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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re A.J., et al, Persons Coming Under the
Juvenile Court Law.

H041175
(Monterey County
Super. Ct. Nos. J46890, J46891,
J46892, J46893

MONTEREY COUNTY DEPARTMENT
OF SOCIAL & EMPLOYMENT
SERVICES,

Plaintiff and Respondent,

v.

Michael J.,

Defendant and Appellant.

Four minors under the age of 10—A.J. (eight), J.J. (eight), K.T. (four), and S.M.T. (two) (collectively, the minors)—were placed in protective custody on November 14, 2012. Thereafter, the Monterey County Department of Social and Employment Services (Department) filed four petitions alleging the failure of the minors’ mother, S.T. (Mother), and father, Michael J. (Father), to protect and provide support for their

children, under Welfare and Institutions Code section 300, subdivision (b).¹ The Department alleged that (1) Mother had a longstanding substance abuse problem and J.J. had reported that Mother took “ ‘morphine pills’ ”; (2) Mother has nine children and a history with child protective services in three counties dating back to at least 1994; (3) the twins, A.J. and J.J., were caught stealing food at a store in Salinas on November 13, 2012; (4) when apprehended, A.J. explained that he was hungry and trying to get food for his younger siblings, and that Mother had sent J.J. and him to steal food; (5) at the time A.J. was caught stealing, J.J. was found outside the store panhandling; (6) on November 14, 2012, a social worker paid a visit to the motel room where Mother and the minors were living and found the family was living in squalor and there was no food in the refrigerator; (7) the children were not enrolled in school; (8) A.J. and J.J. reported that Mother and Father were physically abusive; and (9) J.J. reported that she had been sexually abused by an older half-brother and that Mother, after J.J. informed her about it, did nothing. (Subsequent to the filing of the petition, J.J. reported that Father had also sexually abused her.)

In January 2013, the juvenile court found the allegations true, sustained each petition, and ordered that Mother and Father receive family reunification services. At the six-month review hearing held on October 30, 2013, the court set a selection and implementation hearing under section 366.26 (permanency hearing or .26 hearing) and terminated reunification services for Mother and Father. Father challenged the six-month review order by petition for writ of mandate. We denied Father’s petition. (*Michael J. v. Superior Court* (Feb. 14, 2014, H040336) [nonpub. opn.].) Pursuant to Evidence Code sections 452, subdivision (d) and 459, subdivision (a), we take judicial notice of that opinion and of the record submitted in connection with that proceeding. (See *Flatley v.*

¹ Further statutory references are to the Welfare and Institutions Code unless otherwise stated.

Mauro (2006) 39 Cal.4th 299, 306, fn. 2 [judicial notice of court materials appropriate to “help complete the context of this case”].)

At the time of the .26 hearing (June 24, 2014), A.J. and J.J. had been living with the same foster family in San Benito County for over 19 months. It was a nonconcurrent foster home (i.e., a foster home in which the family had not indicated a willingness to adopt). K.T. and S.M.T. were living in separate, concurrent homes. After the contested .26 hearing, the court found by clear and convincing evidence that each of the minors was adoptable. In each of the four cases, the court selected adoption as the permanent plan and terminated parental rights (permanency orders).

On appeal, Father challenges each of the permanency orders, contending that the court erred in finding by clear and convincing evidence that the minors were likely to be adopted within a reasonable time. We conclude that substantial evidence supported each of the court’s four adoptability findings. Accordingly, we will affirm the four permanency orders.

FACTS AND PROCEDURAL HISTORY²

I. Petitions and Detention Orders (November 2012)

On November 16, 2012, the Department filed four separate petitions alleging that Mother and Father had failed to protect the minors. (§ 300, subd. (b).) The Department alleged, among other things, that Mother has nine children—three adults, two teenagers, and the four minors, A.J. (age 8), J.J. (age 8), K.T. (age 4), and S.M.T. (age 2), and that appellant, Michael J., is the father of the four minors.³ Mother has a long-existing substance abuse problem and “has a very long history with child protective services in

² Portions of the facts and procedural history are taken from our opinion in *Michael J. v. Superior Court, supra*, H040336.

³ As discussed, *post*, Mother was evaluated separately by two psychologists. Both psychologists reported that Mother had given birth to 13 children.

Sacramento, San Francisco, Merced^[,] and Monterey counties dating back to[] at least 1994.”⁴ On November 13, 2012, officers with the Salinas Police Department reported that A.J. and J.J. were caught stealing from a grocery store. A.J. had told the police that he was hungry and was attempting to get food for his younger siblings. J.J. had been outside panhandling.

On November 14, 2012, a Department social worker visited the motel room where Mother and the minors were living. It “was in a filthy state. There was trash all over the floor, as well as broken bowls with dried beans in them. The toilet was plugged to the top with feces, and the bathroom sink was plugged with dirty water filled to the top. There was no food in the small refrigerator, [and] only 1/3 of a half-gallon carton of milk and one potato lying on the floor, which [M]other said she was going to cook in the microwave for their dinner.” Mother denied that her twin children had been stealing and panhandling. She claimed that she had given money to them to buy food and said, “It’s not my fault [A.J.] was stealing . . . Are you going to blame me for that?” The minors were placed in protective custody that day; they left without shoes or jackets because their clothing could not be found among the jumble of clothes on the floor.

J.J. and A.J. said that Mother had sent them out to the grocery store to steal food because they were hungry, and that she had done so on other occasions. A.J. reported that when they got to the store, he told his sister to wait for him outside because she was not serving her purpose. J.J. told the social worker that she was very proud that she had never been caught stealing because she could “ ‘run fast.’ ”

J.J. and A.J. also reported that Father was physically abusive. “A.J. stated his [F]ather ‘whips’ all of the children, except [S.M.T.], with a belt.” J.J. told the social worker that Father had struck A.J. with a closed fist in the back of the head and had made

⁴ In a later report, the Department alleged that since 2001 there had been eight referrals to child protective services involving Mother.

A.J.'s nose bleed. J.J. said that Mother also had struck her and K.T. for disciplinary reasons. J.J. also told the social worker that "[M]other takes 'morphine pills' and when she does not have them she has 'withdrawals' and she gets diarrhea, throws[] up^[3] and sweats."

J.J. told a therapist at Cherish Center that when the family had lived in Hollister, her older brother, M., had on multiple occasions raped her and forced her to orally copulate him. J.J. said that she had told Mother, who " 'didn't like it,' " but Mother did not report it to the police.

None of the minors was enrolled in school. The Department contacted Mother and invited her to participate in a meeting, but Mother declined, saying she was ill. Mother refused to tell the Department where her 17-year-old and 15-year-old sons were living.

On November 19, 2012, the court ordered the minors detained pursuant to section 319, subdivision (b).

II. Family Assessment Reports (January 2013)

Catherine Donahue, Ph.D., a psychologist with the Monterey County Department of Mental Health, prepared two family assessment reports dated January 3 and 8, 2013. In her January 3 report, Dr. Donahue reported that during four family visits with the minors, Mother's "behavior was inappropriate, abusive, erratic and disrespectful toward her children." Mother had been verbally abusive with the social worker during one of the visits.

Dr. Donahue's January 8 report contained a detailed review of her interview and evaluation of Father. Dr. Donahue observed that Father had given conflicting answers to her questions, and that he had "permitted his children to remain in [Mother's] care despite her history of prior involvement with CPS, substance abuse history and alleged absences . . . [and] failed to intervene or [obtain] the assistance of authorities or medical personnel when [Mother] was using substances during all four of the pregnancies."

Dr. Donahue concluded in her clinical evaluation of family functioning: “[Mother’s] erratic behavior creates an atmosphere of danger and unpredictability in the home, and communicates that her needs supersede the needs of all other family members. Thus, family members are constantly in a hypervigilant state in order to anticipate, and likely escape from, the next incident of violence.” Dr. Donahue also found that, based upon Father’s “blatantly inaccurate reports of the children’s development, and the fact that there is no evidence that he sought custody of the children prior to [their detention],” it is likely that Father was emotionally and physically absent, and that his claims of involvement in the minors’ daily care were false. She also noted that Father failed to protect the minors from Mother’s violence, substance abuse, and erratic behavior. And she concluded, based upon the expression by J.J. and A.J. of fear toward Father, A.J.’s anxiety, and “[J.J.’s] severe symptoms of Posttraumatic Stress Disorder [PTSD], it is unlikely that they are fabricating the reports of abuse by [Mother] and [Father].”

Dr. Donahue recommended that Mother be ordered to submit to a psychological evaluation, and that her visitation of the minors, pending that evaluation, be suspended. Likewise, Dr. Donahue recommended that Father be ordered to submit to a psychological evaluation. She also recommended that Father have no contact with J.J. and A.J., based upon the report of child abuse, the twins’ expressed fear of Father, and the fact that they had declined visits with him. She recommended, however, that Father be allowed weekly, supervised visits of K.T. and S.M.T.

III. Jurisdictional and Dispositional Hearing (January 2013)

On January 30, 2013, after a jurisdictional and dispositional hearing, the court found the allegations in each of the petitions true and sustained the petitions. The court declared each of the minors a dependent child of the juvenile court and ordered that they be placed outside of the parents’ custody. It ordered that family reunification services be provided to Mother and Father, pending the results of psychological evaluations for both; no visitation of the minors be provided to Mother; no visitation of J.J. and A.J. be

provided to Father; visitation of K.T. and S.M.T. be provided to Father; and that Father submit to a psychological evaluation.

IV. Six-Month Review Hearing and Order (October 2013)

Pursuant to section 366.21(e), a six-month review hearing took place on October 30, 2013. The court received and considered extensive evidence (discussed below).

A. Psychological Evaluations of Mother

On March 25, 2013, a psychological evaluation of Mother was performed by Elizabeth Lee, Psy.D., a licensed clinical psychologist. The results of Dr. Lee's psychological testing "indicate[d] that [Mother] is self-centered, impulsive and has trouble controlling her temper. When she encounters problems, she is likely to blame them on other people rather than look to her own behavior." The psychologist diagnosed Mother as having a "Personality disorder, NOS [Not Otherwise Specified], with narcissistic and histrionic features." Dr. Lee recommended that Mother not be offered reunification services.

A second licensed clinical psychologist, Elaine Finnberg, Ph.D., interviewed and evaluated Mother on May 14, 2013. Dr. Finnberg diagnosed Mother as having a "Personality Disorder Not Otherwise Specified with Antisocial, Avoidant, and Dependent Features." She similarly recommended that Mother not be offered reunification services.

The language used by both Dr. Lee and Dr. Finnberg in their respective evaluations of Mother (as well as of Father, as discussed, *post*)—i.e., the experts' recommendations that both Father and Mother not be offered reunification services—is technically inaccurate. As noted, *ante*, the court ordered at the January 30 jurisdictional and dispositional hearing that Mother and Father receive family reunification services, pending the results of their psychological evaluations. Indeed, Mother and Father each received reunification services for more than six months.

