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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re K.P. et al., Persons Coming Under  
the Juvenile Court Law.

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

DANIEL P.,

Defendant and Appellant.

B251689

(Los Angeles County  
Super. Ct. No. CK91294)

APPEAL from an order of the Superior Court of Los Angeles County,  
Veronica McBeth, Judge. Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant  
and Appellant.

John F. Krattli, Office of the County Counsel and William D. Thetford,  
Principal Deputy County Counsel, for Plaintiff and Respondent.

Appellant Daniel P. (Father) contends the juvenile court erred in terminating his parental rights over his sons K.P. (K.) and D.P. (D.) under Welfare and Institutions Code section 366.26.<sup>1</sup> Appellant argues that the boys' behavioral and developmental issues precluded a finding of "adoptability" within the meaning of the statute. We conclude substantial evidence supported the court's finding that the boys were specifically adoptable by their foster parents, the M.'s, who were well aware of the boys' problems and had expressed a firm commitment to adopting them. We therefore affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The family came to the attention of the Department of Children and Family Services (DCFS) in August 2011, when K. was two years old and D. was three months old. DCFS received a report that Kh.A., the boys' mother (Mother), was leaving the boys unattended and feeding them only once a day, and that the family home was dirty and infested with roaches and flies. The caseworker was unable to contact the family for several months. In a visit in October 2011, the caseworker found the home in good condition with an adequate food supply, although D. did not have a crib, Father admitted regular use of marijuana, and K. had a boil on his leg that had not been treated. The caseworker made regular visits to the family home for the next few months.<sup>2</sup> On December 27, 2011, Father was arrested following an incident in which he allegedly cut Mother's arm with a box cutter and barricaded himself in the home with the children. Mother initially stated she had

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<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

<sup>2</sup> A year earlier, a third child -- an infant boy -- had died of undetermined causes while in Mother's care, after being placed on his side in an adult bed. An allegation of general neglect was found to be substantiated. The family received voluntary family maintenance services after the boy's death.

been attacked by Father, but later attempted to persuade the caseworker she had cut herself. The children were detained on December 28, when Mother proved unwilling to obtain a restraining order against Father or assure the caseworker she would not get back together with him after his release from jail.

The children were initially placed in separate foster homes. In January 2012, the children were placed with a paternal aunt who stated she would be willing to adopt if reunification efforts failed.

At the February 2012 jurisdictional/dispositional hearing, the court found true that Mother and Father had a history of engaging in violent altercations in the presence of the children, and that Father had stabbed Mother's arm with a box cutter. The court further found true that Father had a history of illicit drug use and was a current user of marijuana, rendering him incapable of providing regular care for the children, and that he had been under the influence of marijuana on several occasions when the children were in his care and supervision. The court ordered Mother to submit to five random drug tests and to complete a substance abuse program if any tests were dirty or missed. The court further ordered Mother to participate in domestic violence counseling, parent education and individual counseling. Father was instructed to attend a substance abuse program with random testing, and to participate in domestic violence counseling, parent education and individual counseling.

Mother was initially uncooperative and did not keep in contact with the caseworker. Father was incarcerated until March 2012, when the domestic violence case was dismissed. In May 2012, Mother enrolled in a parenting class, but had not drug tested or begun other parts of the reunification program. Father had not enrolled in any programs. By July, Mother had enrolled in anger management, drug education and domestic violence classes and had drug tested twice, but had missed tests and was not obtaining individual counseling. Father

had enrolled in a drug and a domestic violence program, but was inconsistent about attending and had drug tested only once. The court terminated reunification services at the six-month review hearing in August 2012 and set a section 366.26 hearing to consider terminating parental rights for December.

In an August 2012 report, the caseworker stated that the paternal aunt was vacillating over whether to continue providing care for the children due to friction with Father and Mother and lack of funding. In December, the caseworker recommended putting off the section 366.26 hearing while DCFS attempted to find a new prospective adoptive placement.<sup>3</sup> Soon thereafter, the boys were placed with foster mother Helen B. Helen reported that the boys' needs were "not . . . very demanding" and that their behaviors were "manageable." She agreed to keep them in her care until an adoptive placement could be located.<sup>4</sup> After an unsuccessful attempt to place the boys with another family in December 2012, the caseworker identified the M.'s as a prospective adoptive family in February 2013. The boys were placed with the M.'s in April 2013, after a series of visits that began in March.<sup>5</sup>

Early in the proceedings, the court had ordered a mental health and developmental assessment for both children. K. had been exhibiting difficult behavior, including biting and hitting his head against objects. A March 2012 assessment indicated that K., then nearly three, had "severe" behavioral problems and developmental delays. A more detailed assessment conducted in April found him to be in the lowest ranges for visual reception, fine motor, and expressive

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<sup>3</sup> The court also continued the hearing to address a section 388 petition filed by Mother. The petition was denied following a hearing on June 19, 2013.

