Filed 5/9/18 In re L.G. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re L.G. et al., Persons Coming Under the Juvenile Court Law.	B283263 (Los Angeles County Super. Ct. No. DK14624)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.G., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Nancy Ramirez, Juvenile Court Referee. Reversed and remanded with directions.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant D.G. (father) lives in Indiana. He is the presumed father of L.D. and the presumed and biological father of L.G. In this juvenile dependency case, father challenges the juvenile court's jurisdictional findings that he knew of and failed to protect the children from their mother's physical abuse. He also challenges the juvenile court's order removing both children from his custody and care. As we explain below, we conclude substantial evidence does not support the jurisdictional findings against father. We also conclude the juvenile court erred in removing the children from father without conducting the detriment analysis required under Welfare and Institutions Code section 361.2, subdivision (a).[1] Accordingly, we reverse the juvenile court's findings and order and remand with directions to conduct the required detriment analysis.

BACKGROUND

1. Events Preceding Section 300 Petition

Father met A.D. (mother) in Indianapolis in 2012. At the time, mother was 17 years old, homeless, and had an approximately six-month-old daughter, L.D. Father invited mother and L.D. to stay with him and his cousin at their home in Indianapolis. Over time, father's friendship with mother turned romantic. Their daughter L.G. was born in 2013. Toward the

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[1] Subsequent undesignated statutory references are to the Welfare and Institutions Code.

end of 2013, father lost his job. As a result, he, mother, L.D. and L.G. moved in with father's mother (paternal grandmother) in Chicago. Paternal grandmother cared for the children when mother was in school. Eventually, in August 2014, father and mother moved into their own apartment in Chicago with the children.

Almost one year later, in June 2015, father returned from work to find mother had packed her belongings. She told father she was moving to California with a man she had met. Father told mother not to take their daughter with her or at the least to let him see her before they left. Mother persisted, but promised father and paternal grandmother could visit them in California. After mother moved to California, however, she changed her phone number and blocked father from her social media accounts.

On December 2, 2015, about six months after mother moved to California, the Los Angeles County Department of Children and Family Services (Department) received a referral related to the children. Mother had brought the children to a hospital because she believed L.D. had a urinary tract infection. The doctor noticed obvious marks on L.D.'s legs consistent with being hit with a belt, as well as an abrasion on L.G.'s back. When asked about the marks, mother admitted she had spanked L.D. that morning with a belt, but denied using a belt on L.G. Both of the girls had urinary tract infections.

Two days later, a Department social worker met with mother, her male companion D. Clark, and the children at a Department office. A sheriff's deputy was also present. Mother had no information on L.D.'s biological father, and stated only that L.G.'s father lived in Chicago. Mother also told the social worker she was 18 weeks pregnant and Clark was the father of

her unborn child. The social worker observed marks on the children consistent with being hit with a belt. Mother admitted to hitting L.D. with a belt, but again denied hitting L.G. with a belt. Mother stated she had been abused as a child and she would never abuse or hurt her own children. As the social worker interviewed mother, Clark became increasingly agitated. Eventually, he took both children and against the deputy's orders attempted to leave the building with the children in his arms. Backup officers were called and Clark had to be tased and restrained. In the midst of the commotion, Clark dropped L.G., who hit her head on the ground. Finally the children were taken to safety and placed in out of home care, and L.G. received medical attention for her head injury. Both mother and Clark were arrested.

2. Section 300 Petition and Detention Hearing

A few days later, on December 9, 2015, the Department filed a section 300 petition on behalf of L.D. and L.G. The petition alleged mother physically abused L.D., neglected both children by failing to obtain necessary recommended medication for them, and put both at risk of future physical harm.

The detention hearing was held the same day, at which time mother identified father as the father of L.G. The court detained the children from mother and ordered reunification services.