B. Psychological Evaluations of Father

1. *Dr. Lee's Evaluation*

On February 18, 2013, Dr. Lee performed a psychological evaluation of Father. During the interview, Father denied a history of alcohol and cocaine abuse until he was confronted by Dr. Lee with contrary information, at which point “[h]e described a long history of cocaine abuse that was severe enough that he repeatedly violated his parole.” He indicated that he had been clean and sober for one year and advised that he had voluntarily begun participating in an outpatient substance abuse clinic in Los Baños after his children were detained. Father “was very angry that [Dr. Lee] had been provided with a copy of his criminal records.” Those records showed that Father was convicted of cocaine sale in or about 1997 and received a nine-year prison sentence. He served six years in prison and thereafter twice violated the terms of his parole. In 2009, he was arrested for felony assault upon Mother. He denied to Dr. Lee that he had assaulted Mother.

Dr. Lee observed that Father “frequently contradicted himself. He initially tried to present an unrealistically positive façade of himself, and became irritable when he was asked about discrepancies between his self report and the CPS records.” She found that Father “was not believable in his assertions that he [had] never physically abused his children and he has only been the victim of domestic violence. Throughout the interview, he appeared to only admit to things that [Dr. Lee] was aware of. . . . [¶] Father] tended to externalize blame. He did not take responsibility for the state in which his children were living or the fact that they were not attending school. He said that he complained to [Mother] about her drug and alcohol abuse, but he did not seem to feel that it was his responsibility to protect the children from it.”

Dr. Lee diagnosed Father as having a cocaine dependency, a personality disorder not otherwise specified with narcissistic and antisocial features, a history of brain trauma, and severe impairment in interpersonal functioning. She concluded that “[Father] is

unlikely to benefit from therapeutic intervention. He has a strong need to not admit genuine personal problems to himself. Even if he participates in treatment, he is likely to continue to misrepresent his problem areas and to leave treatment prematurely.” Dr. Lee therefore recommended that Father not be offered reunification services.

2. *Dr. Finnberg’s Evaluation*

Dr. Finnberg performed an interview and evaluation of Father on May 15, 2013. Dr. Finnberg noted in her report that Father had reported that he had been hospitalized for psychiatric treatment in Seattle, Washington in 1987. Father indicated that he had been hospitalized four times at the same Washington hospital, “twice for suicidal ideation, and twice because he was homeless.” When he was homeless, he had fabricated mental health problems to get off the streets. He told Dr. Finnberg that “he ha[d] been involved in domestic violence episodes with his first two wives and with [Mother].” He explained that he met [Mother] “in Seattle while he was on the street looking for drugs after being released from prison. They met and she came to his room to do drugs. After that they were ‘pretty much together for nine years.’ ”

Father admitted to Dr. Finnberg that he had a history of drug and alcohol abuse. He also admitted that he had “physically abuse[d A.J.] and [J.J.], particularly [A.J.], and describe[d] himself as having been ‘hard on him, spanking him.’ ” He also acknowledged that he had failed to protect the minors from Mother’s abuse and neglect.

Dr. Finnberg diagnosed Father as having a “Personality Disorder Not Otherwise Specified with Antisocial Features.” She noted that Father “ha[d] provided very little emotional support or structure for his four children.” She observed that in the 33 years since he had started using drugs and alcohol, Father admitted that, despite attending a number of substance abuse programs, the maximum amount of time he had been able to stay clean and sober was one year (excluding the periods in which he was incarcerated). Dr. Finnberg opined that “it is not realistic for [Father] to become their primary parent,” because (1) he had not shown any sustained interest in the children in the past; (2) he had

not played an active role in their lives; (3) the minors have “serious needs”; and (4) J.J. and A.J. are afraid of Father and want no contact with him.

Dr. Finnberg concluded that “[e]ach of these disorders, psychiatric, drug, and personality, . . . render[s Father] unable to care for his children, especially in light of the children’s emotional and developmental needs. In addition, his responses indicate that he has a great potential for violence towards the children now and in the future.” She therefore recommended that no reunification services be offered to Father.

C. Department’s Report, Notice of Hearing, and Addendum

The Department submitted a report on June 27, 2013, in which the social worker noted that Father “continues to state . . . that he ‘did nothing wrong’ and he takes no responsibility for his actions that resulted in the children’s dependency. . . . During his meetings with [the social worker], [Father] yelled and slammed doors after walking out of the meetings.” During his one-hour weekly supervised visitations with K.T. and S.M.T., Father caused K.T. to become overexcited, and he provided little supervision to S.M.T. According to the Department, Father was also noncompliant with his case plan in several respects.

D. Visitation Report

In her July 16, 2013 report concerning three visitation sessions between Father and K.T. and S.M.T., Dr. Donahue observed that “[o]f concern is that [Father] may be deliberately managing his impression to appear more favorable, as his positive behaviors decreased when the PAT teacher is not present or when the supervising service aide briefly leaves the room.” Father, in Dr. Donahue’s opinion, did “not demonstrate[] appropriate utilization of techniques for eliminating negative behavior, using appropriate discipline, or facilitating a safe environment thus far. When [K.T.] and [S.M.T.] screamed and yelled, he initially told them to stop in a calm voice, but quickly escalated into yelling at them. When this happened, [K.T.] became dysregulated and scared; he [(K.T.)] screamed every time; on one occasion he backed into a corner between a

book[]shelf and a couch[;] and on multiple occasions he ran out of the room yelling for his foster dad.”

Dr. Donohue concluded that both children exhibited “trauma reactive symptoms” in their dealings with Father. Father demonstrated that he did not have an understanding of his children’s development, and particularly did not understand that acting out behaviors were common for four-year-old children such as K.T., and even more common with such children, as K.T., who showed developmental delays.

E. Testimony

Shannon Wight, a Merced County alcohol and drug counselor, testified that in the first quarter of 2013, Father had attended approximately 15 hours of group sessions and two hours of individual sessions of an outpatient program. He had also attended 25 AA/NA meetings and obtained a sponsor. Father tested negative for each of the weekly tests for drugs and alcohol. Father successfully completed the program and received a certificate. He did not disclose to Wight that there were allegations in pending dependency proceedings that he had physically abused the children and had sexually abused J.J.

Lun Wang, a Department social worker, testified that she never spoke to Wight about Father’s participation in the outpatient drug and alcohol program in Merced County. She asked Father for Wight’s telephone number, but he did not provide it to her.

Father testified that he had completed a 16-week parenting class commencing in January. He claimed that as of the hearing on October 30, 2013, he had been clean and sober for two years. He denied that he had ever physically or sexually abused any of his children. On cross-examination, Father admitted that, contrary to his case plan, he had failed to complete (1) an alcohol and drug assessment in Salinas, or (2) a residential drug and alcohol treatment program.

F. Order After Six-Month Review Hearing

After considering the reports and testimony, the court adopted the findings and orders as recommended by the Department. The court found, by clear and convincing evidence from two competent mental health professionals qualified under Family Code section 7827, subdivision (c), that “the parents are suffering from a mental incapacity or disorder which renders the parents unable to care for and control the child adequately, and which renders [them] incapable of utilizing child welfare services, such that even with the provision of services, the parents are unlikely to be capable of adequately caring for the child and are unlikely to achieve reunification within the next six months.” It also found that the Department had provided or offered reasonable services to both parents, that neither parent had been actively involved in the development of the case plan or the permanent placement plan, and both parents were unwilling to participate in the development of those plans.

The court ordered the termination of family reunification services as to both parents. It also ordered the scheduling of a selection and implementation hearing under section 366.26. Father challenged the six-month review order by petition for writ of mandate. We denied Father’s petition. (*Michael J. v. Superior Court, supra*, H040336.)

V. *Father’s Request for Change Order (April 2014)*

Father also filed petitions pursuant to section 388, seeking orders returning the minors to his care and dismissing the proceedings. He indicated that he had engaged in therapeutic services and counseling, had been and remained clean and sober, and was ready and willing to provide the minors with a safe and stable home. He stated further that he had owned his own landscaping business for two years; had been employed as an apprentice electrician for eight months; had been in a stable relationship with his fiancée for two years; he and his fiancée had plans to purchase a home in Los Banos; and his fiancée (the mother of two adult children) was aware of the minors’ special needs and was willing to accept them into the home.

On April 1, 2014, the court denied each of Father's four section 388 petitions. Father does not challenge those orders in this appeal.

VI. Permanency Hearing (June 2014)

The court held a .26 permanency hearing on June 24, 2014. After accepting the Department's report, hearing testimony from the social worker, Raquel Avila, and hearing argument, the court adopted the findings and orders recommended by the Department. It found by clear and convincing evidence that each of the minors was adoptable, selected adoption as the permanent plan for each minor, and terminated Mother's and Father's parental rights.

DISCUSSION

I. Applicable Legal Principles

Section 300 et seq. provides "a comprehensive statutory scheme establishing procedures for the juvenile court to follow when and after a child is removed from the home for the child's welfare. [Citations.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) As our high court has explained, "The objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide permanent, stable homes if those children cannot be returned home within a prescribed period of time. [Citations.] Although a parent's interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect. [Citations.] The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful. [Citations.] This interest is a compelling one. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

After it has been adjudicated that a child is a dependent of the juvenile court, the exclusive procedure for establishing the permanent plan for the child is the permanency

hearing as provided under section 366.26. The essential purpose of the hearing is for the court “to provide stable, permanent homes for these children.” (§ 366.26, subd. (b); see *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1797.) There are six statutory choices for the permanency plan; the preferred choice is that the child be ordered to be placed for adoption, coupled with an order terminating parental rights. (§ 366.26, subd. (b); see also *In re Celine R.*, *supra*, 31 Cal.4th at p. 53 [“Legislature has thus determined that, where possible, adoption is the first choice”]; *ibid.* [where child is adoptable, “adoption is the norm”].)

The court selects adoption for the permanency plan if it “determines . . . by a clear and convincing standard, that it is likely the child will be adopted.” (§ 366.26, subd. (c)(1).) As the California Supreme Court has explained, “[a]ll that is required is clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time. [Citation.]” (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) Although the juvenile court must find adoptability by clear and convincing evidence, “it is nevertheless a low threshold: The court must merely determine that it is ‘likely’ that the child will be adopted within a reasonable time. [Citations.]” (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292; see also Seiser & Kumli on Cal. Juvenile Courts Practice and Procedure (Matthew Bender 2014) § 2.171[5][b], p. 2-537 (Seiser & Kumli).)

The question of adoptability generally focuses on whether the child’s age, physical condition and emotional health make it difficult to find a person willing to adopt that child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) A specific adoptive family need not be identified in order to find it likely a child will be adopted within a reasonable time. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223, fn. 11 [to prove adoptability, there need not be proposed adoptive parents “waiting in the wings”].)

