IN THE SUPREME COURT OF GUAM

IN THE INTEREST OF J.L.L.P.,
Minor;

DAVID PEREZ,
Respondent-Appellant.

OPINION

Filed: November 22, 2002

Cite as: 2002 Guam 21

Supreme Court Case No.:CVA02-014
Superior Court Case No.:JP0566-97

For Appellant:
Seth Forman, *Esq*.
Law Office of Keogh & Forman
Suite 105, C&A Prof. Bldg.
251 Martyr St.
P.O. Box GZ
Hagatna, GU 96932

For Petitioner-Appellee:
Vernon P. Perez
Assistant Attorney General
Office of the Attorney General
2-200E Guam Judicial Ctr.
120 W. O'Brien Dr.
Hagåtña, Guam 96910

BEFORE: PETER C. SIGUENZA, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; FRANCES TYDINGCO-GATEWOOD, Associate Justice.

CARBULLIDO, J.:

[1] This matter comes before the court upon a motion to withdraw filed by Attorney Seth Forman ("Forman"), court-appointed counsel for the Respondent-Appellant David Perez ("Perez"). Forman filed a notice of appeal but now seeks to withdraw as appellate counsel pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), on the ground that an appeal in this case would be wholly frivolous. The issue before the court is whether *Anders* procedures apply to appeals of decisions which adversely affect a parent's custody of his or her child. For the reasons set forth herein, we hold that the *Anders* does not apply to appeals from such decisions, and we further decline to extend the use of *Anders* procedures to these types of appeals. However, because Forman has submitted an *Anders* brief in this case, we have exercised our discretion and reviewed the brief notwithstanding the rule we announce to be applied in all future cases. We find that Forman has raised several non-frivolous issues in this appeal and therefore deny his motion to withdraw.

I.

[2] Perez, an adult, is the biological father of the minor child, J.L.L.P. Perez is diagnosed as having cognitive and psychological disabilities. On or about November 10, 1999, the Superior Court appointed Ms. Connie Castro ("Castro"), an employee of Guma' Mami, as permanent guardian of J.L.L.P. At a hearing on or about March 27, 2002, Castro informed the court that she intended to move to the state of Oregon on July 18, 2002, and requested to take J.L.L.P. with her. At a hearing on May 16, 2002, the lower court granted Castro's request, which was memorialized in a written order filed on June 12, 2002, and entered on the docket on June 27, 2002.[1]

[1] The facts described in this paragraph are set forth in Forman's *Anders* Brief.

[3] As court-appointed counsel, Forman filed a Notice of Appeal on June 26, 2002 on behalf of Perez, appealing the June 12, 2002 order. On that date, Forman filed an Application to Proceed in *Forma Pauperis*[2] and a Guam Rule of Appellate Procedure ("GRAP") 37 Motion for Leave to File a Brief *In Pro Per* on Perez' behalf. Forman also filed a Motion to Withdraw, a GRAP 9(b)(2)(D) Motion For Appointment of Counsel, and an *Anders* Brief.[3]

[4] This court requested that the parties brief the issue of whether *Anders* procedures must or should apply to appeals of orders adversely affecting parental rights.[4] The court also invited briefing of this issue from the Guam Bar Association as *amicus curiae*. Forman submitted a response to the court's request, in which he essentially averred to his discussion of the issue as set forth in his *Anders* brief that *Anders* should apply to the instant civil appeal. The Family Division of the Office of the Attorney General also submitted a brief on the issue, arguing that the court should limit the application of *Anders* to criminal appeals and should reject the use of *Anders* procedures in the context of the present civil case.

II.

[5] This court has jurisdiction over this appeal pursuant to Title 7 GCA § 3107 (1994). Considering that the preliminary issue regarding the applicability of *Anders* in this case is one of first impression, we find it necessary and beneficial to issue an opinion for the purpose of clarifying the rule to be applied in this jurisdiction.

