay for him out of her own funds, mother's negative answer to subsequent question whether she wanted attorney could not be deemed an intelligent or understanding of her right to counsel.

3. Infants ¶16.14

Where indigent mother had not been afforded counsel in child neglect proceedings, reviewing court would not reverse or vacate order of neglect but would remit proceedings to Family Court for rehearing, both adjudicatory and dispositional, at which mother would be represented by counsel.

John T. Hand, White Plains, for appellant.

John J. S. Mead, County Atty. (Justin F. Collins, White Plains, of counsel), for respondent.

Louis J. Lefkowitz, Atty. Gen. (Maria L. Marcus and Samuel A. Hirshowitz, New York City, of counsel), in his statutory capacity under section 71 of the Executive Law, Consol.Laws, c. 18.

FULD, Chief Judge.

Whether the Family Court is required to advise an indigent parent, charged with child neglect, that he is entitled to be represented by assigned counsel is the question presented by this appeal.¹

In June of 1969, the Westchester County Commissioner of Social Services, the petitioner-respondent herein, filed a charge of child neglect against the respondent-appellant. The petitioner asserts that the appellant left her three-year-old daughter home alone between one and four o'clock in the morning of June 21 and that, during her absence, the little girl was allegedly kidnapped and raped by a friend of the appellant. The child was represented by a law guardian. When the matter came before the Family Court, the judge presiding, after reading the petition to the appellant, spoke to her as follows:

"You may be represented by an attorney in this proceeding, in which case you must obtain one yourself, and pay for him out of your own funds, or you may waive an attorney and either admit or deny the facts in the petition if you want. Do you want an attorney?"

"Mrs. B.: No.

"The Court: Do you admit the facts in the petition?"

"Mrs. B.: Yes, I do."

Thereupon, without further ado, the judge stated that he was "going to find that [the appellant's daughter] is a neglected child and will continue the child in custody of the Child Protective Services". An order was entered adjudicating her a neglected child and directing that she be placed in the petitioner's custody.²

Very shortly after the adjudication of neglect, which was made in July, 1969, the appellant obtained the assistance of the Legal Aid Society. A notice of appeal was filed and, in September, a Legal Aid attorney instituted a proceeding to terminate the child's placement with the petitioner. In February, 1970, while the proceeding was pending, the youngster was informally returned to her mother's home. At the termination hearing some months later—in the fall of 1970—the appellant's attorney, after some preliminary cross-examination of the one witness called, declined to continue the defense because of a "misapprehension" of the nature of the proceeding and moved to strike "all" proceedings previously held and to have a hearing *de novo*. The judge denied the motion, adhered to his original determination and continued the child in the petitioner's custody, noting that she could be taken from the mother's physical custody upon the petitioner's application.

The Appellate Division unanimously affirmed the original order of July, 1969, and the appeal is before us as of right on constitutional grounds (CPLR 5601, subd. [b], par. 1).

1. The Family Court Act (§ 1043, subd. [a]; prior to May 1, 1970, § 343, subd. [a]) makes provision for legal representation but is silent with respect to the right of indigent parents to assigned counsel:

"The court shall advise the parent or other person legally responsible for the child's care of a right to be represented by counsel of his own choosing and to have an adjournment to send for counsel and consult with him."

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2. Not a word had been said to the appellant that she might lose the custody of the child. Indeed, as the colloquy between the judge and her made clear, she believed that she would be permitted to take the child home and, after the judge indicated that the child was to be taken from her, she made a feeble, and unsuccessful, attempt to set forth circumstances which might have provided a basis for a meritorious defense in the hands of an attorney.

[1,2] The determination must be reversed. In our view, an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges (Family Ct. Act, §§ 1014, 1052, 1055; Penal Law, Consol.Laws, c. 40, § 260.10), is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right (see, e. g., *Stanley v. State of Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551, decided April 3, 1972; *Matter of Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y.2d 196, 203, 324 N.Y.S.2d 937, 943, 274 N.E.2d 431, 435), to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer.³ To deny legal assistance under such circumstances would—as the courts of other jurisdictions have already held (see, e. g., *Cleaver v. Wilcox*, decided March 22, 1972 [40 USLW 2658]; *State v. Jamison*, 251 Or. 114, 118, 444 P.2d 15, 444 P.2d 1005; see, also, *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113; Note, *Child Neglect: Due Process for the Parent*, 70 Col.L.Rev. 465; but cf. *In re Robinson*, 8 Cal.App.3d 783, 87 Cal.Rptr. 678, cert. den. *sub nom.* *Kaufman v. Carter*, 402 U.S. 954, 964, 91 S.Ct. 1624, 29 L.Ed.2d 128)—constitute a violation of his due process rights and, in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well. As the Federal District Court wrote in the very similar *Cleaver* case,

"whether the proceeding be labelled 'civil' or 'criminal,' it is fundamentally unfair, and a denial of due process of law for the state to seek removal of the child

from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel. * * * Since the state is the adversary * * * there is a gross inherent imbalance of experience and expertise between the parties if the parents are not represented by counsel. The parent's interest in the liberty of the child, in his care and in his control, has long been recognized as a fundamental interest. * * * Such an interest may not be curtailed by the state without a meaningful opportunity to be heard, which in these circumstances includes the assistance of counsel."

