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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

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

KERN COUNTY DEPARTMENT OF HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

JAMES P.,

Defendant and Appellant.

F069787

(Super. Ct. Nos. JD130224-0,  
JD130225-0)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Kern County. William D. Palmer,  
Judge.

Jacques A. Love, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Theresa A. Goldner, County Counsel, and Thomas G. Morgan, Deputy County  
Counsel, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Gomes, J. and Kane, J.

James P. (father) appeals from a juvenile court judgment terminating his parental rights and selecting adoption as the permanent plan (Welf. & Inst. Code, § 366.26)<sup>1</sup> concerning his three-year-old son James and two-year-old daughter Abigail. He contends substantial evidence does not support the juvenile court’s finding that severing his parental rights would not be detrimental to the children under section 366.26, subdivision (c)(1)(B)(i), the “beneficial relationship” exception to adoption. We affirm.

### **LEGAL BACKGROUND**

Section 366.26 governs the proceedings at which the juvenile court must select a permanent placement for a child adjudged its dependent. If the court determines it is likely the child will be adopted, the statute requires the court to terminate parental rights. (§ 366.26, subd. (c)(1).) The court’s prior findings that it would be detrimental to return the child to parental custody and its order terminating reunification services constitute a sufficient basis for terminating parental rights unless the court finds that one of the six exceptions specified in subdivision (c)(1)(B) would render termination of parental rights detrimental to the child.

At the section 366.26 hearing, father’s attorney argued that terminating father’s parental rights would be detrimental to the children under the beneficial relationship exception. The beneficial relationship exception states: “The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).)

### **PROCEDURAL AND FACTUAL SUMMARY**

The family came to the attention of the Kern County Department of Human Services (department) in January 2013, when then seven-month-old Abigail was taken to the hospital by a family friend, admitted for emergency care, and diagnosed with

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

pneumonia, upper respiratory infection, and respiratory distress. When it was time to discharge her, the hospital was unable to get in touch with father and his wife, Ashley, Abigail's mother. The department placed a protective hold on Abigail but released her to father and Ashley who agreed to family differential response services.

In mid-February 2013, the department took Abigail and her then 18-month-old brother James into protective custody after father was arrested for domestic violence. He struck and choked Ashley in the presence of the children. In addition, he and Ashley tested positive for methamphetamine at a very strong level.

The juvenile court ordered the children detained and ordered twice-weekly supervised one-hour visits for both parents. The children were placed together with their paternal grandfather Jesse.

In March 2013, the juvenile court ordered the children removed from father and Ashley's custody and ordered six months of reunification services for them.

Father was initially very motivated to complete his services plan. He enrolled in parenting and anger management classes and signed up for drug testing. However, by early May 2013, he was no longer attending classes and he consistently failed to drug test or tested positive for methamphetamine. He did, however, regularly visit the children and they appeared to be bonded to him.

In its report for the six-month review hearing, the department recommended the juvenile court terminate father and Ashley's reunification services because of their lack of progress. The department advised the court that the children were adoptable but Jesse was interested in obtaining legal guardianship of them. The children's paternal grandmother, Jacqueline, moved in with Jesse to help him take care of the children.

In October 2013, the juvenile court convened the six-month review hearing. Father and Ashley did not personally appear and their attorneys objected to the department's recommendation. The juvenile court terminated their reunification services and set a section 366.26 hearing.

In December 2013, father was arrested for burglary and possessing a controlled substance. He remained incarcerated until early March 2014.

In its report for the section 366.26 hearing, the department advised the juvenile court that James and Abigail regarded Jesse as their primary parental figure and recommended that they remain in his care under a permanent plan. Though Jesse wanted to enter into legal guardianship, the department was not prepared to endorse that option until it could complete a background check on Jacqueline. Consequently, it recommended long term foster care pending its investigation of Jacqueline.

In February 2014, the juvenile court convened the section 366.26 hearing but continued it so the department could complete Jacqueline's background check. A week later, the department took James and Abigail into protective custody after Jesse was arrested for criminal threats and child endangerment. While the family was eating dinner, James spilled food on the table. Jesse got mad and began shoving food into James's mouth. In the process, Jesse hit James in the forehead with his elbow. Jesse left the room, retrieved his pistol and threatened to kill everyone. He told the deputy he "just lost it."

