PROCEDURES IN NONCRIMINAL CASES WITH NO ARGUABLE ISSUES

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We have often offered guidance on handling cases in which counsel is unable to identify any arguable issues.[1] The decisions of the California Supreme Court in *In re Ben C.* (2007) 40 Cal.4th 529 and *In re Phoenix H.* (2009) 47 Cal.4th 835, as well as the criminal case of *People v. Kelly* (2006) 40 Cal.4th 106, bring no-issue cases into the spotlight again. In the wake of these rulings, we offer the following guidance to counsel for no-issue procedures in noncriminal cases.

Post-*Wende* and *Sade C.* Supreme Court Decisions on No-Issue Procedures

Kelly

In *Kelly*, after counsel filed a *Wende-Anders*[2] (no-issues) brief, the defendant filed a pro per brief. The Court of Appeal opinion merely stated it had "read and considered" the defendant's argument. The Supreme Court held this was inadequate to meet the state constitutional requirement that a decision determining a "cause" be in writing with reasons stated (Cal. Const., art. VI, § 14). (*People v. Kelly*, *supra*, 40 Cal.4th 106, 119-120.) The opinion must set out the facts, procedural history, convictions, and sentence, and must describe the contentions, stating briefly why they are rejected. (*Id.* at p. 124.)

Ben C.[3]

Ben C. held that the Court of Appeal has no obligation to review the record for issues in an LPS conservatorship appeal in which the attorney has filed a no-issue brief; as it held in *In re Sade C.* (1996) 13 Cal.4th 952 for dependency appeals, the court found the strict requirements of *Wende* apply only in criminal cases. *Ben C.* nevertheless prescribed procedures to be followed (40 Cal.4th at p. 544):

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[1]See, for example, the Appellate Defenders, Inc., California Criminal Appellate Practice Manual, chapter 1, § 1.24 et seq.; chapter 4, § 4.73 et seq. http://www.adi-sandiego.com/Articles/Manual2007/ADIManualApril2007.pdf.

[2]*People v. Wende* (1979) 25 Cal.3d 436; *Anders v. California* (1967) 386 U.S. 738.

[3]In response to *Ben C.*, Division One informed us how they intend to handle no-issue cases in conservatorship appeals. A letter from Presiding Justice McConnell is at http://www.adi-sandiego.com/Articles/Letter%20from%20court%20re%20Ben%20C%20%20procedures.pdf.

> "If appointed counsel in a conservatorship appeal finds no arguable issues, counsel need not and should not file a motion to withdraw. Instead, counsel should (1) inform the court he or she has found no arguable issues to be pursued on appeal; and (2) file a brief setting out the applicable facts and the law. fn. 6

Footnote 6 of the *Ben C.* opinion said: "The conservatee is to be provided a copy of the brief and informed of the right to file a supplemental brief."

Phoenix H.

In re Phoenix H. (2009) 47 Cal.4th 835, held that a client has no right to file a pro per brief when counsel has filed a *Sade C.*[4] no-issue brief. We had argued for such a right as a matter of constitutional due process, specifically, the right of access to the courts: when appointed appellate counsel has raised no issues, the appellant has no way to challenge the judgment except through self-representation. The court rejected this argument, concluding "the Court of Appeal is not required to permit the parent to personally file a brief unless the parent can establish good cause by showing that an arguable issue does, in fact, exist." The court repeated the directives laid down in *Ben C.*:

> [W]e direct the Court of Appeal that appointed counsel for a parent in an appeal from an order of the juvenile court affecting parental rights who finds no arguable issues need not and should not file a motion to withdraw, but should (1) inform the court he or she has found no arguable issues to be pursued on appeal, (2) file a brief setting out the applicable facts and the law, and (3) provide a copy of the brief to the parent. But unlike in the conservatorship proceedings at issue in *Ben C.*, the Court of Appeal is not required to permit the parent to file an additional brief absent a showing of good cause.

(*Id.* at p. 843.)

The court also declined to exercise its supervisory power over the courts to require pro per briefing, reasoning this would build additional delay into a system where timeliness is crucial. (*Id.* at p. 844.)

No-Issue Briefs by Counsel

Ben C. and *Phoenix H.*, require for the most part that counsel follow traditional *Wende-Anders* procedures in an LPS conservatorship or dependency appeal raising no

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[4] *In re Sade C.* (1996) 25 Cal.3d 436.

issues. The main difference is that the LPS and dependency briefs should not state that the court *must* review the record, although it may invite the court to do so in its discretion.

The typical no-issues case must meet these requirements:[5]

- ADI's preapproval is required. We will usually want to review the record first.[6]

- The words "BRIEF FILED UNDER [APPLICABLE CASE, *Sade C.* or *Ben C.*]" should appear prominently on the cover.

