

**IN THE COURT OF APPEALS OF IOWA**

No. 0-376 / 10-0062  
Filed July 14, 2010

**IN THE INTEREST OF C.G. and L.G.,  
Minor Children,**

**A.M.-S., Mother,  
Appellant,**

**J.T.G., Father,  
Appellant.**

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Appeal from the Iowa District Court for Clinton County, Phillip J. Tabor,  
District Associate Judge.

A mother and father appeal separately from the juvenile court's order  
adjudicating their children to be children in need of assistance. **AFFIRMED ON  
BOTH APPEALS.**

M. Leanne Tyler, Davenport, for appellant mother.

Robert J. McGee, Clinton, for appellant father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney  
General, Mike Wolf, County Attorney, and Cheryl J. Newport, Assistant County  
Attorney, for appellee State.

Thomas D. Lonergan of Mayer, Lonergan & Rolfes, Clinton, for minor  
children.

Considered by Sackett, C.J., and Vaitheswaran and Doyle, JJ. Tabor, J.,  
takes no part.

**DOYLE, J.**

A mother and father appeal separately from the juvenile court's order adjudicating their children to be children in need of assistance. The mother also appeals the juvenile court's dispositional order requiring she comply with the Iowa Department of Human Services case plans. We affirm.

***I. Background Facts and Proceedings.***

A.M.-S. is the mother and J.G. is the father of C.G., born June 2003, and L.G., born 2004. The parents separated in August of 2008, and the mother subsequently filed for divorce. The children lived with the mother but had regular visitation with the father during the divorce proceedings. The children began to see a therapist to help them cope with the divorce.

In December 2008, the mother took C.G. to the children's primary physician, Dr. Neeru, after the children returned home from visitation with their father. The mother stated C.G. was complaining of itching and hurting around the anal area after returning from the visit. The doctor prescribed medication for the condition.

On March 28, 2009, the mother took C.G. to the emergency room due to a large bruise on the back of C.G.'s thigh. The mother told the treating physician that the children had just returned from a visit with their father and she noticed the bruise on C.G.'s leg. The mother stated to the doctor that C.G. told her the father had hit C.G., causing the bruise. The doctor asked C.G. about this, and C.G. denied the father caused the bruise.

Two days later, the mother took C.G. to Dr. Neeru because C.G. had a fever and a cold. The mother also advised Dr. Neeru of C.G.'s bruise. C.G. told

Dr. Neeru the father had spanked C.G. with the blunt side of an arrow when C.G. was arguing with L.G. The mother advised Dr. Neeru that she had reported the bruise to the Iowa Department of Human Services (Department) and the police.

Following the report of the bruise to the Department, C.G. was referred to the Child Protection Response Clinic for a complete medical assessment. C.G. told the examining doctor, Dr. Harre, the father had hit C.G. with an arrow. C.G. reported the father had “whacked me with it.” C.G. reported that the father sometimes spanked C.G. and that the father “ha[d] left other marks.” Dr. Harre interviewed the father, and he stated he did not know how C.G. got the bruise. The father denied spanking C.G. with the arrow. In talking with the father, the doctor observed that the father avoided talking about how he disciplined the children when he was home with the children without other adults present.

Dr. Harre examined C.G.’s bruise and found the bruise to be very prominent. Dr. Harre noted that the location of the bruise would be difficult for a child to injure in the course of routine play activities, and she found the pattern of the bruise “was consistent with a mechanism of being struck forcefully with an object as described by [C.G.]” The doctor agreed that investigation was warranted “to look into this incident further and also to screen [C.G.’s] environment both within [C.G.’s] mother and father’s care to determine whether there is any risk to this child’s safety and well-being alone with either parent.”

C.G. was also interviewed by a Department child protection worker. C.G. stated the father had hit C.G. with an arrow. Ultimately, the Department concluded the report of child abuse by the father was founded.

Services were offered to the family, including working with a family care coordinator. The mother advised the family care coordinator of many concerns she had about the children's visits with the father, such as the children being fearful before having to visit the father, and the children reported the father was always angry and hitting them. The family care coordinator observed the children in both parents' care and reported she did not observe a difference in the children from one home to another, but noted a lot of tension between the parents. The family care coordinator noted that the parents "have very different perspectives about incidents that occur. Although many issues and concerns have been address[ed], no one has taken responsibility for their actions, so it is difficult to determine what concerns are valid." The parents' divorce was finalized in May 2009.