In a case where the child is considered generally adoptable, the court does not look at the suitability of a prospective adoptive home. (*In re Valerie W.* (2008) 162 Cal.App.4th 1, 13.) But if the finding of adoptability is based entirely on the fact that

a specific family has indicated a willingness to adopt the child, “the trial court must determine whether there is a legal impediment to adoption. [Citation.]” (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061; see also *In re Helen W.* (2007) 150 Cal.App.4th 71, 80 [where adoptability finding is based solely on a particular caretaker’s willingness to adopt the child, “the analysis shifts from evaluating the characteristics of the child to whether there is any legal impediment to the prospective adoptive parent’s adoption and whether he or she is able to meet the needs of the child”].)

In reviewing a juvenile court’s permanency order, “we determine whether the record contains substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that [the child] was likely to be adopted within a reasonable time. [Citations.]” (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400; see also *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1561-1562; but see *In re I.W.* (2009) 180 Cal.App.4th 1517, 1525-1526 [clear and convincing test at trial court “disappears” during appellate court’s review of lower court’s findings for substantial evidence].) We give the court’s adoptability finding the benefit of every reasonable inference and resolve any evidentiary conflicts in favor of the judgment. [Citation.]” (*In re Valerie W., supra*, 162 Cal.App.4th at p. 13.) Likewise, we do not assess the credibility of any witnesses, nor do we weigh the evidence. (*In re R.C.* (2008) 169 Cal.App.4th 486, 491.)

II. No Forfeiture of Challenges to Adoptability Findings

Father contends that the court’s adoptability findings for each of the minors were not supported by substantial evidence. We note that Father did not raise this challenge below when the court made its findings.

“ ‘Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception to the rule.’ [Citation.]” (*People v. Butler* (2003) 31 Cal.4th 1119, 1126.) Thus, “while a parent may waive the objection that an adoption assessment does not comply with the requirements provided in section 366.21,

subdivision (i), a claim that there was insufficient evidence of the child’s adoptability at a contested hearing is not waived by failure to argue the issue in the juvenile court.” (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623; see also *In re Eric P.*, *supra*, 104 Cal.App.4th at p. 399.) Subject to Father’s express waiver of his appellate positions regarding the court’s adoptability finding as to K.T. and S.M.T. (discussed, *post*), Father’s claims are therefore cognizable on appeal.

III. A.J. Adoptability Finding Was Supported by Substantial Evidence

A. Background Concerning A.J. Adoptability Finding

1. January 2013 Evaluation

Dr. Donahue noted in her January 8, 2013 evaluation that Father had stated that eight-year-old A.J. and his twin sister, J.J., had been exposed to alcohol and marijuana in utero throughout Mother’s pregnancy. A.J. has a history of asthma. His foster parents reported that A.J., who was in the second grade in a Hollister elementary school,⁵ “seem[ed] to be adjusting well to his new school environment and [was] making social connections.” A.J., however, “seem[ed] to be performing well below grade level across academic domains.”

Dr. Donahue described A.J. as “severely anxious.” Upon entering the room, he asked Dr. Donahue, “ ‘Are you going to ask me bad questions?’ [She] inquired what [A.J.] meant by ‘bad questions,’ to which he responded, ‘My mom hitting us and doing drugs.’” A.J. said that “ ‘Mom does drugs. She does that white stuff. Smokes it.’” He told Dr. Donahue that Mother frequently became sick because of her use of drugs and showed signs of paranoia while she was under the influence. A.J. also said that Mother suffered from chronic pain and “ ‘if she doesn’t have pills, Mom gets withdrawals.’”

⁵ As noted, none of the minors was enrolled in school at the time of their detention. A.J. and J.J. were enrolled in the second grade in November 2012.

A.J. told Dr. Donahue that Mother physically abused him and his siblings: “ ‘She throws a brush at [K.T.] on the back of the head. Hits all of us with a brush. Even the baby . . . Pops [the baby] with a brush to get her to go to sleep.’ ” He also stated that Mother “ ‘punched me in the face. Bit my head because I wouldn’t let the baby play with my game.’ ” A.J. also reported that “ ‘Dad hits me. He punched me in the face and kicked me. My brother tried to kill my Dad with a hammer. Mom told my brother to kill Dad.’ ” A.J. repeatedly expressed fears that Mother would “ ‘steal [him] from [his] foster home. She’s going to have someone take me.’ ”

Dr. Donahue concluded that “[to] cope with the chaos in the family home, A.J. took on the role of parentified child. He was charged with cleaning the home, meeting the physical needs of his siblings, and stealing food to provide for the family.”

Dr. Donahue observed that A.J. “presents with a significant trauma history, symptoms of anxiety, poor self-esteem, physical abuse, exposure to maternal substance use, and exposure to severe domestic violence. Although [A.J.] does not meet diagnostic criteria of [PTSD] at this time, his symptoms should be monitored by his treating clinician.”

2. *Therapist Reports (January, April 2013, January 2014)*

Kelli M. McDougall, Psy.D., began providing therapeutic services for A.J. on February 2, 2013. She provided reports to the court in April and June 2013, and in January 2014. As of January 2014, A.J. had attended 26 individual therapy sessions.

In her initial report of April 2013, Dr. McDougall stated that A.J. presented “as highly anxious and has a combination of indiscriminant and anxious attachment patterns.” Although A.J. wanted to make it appear that everything was fine, he acknowledged that he “felt sad” about being physically abused by Mother and Father, seeing Mother strike his sister and little brother with a brush, and Mother making him steal food and diapers. A.J. spoke highly of his foster family and that he had a house and his own bed. He required frequent assurance that he would remain in a stable home environment. Dr. McDougall observed that A.J. was “a sweet and likable boy” and

“ha[d] a big heart.” He had made progress in therapy and had become more relaxed, “playful and expressive.” Dr. McDougall also indicated that A.J. “struggle[d] cognitively” and “present[ed] as cognitively much younger than 8 years old.” She recommended that A.J. receive an Individualized Education Plan (IEP) evaluation.

In her June 2013 treatment update, Dr. McDougall noted that A.J. was “very sweet and enjoy[ed] coming to therapy.” He “seem[ed] more comfortable with play and acting things out.” She observed that A.J. “continue[d] to present as the parentified child” and “continue[d] to display anxiety,” but A.J. reported that he was “happy and that things in his current life [were] good.” He had received an IEP evaluation, and it was determined that he would receive some services in the next school year.

Dr. McDougall indicated in her January 2014 treatment report that “[A.J.] continues to present as the parentified child.” Although he was not placed in that role by his current foster family, Dr. McDougall observed that behavior in A.J.’s interactions with his sister, J.J., during multiple sibling sessions. She also reported that A.J. “continues to display anxiety. He gets excited and anxious and this is visible in his body.”

3. *Report of CASA Advocate (February 2014)*

In her February 2014 report, A.J.’s CASA Advocate, Brandi Bluhm, stated that A.J. was “always well dressed, clean and well fed.” Each of the children in A.J.’s foster home had assigned chores, and A.J. had mentioned several times that he “enjoy[ed] being able to contribute.” He especially liked washing cars with his foster father and said that he was “‘good at it.’”

Bluhm described A.J. as “an old soul. He always rushes ahead to open doors for me. He is very thoughtful and often thinks through various options and effects before making a decision. He has a remarkable sense of direction and really seems to enjoy contributing to any process . . . He isn’t easy to read and is relatively quiet and stoic when I first see him and when I leave. He talks quite a bit when we are together Lately, [A.J.] has been laughing and joking a lot more than when I first began spending

time with him. He isn't really a hugger, but he gave me a real hug the last time I saw him."

When A.J. encountered someone he knew, Bluhm observed, he greeted the person politely and cheerfully. "His interactions are positive, brief and socially appropriate. He is friendly and seems to be liked by all [whom] he greets." Bluhm noted that he could "be bossy occasionally," especially with J.J., and that he was sensitive to criticism.

Bluhm observed that "[A.J.] is thriving in his current placement . . . [, which] is providing [him and his sister] with structure and positive foundations. [A.J.] seems to be in an environment in which he is comfortable enough to relax, heal and grow. Although he seems to be very serious and 'adult-like_[,]' I have seen him become more childish and playful in the last few months." Bluhm also reported: "Compared to his sister, [A.J.] seems to be more skeptical of relationships with others and seems resistant to connect. While [J.J.] gives hugs when saying hello and goodbye, [A.J.] almost never hugs." Bluhm indicated, however, that she knew that A.J. enjoyed her visits and expressed himself "in his own cautious way" by confirming Bluhm's next visit.

A.J. was asked by Bluhm if there was anything he wanted the court to know. He responded: " 'There is one thing. I want to stay here and I do not want to go back to my parents.' "

4. *Permanency Hearing Report (February 2014)*

In the Department's February 2014 report in connection with the .26 hearing, the social worker, Raquel Avila, indicated that A.J. was "generally healthy," although he had a history of asthma and allergies. She described him as "a very sweet and timid boy who is friendly and very likeable." Avila noted that A.J. had difficulty interacting with his peers. He "is eager to please and loves positive reinforcement." He "enjoys playing games, painting and writing. . . . [He] loves his foster parents and feels very safe in their home. He continues to display anxiety, which is visible in his body language, displays obsessive compulsive behavior and is very rigid. He struggles with having to be in

control and exhibits frequent episodes of [PTSD] such as disassociation and avoidance. According to his therapist, '[A.J.] exhibits some signs of someone who is on the autism spectrum . . .' However, it is unclear if these behaviors are due to the lack of exposure to age appropriate material and lack of school attendance or a deeper underlying issue."

Avila also reported that A.J. was in the third grade and was receiving services to help with his math skills. He also needed extra help with reading and writing. Because of these needs, he was removed from the general education classroom and received special education for 45 minutes per day, four days a week. A.J. was evaluated in May 2013 through a Hollister School District program. The evaluator opined that "[A.J.'s] cognitive abilities were in the low average range, but are still developing. He had a low average performance with his fine motor skills and an elevated range in anxiety and learning problems."

Avila described A.J. as "a bright and energetic child who presents as severely anxious and hypervigilant. He is extremely guarded, presents with high needs for nurturance and has a strong desire to connect with others [H]e has a history of being bullied, and seems to expect rejection and taunts from others." He avoided talking about his biological family, but had been able to disclose instances of abuse he had witnessed, "people doing 'bad stuff_[j]' and having to steal things from the store for his family." A.J. was "working on a 'life book' in therapy," which had allowed him to express his past experiences.

The Department reported that A.J. and his twin sister, J.J., were placed in November 2012 in a nonconcurrent foster home in San Benito County. The foster home was certified by the Foster Family Agency, Aspiranet. "The caregivers have been successfully working on stabilizing the children." A.J. had had only one placement since his detention. Avila indicated that no prospective adoptive home for A.J. and J.J. had been located and that it had "been difficult to find a concurrent home where they can stay together. Every effort will be made by the Department to ensure that [A.J. and J.J.]

remain together if it is in their best interest and [the Department] will take measures to ensure a smooth and slow transition.” She stated that A.J.’s (and J.J.’s) caregivers’ home “will be available . . . until the Department finds a permanent placement.”

