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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Conservatorship of the Person of BEN C.	D042702
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Petitioner and Respondent, v. BEN C., Objector and Appellant,	(Super. Ct. No. MH93262)

APPEAL from a judgment of the Superior Court of San Diego County, Kevin A. Enright, Judge. Affirmed.

Robert L. Visnick, under appointment by the Court of Appeal, for Objector and Appellant.

Cheryl A. Geyerman for Appellate Defenders, Inc., as Amicus Curiae on behalf of Objector and Appellant.

John J. Sansone, County Counsel, Thomas E. Montgomery, Assistant County Counsel, and Leonard W. Pollard II, Deputy County Counsel, for Petitioner and Respondent.

The question here is whether in light of our high court's opinion in *In re Sade C.* (1996) 13 Cal.4th 952 (*Sade C.*), the procedural safeguards established by *Anders v. California* (1967) 386 U.S. 738 (*Anders*), and *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), apply on appeal of an order for conservatorship of the person under the Lanterman-Petris-Short (LPS) Act (Welf. & Inst. Code,[1] § 5350 et seq.). In *Conservatorship of Margaret L.* (2001) 89 Cal.App.4th 675 (*Margaret L.*), a majority of the Fourth District Court of Appeal, Division Three, answered the question affirmatively. We respectfully disagree and hold our independent review of the record is unavailable in such cases to determine whether there is any arguable appellate issue.

BACKGROUND

A petition for the reestablishment of a conservatorship of the person of Ben C. under the LPS Act was filed on May 29, 2003. At a bench trial the court found Ben C. gravely disabled by a mental disorder. The court ordered the reestablishment of a conservatorship of Ben C. for one year and ordered him placed in a closed locked treatment facility.

Ben C.'s appointed counsel on appeal advises us he is unable to find any issue to raise on appeal, and, citing *Anders, supra,* 386 U.S. 738, and *Wende, supra*, 25 Cal.3d

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1 All statutory references are to the Welfare and Institutions Code.

436, he asks that we independently review the record to determine whether any arguable appellate issue exists. Counsel mentions insufficiency of the evidence as a possible issue. In a declaration counsel states he provided Ben C. a copy of the appellate brief and advised him that he may file a brief raising any points he chooses. We have not received a brief from Ben C.

DISCUSSION

I

In *Anders,* 386 U.S. 738, the United States Supreme Court held that in a criminal defendant's first appeal as of right, when appointed counsel conducts a conscientious examination of the proceedings but finds no meritorious ground of appeal he or she should advise the court and request permission to withdraw. Further, to protect the defendant's constitutional right to assistance of counsel, the "request must . . . be accompanied by a brief referring to anything in the record that might arguably support the appeal," and a "copy of counsel's brief should be furnished the indigent and time allowed him [or her] to raise any points that he [or she] chooses." (*Id.* at p. 744.) The appellate court "then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." (*Ibid.*)

The *Anders* court rejected the "no-merit letter" procedure approved in *In re Nash* (1964) 61 Cal.2d 491. (*Anders, supra,* 386 U.S. at pp. 742-744.) In *In re Nash,* the court held the requirement of *Douglas v. State of California* (1963) 372 U.S. 353—that an indigent criminal defendant be represented by appointed counsel on appeal—is met when appointed counsel thoroughly studies the record, consults with the defendant and trial

counsel, and conscientiously concludes there are no meritorious grounds of appeal, and the appellate court is satisfied from its independent review of the record "in the light of any points raised by the defendant personally that counsel's assessment of the record is correct." (*In re Nash, supra,* at p. 495.) In *Anders,* the court explained 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 [or her] client, as opposed to that of amicus curiae," and the "no-merit letter and the procedure it triggers do not reach that dignity." (*Anders, supra,* 386 U.S. at p. 744, italics omitted.)

In *Wende, supra,* 25 Cal.3d 436, the California Supreme Court held that in a criminal defendant's appeal "*Anders* requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous," and the "obligation is triggered by the receipt of such a brief from counsel and does not depend on the subsequent receipt of a brief from the defendant personally." (*Id.* at pp. 441-442.) "*Wende* reaches somewhat beyond *Anders*" (*Sade C., supra,* 13 Cal.4th at p. 980), by stating that appointed appellate counsel following the *Anders* procedure need not seek the court's permission to withdraw from the case "so long as he [or she] has not described the appeal as frivolous and has informed the defendant that he [or she] may request the court to have counsel relieved if he [or she] so desires." (*Wende,* at p. 442.)

The question in *Sade C.* was whether the procedures of *Anders* and *Wende* are applicable or should be extended to juvenile dependency proceedings. The court answered the question negatively, explaining that "[b]y its very terms, *Anders's*

'prophylactic' procedures are limited in their applicability to appointed appellate counsel's representation of an indigent *criminal defendant*—and there only in his [or her] first appeal as of right. An indigent parent adversely affected by a state-obtained decision on child custody or parental status is simply not a criminal defendant. Indeed, the proceedings in which he [or she] is involved must be deemed to be civil in nature and not criminal. [Citation.] To quote Chief Justice Burger's concurring opinion in *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 34 . . . , they are simply 'not "punitive." ' That they may be said to 'bear[] many of the indicia of a criminal trial' [citation] goes to form and not to substance. As a consequence they are far removed from the object of the *Anders* court's concern, which was the first appeal as of right *in a criminal action*." (*Sade C., supra,* 13 Cal.4th at p. 982.)

