MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In the Matter of the Adoption of L.D. and M.D., Minor Children,

M.H.,

Appellant-Petitioner,

v.

M.D.,

Appellee-Respondent.

March 20, 2023

Court of Appeals Case No. 22A-AD-1245

Appeal from the Hamilton Superior Court

The Honorable David K. Najjar, Judge

Trial Court Cause Nos. 29D05-2003-AD-436 29D05-2003-AD-437

Memorandum Decision by Judge Foley
Judges Robb and Mathias concur.

Foley, Judge.

[1] M.H. ("Stepfather") appeals the trial court's denial of his petition to adopt minor children, L.D. and M.D. ("the Children"). Stepfather raises the following restated issue for our review: whether the trial court erred in concluding that he failed to prove by clear and convincing evidence that M.D. ("Father") is unfit to be a parent and, therefore, denied Stepfather's petition to adopt the Children because Father's consent was required. Because we conclude that the trial court did not err in its order, we affirm.

Facts and Procedural History

[2] Father and J.D. ("Mother") are the natural parents of L.D., born May 14, 2012, and M.D., born November 20, 2014. Father and Mother were married until 2015, when their marriage was dissolved. On January 8, 2015, Father was criminally charged in Hamilton Superior Court with multiple counts, including Level 4 felony burglary, two counts of Class C felony child seduction, two counts of Level 5 felony child seduction, two counts of Class D felony child seduction, two counts of Level 6 felony child seduction, Level 6 felony dissemination of matter harmful to minors, Level 5 felony child exploitation, and two counts of Class A misdemeanor contributing to the delinquency of a minor. At the time of his crimes, Father was employed as a choir teacher at Noblesville High School, and his crimes were committed against two of his female students, S.D. and A.F.

[3] Beginning in the fall of 2013, Father began texting with S.D., who was at least sixteen at the time, and the texting became sexual in the spring of 2014. In approximately April 2014, Father and S.D. kissed for the first time at the

school, and later that same school year, they performed oral sex on each other, again at the school. Sometime later in 2014, S.D. and Father performed oral sex on each other at Father's house. During this time, S.D. sent naked pictures to Father, at least one of which, he instructed her how to pose. On one of the occasions where S.D. went to Father's house, he provided her with alcohol.

[4] Sometime in late 2013, Father also began texting A.F., who was at least sixteen at the time, and the texting became flirty over winter break. In January 2014, A.F. and Father kissed for the first time at the school. Between January and the summer of 2014, things between A.F. and Father became sexual with A.F. performing oral sex on Father multiple times at the school. In the summer of 2014, Father invited A.F. over to his house when his wife was out of town for a few days, and during this time, Father and A.F. had sexual intercourse. Father also provided A.F. with alcohol and marijuana when she went over to his house. When school resumed in the fall, the sexual contact between Father and A.F. continued at the school during after school hours. Father and A.F. also had sex at her house two times, with one of those times being in December 2014. During the time frame that Father and A.F. were engaging in sexual conduct, Father sent several nude photographs of himself to A.F.

[5] When Father was criminally charged, he turned himself in and was subsequently released on bond. When released on bond, a no contact order was issued for both S.D. and A.F., which prohibited Father from contacting either of the victims. However, in May 2015, Father contacted S.D. by phone four times and sent her a handwritten letter. He was subsequently charged on

June 23, 2015, with four counts of Class A misdemeanor invasion of privacy, and his bond was revoked. On August 6, 2015, Father pleaded guilty to two counts of Class C felony child seduction and one count of Class A misdemeanor invasion of privacy and was sentenced to an aggregate sentence of sixteen years. Father began serving his sentence at the New Castle Correctional Facility

[6] After the charges were filed against Father, Mother filed a petition for dissolution. The parties negotiated and executed a marital settlement agreement resolving all issues pertaining to the dissolution of their marriage, which was approved by the dissolution court in January 2016. The dissolution decree provided that Mother would have sole physical and legal custody of the Children and that, at that time, there would be no court-ordered parenting time, subject to future modification due to Father's incarceration. Pursuant to the dissolution decree, Mother was required to provide pictures, videos, and updates (school progress, behavioral, health, activities, etc.) of the children to Father on a monthly basis. The dissolution decree gave Father's parents contact and access with the children, at a minimum of one eight-hour visit per month.

