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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF JETER,
Appellant,

-against-

POOLE ET AL.,
Respondents. NO. 82

20 Eagle Street
Albany, New York
September 12, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: So the first matter on the
2 calendar today is Matter of Jeter v. Poole. Counsel?

3 MS. KUBITSCHEK: Appellant asks to request a - -
4 - reserve five minutes for rebuttal?

5 CHIEF JUDGE WILSON: Yes.

6 MS. KUBITSCHEK: Thank you. May it please the
7 court. My name is Carolyn Kubitschek, and I represent
8 Shani Jeter, who seeks to clear her name in the State
9 Central Register of Child Abuse and Maltreatment after
10 having prevailed in the Family Court on identical charges
11 of child neglect.

12 Had Ms. Jeter waited until 2022 or even today to
13 request a name-clearing hearing, Social Services Law 422
14 requires that her name be cleared because the Family Court
15 order is binding at that administrative hearing. However,
16 because she acted expeditiously, respondents have fought
17 all the way to this court, arguing against giving her
18 relief. Chapter 56, part R of the - - -

19 CHIEF JUDGE WILSON: Could she try - - - could
20 she try again? Sorry. Straight ahead of you. Could she
21 try again?

22 MS. KUBITSCHEK: Yes. Sorry, sorry, Your Honor?

23 CHIEF JUDGE WILSON: Could she try again? Could
24 she file now and ask for another name-clearing hearing?

25 MS. KUBITSCHEK: I'm sorry? Could she try again?

1 No, she could not try again.

2 CHIEF JUDGE WILSON: Because?

3 MS. KUBITSCHEK: Because she - - - you only get
4 one chance at a name-clearing hearing.

5 CHIEF JUDGE WILSON: So do you get another chance
6 if somebody makes a request and the register provides
7 information, does that give you a second chance or no?

8 MS. KUBITSCHEK: No. It - - - you get the second
9 chance at a hearing only if you never had a hearing the
10 first time around. And there are many people who do not
11 exercise their right to have an immediate name-clearing
12 hearing, and they do wait until they're searching for a
13 job, and - - - and then they have the hearing that they
14 didn't have before. But she can only have one hearing
15 total.

16 JUDGE RIVERA: Even to argue that there's been a
17 change in the law that affects the outcome? As opposed to
18 just someone who says, well, I want a second bite at the
19 apple. Nothing else has changed.

20 MS. KUBITSCHEK: The - - - the State would not
21 give her a second hearing if she asked for one, even though
22 she said there's been a change in the law, I want another
23 chance.

24 JUDGE HALLIGAN: Have you - - -

25 JUDGE GARCIA: Have the sealing - - - I'm sorry.



1 Have the sealing rules changed also recently?

2 MS. KUBITSCHEK: The - - - the rules?

3 JUDGE GARCIA: Governing - - -

4 MS. KUBITSCHEK: The same statute. Chapter - - -

5 JUDGE GARCIA: No. But have the rules governing
6 the sealing of those records in - - - depending on
7 outcomes; have those changed?

8 MS. KUBITSCHEK: The - - - the rule governing
9 sealing now says if the person prevailed in the Family
10 Court, that - - - that Family Court order is effectively
11 res judicata. So that there will be no hearing - - -

12 JUDGE GARCIA: But if the - - -

13 MS. KUBITSCHEK: - - - her name will be cleared.

14 JUDGE GARCIA: And if they did not prevail?

15 MS. KUBITSCHEK: If they lost in the Family
16 Court, the rule has always been - - -

17 JUDGE GARCIA: And still is.

18 MS. KUBITSCHEK: - - - since the statute was
19 enacted back in the 1970s, that they lose, they will not
20 get their name cleared.

21 JUDGE GARCIA: And it's not sealed at all for any
22 purpose?

23 MS. KUBITSCHEK: It is - - - it will be sealed
24 after eight years.

25 JUDGE GARCIA: And is that - - -



1 MS. KUBITSCHEK: Or - - - or if it was child
2 abuse rather than child neglect - - -

3 JUDGE GARCIA: - - - and that - - -

4 MS. KUBITSCHEK: - - - it will be sealed after
5 twenty-eight years.

6 JUDGE GARCIA: - - - and has that always been the
7 rule in that - - - those latter two conditions?

8 MS. KUBITSCHEK: No. The - - - the law changed,
9 so now that the sealing will occur after eight years, for
10 people whose names are on the register and have - - - who
11 have not cleared their names. It used to be twenty-eight
12 years for - - -

13 JUDGE GARCIA: And would that apply to your
14 client?

15 MS. KUBITSCHEK: Huh?

16 JUDGE GARCIA: Would that apply to your client?
17 The sealing rules, the new sealing rule?

18 MS. KUBITSCHEK: The new - - - yes. Her name
19 will be sealed in 2027, three years from now.

20 JUDGE CANNATARO: To go back to your opening
21 statement, you said that she acted expeditiously with
22 respect to requesting application of the amendments. I
23 take it by that you mean she asked as close in time to when
24 the amendments went into effect. Is - - - is that correct?

25 MS. KUBITSCHEK: I'm sorry. I - - - I didn't

1 mean that.

2 JUDGE CANNATARO: What did you mean?

3 MS. KUBITSCHEK: She - - - she asked as - - - as
4 soon as she learned that her name was on the State Central
5 Register as a confirmed child maltreater, she asked that it
6 be taken off.

7 JUDGE CANNATARO: And when was that?

8 MS. KUBITSCHEK: That was in 2019.

9 JUDGE HALLIGAN: But when specifically did you
10 make the argument that the statute, upon its effective
11 date, applied to your client?

