

IN THE COURT OF APPEALS OF IOWA

No. 2-1137 / 12-1889
Filed January 9, 2013

**IN THE INTEREST OF S.M.D., E.D.D., S.L.D., and T.L.D.,
Minor Children,**

T.D., Mother,
Appellant.

Appeal from the Iowa District Court for Adams County, Monty W. Franklin,
District Associate Judge.

A mother appeals from the orders adjudicating her children as children in
need of assistance. **AFFIRMED AS TO S.M.D.; REVERSED AS TO E.D.D.,
S.L.D., AND T.L.D.**

Rodney Maharry of Engel & Maharry, P.L.C., Corning, and Jami
Hagemeier, Des Moines, for appellant mother.

Timothy Duffy, Des Moines, for father.

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney
General, Jeffrey Millhollin, County Attorney, and Duane Golden, Assistant County
Attorney, for appellee-State.

Jane Orlanes, Des Moines, attorney and guardian ad litem for S.M.D.

Karen Emerson-Peters, Atlantic, attorney and guardian ad litem for S.L.D.
and T.L.D., and guardian ad litem for E.D.D.

Clinton Hight, Greenfield, attorney for E.D.D.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

EISENHAUER, C.J.

A mother appeals from the order adjudicating her children as children in need of assistance. She contends the court erred in finding S.M.D. a child in need of assistance under Iowa Code section 232.2(6)(d) (2011), and in finding her three other children in need of assistance under section 232.2(6)(c). We affirm as to S.M.D. and reverse as to E.D.D., S.L.D., and T.L.D.

The family has been involved with the Iowa Department of Human Services since April 2012 based on S.M.D.'s report her father sexually abused her. S.M.D. stayed with the family of a friend temporarily until she was removed and placed in foster care. A family safety plan was created providing for the father to leave the family home and have no contact with the children. The family followed the safety plan. The child protective assessment resulted in a founded report as to the father in May. In June the State petitioned to have all four children adjudicated in need of assistance under Iowa Code section 232.2(6)(d). The petitions later were amended to add section 232.2(6)(c). Neither the amendments nor the original petitions included a "clear and concise summary of the facts which bring the child within the jurisdiction of the court" as required by section 232.87(5). The amendments also generally referenced section 232.2(6)(c) without distinguishing between the two alternatives.

"Child in need of assistance" means an unmarried child:

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- c. Who has suffered or is imminently likely to suffer harmful effects as a result of any of the following:
- (1) Mental injury caused by the acts of the child's parent, guardian, or custodian.
 - (2) The failure of the child's parent, guardian, custodian, or other member of the household in which the

child resides to exercise a reasonable degree of care in supervising the child.

Iowa Code § 232.2(6)(c)

A contested hearing on the petitions took place in late August. The State presented evidence concerning the abuse of S.M.D. and that her mental health evaluation indicated some emotional harm from the abuse, from being separated from her family, and from feeling abandoned. Mental health evaluations of the other three children indicated some emotional issues resulting from the father's absence from the home. The court found clear and convincing evidence supported the allegations under both code sections as to S.M.D. It found clear and convincing evidence under section 232.2(6)(c) as to the other three children, finding "all family members have suffered emotional damage as a result of the abuse." It also made an oral finding there was not clear and convincing evidence to adjudicate the three other children under section 232.2(6)(d). The court adjudicated all four children in need of assistance—S.M.D. under section 232.2(6)(c) and (d), and the other three children under section 232.2(6)(c). S.M.D.'s placement outside the home was continued, and the other three children were ordered to remain in the mother's custody. The father was ordered to have no contact with S.M.D. and only supervised phone calls with the other three children.

The mother filed a motion to amend or enlarge, contending clear and convincing evidence did not support the court's conclusions. The motion noted the court found the family members had suffered "emotional damage," but did not make any finding they had suffered "mental injury" as required in section

232.2(6)(c)(1). The motion also alleged the emotional damage found by the court did not meet the statutory definition of mental injury in section 232.2(35).¹ The court denied the mother's motion in its entirety.

In October the court held a contested dispositional hearing. The court confirmed the adjudication of the children, continued S.M.D.'s foster care placement, continued the other three children in the family home with the mother, and somewhat eased restrictions on the father's contact with the three children. The mother appealed. The attorney for seventeen-year-old E.D.D. filed a response on appeal supporting the mother's appeal and seeking reversal of the adjudicatory and dispositional orders. The guardian ad litem for the three children filed a response supporting the adjudicatory and dispositional orders.

We review child-in-need-of-assistance adjudications de novo. *In re B.B.*, 500 N.W.2d 9, 11 (Iowa 1993). We examine both the facts and law and adjudicate anew those issues properly preserved and presented. *In re L.G.*, 532 N.W.2d 478, 480-81 (Iowa Ct. App. 1995). We accord weight to the factual findings of the juvenile court, especially concerning the credibility of witnesses, but are not bound by them. *Id.* Our primary concern lies with the children's welfare and best interests. *Id.* at 481.

S.M.D. The mother contends the court erred in finding clear and convincing evidence supported adjudicating the child in need of assistance under

¹ "Mental injury' means a nonorganic injury to a child's intellectual or psychological capacity as evidenced by an observable and substantial impairment in the child's ability to function within the child's normal range of performance and behavior, considering the child's cultural origin." Iowa Code § 232.2(35).

section 232.2(6)(d).² She argues the record lacks any evidence to support the court's ruling "other than what was stated in the [child protective assessment]." That assessment was founded as to the father. The trial court found S.M.D.'s statements to be reliable based on a finding her allegations of sexual abuse by her father had been assessed as credible, consistent, and detailed by the investigators. Giving proper deference to the trial court's credibility assessment, we find clear and convincing evidence supports a finding S.M.D. was sexually abused by her parent. See Iowa Code § 232.2(6)(d). We affirm S.M.D.'s adjudication and the subsequent dispositional order.

E.D.D., S.L.D., and T.L.D. The mother contends the court erred in finding clear and convincing evidence to adjudicate these three children under section 232.2(6)(c)(1). She argues the court did not find any "mental injury" as required by the statute. The mental health evaluations of the children noted emotional trauma from being separated from their father, but did not indicate any mental injury. The family, contrary to the department's concerns, has followed the safety plan.

The mother specifically challenges the evidence supporting section 232.2(6)(c)(1). The court's adjudicatory order cited section 232.2(6)(c) generally as the statutory ground. On appeal, the State urges us to affirm under section 232.2(6)(c)(2) because the mother does not raise a challenge under that alternative. The evidence at the adjudicatory hearing and the court's findings all relate to section 232.2(6)(c)(1) (mental injury) and not to section 232.2(6)(c)(2)

² The mother does not challenge the adjudication of S.M.D. under section 232.2(6)(c).

(failure to supervise). The court did not base its adjudication on evidence relating to a failure to supervise. The record lacks clear and convincing evidence to uphold the adjudication on that ground. We find the record lacks clear and convincing evidence of mental injury as defined in section 232.2(35). We reverse the adjudication of E.D.D., S.L.D., and T.L.D. and remand for dismissal of the petitions concerning these three children. See Iowa Code § 232.96(8).

**AFFIRMED AS TO S.M.D.; REVERSED AS TO E.D.D., S.L.D., AND
T.L.D.**