3. Amended Section 300 Petition

After learning father's identity, a Department social worker located him in Indianapolis and interviewed him by phone. Father was " 'shocked' " to hear the allegations against mother. He told the social worker how he and mother met and that they had lived together in Indianapolis and Chicago. He stated that,

when he and mother lived together, he had cared both for his biological daughter L.G. as well as for L.D. He explained he and mother " 'had relationship problems, money was tight and we went through a rough patch.' "

With respect to mother's discipline of the children, father stated: " 'To my knowledge, from being with her for two years, she was abused her whole life growing up. At times she will get angry and if the girls agitated her a little bit[,] I would say that she would overact to it. She wouldn't beat them just to beat them, though. She is a person who just doesn't know how to handle it just yet.' [¶] . . . 'A few times she hit them with a belt, but the majority of times, her hands. No, she never put any marks or bruises on them, that's why I was shocked when I heard the allegations. She never put bruises on them before.' [¶] . . . 'Right when I met her, one minute she'd be a sweetheart and then the next minute the devil herself. In the Spring, 2015, we got a packet from her stepfather that they had been keeping from her. It says she does have some psychological problems, depression and anxiety.' [¶] . . . 'She would spank them but it was not like what you are describing. She wasn't doing none of this with me and now she's with this new guy and she's doing all this. I think the guy must be playing a role in all this, but I have never met him so I don't know what kind of guy he is.' "

Father told the social worker that, when mother and the children lived with him, he let mother " 'do the discipline and the whooping.' " He explained, " 'I am a man and heavy handed. Since they are girls and are very light and the slightest pinch would show, I have never really whooped them. I might raise my voice and tell them to stop. I usually send them to their room with no TV. My oldest, I only whooped her only one time. I just

tell them to respect their elders and they don't have to worry about anything. I don't want to have to do any discipline, so the next few years need to be smooth sailing.' "

The Department social worker also interviewed paternal grandmother by telephone. She echoed much of what father had reported and stated she was willing to care for the children. With respect to mother's discipline of the children, paternal grandmother stated, " 'When [mother] was residing with me, most of the time it was verbal discipline. There have been circumstances that she paddled them on the butt with her hand, but I have never seen her use a belt. Or she would hit their hands with her hand. I wouldn't have allowed her to use a belt.' " Paternal grandmother also told the social worker that, when mother spanked the children, " 'there were no bruises or redness.' "

The social worker also spoke with the foster mother caring for the children. The foster mother stated that, every time she bathed the children, they pointed to their buttocks and legs and said " 'Mama did it.' " She also noted that the children became so anxious when they heard the word "belt" that she and her husband had to spell out the word when with the children.

On March 22, 2016, the Department filed an amended petition on behalf of the children. In addition to the original counts alleging mother physically abused L.D., the amended petition added section 300, subdivisions (a), (b), and (j) counts alleging mother inappropriately disciplined L.G. (although the new counts related to L.G. did not allege mother left marks on L.G.'s body).[2] And in all counts related to mother's discipline of

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[2] In some allegations, the amended petition changed the "physically abused" language of the original petition to

the children, the amended petition alleged father "knew of the physical abuse by mother and failed to protect the child[ren]" from that abuse. The amended petition also added a count under section 300, subdivision (b) alleging father and mother had engaged in physical altercations, including pushing and choking, which placed the children at risk. Finally, the amended petition included additional counts not relevant to this appeal.

4. Adjudication and Disposition

a. Jurisdiction and Disposition Report

Also on March 22, 2016, the Department submitted its jurisdiction and disposition report for the juvenile court. In its report, the Department detailed its support for each count in the amended petition. In support of the allegations that father failed to protect the children (specifically, counts a-1, a-2, b-1, b-3, j-1, and j-2 of the amended petition), the Department stated, "father told [the social worker] that mother has hit the children with a belt a few times in the past, but that she usually used her hand. . . . [F]ather said, 'At times she will get angry and if the girls agitated her a little bit. I would say that she would overact to it. She wouldn't beat them just to beat them, though. She is a person who just doesn't know how to handle it just yet.' Although father observed that mother was easily agitated and did not know how to handle the children, he did not take steps to protect the child, [L.D.], from mother. [¶] . . . [F]ather told [the social worker], 'A few times she hit them with a belt, but the majority of times, her hands. No, she never put any marks or bruises on them before.' Father knew that mother was using a belt and her