12 MS. KUBITSCHEK: In the Appellate Division - - -

13 JUDGE HALLIGAN: And was that - - -

14 MS. KUBITSCHEK: - - - which was the court of
15 first instance.

16 JUDGE HALLIGAN: And in your view, was that the
17 first juncture at which that argument could have been made?

18 MS. KUBITSCHEK: Yes.

19 JUDGE HALLIGAN: And if so, why?

20 MS. KUBITSCHEK: Because the - - - the argument
21 could have been made - - - could not have been made before
22 because the law was not in effect before.

23 JUDGE TROUTMAN: But couldn't she have argued
24 before with respect to the effect of the ACD, even at the
25 proceeding?

1 MS. KUBITSCHEK: If she had had a lawyer, which
2 is my second point. The lawyer could have and undoubtedly
3 would have made sure that the - - - the court - - - I'm
4 sorry, that the administrative law judge understood that
5 the charges against Ms. Jeter had been dismissed after an
6 adjournment in contemplation of dismissal.

7 Ms. Jeter, who was pro se and has no legal
8 training at all, had no idea that this might be an
9 important factor.

10 JUDGE HALLIGAN: If - - - if you were to prevail
11 on your argument about when the statute applies, would your
12 client have all the relief that she's seeking?

13 MS. KUBITSCHEK: Yes. Yes. Her name would be
14 cleared, and she would have all the relief that she is
15 seeking.

16 JUDGE GARCIA: Counsel, let's say that we agree
17 with you on - - - I'm trying to figure out the effect - - -
18 one of these two bases, either the statute should have been
19 applied at that time or that she had a right - - - a
20 constitutional right to counsel. Right? You're arguing
21 that?

22 MS. KUBITSCHEK: Yes, Your Honor.

23 JUDGE GARCIA: And you're also arguing that you
24 don't have to raise that at the hearing if you're
25 unrepresented? I take it that there's no preservation

1 issue here?

2 MS. KUBITSCHEK: We are arguing that there is - -
3 - there is not a preservation issue here. Because with
4 regard to the - - - the statute itself, there was nothing
5 that Ms. Jeter could have raised at her hearing.

6 JUDGE GARCIA: Well, she could have said, I have
7 a right to counsel. Right?

8 MS. KUBITSCHEK: Oh, on the right to counsel,
9 yes. On the - - - on the statute that was not yet in
10 effect.

11 JUDGE GARCIA: So let's say we go with right to
12 counsel in - - - in this administrative proceeding, and you
13 didn't have to raise it because there's not a preservation
14 issue. So what effect would that have on all the hearings
15 that have taken place so far where there was an
16 unrepresented party?

17 MS. KUBITSCHEK: Well, Your Honor, because of the
18 doctrine of administrative finality, it would only - - -
19 the - - - the rule that we're seeking, the right to
20 counsel, will only apply to people who have cases that are
21 still alive somewhere in the administrative pipeline or on
22 appeal to the court system. People who let their - - - who
23 lost their hearings and didn't file an Article 78 or filed
24 an Article 78, lost, and did not appeal, their cases are
25 over.

1 JUDGE GARCIA: So it would only apply, in your
2 view, to that limited universe of cases that are somewhere
3 in the pipeline of being actively litigated?

4 MS. KUBITSCHEK: That's correct. Plus, people
5 who come in the future.

6 JUDGE SINGAS: What would have happened or what's
7 your experience if she had asked for an attorney? What
8 would have happened?

9 MS. KUBITSCHEK: They would have told her no.
10 They - - - they did tell her no. And that's why - - -
11 that's one reason why - - -

12 JUDGE HALLIGAN: Where - - - where exactly did
13 she request an - - - are you referring to the letter?

14 MS. KUBITSCHEK: She got a letter saying we will
15 not give you a lawyer. That's - - - that's a pretty strong
16 indication to a pro se litigant, don't ask for one. So it
17 - - - it - - - and if she had asked for one, it would have
18 been futile for her to ask because they were going to say,
19 no, you don't get a lawyer, as they're saying in - - - as I
20 said, in the Appellate Division. And as they say now, no
21 lawyer.

22 And the this court has held that you do not have
23 to exhaust administrative remedies if to do so would be
24 futile. Secondly, because it was a constitutional issue
25 the request was based on the constitutional right to

1 counsel, she did not have to - - - she did not waive it by
2 not raising it.

3 JUDGE RIVERA: How - - - how large is this
4 universe of people who would be affected - - - let's say we
5 agreed with you, by - - - by this rule? I mean, the
6 husband was able to get a lawyer free.

7 MS. KUBITSCHEK: There were 614 people who had
8 pro se hearings in 2021. That number probably will go down
9 because the - - - the law changed - - - the same 2020 law
10 said that a person will not be put on the State Central
11 Register in the first place, unless there is a
12 preponderance of the evidence that she abused or neglected
13 her child.

14 Up until 2020 the law was a person's name would
15 be put on the State Central Register if there was only some
16 credible evidence. And we're seeing the effects of that
17 already, because in 2020 - - - in 2020, before the law was
18 in effect, approximately one - - - one-third of the people
19 who were reported to the State Central Register were marked
20 "substantiated, confirmed", and had their names on, and had
21 a right to get off.

22 Now that the new law is in effect, only one-
23 fifth, twenty percent of the people who are reported to the
24 State Central Register - - -

25 JUDGE TROUTMAN: Is it clear - - -

1 MS. KUBITSCHEK: - - - even get on. I'm sorry.

2 JUDGE TROUTMAN: Is it clear that it is - - -
3 that it is because of counsel? Or is that a change because
4 the - - - the burden is - - - is now changed and it's the
5 same in both instances? So doesn't that take care of the
6 problem?