On July 1, 2009, while the mother helped L.G. get ready for bed after the children had visited with the father, she noticed L.G.'s bottom, around the anal area, looked very red. The mother stated she looked at the area and observed a large dark red ring around his anus with another lighter red ring beyond that ring. She stated L.G. told her it happened at the father's home, "that [the father] had a sword in there and that daddy pulls it out and throws it away." She stated L.G. told her "the sword was both soft and hard and red like in a rainbow." The mother then contacted the Department's workers and the children's therapist.

L.G. was seen by the children's therapist, Candice Kundert, on July 2, 2009. Kundert reported that L.G. told during her their session that the father "stuck a red sword up [L.G.'s] butt while on visits and while [C.G. was at camp]."

Kundert stated L.G. was very explicit with the disclosure, and Kundert subsequently contacted the Department's caseworker.

The mother took L.G. to Dr. Harre on July 7, 2009. L.G. denied that anyone had touched him around his bottom. Dr. Harre found no redness or structural abnormalities in L.G.'s rectal area. Dr. Harre looked at the pictures the mother had taken and found there was redness about the perianal area, but the doctor did not see any abrasions or superficially damaged skin in the photos.

On July 9, 2009, both children were examined at the Child Protection Center, including colposcopic examinations. Both children's genital and physical examinations were found to be normal. L.G. was then interviewed. L.G. stated that the mother did not like the father and the father did not like the mother. When asked who L.G. likes to live with better, L.G. said the father. L.G. was asked if something made his bottom hurt, and L.G. said no. L.G. then stated that "somebody put it in there" and stated "my sore in my bottom, my daddy did." When asked what the father put in L.G.'s bottom, L.G. said "the sore in my bottom." L.G. did not know how the father put the sore in L.G.'s bottom, but L.G. said it happened in the father's living room.

Based upon L.G.'s interview, it was recommended that law enforcement and the Department continue their investigation. It was also recommended the children continue with therapy and the family continue with in home services.

On July 17, 2009, L.G. was seen by clinical psychologist Dr. Richard Hutchison. Dr. Hutchison interviewed L.G. in Kundert's presence. Dr. Hutchison reported that L.G. told him L.G. had a sore and then pointed to the anal area.

L.G. stated a sword made the sore, but L.G. did not want to discuss how the anal area became sore. L.G. said both the mother and the father did it.

The father was interviewed by the case social worker. He denied abusing the children. He ultimately asserted the mother had coached the children to accuse the father of abuse.

On July 23, 2009, the Department's social worker for the case submitted an affidavit to the State in support of filing a children in need of assistance (CINA) petition. The worker's affidavit identified the names of both parents and then set forth information to support the petition. All of the information set forth concerned alleged actions and behaviors of the father; no actions or behaviors of the mother were alleged. Among other things, the affidavit stated that the Department was currently working with the family based upon a prior report of founded physical abuse of C.G. by the father. The worker requested an ex parte removal order removing the children from the father's home.

The State subsequently filed its CINA petition, asserting the children were CINA as defined by Iowa Code sections 232.2(6) (b) (child "[w]hose parent . . . has physically abused or neglected the child, or is imminently likely to abuse or neglect the child"), (c)(1) (child "[w]ho has suffered or is imminently likely to suffer harmful effects as a result of . . . mental injury caused by the acts of the child's parent"), (c)(2) (child "[w]ho has suffered or is imminently likely to suffer harmful effects as a result of . . . [t]he failure of the child's parent . . . to exercise a reasonable degree of care in supervising the child"), and (d) (child "[w]ho has been, or is imminently likely to be, sexually abused by the child's parent") (2009). The petition identified both the mother and the father in the petition. The social

worker's affidavit was attached to the petition. Both parents received notice of the petition.

