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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re NICHOLAS H., a Person Coming
Under the Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Petitioner and Respondent,

v.

KIMBERLY H.,

Objector and Appellant.

A094095

(Alameda County
Juvenile Ct. No. 178428)

I. INTRODUCTION

Kimberly H. appeals from a January 8, 2000, order (the January 8 order) that was entered after a contested six-month review hearing in this dependency case involving Kimberly’s six-year-old son, Nicholas. For reasons that follow, we reverse the January 8 order.

II. NICHOLAS I

This is the third appeal Kimberly has filed in this case, the lengthy and troubling history of which is summarized in *In re Nicholas H.* (2001) 91 Cal.App.4th 86 (hereafter *Nicholas I*). A brief summary of this factual history is sufficient for present purposes.

Nicholas was taken into custody by the Alameda County Social Services Agency (the Agency) on February 7, 2000. (*Nicholas I, supra*, 91 Cal.App.4th at p. 89.) Thomas G. was identified as Nicholas’s alleged father. The Agency

placed Nicholas in Thomas's care on February 15, 2000, and he has remained there throughout these proceedings. (*Id.* at p. 91.) Kimberly has consistently maintained that Thomas is not Nicholas's biological father and that he has no parental rights in these proceedings. Thomas has maintained that his strong father-son relationship and parental bond with Nicholas qualifies him as a presumed father. (*Id.* at pp. 89, 98.) However, Thomas has also admitted under oath that he is not Nicholas's biological father. (*Id.* at p. 98.)

In *Nicholas I*, this court consolidated Kimberly's two prior appeals because the primary issue in both cases was whether the juvenile court erred by declaring that Thomas is Nicholas's presumed father. (*Nicholas I, supra*, 91 Cal.App.4th at p. 89.) We concluded that a presumption that Thomas is Nicholas's natural father arose during the juvenile court proceedings, but that presumption was rebutted by clear and convincing evidence that was presented during a contested dispositional hearing. (*Id.* at pp. 103-110.) We reversed both an August 2, 2000, dispositional order and an October 6, 2000, six-month review order to the extent that they implemented the juvenile court's erroneous finding that the presumption was not rebutted. We expressly left to the juvenile court the task of determining the effect of our decision on the specific rulings that were set forth in the challenged orders. (*Id.* at p. 110.)

III. THE PRESENT APPEAL

When we decided *Nicholas I*, this appeal was already pending. We chose not to consolidate this case with the prior appeals because briefing was not yet complete and we did not want to delay resolving an important issue. Nevertheless, the primary issue presented in this appeal is identical to the dispositive issue in *Nicholas I*, i.e., whether Thomas is the presumed father of Nicholas.

In the present case, Kimberly contends the juvenile court's January 8 order must be reversed to the extent it continues the placement of Nicholas with Thomas. Although she maintains that there are alternative grounds for removing Nicholas from Thomas's care, her primary contention is that the court's placement

is based on the erroneous finding that Thomas “qualified as a presumed father, thereby qualified as a parent under Family Code 7611 and, therefore, qualified for placement pursuant to Welfare and Institutions Code section 361.2.”

Our decision in *Nicholas I* requires us to reverse the January 8 order to the extent that it implements the juvenile court’s erroneous finding that the presumption that Thomas is Nicholas’s natural father has not been rebutted. As we found in *Nicholas I*, the precise effect of the juvenile court’s erroneous assumption on the specific rulings that are formalized in the January 8 order is best determined by the juvenile court itself. We cannot fairly or efficiently evaluate each of the court’s discreet rulings when all were based on the false premise that Thomas is Nicholas’s presumed father.

In a letter brief filed at our request,¹ Kimberly argues that this court should resolve a separate issue raised by her appeal. She asks us to find that Welfare and Institutions Code section 361.4 precludes Thomas from becoming a foster parent for Nicholas. As a court of review, we decline this invitation to address an issue that has not been litigated in the court below.

Both Thomas and the Agency ask us to affirm the juvenile court’s finding that Nicholas could not be safely returned to Kimberly’s physical custody at the conclusion of the six-month review hearing. We decline this invitation as well. The January 8 order does not contain any express finding on this issue. At the January 8 hearing, the court did state that returning Nicholas to Kimberly would be detrimental to Nicholas at that time. However, the court’s reasoning was based on the incorrect premise that two parents were asserting competing claims for physical custody of their child. Absent this premise, the court’s analysis and conclusion as to this and other issues related to Nicholas’s placement could be substantially altered.

¹ After we filed our decision in *Nicholas I*, we inquired of the parties whether the issues presented by the present appeal had been rendered moot.

IV. DISPOSITION

The January 8, 2000, order is reversed and this case is remanded to the juvenile court so that it can reconsider the issues presented in light of our decision in *Nicholas I*.

Haerle, J.

We concur:

Kline, P.J.

Lambden, J.