Filed 3/27/17 In re D.G. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re D.G., a Person Coming Under the Juvenile Court Law.	B275206 (Los Angeles County Super. Ct. No. DK13732)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARIA D., Defendant and Appellant; ANDRES G., Respondent.	

APPEAL from orders of the Superior Court of Los Angeles County, D. Zeke Zeidler, Judge. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Brian Mahler, Deputy County Counsel, for Plaintiff and Respondent.

Jack A. Love, under appointment by the Court of Appeal, for Respondent.

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Maria D. (mother) appeals from the juvenile court's findings and orders regarding her daughter D.G. The court removed D.G. from mother's custody and granted custody to D.G.'s incarcerated father Andres G. (Andres), who placed D.G. with her paternal grandmother. The court ordered no family reunification services for mother and terminated jurisdiction. We affirm the findings and orders.[1]

FACTUAL BACKGROUND

Mother has three daughters: J.P., born in 2006; D.P., born in 2009; and D.G., the child who is the subject of the orders appealed here, born in 2013.[2] Walter P. (Walter) is the father of J.P. and D.P. Andres is the father of D.G. Mother and Walter do

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[1] Respondent Los Angeles County Department of Children and Family Services (DCFS) submitted a brief in support of the court's order removing D.G. from mother's custody. Respondent Andres submitted a brief in support of the court's orders granting Andres custody, denying reunification services to mother, and terminating jurisdiction.

[2] The juvenile court issued separate orders concerning J.P. and D.P. Those orders are not contested in this appeal.

not live together. Andres was incarcerated in state prison before D.G. was born and remained incarcerated during the proceedings at issue here. He was scheduled to be released in September 2018.

1. Incident leading to removal of children

On September 17, 2015, Walter came to mother's home to pick up his daughters. Walter and mother got into an argument about child support. Walter and the two older girls reported that mother grabbed his cell phone from him and threw it to the ground, breaking the case. Walter drove off with his daughters in his truck.

Mother put two-year-old D.G. in her car and drove to Walter's home, driving fast enough to arrive there before he did. When Walter arrived home with his daughters, he saw mother's vehicle on the street and drove around the corner to avoid a confrontation. After some time had passed, Walter drove back towards his house, thinking mother was gone. But mother was still there, and she drove forward at a fast speed and turned her car in front of him, hitting the front hood of his truck. D.G. was still in mother's vehicle at the time. J.P. reported that her shoulder hurt after the collision, and D.P. reported stomach pain from pressing against the seatbelt. Both girls were frightened. Mother then got out of the car and tried to get to J.P. and D.P., but they locked the doors to prevent her. Walter called the police, and mother got back in her car and drove off. Mother returned 10 minutes later, by which time the police had arrived, and was arrested.

Mother was charged with three counts of child endangerment, and one count each of assault with a deadly weapon, hit and run, and driving without a license. Walter told

the investigating detective he did not believe mother intended to hit his car, "but she was trying to cut him off and it was not slow." The investigating detective opined that mother was attempting to "intentionally block the path of [Walter's] vehicle putting all involved parties in harm[']s way."

DCFS investigated mother following her arrest. The investigating social worker learned that Walter and mother frequently argued about child support. Mother reported that Walter was sometimes violent and described incidents where he had kicked her, bit her, and kicked in the metal door of her home (which Walter denied). Walter reported that mother had at one point broken all the windows in his truck. A social worker who reviewed mother's cell phone voicemail and text messages reported that both Walter and mother were verbally abusive towards each other in those communications. Daughters J.P. and D.P. reported that mother was always very angry with Walter and yelled at him a lot.

Interviewed about the September 17 incident eight days later by a social worker, mother said she had gone to Walter's house because he had not taken their daughters' backpacks and school uniforms when he picked them up. She said the cars had "collided but not very fast." Speaking to the social worker again on October 6, 2015, mother said it was Walter who was driving fast towards her, and she pulled to the side to avoid hitting him. In an interview on October 30, 2015, she characterized the incident as an "accident" that occurred because the road was very narrow and she was trying to get around Walter's truck.

2. D.G.'s father

According to mother, Andres, D.G.'s father, was incarcerated on a charge of domestic violence against mother.

Mother said Andres would drink alcohol in excess and act violently towards her. Mother in fact learned that she was pregnant with D.G. when she was being treated at a hospital after sustaining a foot injury from Andres. When interviewed by DCFS, Andres admitted arguing with mother but denied any domestic violence or substance abuse.