5. *Permanency Hearing (June 2014)*

Avila testified at the .26 hearing and opined that A.J. and J.J. were adoptable. She based this opinion on the fact that A.J. and J.J. had established an attachment with their caregivers, who were willing to keep the twins in their home “on a long-term basis.” Avila testified that a child’s attachment to a caregiver was important in assessing the child’s adoptability, “[b]ecause it shows that . . . there is a bond there and that [the child] can attach to a different caregiver.” She also testified that A.J. and J.J. were “sweet and loving kids.” In response to questioning by the court, Avila testified that the “likelihood is probable” that A.J. and J.J. will be adopted by current caregivers or others, but there “is never a guarantee.” She explained that “[b]ecause they have been able to form a relationship with these . . . caregivers, . . . I believe they deserve the opportunity to be in an adoptive home if we find one fit for them.”

Avila testified that the Department had not “actively” searched for a concurrent home for A.J. and J.J. She nonetheless testified: “We have searched. We have kept our eyes [open] and looked at prospective adoptive homes for them, but we haven’t found one that matches their individual needs.”

Avila responded to the court’s inquiry as to why A.J. and J.J. were not in a concurrent home: “The only reason we haven’t moved [J.J.] and [A.J.] is because they have been doing so well in their current placement and the current caregivers, although they continue to state they are not [a] concurrent placement, the hope is they would have been at least legal guardians or possibly adoptive parents as they have recently adopted other children. The goal was to stabilize [J.J.] and [A.J.] and get more information regarding their behaviors while being in a stable home.”

B. Substantial Evidence Supported Finding of A.J.'s Adoptability

A two-word conclusion may be drawn from the evidence supporting the juvenile court's finding of A.J.'s adoptability: significant progress. Notwithstanding A.J.'s exposure to extreme trauma, physical abuse, domestic violence, and Mother's substance abuse, he had made significant progress at home, at school, in his outward actions, and in interpersonal relationships. Although he was not enrolled in school as of November 2012, by the time of the permanency hearing, he had made strides to catch up academically. He had made significant progress over time in his relationships with his therapist, Dr. McDougall, and his CASA representative, Brandi Bluhm. And most significantly, A.J. had established a long-term (19-month), successful, healthy, and loving relationship with his caregivers. He indicated he was happy in his current life, enjoyed doing chores assigned to him by his foster parents, and told Bluhm to advise the court that he wanted to stay with his foster family. Bluhm described A.J. as "thriving in his current placement." And Avila indicated that A.J. loved his foster parents and felt very safe with them.

The healthy boy—nine years old at the time of the .26 hearing—was described by Dr. McDougall as "a sweet and likeable boy" with "a big heart." Similarly, Avila said that A.J. was "a very sweet and timid boy who is friendly and very likeable." And Bluhm called A.J. "an old soul," and described him as "very thoughtful," one who "enjoy[s] contributing to any process," and has positive and friendly interactions with others.

Father makes several arguments challenging the trial court's finding that it was likely that A.J. would be adopted within a reasonable time. In summary, Father argues (1) the Department had not located a family expressing a willingness to adopt A.J. and J.J.; (2) the Department had not identified any persons who had adopted or were willing to adopt a child of A.J.'s age, condition, and characteristics; (3) A.J. exhibited various psychological, mental, and emotional problems that reflected negatively on his adoptability; (4) the court displayed flawed reasoning not supported by the evidence that

the twins' foster parents might be willing to adopt them; and (5) a social worker's opinion by itself is not sufficient to support an adoptability finding.

Addressing the first two arguments, the absence of a prospective adoptive family is not an impediment to a finding of adoptability. In fact, the statutory scheme prohibits a negative determination regarding adoptability where it is based upon the child's placement in a nonconcurrent home: "The fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child, shall not constitute a basis for the court to conclude that it is not likely the child will be adopted." (§ 366.26, subd. (c)(1).) "It is not necessary that the child already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citation.]" (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1311.) Moreover, while evidence that there are approved families willing to adopt a child with circumstances (age, physical and emotional health) similar to the dependent child is useful in evaluating adoptability (see, e.g., *In re R.C.*, *supra*, 169 Cal.App.4th at p. 492; *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205), the law does not require such evidence to find a child likely to be adopted within a reasonable time.

Father emphasizes that A.J. has a number of psychological and emotional issues that reflected negatively toward his adoptability. The record shows that A.J. has various psychological, mental, and emotional problems, including PTSD symptoms, anxiousness, poor self-esteem, cognitive deficits, learning disabilities, fine motor skill limitations, and signs on the autism spectrum. These are no doubt facts the court below considered and ones that Father emphasizes as undercutting the court's finding of adoptability. But a challenge to an adoptability finding may not be based upon "picking and choosing evidence from the record in support of [the parent's] argument." (*In re A.A.*, *supra*, 167 Cal.App.4th at p. 1313.) Moreover, although a parent challenging an adoptability finding may point to the condition of a child at the commencement of the dependency (e.g., psychological or emotional problems), the court should also consider the progress

the child has made during the dependency in assessing adoptability. (*Id.* at pp. 1312-1313.) And “[t]he possibility [the dependent child] may have future problems does not preclude a finding he [or she] is likely to be adopted.” (*In re R.C.*, *supra*, 169 Cal.App.4th at p. 492 [general adoptability finding upheld notwithstanding child’s in utero exposure to drugs, slight speech delays, and absence of identifiable father].)

In support of his position, Father cites two cases, *In re Asia L.* (2003) 107 Cal.App.4th 498, and *In re Brian P.*, *supra*, 99 Cal.App.4th 616, in which the psychological and emotional difficulties and developmental delays of the dependent children were significant factors in the reversal of adoptability findings. In *In re Asia L.*, *supra*, 107 Cal.App.4th 498, the appellate court reversed adoptability findings for three young children; each of them showed behavioral problems, including hyperactivity, and the youngest child had been exposed to drugs in utero. (*Id.* at pp. 510-512.) The agency indicated that “ ‘the children are adoptable but are in need of specialized placements.’ ” (*Id.* at p. 511.) The appellate court concluded that the children’s psychological and emotional health “present[ed] a potential obstacle for adoption,” and evidence that two of the children’s foster parents were willing to explore the possibility of adoption was “too vague” to establish that they or some other family would be willing to adopt them. (*Id.* at p. 512.)

While there are some similarities, *Asia L.* does not compel the conclusion that the juvenile court here erred. In *Asia L.*, *supra*, 107 Cal.App.4th 498, the foster family had been caretakers for the two older children for only a short while, i.e. two to three months (*id.* at p. 511), as contrasted with the more than 19-month continuous period the foster family in this case had cared for A.J. and J.J.

In *In re Brian P.*, *supra*, 99 Cal.App.4th 616, the child’s father challenged the juvenile court’s adoptability finding. The father had come forward to attempt to establish contact with the child approximately one and one-half years after commencement of the dependency proceeding and after the setting of a .26 hearing, claiming that the child’s

mother had threatened to contact immigration authorities and have him deported if he attempted to contact the child. (*Id.* at pp. 619-620.) The dependent child, upon initial placement, “was sickly and developmentally delayed,” insofar as he could not speak, had difficulty walking, and could not dress himself. (*Id.* at p. 620.) He had improved in the nearly two years that followed. (*Ibid.*) The social worker who prepared the agency’s .26 report “recommended a permanent plan of long-term foster care ‘at the present time’ ” and indicated that “ ‘[t]here is not clear and convincing evidence that it is likely the child will be adopted at this time.’ ” (*Id.* at p. 619.) At the hearing, the social worker gave brief testimony, stating that “she had intended to recommend continued long-term foster care when she wrote the report, but realized she had made an error after speaking to counsel, who informed her that ‘[w]e were recommending termination of parental rights.’ ” The worker also retracted, with some confusion, her proposed finding on the lack of clear and convincing evidence of adoptability.” (*Id.* at pp. 620-621, fn. omitted.)

The appellate court in *In re Brian P.* reversed the juvenile court’s adoptability finding, holding that evidence of adoptability was “sorely lacking.” (*In re Brian P.*, *supra*, 99 Cal.App.4th at p. 624.) It found the social worker’s conclusory testimony that “the chances of adoption were ‘very good,’ . . . hardly amount[ed] to clear and convincing evidence.” (*Ibid.*) It also concluded that evidence about the child’s circumstances and progress was “fragmentary and ambiguous” and was insufficient to support the agency’s position that the child was adoptable. (*Id.* at p. 625.)

Aside from the different procedural posture in *In re Brian P.*, in which the father appeared very late in the proceedings, the case is distinguishable. In *In re Brian P.*, there was (a) little favorable evidence presented regarding adoptability; (b) a recommendation by the social worker in the .26 hearing report of long-term foster care for the child and an opinion that the child was not adoptable; (c) a later unclear retraction by the social worker of her prior statement regarding adoptability; (d) an unsupported opinion by the social worker at the .26 hearing that the child’s chances for adoption “were ‘very good’ ”

(*In re Brian P.*, *supra*, 99 Cal.App.4th at p. 624); and (e) evidence supporting adoptability that was “fragmentary and ambiguous” (*id.* at p. 625). Because of these significant distinctions, *In re Brian P.* does not compel the conclusion that the court’s finding that A.J. was adoptable was not supported by substantial evidence.

Father also contends that the juvenile court’s reasoning in making its adoptability findings was flawed. He argues: “In finding [A.J. and J.J.] adoptable, the court cited the evidence that the children were capable of bonding with their caregivers and that they had so bonded. [Record citation.] Although being able to form attachments with their current caregivers was a positive factor the court could consider, the court made short shrift of the children’s daunting conditions by stating that they had ‘stabilized’ in their placements.” Father also contends that the court erroneously reasoned that “the current caregivers [of A.J. and J.J.] were ‘certainly not out of the question as far as being adoptive parents simply because they have not committed to that plan yet. The evidence is they are committed to caring for these children over the long term . . . So there is no evidence that these children are not adoptable other than the speculation of counsel.’ [Record citation.]” Father argues that [c]ontrary to the court’s statement, there is only speculation that the current foster parents would adopt A.J. and J.J.”

We do not read the record as suggesting that the court based its adoptability finding upon the belief that the foster family who had cared for A.J. and his sister for over 19 months would ultimately adopt the two children. Rather, we understand the court to have been emphasizing the bond that had developed between the twins and their foster family and the longevity of their placement as having great significance in determining whether A.J. and J.J. were adoptable. In any event, the court’s reasoning, even if flawed, is of no consequence in our review of its findings. “The juvenile court’s reasoning is not a matter for our review. [Citation.] It is judicial action not judicial reasoning which is the proper subject of appellate review. [Citation.]” (*In re A.A.*, *supra*, 167 Cal.App.4th at p. 1313.)