7 MS. KUBITSCHEK: No, Your Honor. Because in - -
8 - people are still being put on the State Central Register
9 wrongfully. About half of them are winning their hearings.
10 So that - - - that's a - - - that's a substantial number -
11 - -

12 JUDGE TROUTMAN: So are they winning - - -

13 MS. KUBITSCHEK: - - - of people getting their
14 names cleared.

15 JUDGE TROUTMAN: - - - are they winning with
16 lawyers or because the standard's been changed? .

17 MS. KUBITSCHEK: Well, the standard - - - the
18 standard has been the same for getting your name off. The
19 standard has been preponderance of the evidence since 1996
20 - - -

21 JUDGE TROUTMAN: To get it off?

22 MS. KUBITSCHEK: - - - when this court - - - to
23 get off. When this court decided Lee TT. - - -

24 JUDGE TROUTMAN: But in the first instance - - -

25 MS. KUBITSCHEK: But fewer people are getting on



1 - - -

2 JUDGE TROUTMAN: - - - that - - - that - - -

3 MS. KUBITSCHEK: - - - and - - - and that is an
4 important - - - that is an important change - - -

5 JUDGE CANNATARO: Counsel - - -

6 MS. KUBITSCHEK: - - - for individuals.

7 JUDGE CANNATARO: - - - with respect to your
8 argument about the constitutional right to have State-paid
9 counsel in these kinds of proceedings, you've just gotten a
10 number of questions about how many people go to these
11 proceedings? How many of them have lawyers? How many of
12 them don't have lawyers? There could be questions about
13 how much would it cost to create a - - - a - - - a assigned
14 counsel program. Do you think that it would be advisable,
15 prudent, to have some sort of notion of what all these
16 factors are before you create an assigned counsel program?
17 Or do you think that's totally irrelevant in the context of
18 the constitutional right you're arguing?

19 MS. KUBITSCHEK: Well, it - - - it's - - - it is
20 a factor that the court said in Lee TT. The State's
21 interest, including a fiscal interest, is a factor in - - -
22 however, there are a couple of responses. And the first is
23 that the State did not raise that issue in its answer, and
24 they did not raise it in the Appellate Division. If the
25 cost were truly prohibitive, they - - - they would have



1 raised it immediately.

2 The second thing is that this court may not have
3 to decide that at all if it chooses not to, because this is
4 not a class action lawsuit. This is Ms. Jeter. Ms. Jeter
5 is saying that she has a right to counsel.

6 JUDGE HALLIGAN: But how would that be different
7 for anybody else? I mean, I understand your procedural
8 point, but how would that holding not apply to anyone - - -

9 MS. KUBITSCHEK: Well, the - - - the - - -

10 JUDGE HALLIGAN: - - - who - - - who can
11 demonstrate indigency?

12 MS. KUBITSCHEK: - - - this court - - - this
13 court could say that Ms. Jeter gets a lawyer because the
14 interest at stake, which is mostly the same for almost
15 everybody, works in her favor. The State's interest is
16 mostly the same. But the risk of erroneous deprivation for
17 her is so clear - - -

18 JUDGE HALLIGAN: So - - - so in that - - -

19 MS. KUBITSCHEK: - - - that she has to have a
20 lawyer, and the court can reserve for another day - - -

21 JUDGE HALLIGAN: But how - - - but how - - -

22 MS. KUBITSCHEK: - - - whether everybody gets it.

23 JUDGE HALLIGAN: - - - how would that - - - how
24 would that work? Would that mean that in each case you
25 would have the agency look in the first instance? I - - -

1 it just seems like that's a very difficult rule to
2 administer.

3 MS. KUBITSCHEK: This - - -

4 JUDGE HALLIGAN: But maybe I'm missing something.

5 MS. KUBITSCHEK: It - - - it - - - it would be a
6 complicated rule to administer. It was the rule that the
7 Supreme Court itself laid down in the case of Lassiter
8 against North Carolina.

9 CHIEF JUDGE WILSON: Well, could you change the -
10 - - could you - - - sorry. Could you tie the risk that you
11 just mentioned in essentially the third factor to the prior
12 standard that doesn't exist any longer?

13 MS. KUBITSCHEK: The - - - the prior standard
14 only exists for getting people on - - - only changed for
15 putting people on that list in the first instance. It did
16 not change for taking people off the list.

17 CHIEF JUDGE WILSON: Okay. Got it.

18 MS. KUBITSCHEK: And so - - -

19 CHIEF JUDGE WILSON: Got it.

20 MS. KUBITSCHEK: - - - the - - -

21 JUDGE RIVERA: Well, why is her risk so much
22 higher?

23 MS. KUBITSCHEK: I'm sorry?

24 JUDGE RIVERA: Why is her risk so much higher?
25 What - - - I'm sorry. Maybe I misunderstood you.

1 MS. KUBITSCHEK: Her risk - - - her risk is high
2 because the - - - the record shows that in this particular
3 case the - - - the city behaved in an extremely adversarial
4 fashion, as they do - - - as they can in other name
5 clearing hearings. They took advantage of the fact that
6 she didn't have a lawyer. They now say, well, the
7 important - - - one important document that she sought to
8 introduce into evidence was her daughter's written
9 retraction of the charges against Ms. Jeter, which was the
10 only piece of evidence linking Ms. Jeter to the marks on
11 the child's body.

12 CHIEF JUDGE WILSON: That's the difficult - - -

13 JUDGE HALLIGAN: Can I ask you to go - - -

14 CHIEF JUDGE WILSON: I'm sorry. Go ahead.

15 JUDGE HALLIGAN: - - - can I ask you to go back
16 quickly to preservation? I tried to figure out, but I
17 wasn't able to, and maybe you know the answer. In cases,
18 for example, Gideon, where there is a right announced in
19 the first instance or in cases in which we have found a
20 right to counsel, do you know whether that - - - that claim
21 was preserved in the first instance in the trial court in
22 those cases or not?