The court further explained in *Sade C.*: "*Anders's* 'prophylactic' procedures are dependent for their applicability on the existence of the indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the assistance of appellate counsel appointed by the state—and there again, only in his [or her] first appeal as of right. That right of the indigent criminal defendant, however, does not exist for the indigent parent adversely affected by a state-obtained decision on child custody or parental status. . . . [¶] Lastly, *Anders's* 'prophylactic' procedures are designed solely to protect the indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the assistance of appellate counsel appointed by the state—and there yet again, only in his [or her] first appeal as of right. Since that right of the indigent criminal defendant, by its very terms, does not exist

for the indigent parent adversely affected by a state-obtained decision on child custody or parental status, any protection of that nonexistent 'right'—whether in the form of the procedures in question or otherwise—fails at bottom for lack of an object." (*Sade C., supra,* 13 Cal.4th at pp. 983-982.)

In *Sade C.,* the court disapproved of *In re Andrew B.* (1995) 40 Cal.App.4th 825, 830, in which the court "broadly" concluded " '*Anders/Wende* procedures are required' whenever 'there is a right to appointed [appellate] counsel,' apparently no matter what its source, at least when a 'fundamental interest' is implicated." (*Sade C., supra,* 13 Cal.4th at p. 983, fn. 13.)

II

Before the *Sade C.* decision*,* the court in *Conservatorship of Besoyan* (1986) 181 Cal.App.3d 34, 36 (*Besoyan*), held the *Wende* procedure applied to an appeal of the imposition of a conservatorship under the LPS Act. In *Sade C.* the court noted that "[g]enerally, the Courts of Appeal have confined *Anders* and *Wende* to criminal appeals," but cited *Besoyan* and other cases to show "[e]xceptions, however, are apparent." (*Sade C., supra,* 13 Cal.4th at p. 962, fn. 2.) The court did not expressly disapprove of *Besoyan,* however, it declared "[t]o the extent that *any* decision of ours or of the Courts of Appeal states or implies that the applicability of *Anders* goes beyond what is described in the text, it is disapproved." (*Id.* at p. 984, fn. 13, italics added.) The court repeated the admonition later in the opinion. (*Id.* at p. 994, fn. 21.) The text of *Sade C.* repeatedly states *Anders's* "prophylactic" procedures apply only to appointed appellate counsel's

representation of an indigent criminal defendant in his or her first appeal. (*Id.* at pp. 977-979, 982-983, 985-986, 991.)[2]

In *Margaret L.,* the majority concluded that after *Sade C., Anders* and *Wende* remain applicable to LPS Act proceedings for conservatorship of the person. The court noted *Sade C.* did not expressly overrule *Besoyan,* and "[c]ases do not stand for questions not directly presented, or at least not directly answered." (*Margaret L., supra,* 89 Cal.App.4th at p. 680.) In our view, the Supreme Court's express disapproval in *Sade C.* of *any* Court of Appeal case extending the procedural protections of *Anders* and *Wende* beyond the factual context of *Anders* shows the Supreme Court's intent to overrule *Besoyan*; at the least, *Sade C.* calls *Besoyan's* viability into question. In any event, even if footnotes 13 and 21 of *Sade C.* do not set precedent here, we conclude the procedural protections of *Anders* and *Wende* are inapplicable to LPS Act conservatorship proceedings.

The majority in *Margaret L.* concluded *Anders* and *Wende* are applicable to LPS Act conservatorship proceedings because they are analogous to criminal proceedings. The majority noted "Margaret L. was accused of no crime, but she faces severe stigma and even more disabilities than a convicted felon. Not only is her sentence potentially indeterminate, she has lost the power to manage her property . . . , to have a professional

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2 We accepted the amicus curiae brief of Appellate Defenders, Inc., on behalf of appellant, on the continued viability of *Besoyan* after *Sade C.* Further, we asked Ben C.'s counsel and counsel for the San Diego County Health and Human Services Agency to submit briefing on the matter, and we have taken their responses into consideration.

license, to drive, to vote and even the right to refuse consent to certain medical treatment." (*Margaret L., supra,* 89 Cal.App.4th at p. 682.)

The majority relied on *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235, in which the court held that as in criminal cases, the "due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act." The court explained the "appointment of a conservator for appellant and her subsequent confinement in a mental hospital against her will deprived appellant of freedom in its most basic aspects and placed a lasting stigma on her reputation." (*Id.* at p. 223.) Persons subject to conservatorship proceedings are also entitled to other safeguards afforded criminal defendants, such as appointed counsel (§ 5365), a jury or court trial (§ 5350, subd. (d)) and a free transcript of the proceedings for purposes of appeal. (*Waltz v. Zumwalt* (1985) 167 Cal.App.3d 835, 838-839.)