Lastly, Father argues that the adoptability finding is not supported by substantial evidence because it is founded upon the social worker’s opinion of adoptability. We agree with Father that a social worker’s opinion, of itself, is not sufficient to support an adoptability finding. (*In re Brian P.*, *supra*, 99 Cal.App.4th at p. 624; *In re Kristin W.* (1990) 222 Cal.App.3d 234, 253.) But we do not view the record here as showing that the juvenile court relied solely on Avila’s opinion that A.J. was adoptable. Thus, regardless of the conclusory nature of Avila’s opinion concerning adoptability—and we agree that she could have supplied more facts supporting her opinion—the court’s adoptability finding is not undermined by any reliance it placed upon that opinion.

Giving every reasonable inference and resolving any evidentiary conflicts in favor of the trial court’s judgment (*In re Valerie W.*, *supra*, 162 Cal.App.4th at p. 13.), the record demonstrates that there was substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that it was likely that A.J. would be adopted within a reasonable time. (*In re Erik P.*, *supra*, 104 Cal.App.4th at p. 400.)

IV. J.J. Adoptability Finding Was Supported by Substantial Evidence

A. Background Concerning J.J. Adoptability Finding⁶

1. January 2013 Evaluation

Dr. Donahue noted in her January 8, 2013 evaluation that the foster parents reported that eight-year-old J.J., who was in the second grade in a Hollister elementary school, “seem[ed] to be adjusting well to her new school environment but struggles to make social connections because she presents as immature.” She also “seem[ed] to be performing well below grade level across academic domains.” J.J.’s foster parents also

⁶ Background facts concerning J.J. that are shared with her twin brother, A.J., and that have been discussed, *ante*—such as the foster home setting in which the twins were placed and Avila’s testimony concerning adoptability that concerned both children—are not repeated here.

reported that J.J. had adjusted well to her new home “and she ‘could not get enough food . . . [and was] always wondering what the next meal will be.’” J.J. had had frequent nightmares, and while she had not been aggressive in the home, J.J. had begun “to demonstrate sexualized behaviors and comments.” It was observed that J.J. “often ‘laughed at inappropriate times.’” Her foster family had been working with her on expressing her emotions in a more appropriate way, and they had “observed improvements in her ability to express a wider range of emotions.” Dr. Donahue indicated that it appeared J.J. had made a connection with her foster family and had opened up about the trauma she had undergone.

During her two interviews of J.J., Dr. Donahue described her as “demonstrat[ing] indiscriminate boundaries: she attempted to hug this examiner and stayed physically close to this examiner.” She was “anxious,” “spoke loudly and rapidly,” and “[h]er ability to initiate and sustain attention was significantly impaired, and although she was hypervigilant, she seemed to be easily overwhelmed by the extraneous stimuli in the evaluation environment.” J.J. “struggled to persist with tasks, and demonstrated a poor frustration tolerance. As the session progressed, [J.J.] became dysregulated.”

Upon meeting Dr. Donahue, J.J. asked, “ ‘[W]ant to talk about drugs? My Mom does drugs’ ”. She reported that Mother used “marijuana and ‘white stuff’ ” and that Mother “ ‘smoked out of [a pipe] . . . a lot.’ ” J.J. said that Mother received money from a man named Lee. And she said, “ ‘I think he has sex with Momma. Dunno. She gets money from Lee.’ ”

J.J. described to Dr. Donohue the physical abuse she had experienced and witnessed: “ ‘Mom hits me and [K.T.] and [A.J.]’ with a brush, belt, ‘[she] cut me, punched me with [a] fist in [the] face.’ . . . [Mother] throws ‘kids against the wall. Across the room.’ [J.J.] stated that [Mother’s] physical limitations prevent her from getting ‘off the couch . . . [A.J.] chases us. She makes him chase us. Then Mom beats us with a brush or her fist.’ ” J.J. also said that on one occasion, Mother struck her on the head

with a screwdriver. She said that Father also physically abused her. On one occasion, Father had choked her and had his hand over her mouth. J.J. said she had witnessed Mother hit Father with a hammer because he had cheated on her. J.J. also said that Father “forced [A.J. to] swallow a penny, noting, ‘[A.J.] choked.’ ”

Additionally, J.J. told Dr. Donahue that her adult brother, M.T., had repeatedly sexually assaulted her and had forced her to orally copulate him. J.J. reported the first sexual assault to Mother, “who ‘was crying.’ Yet, [J.J.] alleged that [Mother] failed to intervene to prevent further, sexual assaults.” J.J. also reported to Dr. Donahue that Father “ ‘pinched my private with his hands’ ” and gestured to her vagina. J.J. also reported that she had engaged in sexual activity with her brothers, A.J. and K.T.

J.J. told Dr. Donahue that she had been “ ‘sad’ ” when Mother, during visitation, had spoken to the social worker in a disrespectful manner. She said Mother had embarrassed her during a visit “by making comments that ‘I stink and [Mother saying] she was mad about my hair.’ ” J.J. expressed to Dr. Donahue that she was fearful that Mother would “kidnap” her or A.J.

Dr. Donahue opined that “[J.J.] has taken on the role of family scapegoat: the problematic child who is generally in trouble, is impulsive, and does not fit in. [J.J.] is sensitive to the chaos in the family home, and is constantly scanning her environment for threats. This hypervigilance overwhelms [her].” Dr. Donahue concluded: “[J.J.] presents with significant symptoms of trauma and emotional dysregulation. Additionally, [J.J.] exhibits high needs for nurturance, a strong desire to connect with others, and indiscriminate boundaries. It should be noted that these poor, indiscriminate boundaries will place her at risk for being further exploited by others. These symptoms are consistent with chronic, and untreated, [PTSD] in children. Additionally, [J.J.] exhibits a disorganized attachment style. Children with a disorganized attachment are often confused and inconsistent in their responses; they may vacillate between appropriate behavior and extreme behavioral outbursts. . . . Thus, [J.J.] also meets diagnostic criteria

for a Reactive Attachment Disorder [RAD]. Finally, [J.J.] exhibits symptoms of depression that, although just below the clinically significant cutoff, should continue to be monitored by a mental health professional.”

2. *Therapist Reports (April 2013, January 2014)*

Dr. Donahue began providing weekly therapeutic services for J.J. in January 2013. The psychologist provided reports to the court in April 2013 and January 2014.

In her April 2013 report, Dr. Donahue stated that J.J. had been actively involved in individual therapy sessions with her. Dr. Donahue used “play therapy strategies, in order to provide [J.J.] with a safe venue in which she can express her thoughts and feelings in a non-threatening fashion.” J.J.’s expression of her thoughts and feelings “incorporate[d] themes of violence, abuse, rejection and abandonment by parental figures. She also employ[ed] sexualized behaviors (e.g.,[] having dolls rub against one another ‘for sex’) and abuse (e.g.,[] beating a character with a belt for ‘being bad’).” J.J. said she did not wish to have any contact with Mother or Father and “expresses a desire to be adopted.” Reiterating her findings from her January 2013 evaluation, Dr. Donahue concluded that J.J. showed PTSD symptoms, “including: nightmares, flashbacks, hopelessness, helplessness, concentration difficulties, memory difficulties, emotional reactivity, anger, irritability, sleeping difficulties and hypervigilance.” J.J. “also exhibit[ed] symptoms of Reactive Attachment Disorder including: withdrawal, indiscriminate boundaries, aggressive behavior, rejection of comfort, and difficulties with asking for help or assistance.”

Dr. Donahue indicated in her January 2014 updated treatment report that J.J. had remained actively involved in her individual therapy sessions and had “been forthcoming in discussing details of her traumatic past and her life with [Mother] and [Father].” The psychologist opined that “[o]ver the last twelve months, [J.J.] has made significant progress in her behavioral regulation, and she has demonstrated less sexualize[d] behavior, decreased impulsivity, and fewer behavioral problems in school, home and

therapy environments. [J.J.] continues to exhibit high needs for nurturance, and requires a great deal of support and reassurance from her foster parents and this clinician. She is forging a strong attachment with her foster parents, and this clinician as demonstrated by: trust, sharing her affective experiences, expressing her thoughts and feelings more openly, accept[ing] nurturance and divulging further details of her trauma history.” Dr. Donahue also noted that J.J.’s frustration tolerance had improved, as demonstrated by her “increasingly verbalizing her frustration rather than engaging in acting out behaviors (e.g., sexualized behaviors, running out of the room and throwing objects).” The psychologist stated that J.J. continued to exhibit symptoms of PTSD, depression, and RAD, and that the frequency of her nightmares had decreased.

3. *Report of CASA Advocate (January 2014)*

A report prepared by J.J.’s CASA Advocate, Starra Hill, was filed January 30, 2014. Hill reported that J.J. and A.J., were still residing with the foster family with whom they had been placed on November 14, 2012. Hill indicated that “J.J. appears very stable in her home environment.” J.J. “expresses affection toward her foster parents” and refers to them as mom and dad. J.J. “cares for her foster family dearly.” The family is very close, but from Hill’s observation, the twins are not very close.

Hill reported that although J.J. had been promoted to the third grade, she was later placed back in the second grade after it was concluded from an IEP that she had a learning disability. J.J. participated in a special education group in language arts and math four days a week, which allowed her one-on-one instruction. The teacher stated that J.J. enjoyed being in class and that her reading had greatly improved from the beginning of the academic year. The teacher indicated that J.J. “generally is well-behaved and gets along well in the [classroom, but] she does struggle with math and really needs assistance, lacks comprehension and [the teacher] does not feel that she always has [J.J.’s] attention.” It was the teacher’s belief that J.J.’s learning disability was attributable to her nonattendance at school before November 2012.

Hill stated that, from her observation, J.J. “is a happy, well-adjusted nine year old child, who loves playing: basketball, kicking a soccer ball around, flipping on the ‘monkey bars’ and having her picture taken while making crazy funny faces. She is well mannered and courteous.” Based upon Hill’s experience in reading and coloring with J.J., she showed a short attention span and preferred playing. Hill observed that J.J. “gravitated towards younger children” and her foster mother said that J.J. was “awkward around her age group and feels she doesn’t fit in.” But she is comfortable interacting with her peers if sports are being played. J.J. was described as “an avid swimmer,” and she was participating in activities at a Christian Girl Scouts group through her church, including Bible studies, art projects, and cooking. Hill opined that J.J. was “living in a healthy environment and loving home. Her foster parents and siblings are caring, wonderful people, who love her very much!”

4. *Permanency Hearing Report (February 2014)*

In the Department’s February 2014 report in connection with the .26 hearing, social worker Raquel Avila reported that it was determined from a December 2013 medical examination that, in addition to needing to have her tonsils and adenoids removed, J.J. was diagnosed with “chronic otitis media with associated hearing loss” that would require ear tubes to address her impaired hearing. Avila described J.J. as “a bubbly and happy girl. She enjoys sports and outdoor activities. . . . She often relates emotionally and socially to children that are preschool age. She feels the need to please and is constantly seeking approval.” She had an IEP learning disability, and she received special education four days a week. J.J.’s resource specialist teacher reported that J.J.’s reading had improved greatly. Her general education teacher stated that J.J. got along well with others in the classroom but struggled academically with mathematics and she lacked comprehension skills.

