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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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IN THE INTEREST OF S.D.S., A Child,

G.W.S., Father,

Appellant.

8-362
87-1298

Appeal from the Iowa District Court for Polk County (Juv.) (No. JU 7038-15) - Vincent M. Hanrahan and Jerrold W. Jordan, Judges.

The father of a young girl appeals the juvenile court order adjudicating the girl to be a child in need of assistance. **AFFIRMED.**

Michael J. Burdette, of Adler, Brennan, Joyce & Steger, Des Moines, for the appellant father.

Thomas J. Miller, Attorney General; Charles K. Phillips, Assistant Attorney General; and Michon Marie Hinz, Assistant County Attorney, for the appellee State.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

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SACKETT, J.

Appellant G.W.S., the father of the female child S.D.S., born in May 1983, appeals an order determining the child to be a child in need of assistance. We affirm as modified.

I.

The father who was in prison contends he should have been transported to the adjudicatory hearing. He directs us to Iowa Code section 232.91 (1987) which states:

> Any hearings or proceedings under this division subsequent to the filing of a petition shall not take place without the presence of the child's parent, guardian, custodian, or guardian ad litem in accordance with and subject to section 232.38. A parent without custody may petition the court to be made a party to proceedings under this division.

He contends this section demands his presence at the hearing. We disagree. In In re T.M.C., ___ N.W.2d ___, WL 98252 (Iowa App. 1988) we rejected a similar argument.

II.

Appellant's next argument is there is not clear and convincing evidence from which the court can find the child is a child in need of assistance. The only allegation was the child was a child in need of assistance under section 232.2(6)(d) (1985) which provides in applicable part:

> "Child in need of assistance" means an unmarried child:
>
> (d) Who has been sexually abused by the child's parent, guardian, or custodian or other member of the household in which the child resides.

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The trial court found there was clear and convincing evidence the child had been sexually abused by her father. Appellant contests this finding. The child was born May 9, 1983. The alleged abuse occurred in September 1986. The child at that time would have been three years and four months old. The evidence in the record as to the abuse is as follows. On January 25, 1987, the child, then three years and ten months old, said to her mother, after the mother had pinched her thigh, that her daddy Gary[1] had stuck his finger in her butt. The statement was made again to a social worker on January 27, 1987, and on video tape in an interview on January 29, 1987. There was testimony by the social worker the child was telling the truth.

There was no medical evidence of abuse. The child said the abuse happened in an orange truck. Her father had an orange truck. The time of the abuse was determined because it seemed a likely time based on the child's proximity to the alleged perpetrator. The petition stated the child had previously been sexually abused by her stepfather. An earlier allegation of abuse had been made concerning the child. The mother testified about the abuse.

> EXAMINER: Has anything ever happened like this before to her?
> MOTHER: Okay. I lived with somebody, and his old lady said that -- you know, called Child Protection and reported it, and she was checked

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1. The child's father was Gary and her former stepfather was Larry.

out by her doctor, and he said no way. Nobody knew what we were talking about.

She has even seen Larry's goober, and she caught me in the act of oral one time when I was married to him. Well, about three, four days later she bent down and kissed it, and I talked to her, and I said, "That's something that little girls don't, you know, do" (tape inaudible) because I didn't want her to think -- and I went to the violence center this summer to get away from Gary -- Larry. I was relaying that story, and they called Child Protection investigator.

EXAMINER: And there's no medical evidence?

MOTHER: No, none. Dr. (tape inaudible) saw and examined her.

EXAMINER: Okay.

EXAMINER: When was that? What year did Dr. (tape inaudible) --

MOTHER: This year; 1986.

EXAMINER: That was in May of 1986.

The father is currently incarcerated because of problems with bad checks and alcoholism. The father argues the testimony of a three-year-old child alone is not clear and convincing evidence he sexually abused the child, particularly where the mother, who allegedly first heard the story, has indicated a dislike for him and the child's testimony indicates the child fantasized about some things.

While we too have some concern whether this evidence meets the clear and convincing standard, we need not agree with the trial court's findings in order to affirm the order finding the child to be a child in need of assistance. The mother's testimony supports by clear and convincing evidence a finding the child was subject to inappropriate sexual behavior which could be classified sexual abuse. See Iowa Code sections 232.2(45), 709.1(3),

709.8(2), 709.9(2), and 709.12(3). The allegation of the petition has been proved by clear and convincing evidence. In considering the child's well-being, we consider the incarceration of the father for alcoholism related problems.

We remand to the trial court to make further orders as are necessary to assure the parties and their child receive assistance to help both parents correct their deficiencies.

AFFIRMED.