APPELLATE PROCEDURE

Appellate Procedure: Incorrectly Filed Appeals

***Thompson v. Park Place of Venice, Inc.*,**
888 So. 2d 47 (Fla. 1st Dist. App. 2003)

In workers'-compensation lawsuits, a district office for compensation claims must forward the notice of appeal to the proper district office when a party files a timely notice of appeal with an incorrect district office. The date of filing is the date on which the appellant filed the notice of appeal with the incorrect district office, not the date on which the correct district office received the forwarded filing.

FACTS AND PROCEDURAL HISTORY

John G. Thompson sought review of a final workers'-compensation order issued by a compensation-claims judge in the Sarasota district office. Because the final order was mailed on August 21, 2003, the final day to invoke the First District Court of Appeal's jurisdiction was Monday, September 22, 2003. Fla. R. App. P. 9.180(b)(2) (requiring that the notice of appeal be "filed with the lower tribunal within 30 days of the date the order to be reviewed is mailed by the lower tribunal to the parties"). On September 22, 2003, Thompson timely filed the notice of appeal with the St. Petersburg district office, which was the incorrect office. The St. Petersburg district office forwarded the notice to the proper district office in Sarasota. The Sarasota district office received the notice on September 23, 2003. The Appellee, Park Place of Venice, Inc., filed a motion to dismiss, arguing that Thompson did not file a timely appeal with the proper district office. The First District Court denied the motion.

ANALYSIS

In *Thompson*, the First District Court relied upon the reasoning of three cases: *Dayan v. H.I. Development/Holiday Inn*, 710 So. 2d 187 (Fla. 1st Dist. App. 1998); *Alfonso v. Department of Environmental Regulation*, 616 So. 2d 44 (Fla. 1993); and *Kaweblum v. Thornhill Estates Homeowners Assn., Inc.*, 755 So. 2d 85 (Fla. 2000). Specifically, the *Thompson* court used these prece-

dents to justify its extension of a non-workers'-compensation-case holding to a workers'-compensation case.

In *Dayan*, a party to a workers'-compensation proceeding incorrectly filed a timely notice of appeal in the appellate court instead of the lower tribunal. The *Dayan* court relied upon *Alfonso*, a case that involved a similar situation outside the workers'-compensation arena, to hold that jurisdiction had been properly invoked. Noting *Dayan's* extension of the holding to a workers' compensation case, the *Thompson* court looked to *Kaweblum* for guidance. In *Kaweblum*, a party filed a notice of appeal in the incorrect circuit court, and the Fourth District Court of Appeal dismissed the party's appeal as untimely because the forwarded notice of appeal arrived at the correct circuit court after the filing deadline. On appeal, the Florida Supreme Court discussed Article V, section 2(a) of the Florida Constitution, which states that "no cause shall be dismissed because an improper remedy has been sought," and Florida Rule of Appellate Procedure 9.040(b)(1) and (c), which provides as follows:

> (b) Forum. (1) If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court. . . .
> (c) Remedy. If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy.

The Florida Supreme Court in *Kaweblum*, therefore, held that both the Florida Constitution and the Florida Rules of Appellate Procedure require that a court transfer a notice of appeal that is improperly filed to the proper court, and the proper court shall consider the notice to have been filed on the date of the original filing with the improper court. The committee notes to Florida Rule of Appellate Procedure 9.040(b) support this interpretation.

In *Thompson*, the First District concluded "that the reasoning of *Kaweblum* applies with equal force to the instant matter." 2003 WL 22908497 at *1. The court could not justify a different result solely because *Thompson* involved a workers'-compensation appeal. Therefore, the court denied Park Place of Venice's motion to

dismiss and held that the notice of appeal was timely filed in the Sarasota district office on September 22, 2003.

SIGNIFICANCE

When an appealing party mistakenly files a timely notice of appeal in an incorrect court, the filing is considered to be filed with the correct court on the date of the original filing. The court that incorrectly receives the original filing has a duty to forward the notice to the proper court. This rule of law is equally applicable to an appeal in a workers'-compensation case, in which notices of appeal are filed with district offices.