23 MS. KUBITSCHEK: I - - - I do not know whether
24 the - - - the claim of right to counsel has always been a
25 right.

1 JUDGE HALLIGAN: I mean, in the first case in
2 which it is initially announced. I - - - I couldn't
3 determine that.

4 MS. KUBITSCHEK: Because the issue of
5 preservation, the issue of right to counsel, Ms. Jeter did
6 raise that in her Article 78 petition, in her amended
7 petition. So she raised it at the first court - - -

8 JUDGE HALLIGAN: I understand. But in terms of
9 prior cases - - - I know your red light is on. Sorry, but.

10 MS. KUBITSCHEK: In - - - in terms of
11 administrative preservation because this court has said so
12 often that if a constitutional right is at stake, a person
13 does not have to raise the issue in front of the
14 administrative agency, I don't have a - - - an answer for
15 how often people do and how often they don't.

16 Thank you.

17 CHIEF JUDGE WILSON: Thank you.

18 MS. BRODY: May it please the court. Elizabeth
19 Brody for the Commissioner of OCFS.

20 This court lacks jurisdiction to review
21 petitioner's unpreserved claim that the State Constitution
22 requires OCFS to appoint paid counsel for all subjects
23 appearing in administrative fair hearings. This claim was
24 not raised before OCFS or the agency - - -

25 JUDGE RIVERA: Well, why - - - why should it have

1 been? It's their policy. The best that they could do is
2 refer her out.

3 MS. BRODY: That's true. But as this court
4 explained in *Bingham v. New York City Transit Authority*,
5 quote, "A new issue, even a pure law issue may be reached
6 on appeal only if it could not have been avoided by factual
7 showings or legal counter steps below."

8 JUDGE RIVERA: But how would it have been
9 avoided?

10 JUDGE CANNATARO: It wouldn't have been - - -

11 JUDGE RIVERA: How would it have been avoided? I
12 - - - I'm not understanding. This is - - - I may have
13 misunderstood this record. This is their policy. They are
14 not going to give anyone a free lawyer. They're not going
15 to foot the bill for counsel.

16 MS. BRODY: What *Bingham* says is that it has to
17 do with issues of ripeness, of standing, that that - - -
18 that is intimately tied to the preservation issue.

19 JUDGE CANNATARO: But we're talking sort of about
20 the futility exception to the preservation requirement.
21 They told her in a letter, don't bother asking for a paid
22 lawyer. We're not going to give you one. So what else was
23 there for her to do?

24 MS. BRODY: Respectfully, the letter did not say,
25 don't bother asking for - - -

1 JUDGE CANNATARO: Okay. You're right. I - - -
2 I'm paraphrasing in a particularly dramatic way. But they
3 said this office will not provide paid counsel for you.

4 MS. BRODY: It said this office cannot provide
5 paid counsel for you. You're welcome to bring a lawyer or
6 another representative to the hearing. If you can't afford
7 one - - -

8 JUDGE RIVERA: Well, even a stronger statement,
9 not "may", which suggests that there's some discretion, but
10 "cannot", as in suggesting we don't have the funds, or
11 we're not authorized to do so.

12 MS. BRODY: That's - - - that's correct. But I
13 would again encourage this court - - -

14 CHIEF JUDGE WILSON: What is the counter step
15 that could have been taken had this been raised in the
16 administrative proceeding?

17 MS. BRODY: Well, as the head of the Bureau of
18 Special Hearings stated in the affirmation appended to our
19 amended answer, if somebody indicates that they want
20 counsel - - - a simple statement, "I need a lawyer",
21 they're given a list of pro bono counsel in their
22 respective geographic area.

23 JUDGE TROUTMAN: But that's not getting her one.

24 MS. BRODY: It's not. But again, I think what
25 these - - -

1 CHIEF JUDGE WILSON: Would that - - - would that
2 satisfy Gideon?

3 MS. BRODY: The relevant standard here is not
4 Gideon where the source of the right is the - - - is the
5 Sixth Amendment - - -

6 CHIEF JUDGE WILSON: Right.

7 MS. BRODY: - - - to the Constitution. It's
8 instead a due process right, where - - - where this court
9 and the Supreme Court have said that you're expressly
10 balancing three different interests. It's not a right
11 standing alone that exists without - - - without regard to
12 the State's interests, the State's fiscal interests, or the
13 State's administrative burden.

14 But I would just - - - going - - - going back
15 quickly to Bingham and cases like Telaro, this court has
16 said that the preservation requirement, in - - - in
17 addition to allowing the courts below to elaborate on the
18 issue, also has to do with - - -

19 JUDGE TROUTMAN: How does Menochino impact
20 preservation here?

21 MS. BRODY: I'm not sure how Menochino impacts
22 preservation. That was the case saying that - - -

23 JUDGE TROUTMAN: Wouldn't it suggest that there
24 is - - - it's not required to be preserved?

25 MS. BRODY: I'm not - - - I'm not familiar with

1 what that case said about preservation, but I will note
 2 that all we're asking that she have done is what the
 3 petitioner did in Matter of Brown v. Lavine, which is
 4 another right to counsel case that petitioner said, in that
 5 case, I want an attorney. The ALJ adjourned the proceeding
 6 and gave him contact information for local legal services -
 7 - -

8 JUDGE HALLIGAN: But - - -

9 MS. BRODY: - - - he was unable - - -

10 JUDGE HALLIGAN: - - - there - - - there's a
 11 distinction, it seems to me, between a right to counsel,
 12 which requires whatever the adjudicator is: court, agency,
 13 whatever it is, to provide that counsel and something which
 14 gives an individual some assistance in seeking themselves
 15 to - - - to find counsel. So I - - - I'm just not sure how
 16 in light of the letter and what I take it to be, your
 17 suggestion that - - - that the adjournment would have
 18 allowed the ALJ to assist, but not to impose any right.
 19 Those seem like different things to me, are they not?

