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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

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.	A095267 (Alameda County Juvenile Ct. No. 178428)

I. INTRODUCTION

This is the fourth appeal filed by Kimberly H. in this on-going dependency case involving Kimberly's six-year-old son, Nicholas.

Kimberly's first two appeals in this case were consolidated by this court and resulted in a published opinion. (*In re Nicholas H*. (2001) 91 Cal.App.4th 86, rev. granted Nov. 14, 2001 [113 Cal.Rptr.2d 825] (hereafter *Nicholas I*).) We resolved Kimberly's third appeal in an unpublished opinion. (*In re Nicholas H*. (Oct. 9, 2001, AO94095) [nonpub. opn.] rev. granted Dec. 19, 2001 (hereafter *Nicholas II*).) *Nicholas I* and *Nicholas II* set forth the factual and procedural history of this case and contain our extensive analysis of an important legal issue which arises again in this appeal.

Therefore, the present opinion contains numerous references to both *Nicholas I* and *Nicholas II*.[1]

In this appeal, Kimberly appeals from orders entered by the juvenile court on April 4, 2001, April 20, 2001, and May 9, 2001. For the reasons that follow, we reverse in part and remand this case to the juvenile court.

II. STATEMENT OF FACTS[2]

A. *Background*

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.) In August 2000, Thomas obtained permission from the juvenile court to move with Nicholas to Southern California. (*Id*. at p. 99.) In October 2000, the court ordered that the location of visits between Kimberly and Nicholas was to alternate between Alameda County and Southern California. (*Id*. at p. 101.)

Kimberly has consistently maintained that Thomas is not Nicholas's biological father, that he has no parental rights in these proceedings, and that Nicholas should not be placed in his care. Thomas has maintained that his strong father-son relationship and parental bond with Nicholas qualifies him as a "presumed" father.[3] (*Nicholas I, supra*, 91 Cal.App.4th at pp. 89, 98.) However, Thomas has also admitted under oath that he is not Nicholas's biological father. (*Id*. at p. 98.)

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[1] We recognize that the Supreme Court has granted review in *Nicholas I* and *Nicholas II*. Thus, these opinions are not published and, as a general rule, cannot be cited or relied on in "any other action or proceeding." (Cal. Rules of Court, rule 977(a).) However, the present opinion derives from the same action which spawned our prior opinions.

Furthermore, while unpublished opinions cannot be relied on as precedent, a court may adapt the analysis of an issue that is set forth in a depublished opinion. (See, e.g., *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254 & fn. 9.) In the present case, we do not rely on our prior decisions as precedent. Rather, in order to resolve the present appeal and for the sake of judicial economy, we adopt and reiterate our own prior analyses of issues that resurface for the fourth time in this case.

Finally, to obtain context, maintain consistency and economize judicial resources, we take judicial notice of our prior opinions in *Nicholas I* and *Nicholas II*. (Evid. Code, § 451, subd. (a); see *In re Luke L.* (1996) 44 Cal.App.4th 670, 674, fn. 3.)

[2] A detailed summary of the facts of this case appears in *Nicholas I, supra*, 91 Cal.App.4th 86.

[3] See Family Code section 7611.

B. *Prior Appeals*

In *Nicholas I*, this court consolidated Kimberly's separately filed appeals from an August 2, 2000, dispositional order and an October 6, 2000, six-month review order. 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 the dispositional order and the 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.)

Kimberly filed her third appeal in this case before we issued our opinion in *Nicholas I.* Kimberly challenged a January 8, 2000, order entered after a contested six-month review hearing. As we explained in *Nicholas II*, the primary issue presented was identical to the dispositive issue in *Nicholas I*, i.e., whether Thomas is the presumed father of Nicholas. We reversed the juvenile court's January 8 order to the extent that it implemented the juvenile court's erroneous finding that the presumption that Thomas is Nicholas's natural father had not been rebutted.

C. *The 12-Month Review Proceedings*

The present appeal is from three orders issued by the juvenile court at separate hearings conducted as part of the 12-month review process. As was true in *Nicholas II*, the orders that are the subject of this appeal were made before this court filed its opinion in *Nicholas I* reversing the juvenile court's finding that Thomas is Nicholas's presumed father.