DCFS reported that Andres had a long history of arrests and convictions dating back to 2001, including for burglary in 2005, second degree robbery and use of a firearm in the commission of a felony in 2006, and multiple incidents of infliction of corporal injury on a spouse or cohabitant, the most recent in 2014 resulting in a seven-year prison sentence. Andres's criminal history spans nearly four pages of DCFS's jurisdiction and disposition report.

DCFS had previously been called to investigate mother and Andres in February 2013 regarding abuse and neglect towards J.P. and D.P., although "[t]he allegations were concluded inconclusive." J.P. and D.P. denied knowing Andres. DCFS reported allegations that Andres had injured mother's leg and had violated a restraining order mother had in place against him. The reporting party alleged that relatives of Andres had said that Andres abused methamphetamine and mother abused cocaine and alcohol, with mother leaving the children unsupervised or putting them in the care of "strange people" and not checking on them. Andres's relatives also reported that there was regularly no food in the home. DCFS referred the family to services and domestic violence classes for the mother, but the record does not indicate any action to remove the children from mother or Andres.

PROCEDURAL BACKGROUND

1. Detention hearing

DCFS detained the three girls on October 6, 2015, and filed a juvenile dependency petition under Welfare and Institutions Code section 300 et seq.[3] on October 9, 2015, based on the vehicle incident on September 17, 2015, and the allegations of earlier altercations between mother and Walter. At the detention hearing that same day, mother submitted on the issue of detention and requested a visitation schedule and referrals for individual counseling and anger management. The juvenile court issued an order detaining J.P. and D.P. from mother and releasing them to Walter, and detaining D.G. from mother and Andres and placing her with her maternal great aunt. The court further ordered a visitation schedule and instructed DCFS to provide family reunification services to mother and Andres.

2. First jurisdiction and disposition hearing

A jurisdiction and detention hearing was held on January 12, 2016. A week prior to the hearing, the court ordered DCFS to interview Andres regarding an appropriate plan for D.G.'s care should he be granted custody.

At the hearing, mother offered no testimony beyond her statements in the jurisdiction and disposition report (portions of which are summarized above). The court proceeded to disposition regarding J.P. and D.P., removing custody from mother and giving it to Walter. The court ordered services for both parents and directed mother to complete anger management classes, individual counseling, and parenting education. The court continued the hearing regarding D.G. until March 4, 2016, to

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[3] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

allow time for DCFS to interview Andres regarding parentage and an appropriate plan for D.G.'s care. Andres's attorney noted that her office had received a letter from Andres "indicating that he does have an appropriate plan for the care of his daughter with the paternal grandparents." Andres stated in the letter that he "ha[d] always been in contact with [D.G.] as she's been growing up."

3. Continued jurisdiction and disposition hearing

In advance of the March 4 hearing, the court on February 26, 2016, directed DCFS to "assess whether paternal grandmother would be an appropriate plan for father." A social worker contacted paternal grandmother that day and reported that paternal grandmother was not requesting placement of D.G., did not have a close relationship with D.G., and did not wish to disrupt the child's placement with the "maternal grandmother."[4]

Mother testified at the March 4, 2016 hearing. She said she had started individual therapy the previous month and had completed four sessions. She also said she had attended 18 anger management classes, with eight remaining, and had completed a parenting course of 24 sessions. Mother's counsel attempted to admit documentary evidence corroborating this testimony, which the court rejected as untimely; a report submitted by DCFS, however, confirmed that at the time the report was completed mother was "making efforts to comply with DCFS . . . and court requirements," and was participating in parenting and anger management classes and individual therapy.

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[4] D.G. was in fact placed with her maternal great aunt at the time, a fact of which paternal grandmother may not have been aware.

Regarding the vehicle incident on September 17, 2015, mother said, "I got very angry, and I acted in a bad way." When asked what specifically she did, mother said, "I drove very fast, and there was an accident because I was driving." She said, "I feel bad about it. I feel bad, and I do accept that I acted poorly."

Paternal grandmother also testified. She clarified that when she had spoken to the social worker on February 26, she thought the social worker was asking whether she intended to fight for custody of her granddaughter. Paternal grandmother explained that she did not want to take away custody from mother or further complicate the case. But she was willing to care for D.G. until Andres was out of prison or mother regained custody, and paternal grandmother would require no funding from DCFS. She and her daughter had been fingerprinted for that purpose, although her husband had not yet because he had been working.

Paternal grandmother acknowledged that prior to the social worker speaking to her she had never asked to be assessed for placement, and no social worker had inspected her home. She also acknowledged that she had told the social worker that she did not have a close relationship with D.G., although she had cared for her occasionally, one time for about a month.