- The brief must include a statement of the case and facts and should describe issues identified but not briefed, with relevant authorities. It should neither urge the issues listed as a ground for relief nor argue against the client by, for example, affirmatively characterizing the issues as frivolous. (See ADI Criminal Appellate Practice Manual,[7] §§ 1.26 and 4.77.)

- The brief should include a declaration stating that counsel has reviewed the record. The declaration must also say counsel has sent the client a copy of the brief and has informed the client of the nature of the brief filed. In conservatorship cases, it must state counsel has informed the client of the right to file a pro per brief and the right to obtain the record from counsel on request.

- Although counsel must acknowledge that under *Sade C.* or *Ben C.* the court has no duty in a dependency or conservatorship case to review the record for issues, the brief may nevertheless urge the court exercise its discretion to do so and explain why.

- Include the client's address on the proof of service or, if confidentiality is an issue, in a cover letter requesting it be kept confidential. If the client will be given an opportunity to file a pro per brief, the court needs to notify the client directly.

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[5]ADI's website provides a sample *Sade C.* brief. http://www.adi-sandiego.com/PDFs/Dependency%20Forms/Sade%20C%20opening%20brief.wpd

[6]On occasion, if counsel has filed a brief on the merits but it appears the issues are borderline frivolous or trivial, the ADI staff attorney may ask to do a "quasi-*Wende*" review of the record to see if there might be additional issues. See chapter 4 of the ADI Manual, § 4.87 et seq., on deciding whether to brief an unproductive issue on the merits or to file a no-issues brief instead.

[7]http://www.adi-sandiego.com/manual.html.

Pro Per Briefs

Conservatorship Cases

Ben C. specifically gives the conservatorship client the right to file a brief in pro per if counsel has filed a no-issue brief. Footnote 6 says: "The conservatee is to be provided a copy of the brief and informed of the right to file a supplemental brief." (*In re Ben C.*, *supra*, 40 Cal.4th at p. 544.)

Dependency Cases

Phoenix H., in contrast, holds that the client has no right to file a pro per brief in such a situation, "unless the parent can establish good cause by showing that an arguable issue does, in fact, exist."

This aspect of *Phoenix H.* presents some nettlesome problems that raise practical questions and/or contradict existing law: First, the opinion does not explain how a client is to show "good cause" for a pro per filing without having an opportunity to file a brief or even a letter. Second, once the client shows good cause, which the court defines to mean "an arguable issue does, in fact, exist," the court should order *counsel* to brief it, not just decide the issue on the basis of pro per briefing. (See *Penson v. Ohio* (1988) 488 U.S. 75.) Third, coming full circle – if a client has a right to have counsel's briefing upon the identification of an arguable issue, why should the client also then have a right to pro per briefing per *Phoenix H.*? Normally a client represented by counsel has no right to pro per filings in addition. (*In re Barnett* (2003) 31 Cal.4th 466.)

We think the most productive way to approach these dilemmas is to see a pro per filing as a way of calling attention to issues the client wants the court to consider. Counsel should accordingly work with the client to submit, as expeditiously as possible, a pro per filing (which probably need not be a formal brief) so that the court can consider it as an effort to show good cause. Ideally, the pro per brief or at least an issue letter from the client should be submitted at the same time as counsel's *Sade C.* brief. To this end:

- *Make arrangements for the record:* If the client is to prepare a pro per brief or letter, he or she will likely need the record. As soon as counsel has reviewed the record and determined the case is a likely *Sade C.*, counsel should call ADI to see whether it has its own copy of the record. In most cases it does, and counsel can simply send the record to the client along with an explanatory letter (next paragraph); ADI's copy then can be used by ADI and counsel. If ADI did not receive a copy, counsel should make arrangements with the ADI staff attorney to ensure they will have access to a copy after counsel sends the original to the client. Scanning, copying, and borrowing from another party are possible solutions.

• *Inform the client early:* As soon as counsel has made arrangements for the record and is ready to submit the draft *Sade C.* brief to ADI,[8] counsel should inform the client about the situation, ask whether he or she is interested in doing a pro per filing, and if so urge the client to start to work on a brief or at least an issue letter right away. The record and draft *Sade C.* brief should be enclosed.

• *Keep in close touch with client:* If the client is interested in a pro per filing, counsel should work closely with him or her to secure the filing promptly, so as to coordinate with the deadlines imposed on counsel, with the goal of submitting the pro per filing at the same time as the *Sade C.* brief.

• *Have fall-back procedures (Plan B) ready:* If the client is unable to produce the pro per filing in time but still has expressed genuine interest in submitting one, counsel can resort to alternative procedures. For example:

  • Counsel may ask the court for a brief extension on behalf of the client.

  • If counsel knows what the client's issues are, counsel can summarize them in the *Sade C.* brief.