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"inappropriately disciplined." It is not clear why this change was made or why it was not made consistently throughout the amended petition.

hands to strike the child, [L.G.], and did not intervene to protect the child[.] It is noted that mother and the children move[d] to California from Chicago, Illinois, in June, 2015, when [L.G.] was 21 months old. Therefore, mother was using a belt and her hand to discipline the child . . . when she was an infant and toddler and completely unable to defend herself or verbalize the abuse to anyone."

The Department also reported that, in December 2015, after mother had moved to California, father moved back to Indianapolis to be close to his older daughter, who he supported and with whom he had a parental relationship. In addition, it was reported father kept in contact with the children's foster parents in California and "speaks with the children on a regular basis." Father also had been in touch with L.D.'s biological father concerning the dependency proceedings. Although father forwarded the foster parents' phone number to L.D.'s biological father, L.D.'s father did not contact them. Father indicated to a Department social worker that he would " 'like to take both girls home with me.' " And he stated he planned to file a family law case because he " 'want[s] to be a father to my children.' " Father stated he was employed and lived with his cousin, whose home had space for the children.

In its report, the Department also recounted that father, mother, paternal grandmother, and L.D.'s biological father all agreed the children should be placed with father. Father stated, " 'I would like to have both [L.D.] and [L.G.] released to me. I am an involved father and I want them back in my care.' " Mother stated, " 'I want [L.G.] and [L.D.] to go with [father]. The children will be safe with him. That's one hundred percent what I want.' " L.D.'s biological father stated, " 'I don't want to split up

the girls. I agree with [L.D.] staying with [father].' " And paternal grandmother stated, " 'We have a support system for [father]. He has a true desire to be a father to the girls. He's not alone in doing this. He's going to stay where he is at. We do have family in the state that he is in. He has the financial security, the support system and the love to take care of them. [Mother] is not a terrible person, she just made a mistake.' "

b. Hearings Preceding Adjudication and Disposition

There were several hearings prior to the adjudication and disposition hearing (which was continued numerous times for various reasons). At a hearing on March 29, 2016, counsel for mother indicated paternal grandmother was willing to care for both children. Counsel asked the juvenile court to order an Interstate Compact for Placement of Children (ICPC) evaluation of paternal grandmother as a potential caregiver for the children. The juvenile court stated it could not make an ICPC order until the disposition stage of the proceedings. Nonetheless, in its minute order from the hearing, the court ordered the "Department to assess paternal grandmother . . . in Indianapolis, Indiana for placement of both minors."

At a hearing held April 11, 2016, the juvenile court found father to be the presumed father of both L.D. and L.G. At the same hearing, counsel for father stated "while we can't look at an ICPC as yet, I'm asking that the Department address the possibility of placement with father for both children. [¶] . . . [¶] I'm also asking they be assessed and plac[ed] with the father." In response, the juvenile court stated, "That's going to take an ICPC." In its April 11 minute order, the juvenile court ordered the "Department to assess . . . father for placement of minors."

Following the April 11 hearing, a Department social worker contacted father to evaluate placement of the children with him. Father told the social worker he lived in a large home with his cousin, he was preparing a room for the children, he had family support, and his mother lived three hours away in Chicago and was willing to help care for the children. The Department confirmed neither father nor paternal grandmother had a criminal history, and there were no matches for father in either the Child Abuse Index or Child Protective Services in Illinois. Although there was one domestic violence related referral for father and mother in Indiana, that referral had been closed with a signed safety plan. The social worker also spoke with paternal grandmother, who explained she had a fulltime job and a spacious house in Illinois. Although she was willing to quit her job to care for the children, she believed they would be better off with father who she believed was capable of caring for them. It does not appear from the record that the Department ever made a recommendation with respect to the suitability of placing the children with father. Rather, the Department stated the children should remain in foster care "until an approved ICPC is received."