20 MS. BRODY: They are different. And this is the
 21 last time I'll mention these cases. But in Bingham and
 22 Telaro, this - - - this court has said that the
 23 preservation requirement, in addition to all of its other
 24 virtues, one of the virtues is that it avoids bringing
 25 cases before this court when they are academic, when there



1 is no actual case or controversy. If she had been able to
2 get a pro bono lawyer, there would have been no need for
3 this court to hear the appeal and that's what those cases -
4 - -

5 JUDGE RIVERA: So let me ask you this - - -

6 MS. BRODY: Even if - - -

7 JUDGE RIVERA: - - - let me ask you this. Your
8 argument then turns on, they'll provide her with a list,
9 it's on her to go and find one. If she comes back and
10 says, I called every single number, they're either
11 conflicted out or they're completely unavailable; what then
12 happens?

13 MS. BRODY: Well, then the issue would be
14 preserved, and she would be allowed to - - -

15 JUDGE RIVERA: No, no. I'm not talking about
16 preservation. What would - - - what would happen? She now
17 has followed through on what you say is all that you had to
18 do for her, what - - - what then happens?

19 MS. BRODY: Well, then - - -

20 JUDGE RIVERA: She's going to proceed without a
21 lawyer.

22 MS. BRODY: Yes. Although, we - - - we say - - -

23 JUDGE RIVERA: So we've circled back to that
24 right to counsel?

25 MS. BRODY: Yes. So even if this court thinks

1 the claim is preserved, the due process clause of the State
2 Constitution does not require OCFS to pay for appointed
3 counsel in all SCR fair hearings.

4 JUDGE SINGAS: You have an idea about the
5 practical question we asked before about how many people
6 this would impact if we disagreed with you?

7 MS. BRODY: We stated in our brief that the
8 number of requests for fair hearings that OCFS receives
9 every year is somewhere between 3,900 and 5,200. And so we
10 did some back-of-the-napkin calculations in this brief,
11 primarily to respond to petitioner's arguments that the
12 costs would be small or negligible, and it was in the tens
13 of millions of dollars.

14 CHIEF JUDGE WILSON: Is that - - -

15 MS. BRODY: The attorneys' fees - - -

16 CHIEF JUDGE WILSON: - - - is that - - - are
17 those numbers after the new legislation took effect?

18 MS. BRODY: No. The petition was - - - the
19 petition was - - -

20 CHIEF JUDGE WILSON: No. I mean, the - - - the
21 numbers you gave me.

22 MS. BRODY: I - - - no, I understand. Her
23 petition was amended in 2021. And we had to answer, I
24 think, in early 2022. The amendments took effect January
25 1st, 2022. So at the time we answered, there was no - - -



1 CHIEF JUDGE WILSON: Right. And do you have data
2 for 2023, for example?

3 MS. BRODY: Which is - - - we - - - we don't.
4 Which is why, respectfully, we would say that this is a
5 question for the legislature in the first instance. And
6 that's precisely the kinds of figures, costs, things that
7 can be studied by the legislature.

8 JUDGE HALLIGAN: Would you address the question
9 of the applicability of the statute? And specifically, I'm
10 interested in why you think it's retroactive, as opposed to
11 a changed law, which would apply at the time of its
12 effective date?

13 MS. BRODY: Because the way that the law works
14 mechanically is that it amended the administrative review
15 procedures that OCFS applies in fair hearings. This is
16 subdivision 8 of the law. And that's - - - that's where
17 the changes take effect. There are also - - -

18 JUDGE HALLIGAN: But as it comes before the
19 Appellate Division, right? Why would - - - why is it your
20 view that, at that point in time, application of the new
21 law is - - - is retroactive and reaching back as opposed to
22 applying it as it sits before the Appellate Division as a
23 changed law.

24 MS. BRODY: Two responses to that. I think on a
25 basic level, it's retroactive because the hearing and the



1 proceedings concluded a long time ago, and it would require
2 reopening that procedural step, thereby making it
3 retroactive. But on another level - - -

4 CHIEF JUDGE WILSON: I'm - - -

5 MS. BRODY: It would - - -

6 CHIEF JUDGE WILSON: - - - I'm sorry. I don't
7 understand that.

8 JUDGE HALLIGAN: Yeah. Me either.

9 MS. BRODY: That it would require - - -

10 CHIEF JUDGE WILSON: Why would you need to reopen
11 the proceeding? Why - - - why isn't the relief sought just
12 a removal of a name from the register?

13 MS. BRODY: Yes. But the way - - - the way that
14 irrebuttable presumption is operationalized - - - if - - -
15 if you'll just bear with me? There are a few steps to it.
16 So the way it works now is that once a report is indicated,
17 OCFS asks the local child protective service - - - and
18 there are about I'm forgetting the exact number. I think
19 there are about fifty-eight or fifty-nine throughout the
20 State - - - for all - - - not only all their investigative
21 notes, but also all of the Family Court - - - the relevant
22 Family Court records. So that's the petition, that's any
23 orders or findings that the Family Court judge has made,
24 and that's the disposition. None of those documents are in
25 this record with respect to the subject child at issue.

1 And so what happens is that OCF - - - staff at
 2 OCFS - - - legal staff compares the allegations in the
 3 petition and the indicated report, reviews the orders to
 4 make sure that no findings of fact were made, and then
 5 confirms that the disposition is one of the types of
 6 disposition where this irrebuttable presumption can be
 7 replied.

8 And so yes, it would require reopening this and
 9 going back and make - - - this is not something that the
 10 court, in other words, could do purely as a legal matter on
 11 this record.

12 JUDGE RIVERA: I'm not sure I understand that. A
 13 - - - a court can take judicial notice of judicial orders.
 14 The order is plain on its face.

15 MS. BRODY: So - - - so the - - -

16 JUDGE RIVERA: There's not an ambiguity in the
 17 order?

18 MS. BRODY: I'm not - - - I think it would be
 19 quite unprecedented for this court to go beyond the record,
 20 take judicial notice of Family Court - - -

21 JUDGE RIVERA: Of - - -

22 MS. BRODY: - - - proceeding - - -

23 JUDGE RIVERA: Of a judicial order? Of an order?
 24 That - - - that's what we're talking about. The order, not
 25 - - -



1 MS. BRODY: Of the - - - of a petition as well.
 2 Of the pleadings - - - of the pleadings and the order in
 3 those proceedings, and then apply a legal presumption. I
 4 think that would be quite unprecedented. And - - - and - -
 5 - and it would - - - it would be retroactive.