The Agency status report filed in anticipation of the 12-month review indicated that Nicholas and Thomas were living with Thomas's mother in Southern California. The Agency recommended that Nicholas be continued as a court dependent, that both

Thomas and Kimberly receive an additional six months of services, and that the court continue all other prior orders.

The first 12-month review hearing took place on April 4, 2001. Kimberly appeared and contested the Agency's recommendations. The court continued the matter and scheduled a contested hearing for April 20, 2001.

Kimberly's counsel appeared at the April 20 hearing but requested a continuance because Kimberly was not available. Her infant son Joshua had been hospitalized after suffering an injury. The Agency's counsel did not object to the continuance. However, counsel did request that Kimberly's visitation order with Nicholas be modified in light of the "current situation with Joshua." Counsel for the Agency was concerned by allegedly inconsistent reports about Joshua's injury and because Joshua had been placed under a protective hold while at the hospital. The Agency acknowledged visitation could not be modified that day because Kimberly had not been given notice of the Agency's modification request. Therefore, the Agency asked that a separate hearing be scheduled to address visitation.

The juvenile court continued the 12-month review for a contested hearing to commence on August 3. The court also scheduled a hearing for May 9, 2001, to address issues regarding visitation. The court also made the following ruling: "[I]n light of what I've been told this morning, that Joshua is now on a protective hold and that the Agency is raising concerns about the care, I am going to modify the order this morning sua sponte so that, in the future, between now and the hearing date on visitation, Mother's visits shall occur in Southern California only and shall be supervised."

At the May 9 hearing, the Agency requested that Kimberly's visitation order be permanently modified to provide that all visits with Nicholas be supervised and take place in Southern California. When asked to clarify the basis for this request, the Agency worker, Ruth Levin, admitted that she did not have a concern that Kimberly "would physically harm Nicholas or that she would be dangerous to Nicholas in other ways." Rather, Levin requested the change because she had heard that Kimberly had driven a car without a license. Further, Kimberly had changed her residence and the Agency had been

unable to "clear" her new residence for overnight stays. Nicholas's counsel supported the Agency's modification request because he was concerned that the trips Nicholas made to Northern California to visit Kimberly were too burdensome for the boy.

Levin testified at the hearing. She recounted an incident during which she discovered Kimberly sitting in the driver's seat of a parked car and asked if she had been driving without a license. Kimberly responded that she had not been driving but was waiting for a friend to return from an errand. Levin testified that she was concerned Kimberly might obtain access to a car and drive Nicholas somewhere in which case Nicholas's safety or well-being could be in jeopardy. Levin testified that she did not have any concern that Kimberly would abuse Nicholas.

Levin testified that Kimberly had refused to give her information about a man named Steven whom Kimberly was living with at the time Kimberly's son Joshua was injured. When Levin discovered that Kimberly had spent time at that man's home during a visit with Nicholas, Levin asked for information about him so she could do a background check. Rather than provide the requested information, Kimberly told Levin she would not stay there anymore. Levin admitted during cross-examination that Kimberly had given the Agency the name of her current landlord and that a background check on that man had been completed.

Kimberly testified that she had a driver's license in the past which was revoked because of parking fines. Kimberly testified that she had not driven a car in the past year. Kimberly reported that a friend named Dan drove her and Joshua to the hospital when Joshua was hurt. On the night Joshua was injured, Kimberly was at a parenting class. The next morning, Dan drove her and Joshua to the hospital. Kimberly testified that at that time this incident occurred, she and Joshua were staying at the home of a man named Steve because the rooms she had arranged to rent in Dan's home had not yet been vacated by the prior tenant.

In addition to witness testimony, the juvenile court admitted into evidence an Attachment Study and a Psychological Evaluation that had been done for Kimberly and Nicholas. Nicholas' counsel relied on these reports to support the Agency's request that

visits be confined to Southern California. Counsel for Nicholas underscored that such a restriction would be less burdensome for Nicholas and would give visitation the consistency and predictability Nicholas wanted and needed. However, Nicholas's counsel did not support the Agency's request that visits be supervised because the Attachment Study indicated that Kimberly was appropriate with Nicholas and demonstrated parenting knowledge and responsibilities.

