

court granted permanent custody of S.M. to the agency on February 21, 2008, which was upheld by this court.

{¶3} In early 2008, S.M.'s older sister, T.M., was also placed in appellants' care since appellants knew the agency wished to place the siblings in the same adoptive home. After a few months, though, appellants contacted children services with complaints relating to T.M. Appellants informed the agency that T.M., who had been physically abused by her natural parents and a subsequent foster family, was displaying aggressive behavior towards S.M. Appellants requested that children services find another placement for T.M. and the child was removed from their care.

{¶4} Appellants sought to adopt S.M. The agency initially consented to an adoption; however, on October 6, 2008, children services were advised that D.C. had a previous criminal history involving sex-related offenses committed in August 2003.

{¶5} Caseworkers at the agency obtained details of the convictions by contacting the police detective that handled the case, reviewing police reports, and obtaining a copy of the newspaper article listing the crimes. The police reports, stipulated by the parties, indicate that on one occasion D.C. was masturbating in his car outside a video store and motioned a 12-year-old female over to his car. On the second occasion, a 14-year-old female observed him standing in his doorway waiving his penis through the glass door. Following the incidents, D.C. entered guilty pleas to charges of public indecency and the convictions were later expunged.

{¶6} When questioned by the agency, appellants initially denied the convictions, claiming that the events never occurred. They later recanted, admitting the convictions and acknowledging that D.C. had attended counseling for the incidents.

{¶7} On October 8, 2008, children services removed S.M. from appellants' home. Appellants moved to prohibit the change in placement of the child or, in the

alternative, seeking legal or physical custody of the child. Further, appellants requested visitation, sought to have S.M.'s photo removed from the Ohio Photo Adoption Listing, filed a motion in contempt against an agency worker, and a motion to suppress the use of sealed/expunged materials. The trial court denied the motions.¹ Appellants timely appeal, raising a single assignment of error:

{¶8} "THE TRIAL COURT ERRED BY DENYING [APPELLANTS'] MOTION FOR REVIEW AND FOR AN ALTERNATIVE ORDER PROHIBITING CHANGE OF PLACEMENT AND, IN THE ALTERNATIVE, FOR LEGAL PHYSICAL CUSTODY OF [S.M.]"

{¶9} As a preliminary matter, we will first address the state's jurisdiction argument. The state maintains that a juvenile court has jurisdiction neither to review the placement of a child by children services nor to order the agency to return the child to appellants' home. The state relies upon the statutory definition of "permanent custody," which "means a legal status that vests in a public children services agency or a private child placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of all parental rights, privileges, and obligations, including all residual rights and obligations." R.C. 2151.011(B)(30). The state urges that based upon this definition "Children Services has the right to determine where a child should be placed after a court grants permanent custody" and, as a result, the juvenile court has no "authority to specify a foster home or adoptive home in which to place the child."

{¶10} To support its position, the state relies upon *In re J.D.*, 172 Ohio App.3d 288, 2007-Ohio-3279. In *J.D.*, the minor was adjudicated delinquent after admitting a single count of rape. *Id.* at ¶2. The juvenile court temporarily committed J.D. to the

1. A petition for adoption filed by appellants remains pending.

custody of Franklin County Children Services (FCCS) and ordered the agency to place the minor in a specific rehabilitation facility, Cove Prep in Latrobe, Pennsylvania. Id. at ¶3. FCCS appealed the decision, arguing that the court exceeded its statutory authority when it instructed the agency to commit the minor into a specific facility. Id. at ¶4.

{¶11} The Tenth District Court of Appeals reversed the decision of the trial court, finding that, although the court can order a delinquent child in the custody of children services to be placed in a residential treatment facility, it could not specify which facility. The court held that the court placed the minor into the temporary custody of FCCS, giving the agency legal custody of J.D. Id. at ¶15. "R.C. 2151.011(B)(19) defines 'legal custody' as a 'legal status that vests in the custodian the right to have physical care and control of the child and *to determine where and with whom the child shall live,*' including the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities." (Emphasis sic.) Id.

{¶12} The appellate court noted that no statutory authority existed for a juvenile court to determine the specific placement. Id. at ¶16. Accordingly, the Tenth Appellate District found that the juvenile court could not order the specific placement of the minor. Id. at ¶18. "When legal custody is granted to FCCS, decisions related to normal incidents of custody are committed to the discretion of the agency. Stated another way, when the juvenile court grants custody of a child to FCCS, with custody goes the authority to determine the child's specific placement." Id. at ¶17.

{¶13} The state notes that Ohio appellate courts have found that a juvenile court may review the placement of a child following a permanent custody decision. *In the Matter of Woolf* (May 23, 1994), Stark App. No. CA9545, 1994 WL 249945; *In re A.W.*, Cuyahoga App. No. 86078, 2005-Ohio-4127. Yet, the state urges that in these cases

the courts provide little support for these conclusions and, as a result, the decisions should not be followed. In further opposition, the state argues that, like *J.D.*, the juvenile court in this case has no jurisdiction to determine a specific placement for S.M.