---

[2] On September 4, 2002, this court granted Perez' application to proceed *in forma pauperis*.

[3] Furthermore, on July 2, 2002, Forman filed a GRAP 12(a) Motion for Stay Pending Appeal, seeking a stay of the lower court's June 12, 2002 order. This court issued an order denying the motion for stay on July 17, 2002.

[4] In its order requesting briefing, the court expressed that the issue of whether *Anders* applies or should be extended to appeals of orders affecting or terminating parental rights was one of first impression in this jurisdiction. While the order appealed from in this case affects parental rights, and has been characterized by the parties as a severe curtailment of parental rights, it is not in fact an order terminating parental rights. The rule announced today is necessarily limited to the facts of this case, and extends only to appeals of decisions negatively affecting a parent's custody of his or her child.

III.

A. The Issue and the Parties' Arguments

[6] Court-appointed counsel for a criminal defendant who seeks to withdraw from representing the defendant on appeal due to counsel's belief that an appeal would be frivolous is required to follow the procedures announced in *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967). *See* GRAP 37 (permitting counsel for the "Defendant-Appellant" to file an *Anders* Brief); *see also People v. Leon Guerrero*, 2001 Guam 19, ¶¶ 9-10, 36 (dismissing a criminal defendant's appeal as frivolous after conscientiously reviewing the record as set forth in *Anders*).[5] The issue in this case is whether court-appointed counsel in a civil case involving child custody may file both a motion to withdraw and an *Anders* brief in this court if the attorney wishes to withdraw from an appeal. Specifically, the issue presently before us is whether *Anders* procedures must or should be made applicable to an appeal from a decision adversely affecting a parent's custody of his or her child.

[7] Forman argues that the underlying order appealed from amounts to a *de facto* termination of Perez' parental rights. Forman argues that because GRAP 37 does not limit the use of an *Anders* brief to criminal cases, the *Anders* brief he filed in the instant case should be accepted. He further contends that *Anders* should apply to this case because attorneys representing parents in juvenile special proceedings involving termination or extreme curtailment of parental rights face the same ethical dilemmas as court-appointed attorneys when clients insist on pursuing frivolous appeals. Finally, Forman points out that like criminal defendants, parents possess certain constitutionally protected rights and should therefore be afforded *Anders* protections.

[8] In contrast, the Family Division argues that *Anders* should not apply to appeals of orders adversely affecting parental rights. Specifically, the Family Division argues that permanency plans which result from these proceedings require a showing that the "prompt and permanent placement with responsible substitute caretakers and family in a safe and secure home is in the best interests

[5] See *People v. Leon Guerrero*, 2001 Guam 19, ¶¶ 9-10, for a discussion on the procedures a court-appointed attorney must follow when seeking to withdraw pursuant to *Anders*.

of the child," and that such requirement presents safeguards for parents and indicate that the protections afforded by *Anders* procedures is outweighed by the costs of the use of those protracted procedures in termination of parental rights cases. Regarding *Anders* Brief, pp. 10-11 (Sept. 18, 2002). The Family Division further argues that the use of *Anders* procedures should be limited to criminal appeals because the procedures are derived from "a liberty deprivation exclusive to criminal defendants." Regarding *Anders* Brief, p. 12 (Sept. 18, 2002).

B. Discussion

[9] We agree with the Family Division that *Anders* does not and should not be made applicable to appeals of orders adversely affecting a parent's custody of his or her child. *See Sade*, 920 P.2d at 733 (Cal. 1996); *see also In re Harrison*, 526 S.E.2d 502, 502-03 (N.C. Ct. App. 2000); *Denise H. v. Arizona Dep't of Econ. Security*, 972 P.2d 241, 243 (Ariz. Ct. App. 1998); *Ostrum v. Dep't of Health & Rehab. Servs.*, 663 So. 2d 1359, 1361 (Fla. Dist. Ct. App. 1995)[6]. The procedures formulated in *Anders* were specifically made applicable to criminal appeals, *see Anders*, 386 U.S. at 739, 87 S. Ct. at 1397 (describing the issue as determining the extent of a *criminal defendant's* court-appointed counsel's duty on appeal when he deems the appeal to have no merit) *and Leon Guerrero*, 2001 Guam 19 at ¶ 10 (conducting an *Anders* review of the record in a criminal appeal), and have not been extended by the U.S. Supreme Court to civil appeals, *Sade*, 920 P.2d at 735