RESEARCH REFERENCES

- 3 Fla. Jur. 2d *Appellate Review* § 121 (2004).
- Philip J. Padovano, *Florida Appellate Practice Series* vol. 2, § 24.3 (2004 ed. West) (available in WL, FLPRAC database).
- Allen C. Winsor, Student Author, *Appellate Procedure: Incompetence Forgiven* Kaweblum v. Thornhill Estates Homeowners Ass'n*., 755 So. 2d 85 (Fla. 2000)*, 53 Fla. L. Rev. 595 (2001).

Tara L. Carroll

Appellate Procedure: Intervention Test and Last Resort Rule

***Sullivan v. Sapp*,**
866 So. 2d 28 (Fla. 2004)

A party seeking to intervene in a cause of action must pass a two-step test. The first step requires that the intervenor have a legitimate interest in an issue that is currently being litigated. When an intervenor fails to pass this first step, the Florida Supreme Court may, however, overlook this deficiency if the claim presents a constitutional question of great importance to the citizens of Florida.

FACTS AND PROCEDURAL HISTORY

Frances Adrienne Sullivan filed a paternity suit against Landon Sapp to determine custody, parental responsibility, and child support for their son. The trial court affirmed that Sapp was the boy's natural father, held that the parents would share parental responsibility, and awarded primary physical residence of the child to Sullivan. The court further ruled that Sullivan and Sapp would alternate years claiming the child as a dependent for federal income tax purposes. Less than a week later, Sullivan moved for a rehearing to clarify the tax-exemption ruling. Before the court ruled on the motion, Sullivan died tragically in a car accident.

Thereafter, Sullivan's mother, Elizabeth, filed a motion seeking to intervene in the pending paternity action and requested grandparent visitation rights pursuant to Florida Statutes § 61.13(2)(b)2.c. (2001). Elizabeth argued that such a visitation award was in her grandson's best interest. Elizabeth also filed a "Motion to Substitute Parties," in which she asked the court to substitute her, as personal representative of her daughter's estate, for Sullivan in the paternity action. She asserted that Sullivan's death did not dissolve the action and substantive issues remained. The trial court granted Elizabeth's motion to substitute parties, but denied her motions for rehearing on the issues of custody and personal contact with the child because those issues were no longer in dispute at the time of Sullivan's death. Because the only pending issue—the tax-exemption ruling—was economic, and thus collateral in nature, the court held that Elizabeth had "no viable pending matter at issue in which she could intervene." *Sullivan*, 866 So. 2d at 31. The court also denied Elizabeth's motion to award grandparent visitation rights.

The First District Court of Appeal affirmed the trial court's decision and found Florida Statutes § 61.13(2)(b)2.c. to be facially unconstitutional because it intruded on a parent's fundamental right to raise his or her child without interference from the government. The Florida Supreme Court affirmed the appellate court's decision and found that Sullivan's death neither voided the paternity judgment nor mooted the motion for rehearing. It held that Elizabeth was not entitled to intervene in the paternity action and that Florida Statutes § 61.13(2)(b)2.c. was unconstitutional.

ANALYSIS

To answer the question of whether a grandparent may intervene in a paternity action, the Court applied a two-step test that is triggered whenever a party seeks to intervene in a cause of action. The first step requires a court to determine whether intervention is procedurally appropriate. Under Florida precedent, "the interest [that] will entitle a person to intervene . . . must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Union Central Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992) (citing *Morgareidge v. Howey*, 78 So. 14, 15 (Fla. 1918)). Only after this criterion is met should a court move to the second step and determine the merits of the intervenor's claim. In this case, the Court reasoned that Elizabeth failed to meet the first criterion because, when she filed her motion to intervene, the sole issue remaining between the parents involved the economic tax benefits. No dispute remained regarding the substantive matters of paternity, custody, child support, and visitation. Therefore, the matter in which she sought to intervene was no longer in litigation.

