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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re T.K., a Person Coming Under the  
Juvenile Court Law.

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

T.K.,

Defendant and Appellant.

E057082

(Super.Ct.No. J239158)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B. Marshall, Judge. Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Regina A. Coleman, Assistant County Counsel, for Plaintiff and Respondent.

Tanya K. (hereafter mother) appeals an order terminating her parental rights to her son, T.K., and placing the child for adoption. She contends that, in light of several failings by San Bernardino County Children and Family Services (CFS), there was insufficient evidence to support the juvenile court's finding that T.K. is generally adoptable. She contends that it is not sufficient to find that the child is likely to be adopted by his foster parents, because, if that adoption falls through, T.K. may become a legal orphan because his late-discovered developmental delays and the sudden onset of emotional problems render him not generally adoptable.

We conclude that substantial evidence supports the finding that it is likely that T.K. will be adopted by his foster parents within a reasonable time. Moreover, even if that adoption falls through and no other adoptive parent can be found, parental rights can be reinstated. (Welf. & Inst. Code, § 366.26, subd. (i)(3).)<sup>1</sup> Accordingly, any error in the juvenile court's finding that T.K. is generally adoptable does not require reversal of the order appealed from.

#### FACTUAL AND PROCEDURAL HISTORY

On May 26, 2011, T.K., then 15 months old, was detained by CFS based on mother's false report to the Culver City police that he had been kidnapped by Mtume Elam, who was, according to mother, her pimp. She said that Elam beat her and kept her away from her child. The child was located at a home in San Bernardino. The adult in the home who was caring for T.K. told police that she was a childhood friend of Elam,

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<sup>1</sup> All statutory citations refer to the Welfare and Institutions Code.

and that mother and Elam had brought T.K. to her house in March or April of that year and had left him in her care. Mother had not visited T.K. since she left him there, but she did provide money for his support. Mother later admitted that she had lied about Elam kidnapping T.K. and admitted that she had a cocaine and alcohol problem. She acknowledged that she was engaging in prostitution.

Mother was given assistance in moving to a safe location, and T.K. was placed in confidential foster care. T.K. was in reasonably good physical condition, although he was dirty and appeared underweight.<sup>2</sup> Elam was eventually arrested for pimping and was returned to prison on a parole violation. Although mother had been arrested for child endangerment, the district attorney declined to file charges.

Mother's three older children had been removed from her custody by authorities in Ohio because mother was "partying all of the time, using heroin and allowing strange men to come over," according to mother's aunt, A.K. A.K. reported that mother locked the children in a bedroom while she "partied with strangers." Mother's oldest child was living with his paternal grandmother, and the two younger children lived with their father.

Mother and T.K. had lived with A.K. for the first eight months of T.K.'s life. A.K. reported that mother was drinking daily to the point of intoxication and using marijuana.

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<sup>2</sup> The disposition report states that T.K. was very small for his age and that testing for lead poisoning had been done. The result of the test is not reported. The report also states that he appeared to be developmentally on target, although this later turned out not to be the case. (See discussion below.)

A.K. eventually asked mother to leave her home. Mother then came to California to meet Elam, whom she had “met” via the internet while he was in prison. Once in California, mother began to engage in prostitution under Elam’s aegis.

A dependency petition was filed on May 31, 2011. At the detention hearing, T.K. was removed from mother’s custody and placed in a specialized care foster home. Family reunification services and monitored visitation were ordered for mother, pending development of a case plan. No information was then available as to an alleged father or any relatives as potential placements.

Between the detention hearing and the jurisdiction/disposition hearing, mother did not ask about T.K.’s well-being and did not ask to visit him. However, mother did attend the jurisdiction/disposition hearing. She reported that she had moved to Las Vegas but had no permanent address. She waived trial, and the court found the allegations in the petition true as amended.<sup>3</sup> The court ordered reunification services continued for mother and ordered monitored visitation for one hour per week. Mother gave CFS the names, or partial names, of three possible fathers, all of whom resided in Ohio. She did not provide sufficient information to permit CFS to contact any of the possible fathers. The court found all of the possible fathers to be alleged fathers not entitled to services.