[6] We note that the validity of the *Ostrum* court's rule rejecting *Anders* procedures in termination of parental rights ("TPR") appeals was recently certified to the Florida Supreme Court in *N.S.H. v. Dep't of Children and Family Services*, 803 So. 2d 877 (Fla. Dist. Ct. App. 2002). Specifically, in *Pullen v. State*, 802 So. 2d 1113 (Fla. 2001), the Florida Supreme Court extended *Anders* to appeals in civil commitment proceedings. In *Pullen*, the Florida Supreme Court rejected the *Ostrum* line of cases and instead followed the line of cases which accepts *Anders* procedures in certain civil appeals. *Pullen v. State*, 802 So. 2d 1113, 1119 (Fla. 2001) ("While the United States Supreme Court has never ruled that *Anders* procedures are required in the civil context, we agree with the courts cited above that the policies and interests served by the *Anders* procedure in criminal proceedings are also present in involuntary civil commitments under Florida's Baker Act, namely, that the resolution of an appeal of the commitment order be related to the merits of the appeal rather than to the individual's ability to hire private counsel."). Thus, the *N.S.H.* court was required to decide whether to apply the *Ostrum* rule (rejecting *Anders*) in light of *Pullen*. The *N.S.H.* court found that because *Pullen* dealt with civil commitment appeals, it did not specifically overrule *Ostrum* which rejected *Anders* in appeals in TPR proceedings. *N.S.H. v. Dep't of Children and Family Servs.*, 803 So. 2d 877, 879 (Fla. Dist. Ct. App. 2002). Thus, the *N.S.H.* court adhered to the *Ostrum* procedure, but certified the following question to the Florida Supreme Court: "In termination of parental rights cases, if an attorney appointed to represent an indigent parent below in good faith determines there is no valid issue on appeal, should that attorney be permitted to withdraw pursuant to *Ostrum*, or be required to file an *Anders* type brief." *Id.*

(recognizing that the U.S. Supreme Court has declined to extend *Anders* outside the criminal context).

[10] Furthermore, *Anders* procedures are prophylactic in nature. *See Pennsylvania v. Finley*, 481 U.S. at 555, 107 S. Ct. at 1993. They are not themselves required under the constitution but are reliant upon a defendant's Sixth Amendment right to counsel and Fourteenth Amendment due process right to the effective assistance of counsel. *See Ostrum*, 663 So. 2d at 1361 ("The right to counsel in *Anders* is based on the Sixth Amendment . . . ."); *Sade*, 920 P.2d at 730; *Evitts v. Lucey*, 469 U.S. 387, 404, 105 S. Ct. 830, 840 (1985) (stating the rule that all criminal defendants have a due process right to the effective assistance of counsel, whether appointed or not, in his or her first appeal as of right). *Anders* procedures are meant to secure the effective assistance of appellate counsel guaranteed by the Constitution in a criminal defendant's first appeal as of right. *See Sade*, 920 P.2d at 733; *see also In re E.L.Y.*, 69 S.W.3d 838, 839 (Tex. App. 2002) ("'[T]he *Anders* procedure is a 'prophylactic' framework' . . . established to vindicate the constitutional right to appellate counsel.'") (quoting *Smith v. Robbins*, 528 U.S. 259, 273, 120 S. Ct. 746, 757 (2000)).