6 JUDGE RIVERA: Well, in any event, let - - -
 7 let's go with what you've argued here. That - - - isn't
 8 that the case whenever you're applying a change in the law
 9 to something that's pending down the pike on an - - - in an
 10 appeal? You may very well have to go back. That - - -
 11 that might be what the change in the law requires.

12 MS. BRODY: It may be. But I think in those
 13 cases, the legislature is usually quite explicit that
 14 that's what it wants to do.

15 JUDGE RIVERA: But that's a different story.
 16 Whether or not you think it's retroactive gets you back to
 17 Judge Halligan's question. Is this really a case of
 18 retroactivity, or just application of a change in law to an
 19 appeal that's pending at the time?

20 MS. BRODY: Well, for the reasons explained, we
 21 think it's truly an issue of retroactivity because what the
 22 legislature amended was the administrative - - - the steps
 23 in the administrative review process that take place at
 24 OCFS. It did not simply enact a new substantive legal
 25 presumption that anyone, OCFS, the Appellate Division, or



1 this court could apply. And there are many steps
2 associated with doing so.

3 If I could just briefly return to the - - - the
4 right to counsel issue and the issue of cost? The
5 calculations that we provided - - -

6 JUDGE RIVERA: Let me just ask you though, before
7 - - -

8 MS. BRODY: Of course.

9 JUDGE RIVERA: You will have time because I think
10 it's a quick answer. I hope it's a quick answer. The - -
11 - staying on this point, do you agree that if the court
12 happens to find in favor of Ms. Jeter on this question of
13 the application of the statute to her case, that we need
14 not address any of the other issues? Because assuming,
15 yes, that the order fits within the statute, it's
16 dispositive, and it gives her full remedy that she's
17 seeking. Are you - - - do you agree with that?

18 MS. BRODY: Yes. It would give her - - - it
19 would give her full relief - - -

20 JUDGE RIVERA: Okay.

21 MS. BRODY: - - - because it would change the
22 report from indicated to unfounded.

23 JUDGE RIVERA: All right.

24 MS. BRODY: Yes.

25 JUDGE RIVERA: Thank you.

1 MS. BRODY: Going back to the issue of cost, just
2 briefly. The - - - the figures we provided are for
3 attorneys' fees alone. So in order to implement any kind
4 of paid counsel mandate, OCFS would not only need to spend
5 these tens of millions of dollars in attorney fees but
6 would need to stand up from scratch an entire indigent
7 defense infrastructure parallel to that of the Unified
8 Court System.

9 Because that's - - - OCFS is an agency, it's not
10 within the court system. It has no inherent supervisory
11 authority over lawyers. Unlike cases where a trial judge
12 can appoint counsel for somebody because they have such
13 inherent supervisory authority and they're authorized to
14 under the CPLR, there - - - there's nothing like that for
15 OCFS.

16 The only authority it has is - - - is through
17 contract. So it would have to do this through individual
18 contractual assignments. It would need staff to effectuate
19 that. And - - - and because of these costs - - -

20 CHIEF JUDGE WILSON: I bet you could work
21 something out with the Indigent Legal Services Board, which
22 I chair.

23 MS. BRODY: Perhaps. But I - - - I think that -
24 - - essentially to the extent that offering counsel to
25 individuals in administrative hearings, these - - - they're

1 unanswerd questions about how many hearings this would
2 affect. Although, we've really tried our best, given the
3 information we had at the time, to estimate that. This is
4 really a question for the legislature.

5 JUDGE RIVERA: But if it's a constitutional
6 right, it's a constitutional right. We don't say - - - you
7 know, it just costs too much. It just costs too much to
8 comply with the Constitution, we're not going to do that
9 today.

10 MS. BRODY: Correct.

11 JUDGE GARCIA: I thought this is a due process
12 right. It's not a - - - it's not a - - -

13 JUDGE RIVERA: I mean, if she made some other
14 constitutional arguments, you may not think they're
15 preserved if she made some other constitutional arguments.

16 MS. BRODY: Right. Again, I'd just like to go
17 back to what I said about Gideon and the Sixth Amendment,
18 which is if you're talking about the constitutional
19 procedural due process right, then there is an explicit
20 balancing of - - - of the State's interests including - - -

21 JUDGE CANNATARO: What other administrative
22 proceedings in New York is there a due process
23 constitutional right to counsel in?

24 MS. BRODY: And the only one would be parole
25 revocation. And we - - - that's highly distinguishable

1 because you're talking about physical liberty. And that is
2 - - - that is the part of Menochino that I remember. That
3 - - - that - - - that was part of the court's holding.

4 JUDGE CANNATARO: And here there's an argument
5 made by the other side that there is a liberty interest at
6 stake. Do you - - - do you dispute that characterization
7 of the interest?

8 MS. BRODY: No. There is a stigma plus liberty
9 interest, as this court held in Matter of Lee TT. But
10 we're saying that when you're weighing the various
11 interests - - - may I?

12 CHIEF JUDGE WILSON: Yeah. Please continue.

13 MS. BRODY: When you're weighing the various
14 interests here, physical liberty interests, things like
15 that would be given more weight in the Mathews v. Eldridge
16 balancing test than a stigma plus liberty interest, like
17 the one identified in Lee TT.

18 CHIEF JUDGE WILSON: Thank you.

19 MS. MCCAMPBILL: Good afternoon, Your Honors, and
20 may it please the court. Amy McCamphill, on behalf of ACS.

21 Your Honors, I'd like to just briefly address the
22 merits here, which are quite straightforward.

23 Here, this court should affirm OCFS's
24 determination because it is supported by substantial
25 evidence. And the substantial evidence standard, it's a

1 minimal standard. It simply requires something more than
2 conjecture or speculation. It - - - it - - - it can be
3 based on inferences that are probable; they don't
4 necessarily need to be the most probable. And here there
5 was certainly more than enough evidence to meet the
6 substantial evidence standard.