Avila summarized: “[J.J.] is very friendly and is always smiling. She is immensely happy to be living in her current placement.” Reiterating Dr. Donahue’s

comments, Avila indicated that J.J. continued to experience symptoms of PTSD, depression, and RAD. Avila noted that “[J.J.] has made significant progress and is beginning to recognize that her parents’ behaviors were unsafe and unhealthy.”

B. Substantial Evidence supported Finding of J.J.’s Adoptability

Like in the case of her twin brother, A.J., a two-word conclusion may be drawn from the evidence supporting the juvenile court’s finding of J.J.’s adoptability: significant progress. Notwithstanding the extreme trauma, physical abuse, sexual abuse by multiple family members, exposure to domestic violence, and exposure to Mother’s substance abuse experienced by J.J. before her detention, she had made significant progress at home, at school, in her outward actions, and in interpersonal relationships. Although she was not enrolled in school as of November 2012, the evidence was that by the time of the permanency hearing, her reading skills had improved as a result of special education she had received. In fact, one of her teachers expressed the opinion that J.J.’s learning disability was attributable to her nonattendance at school before November 2012.

J.J. had also made significant progress over time in her relationship with her therapist, Dr. Donahue. According to Dr. Donahue, J.J. “had made significant progress in her behavioral regulation, and ha[d] demonstrated less sexualize[d] behavior, decreased impulsivity, and fewer behavioral problems in school, home and therapy environments.” In addition, J.J.’s frustration tolerance had improved. And most significantly, J.J. had established a long-term (19-month), successful, healthy, and loving relationship with her caregivers. J.J. called her caregivers “mom” and “dad,” expressed affection toward the foster family, and, in the opinion of CASA Advocate Starra Hill, J.J. “cares for [them] dearly.” J.J. was “living in a healthy environment and loving home.” She expressed a desire to be adopted. Avila indicated that J.J. was “immensely happy in her current placement.”

J.J. was described by Hill as “a happy, well-adjusted nine year old child,” who “is well mannered and courteous.” Similarly, Avila described J.J. as “a bubbly and happy girl,” who enjoyed sports and other outdoor activities and “is friendly and is always smiling.”

In challenging the trial court’s finding that it was likely that J.J. would be adopted within a reasonable time, Father makes the same five arguments asserted with respect to the court’s adoptability finding as to A.J. For the reasons expressed *ante*, none of those arguments demonstrates error.

First, the fact that the Department had not located a prospective adoptive family did not preclude a finding of J.J.’s adoptability. (See § 366.26, subd. (c)(1); *In re A.A.*, *supra*, 167 Cal.App.4th at p. 1311.) Second, the fact that the Department had not identified any persons who had adopted or were willing to adopt a child of J.J.’s age, condition, and characteristics was not dispositive on the question of her adoptability. Third, the record shows that J.J. exhibited some characteristics—including symptoms of PTSD, RAD, depression, and a learning disability—that may have been factors weighing against a finding of adoptability. But we do not weigh the evidence or assess the credibility of witnesses in determining whether the juvenile court’s adoptability finding was supported by substantial evidence (*In re R.C.*, *supra*, 169 Cal.App.4th at p. 491), and we give that finding the benefit of every reasonable inference and resolve all evidentiary conflicts in favor of the court’s decision (*In re Valerie W.*, *supra*, 162 Cal.App.4th at p. 13). And we acknowledge that while part of the record consisted of the dire circumstances J.J. had faced before the commencement of the proceedings, the court also considered the progress she made in the 19 months after she was placed with her foster family. (See *In re A.A.*, *supra*, 167 Cal.App.4th at pp. 1312-1313.)⁷ Fourth, we disagree

⁷ For the same reasons stated in our discussion of Father’s challenge to A.J.’s adoptability finding, *In re Asia L.*, *supra*, 107 Cal.App.4th 498, and *In re Brian P.*, *supra*,

(continued)

that the court’s reasoning was flawed, and, in any event, “[t]he juvenile court’s reasoning is not a matter for our review. [Citation.]” (*Id.* at p. 1313.) Fifth, although a social worker’s opinion, of itself, is not sufficient to support an adoptability finding (*In re Brian P., supra*, 99 Cal.App.4th at p. 624), the juvenile court did not base its adoptability finding with respect to J.J. solely on Avila’s opinion that she was adoptable. Thus, the record demonstrates there was substantial evidence from which a reasonable trier of fact could find by clear and convincing evidence that it was likely J.J. would be adopted within a reasonable time. (*In re Erik P., supra*, 104 Cal.App.4th at p. 400.)

V. *K.T. Adoptability Finding Was Supported by Substantial Evidence*

A. Background Concerning K.T. Adoptability Finding

1. *January 2013 Evaluation*

Dr. Donahue’s January 8, 2013 evaluation notes that Father had reported that K.T. had been exposed to alcohol, marijuana, and cocaine in utero throughout Mother’s pregnancy. Dr. Donahue also noted that K.T. demonstrated “obvious developmental delays,” but Father told her that the minor had always “exhibited developmentally appropriate behavior.”

Dr. Donahue observed that four-year-old K.T. “demonstrated mild echolalia with sporadic speech, but his vocabulary was limited”; “[h]is eye contact was sporadic”; “[h]e also demonstrated odd movements with his mouth . . . [that were] clearly linked to internal states of anxiety”; he “struggled to initiate and sustain attention”; he “exhibited impulsivity, poor frustration tolerance”; and “[o]n several occasions, [K.T.] became silly, dysregulated, and uttered obscenities . . .” Dr. Donahue also observed that K.T. “demonstrated indiscriminate boundaries” and “a disorganized attachment style.” His

99 Cal.App.4th 616, relied on by Father, are distinguishable and do not support his claim that there was no substantial evidence supporting the court’s finding that J.J. was likely to be adopted within a reasonable time.

foster father reported that K.T. “tend[ed] to be physically aggressive with peers,” was not yet toilet trained, struggled with brushing his teeth, and he exposed himself to others in the foster home. Dr. Donahue also noted that K.T. had been aggressive toward J.J. and A.J. at the family visitations.

Dr. Donahue opined, based upon family visitations, that K.T. had “taken upon the role of mascot within the family system. He is perceived as the ‘silly’ one and brings comic relief to the family system to avoid problems.” Dr. Donahue concluded: “[K.T.] presents with significant emotional and behavioral dysregulation, hyperarousal, hyperactivity, impulsivity and inattention. . . . It is important to note that chronic exposure to substance use, domestic violence, and being the victim of physical abuse, can contribute to severe dysregulation and symptoms of hyperactivity, impulsivity and inattention. Additionally, his difficulties with social cognition and social communication might be artifacts of his trauma history.” Dr. Donahue also noted that K.T.’s difficulties might be the result of Mother’s substance abuse while K.T. was in utero.

2. *Developmental Assessment (May 2013)*

A developmental assessment of K.T. was performed by MCSTART between February and May 2013. A licensed psychologist, Lesley Wilson, Ph.D., prepared a lengthy report dated May 8, 2013.

K.T.’s foster father, C.E., reported to Dr. Wilson that K.T. was initially very afraid of showers and baths, but no longer had problems with showering. He also reported that when K.T. first arrived, he exposed himself to others. That behavior decreased, and it had not occurred for several weeks. And K.T. initially “tried to eat everything he saw,” but had progressed to the point of being able to tell his foster parents when he was hungry. His sleep patterns were such that it would take one to two hours for him to fall asleep, and he did not get enough sleep for a child of his age.

C.E. also reported that the minor’s “play was very rough; that he jumped from one activity to another; that he runs off; that he uses bad language; and it is difficult to

understand what he says.” The foster father “described [K.T.’s] behavior as ‘out of control’ noting that he knocks things out of his foster parents’ hands, climbs on ‘everything,’ [and] he tries to take everything in reach . . .” C.E. said that K.T. was “‘mentally like a two year old.’ He does not know colors or how to count. He cannot point to objects in books.” C.E. expressed a high degree of concern about K.T.’s aggressive and “‘out of control’” behavior, and “his lack of attentional focus, cursing and tantrums.” He noted that K.T. “never [sought] comfort from anyone and [was] not affectionate. However, he will inappropriately touch both children and other adults.” C.E. was also concerned that K.T. might hurt himself or others.

K.T. was evaluated over four sessions. In each of the sessions, K.T. was unable to sit for any period of time, and was unable to complete various tests. But by the third session on March 18, 2013, he “engaged in the tasks presented and made frequent eye contact with the examiner. He appeared to use more language than during the previous two testing sessions and even asked the examiner, ‘Can we count?’ . . .” During the fourth session in May 2013 (after the court had ordered the prescribing and administration of psychotropic medication [clonidine] to K.T.), he was able to remain seated during testing; however, “his attentional focus was quite limited” and he became easily frustrated and dysregulated.

K.T. tested at the lower extreme in each of five categories for cognitive functioning under the Kaufman Assessment Battery for Children, Second Edition (KABC-2) test, with a ranking of his overall performance at less than 0.1 percentile. Dr. Wilson concluded that these results “suggest[] that [K.T.] has severe delays and problems in all domains of functioning.”

K.T. was tested for his communication abilities (expression and comprehension), using the Preschool Language Scale: Fourth Edition (PLS-4). His overall language results ranked in the first percentile and represented the age equivalent of two years, one month.

K.T. was tested by MCSTART for possible autism. Although a developmental history was not available, from the testing conducted, there was a suggestion that K.T. “qualifie[d] for a diagnosis of [a]utism.” Dr. Wilson explained that K.T. was a young child who had come “from [an]extremely deprived and neglectful environment[. Such children] can display behaviors consistent with autism even though they are not truly autistic, and will show behavioral improvement over time when placed in an enriched environment. . . . For this reason, [K.T.] will not currently be diagnosed with [a]utism, but the diagnosis will need to be ruled out in the future if he does not progress developmentally.”

An assessment “to better understand [K.T.’s] social/emotional functioning” was made using the Conners’ Parent Rating Scale Revised: Long Version (CPRS-R:L). The results suggested that “[K.T.] has many behavior problems that appear to be more wide-ranging than those usually seen in ADHD It seems unlikely that [K.T.] has the classic genetic form of ADHD, but his behaviors are most likely related to brain damage from both teratogen exposures during gestation, and severe early neglect and trauma.”

Dr. Wilson concluded that “[K.T.] presents as a child with no selective attachments, and with behaviors that are similar to those exhibited by children who are autistic and/or intellectually impaired.” But Dr. Wilson concluded that “[K.T.] will not be diagnosed with autism or mental retardation at this time because of the adverse conditions in which he has lived. It is clear that [K.T.] received little or no parental guidance, and lived in extreme deprivation. Sometimes, such severe early life circumstances result[] in primitive behavior. Behaviorally, [K.T.] presents as a two-year-old child. An accurate diagnosis can only be made after [K.T.] has been in an enriched and supportive environment and has had the opportunity to show whether or not he progresses developmentally. In addition, [K.T.] is currently unable to participate fully in some formal assessment procedures, resulting in scores that may underestimate his true ability.”