A contested adjudicatory hearing was held on October 5, November 16, and November 19, 2009. Discovery issues arose in the case after the first day of hearing, and a discovery hearing was held on October 20, 2009, on various parties' motions to compel. At that hearing, the juvenile court stated it would also consider adjudication as to the mother based upon section 232.2(6)(c)(2).<sup>1</sup> The mother filed a motion for reconsideration asserting unfairness and constitutional violations in the court's ruling because the State did not seek such adjudication against her and because no actions or behaviors of the mother were cited in the social worker's affidavit to support a CINA adjudication against her. The State joined in the mother's motion, stating, among other things, that at that point in time the mother had not properly been noticed of any allegation against which to defend. The juvenile court subsequently denied the mother's and the State's motions, and the contested adjudicatory hearing continued. The mother did not testify. The mother was represented at the hearing, and her attorney participated in the examination of the witnesses and entered exhibits into evidence.

Thereafter, the court entered its order adjudicating the children CINA. The court's order noted that the Department's social worker testified he found this case to be one of the closest calls in his thirty-year career for whether or not abuse had occurred. Although the worker determined the sexual abuse report to be founded, the court further noted that the Department required only a

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<sup>1</sup> The juvenile court did not enter a written ruling stating such, and no transcript of the hearing was entered into the record. However, the parties do not dispute the fact.

preponderance of the evidence in findings of abuse, a lower burden than the State's clear and convincing standard required in CINA cases.<sup>2</sup> The court found most of the witnesses presented to be credible; however, the court specifically found the testimony of the children's therapists Kundert and Dr. Hutchison not credible because they were very involved in the therapy of this case.

The juvenile court concluded that the State failed to establish the children were CINA under sections 232.2(6) (c)(1), (c)(2), and (d). However, the court found clear and convincing evidence existed to support the conclusion that the children were CINA pursuant to section 232.2(6)(b). The court specifically found that C.G. had a bruise on the thigh and the investigation revealed the bruise was caused by the father.<sup>3</sup>

The court further explained:

In making this finding, the court is very concerned that the amount of damage, the type of damage, and the recurrence of the damage seems to be overstated each time the story is relayed to another party. The court is also very concerned that this overstatement is usually at the hands of the mother and not the child. The evidence throughout this case demonstrates that any problem reported by the child to the mother is consistently overstated when the mother restates it to a professional and that the mother's statement of what happened is often different than the original report of the child to the mother.

Finally, in making this finding, the court is very concerned about the position the children have been placed vis-à-vis their parents in the parents' divorce. It is obvious to the court that the children have become the tool of revenge for both parents in this divorce.

The children have not been removed from the care of their mother.

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<sup>2</sup> See Iowa Code § 232.96(2).

<sup>3</sup> The juvenile court's order originally found it was L.G., not C.G., who had been physically abused by the father. The court corrected its scrivener's error in its later dispositional order.



Based on the foregoing, an evaluation of the needs of the children, the resources and capabilities of the parents, the efforts made by the parents to rectify the situation, and the risk of future adjudicatory harm, the court determines that the children can continue in the home of their mother and can continue to have visitation with their father.

The mother filed a motion for reconsideration. The mother asserted the children's therapists should have been found to be credible witnesses, and therefore, the court should have also adjudicated the children CINA based upon Iowa Code section 232.2(6)(d), based upon the therapists' beliefs that the father perpetrated sexual abuse upon L.G. The court denied the mother's motion.

A dispositional hearing was held on December 22, 2009. The Department recommended its case plans be accepted as submitted, which required among other things that the parents complete a children in the middle class at their expense and the mother receive a psychological evaluation. The children's guardian ad litem (GAL) submitted its report recommending services for both parents. The GAL specifically recommended that the mother attend children-in-the-middle and parenting classes. The GAL also recommended family team meetings. The Court Appointed Special Advocate also recommended the mother receive a psychological evaluation. In response, the mother's counsel argued:

I think that, minimally, the case plan suggested by the Department should be followed. . . .

I don't know why [the mother] should have done a psychological evaluation. The case was never brought against her, and . . . she was never ordered to do one. If they want it done, I suppose she can, but I don't see any reason why she should do that.

. . . .

I think the report should be followed.

On December 23, 2009, the court entered its dispositional order. The court found it had jurisdiction of the parties and of the subject matter and adopted the Department's case plans.

Both parents appeal.