The children's maternal great aunt and uncle, J.P. and Michelle P., their paternal great uncle, Raymond P., and Jacqueline requested placement of the children and were approved by the department. The department recommended placement with J.P. and Michelle, who lived in San Bernardino County and who were amenable to adoption. The department also recommended the juvenile court terminate father and Ashley's parental rights and free James and Abigail for adoption.

Father objected to placing the children out of county and the juvenile court set a contested placement hearing. Father also filed a section 388 petition asking the juvenile court to reinstate reunification services. He explained in the petition that he had either completed or was close to completing his services, except substance abuse counseling, which he had to defer for lack of funds. Nevertheless, he claimed 125 days of sobriety.

In April 2014, the juvenile court convened the contested placement hearing. Father testified that he was still visiting the children twice a week for one hour and did so regularly except December 2013 through early March 2014, when he was incarcerated. The court ordered the children placed with J.P. and Michelle and ordered that visitation take place in San Bernardino County.

In May 2014, the juvenile court convened a combined hearing under sections 388 and 366.26. The court first considered father's section 388 petition. Father testified he was attending a drug treatment program but that it was not approved by the department. He said he tried to enroll in an approved program but there was a month-long waiting list. He completed child neglect counseling and would complete his parenting class in four weeks. He said he regularly visited the children except for August through September of 2013, when he was working. He resumed regular visitation until December 2013, when he was incarcerated. During that time the children did not visit him because he waived in-custody visits. After the children were moved to San Bernardino, he continued to visit them once a week for two hours. The juvenile court denied father's section 388 petition and continued the section 366.26 hearing.

In the interim, the department provided the juvenile court an update on father's visits with the children in May 2014. Both of the children were very happy to see father and often talked to and smiled at him. At the end of one visit, they kept wanting hugs and kisses from him. At the end of another visit, James told father he wanted to go with him. However, the children separated from father without exhibiting any emotional distress. The department reiterated its recommendation that the court terminate father and Ashley's parental rights.

In June 2014, the juvenile court conducted the section 366.26 hearing. Father and Ashley did not personally appear. Father's attorney objected to the department's recommendation to terminate parental rights and argued the juvenile court should find

that the parent-child beneficial relationship exception applied. He argued father regularly visited the children and had a close relationship with them.

The juvenile court terminated father and Ashley's parental rights and found it was in the children's best interests to be adopted. In so doing, the court found there was not a compelling reason for determining that terminating parental rights would be detrimental to the children because the parents maintained regular visitation and contact.

This appeal ensued.<sup>2</sup>

### DISCUSSION

Father contends the juvenile court erred in terminating his parental rights because overall he maintained regular visitation and contact with the children during the entire dependency proceedings and the children needed to maintain a relationship with him as evidenced by their acting-out behavior following visits. We conclude father failed to carry his burden of proof at the section 366.26 hearing.

“[T]he burden [of proof] is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence.” (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

When a juvenile court rejects a detriment claim and terminates parental rights, the appellate issue is not whether substantial evidence exists to support the court's rejection of the detriment claim but whether the juvenile court abused its discretion in so doing. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) For this to occur, the proof offered would have to be uncontradicted and unimpeached so that discretion could be exercised only in one way, compelling a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*)). Based on our review of the record, we conclude the juvenile court properly exercised its discretion.

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<sup>2</sup> Ashley did not appeal.

Father failed to show that he maintained regular visitation and contact with the children. Over the 16 months between the children's initial detention and the 366.26 hearing, father missed approximately six months of visitation because of his employment and incarceration. Three of those months (December 2013 through March 2014) occurred during the seven months preceding the section 366.26 hearing. Consequently, no matter how one views father's visitation, it was never regular.

Further, even assuming father met his burden of proving he regularly visited the children, he failed to show that the children would benefit from continuing their relationship with him. "To meet the burden of proving the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child." (*I.W.*, *supra*, 180 Cal.App.4th at p. 1527.) Although the children were happy to see father and were loving toward him, he did not present any evidence that they looked to him as a parental figure. Rather, they looked to Jesse as a parental figure until they were removed from his care. Thereafter, they resided in another county and only had contact with father once a week for two hours. Father had neither the contact nor the parental relationship with the children that would compel a finding that terminating his parental rights would be detrimental to the children as a matter of law.

We find no abuse of discretion.

#### **DISPOSITION**

The judgment is affirmed.