3. *Status Review Report (July 2013)*

K.T. received an IEP assessment from the Alisal Union School District in May 2013. The IEP team determined that K.T. had “significant developmental and cognitive delays.” The team planned to place him in a special day class at Vasquez Elementary School in the fall.

The Department reported that “[a] concurrent home for [K.T.] has been identified with caregiver, [A.R.], and he has begun transitioning to her home.” K.T.’s then-current caregiver reported that his behavior had improved greatly over six months and that he has had success in following one-step directions, something he was previously incapable of doing. But the Department also reported that K.T. had been unable to participate in therapy due to his behavior, and that his caregiver and social worker were still concerned about K.T.’s aggressive behaviors and inappropriate touching of women and other children. K.T. also “continue[d] to use very foul language to adults.”

4. *Permanency Hearing Report (February 2014)*

Social worker Raquel Avila reported in connection with the .26 hearing that K.T. had been placed in a nonconcurrent foster home in Salinas. K.T. had had one placement since his detention in November 2012. However, the Department had “identified a prospective adoptive Monterey County licensed foster home” for K.T. to which he had been transitioning slowly. Avila indicated that a change in placement for K.T. would take place on February 6, 2014.

K.T. was enrolled in kindergarten in Salinas and was in a special day class with a full-time one-on-one aide. His teacher reported that he had made significant academic progress since the beginning of the school year. He was able to follow directions, knew the letters of his name, and his interpersonal skills had improved.

Avila summarized: “[K.T.] is an adorable boy with a beautiful smile. He appears to be curious, very shy and not trusting. It usually takes approximately two-three days being around the same person before he is comfortable enough to socialize or make eye

changes have an adverse impact on the judicial process. [Citation.]” ’ ’” (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 350.) “ ‘Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts.’ [Citation.]” (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) The principles of invited error also prevent a party from taking litigation action which “induces the commission of an error[; the party] is estopped from asserting it as grounds for reversal.” (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166.)

Father, through his counsel, went beyond simply failing to argue that there was no substantial evidence to support an adoptability finding as to K.T.—an omission which, under *In re Brian P.*, *supra*, 99 Cal.App.4th at page 623, would not result in a forfeiture of the contention. Here, Father’s counsel *expressly conceded* on the record that K.T. was adoptable. Under principles of judicial estoppel and invited error, he has expressly waived his appellate claim.

2. *Merits of Contention*

Even were we to overlook Father’s express waiver of his challenge to the adoptability finding as to K.T., we would nonetheless reject it. As was the case with his two older siblings, the evidence was that K.T. had made significant progress since his detention in November 2012. K.T.’s foster family reported in mid-2013 that his behavior had greatly improved during the first half of the year and he had become successful in following one-step directions. As of February 2014 (four months before the .26 hearing), K.T. was enrolled in kindergarten, was receiving special education, and had made significant progress since the beginning of the academic year. He was in good health and was described by Avila as “an adorable boy with a beautiful smile.” Prior to March 2014, he had had only one placement, indicating he had been able to have a stable family relationship with a foster family for 16 months. (See *In re A.A.*, *supra*,

167 Cal.App.4th at pp. 1312-1313 [court in assessing adoptability should consider child's progress during dependency].)

And, significantly, as of the time of the permanency hearing (at which time he was six years old), K.T. had been living in a concurrent home for approximately three months. “ ‘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 the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family.’ [Citation.]” (*In re Asia L.*, *supra*, 107 Cal.App.4th at p. 510; see also *In re Sarah M.*, *supra*, 22 Cal.App.4th at pp. 1649-1650.)

In reversing his position taken below regarding K.T.'s adoptability, Father emphasizes that K.T. “present[ed] with significant emotional and behavioral dysregulation, hyper-arousal, hyperactivity, impulsivity and inattention as well as exhibiting symptoms that might be indicative of an Autism Spectrum Disorder.” He argues that K.T.'s emotional and behavioral problems, psychological conditions, developmental delays, and possible autism are factors that “did not weigh in favor of general adoptability,” and that therefore, the fact that K.T. was in a concurrent home did not make him generally adoptable. But we do not weigh the evidence presented below to assess whether there was substantial evidence supporting the adoptability finding. (*In re R.C.*, *supra*, 169 Cal.App.4th at p. 491.) And we must be careful in our review of the juvenile court's finding to not place undue emphasis upon one or more facts that may not have reflected positively toward the minor's adoptability. (*In re A.A.*, *supra*, 167 Cal.App.4th at p. 1313 [challenge to adoptability finding may not be based upon “picking and choosing evidence from the record”].) The fact that there is the possibility K.T. will be diagnosed at some time in the future with autism does not undermine the

adoptability finding here. (*In re R.C.*, *supra*, 169 Cal.App.4th at p. 492 [possibility of dependent child’s having future problems does not preclude adoptability finding].)

Father also contends there was insufficient evidence showing the specific adoptability of K.T. because “there was no assessment as to K.T.’s prospective adoptive parent or parents in evidence.” But the court did not make a finding that K.T. was specifically adoptable. Its finding was simply that there was clear and convincing evidence that K.T. was adoptable. “Only when a ‘social worker opines that the minor is likely to be adopted *solely* on the existence of a prospective adoptive parent who is willing to adopt the minor, [may] an inquiry . . . be made into whether there is any legal impediment to adoption by that parent . . .’ [Citation.]” (*In re Jeremy S.* (2001) 89 Cal.App.4th 514, 525, original italics, disapproved on another ground in *In re Zeth S.*, *supra*, 31 Cal.4th at p. 413.) Thus, because there was substantial evidence to support the court’s finding that K.T. was generally adoptable, there was no requirement the court make inquiry into the qualifications of the prospective adoptive parent(s). (See *In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650 [adoptability inquiry focuses on child and not the prospective adoptive family; inquiry into “ ‘suitability’ of a potential adoptive family” improper].)

Father relies on *In re Carl R.*, *supra*, 128 Cal.App.4th 1051 to support his argument about specific adoptability. There, the issue before the court was the “very narrow [one of] . . .the proper scope of the inquiry in determining the adoptability of a child,” when that child “is specifically adoptable and who will need total care for life.” (*Id.* at p. 1062.) This is not a case in which the court’s adoptability finding was based solely upon the fact that there was a family willing to adopt K.T.—i.e., is not a case based upon a specific adoptability finding. Further, this is not an instance in which the prospective adoptive family was seeking to adopt a dependent child “need[ing] total care for life.” (*Ibid.*) *In re Carl R.* is not applicable here.

Finally, Father contends that the “premature” finding of K.T.’s adoptability raises the specter of his “becoming a legal orphan if parental rights are terminated and the child is not adopted or an adoptions fails.” The concept of a juvenile court exercising caution in making an adoptability finding because of the possibility the child will become a “legal orphan” if adoption later fails was articulated in, among other cases, *In re Carl R.*, *supra*, 128 Cal.App.4th at page1062, and *In re Asia L.*, *supra*, 107 Cal.App.4th at page 512. Both cases were decided under a former version of section 366.26. In 2005, the Legislature amended the statute to provide, under subdivision (i)(2), that where a child has not been adopted within three years after the termination of parental rights, the child may file a petition to have the juvenile court reinstate parental rights. (Stats. 2005, ch. 640, § 6.5.) Therefore, the possibility of a dependent child becoming a “legal orphan” as a result of the termination of parental rights is no longer a danger. (See *In re I.I.* (2008) 168 Cal.App.4th 857, 871; see also Seiser & Kumli, *supra*, § 2.171[5][b], p. 2-538 [“ ‘legal orphan’ argument is now less colorable” after amendment of § 366.26 to add subd. (i)(3)].)

The fact that someone identified as a prospective adoptive parent was ready and willing to adopt K.T. was itself evidence that he was adoptable. (*In re Asia L.*, *supra*, 107 Cal.App.4th at p. 510.) Coupled with the other evidence mentioned above, there was substantial evidence to support the juvenile court’s finding that it was likely K.T. would be adopted within a reasonable time.

VI. *S.M.T. Adoptability Finding Was Supported by Substantial Evidence*

A. Background Concerning S.M.T. Adoptability Finding

1. *January 2013 Evaluation*

Dr. Donahue noted in her January 8, 2013 report that Father had reported that Mother had used alcohol, marijuana, and cocaine throughout her pregnancy with S.M.T. Dr. Donahue found that throughout the interview with two-year-old S.M.T., she “demonstrated minimal regard for this examiner, and exhibited a flat affect and restricted

range of facial expressions. She exhibited poor eye contact, rarely directed her facial expressions toward this examiner, and did not respond to her name on several presses. She also failed to follow one-step directions.” Dr. Donahue noted that S.M.T. was “largely mute” during the session, uttered only “a few vowel sounds,” and “presented as aloof, exhibit[ing] little interest in her surroundings, and seem[ing] drawn to only a few select toys.”

Dr. Donahue concluded from an Ages and Stages Questionnaire, 30 Month Questionnaire (ASQ: 30 months) completed by S.M.T.’s foster parents that “[S.M.T.’s] communication, gross motor, fine motor, problem-solving and personal social skills were well below the clinical cutoff, and these are areas that are in need of intervention.” The minor was also administered the Bayley Scales of Infant and Toddler Development, Third Edition (Bayley-III). The results of this test were that S.M.T. was found to be in the “moderately impaired range” for “overall sensorimotor development, exploration and manipulation, object relatedness, concept formation, and memory. She was in the “profoundly impaired range for her vocabulary development, following directions, and referencing objects and pictures . . . [as well as for] her use of words, speech . . . , perceptual-motor integration, motor planning, and motor speed . . . , and movement of the limbs and torso.”

Dr. Donahue concluded: “[S.M.T.] presents with a history of physical abuse, exposure to severe violence in the home, exposure to maternal substance use, neglect and separation from her mother. . . . [S.M.T.] demonstrated significant developmental delays, and there is a suspicion of prenatal substance exposure.”

2. *Developmental Assessment (April 2013)*

A developmental assessment of S.M.T. was performed by MCSTART between February and April 2013. Dr. Lesley Wilson prepared a lengthy report dated April 15, 2013.

S.M.T.'s foster father, S.G., reported to MCSTART that when S.M.T. arrived in the home, she was "very scared to have her diaper changed," "touched herself inappropriately," and "appeared afraid of males." Because of these behaviors, S.G. was concerned that S.M.T. had been sexually abused. S.G. also reported that S.M.T. showed a great amount of aggression and anger, having "four or five tantrums daily, sometimes for no apparent reason." S.G. reported that she made little eye contact and was not interested in toys or play. He indicated that the minor initially "tried to eat everything she saw" and had difficulty chewing her food. He also noticed that the minor had problems with speech and language. When S.M.T. first arrived, "she had no speech, could not stick her tongue out, and drooled rather than swallow[ed] her saliva." She also had difficulty going to bed and sleeping, and her sleep was interrupted by night terrors.