7 We have the child's consistent statements in more
8 than one interview, with more than one ACS caseworker,
9 describing these acts - - -

10 JUDGE RIVERA: What about the recantation letter
11 that - - - what - - - what if we thought that was error not
12 to accept the recantation letter?

13 MS. MCCAMPBILL: So a couple of points on that,
14 Your Honor. The recantation letter, as we've argued, the -
15 - - the hearing officer had the discretion not to admit it
16 because it was so unhelpful as to be essentially irrelevant
17 or immaterial. But even if it was admitted, it wouldn't
18 have moved the needle for the same reasons.

19 This is a letter that was undated. There was no
20 information provided as to the circumstances under which
21 the child wrote the letter. The letter didn't specifically
22 address the injuries at all. It offered no alternate
23 explanation for the injuries. And while the mother now
24 argues that she had submitted the letter to Family Court,
25 she didn't raise that claim at the hearing, and she still

1 hasn't provided any evidence to show that this letter was
2 ever submitted to Family Court.

3 Even if it was submitted to Family Court, it
4 seemingly didn't persuade the Family Court because at the
5 1028 hearing, when the Family Court remanded the children
6 to Jeter and Lange, it did so on the condition that the
7 children not be alone with Jeter. And that's - - -

8 CHIEF JUDGE WILSON: Some of the points you're
9 making seem to emphasize the importance of having counsel.

10 MS. MCCAMPBILL: Your Honor, we have not taken a
11 position on the - - - the right to counsel for the city.
12 But we do agree with New York State that the right to
13 counsel and the retroactivity point are not preserved.

14 And I - - - I'd also just like to touch on the
15 retroactivity point, the reason why this would be an
16 inappropriately retroactive application of the statute,
17 rather than simply an application of a change in law, is
18 because the provision it specifically says that this
19 presumption would be applied in the hearing. And the
20 hearing process had long concluded by the time that - - -
21 that Jeter raised this argument.

22 The legislature set a future date for the
23 effectiveness of the statute when it enacted the statute,
24 and hearings that - - - when hearing processes occur after
25 that date, the presumption will apply; before that date,

1 they don't. It's a clear application of the plain language
2 of the statute.

3 Going back to the substantial evidence. Again,
4 Your Honors, we have the - - -

5 CHIEF JUDGE WILSON: What does it mean for the
6 presumption to apply in the hearing, if what the
7 presumption gets you is not something - - - not a result of
8 the hearing, but a result of an action on the register?

9 MS. MCCAMPBILL: As - - - as New York State
10 explained, the hearing process starts with an
11 administrative review.

12 CHIEF JUDGE WILSON: Right.

13 MS. MCCAMPBILL: So once that review concludes
14 that this is an appropriate instance to apply that - - -
15 that - - - to apply that - - -

16 CHIEF JUDGE WILSON: But doesn't the presumption
17 - - - doesn't what trigger the - - - isn't what triggers
18 the presumption, the conclusion of the hearing?

19 MS. MCCAMPBILL: The conclusion of the Family
20 Court proceeding?

21 CHIEF JUDGE WILSON: Or the conclusion of the
22 family - - - right.

23 MS. MCCAMPBILL: Yes.

24 CHIEF JUDGE WILSON: So the presumption doesn't
25 really apply until that process is over. No?



1 MS. MCCAMPBILL: And then it will apply to any
2 pending OCFS hearings.

3 JUDGE HALLIGAN: And are you saying that you
4 would actually reopen the hearing? Or would this not be a
5 more ministerial act? If - - - if we were to disagree with
6 you and find that it - - - it did apply with respect to,
7 for example, Ms. Jeter's case? Would there be any reason
8 to reopen a hearing and have a new proceeding, or would it
9 be a ministerial act of giving effect to that
10 determination?

11 MS. MCCAMPBILL: I - - - I think New York State
12 explained better than I can the process involved. But
13 there is an administrative review that determines whether
14 or not this - - - this new provision would apply. And
15 again, the statute is very clear that these provisions
16 apply to the hearing. And again, the hearing process had
17 long concluded.

18 So because the OCFS determination is supported by
19 substantial evidence and because Jeter's other arguments
20 are unpreserved and otherwise lacking in merit, we ask this
21 court to affirm.

22 CHIEF JUDGE WILSON: Thank you.

23 MS. MCCAMPBILL: Thank you.

24 MS. KUBITSCHKEK: Your Honor, the - - - the
25 Bingham court case and other cases that the counsel

1 referred to were cases where an issue had not been raised
2 in the court of first instance. The right to counsel was
3 raised. Ms. Jeter raised it in her Article 78 petition.

4 JUDGE HALLIGAN: Could - - - could you - - -
5 sorry. Could you respond to the - - - the exchanges we
6 were having about what would actually happen if we were to
7 conclude that this was a change in law and it applied as a
8 - - - as a - - - you know, operational matter?

9 MS. KUBITSCHEK: And - - - what would happen to
10 Ms. Jeter? She would win her case. Her name would be
11 cleared.

12 JUDGE HALLIGAN: No, but I mean, I take it the
13 argument that your adversaries are making about why this,
14 in their view, is - - - is a retroactive application as
15 opposed to a change in law, is because they say the statute
16 says it applies to a hearing. And also, I - - - I
17 understood from the State that there would have to be some
18 reopening of a hearing. In your view, as a operational
19 matter, as an administrative matter, what would happen to
20 Ms. Jeter and anybody else similarly situated? Is this
21 ministerial? Would you have to have a whole new
22 proceeding? How - - - how do you see it playing out?