After all evidence had been presented, the court asked the parties for their recommended dispositions. DCFS recommended suitable placement with family reunification services for the mother and no reunification services for the father given his incarceration. Andres's counsel stated that Andres was agreeable to D.G. being placed in his custody or mother's custody. Mother's counsel requested that mother take custody and asked to be heard regarding Andres taking custody. The court declined to

hear any further argument. D.G.'s attorney opposed placement with either mother or Andres.

The court then removed care, custody and control from mother and granted Andres legal and physical custody. The court granted mother monitored visits, but did not grant family reunification services because "the child is safely in the care of another parent." The court stated that the visits would revert to unmonitored if a dependency court granted her unmonitored visits of her other daughters. Having issued the custody order, the court terminated jurisdiction.

D.G.'s attorney asked for "ample time to assess my client in the home of the paternal grandmother" and objected to the father taking custody, referring to DCFS's prior investigation of Andres in February 2013. The court stated that the issue of the father making an appropriate plan of care was raised at the first jurisdiction and disposition hearing, and therefore D.G.'s counsel had "since January 12th to . . . assess[] paternal relatives." D.G.'s counsel asked the court to inquire of paternal grandmother whether she would allow D.G.'s counsel access to D.G., and the court stated that was between the parties to decide.

DCFS requested a stay of the court's order, which was denied. Mother timely appealed.

DISCUSSION

1. Order removing custody of D.G. from mother

Mother claims that the court's order removing D.G. from her care, custody, and control was not supported by sufficient evidence. We disagree.

A juvenile court may issue an order removing a child from the custody of a parent if the court finds clear and convincing evidence that "[t]here is or would be a substantial danger to the

physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody." (§ 361, subd. (c)(1).)

" 'In reviewing a challenge to the sufficiency of the evidence supporting the jurisdictional findings and disposition, we determine if substantial evidence, contradicted or uncontradicted, supports them. "In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court." [Citation.] "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] ' "[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate]." ' " ' " (*In re I.J.* (2013) 56 Cal.4th 766, 773.)

Reviewing the record in the light most favorable to the judgment, there is substantial evidence that mother's anger was a danger to the health and safety of her children. Mother, angry with Walter over child support, placed her two-year-old child in her car, drove at high speed to Walter's house, and, despite knowing her other two daughters were in Walter's truck, collided her vehicle into his. Although the evidence was not conclusive that mother deliberately hit Walter's truck, there was evidence that she was attempting to cut him off at a fast speed, which the

court could reasonably conclude was at the very least highly reckless. The collision was severe enough that the two older girls were injured and frightened, and they locked the doors to prevent their mother getting to them. Mother fled the scene, adding hit and run to her list of charges.

Although the collision was the most extreme example of mother's anger, DCFS presented additional evidence that mother and Walter were frequently verbally abusive to one another, including in front of the children, and mother had broken Walter's truck windows and cell phone case out of anger. Thus, the court could reasonably conclude that the collision was not an isolated incident and mother's anger had caused difficulties before. All of this constitutes substantial evidence supporting the disposition.

Mother points to a variety of evidence that she argues supports her retaining custody of D.G., including evidence that mother was generally a good parent and she and D.G. were closely bonded. But under the applicable standard of review, we look only to the evidence in *support* of the disposition. The fact that there is other evidence from which the juvenile court could have reached a different outcome is immaterial to our review, so long as substantial evidence supports the outcome actually reached. (See *In re I.J.*, *supra*, 56 Cal.4th at p. 773.) As described above, mother's behavior when angered, and in particular her decision to drive recklessly and put her children at risk, was substantial evidence supporting the juvenile's court's decision, even if we accept that other evidence conflicts with that substantial evidence.

Moreover, we do not believe the totality of the evidence in support of mother's position is as compelling as she characterizes

it. Mother argues that she was "immediately remorseful" following the incident, but the record indicates otherwise. In three separate interviews following the collision, mother denied responsibility for the collision, explaining that she was trying to avoid an accident, and that it was Walter that was driving too fast. It wasn't until the last hearing that she acknowledged any fault, and even then it was not clear she recognized the danger she had put her children in. Thus, the record does not show a high level of remorse.