[7] Prior to his arrest, Father was an active parent. Before M.D. was born, Father changed L.D.'s diapers, played with him, and took him to the park, and Father particularly enjoyed putting L.D. to bed at night. When M.D. was born, Father spent nights with him in the hospital after his birth and cared for him by changing his diapers and rocking him to sleep at night. While he was

incarcerated, Father frequently sent the Children handwritten letters and cards, in which he told them how much he loved them and missed them and how proud of them he was. He also asked appropriate questions about the Children's sports and schoolwork and acknowledged their birthdays, holidays, and accomplishments. Father also regularly sent the Children artwork and crafts he made them. Mother kept the items she received from Father but did not share them with the Children. Mother did not tell the Children that Father was incarcerated but that he made bad choices and moved away. Paternal grandparents would spend time with the Children, and every time Father spoke to his parents, he would ask them for updates about the Children, both during and after his incarceration.

[8] After the marriage between Mother and Father was dissolved, Mother and Stepfather began dating in January 2017. Mother and Stepfather later married, and Stepfather began living with Mother and the Children. Stepfather became the father-figure for the Children and became involved with the Children in several aspects of their lives, including academics, social activities, and emotional development. Stepfather's parents view the Children as their grandkids, and the Children think of Stepfather as their dad. On March 5, 2020, Stepfather filed a petition to adopt the Children, and Father, who was still incarcerated at that time, filed his objection to the adoption petition on April 1, 2020. A hearing on the matters was held on December 17 and 20, 2021.

[9] At the hearing, evidence was presented regarding Father's time while incarcerated. Throughout his incarceration, Father was a model inmate and

had no disciplinary issues or negative conduct reports. All of his evaluations and performance reports were extremely positive. While incarcerated, Father committed himself to purposeful incarceration with the goal of bettering himself and determining where he went wrong so he could grow.

[10] Father completed both the PLUS (Purposeful Living Units and Serving) Program and the PLUS Graduate Program while incarcerated. The PLUS Program is an immersive program lasting twelve to eighteen months involving intensive group and individual work, classes, and a commitment to personal growth and service to others. Participation in the program is voluntary, but individuals must apply for and be accepted in order to participate. The program is not eligible for sentence-time cuts. Father completed the PLUS Program in thirteen months and was then selected for the Graduate Program, where he remained until his release from incarceration. Of the many classes Father completed, he testified that he found the Victim Impact course most impactful, because it helped him to recognize and understand the extent of the harm his criminal actions caused to his two victims, their families, the school community, his own family, and the Children.

[11] Father voluntarily completed numerous other programs during his incarceration, including several faith-based programs focusing on sexual temptation and correcting the "problematic ways of thinking" Father had about sex. Tr. Vol. 2 p. 69. Father testified that he believed that the programs helped him to address and correct this "problematic thinking," to identify and learn to manage his dynamic risk factors for inappropriate sexual behavior and to be

accountable about any temptations he faces. None of the courses were eligible for sentence time cuts, and Father received no other benefit from completing the programs except "bettering himself." *Id*. at 71.

[12] Father also completed a number of programs designed to assist him in gaining employment upon release. He also earned his Associates of Arts degree from Oakland City University. For most of his incarceration, Father was employed full-time in the facility chapel. Father worked forty hours per week in the chapel, working closely with staff and volunteer chaplains, including Dr. Kathy Williams ("Dr. Williams") and David Lother ("Lother").

[13] Dr. Williams, who worked for twelve years as a chaplain, testified on Father's behalf at the hearing. Dr. Williams stated that, although she keeps in touch with many former inmates, she had never before testified on behalf of them but chose to do so for Father because she appreciated Father's character and integrity. Dr. Williams described Father as having a strong sense of remorse for his offenses, being forthright and open with her about his convictions, and understanding the ripple effects of his actions. In her role as Father's supervisor and during the course of the many personal conversations with Father about his personal life, his crimes, his family, and his faith, Dr. Williams never suspected that he had been dishonest with her.

[14] Lother did not testify but did write a letter of reference describing his experience working with Father. Father did not request that Lother write the letter; rather, Lother volunteered to do so. Lother knew and worked with Father for five

years and wrote that Father "has performed his duties, as a servant leader in the Chapel Complex, with the highest degree of competence, integrity, perseverance, and humility" and described Father's main goal as "to do what it takes, to reestablish his relationship with his sons, and be the father and role model they need." Ex. Vol. 4 p. 75. Lother wrote that he was "as confident as one can possibly be, that [Father] will succeed." *Id*.