Paternal grandmother attended a hearing held on June 13, 2016. At that hearing, paternal grandmother told the juvenile court "I want to obtain custody of my grandchildren." The court responded "If you do, I can order an ICPC." But the court explained that it could not "do that until the case goes to disposition, which means I cannot order that until the case is tried and when I go to disposition or make orders." "I cannot release the children, your grandchildren to you without that formal paperwork and the state of Illinois agreeing to verify it's

their case." The juvenile court indicated it would order the ICPC process to begin, but any final order could not be made until disposition.

Paternal grandmother also attended a hearing held on March 1, 2017. At that hearing, counsel and the court discussed the status of the ICPC evaluation for paternal grandmother. The juvenile court expressed frustration that the ICPC process had not proceeded further, stating the order for the evaluation was made "eight months ago, and if the Department had objections to initiating ICPC, it should have been done at that time rather than lead the parties to believe that that was a possible placement." The court ordered the Department to submit a report to the court with as much information as possible on the suitability of placement with paternal grandmother.

Father and paternal grandmother attended what was scheduled to be the adjudication hearing on March 17, 2017. Due to court congestion, however, the hearing was continued. Father and paternal grandmother again appeared for the continued adjudication hearing, which was then continued over father's and mother's objections.

c. Adjudication and Disposition

On April 14, 2017, after two further continuances and more than one year after the amended petition was filed, the adjudication and disposition hearing was held.[3] At the hearing,

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[3] It is worth noting that mother gave birth to her third child while these proceedings were pending below. The Department filed a section 300 petition with respect to that child, who was then removed from the care and custody of mother and Clark (the child's father). Although not relevant to our decision here, the addition of a new petition and parent while these proceedings were pending caused confusion during the

counsel for the children joined in father's unsuccessful argument that the juvenile court should dismiss all counts against him. Although the court dismissed the count against father regarding domestic violence, the court sustained the section 300, subdivisions (a) and (j) failure to protect counts against him. The court stated it "was persuaded by the lack of the nexus between the domestic violence with [father] given that it was several years ago and the fact that he is living in Indiana. However, he's not absolved of his responsibility of protecting the children. They're still his children. [¶] And the court is sustaining the counts related to his failure to protect them. He made statements that he knew they were disciplined by mother with the belt, and he didn't appear to do anything to protect them from that. And so for that reason the court is sustaining those counts." Thus, the juvenile court declared the children dependents of the court.

With respect to disposition, the juvenile court removed the children "from the home and the care, custody, and control of mother and father." The court found the "Department has made reasonable efforts to prevent removal, but there are no services available to prevent further detention. Children are removed from the home of mother and father and placed in the care, custody, and control of the Department." The court granted father monitored visits and ordered father to attend individual counseling as well as a domestic violence program. The court also ordered an expedited ICPC evaluation for paternal grandmother's home in Chicago.

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adjudication hearing. In addition, the case had only recently come before the bench officer presiding over the adjudication and disposition hearing.

5. Appeal

On April 20, 2017, father appealed. His notice of appeal stated he was appealing the juvenile court's finding that "the failure to protect allegations regarding father . . . to be true by a preponderance of the evidence." On the caption page to his notice of appeal, he listed the "child's name" as "In re [L.G.] et. al," indicating more than one child was involved. On the second page of his notice of appeal, however, father included only L.G.'s name and birth date.