[11] Unlike criminal defendants, there is no absolute constitutional guarantee to court-appointed counsel for indigent parents in proceedings adversely affecting the custody of their child. *See In re E.L.Y.*, 69 S.W.3d at 841 (recognizing that parents are not constitutionally guaranteed counsel in proceedings to *terminate* parental rights) (citing *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 31-32, 101 S. Ct. 2153, 2162 (1981)). In fact, the availability of counsel for a parent in the context of a child protective proceeding arises from statute, *see* Title 19 GCA § 13308(a) (1994), and not from the Sixth or Fourteenth Amendment. Because *Anders*' prophylactic procedures are derived from a criminal defendant's Sixth and Fourteenth Amendment right to the effective assistance of counsel, they are not necessarily applicable to appeals of an order terminating custody where the claim to counsel arises through local statute and not the Constitution.

[12] We further find that *Anders* procedures should not be extended to appeals of orders adversely affecting a parent's custody of a child. First, *Anders* procedures are time-consuming and are therefore inappropriate in child placement proceedings where there is a heightened interest in finality. *Ostrum*, 663 So. 2d at 1361; *Sade*, 920 P.2d at 740-41 (determining that the costs in using *Anders* procedures are not justified considering that the interest in finality in proceedings involving parental rights is "unusually strong"). "[W]e think the interest of the children in quitting the uncertainties surrounding their future should be put to rest as soon as it can fairly be done." *Ostrum*, 663 So. 2d at 1361. The Child Protective Act similarly evidences the legislature's intent that the placement of children be accomplished in the timeliest manner possible. *See* Title 19 GCA § 13100 (1994) ("This permanent planning should effectuate placement with a child's own family when possible and should be conducted in an *expeditious fashion* so that where return to the child's family is not possible as provided in this Chapter, such children will be *promptly* and permanently placed with responsible and competent substitute parents and families, with their places in such families secured by adoption or permanent custody orders.") (emphasis added). The use of *Anders* procedures, which requires both court-appointed counsel and the court to undertake a thorough review of the record, fosters protracted proceedings which undermines the interest in finality in child placement proceedings and is therefore unsuitable for use in such cases. *See Sade*, 920 P.2d at 741; *Ostrum*, 663 So. 2d at 1361.

[13] Furthermore, the use of *Anders* procedures mark a radical departure from the normal judicial process because the procedures require the court to thoroughly review the record for arguable issues on appeal. *See Leon Guerrero*, 2001 Guam 19 at ¶ 9 ("[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. . . . [T]he court - not counsel - then proceeds, after full examination of all the proceedings, to decide whether the case is wholly frivolous.") (quoting *Anders*, 386 U.S. at 744-

45, 87 S. Ct. at 1400) (first alteration in original). We think that such procedures force the court into the position of advocate rather than neutral decision-maker. *See Ostrum*, 663 So. 2d at 1361. While such deviation may be justifiable in the criminal context where the defendant has a constitutional right to the effective assistance of counsel at virtually all stages of the proceedings,[7] we decline to expand the use of *Anders* procedures to the instant civil case where no such right exists. *See Lassiter*, 452 U.S. at 31, 101 S. Ct. at 2161 (determining that parents involved in proceedings to terminate their parental rights do not have a general due process right to court-appointed counsel); *see also Denise H.*, 972 P.2d at 243 (recognizing that a parent involved in a termination proceeding does not have the same constitutional right as a defendant involved in a criminal proceeding).

[14] Finally, we agree that court-appointed attorneys face similar ethical dilemmas whether they represent criminal defendants or parents. Undoubtedly, all attorneys, whether appointed or not, have an ethical responsibility to competently and diligently represent his or her client. *See L.C. v. State*, 963 P.2d 761, 763-64 (Utah Ct. App. 1998). Furthermore, in all cases, whether criminal or not, an attorney will be faced with the dilemma between providing competent representation and refraining from filing a frivolous appeal. However, a court-appointed attorney for a criminal defendant is faced with the *additional* responsibility of providing representation consistent with the criminal defendant's unique constitutional right to the effective assistance of appellate counsel. *Sade*, 920 P.2d at 730 (stating that the criminal defendant's constitutional right to the assistance of counsel "extends beyond normal assistance to effective assistance."). It is this additional responsibility for which *Anders*' requirements are derived. *Id.* at 731.