[15] Because Father admitted to drinking heavily and using marijuana during the time period that he committed his crimes and believed that his substance use contributed to his choices, he stopped using alcohol and marijuana when he was out on pretrial release and has maintained sobriety since that time. He testified that he intended to maintain sobriety in the future because substance use was one of his risk factors for inappropriate behavior.

[16] Since being released from incarceration, Father was employed full-time at a woodworking shop and had already obtained a raise. Also, since his release, Father participated in the Indiana Sex Offender Management and Monitoring program ("SOMMs program"), which consisted of group and individual therapy. Father was described as an active participant in the SOMMs program and continued to identify his risk factors for problem behavior and had identified an individual counselor with whom to further work on this in the future.

[17] Once released from incarceration, Father also sought a psychological evaluation to determine whether there was anything that would indicate any

unfitness to be a parent to the Children, and he was evaluated by Dr. Pamela Reed ("Dr. Reed"). In her evaluation, Dr. Reed conducted a lengthy clinical interview with Father, interviewed his parents and parole supervisor, performed psychological testing including the Minnesota Multiphasic Personality Inventory—3rd edition[1] ("MMPI-3") and the STATIC-99,[2] and reviewed a prior psychological evaluation and Father's charges. Father's MMPI-3 results showed a slight elevation correlating with compulsive behavior that was common for individuals who have been incarcerated and subject to a rigid routine. The results also showed an elevation that correlated with impulsive behavior, but Dr. Reed explained that the questions for impulsiveness were based on past events, and it would be expected for someone with past impulsive behavior to show an elevation in this area. Father also has a slight elevation on the cynicism scale, which is also common for recently incarcerated individuals. Father's results from the STATIC-99 was a score of one, which placed him in the category for the lowest risk of reoffending. Dr. Reed testified that she found Father to be very open and honest, that he took responsibility for his offenses, articulated his understanding that his actions harmed not only the named victims, but his family, the school community, and others. Dr. Reed concluded that she found nothing in Father's psychological profile that would lead her to

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[1] The Minnesota Multiphasic Personality Inventory—3rd edition is a "personality inventory that looks at someone's personality profile" and is considered "one of the gold standards in psychological testing." Tr. Vol. 2 p. 141.

[2] The STATIC-99 is a mental health assessment that measures the likelihood of a sex offender will commit another sex-related offense. *Id*.

conclude that he was unfit to be a parent. Dr. Reed spoke with Father's parole supervisor who confirmed that Father was fully compliant with the terms of his parole and described Father as "one of the best supervisees he's had in a long time." Tr. Vol. 2 p. 153.

[18] On April 29, 2022, the trial court issued its Findings of Fact, Conclusions of Law, and Judgment, which found that Stepfather had failed to meet his burden to prove that Father was unfit as a parent and that, therefore, Father's consent was required for the adoption to proceed.[3] Because Father did not consent to the adoption, the petition for adoption was denied. Stepfather now appeals.

Discussion and Decision

[19] Stepfather argues that the trial court erred when it determined that Father's consent was required for Stepfather's adoption of the Children to proceed and, thereafter, denying Stepfather's petition to adopt the Children. When reviewing a trial court's ruling in an adoption case, the appellant bears the burden of overcoming the presumption that the trial court's decision is correct. *In re Adoption of S.W.*, 979 N.E.2d 633, 639 (Ind. Ct. App. 2012). When reviewing a trial court's ruling in an adoption proceeding, we will not disturb that ruling unless the evidence leads to but one conclusion and the trial court reached an opposite conclusion. *In re Adoption of T.L.*, 4 N.E.3d 658, 662 (Ind. 2014). We

[3] We commend the trial court on its extensive and thorough findings of fact and conclusions of law, which greatly aided in our review of this case.

presume that the trial court's decision is correct, and we consider the evidence in the light most favorable to the decision. *Id*.