<sup>4</sup> There is no evidence Helen B. ever sought to adopt the boys.

<sup>5</sup> The M.'s were a married couple who had experienced fertility problems in the past and were raising a biological autistic son.

language skills. His daily living and socialization skills scores were also low. His caretaker at the time, the paternal aunt, reported that he was not speaking, and would become physically aggressive and have temper tantrums. In addition, he did not like diaper changes or bath time, and had on two occasions smeared feces around his room and himself. During the April assessment, the evaluator found him to be generally cooperative, but easily distracted and prone to tantrums. K. became a Regional Center client.<sup>6</sup> A November 2012 assessment found that K. remained behind in age-appropriate skills, “especially speech and language.”

D. was tested in March 2012, when he was almost a year old, and found to be a contented, happy baby. In May 2013, however, the Regional Center reported that he was inappropriately non-verbal and developmentally behind in other ways. In June 2013, following his second birthday, he received a comprehensive evaluation which indicated significant delays in speech and language. He also was found to have developmental delays in multiple areas, including cognition and social skills. The M.’s reported he had daily tantrums, albeit decreasing in duration since he had been placed in their care. Despite his developmental issues, the evaluator described D. as a “happy child,” who was affectionate with the M.’s and enjoyed playing with his older brother and the M.’s son.

In the July 2013 section 366.26 report, the caseworker reported the boys were adjusting well to the M.’s home, and the M.’s were doing “an excellent job of meeting the minors’ special needs.” Specifically, K. had received an IEP (individualized education program) evaluation from the local school district, and

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<sup>6</sup> The Regional Center is a private nonprofit community-based organization which contracts with the State Department of Developmental Services to coordinate services for individuals with developmental disabilities. (See Lanterman Developmental Disabilities Services Act (§ 4500 et seq.); *Morohoshi v. Pacific Home* (2004) 34 Cal.4th 482, 486; *Harbor Regional Center v. Office of Administrative Hearings* (2012) 210 Cal.App.4th 293, 307.)

had begun to attend school five days a week and to receive occupational and speech therapy. D. was receiving child development therapy, occupational therapy and group therapy at the Regional Center. The M's were described as loving and affectionate with the boys and eager to move forward toward permanency and adoption. The caseworker found no legal impediments to adoption and a high likelihood it would go forward if parental rights were terminated.

In the August 2013 status report, the caseworker stated that the boys were bonding with the M.'s and their new prospective sibling.<sup>7</sup> In addition, the M.'s had "demonstrated the ability to have [the] children assessed for appropriate care and supervision as well as able to coordinate [the] significant amounts of services that the children require." In all, the boys were participating in 22 hours of services per week, and were also receiving "the attention and focus of the M.'s." The caseworker found that the two boys were making "significant improvements in their developmental progress and growth," as evidenced by their social interaction and attempts at communication with her and the M.'s.

The section 366.26 hearing took place on August 21, 2013. Mother and Father were not present. Counsel for DCFS and counsel for the children advocated termination of parental rights so that adoption by the M.'s could go forward. Counsel for Mother and counsel for Father objected to termination, but raised no issue with respect to adoptability. The court found by clear and convincing evidence that the children were "specifically adoptable" and terminated Mother's and Father's parental rights. Father appealed.<sup>8</sup>

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<sup>7</sup> The M.'s reported D. displayed separation anxiety when he was apart from them.

<sup>8</sup> Mother also appealed, but her appointed counsel withdrew her original brief and filed a brief asking that we undertake a review under *In re Sade C.* (1996) 13 Cal.4th 952 and *In re Phoenix H.* (2009) 47 Cal.4th 835. Mother's appeal was dismissed by order dated June 4, 2014.

## DISCUSSION

Section 366.26, subdivision (c)(1) requires the juvenile court to terminate parental rights and order the dependent child placed for adoption if it finds by clear and convincing evidence that the child is likely to be adopted, unless it finds “a compelling reason for determining that termination would be detrimental to the child” due to the existence of specified exceptional circumstances. (See § 366.26, subd. (c)(1)(B); see *In re Scott B.* (2010) 188 Cal.App.4th 452, 469 [“Because adoption is more secure and permanent than a legal guardianship or long-term foster care, adoption is the Legislature’s first choice for a permanent plan for a dependent minor child who has not been returned to the custody of his or her parents and who is found by the dependency court to be adoptable.”].) Father contends the juvenile court’s finding of adoptability was not supported by substantial evidence in view of the children’s severe developmental delays.<sup>9</sup> We find ample support for the court’s determination.