DISCUSSION

1. Scope of Appeal

As an initial matter, we address the scope of father's appeal. In his opening brief, father clearly refers to L.G. and L.D. as if they are both the subject of his appeal. The Department contends, however, that father appealed only the juvenile court's findings and orders pertaining to L.G. Father did not file a reply brief on appeal and, therefore, did not respond to this contention. As explained below, we construe the notice of appeal liberally to include the juvenile court's findings and orders with respect to both children. (Cal. Rules of Court, rule 8.100(a)(2) ["The notice of appeal must be liberally construed"].)

The Department states without reference to the record or legal citation that father chose to appeal the juvenile court's findings and orders as to L.G. only. Although not clear, we assume the Department made this statement because, on page two of his form notice of appeal in response to the statement "This notice of appeal pertains to the following child or children," father lists only L.G.'s name and date of birth. Nonetheless, based on father's (*a*) broad statement of appeal from all findings against him, which include findings as to his alleged failure to

protect both L.G. and L.D., (*b*) inclusion of "In re [L.G.] *et. al*" (italics added) as the "Child's Name" on page one of his notice of appeal, (*c*) repeated statements before the juvenile court that he had previously cared for, and wanted to care for, both children, and (*d*) briefing on appeal urging reversal as to all findings against him as well as for an assessment for placement of both children with him, we conclude father's appeal encompasses the findings and orders made against him with respect to both children.

Similarly, we construe the notice of appeal liberally to include not only the juvenile court's jurisdictional findings, but its dispositional orders as well. (*In re Daniel Z.* (1992) 10 Cal.App.4th 1009, 1017.)

2. Standard of Review

We review the juvenile court's jurisdictional findings and dispositional orders for substantial evidence. "In reviewing the jurisdictional findings and the disposition, we look to see if substantial evidence, contradicted or uncontradicted, supports them." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193, disapproved on other grounds in *In re R.T.* (2017) 3 Cal.5th 622, 628.) "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." (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) " 'All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible. Where there is more than one inference which can reasonably be deduced from the facts, the appellate court is without power to substitute its deductions for those of the trier of fact.' " (*In re David H.* (2008) 165 Cal.App.4th 1626, 1633.) But substantial evidence " ' "is not

synonymous with any evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, '[w]hile substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].' [Citation.] 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' " ' " (*In re Drake M.* (2012) 211 Cal.App.4th 754, 763.)

3. Substantial evidence does not support the juvenile court's findings that father knew of and failed to protect the children from mother's physical abuse.

Although the sustained allegations against father were embedded in counts brought under section 300, subdivisions (a) (serious physical harm or risk of serious physical harm) and (j) (sibling abuse or neglect), the allegations against father pertain only to his alleged knowledge of, and failure to protect the children from, "physical abuse by mother." There is no evidence that father ever harmed the children.

It appears the juvenile court based its jurisdictional findings against father solely on his knowledge that mother sometimes used a belt to discipline the children. At the adjudication hearing, in sustaining the failure to protect allegations against father, the court stated, "He made statements that he knew [the children] were disciplined by mother with the belt, and he didn't appear to do anything to protect them from that. And so *for that reason* the court is sustaining those counts." (Italics added.) However, as this court has held, dependency jurisdiction cannot be based solely on a parent's use of her hand

or other object to spank a child on his or her buttock. (*In re D.M.* (2015) 242 Cal.App.4th 634, 640.) Thus, to the extent the juvenile court sustained the allegations against father based solely on his knowledge that mother sometimes used a belt to discipline the children, that was error.

The Department also urges, however, that substantial evidence supports the juvenile court's jurisdictional findings against father. We disagree. Contrary to the Department's position, we conclude substantial evidence does not support a finding that father knew of mother's physical abuse or had reason to believe the children were at substantial risk of serious physical harm while with mother. It is undisputed that father knew mother used her hands and, at times, a belt to discipline the children. It is also undisputed, however, that when mother lived with father she never left a mark on either child's body, and father was "shocked" to hear of the allegations against her. Similarly, paternal grandmother reported mother most often verbally disciplined the children. And, when mother did spank the children she used her hand and never left a mark. There was no evidence father knew there was a "substantial risk" that mother would at some point in the future discipline the children with such force that she would leave marks on their bodies or otherwise cause them "serious physical harm or illness," as is required for a failure to protect finding. (§ 300, subd. (b)(1).)