[20] Parental consent is generally required to adopt a child in Indiana. Ind. Code § 31-19-9-1. However, consent to adoption is not required from a parent if: "(A) a petitioner for adoption proves by clear and convincing evidence that the parent is unfit to be a parent; and (B) the best interests of the child sought to be adopted would be served if the court dispensed with the parent's consent." I.C. § 31-19-9-8(a)(11). "If a parent has made only token efforts to support or to communicate with the child the court may declare the child abandoned by the parent." I.C. § 31-19-9-8(b). The petitioner who is seeking to adopt must prove this statutory criterion is satisfied by clear and convincing evidence. *In re Adoption of T.L.*, 4 N.E.3d at 662 (citing *In re Adoption of M.A.S.,* 815 N.E.2d 216, 220 (Ind. Ct. App. 2004)).

[21] > While the term "unfit" as used in [Indiana Code section] 31-19-9-8(a)(11) is not statutorily defined, this court has defined "unfit" as "[u]nsuitable; not adapted or qualified for a particular use or service" or "[m]orally unqualified; incompetent." We have also noted that statutes concerning the termination of parental rights and adoption "strike a similar balance between the parent's rights and the child's best interests" and thus termination cases provide useful guidance in determining whether a parent is unfit. Termination cases have considered factors such as a parent's substance abuse, mental health, willingness to follow recommended treatment, lack of insight, instability in housing and employment, and ability to care for a child's special needs. Also, this Court has consistently held in the termination context that it need not wait until children are irreversibly harmed such that their physical, mental, and social development are

> permanently impaired before terminating the parent-child relationship. It is well-settled that individuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children. A parent's criminal history is relevant to whether the parent is unfit to be a parent under [Indiana Code section] 31-19-9-8(a)(11).

In re Adoption of K.T., 172 N.E.3d 326, 336–37 (Ind. Ct. App. 2021) (quoting *In re Adoption of D.M.*, 82 N.E.3d 354, 358–59 (Ind. Ct. App. 2017)) (internal citations omitted), *trans. denied*.

[22] Here, the trial court found that Stepfather failed to prove by clear and convincing evidence that Father was unfit to be a parent to the Children and that, therefore, Father's consent was required for the adoption to proceed. Because Father did not consent to the adoption of the Children, the trial court denied Stepfather's petition for adoption. In doing so, the trial court concluded that:

> Taken alone, [Father's] criminal behavior may be sufficient to declare him unfit to be a parent. However, the Court must look at a larger picture of who [Father] is and his role as a parent. He has admitted his criminal behavior and accepted the sentence of the criminal court. He has served his incarcerated time and continues to serve his time on parole. He has engaged in and successfully completed hundreds of hours of courses, programs, counseling, and classes to better himself, to refrain from future criminal behavior, and, ultimately, to reunite himself with the Children and be the best father he can be. He has abstained from drug and alcohol use since his arrest and incarceration and pledges to maintain his sobriety. He is at low risk to reoffend. He has attempted to maintain communication with the Children

> within the bounds of his sentence. While [Father] remains under restrictions as to what he can do as a parent, those restrictions will terminate at a point in the not-so-distant future. [Father] is entitled to the opportunity to renew a relationship with the Children when and if his parole restrictions on contact with children are relaxed or terminated.

Appellant's App. Vol. 2 pp. 39–40. The trial court then concluded that the evidence presented by Stepfather for the proposition that Father was unfit was strong, that the evidence presented by Father that he was fit to be a parent was also strong, and that in such a close case, Stepfather could not meet his heavy burden. *Id*. at 40. We agree with the trial court.

[23] Father's criminal conduct should not be diminished. He engaged in a prolonged period of criminal conduct, involving dozens of individual criminal acts of performing sex acts on two minors and supplying them with drugs and alcohol, which violated a position of trust with those victims, other students, and his employer and violated the homes and family lives of his victims and his own marriage and commitment to his family. However, Father pleaded guilty to two felonies and one misdemeanor in 2015, which was approximately seven years prior to the adoption hearing, and served his sentence. It was undisputed Father has no other criminal history, before or since. It was also undisputed that there was no evidence that Father ever behaved inappropriately in front of the Children or toward the Children in any way, sexually or otherwise. Evidence at the hearing showed that Father was a model inmate and a model chapel clerk while incarcerated and was a model supervisee while on parole.