Because Elizabeth's claim failed the first step of the two-step test, the Court recognized that it could, and potentially should, resolve the case strictly on the procedural issue. It chose, however, to address the constitutional issue of whether Florida Statutes § 61.13(2)(b)2.c. violated a parent's right to privacy under the Florida Constitution. The Court stated that it made this choice to resolve conflicting rulings among the lower courts and because grandparent visitation rights are an "issue of great importance to the citizens of Florida." *Sullivan*, 866 So. 2d at 34. In evaluating the constitutionality of the current statute, the Court noted that it allows a court to, upon dissolution of the parents' marriage, "award the grandparents visitation rights with a minor child if it is in the child's best interest." Fla. Stat. § 61.13(2)(b)2.c. The Court also noted that it had previously declared provisions of two similar statutes, Florida Statutes §§ 752.01 (1995) and 61.13(7) (1999), to be unconstitutional because they sought to compel grandparent visitation or custody on the sole basis of the best interest of the child, without showing any threat or harm to the child. (For examples of cases showing that a demonstration of harm to the child is required before a court can find a compelling

state interest that justifies such an "invasion . . . into the parental privacy rights," *Sullivan*, 866 So. 2d at 37–38, see *Saul v. Brunetti*, 753 So. 2d 26, 28–29 (Fla. 2000); *Richardson v. Richardson*, 766 So. 2d 1036, 1039–1040 (Fla. 2000); *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998); *Beagle v. Beagle*, 678 So. 2d 1271, 1276 (Fla. 1996)). In this case, the Court noted that Elizabeth never asserted that her grandson would suffer harm if he did not visit with her. The Court, therefore, held the statute to be a facially unconstitutional violation of a parent's fundamental right to privacy and denied Elizabeth's motion for grandparent visitation rights.

CONCURRENCE AND DISSENT

Three Justices concurred in part with and dissented in part from the majority's opinion. They agreed that Elizabeth was not entitled to intervene in the paternity action because she failed to satisfy the Court's intervention test. They disagreed, however, with the majority's decision to evaluate the case's constitutional issue. Under the principle of judicial restraint, or the "last resort rule," a court should "avoid considering a constitutional question when the case can be decided on nonconstitutional grounds." *Id*. at 39 (Cantero, Wells, & Bell, JJ., concurring in part and dissenting in part). The dissent rejected the majority's assertion of the need to maintain uniformity in Florida law. It argued that no conflict would exist if the Court properly quashed the First District's decision on procedural grounds. *Id*. at 40. Moreover, the dissent found a thinly-veiled pretext in the majority's claim that deciding the constitutionality of the statute would guide lower courts, because any opinion the Court issues is for the purpose of guiding lower courts. According to the dissent, the real purpose of the majority's ruling was to allow the Court to "quietly but inevitably eviscerate the last resort rule." *Id*. at 40.

SIGNIFICANCE

From a substantive perspective, this case declares Florida Statutes § 61.13(2)(b)2.c. unconstitutional because it does not require a showing of harm to the child prior to awarding grandparent visitation rights. From a procedural perspective, this case makes clear that any time a party seeks to intervene in an action, the court must first determine whether the intervention is proper

and then determine whether the intervenor's claim has merit. And while a court normally will not proceed to the second step when intervention is improper, the Florida Supreme Court may proceed to the merits of a constitutional question if it is a matter of great public importance.

RESEARCH REFERENCES

- 10 Fla. Jur. 2d *Constitutional Law* § 74 (2004).
- 39 Fla. Jur. 2d *Parties* § 67 (2004).
- Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003, 1025 (1994).

Nicole M. Panitz
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Appellate Procedure: Res Judicata

***Topps v. State*,**
865 So. 2d 1253 (Fla. 2004)

The Florida Supreme Court resolved a conflict among various district courts of appeal in holding that an unelaborated denial of relief associated with extraordinary writ petitions does not constitute a decision based "on the merits" of the claim. As a result, the doctrine of res judicata does not apply to such denials, and a petitioner is not barred from relitigating the same issue on direct appeal.