In urging this court to affirm the juvenile court's findings, the Department relies on the following statements father made to the Department social worker: (a) at times mother got angry if the girls acted up, and she would " 'overact to it,' " (b) she " 'wouldn't beat [the children] just to beat them, though. She is a person who just doesn't know how to handle it just yet,' " and

(c) " 'one minute she'd be a sweetheart and then the next minute the devil herself.' " The Department claims these statements were "more than sufficient" to put father on notice that the children were at substantial risk of harm in Mother's care. We disagree. Although father's statements indicate he knew mother had a temper and could get angry with the children, there is no evidence father had any indication mother would seriously harm her children. We conclude those few statements do not amount to substantial evidence that, at the time mother moved to California with the children, the children were at "substantial risk" of suffering "serious physical harm or illness." (§ 300, subd. (b)(1).) Father cannot be expected to have protected or attempted to protect the children from an unknown or, at best, speculative risk. " ' "A decision supported by a mere scintilla of evidence need not be affirmed on appeal. . . . 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' " ' " (*In re Drake M.*, *supra*, 211 Cal.App.4th at p. 763.) In light of the whole record here, the jurisdictional findings against father were not reasonable.

4. The juvenile court erred both in "removing" the children from father and not considering placement with him under section 361.2.

Because father was a non-custodial parent at the time the Department initiated these dependency proceedings, section 361.2 applies. In relevant part that section provides: "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).)

It is undisputed that, at all times during these proceedings, father was a noncustodial parent. The children had not lived with him for close to two years, and were not living with him when the petition was filed. Thus, the juvenile court erred when it purported to "remove" the children from father under section 361, subdivision (c), which applies only to custodial parents.

Instead, once the juvenile court removed the children from mother, section 361.2 required the court to determine whether father desired to assume custody of the children. Father did desire custody of the children and had said so repeatedly. Accordingly, because father was a noncustodial parent requesting custody, the juvenile court was then required to place the children with father unless the court found that placement with father "would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) Despite the Department's statements to the contrary, the juvenile court neither considered the question of detriment nor made any finding with respect to detriment.

The Department incorrectly argues both that the juvenile court made a finding that it would be detrimental to place the children with father and that substantial evidence supports that finding. First, the juvenile court simply did not address the issue and made no such finding. Second, even if the court had made a finding of detriment under section 361.2, such a finding would not be supported by substantial evidence. There is no evidence in the record suggesting there would be any detriment to the

children in father's care. Indeed, the only finding made against father was his alleged failure to protect the children from mother, which finding we reverse as discussed above. In addition, because mother and father were no longer living together and father lived thousands of miles away from mother, any concern that father might fail to protect the children from mother no longer existed.

Accordingly, the matter must be remanded so the juvenile court can consider whether placement with father would be detrimental to L.D. or L.G. as required by section 361.2.

5. Any confusion regarding ICPC procedures did not affect the juvenile court's orders with respect to father.

Father argues the juvenile court erred in believing an ICPC assessment was necessary for placement with him. The parties agree there was some confusion below with respect to who needed an ICPC evaluation and when such an evaluation would occur. In making its dispositional orders with respect to father, however, the juvenile court did not rely on or reference ICPC. We conclude that, to the extent there was confusion as to the proper ICPC procedure, it did not impact the juvenile court's orders with respect to father.

DISPOSITION

We reverse the jurisdictional findings as to father D.G., as well as the juvenile court's order removing the children from father. We remand for further proceedings examining whether placement with D.G. would be detrimental to L.D. or L.G. (Welf. & Inst. Code, § 361.2.)

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.