Evidence was also presented that Father was at a low risk to reoffend. Since being sentenced for his crimes, Father continually availed himself of every opportunity and resource to better himself and to ensure that he will never again violate the law. The criminal justice system is supposed to reform and rehabilitate individuals, and Father has engaged in and successfully completed hundreds of hours of courses and counseling designed to reform his behavior. The evidence most favorable to the trial court's judgment supported its conclusion that Stepfather failed to prove by clear and convincing evidence that Father was unfit to be a parent to the Children and that, therefore, Father's consent was required for the adoption to proceed pursuant to Indiana Code section 31-19-9-8(a)(11). Based upon the record, we cannot say that the evidence leads to but one conclusion, and the trial court reached an opposite conclusion.

[24] Stepfather relies on *In re Adoption of D.M.*, 82 N.E.3d 354 (Ind. Ct. App 2017) for his argument that Father's criminal history was sufficient to render him unfit to be a parent. *In D.M.,* the child's father, Mendez, was married to D.M.'s mother. During this marriage, Mendez was a stay-at-home parent to D.M. and stepparent to D.M.'s sibling, who was the mother's child from a prior relationship. When D.M. was two years old, Mendez was arrested for molesting the sibling and charged with child molesting as a Class C felony, to which he later pleaded guilty. Mendez and the mother subsequently divorced, and the mother's new husband later filed a petition to adopt D.M., which the trial court granted without Mendez's consent, finding that Mendez was unfit to

be a parent "due to the fact his crime of child molesting as a class C felony was committed in D.M.'s home and that Mendez was in a position of trust with respect to D.M. and [the sibling] at a time when he had a parental and moral duty to provide care, nurture and protection to D.M. and [the sibling]" and because Mendez had made no effort to pay support nor to establish parenting time with D.M., despite his dissolution decree requiring him to do so. *Id*. at 360. On appeal, this court affirmed the trial court, concluding that "[t]he evidence most favorable to the trial court's decision supports its conclusion that Mendez's consent to the adoption is not required" under the statute. *Id*. at 361.

[25] However, *D.M.* is distinguishable from the present case in several respects. First, unlike Father, Mendez had a criminal history in that he had molested another child, where the victim was a child staying at his home, and he had an unrelated battery conviction as well. In this case, Father has no criminal history before or since his 2015 convictions. Father's criminal history was limited to a single period of time, and the record reflected that since he committed his crimes, Father has made every effort to rehabilitate himself and to lead a law-abiding life. Second, Mendez's victim was D.M.'s half-sibling, who was only seven years old at the time. In the present case, Father's victims were between sixteen and seventeen years of age, and there was nothing to suggest that either of the victims knew, or had even met, the Children. Third, the crime in *D.M.* was committed while D.M. was not only "on the premises," but "in the same room when it happened." 82 N.E.3d at 355. Although several of the instances of Father's criminal conduct occurred in the Children's home,

the Children were not present in the room, nor anywhere on the premises. No evidence was presented to suggest that Father ever acted inappropriately in front of the Children, sexually or otherwise.

[26] Lastly, in *D.M.*, Mendez's crime was only one of the factors supporting his unfitness. Mendez also made no effort to pay child support, despite being employed and being able to provide support, and failed to file a petition for visitation with D.M., despite the dissolution decree requiring him to "appear before this Court to request parenting time with the minor children upon his release from incarceration." *Id.* at 360. However, here, the evidence showed that Father made attempts to begin paying child support for the Children and testified that he is willing and able to provide financial support, but Mother had declined. Additionally, although Father's dissolution decree did not require him to request parenting time, he filed a motion seeking to begin having contact with the Children before he was released from incarceration. Further, Father continually made efforts to reach out to the Children while he was incarcerated, sending them cards for birthdays and holidays, writing them letters, sending them pictures and crafts he made, and even writing them a song. We, therefore, do not find that *D.M.* controls our decision.

[27] As previously stated, we conclude that the evidence most favorable to the trial court's judgment supported its conclusion that Stepfather failed to prove by clear and convincing evidence that Father was unfit to be a parent to the Children and that Father's consent was required for the adoption to proceed. Indiana Code section 31-19-9-8(a)(11) is written such that the petitioner must

prove both parts in order for the court to find that the parent's consent may be dispensed with. Here, because we find that the trial court properly found that Stepfather failed to prove that Father was unfit to be a parent, we do not reach whether the best interests of the Children would be served if the trial court dispensed with Father's consent. We, therefore, affirm the trial court's decision denying Stepfather's petition for adoption.

[28] Affirmed.

Robb, J., and Mathias, J., concur.