Mother also points to her participation in individual therapy and parenting and anger management courses, and complains that the juvenile court did not allow her to introduce evidence of her progress. As an initial matter, while the court did not admit the most up-to-date documentary evidence of mother's progress, she was able to testify orally about it, and an earlier report was admitted confirming mother was participating in therapy and classes and cooperating with DCFS. Thus, the court was aware that mother was taking steps to address the issues that gave rise to the dependency proceeding.

But even had the court admitted all of mother's evidence, at best it would have shown she had completed her parenting course, but still had a substantial number of anger management sessions remaining, and had only just begun her individual therapy. The court could quite reasonably conclude that, although mother had made progress, she had more work to do.

Mother argues that "removal was unnecessary as there were reasonable means to protect [D.G.] if she were maintained in [mother's] care" given that "[t]he circumstances of [mother's] life at the time of the dispositional hearing were significantly different that her circumstances at the time the section 300

petition was filed." Specifically, she notes that a restraining order against her prohibits her from interacting with Walter, "her past source of high frustration." And because her older daughters are in Walter's care, she will no longer be "overwhelmed by having to take care of three children on her own," and will have no reason to fight with Walter about child support. We decline to conclude that being the subject of a restraining order and an adverse dependency ruling is evidence that a person is *less* of a danger to her child.

We therefore find that the disposition is supported by substantial evidence.

2. Order granting custody to Andres

Mother claims there was clear and convincing evidence that placing D.G. in her father's custody would be detrimental, and therefore the court's order doing so should be reversed. We disagree.

"When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) "Under the plain terms of the statute, if the juvenile court finds that placing a child in the physical custody of a noncustodial parent would not be detrimental to the child within the meaning of section 361.2, subdivision (a), it *must* place the child in the physical custody of the noncustodial parent." (*In re Abram L.*

(2013) 219 Cal.App.4th 452, 461, italics added.) "It is the burden of the party or parties opposed to such placement to prove detriment by 'clear and convincing evidence.' " (*In re K.B.* (2015) 239 Cal.App.4th 972, 979 (*K.B.*).)

Mother contends we should review the juvenile court's finding of no detriment for substantial evidence. But mother had the burden of proving detriment, and the court, in placing D.G. with Andres, implicitly found she had not met that burden. "In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*).) Instead, "where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*Ibid.*) "Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' " (*Ibid.*)[5]

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[5] Some reviewing courts have applied the substantial evidence standard to findings of no detriment under section 361.2. (See, e.g., *In re Liam L.* (2015) 240 Cal.App.4th 1068, 1087; *K.B., supra*, 239 Cal.App.4th at p. 979.) But to do so "allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case . . . ." (*I.W., supra*, 180 Cal.App.4th at p. 1528.)

Here there was no evidence such that the juvenile court should have found detriment as a matter of law. The fact that the noncustodial parent is incarcerated will not by itself support a finding of detriment so long as "the parent is able to make appropriate arrangements for the child's care during the parent's incarceration . . . ." (*In re John M.* (2013) 217 Cal.App.4th 410, 423.) Here, the court found that Andres had made appropriate arrangements by placing D.G. with paternal grandmother. We also have held that "the alleged lack of an established relationship with father [is insufficient] to constitute substantial evidence of the high level of detriment required under section 361.2(a)." (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1403 (*C.M.*)) For this reason, mother's argument that D.G. had an insufficient bond with Andres or paternal grandmother fails.[6] To the extent there was confusion as to whether paternal grandmother was seeking placement, that confusion was resolved during the March 4 disposition hearing at which paternal grandmother made clear through her testimony she was willing to care for D.G. and would not require financial support from DCFS.

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[6] Mother argues "[t]here is no evidence that a plan of placement with [paternal grandmother] was in [D.G.'s] best interests . . . ." To the extent mother is suggesting that Andres was obliged to present such evidence, she is incorrect. The burden was on her, as the party opposing placement, to show evidence of detriment. (*K.B., supra*, 239 Cal.App.4th at p. 979.) Moreover, "[a]n underlying presumption reflected in [California's dependency] scheme is that a child should be placed with his or her parents, whether custodial or noncustodial, and that such placement is in the child's best interests absent a finding of detriment." (*In re Liam L., supra*, 240 Cal.App.4th at p. 1085.)

Nor are we persuaded that Andres's criminal record and allegations of substance abuse compel a finding of detriment. In *C.M.*, we concluded that a father's conviction for domestic violence and unsubstantiated claims of alcohol abuse did not support a finding of detriment, "especially since neither formed the basis of jurisdiction" of the juvenile court. (*C.M., supra*, 232 Cal.App.4th at p. 1403. Here, although there were claims that Andres abused drugs and alcohol, such claims were unsubstantiated, even after an investigation by DCFS. And while Andres apparently had been convicted for domestic violence against mother, he had no history of child abuse or neglect, and the record does not reflect any previous actions by DCFS to remove children from his custody.