23 MS. KUBITSCHEK: Because she prevailed in the - -
24 -

25 JUDGE HALLIGAN: Yeah.

1 MS. KUBITSCHEK: - - - in - - - in the Family
2 Court, if there was a new hearing, there would be nothing
3 to hear, because the law is very clear: at a - - - at an
4 administrative hearing, a - - - the Family Court ruling in
5 favor of the parent creates an irrebuttable presumption
6 that the name must be sealed.

7 JUDGE HALLIGAN: So it would be a mechanical
8 application?

9 MS. KUBITSCHEK: What?

10 JUDGE HALLIGAN: A mechanical application of that
11 presumption.

12 MS. KUBITSCHEK: It would be a mechanical
13 application, that's correct.

14 JUDGE CANNATARO: And to go back to - - -

15 JUDGE RIVERA: Are there any regulations that
16 have been passed in terms of what process they now have to
17 follow?

18 MS. KUBITSCHEK: Not as of the day before
19 yesterday. That's when I last checked. There have been no
20 - - - there - - - there is - - - there is one
21 administrative directive from 2021 which the State sent to
22 all of its employees, saying that the irrebuttable
23 presumption applies to all parents who prevail, including
24 those who prevail after an adjournment in contemplation of
25 dismissal. So that's Ms. Jeter.

1 Other than that, I am not aware of any.

2 JUDGE RIVERA: Other than that notification?

3 MS. KUBITSCHEK: Other than that - - -

4 JUDGE RIVERA: I'm sorry. That - - - other than
5 that statement - - - I'm sorry - - - in that document, does
6 it then say what they are supposed to do with - - - with
7 this change?

8 MS. KUBITSCHEK: Yes. What they are supposed - -
9 - what they are supposed to do with this change is that at
10 an administrative hearing - - -

11 JUDGE RIVERA: Okay.

12 MS. KUBITSCHEK: - - - if somebody introduces
13 into evidence - - -

14 JUDGE RIVERA: I see.

15 MS. KUBITSCHEK: - - - that the - - - the Family
16 Court case was dismissed, that's the end of the hearing.

17 JUDGE RIVERA: And that's the only way someone is
18 going to be able to present the resolution in Family Court?

19 MS. KUBITSCHEK: No. Because - - - because prior
20 to the actual hearing itself - - -

21 JUDGE RIVERA: Yes.

22 MS. KUBITSCHEK: - - - and this is - - - there is
23 the - - - as State's Attorney says, the State conducts an
24 internal administrative review - - - this is a paper
25 review, has nothing to do with the trial - - - and they

1 look to determine whether or not the case can be resolved
2 without a trial. First, if the parent had a case in Family
3 Court and lost, the parent is going to lose the hearing.

4 Now, as of 2022, if the parent had a case in the
5 Family Court and won, the parent will win the hearing. And
6 at that point, the State will say there's no need for a
7 hearing because there's nothing to hear, the parent
8 prevails.

9 The court asked about other constitutional rights
10 that this court - - - that trigger a right to counsel.
11 This court held - - - held that not only parole revocation
12 but also forced administration of psychotropic medication
13 triggers a right to counsel at that administrative hearing.
14 Two of the Appellate Division departments have ruled that
15 in sex offender registration cases, there is a
16 constitutional right to counsel. There is also a statutory
17 right.

18 JUDGE CANNATARO: You know, I asked that question
19 of your adversary because in some respects, the right that
20 you seem to be defending here to me seems like a property
21 right. The ultimate purpose of getting your name off the
22 SCR is to be able - - - for - - - at least for this
23 petitioner, is to be able to get employment in the
24 childcare industry. And I'm - - - I'm - - - I'm still
25 wondering what - - - exactly what the liberty interest is.

1 I understand the reputational issue, but the liberty
2 interest sort of escapes me a little.

3 MS. KUBITSCHEK: Because this court in Lee TT.
4 and the United States Supreme Court, in a string of cases,
5 mostly in the early 1900s, said that there is a right to
6 work in your chosen profession and that is a liberty
7 interest, not a property interest.

8 Ms. Jeter is currently employed, but she cannot
9 work in her own profession. Now, for many people,
10 especially for poor minority women, childcare is the only
11 field that is open to them. And so that if they don't get
12 a job in childcare, they are not going to get a job at all.

13 JUDGE TROUTMAN: So - - -

14 MS. KUBITSCHEK: And this court recognized that
15 in - - -

16 JUDGE TROUTMAN: - - - so have we, in other cases
17 said that if your right to work in a specific, particular
18 profession - - - you can cite a case?

19 MS. KUBITSCHEK: Lee TT. against Dowling, which
20 was really the seminal case dealing with - - -

21 JUDGE TROUTMAN: But other - - -

22 MS. KUBITSCHEK: - - - State Central Registers.

23 JUDGE TROUTMAN: - - - in - - - in more recent
24 decisions - - -

25 MS. KUBITSCHEK: Well, that was 19 - - -

1 JUDGE TROUTMAN: - - - with respect to, for
2 instance, a lawyer - - - a lawyer's right to keep their
3 license. Are - - - are all cases where your ability to
4 work in your chosen profession, every one of them, you're
5 saying you do have more than a property interest; it is a
6 liberty interest?

7 MS. KUBITSCHEK: Well, the - - - first the - - -
8 I am not familiar with the issue coming up since 1996, in
9 the Lee TT. case. Secondly, this is not merely the right
10 to work in your chosen profession, but as Lee TT. said, and
11 as study after study cited in our brief has shown, that
12 this affects a person's individual family life as well.

13 Ms. Jeter - - -

14 JUDGE TROUTMAN: So - - - so it's more than a
15 property interest?

16 MS. KUBITSCHEK: It's more than a property
17 interest, that's correct.

18 CHIEF JUDGE WILSON: Thank you, Counsel.

19 MS. KUBITSCHEK: Thank you.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of Jeter v. Poole, No. 82 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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