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<sup>3</sup> The petition alleged failure to protect, based on mother’s leaving T.K. with an unsuitable caretaker who was not known to mother, mother’s substance abuse problem, and her “dangerous lifestyle of prostitution.” It also alleged that mother was incarcerated and unable to provide for T.K. and that the identity and whereabouts of his father were unknown. The court struck the allegation that mother was incarcerated and unable to provide for T.K.’s care.

A status review report written for the six-month review hearing stated that mother had made no progress in resolving the problems which led to the dependency. She had refused to participate in services and had ceased visiting with T.K. Although mother had visited consistently for about two months, she had last visited T.K. approximately five months before the date the report was written. Mother had also not communicated with the social worker for about three months prior to the report date. In the final telephone call between mother and the social worker, mother stated that she knew she would lose T.K. but that she was not interested in the social worker's offer to place her in an inpatient substance abuse program in San Bernardino. She admitted that she had been arrested for "solicitation" in Las Vegas about two months earlier. Nevertheless, she stated that she wanted to reunify with T.K.

The social worker recommended that services be terminated, that T.K. remain with his foster parents, and that the court order initiation of an interstate compact process to place T.K. with A.K., the maternal aunt in Tennessee, or with H.W., a maternal cousin in Ohio, both of whom had expressed interest in caring for T.K.

Mother did not appear at the contested review hearing. The court terminated services and set a hearing on termination of parental rights and determination of a permanent plan for T.K., pursuant to section 366.26. The court ordered monitored visitation for mother and ordered initiation of the interstate compact process for the maternal aunt in Tennessee. The court ordered the clerk's office to provide mother with

the documents necessary to seek writ review of the order terminating services. The documents were sent to mother's last known address but returned as undeliverable.

By packet dated May 22, 2012, the social worker notified the court that she no longer recommended assessing the maternal aunt for placement, in that she had concluded that it was in T.K.'s best interest to be adopted by his foster mother.<sup>4</sup> She reported that she had informed the maternal aunt of her observations as to T.K.'s best interests, and that the aunt had informed her that she had changed her mind about taking T.K. After a conversation with mother, who had told her that she wanted the aunt to take T.K. so that mother could eventually take him back, the aunt had realized that mother was not going to change. She agreed that adoption by the foster mother was the best option for T.K. She reported that the maternal cousin and other family members agreed with that conclusion.

In the report for the section 366.26 hearing, the social worker reported for the first time that T.K. had been diagnosed as having unspecified developmental delays and concerns. The report also stated that T.K. was having severe temper tantrums and was smearing and eating feces. A SART (Screening, Assessment, Referral and Treatment) had been completed; however, the report does not state the results. Despite these issues, the social worker stated that T.K. was likely to be adopted by his foster parents. She stated that he was very attached to the foster parents, as they were to him, that they were

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<sup>4</sup> T.K. was placed with a married couple. However, the packet refers solely to the foster mother.

committed to raising him to adulthood, and that they appeared to be appropriate for adoptive placement.

At the section 366.26 hearing, the court found by clear and convincing evidence that it was likely that T.K. would be adopted and that the adoption was likely to be finalized within 12 months. The court terminated parental rights.

Mother filed a timely notice of appeal.

### LEGAL ANALYSIS

#### SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING OF ADOPTABILITY

A juvenile court may terminate parental rights only if it determines, by clear and convincing evidence, that it is likely that the child will be adopted. (§ 366.26, subd. (c)(1).) Mother contends that the juvenile court's finding that T.K. is likely to be adopted is not supported by the requisite clear and convincing evidence.

#### *Standard of Review*

Mother cites *In re Jasmon O.* (1994) 8 Cal.4th 398, in which the California Supreme Court stated the standard of review applicable to a claim of insufficient evidence to support termination of parental rights as follows: “[W]e view the record in the light most favorable to the judgment below and “decide if the evidence [in support of the judgment] is reasonable, credible and of solid value – such that a reasonable trier of fact could find that termination of parental rights is appropriate based on clear and convincing evidence. [Citation].” [Citations.]” (*Id.* at pp. 422-423.) Based on this

statement, mother appears to contend that because the finding of adoptability must be based on clear and convincing evidence, that finding requires additional scrutiny on appeal.