Mother acknowledges it was the burden of the parties opposing placement to present clear and convincing evidence of detriment, but asserts that the court wrongfully prevented the parties from doing so. She claims the court denied both her counsel and D.G.'s counsel the opportunity to argue against the placement, referring to the court declining to hear further argument when asking the parties for their recommended dispositions. But all parties had the opportunity to cross-examine paternal grandmother: mother's counsel asked only two questions, whether mother would be permitted overnight visits if D.G. were placed with paternal grandmother, and whether paternal grandmother would be willing to serve as monitor. D.G.'s counsel asked no questions at all. Neither party elicited nor even attempted to elicit any evidence suggesting paternal grandmother would not be an appropriate caretaker. Nor did any witnesses testify regarding Andres's fitness to care for D.G. once

he was released from prison. Thus, the court reasonably declined to hear argument on these points.[7]

We therefore affirm the court's order granting custody to Andres.

3. Order denying reunification services to mother and terminating jurisdiction

Mother argues the juvenile court abused its discretion by denying her reunification services and terminating jurisdiction over the case. We disagree.

A court has three options when placing a child with the noncustodial parent under section 361.2, which we summarize: the court may (1) grant legal and physical custody to the noncustodial parent and terminate jurisdiction; (2) grant custody to the noncustodial parent subject to a home visit by a social worker; or (3) grant custody to the noncustodial parent subject to the supervision of the juvenile court, in which case the court may provide services to one or both parents, either to allow possible

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[7] Mother notes the court's refusal to give D.G.'s attorney more time to evaluate paternal grandmother as a caregiver. To the extent mother is implying that the parties did not have sufficient time to evaluate possible detriment, we reject this claim. On January 5, 2016, the court ordered DCFS to interview Andres regarding an appropriate plan for care for D.G. should he be granted custody. On January 12, 2016, Andres's counsel read from a letter indicating Andres's plan to place D.G. with paternal grandmother. Thus, the parties were notified nearly two months before the March 4 disposition hearing that the court was considering granting custody to Andres, and that Andres wanted to place D.G. with paternal grandmother. This was sufficient time to gather evidence to prove detriment if the parties so chose, or to seek more time from the court in advance of the disposition hearing.

reunification with the parent from whom the child is being removed, or to allow the parent taking custody to later assume custody without court supervision. (§ 361.2, subd. (b)(1)-(3).)

Here, the juvenile court selected the first option, granting Andres full custody and terminating jurisdiction without ordering reunification services for mother. We review this decision for abuse of discretion. (*K.B., supra*, 239 Cal.App.4th at p. 981.)

We find no abuse here. The court selected one of the three allowable statutory options. The court explained it was denying reunification services because "the child is safely in the care of another parent." This is a reasonable basis to deny reunification services to mother; as one court said when discussing an earlier version of section 361.2, the statute "expressly contemplates that reunification services will be offered only for the purpose of facilitating permanent parental custody of the child by one or the other parent." (*In re Erika W.* (1994) 28 Cal.App.4th 470, 476.) Having placed the child with the father, the court was not obliged to provide reunification services to the mother. Nor was the court obliged to order a home visit under section 361.2, subdivision (b)(2); that subdivision expressly states that it should not be read to imply that a home visit is required before the court chooses options (1) or (3).

Mother asserts that "the idea that [D.G.] has been placed with a parent is a fiction given she will live at least the next two and a half years outside of a parent's custody," referring to Andres's incarceration. Mother argues that placing D.G. with paternal grandmother "could potentially be tantamount to a permanent planned living arrangement with a relative. . . . [I]t is entirely possible that Andres will never assume physical custody of her, or if he does, his custodial time could be limited until he

finds himself re-arrested again." But in making these arguments, mother is essentially repeating her challenge to the court's order granting custody to Andres in the first place, and claiming once again that D.G. is better off with mother. For the reasons discussed above, this challenge lacks merit.

We also note that the juvenile court's decision in no way forecloses mother from seeking custody of D.G. at a later time. Section 361.2, subdivision (b)(1) states that "[t]he custody order shall continue unless modified by a subsequent order of the superior court." Mother's commendable efforts in participating in therapy and parenting and anger management classes would presumably be factors considered by a court if mother requests the custody order be modified.

DISPOSITION

The findings and orders are affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.