FACTS AND PROCEDURAL HISTORY

In June 2001, Martha Topps filed a petition for a writ of mandamus challenging the Stop Turning Out Prisoners Act, which requires "inmates [to] serve eighty-five percent of their criminal sentences in prison." *Topps*, 865 So. 2d at 1254 (referencing 1995 Fla. Laws ch. 294 § 2 at 2717-2718, enacted in Fla. Stat. § 944.275(4)(b)(3)). The Florida Supreme Court considered Topps's arguments, deemed them meritless, and denied her petition. The Court did so, however, by issuing an unelaborated order that denied relief. Topps later filed another writ of mandamus petition and reasserted the same issue. The Court denied Topps's

second petition based on the doctrine of res judicata and used her case to clarify the discrepancies in Florida courts regarding unelaborated denials of extraordinary writ petitions.

ANALYSIS

Res judicata procedurally precludes a litigant from presenting the same claim in a subsequent action. As the Court explained, "if a matter has already been decided, the petitioner has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined again in *any court* (except, of course, for appeals by right)." *Id*. at 1255 (emphasis in original). The doctrine of res judicata is triggered by the presence of four identities: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of . . . parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made." *Id*. The Court noted that the related doctrine of collateral estoppel also prevents relitigation, but that it does so in cases that involve the same issues between the same parties linked with a different cause of action. For res judicata to apply, an issue must have been decided on the merits of the substantive issue(s).

In *Topps*, the Court reasoned that, although it issued an unelaborated order for Topps's prior petition, the Court intended the denial to be on the merits. The Court further reasoned that the doctrine of res judicata applied because the four identities existed in both petitions. As a result, the Court denied Topps's second petition.

Prior to this ruling, Florida courts have disagreed on whether an unelaborated denial of relief connected to extraordinary writ petitions should constitute a decision "on the merits." The First, Second, and Fifth District Courts of Appeal have held that an unelaborated denial will not be considered a ruling on the merits and will not bar the petitioner from reasserting the matter on direct appeal. By contrast, the Third and Fourth District Courts of Appeal have held that an unelaborated denial of such a petition will constitute a ruling on the merits.

To resolve this inconsistency, the Court turned to an analysis of the character of extraordinary writs. The Court noted that such writs are not an absolute right and may be denied for a plethora of reasons, some of which may not be based upon the merits of the

petition. For example, an appellate court may deny an extraordinary writ petition because the litigant presents issues that are not ripe for consideration or issues that have become moot. Or, when a litigant files a petition before the trial court has entered a judgment, an appellate court may deny the petition because it determines that it should review the allegations later, on direct appeal.

Citing these examples, the *Topps* Court concluded that it did not want to exclude a litigant from potential relief in another court if an issue had not been determined on the merits. To guarantee that courts consistently give all issues proper consideration, it held that, going forward, "unelaborated orders denying relief in connection with all extraordinary writ petitions issued by Florida courts shall *not* be deemed to be decisions on the merits." *Id.* at 1258 (emphasis in original). Such an unelaborated order, therefore, will not "later bar the litigant from presenting the issue under the doctrines of res judicata or collateral estoppel unless there is a citation to authority or other statement that clearly shows" that the court considered the issue on the merits and denied relief. *Id.*

The Court narrowed the scope of its holding in declaring that the rule will function only prospectively. Thus, lower courts need not reconsider the claims articulated in any extraordinary writ petition when the same issues were previously denied in an unelaborated order. Moreover, the Court noted that its holding does not require lower courts to issue an opinion in every writ case. Rather, a court must simply include a phrase such as "with prejudice" or "on the merits" in its order to indicate that it considered and denied the writ petition on its merits.

SIGNIFICANCE

This case clarifies Florida law for unelaborated denials in extraordinary writ cases. For res judicata or collateral estoppel to apply to a subsequent petition on the same issue, the prior order must include the phrase "with prejudice" or "on the merits," or otherwise indicate by citation or statement that the court considered the issue on the merits before denial. Otherwise, a petitioner who receives an unelaborated denial in an extraordinary writ case may subsequently reassert exactly the same issue.

RESEARCH REFERENCES

- 32A Fla. Jur. 2d *Judgments and Decrees* § 161 (2003).
- Barbara Green, *Cracking the Code: Interpreting and Enforcing the Appellate Court's Decision and Mandate*, 32 Stetson L. Rev. 393 (2003).
- Anthony C. Musto, *Appellate Practice: 1998 Survey of Florida Law*, 23 Nova L. Rev. 1 (1998).