In determining whether our independent review of the record is required, we may consider the LPS Act's " 'delicate balance "between the medical objectives of treating sick people without legal delays and the equally valid legal aim of insuring that persons are not deprived of their liberties without due process of law." [Citation.]' [Citations.] Integral to this delicate balance is the presence or absence of procedural safeguards at specific stages of LPS Act proceedings." (*Conservatorship of Kevin M.* (1996) 49 Cal.App.4th 79, 89.) We agree with the dissent in *Margaret L.,* that our independent review of the appellate record is not a procedural safeguard required to maintain this delicate balance, because there are safeguards afforded the conservatee throughout the

duration of the conservatorship process. (*Margaret L., supra,* 89 Cal.App.4th at pp. 686-687 [conc. & dis. opn. of Rylaarsdam, J.].)

As the dissent explained: "[B]ecause a conservatee's commitment is different in purpose and duration from a criminal defendant's incarceration, differences exist that afford a conservatee rights not granted to a criminal defendant. For example, conservatorships under section 5350 last for only one year. (§ 5361.) During that time, a conservatee can petition for immediate release or for a modification of the conservatorship's terms. (§§ 5358.3, 5364.) Also, . . . conservatees who display improvement can receive day passes to temporarily leave the facility where they are committed." (*Margaret L., supra,* 89 Cal.App.4th at pp. 686-687 [conc. & dis. opn. of Rylaarsdam, J.].)

Moreover, "[t]o extend the commitment beyond one year, the petitioning party must again prove beyond a reasonable doubt the conservatee is, at that time, gravely disabled. [Citations.] And, if requested, the conservatee is entitled to have the new proceeding tried before a jury. (§ 5365; *Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037.)" (*Margaret L., supra,* 89 Cal.App.4th at p. 687 [conc. & dis. opn. of Rylaarsdam, J.]; see also *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1015 [conservatorship under LPS Act " 'may not reasonably be deemed punishment

either in its design or purpose' " and it " 'is not analogous to criminal proceedings' "].[3]) Thus, conservatorship proceedings are distinguishable from criminal proceedings in which defendants may be sentenced to prison for lengthy terms and their only avenue of relief from error is through the appellate court.

Further, in contrast to a criminal conviction, the one-year limitation on conservatorships essentially renders *Wende* review ineffective, as by the time an appeal is processed the commitment order has or will soon automatically expire, precluding further commitment absent a new showing of grave disability. Although historically there have been relatively few appeals of conservatorship orders, an extension of *Anders* and *Wende* to LPS Act proceedings would prompt counsel who cannot find any appealable issue to seek our independent review of the entire appellate record each time a recommitment order is entered. We must balance the benefit of applying *Anders* and *Wende* to ensure appellate counsel " 'acts in the role of an active advocate in behalf of his [or her] client,' " against "the lost time and money, and most importantly, delay in entering a final decision." (*Margaret L., supra,* 89 Cal.App.4th at p. 687 [conc. & dis. opn. of Rylaarsdam, J.].)

As the court recognized in *Sade C.,* "[p]rocedures that are practically 'unproductive,' like those in question, need not be put into place, no matter how many and

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3 In *Conservatorship of Susan T., supra,* 8 Cal.4th 1005, 1020, the court held the federal exclusionary rule is inapplicable to conservatorship proceedings under the LPS Act. In a dissent, Justice Mosk disagreed with the holding and cited *Besoyan, supra,* 181 Cal.App.3d 34, approvingly. (*Conservatorship of Susan T.*, at p. 1023 [conc. & dis. opn. of Mosk, J.].)

how weighty the interests that theoretically support their use. To be sure, these procedures may have 'symbolic' value of some kind. [Citation.] Such value, however, is too slight to compel their invocation." (*Sade C., supra,* 13 Cal.4th at pp. 990-991, fn. omitted.) In the juvenile dependency context, this court has noted *Wende* review is "nearly always unproductive" and results in needless delay. (*In re Kayla G.* (1995) 40 Cal.App.4th 878, 888; *In re Angelica V.* (1995) 39 Cal.App.4th 1007, 1016 [we cannot "justify the devotion of time and energy for duplicative review of this special class of civil case, when all our experience teaches that such review is unproductive"].) Given "a significant improvement in the quality of appellate representation for indigents" since *Wende* was decided (*Margaret L., supra,* 89 Cal.App.4th at p. 688 [conc. & dis. opn. of Rylaarsdam, J.]), it is likely *Wende* review in the conservatorship context would also be unproductive.

We hold the procedures of *Anders* and *Wende* are inapplicable to conservatorship proceedings under the LPS Act. Accordingly, we do not independently review the appellate record for error.

DISPOSITION

The judgment is affirmed.

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McCONNELL, P. J.

WE CONCUR:

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HUFFMAN, J.

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AARON, J.