At the close of the May 9 hearing, the juvenile court made the following rulings: The Agency's concern that Kimberly had been driving without a license was "misplaced" and, in any event, would not warrant a change in visitation. However, Kimberly had "willfully frustrated" the Agency's attempt to run a background check on Steve and had moved into that home without assuring that it was safe. Joshua had been injured while staying at that home and there were allegations that Kimberly's neglect resulted in that serious injury. Therefore, the court ordered that Kimberly's visits with Nicholas would be limited to two supervised weekend visits per month in Southern California.

III. DISCUSSION

A. *The Placement With Thomas*

Kimberly's first argument is that the April 4 order, the April 20 order, and the May 9 order, must all be reversed to the extent they continue the placement of Nicholas with Thomas.

The Agency argues this court can and should ignore Kimberly's objection to the continuing placement orders because, in the Agency's view, this court should not "restate what it has already decided" in *Nicholas I* and *Nicholas II*. We reject the Agency's argument for two reasons.

First, the orders at issue in this case are appealable orders. "A 'subsequent order' after a declaration of dependency in juvenile court proceedings (Welf. & Inst. Code, § 300 et seq.) is appealable as an order after judgment. [Citations.] (Eisenberg, et al. Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2001) ¶ 2:163, p. 2-78.1; see also Welf. & Inst. Code, § 395; *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th

1391, 1395.) Therefore, we are not comfortable simply ignoring Kimberly's challenge to these appealable orders.

Second, the appealed orders (all of which were made before we filed our opinion in *Nicholas I*) either implicitly or explicitly implement the juvenile court's conclusion that Thomas continues to be the presumed father of Nicholas. The Agency is correct that this court has already decided that the juvenile court erred by finding that the presumption of natural fatherhood was not rebutted in this case. However, both the Agency and Thomas have expressed doubt as to the status of our prior holding in light of the supreme court's orders granting review in *Nicholas I* and *Nicholas II*. Therefore, we conclude Kimberly's argument, although redundant, should be addressed.

Pursuant to our analysis in *Nicholas I*, which we incorporate by reference and adopt here (see footnote 1), we find that the presumption that Thomas is the natural father of Nicholas has been rebutted in this case. Therefore, we will reverse each of the appealed orders to the limited extent they continue to implement the juvenile court's conclusion that Thomas is Nicholas's presumed father. However, we address two important issues which we hope will provide guidance to Kimberly's appellate counsel as this case continues.

First, as we expressly advised in *Nicholas II*, this court is a court of review, and we will not "address an issue that has not been litigated in the court below." (*Nicholas II, supra*, at p. 3.) Therefore, we summarily reject Kimberly's specific request that we hold that Thomas is precluded from becoming a foster parent for Nicholas by Welfare and Institutions Code section 361.4 (section 361.4) because he has a prior felony conviction for domestic violence. We also decline to address Kimberly's general claim that Nicholas cannot be placed with Thomas at all. Our holding in this appeal, consistent with our prior opinions in this case, is that the presumption that Thomas is the natural father of Nicholas has been rebutted. We have previously declined and continue to decline to

decide whether the placement of Nicholas with Thomas is proper under any other ground. That is a question that has not been litigated in the court below.[4]

Our second observation pertains to a statement Kimberly's counsel made at oral argument before this court. Counsel stated she will have to appeal every juvenile court order which expressly or implicitly continues the placement of Nicholas with Thomas in order to preserve her client's objection to the juvenile court's finding that Thomas is the presumed father of Nicholas.[5] We are truly puzzled by this statement. In *Nicholas I*, Kimberly appealed the juvenile court's finding that the presumption that Thomas is Nicholas's father was not rebutted. The Agency agreed with Kimberly on this issue as did this court in *Nicholas I* and *Nicholas II*, and as we do again today. The issue is now pending before the Supreme Court of this state. *No further appeal is necessary to preserve this precise legal question.*

B. *Visitation*

Kimberly argues that the juvenile court's April 20 order temporarily modifying her visitation was erroneous because (a) the modification was made without notice to her and (b) there was no substantial evidence to support the modification. Kimberly also argues that the court's May 9 order, which made the temporary modification permanent, is also not supported by substantial evidence.