It was noted in the report that S.M.T.'s behavior had improved since she had moved in with her foster family. "She displays interest in toys and attempts to engage her caregivers in basic play." She was also more willing to permit S.G. to hold her and to seek comfort from him.

Dr. Wilson concluded, after extensive examination and testing: "[S.M.T.] is a sweet 3-year-old African-American female. [Her] early life was marked by exposure to teratogens during gestation, physical abuse, probable sexual abuse, chaos, neglect, different caregivers, and exposure to violence." She "continues to exhibit physical and behavioral indicators of prenatal teratogen exposure." Dr. Wilson also opined that "[S.M.T.] has significant developmental delays in the areas of cognitive functioning, speech and language, motor development, adaptive functioning and social/emotional functioning. Given that severely neglected and abused children can present with similar symptoms, and that the examiner was unable to get an accurate and thorough developmental history, [S.M.T.] will be diagnosed with Pervasive Developmental Disorder, Not Otherwise Specified. As she grows and develops, [S.M.T.] should be reevaluated for [a]utism and that diagnoses should be ruled in or out."

3. *Status Review Report (July 2013)*

S.M.T. received an IEP assessment from the Alisal Union School District in June 2013. The IEP team determined that she had “significant developmental and cognitive delays.” The team planned to have S.M.T. attend special education preschool class for one to two hours per day, two or three days per week. They also planned to begin mainstreaming her into the “preschool classroom to give her the opportunity for more socialization with other children.”

4. *Permanency Hearing Report (February 2014)*

In the Department’s report prepared for the .26 hearing, social worker Raquel Avila indicated that S.M.T. “is a happy and energetic girl who has significant developmental delays for her age.” She received weekly occupational therapy, which had “been a great resource for her and her prospective adoptive parents.” Avila noted that despite her behavioral and emotional challenges, S.M.T. had “made progress.” S.M.T. had “adapted well to her environment” and had “formed an attachment with her prospective adoptive family.” Her behavior had improved over the past year.

Avila reported that S.M.T.’s caregivers had decided in or about August 2013 to become a concurrent placement for the minor. The prospective adoptive parents had been married for 33 years. They had four adult children and 15 grandchildren. Avila reported: “They have a good relationship with all of their children and grandchildren, [and] are very family oriented and love to spend time together.” The prospective adoptive mother was born in Mexico and moved to this country when she was 13. She “considers herself to be very traditional, and is proud of her business endeavors. She had a licensed daycare business for approximately 15 years.” The prospective adoptive father came from a large family and was born and raised in Salinas. Neither prospective adoptive parent had a criminal history. The prospective adoptive father had no child welfare history. The prospective adoptive mother had “a substantiated allegation of physical abuse. Although

the allegation was substantiated^[,] the minor remained under the family's care and they are now her legal guardians.”

The prospective adoptive parents, Avila concluded, (1) have loved S.M.T. since her placement with them in December 2012; (2) “appear to be able to handle in a positive manner the behaviors that [S.M.T.] exhibits”; (3) “have demonstrated their ability to meet the child's needs, and have ensured all medical, dental and therapeutic appointments are met”; and (4) understand the differences between legal guardianship and adoption and are willing to accept the responsibilities of adopting S.M.T. Avila indicated that the prospective adoptive parents “are firmly committed to the permanent plan of adoption for [S.M.T.] Assuming this is the plan that is ordered, the prospective adoptive parents can envision no situation that would dissuade them from this commitment. They absolutely adore and love [S.M.T.]”

Avila concluded that “[S.M.T.’s] placement is highly appropriate. The prospective adoptive parents meet all of her needs and she is attached to them.” Avila noted that S.M.T. had “thrived in her current environment.” S.M.T.’s caregivers were in the process of completing a home study through Aspiranet.

5. *Permanency Hearing (June 2014)*

Avila testified at the .26 hearing that S.M.T.—then four years of age—was currently placed in a concurrent home, and that the prospective adoptive family had been caring for the minor for “at least a year.” Avila opined that S.M.T. was “clearly adoptable.” She based this opinion on the fact that S.M.T. had established a bond with her caretakers who were ready and willing to adopt her.

B. Substantial Evidence Supported Finding of S.M.T.’s Adoptability

1. *Express Waiver of Contention*

In his argument at the .26 hearing, Father’s counsel stated that S.M.T. “has been in the present home for a year . . . and her caregivers are willing to adopt. That is strong

evidence she is adoptable.” Father’s counsel then limited his challenge to the Department’s contentions that the two older children, A.J. and J.J., were adoptable.

Although an appellate claim based upon a lack of substantial evidence to support an adoptability finding is not forfeited because of a failure to make the argument before the juvenile court (*In re Brian P.*, *supra*, 99 Cal.App.4th at p. 623), the same rule does not apply when, as here, a party expressly waives the argument. Because Father’s counsel specifically conceded to the juvenile court that S.M.T. was adoptable, under principles of judicial estoppel and invited error, Father has expressly waived the claim. (See *Doers v. Golden Gate Bridge etc. Dist.*, *supra*, 23 Cal.3d at pp. 184-185, fn. 1; *International Engine Parts, Inc. v. Feddersen & Co.*, *supra*, 64 Cal.App.4th at p. 350.)

2. *Merits of Contention*

Even were we to overlook Father’s express waiver of his challenge to the adoptability finding as to S.M.T., we would nonetheless reject it. Dr. Wilson described S.M.T. as a “sweet” three-year-old girl. Avila indicated that S.M.T. was “a happy and energetic girl.” S.M.T.’s caregiver had reported that her behavior had improved. She had developed an interest in toys and in engaging her caregivers in play. She had displayed a willingness to be held by her foster father and to seek comfort from him. Avila likewise reported that S.M.T.’s behavior had improved over the past year, and that S.M.T. was “doing well in the classroom and [was] responding positively to the teachers.” Avila stated that despite S.M.T.’s behavioral and emotional challenges, she had “made progress.” And, as reported by Avila, S.M.T. had “adapted well to her environment” and had “formed an attachment” with her foster family (who had become her prospective adoptive family).

Significantly, at the time of the .26 hearing, S.M.T. was living in a concurrent home. Indeed, S.M.T.’s foster family had made the commitment to adopt her approximately 10 months before the hearing. And S.M.T. had been living with that family for approximately 18 of the 19 months the proceedings had been pending. As

reported by the Department, S.M.T.'s foster family was "firmly committed to the permanent plan of adoption for [S.M.T.]. . . . [T]he prospective adoptive parents can envision no situation that would dissuade them from this commitment. They absolutely adore and love [S.M.T.]." Avila also noted that S.M.T. had "thrived" in her placement with her prospective adoptive family. This expression by S.M.T.'s foster parents of their willingness to adopt was evidence that S.M.T.'s "'age, physical condition, mental state, and other matters relating to [her] are not likely to dissuade individuals from adopting her.'" [Citation.]" (*In re Asia L.*, *supra*, 107 Cal.App.4th at p. 510.)

In opposing the adoptability finding, Father emphasizes—presumably as a showing of the instability of S.M.T.'s placement—that she "had been in five placements." While the Department's permanency hearing report indicated that S.M.T. had had five placements since her initial detention, this is a misleading proposition, as borne out by the details of the placements. S.M.T. was initially placed in November 2012 with the foster family caring for A.J. and J.J. But after several weeks, it was determined that each of the minors required individual attention. S.M.T. was therefore placed in December 2012 with a foster family Monterey County—this was at the time a nonconcurrent home, but it is the family who ultimately agreed to adopt S.M.T. She remained there until August 2, 2013, when S.M.T.'s placement required changing because the foster family went on vacation to Mexico for two weeks. She had two successive placements with licensed foster homes within the next 15 days; neither placement was successful because S.M.T. could not adjust to either change. Throughout that period of time, her prior caregivers called the social worker to ask how S.M.T. was doing. They ultimately decided to become a concurrent placement for the minor, and she was returned to their care on August 17, 2013. Thus, for all but approximately one month of the 19-month period from initial detention to the June 2014 permanency hearing, S.M.T. was living with the same caregivers, who had committed to adoption in August 2013.

Similar to his position concerning the court's adoptability finding as to K.T., Father highlights S.M.T.'s "significant developmental delays for her age in the areas of cognitive functioning, speech and language, motor development, adaptive functioning and social/emotional functioning." He argues that these issues "did not weigh in favor of general adoptability," and that therefore, the fact that S.M.T. was in a concurrent home did not make her generally adoptable. But we do not weigh the evidence presented below to assess whether there was substantial evidence supporting the adoptability finding. (*In re R.C.*, *supra*, 169 Cal.App.4th at p. 491.) Nor may we place undue emphasis upon one or more fact that may not have reflected positively toward the minor's adoptability. (*In re A.A.*, *supra*, 167 Cal.App.4th at p. 1313 [challenge to adoptability finding may not be based upon "picking and choosing evidence from the record"].)

Father also argues that there was insufficient information concerning the prospective adoptive family, including the absence of a completed home study, to support the adoptability finding as to S.M.T. He contends the Department presented no evidence that any other families were available who would be willing to adopt a child with S.M.T.'s life circumstances. He asserts that these two facts compel the conclusion that S.M.T. was not specifically adoptable. But, like the adoptability finding as to K.T., the court did not make a finding that S.M.T. was specifically adoptable. Its finding was simply that there was clear and convincing evidence that S.M.T. was adoptable. Because the court's finding was not based solely on the fact that S.M.T. was in a concurrent home (i.e., that S.M.T. was specifically adoptable), and because there was substantial evidence to support the court's finding that S.M.T. was generally adoptable, the court was not required to inquire about the qualifications of the prospective adoptive family. (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1650; see also *In re Jeremy S.*, *supra*, 89 Cal.App.4th at p. 525 [court makes inquiry about any legal impediments to adoption only when social worker testifies that child is likely to be adopted solely because of prospective adoptive parent's willingness to adopt child].)

Because this is not a case in which the court’s adoptability finding was based solely upon the fact that there was a family willing to adopt S.M.T., *In re Carl R., supra*, 128 Cal.App.4th 1051, relied on by Father, is not applicable. Further, Father’s concern that S.M.T. will become a “legal orphan” if her prospective adoptive parents do not ultimately adopt her—a specter emphasized in *In re Carl, supra*, at page 1062—has been mitigated by the amendment in 2005 of section 366.26 to add subdivision (i)(2). (See *In re I.I., supra*, 168 Cal.App.4th at p. 871.)

The fact that someone identified as a prospective adoptive parent was ready and willing to adopt S.M.T. was itself evidence that she was adoptable. (*In re Asia L., supra*, 107 Cal.App.4th at p. 510.) Coupled with the other evidence mentioned above, there was substantial evidence to support the juvenile court’s finding that it was likely S.M.T. would be adopted within a reasonable time.

DISPOSITION

The June 24, 2013 orders approving adoption as the permanent plan for each of the minors, A.J., J.J., K.T., and S.M.T., and terminating the parental rights of Mother and Father as to each of the four minors, are affirmed.

Márquez, J.

WE CONCUR:

Rushing, P. J.

Premo, J.