

IN THE COURT OF APPEALS OF IOWA

No. 1-174 / 11-0129
Filed March 21, 2011

**IN THE INTEREST OF V.M. and G.M.,
Minor Children,**

**J.E.D., Mother,
Appellant.**

Appeal from the Iowa District Court for Monroe County, William S. Owens,
Associate Juvenile Judge.

A mother appeals from the juvenile court's order adjudicating her children
as children in need of assistance. **AFFIRMED.**

Debra A. George of Griffing & George Law Firm, P.L.C., Centerville, for
appellant mother.

Samuel Erhardt, Ottumwa, for father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, and Steve Goodlow, County Attorney, for appellee State.

Jonathan Willier, Centerville, for minor children.

Considered by Vogel, P.J., and Doyle and Tabor, JJ. Mansfield, J., takes
no part.

DOYLE, J.

A mother appeals from the juvenile court's order adjudicating her children as children in need of assistance. We affirm.

I. Background Facts and Proceedings.

J.D. is the mother of V.M., born September 2002, and G.M., born July 2004. The children first came to the attention of the Iowa Department of Human Services (Department) in 2005, after V.M., then age three, was found outside unsupervised in winter wearing only a diaper. In 2007, it was reported that the mother's boyfriend had sexually abused V.M. The Department determined the report was founded, and the children were adjudicated children in need of assistance (CINA) by the juvenile court. The mother agreed to a safety plan requiring she not expose the children to any known sex offenders, and the CINA case was closed in November 2008.

In 2010, new child abuse allegations were reported to the Department concerning the children. It was reported the mother had left the children in the care of a mentally incompetent adult who could not properly supervise them. It was also reported that G.M. had acted out sexually with another child. The investigator found it was likely that G.M. had been sexually molested at some time in his life or, at the very least, G.M. had been exposed to sexual situations far beyond those appropriate for his age.

Additionally, the Department learned of the mother's relationship with T.D. T.D., a registered sex offender convicted of sexual abuse of a child and child pornography, was incarcerated when he and the mother met. T.D. was paroled in 2009, and, as part of T.D.'s parole, he was to have no contact with minor

children. He was specifically directed not to have contact with V.M. and G.M. However, the mother continued her relationship with T.D. and exposed her children to T.D., against the advice of the Department, T.D.'s parole officer, and the federal judge involved in T.D.'s case. The mother went on to marry T.D. in March 2010. T.D.'s parole was revoked on July 1, 2010, for violating numerous conditions of his probation, including having contact with the children. He is scheduled to be released in May 2011.

On September 15, 2010, the State filed a petition alleging the children to be CINA within the purview of Iowa Code section 232.2(6)(c)(2) (2009). Following a contested adjudicatory hearing, the juvenile court entered its order adjudicating the children CINA under section 232.2(6)(c)(2). Although the court found the mother was meeting the basic needs of the children, the court explained court intervention was necessary due to the mother's "inexplicable and perplexing desire to seek out, locate and begin relationships with men who create a clear, real, and imminent threat to both the short-term and long-term safety and best interests of her children."

On January 10, 2011, the juvenile court entered its dispositional order confirming its prior finding that the children were CINA. However, the court's order stated the children had been previous adjudicated CINA pursuant to section 232.2(6)(c)(2) and (n). The court ordered, among other things, that services be offered to reunite the children with the mother.

The mother now appeals.

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.

On appeal, the mother contends the State failed to prove the grounds for adjudication. Additionally, the mother argues the juvenile court erred in sua sponte adding section 232.2(6)(n) as a ground for adjudication in the dispositional hearing when it was not raised by the State nor found by the court following the adjudicatory hearing. Finally, the mother argues section 232.2(6)(c)(2) is unconstitutional, asserting that section is overbroad and vague.