Nicole M. Panitz

Appellate Procedure: Sentencing Errors and *Anders* Briefs

***A.F.E. v. State*,**
853 So. 2d 1091 (Fla. 1st Dist. App. 2003)

Under the current Florida Rules of Juvenile Procedure, counsel for indigent defendants must preserve a sentencing error by either objecting at the sentencing proceeding, filing a post-trial motion before serving an appellate brief, or identifying the sentencing error within an *Anders* brief. Otherwise, a defendant's right to raise the issue on direct appeal will be extinguished, even when the sentence is clearly erroneous.

FACTS AND PROCEDURAL HISTORY

After authorities found a note in A.F.E.'s high school containing a bomb threat, the Florida Department of Juvenile Justice (DJJ) charged A.F.E. with one count of making a false report about planting a bomb or explosive—a second-degree felony under Florida Statutes § 790.163 (2001). A.F.E did not contest the charge. In its predisposition report, DJJ recommended either probation with adjudication, or alternatively, commitment to a moderate-risk facility. The trial court departed from the disposition recommendation and committed A.F.E. to a high-risk, residential-commitment facility. A.F.E.'s appointed counsel did not object to the court's sentencing departure when the trial court entered its disposition order. On appeal, appointed counsel also failed to file a motion to correct the disposition order before serving its appellate brief, as required by Florida Rules of Juvenile Procedure 8.135(b)(2). Instead, counsel filed an *Anders* brief with the First

District Court of Appeal indicating that "counsel could not, in good faith, argue that reversible error occurred below." *A.F.E.*, 853 So. 2d at 1093; *see Anders v. California*, 386 U.S. 738, 742–745 (1967) (establishing the procedural mechanism that appellate counsel must follow when requesting to withdraw from representation of an indigent client because no non-frivolous basis for appeal exists).

The First District Court undertook a "full and independent review of the record" pursuant to *Anders*' procedural mandate. *In re Anders Briefs*, 581 So. 2d 149, 151 (Fla. 1991). It found that the record did not support, with substantial evidence, the trial court's departure from DJJ's disposition recommendation. Despite its concerns regarding the erroneous sentencing, the First District Court found itself constrained to affirm the trial court's ruling because counsel did not preserve the issue with either an objection at trial, a motion to correct the disposition order, or an *Anders* brief that addressed the erroneous sentencing.

ANALYSIS

Anders mandated that, whenever counsel for an indigent appellant files a motion to withdraw, counsel must simultaneously file a "brief referring to every arguable legal point in the record that might support an appeal." *Id*. The purpose of an *Anders* brief is to assist the court in determining whether counsel should be permitted to withdraw. Once the brief is filed, the appellate court assumes the responsibility of conducting a full and independent review of the record to discover any arguable issues. The Florida Supreme Court clarified the scope of this independent review in *State v. Causey* and noted that "[w]hile courts should not assume the role of appellate counsel, reversible error should not be ignored simply because an indigent appellant or a public defender failed to point it out." 503 So. 2d 321, 322–323 (Fla. 1987). Theoretically, the *Anders*-brief mechanism, as clarified by *Causey,* ensures that an indigent client is not denied his or her Sixth Amendment right to counsel when any non-frivolous issue exists.

In *A.F.E.*, the First District Court indicated its desire to follow the *Anders* and *Causey* mandates, but noted that it faced the same dilemma posed in *Washington v. State*. 814 So. 2d 1187 (Fla. 5th Dist. App. 2002), *cert. dismissed*, 831 So. 2d 675 (Fla. 2002). In *Washington*, the Fifth District Court of Appeal found that the