We disagree. The long-standing rule is that clear and convincing evidence is the standard for the trial court; it is not a standard for appellate review. ““The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.’ [Citations.]” (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.) Accordingly, on appeal, “[T]he clear and convincing test disappears and ‘the usual rule of conflicting evidence is applied, giving full effect to the respondent’s evidence, however slight, and disregarding the appellant’s evidence, however strong.’ [Citation.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1525-1526.) This rule applies, as elsewhere, on review of a juvenile court’s finding that a child is adoptable. (*Ibid.*) In *In re Jasmon O.*, *supra*, 8 Cal.4th 398, the court did not address a contention that a different standard of review applies to a determination required to be based on clear and convincing evidence. A case is not authority for an issue which it does not address. (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155.) Accordingly, despite the wording employed by the court (*In re Jasmon O.*, *supra*, at pp. 422-423), we cannot conclude that the court intended to modify the substantial evidence rule for rulings required to be based on clear and convincing evidence.

*Substantial Evidence Supports the Finding That It Is Likely T.K. Will Be Adopted Within a Reasonable Time.*

In determining whether substantial evidence supports a finding that a dependent child is likely to be adopted within a reasonable time, “[w]e give the court’s finding of adoptability the benefit of every reasonable inference and resolve any evidentiary conflicts in favor of affirming.” (*In re I.I.* (2008) 168 Cal.App.4th 857, 869 [Fourth Dist., Div. Two].) Applying this standard, we conclude that the juvenile court’s finding that it is likely that T.K. will be adopted by his prospective adoptive parents is supported by substantial evidence.

The report prepared for the section 366.26 hearing stated that T.K. is an engaging child who is very attached to his prospective adoptive parents and that they are very attached to him and want to adopt him. However, it also stated that T.K. had recently begun having severe temper tantrums and eating and smearing feces and had recently been reported as having some unspecified developmental delay. The report did not discuss the prospective adoptive parents’ reaction to these issues. However, because T.K. was living with them when he began displaying these behaviors and was first reported to have developmental delays, it is reasonable to infer that the prospective adoptive parents were aware of these issues. Nevertheless, according to the report, the prospective adoptive parents were committed to adopting T.K., and they were suitable adoptive parents. Accordingly, substantial evidence supports the inference that despite these

unfortunate developments, it was likely that T.K. would be adopted by the prospective adoptive parents within a reasonable time.

Mother does not appear to contest that conclusion. Rather, she argues that the record does not show that the court gave any consideration to whether T.K. is generally adoptable. She contends that because of T.K.'s recent behaviors and recent diagnosis as developmentally delayed, T.K. is not generally adoptable. She contends that if T.K. is not adopted by his present prospective adoptive parents, he may become a "legal orphan."

"The issue of adoptability posed in a section 366.26 hearing focuses on the *minor*, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.] Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) "However, the fact that a prospective adoptive family has been identified is an indication that the child is likely to be adopted within a reasonable time. "Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates [that] the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family.*" [Citation.]' [Citation.]" (*In re I.I., supra*, 168 Cal.App.4th at p.

870.) Here, the willingness of the prospective adoptive parents to adopt T.K. supports the finding of adoptability. Moreover, “Since it is not even necessary that one prospective adoptive home be identified before a child may be found adoptable, a fortiori, it is not necessary that backup families be identified.” (*Ibid.*)