A. Iowa Code section 232.2(6)(n).

The mother challenges the juvenile court’s addition of section 232.2(6)(n) as a ground adjudicating the children as CINA in its dispositional order. It appears the addition of subsection (n) was included by accident by the juvenile court. In any event, the State concedes the addition of the ground was error, and

we agree. Nevertheless, we need only find grounds under one section to affirm the court's adjudicatory ruling. *In re R.R.K.*, 544 N.W.2d 274, 276 (Iowa Ct. App. 1995). Because the juvenile court also adjudicated the children CINA pursuant to section 232.2(6)(c)(2), if we find clear and convincing evidence supports the court's adjudication under that ground, we need not reverse. *See id.*

B. Grounds for Adjudication.

The provisions of Iowa Code chapter 232 are preventative as well as remedial. *Id.* Their goal is to prevent probable harm, and they do not require delay until harm has occurred. *In re T.A.L.*, 505 N.W.2d 480, 483 (Iowa 1993). Moreover, we look to the whole body of a parent's past performance in CINA cases because that performance may be indicative of the quality of the future care that the parent is capable of providing. *See L.L.*, 459 N.W.2d at 493.

The juvenile court found the State proved by clear and convincing evidence that the children were CINA pursuant to section 232.2(6)(c)(2). Section 232.2(6)(c)(2) provides that a CINA

means an unmarried 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.

We believe the State carried its burden in this case.

Here, V.M. has previously been sexually abused, and G.M.'s recent acting out sexually is strong evidence that he too has been sexually abused. Although the mother denies having knowledge that her prior boyfriend sexually abused V.M., V.M.'s own statements to child protective workers appear to indicate otherwise. Now the mother has married a registered sex offender who has

previously been convicted of child pornography and sexual abuse of a child. The mother also admitted she left the children in the care of a mentally incompetent adult who could not properly supervise the children.

“The consequences of physical or sexual abuse are immediately devastating to the child.” *In re D.T.*, 435 N.W.2d 323, 331 (Iowa 1989) (citation omitted). The State has the duty to see that every child within its borders receives proper care and treatment. *L.L.*, 459 N.W.2d at 494; *D.T.*, 435 N.W.2d at 329. As noted above, a child’s adjudication as a CINA need not await the occurrence of injury or harm. See *D.T.*, 435 N.W.2d at 330 (“[W]e think our temporary removal provisions in [CINA] proceedings are designed to prevent probable harm to a child and do not require delay until after the harm is done.”). On our de novo review, we find the State met its burden in establishing that the children have suffered or are imminently likely to suffer harmful effects as a result of the failure of the mother to exercise a reasonable degree of care in supervising the children. We therefore conclude the juvenile court did not err in adjudicating the children CINA pursuant to section 232.2(6)(c)(2).

C. Constitutionality of Iowa Code section 232.2(6)(c)(2).

Finally, the mother contends section 232.2(6)(c)(2) is unconstitutional as is overbroad and vague “as applied to [the] mother’s intent that her children have a supervised relationship with her sex offender husband.” This argument was not specifically raised before the juvenile court. Rather, on a motion to reconsider after the juvenile court entered its CINA adjudication, the mother argued the court failed to consider the additional protection the marriage of the mother to T.D. provides in reducing the risk to the children, as well as the mother’s right to

privacy in her family. The juvenile court denied the mother's motion without addressing the mother's argument concerning her marriage to T.D. or privacy rights.

"Matters not raised in the trial court, including constitutional questions, cannot be asserted for the first time on appeal." *In re C.D.*, 508 N.W.2d 97, 100 (Iowa Ct. App. 1993). "Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal." *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003). A motion pursuant to Iowa Rule of Civil Procedure 1.904(2) is essential to the preservation of error when a trial court does not resolve an issue. *In re A.M.H.*, 516 N.W.2d 867, 872 (Iowa 1994); *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984). "We will not allow a party to make a general reference to constitutional provisions in the trial court and then seek to develop the argument here." *Klobnack v. Abbott*, 303 N.W.2d 149, 153 (Iowa 1981).

Here, the mother did not file a motion under rule 1.904(2) seeking the juvenile court rule on her asserted constitutional claims. As urged by the State, although the mother raised constitutional issues with the juvenile court in her motion to reconsider, the record before us does not demonstrate that the issues were addressed or resolved by the juvenile court. Accordingly, we conclude the mother has not preserved error on this claim and we will therefore not consider it.

IV. Conclusion.

Because we find clear and convincing evidence supports finding the children were CINA under section 232.2(6)(c)(2) and the mother failed to

preserve her argument as to the constitutionality of section 232.2(6)(c)(2), we affirm the juvenile court's order adjudicating the children CINA.

AFFIRMED.