## ***II. Scope and Standards of Review.***

Our review of CINA proceedings is de novo. *In re K.N.*, 625 N.W.2d 731, 733 (Iowa 2001). We review both the facts and the law and adjudicate rights anew. *In re H.G.*, 601 N.W.2d 84, 85 (Iowa 1999). We give weight to the fact findings of the juvenile court, especially when considering the credibility of witnesses, but are not bound by those findings. *In re L.L.*, 459 N.W.2d 489, 493 (Iowa 1990). The State has the burden of proving the allegations by clear and convincing evidence. Iowa Code § 232.96(2). "Clear and convincing evidence" is evidence leaving "no serious or substantial doubt about the correctness of the conclusion drawn from it." *In re D.D.*, 653 N.W.2d 359, 361 (Iowa 2002). The best interests of the children are paramount to our decision. *K.N.*, 625 N.W.2d at 733.

## ***III. Discussion.***

### ***A. Father.***

#### ***1. Failure to Plead with Particularity.***

The father argues the petition failed to comply with Iowa Code section 232.36(3)(c), which requires that the petition "set forth plainly . . . [w]ith reasonable particularity, the time, place and manner of the delinquent act alleged and the penal law allegedly violated by such act." The father argues that the State's CINA petition and the attached affidavit only set forth allegations of

sexual abuse by the father, not physical abuse, and therefore violated section 232.36(3)(c). We disagree.

The affidavit plainly references the previous physical abuse finding, noting the Department was working with the family based upon this prior finding. At the adjudication hearing, the father's counsel conceded that affidavit did refer to the physical abuse finding. We find the petition met the minimal requirements of Iowa Code section 232.36(3)(c).

## **2. Grounds for Adjudication as to C.G.**

The father contends the juvenile court erred in finding the State proved the grounds for adjudicating C.G. as CINA under Iowa Code section 232.2(6)(b). Section 232.2(6)(b) defines CINA as a child “[w]hose parent . . . has physically abused or neglected the child, or is imminently likely to abuse or neglect the child.” The State has a duty to see that every child within its borders receives proper care and treatment. *In re D.T.*, 435 N.W.2d 323, 329 (Iowa 1989). Our juvenile statutes are designed to effectuate that duty. *In re M.M.*, 483 N.W.2d 812, 814 (Iowa 1992). The provisions of Iowa Code chapter 232 are preventative as well as remedial. See *L.L.*, 459 N.W.2d at 494 (affirming termination of parental rights). “Their goal is to prevent probable harm to the child; they do not require delay until after the harm has happened.” *In re T.A.L.*, 505 N.W.2d 480, 483 (Iowa 1993).

On our de novo review, we find clear and convincing evidence supports the adjudication made by the juvenile court. The court found the doctors examining C.G. after he returned home from a visit with a bruise to be credible. C.G. told Dr. Harre the father had hit C.G. with an arrow causing the bruise.

Dr. Harre found C.G.'s bruise to be very prominent and found the location of the bruise would be difficult for a child to injure in the course of routine play activities. Most importantly, she found the pattern of the bruise "was consistent with a mechanism of being struck forcefully with an object as described by [C.G.]." The circumstances justify adjudication of the child as CINA to secure the juvenile court intervention necessary to address the physical abuse and unsafe conditions of the home and attempt to protect the child from imminent harm. We therefore conclude the court did not err in adjudicating C.G. CINA under section 232.2(6)(b).

### ***3. Grounds for Adjudication as to L.G.***

The father also asserts the court improperly adjudicated L.G. CINA based upon an incident of physical abuse to C.G. We disagree.

As stated above, our juvenile statutes are preventive as well as remedial. *L.L.*, 459 N.W.2d at 494. Ordinarily, all siblings are at risk when one child has been abused. See *In re A.B.*, 492 N.W.2d 446, 447 (Iowa Ct. App. 1992). Here, the Department's investigation found the father had physically abused C.G. The father denied the abuse. We find the facts before us support the conclusion the father was imminently likely to abuse both children, and we therefore affirm the court's order adjudicating L.G. CINA under section 232.2(6)(b).