{¶14} Juvenile courts are courts of limited jurisdiction whose powers are created solely by statute. *Carnes v. Kemp*, 104 Ohio St.3d 629, 2004-Ohio-7107, at ¶25. R.C. 2151.353(E) provides that after granting permanent custody, a juvenile court retains jurisdiction over the child until the child is adopted or attains the age of 18.

{¶15} Further, R.C. 2151.417(A) specifically provides that a juvenile court that issues a decision awarding permanent custody "may review at any time the child's placement or custody arrangement, * * * and any other aspects of the child's placement or custody arrangement. In conducting the review, the court shall determine the appropriateness of any agency actions, the safety and appropriateness of continuing the child's placement or custody arrangement, and whether any changes should be made with respect to the child's * * * placement or custody arrangement or with respect to the actions of the agency under the child's placement or custody arrangement. Based upon the evidence presented at a hearing * * * the court may require * * * any reasonable action that the court determines is necessary and in the best interest of the child or discontinue any action that it determines is not in the best interest of the child."

{¶16} Unlike *J.D.*, in this instance, specific statutory authority exists for a juvenile court to review the agency's placement of the child. Although, children services has legal custody of S.M. and the right to determine where the child should be placed after a court granted permanent custody to the agency, the agency's authority is not unfettered. If challenged, the agency's actions are subject to review by the juvenile court. *In re Bowman* (1995), 101 Ohio App.3d 599, 601-602.

{¶17} Having addressed the state's jurisdiction argument, we now turn to the

merits of the case. In their sole assignment of error, appellants argue that the trial court erred by allowing the agency to remove S.M. from their home or, in the alternative, deny them legal physical custody of S.M. Appellants argue that the trial court's decision was an abuse of discretion, the court failed to properly balance the best interests of the child, the court's decision was against the sufficiency and manifest weight of the evidence, and the trial court violated the administrative code by improperly accepting evidence offered by the agency.

{¶18} Appellants submit that S.M. had lived with them since birth, bonded with them, and the agency had initially given its blessing to adopt the child. Appellants argue that D.C.'s convictions were insufficient reasons to remove S.M. Appellants urge that the convictions are merely fourth-degree misdemeanors, he received counseling following the convictions, there is no history of abuse of S.M., and D.C. was assessed as "low risk" in committing future sexual crimes. Further, appellants dispute that the acts committed by D.C. resulting in the convictions involved minors. Specifically, appellants claim that if the acts involved minors, D.C. would have been charged with a crime that reflects that fact. Instead, appellants note that he was only cited for public indecency.

{¶19} Judgments supported by some competent, credible evidence going to all essential elements of the case will not be reversed as being against the manifest weight of the evidence. *In re Pieper Children* (1993), 85 Ohio App.3d 318, 327. When reviewing a trial court's decision on a manifest weight of the evidence basis, an appellate court is guided by the presumption that the findings of the trial court were correct; reversing a judgment on manifest weight grounds should only be done in exceptional circumstances, when the evidence weighs heavily against the judgment. *In re G.S.*, Franklin App. No. 05AP-1321, 2006-Ohio-2530, ¶4.

{¶20} A trial court's decision concerning the best interests of a child is subject to reversal upon a showing of an abuse of discretion. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. An abuse of discretion is more than simply an error of law or judgment; it is a finding that the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶21} Factors relating to the best interest of the child are listed in R.C. 2151.414(D) and R.C. 3109.04(F). In its decision in this case, the trial court stated, "[t]he police reports, stipulated by the parties, indicate that [D.C.] exposed himself to female minors on at least three occasions. * * * Both [D.C. and A.C.] espoused vague memories of the incidents in their testimony. Neither could remember whether the incidents involved child victims. * * * The lack of memory and candor is troubling to the Court. * * * The Court finds that the Children Services Department's actions in removing [S.M.] from the [appellants'] home was appropriate and that the Agency had the authority to do so, even a mandatory duty to do so, under the state of their knowledge at the time and the requirements of R.C. 5153.16(A)(7) and R.C. 2151.01(B)(30) [sic]. [Appellants] assert that [D.C.'s] expunged record should not be explored. * * * A line of cases indicate that persons may be questioned as to expunged records when the record has a direct relationship to the position applied for. *Szep v. Ohio State Board of Pharmacy* (1995), 106 Ohio App.3d 621; *Pepper Pike v. Doe* (1981), 66 Ohio St.2d 374. * * * The relevance of sexual offenses to adoptions is highly direct and material. * * * The Court has reviewed the factors contained in R.C. 2151.414(D) and R.C. 3109.04(F). The Court finds that it is in the best interest of the child to approve and continue the Agency's actions in removing the child from placement in the [appellants'] home."

{¶22} Further, the court also discussed appellants' history with S.M.'s sister and

the effect of separate placements for the siblings. The court stated, "[t]he evidence indicates that [S.M.]'s sister, [T.M.], four years old, has also been placed with the [appellants'] and that things had gone well until the [appellants] abruptly requested the Agency to remove [T.M.] from their home, characterizing her as a 'demon.' * * * The guardian ad litem opines that it is in [S.M.]'s best interest to approve the removal from the [appellants'] home and to be placed for adoption with his sister."