The April 20 order was improper. At the time it was issued, there was no evidence before the juvenile court about Joshua's alleged injury. Comments by Agency counsel about the incident, which Kimberly's counsel disputed, were not evidence. (See *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1426.) Furthermore, Kimberly was entitled to notice prior to a modification of her visitation. (*Cf. In re Lance V.* (2001) 90 Cal.App.4th 668, 675-677.)

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[4] Kimberly contends that she raised her section 361.4 argument in the lower court and argues the trial court erroneously declined to rule on that issue. We disagree. When the orders at issue in this appeal were made, the placement of Nicholas was supported by the court's conclusion that Thomas was the presumed father of Nicholas. It was not required to supply an alternative ground for its ruling.

[5] At oral argument, the parties represented that the juvenile court has stayed proceedings in this case. However, it may well be necessary to lift that stay before the Supreme Court issues decisions in *Nicholas I* and *Nicholas II*. (See Code Civ. Proc., § 917.7; *In re Natasha A.* (1996) 42 Cal.App.4th 28, 38.)

Although the juvenile court acted improperly, its error was harmless. Contrary to her contentions on appeal, Kimberly did have notice of the Agency's request to modify the visitation order and the opportunity to present evidence and be heard at the May 9 hearing where the court made its temporary order permanent. Furthermore, the temporary order was in place for less than one month before a proper hearing was held. Kimberly has not demonstrated that she was damaged in any way during that brief period.[6]

In contrast to the April 20 order, the May 9 order was entered after the court heard evidence relevant to issues pertaining visitation. Kimberly contends that evidence does not support the court's rulings that visits with Nicholas (1) had to be supervised and (2) had to occur in Southern California.

Evidence of a need for supervision was not overwhelming by any means. Indeed, the juvenile court conceded that the Agency's concern about Kimberly's driving was not an adequate ground for modifying her visitation. However, there was evidence that Kimberly may have been dishonest or deceptive with the Agency about her residence and about the places where she was spending time while Nicholas was with her. We need not decide whether that evidence was sufficient to support the supervision restriction because subsequent events have rendered this issue moot.

This court has granted the Agency's request to take judicial notice of an August 3, 2001, order issued by the juvenile court at the continued 12-month review hearing in this case. In that order, the court vacated the supervised visitation order and reinstated its previous order for unsupervised visits to occur on alternating weekends. Therefore, Kimberly's complaint about the supervision restriction is moot.

It is unclear from the language of the August 3, 2001, order whether the restriction limiting visits to Southern California is still in place. At oral argument, the Agency

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[6] We reject Kimberly's contention that the visitation order could only be modified pursuant to a Welfare and Institutions Code section 388 petition. The orders at issue in this appeal were made pursuant to the 12-month status review. (See Welf. & Inst. Code, § 366.21.) Reunification services, including visitation, were the proper subject of that review. (*Ibid.*) We agree with Kimberly that she was entitled to written notice of the Agency's recommendation that the visitation order be modified. (§ 366.21, subd. (b).) But, the April 20 order was adequate notice of that recommendation.

conceded the order was unclear. If we accept Kimberly's contention that the geographic restriction still applies, we need not reach the issue whether substantial evidence supports it. In contrast to the supervision restriction, the restriction limiting visits to Southern California is an extension of and a means of further implementing the juvenile court's erroneous conclusion that Nicholas is residing with his presumed father. As we have consistently maintained, the trial court is in the best position to determine the effect of our conclusion that the presumption of natural fatherhood has been rebutted in this case. Therefore, if the geographic visitation restriction is still in place, the court must reconsider it in light of our conclusion that Thomas is not the presumed father of Nicholas.

IV. DISPOSITION

For the reasons set forth in our prior opinions in this case (see footnote 1) we reverse the three orders challenged in this appeal to the extent they continue the placement of Nicholas with Thomas on the erroneous ground that Thomas is the presumed father of Nicholas. We also reverse the May 9 order to the extent it limits visits between Kimberly and Nicholas to Southern California. This case is remanded to the trial court for further proceedings consistent with this opinion.

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Haerle, J.

We concur:

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Kline, P.J.

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Lambden, J.