### ***B. Mother.***

#### ***1. Additional Grounds for Adjudication against the Father.***

The mother first contends the juvenile court erred in not finding the children were CINA under Iowa Code section 232.2(6)(d). Specifically, the mother argues there was clear and convincing evidence the father sexually

abused L.G. The mother further argues that the children's therapists should have been found credible by the juvenile court.

In evaluating credibility, trial courts have the advantage of observing the witnesses' demeanor during testimony, but appellate courts have only the printed record from which to judge credibility. See *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984); *Lehmkuhl v. Lehmkuhl*, 259 Iowa 686, 692, 145 N.W.2d 456, 460 (1966); *In re R.L.F.*, 437 N.W.2d 599, 600 (Iowa Ct. App. 1989). Here, although L.G. indicated to some that the father had sexually abused L.G., L.G. denied the abuse to others. Upon our de novo review of the entire record, we conclude the juvenile court did not err in finding there was not clear and convincing evidence the father sexually abused L.G. We therefore affirm the ruling of the court.

## **2. Court Erred in Raising Ground against the Mother.**

The mother next argues the juvenile court erred in adding a ground for adjudication against the mother sua sponte. The mother asserts the addition of the ground violated her constitutional due process rights. Although we agree, we ultimately find the issue to be moot.

Both the Federal and State Constitutions provide no person shall be deprived of life, liberty, or property, without due process of law. U.S. Const. amends. V, XIV; Iowa Const. art. I, § 9. "[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed. 2d 599, 606 (1982). A natural parent has due process rights relating to a CINA proceeding. *In re A.M.H.*, 516 N.W.2d 867, 870 (Iowa 1994).

Clearly, we have a duty to enforce the procedural safeguards contained in Iowa Code chapter 232. Both DHS and the juvenile court have the important function of protecting children who are in need of assistance. However, taking a child away from the care and custody of a parent is of serious consequence. We therefore must carefully observe statutory procedural safeguards.

*Id.* at 871.

Due process requires sufficient notice of the complaint against the parent and of the time of the hearing. *In re D.E.D.*, 476 N.W.2d 737, 739 (Iowa Ct. App. 1991), *overruled on other grounds by In re P.L.*, 778 N.W.2d 33, 38-39 (Iowa 2010). *In D.E.D.*, this court held a father's due process rights were violated where the State was allowed to amend a termination petition during trial to allege a new ground for termination because he had no notice prior to the hearing of the ground under which termination was decreed. *Id.* at 739-40.

Although CINA proceedings are not the same as termination proceedings, *In re L.K.S.*, 451 N.W.2d 819, 822 (Iowa 1990) ("Although a CINA proceeding may be the first step toward the termination of fundamental parental rights, we refuse to equate the consequences of a CINA proceeding with those of parental termination."), we conclude the mother's due process rights were violated here as well. The mother was not provided with notice of the grounds for which her children were adjudicated CINA concerning her prior to the commencement of the adjudicatory hearing. Nevertheless, despite the court's error in adding the ground against the mother, the court ultimately concluded the State failed to prove the additional ground by clear and convincing evidence, and the court did not adjudicate the children CINA based upon the ground. We therefore find the issue to be moot. See *In re Marriage of Neff*, 675 N.W.2d 573, 578 (Iowa 2004)

(stating a question is moot when the issue it presents is merely academic and any judgment rendered can have no practical legal effect).

**3. Requirement of Mother to Participate in Services.**

Finally, the mother argues:

The court, although not adjudicating against the mother, made findings in the adjudicatory order and required her to do actions, including a psychological evaluation[, ] by approving the case plan in the dispositional order. These actions by the court were a violation of due process, both under the Iowa Constitution and the U.S. Constitution.

However, at the dispositional hearing, the mother specifically advised the court that she believed the case plans should be adopted. She did not challenge the Department's request that she participate in services, other than vaguely questioning why it requested she be evaluated. An issue not presented in the juvenile court may not be raised for the first time on appeal, even an issue of constitutional dimensions. *In re T.J.O.*, 527 N.W.2d 417, 420 (Iowa Ct. App. 1994). We thus conclude the mother has not preserved error on this claim.

**IV. Conclusion.**

For the reasons set forth above, we affirm the juvenile court's adjudicatory and dispositional orders.

**AFFIRMED ON BOTH APPEALS.**