{¶23} Appellants allege that the trial court's decision is replete with factual errors and misunderstandings. Most notably, appellants challenge the trial court's statement regarding the psychologist's conclusion that D.C. displayed a "low" risk profile to commit sexual abuse. Appellants urge that the trial court was disturbed by the "low risk" assessment, although the psychologist testified that "low risk" is the least likely profile to commit a future sexual offense since there is not a "no risk" category or an absolute certainty in any psychological evaluations. Appellants claim the court's decision is against the manifest weight of the evidence because the trial court agreed with the testimony of two unlicensed caseworkers rather than the professional views of multiple psychologists and 45 individuals that submitted letters in support of their continued custody. Further, appellants argue that the court's decision focused solely upon D.C.'s convictions and did not balance any other "best interest" factor.

{¶24} While we note that the trial court did misconstrue the psychologist's testimony relating to D.C.'s risk profile, we cannot say that the trial court abused its discretion in denying appellants' motion.² Appellants correctly mention the trial court's improper interpretation of the psychologist's testimony; however, the psychologist's finding is not the determinative factor in the court's decision as appellants claim. Rather,

2. In the findings of fact, the trial court stated, "Dr. Tennebaum found [D.C.] to be a '. . . low risk. . .' after giving [D.C.] the 'Sexual Violence Risk-Twenty' test. * * * The fact that [D.C.] is classified as a "low risk" is troubling to the Court."

as noted above, the trial court's decision was based upon the incidents themselves, the relevance of sexual offenses to adoptions, and appellants' lack of candor. In fact, the trial court never mentioned the psychologist's risk assessment in his conclusions of law.

Further, the trial judge stated that he reviewed the "best interest" factors and found that removal from appellants' home was appropriate.

{¶25} Specifically, the trial court mentioned appellants' lack of candor during the hearing. The psychologist testified that, during his evaluation, D.C. recalled that minors witnessed him committing the offenses. Yet, during the hearing, D.C.'s testimony differed significantly. D.C.'s recollection of the events was vague, completely disputing that minors may have been involved, even merely as witnesses.

{¶26} Specifically, D.C. testified, "I recall what I did. I know what I was doing. I don't know who witnessed me or their age or gender."

{¶27} The state then asked, "Would it surprise you to know that both charges involved minors?"

{¶28} D.C. responded, "That does surprise me, yes."

{¶29} Further, despite the fact that D.C. was classified as "low risk," the convictions were relevant to the instant matter and the trial court did not err in reviewing the details of the offenses. R.C. 2953.33(B); *Szep*, 106 Ohio App.3d at 623-624.

{¶30} Appellants urge that the testimony of learned professionals significantly favors their position, citing the testimony of experts at trial, while the only opposing testimony comes from biased, unlicensed caseworkers who conspired against them to remove S.M. from their home. Yet, appellants omit the opinion of S.M.'s guardian ad litem. The GAL advocated in favor of appellants through much of the proceedings and originally wished for S.M. to be returned to their home. However, following the hearing, the GAL changed his position, recommending that, based upon the evidence, S.M.

should remain removed from their care. The trial court noted the GAL's opinion as further support for the decision.

{¶31} As a final matter, we must address appellants' challenge to the investigation by the agency. Appellants submit that Ohio Adm.Code 5101:2-34-34(D)(2) required the agency to undertake a third-party investigation in this matter. Ohio Adm.Code 5101:2-34-34(D)(2) provides, that when conducting an investigation of a report of out-of-home care child abuse or neglect, the public children services agency shall conduct a third-party investigation if the allegation involves foster care givers or prefinalized adoptive parents. Appellants urge that the trial court abused its discretion by accepting and relying upon evidence obtained during the agency's improperly conducted investigation.

{¶32} First, appellants were never accused of abusing or neglecting S.M. Accordingly, Ohio Adm.Code 5101:2-34-34(D)(2) is inapplicable to this matter. Rather, the agency received a report that D.C. had previously committed an offense of a sexual nature that had not been disclosed in their application. There were no allegations that appellants had abused or neglected S.M., which would require the agency to undertake a third-party investigation. The agency believed a conviction of that nature would be relevant in determining whether a potential foster parent is suitable. When questioned by the agency, appellants denied the convictions. So the agency obtained the information through other sources. Caseworkers believed that appellants were attempting to deceive the agency and, thereafter, the relationship between appellants and the agency deteriorated. Although appellants eventually admitted the convictions to the agency, children services removed S.M. and began to oppose appellants' adoption petition based upon the information obtained and the resulting adversarial circumstances between the parties.

{¶33} Based upon the record, appellants appeared to be loving and caring foster parents while S.M. was placed in their home and, in all likelihood, the probability would be very remote that the child would ever be abused while in their care. However, we cannot say the trial court abused its discretion in denying their motions. The trial court viewed the evidence, weighed the best interest factors, and found that the agency's actions were appropriate.

{¶34} Appellants' sole assignment of error is overruled.

{¶35} Judgment affirmed.

BRESSLER, P.J., and HENDRICKSON, J., concur.