[15] *Anders* procedures strike a balance between the criminal defendant's constitutional right to an active advocate and the attorney's ethical responsibilities. *See L.C.*, 963 P.2d at 764. The procedures ensure the effective assistance of counsel by requiring the attorney to demonstrate that

[7] *See Mempa v. Rhay*, 389 U.S. 128, 134, 88 S. Ct. 254, 257 (1967) ("[The] appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected."); *People v. Dulana*, Crim. No. CF0062-94, 1996 WL 875743 (D. Guam App. Div. Oct. 1 1996) ("To protect the fundamental right to a fair trial, a defendant has a Sixth Amendment right to effective assistance of counsel.") (citing *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

he has thoroughly reviewed the record and to identify any arguable issues on appeal. *Sade*, 920 P.2d at 728. The filing of an *Anders* brief enables the court to determine whether appointed attorneys "have fully performed their duty to support their clients' appeals to the best of their ability." *Id*. (citing *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 439, 108 S. Ct. 1895, 1902 (1988)). At the same time, by filing a motion to withdraw after indicating that he deems the appeal to be frivolous, counsel is protected from violating his ethical duties. *See L.C.*, 963 P.2d at 764. As the U.S. Supreme Court has determined, the use of *Anders* procedures adequately safeguards a criminal defendant's constitutional right to the effective assistance of counsel. *See Anders*, 386 U.S. at 744, 87 S. Ct. at 1400 ("The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.").

[16] However, because the rights of a criminal defendant are distinct from those of a parent facing the loss of custody of his or her child, parents are not necessarily entitled to the same level of protection as criminal defendants. *See E.L.Y.*, 69 S.W.3d at 843 (Gray, J., dissenting); *see also Sade*, 920 P.2d at 736-39 (determining that due process does not require the use of *Anders* protections in termination of parental rights appeals). Simply put, we are satisfied with counsel's good faith assertion that an appeal would lack any meritorious issues. The costly and protracted procedures required under *Anders* are not necessary to reassure the court that counsel has in fact undertaken the required level of review expected of all advocates admitted to practice before this court. We find that procedures short of those required by *Anders* are adequate to safeguard the rights of parents who insist on filing an appeal while concurrently protecting court-appointed attorneys from violating their ethical duties.[8]

[8] While there may be a case where an attorney abandons an appeal due to counsel's erroneous subjective belief regarding its merits, we find the risk to be slight assuming attorneys properly appreciate the distinction between a frivolous appeal and a losing one. The duty to provide competent representation commands that the attorney make a plausible argument on behalf of their client, even if counsel believes that the argument is likely to fail. We are not

[17] In sum, we hold that *Anders* does not apply to appeals of decisions negatively affecting a parent's custody of his or her child. We further decline to extend the use of *Anders*-type procedures in such appeals. Thus, court-appointed counsel of a parent who seeks to withdraw from an appeal of an order affecting the custody of his or her child on the ground that the appeal would be frivolous is not required to file an *Anders* brief. Rather, court-appointed counsel is merely required to file a motion to withdraw, stating his or her good faith belief that there are no meritorious issues which can be raised on appeal. Counsel shall serve the motion to withdraw on his or her client. The court will thereafter allow the appellant to file an appellant's brief in accordance with the time permitted in the Rules of Appellate Procedure for these types of appeals, or as otherwise ordered by the court. Should the appellant fail to file a brief within the time allowed, the court will dismiss the appeal for failure to prosecute. On the other hand, if the appellant files the required brief, and the court determines that the brief does not provide a preliminary basis for reversal, the court will summarily affirm the lower court's decision. If the appellant files the required brief, and the court determines that the brief raises a preliminary basis for reversal, the court will allow the appeal to go forward.