Once the conclusion is reached that one has a right to be represented by assigned counsel—and, as noted, the petitioner does not dispute that the appellant did have such a right—it follows that one is entitled to be so advised. If the rule were otherwise, if the party before the court was not apprised of his right to assigned counsel, there could be no assurance either that he knew he had such a right or that he had waived it. Certainly, the appellant in the present case could not have realized that she would have been provided with a lawyer if she could not afford to retain one. In point of fact, the judge actually told her that, if she desired an attorney, "you must obtain one yourself, and pay for him out of your own funds". This statement completely excluded the availability of assigned counsel or other free legal assistance. Consequently, the appellant's negative answer to the question, "[d]o you want an attorney?" could not possibly be deemed an intelligent or understanding waiver of her right to counsel. (See, e. g., *Matter of Lawrence S.*, 29 N.Y.2d 206, 325 N.Y.S.2d

3. The petitioner acknowledges that an indigent parent is entitled to be represented by assigned counsel in a child neglect proceeding and that, had the appellant stated that she could not afford an attorney, the court would have been "under a duty to

advise her of the availability of counsel." But he urges that, since the proceeding is "civil" in nature, the court was not required, on its own initiative, to inform the appellant of her right to have counsel assigned to her.

921, 275 N.E.2d 577; *People v. Witenski*, 15 N.Y.2d 392, 259 N.Y.S.2d 413, 207 N.E.2d 358.)

[3] It is true that the appellant was represented by an attorney in the later proceeding to terminate the child's placement. As noted above, the trial judge there denied the motion of her counsel for a *de novo* hearing, refused to terminate the child's custody and continued placement "with the Commissioner of Social Services." Because of the paucity of evidence at such hearing, however, it is manifest that the trial judge's decision was influenced more by his earlier determination of neglect—based, as indicated, solely on the appellant's uncounselled plea "admit[ting] the facts in the petition"—than by the child's apparent need for continued supervision. However, we do not believe it necessary or desirable to reverse or vacate the initial order (of July, 1969). We meet the exigencies of the case if, without impairing the effectiveness of that order, we remit the proceeding to the Family Court for a rehearing, both adjudicatory and dispositional (Family Ct. Act, §§ 742, 743), at which the appellant will, of course, be represented by counsel.

The order appealed from should, therefore, be modified, without costs, and the matter remitted for further proceedings in accordance with this opinion and, as so modified, affirmed.

BURKE, SCILEPPI, BERGAN, BREITEL, JASEN and GIBSON concur.

Order modified, without costs, and matter remitted to Family Court, Westchester County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.

30 N.Y.2d 359

**In the Matter of Ruth GOLDEN et al.,
Respondents,**

v.

**PLANNING BOARD of the TOWN OF
RAMAPO et al., Appellants.**

**ROCKLAND COUNTY BUILDERS ASSOCI-
ATION, Inc., et al., Respondents,**

v.

**John McALEVEY et al., Constituting the
Town Board of the Town of Rama-
po et al., Appellants.**

Court of Appeals of New York.

May 3, 1972.

Article 78 proceeding to annul determination of Planning Board denying application for preliminary approval of subdivision plan. The Supreme Court, Special Term, Rockland County, John H. Galloway, Jr., J., declared amendment to zoning ordinance unconstitutional, and appeal was taken. The Supreme Court, Appellate Division, 37 A.D.2d 236, 324 N.Y.S.2d 178, reversed, and appeal was taken. Joined with that appeal was an appeal from an order of the Supreme Court, Appellate Division, 37 A.D.2d 738, 324 N.Y.S.2d 190, reversing an order of the Supreme Court, Special Term, Rockland County, John H. Galloway, Jr., J., dismissing complaint seeking declaration that zoning ordinance was unconstitutional. The Court of Appeals, Scileppi, J., held that amendment to town zoning ordinance whereby subdivision development would not be permitted until, according to schedule completion dates in town's 18-year capital plan, the availability of proposed municipal services should reach specified level on scale of value points, with developer authorized to provide such services if he desired, was constitutional; even if restrictions on residential development remained outstanding for