“A finding of adoptability requires ‘clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time.’” (*In re Valerie*

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<sup>9</sup> As noted, Father did not appear at the section 366.26 hearing, and his counsel raised no issue pertaining to adoptability at the hearing, but whether an adoptability finding is supported by substantial evidence may be raised for the first time on appeal. (See, e.g., *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1560; *In re Erik P.* (2002) 104 Cal.App.4th 395, 399.) *In re Crystal J.* (1993) 12 Cal.App.4th 407, cited by respondent, does not suggest otherwise. There, the mother contended on appeal that the adoption assessment prepared by the department had not adequately addressed certain specific topics mandated by section 366.21, subdivision (i). The court held that by failing to object to the sufficiency of the adoption report in the juvenile court, the mother had waived the right to raise that issue on appeal. (12 Cal.App.4th at p. 411.) However, “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.)

W. (2008) 162 Cal.App.4th 1, 13, quoting *In re Zeth S.* (2003) 31 Cal.4th 396, 406.) Clear and convincing evidence is evidence “sufficiently strong to command the unhesitating assent of every reasonable mind.” (*In re Valerie W.*, *supra*, at p. 13.) We review a trial court’s determination of adoptability for substantial evidence, keeping in mind the heightened standard of proof. (*In re R.C.* (2008) 169 Cal.App.4th 486, 491; see *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654.) “Although a finding of adoptability must be supported 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.” (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292, quoting § 366.26, subd. (c)(1).)

“Usually, the issue of adoptability focuses on the minor, ‘e.g., whether the minor’s age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor.’ [Citation.] However, ‘in some cases a minor who ordinarily might be considered unadoptable due to age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child.’” (*In re Brandon T.* (2008) 164 Cal.App.4th 1400, 1408, quoting *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) In determining whether a child is specifically adoptable, courts consider such factors as the length of time the child has been in the placement, the prospective adoptive parents’ awareness of the child’s special needs, the prospective adoptive parents’ commitment to adoption, the nature of the bond between the child and the prospective adoptive parents, and whether any legal impediment exists. (*In re Brandon T.*, *supra*, at pp. 1409-1410.)

Here, the M.’s demonstrated a strong commitment to adopting and raising the minors. They learned about the boys from DCFS in February 2013, began visitation in March, and took the boys into their home in early April. By early



June, they had arranged for the boys to be evaluated by professionals to determine the specific areas where they needed assistance. They freely undertook the burdensome task of transporting the boys to 22 hours per week of therapy and other activities at the local school and Regional Center. As a result, by August, the boys had made observable progress when the caseworker completed her final report and the court terminated parental rights. In addition to ensuring that the boys received services for their developmental needs, the M.'s repeatedly confirmed their affection for the boys and their commitment to adoption. By all reports, the boys returned their affection and were bonding with the M.'s and their son. The court's finding that the boys were specifically adoptable and that the adoption was likely to go forward was fully supported by this evidence.

Father's brief on appeal discusses the boys' history of behavioral and developmental issues in detail, and contends the existence of these problems established that adoption was improbable. Father also contends that the prior unsuccessful placement with the paternal aunt and the attempt at placement called off by another family in December 2012 demonstrated the improbability of a successful adoption. The existence of multiple failed placements may undermine a finding of general adoptability, but it is not a significant factor in determining specific adoptability, which begins with the premise that the children are difficult to place. In determining specific adoptability, the court focuses not on the minors and their physical, emotional or developmental disabilities, but on the prospective adoptive family's awareness of these disabilities and commitment to proceeding with the adoption. There can be no doubt that the M.'s had an understanding of the difficulties inherent in raising K. and D., having fully engaged in the process of ensuring they obtained appropriate assessments and services. Their commitment to adoption never wavered. Moreover, the record indicates that the boys' behavior was improving, as there were no recent reports of K. engaging in the type of

inappropriate behavior the paternal aunt described in 2012, and the caseworker described both boys as being appreciably more social and communicative in July and August 2013.

Father further contends it was improper for the court to make a finding of specific adoptability at the August 2013 hearing, given that the boys had been living with the M.'s for less than six months. There is no requirement that children be in a placement for a specific period of time prior to a determination that they are specifically adoptable. Sufficient commitment to adoption to support a finding of specific adoptability can be demonstrated in a relatively short period. Such commitment was demonstrated by the M.'s here.<sup>10</sup>

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<sup>10</sup> At respondent's request, we took judicial notice of the status report filed February 19, 2014, while this appeal was pending. The status report stated that the boys continued to do well in the home of the M.'s, who were still committed to providing them a permanent home via adoption.

## **DISPOSITION**

The order terminating parental rights is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

EDMON, J.\*

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\*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.