Although at one time it was a legitimate concern that a child freed for adoption by a current prospective adoptive parent could end up in legal limbo if the adoption fell through and some characteristic of the child rendered it unlikely that another adoptive parent would be found, the Legislature obviated that concern when, in 2005, it enacted section 366.26, former subdivision (i)(2) (now subd. (i)(3)). (Stats. 2005, ch. 640, § 6.5; see *In re I.I.*, *supra*, 168 Cal.App.4th at p. 871.) That subdivision provides, in pertinent part, “A child who has not been adopted after the passage of at least three years from the date the court terminated parental rights and for whom the court has determined that adoption is no longer the permanent plan may petition the juvenile court to reinstate parental rights pursuant to the procedure prescribed by Section 388. The child may file the petition prior to the expiration of this three-year period if the State Department of Social Services, county adoption agency, or licensed adoption agency that is responsible for custody and supervision of the child as described in subdivision (j) and the child stipulate that the child is no longer likely to be adopted. . . . If it appears that the best interests of the child may be promoted by reinstatement of parental rights, the court shall order that a hearing be held . . . .” Consequently, the concerns expressed in *In re Jayson T.* (2002) 97 Cal.App.4th 75, 91, relied upon by mother, no longer apply.

Mother is deeply critical of the conduct of this case and expresses a number of legitimate concerns. In particular, she criticizes the belated discovery of T.K.'s developmental delays, and she criticizes the juvenile court for finding him adoptable without further inquiry into both T.K.'s sudden emotional problems and the nonspecific diagnosis of developmental delay. She also points out that when the court terminated parental rights, the court was apparently under the misapprehension that T.K. had been placed with his aunt. However, her contention that the "lack of proper process and the failure to follow basic dependency statutory guidelines and policy made the evidence upon which the court relied neither clear nor convincing" (capitalization normalized), is not persuasive.

First, although mother is correct that the minor's attorney represented to the court that T.K. had been placed with his aunt as a prospective adoptive parent, the social worker's report correctly stated that T.K.'s prospective adoptive parents were his foster parents, with whom he had been placed since May 26, 2011. The court stated that it had read and considered the social worker's report. Accordingly, minor's counsel's misstatement does not undermine the sufficiency of the evidence supporting the court's ruling.

Next, with respect to the limited information provided concerning T.K.'s emotional and developmental issues, we conclude that the record nevertheless establishes that substantial evidence supported the court's finding of adoptability. As we stated above, T.K. was already living with his prospective adoptive parents when these issues

first arose. Because they were aware of those issues but had not expressed any reluctance to adopt T.K. because of them, substantial evidence supports the finding of adoptability.

Mother also contends that the juvenile court failed to make sufficient efforts to find a relative willing to adopt T.K. As we have discussed above, although CFS initially requested initiation of an interstate compact investigation of the aunt as a potential placement, CFS later informed the court that the aunt had changed her mind about taking T.K. and reported that the cousin and unidentified other family members agreed with her that adoption by the foster parents was the best option for T.K. Section 361.3 requires preferential relative assessment only for those relatives who *request* placement of the child with them. (§ 361.3, subs. (a), (c).) The information presented to the court was that there were no relatives requesting placement.

Furthermore, section 361.3 places the burden of identifying potential relative placements on the parent. (§ 361.3, subd. (a)(8).) Mother did not inform the court that, contrary to the report made by CFS, there were in fact relatives seeking placement. She also did not challenge what she now objects to as double hearsay, i.e., the social worker's report as to what mother's aunt told her that the other family members had told her. She had the opportunity to do so at any of the three hearings held after CFS reported the withdrawal of the aunt's request for placement, but she did not do so. Consequently, she has forfeited any claim of error in this regard. In any event, what she deems to be the court's failure to pursue relative placements has no bearing on the sufficiency of the evidence to support the court's finding of adoptability.

Mother also points out that the social worker's packet dated May 22, 2012, erroneously states that T.K. had been placed with his prospective adoptive parents since July 27, 2010, when T.K. was five months old, and that he had been with them for the majority of his life. In fact, T.K. was 15 months old when he was detained and placed with his prospective adoptive parents on May 26, 2011. Because the social worker's recommendation of adoption by the foster parents is based on this erroneous information, mother contends that the recommendation does not amount to clear and convincing evidence of adoptability. However, the report prepared for the section 366.26 hearing sets forth the accurate information concerning the date of T.K.'s placement with his foster parents, and it constitutes substantial evidence supporting the court's finding of adoptability.

DISPOSITION

The judgment is affirmed.

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McKINSTER  
J.

We concur:

HOLLENHORST  
Acting P. J.

CODRINGTON  
J.