Criminal Appeal Reform Act of 1996, the rules adopted by the Florida Supreme Court to implement the Act, and *Maddox v. State*, 760 So. 2d 89 (Fla. 2000), precluded an appellate court from reversing any issue that counsel did not preserve for appeal, even when the unpreserved issue was a fundamental sentencing error. *See* 1996 Fla. Laws ch. 96-248 (creating the Criminal Repeal Reform Act of 1996); *Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (Fla. 1996) (*Amendments I*) (incorporating the Criminal Appeal Reform Act of 1996 into the Florida Rules of Appellate Procedure); and *Amendments to the Florida Rules of Criminal Procedure 3.111(e) and 3.800 and Florida Rules of Appellate Procedure 9.020(h), 9.140, and 9.600*, 761 So. 2d 1015 (Fla. 1999) (*Amendments II*) (revising the Florida Rules of Appellate Procedure to reflect the intent of the Criminal Appeals Reform Act of 1996). Thus, the First District in *A.F.E.* shared the "misgivings and concerns" that the Fifth District expressed in *Washington*: *Maddox* effectively frustrated the *Anders* and *Causey* directives. *A.F.E.*, 853 So. 2d at 1093. Specifically, when counsel fails to preserve a non-frivolous and even clear error, the *Anders*-brief mechanism will not protect an indigent client's right to raise the issue on direct appeal. Instead, the indigent client can seek only post-conviction relief. Such relief is of little value to an indigent client who has no right to counsel in post-conviction proceedings. *Washington*, 814 So. 2d at 1189. Post-conviction relief is particularly valueless in a juvenile proceeding, in which "the sentence imposed may be completed before any relief is granted." *A.F.E.*, 853 So. 2d at 1093.

These concerns prompted the First District to certify, despite its affirmation of the trial court's sentence, the following question to the Florida Supreme Court:

> Notwithstanding *Maddox,* should an appellate court correct a sentencing error in an *Anders* case which was not preserved pursuant to the applicable rules of procedure? If not, what steps should an appellate court follow to carry out the mandates of *Anders* and *Causey* in such a case?

Id. at 1095 (typeface altered). This question restates the same question that the Fifth District certified to the Florida Supreme Court in *Washington*. 814 So. 2d at 1190.

SIGNIFICANCE

A.F.E. highlights the gap between the *Anders* and *Causey* mandates, and the revised Florida Rules of Appellate Procedure and Criminal Procedure that seek to reduce frivolous appeals. Unless counsel for an indigent defendant properly preserves a sentencing error as an issue for appeal, appellate courts are required to affirm the sentence, even when it is clearly erroneous. Florida courts and indigent defendants will continue to face this inequitable result until either the Florida Supreme Court answers the certified questions of *A.F.E.* and *Washington*, or the Florida legislature changes the rules.

RESEARCH REFERENCES

- 14 Fla. Jur. 2d *Criminal Law* § 553 (2001 & Supp. 2004).
- 15A Fla. Jur. 2d. *Criminal Law* § 2889 (2001)

Terri L. Bryson

Appellate Procedure: Termination of Parental Rights

***N.S.H. v. Florida Department of Children and Family Services*,**
843 So. 2d 898 (Fla. 2003)

The *Anders* procedures, which apply to criminal cases and civil-commitment proceedings, do not apply to civil cases involving the termination of parental rights.

FACTS AND PROCEDURAL HISTORY

In *N.S.H.*, the court-appointed counsel of a parent involved in a termination-of-parental-rights proceeding filed a motion with Florida's Fifth District Court of Appeal to withdraw from representation. The attorney asserted that no valid legal issue existed and that any appeal would be frivolous. The Fifth District Court, upon granting the motion, certified to the Florida Supreme Court the question of whether the *Anders* procedures, which are applicable in criminal cases, should also be applied in cases involving the termination of parental rights. In response, the Court declined to extend *Anders*'s procedural requirements to such cases.

ANALYSIS

In 1967, the United States Supreme Court sought to protect an indigent criminal defendant's right to appellate counsel when the Court established a specific set of procedures that appointed counsel must follow when seeking to withdraw from representation. *Anders v. Cal.*, 386 U.S. 738 (1967). Under *Anders*, when counsel determines that an appeal is wholly frivolous, he or she must file a brief requesting the court's permission to withdraw and highlight any facts "that might arguably support the appeal." *Id*. at 744. Upon receiving a motion to withdraw and an accompanying *Anders* brief, the court must independently analyze the complete record to determine whether the indigent defendant's appeal has any merit. If the court determines the appeal is frivolous, the attorney is permitted to withdraw, and the court will dismiss the case or proceed to a decision on the merits, as appropriate. However, if the court finds that the appeal is supported by any legitimate claim, the defendant's appeal must proceed with the assistance of appointed counsel.