  • If the case is dismissed, counsel may ask for reinstatement when and if the client produces the filing, provided it is within the 30 days that the court has jurisdiction after the opinion is filed (rule 8.264(b)(1)). Obviously, counsel should make sure the client is aware of this jurisdictional deadline.

• *Consider habeas corpus instead:* If the issues the client wants raised are based on facts outside the record (as is often the case), counsel may suggest the client file a pro per petition for writ of habeas corpus rather than a brief. The Judicial Council form, MC-275,[9] can be used, but counsel should suggest modifications suitable to a dependency case.

  Caveat: If the appeal is from a termination of rights, counsel needs to keep in mind Welfare and Institutions Code section 366.26, subdivision (i)(1), which provides that the court has no power to modify an order terminating parental rights, except for the right to appeal. See *Adoption of Alexander S.*

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[8]The submission to the staff attorney should include not only the record, but a statement of the case and facts, a description of issues considered and rejected, and the results of research on those issues.

[9]http://www.courtinfo.ca.gov/forms/fillable/mc275.pdf. See also rule 8.380 [MC-275 form must be used by a pro per petitioner seeking release from, or change in conditions of, custody].

(1988) 44 Cal.3d 857, 859: "[W]e hold that habeas corpus may not be used to collaterally attack a final nonmodifiable judgment in an adoption-related action where the trial court had jurisdiction to render the final judgment." In that case the time for appealing had elapsed. In *In re Darlice C.* (2003) 105 Cal.App.4th 459, in contrast, the court issued an order to show cause in a habeas corpus proceeding while the appeal was still in progress and directed the trial court resolve it before the appeal was final. It disagreed with *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1161-1163, which held habeas corpus may not be used at all in termination cases. In light of these authorities, any habeas corpus petition should be filed in time for it to be decided before the appeal is final.

Right to Written Opinion When the Appellant Files a Pro Per Brief

Conservatorship Cases

Division One's *Ben C.* policy (see footnote 3, *ante*) indicates that if the client does not file a pro per brief in a conservatorship case, the case will be dismissed as abandoned; this is in accordance with *In re Ben C.*, *supra*, 40 Cal.4th 529, 544: "Nothing is served by requiring a written opinion when the court does not actually decide any contested issues." Division One's policy also provides that if the client does file a pro per brief, the court will order briefing by counsel if it determines any issues the client has raised are arguable; this provision, too, is unobjectionable. The remaining provision is open to dispute: If appellant files a pro per brief and the court determines the issues are not arguable, it will dismiss the appeal as abandoned, instead of filing a written opinion. We urge counsel to argue for the right to an opinion on the merits when the client actually does file a brief.

First, it is doubtful a case could be considered "abandoned" if the client has actually raised issues, even if frivolous, and has urged relief on that basis.[10] Both the majority and dissent in *Kelly* agreed that once the pro per brief was filed, the appeal was a "cause" requiring a written decision. (*People v. Kelly*, *supra*, 40 Cal.4th 106, 119-120 (maj. opn.), and 126 (conc. and dis. opn. of Corrigan, J.).)

Second, part of the rationale of *Kelly* was that the defendant in a *Wende* situation has a right to file a pro per brief, even though also represented by counsel; from this it follows that when a Court of Appeal disposes of the case it necessarily must have considered and rejected those contentions and thus must comply with the constitutional requirement of "reasons stated." (*Kelly*, 40 Cal.4th at p. 120.) *Ben C.* explicitly

[10]Presumably all of the defendant's issues in *Kelly* were frivolous, i.e., not reasonably arguable. If they had been arguable, the court would have had a constitutional duty to order counsel to brief them. (*Penson v. Ohio* (1988) 488 U.S. 75, 83-85.)

recognized the right to file a pro per brief in conservatorship cases (*In re Ben C.*, *supra*, 40 Cal.4th at p. 544, fn. 6). Thus it would appear arguable that *Kelly* applies to opinions in conservatorship, as well as criminal, cases.

Critically, *Kelly* was based on the state constitutional requirement for written decisions that determine causes. (Cal. Const., art. VI, § 14.) This applies to all cases, criminal and civil. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1262-1264.) Since it was not derived from the federal constitutional right to counsel on a criminal appeal as interpreted in *Anders*, the holdings of *Ben C.* and *Sade C.* limiting *Anders* requirements to criminal appeals are not relevant to the question whether the Court of Appeal may dismiss a contested appeal instead of deciding it in a written opinion.

Dependency Cases

Some of these arguments possibly can be made in dependency cases if the court dismisses a *Sade C.* appeal or files an opinion not in compliance with *Kelly* after the client has submitted a pro per filing, even if the court has rejected the filing. However, after *Phoenix H.* counsel may not argue the client has a right to file a pro per brief, and so that part of the reasoning of *Kelly* does not apply.