[18] In the instant case, because Forman filed an *Anders* brief in addition to his motion to withdraw, we will depart from the procedure announced above which shall apply to future cases of this nature. The court treats the *Anders* brief as a memorandum in support of Forman's motion to withdraw. In his *Anders* brief, Forman has raised four possible issues on appeal. We have reviewed the facts and the issues presented in the *Anders* brief and find that the first three issues that Forman has raised are non-frivolous issues which can be pursued in this appeal. Accordingly, as we find that this appeal is not frivolous, it is not necessary to require Perez to file an additional brief in this case.

---

inclined to formulate a rule based on the assumption that attorneys cannot distinguish between frivolous and mere losing appeals. The rules of professional conduct and the mechanisms in place to enforce those rules are adequate to prevent that type of unethical behavior. Hence, we believe that the possibility that an attorney would abandon an otherwise meritorious appeal is slight and the risk is therefore tolerable when weighed against the policies opposing the application of *Anders* in this type of case.

Forman's motion to withdraw is hereby denied and Forman is required to file an appellant's brief discussing the first three potential issues he has identified, and any other issues he deems appropriate for review.

IV.

[19] In accordance with the foregoing, we hold that *Anders* procedures do not apply and will not be extended to appeals of orders negatively affecting a parent's custody of his or her child. Court-appointed attorneys seeking to withdraw from such appeals on the ground that he or she believes an appeal would be frivolous need only comply with the procedures described above. Upon review of the motion to withdraw and *Anders* brief filed in this case, we find that several non-frivolous issues can be raised on behalf of Perez. Accordingly, Forman's motion to withdraw is hereby **DENIED** and this appeal shall proceed in the normal course.

TYDINGCO-GATEWOOD, J., Concurring:

[20] I concur with the result reached today. I agree with the majority that *Anders* procedures should not be made applicable in this case. However, I write separately to emphasize that my concurrence rests solely on the fact that this is not an appeal of a decision which terminates Perez' parental rights.

[21] While Forman asserts that the underlying order appealed from "effectively" terminates Perez' parental rights, there is a clear distinction in my mind between an *effective* termination of parental rights and an *actual* termination of parental rights. The interests at stake between the two proceedings are distinct. The former does not justify the use of *Anders* procedures, while the latter may. My decision to join in the result today does not answer the separate question, answered in the affirmative in a growing number of jurisdictions, of whether *Anders*-type procedures should be extended to appeals of orders or judgments terminating parental rights. *See e.g. In re E.L.Y.*, 69 S.W.3d 838, 841 (Tex. App. 2002) (adopting *Anders* procedures in termination of parental rights proceedings); *L.C. v. State*, 963 P.2d 761, 764 (Utah Ct. App. 1998) ("[W]e hold that when appointed counsel represents an indigent client in a termination of parental rights appeal and concludes no nonfrivolous issues exist for appeal, counsel may file an *Anders*-type brief."); *J.K. v. Lee County Dep't of Human Res.*, 668 So. 2d 813, 815 (Ala. Civ. App. 1995) ("We believe that court-appointed counsel in a civil case should have some means by which to effectively represent his client and yet be allowed to withdraw without having to file a frivolous appeal if counsel thinks an appeal would be without merit."); *In re V.E.*, 611 A.2d 1267, 1275 (Pa. Super. Ct. 1992) (adopting *Anders* procedures in Pennsylvania); *In re Keller*, 486 N.E.2d 291, 292 (Ill. App. Ct. 1985) ("We hold that the *Anders* procedure is applicable to [termination of parental rights proceedings.]"); *Morris v. Lucas County Children Servs. Bd.*Ä550 N.E.2d 980, 981 (Ohio 1989) (adopting *Anders* procedures in Ohio and recognizing the extension of *Anders* to termination proceedings in Wisconsin by *In re J.R.W.*, 439 N.W.2d 644 (Wis. 1989)).