The Florida Supreme Court extended *Anders*'s procedural requirements to appeals of involuntary-civil-commitment proceedings in *Pullen v. State*. 802 So. 2d 1113 (Fla. 2001). Prior to the Fifth District Court's decision in *N.S.H.*, however, the Florida Supreme Court had not ruled on whether the *Anders* procedural requirements should also be extended to cases involving the termination of parental rights, even though four of Florida's other district courts of appeal had declined to do so. In one such case, *Ostrum v. State Department of Health & Rehabilitative Services*, the Fourth District Court of Appeal held that, rather than using the *Anders* procedures, a court-appointed attorney who determines that a client's appeal is without merit may simply file a motion to withdraw as counsel. 663 So. 2d 1359, 1361 (Fla. 4th Dist. App. 1995). That motion must also be served on the client, who is then afforded the opportunity to file his or her own appellate brief. If the client does not file a brief within the time limit established by the court, the appeal is dismissed. In contrast to the *Anders* procedures, the appellate court is not required to independently review the entire record for appealable issues. The court should consider only whether the unrepresented client's brief establishes a preliminary basis for appeal. If the court finds the appeal to have merit, the case will resume as any ordinary

appeal with the court-appointed counsel's assistance. The Florida Supreme Court expanded on the *Ostrum* procedure in *Pullen* when it required the moving attorney to include, within the motion to withdraw, a certification that he or she has conducted a good faith review of the record and determined that no valid claims exist to support the client's appeal.

In answering the question certified in *N.S.H.*, the Florida Supreme Court analyzed both the *Ostrum-Pullen* procedures and their more stringent counterparts, the *Anders* procedures. The Court observed that the *Anders* procedures require courts to depart from their "traditional role as a neutral decision maker" and, instead, force courts to act as advocates for the unrepresented clients. *N.S.H.*, 843 So. 2d at 901. While the Court recognized the need to protect an indigent defendant's right to appellate counsel in criminal cases and in civil-commitment proceedings, it reasoned that in all other civil cases, a client's physical liberties are not at stake, and it is inappropriate for a court to assume the role of advocate. The Court also considered that, unlike criminal cases, termination-of-parental-rights cases implicate the rights of at least two individuals: the parent and the child. Moreover, in many cases two parents have conflicting interests at stake. The Florida Supreme Court recognized that the *Anders* procedures would thus require appellate courts to review the often long and extensively fact-based records inherent in termination-of-parental-rights cases. Because any potential benefits that may be afforded to parents by requiring the use of the *Anders* procedures would be outweighed by the substantial burdens that *Anders* would place on the court system and the possible detrimental effect it would have on childrens' rights, the Court concluded that the due process considerations under *Mathews v. Eldridge*, 424 U.S. 319 (1976), do not require the use of *Anders* procedures. The Court, therefore, held that the procedures developed in *Ostrum* and refined in *Pullen* are more appropriate for termination-of-parental-rights cases.

SIGNIFICANCE

When a court-appointed attorney representing an indigent client in a termination-of-parental-rights appeal determines that the client's claim is wholly frivolous and seeks to withdraw as counsel, the court is not required to follow the *Anders* procedures.

An appellate court can rely on the attorney's certification that he or she has conducted a good faith review of the record, and the court is not required to complete a full and independent review before granting the motion to withdraw. Any client who wishes to pursue such an appeal despite the attorney's conclusions must file his or her own appellate brief and convince the court that the facts of the case support an appeal to retain court-appointed counsel.

RESEARCH REFERENCES

- 25 Fla. Jur. 2d *Family Law* §§ 281, 296 (2004).
- Patricia C. Kussmann, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 92 A.L.R.5th 379 (2004).
- Michele R. Forte, Student Author, *Making the Case for Effective Assistance of Counsel in Involuntary Termination of Parental Rights Proceedings*, 28 Nova L. Rev. 193 (2003).

J. Jervis Wise