[Cite as *In re D.H.*, 2009-Ohio-2798.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

GEAUGA COUNTY, OHIO

IN THE MATTER OF: D.H., C.H. AND R.H., NEGLECTED AND DEPENDENT CHILDREN.	:	**O P I N I O N**
	:	**CASE NO. 2009-G-2882**

Civil Appeal from the Court of Common Pleas, Juvenile Division, Case No. 07JF 593.

Judgment: Affirmed.

R. Robert Umholtz, Geauga County Public Defender, and *Paul J. Mooney*, Assistant Public Defender, 211 Main Street, Chardon, OH 44024 (For Appellant Gwen Hall).

David P. Joyce, Geauga County Prosecutor, and *Craig A. Swenson*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellee Geauga County Job and Family Services).

Sandra Thompson and *Steve Thompson*, Court Appointed Special Advocates, 470 Center Street, Building 6-C, Chardon, OH 44024 (Guardians ad litem).

Sarah L. Heffter, 401 South Street, Suite 2-B, Chardon, OH 44024 (For minors, D.H. and R.H.).

Eileen Noon Miller, Law Offices of Carolyn J. Paschke Co., L.P.A., 10808 Kinsman Road, P.O. Box 141, Newbury, OH 44065 (For minor, C.H.).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Gwen Hall, appeals the judgment entered by the Juvenile Division of the Geauga County Court of Common Pleas. The trial court granted a motion for permanent custody filed by appellee, Geauga County Job and Family Services ("GCJFS").

{¶2} This matter concerns three of appellant's children – D.H., C.H., and R.H. D.H. is currently a 15-year-old boy; C.H. is an 11-year-old girl; and R.H. is a ten-year-old boy.

{¶3} In 2007, appellant lived with the three children; her husband and the children's father, Mark Hall; and her boyfriend, with whom appellant is no longer in a relationship.

{¶4} A complaint was filed alleging the children to be abused, neglected, and dependent. The complaint alleged that on September 21, 2007, appellant was arrested for domestic violence as a result of an altercation with her former boyfriend. In addition, the complaint alleged that a second altercation occurred the following day between appellant and her former boyfriend, during which the boyfriend swung a golf club at appellant and the children and threatened to stab appellant with a knife.

{¶5} An initial hearing was held on October 9, 2007. At that time, appellant entered a plea of not true to the allegations in the complaint. The trial court placed the children in the protective supervision of GCJFS. At that time, the children were placed in the temporary custody of paternal aunts – D.H. was placed with Brenda Stegmann, and C.H. and R.H. were placed with Patti Carey.

{¶6} Jason Yanchar, an Assistant Geauga County Public Defender, entered an appearance on behalf of appellant on October 10, 2007.

{¶7} A pretrial hearing was held on October 24, 2007. The complaint was amended, with GCJFS dismissing the allegations of abuse. Thereafter, appellant entered a plea of true to the allegations in the amended complaint that the children were neglected and dependent. The trial court ordered GCJFS's protective supervision of the

children to continue. In addition, it ordered that temporary custody "continue as previously ordered."

{¶8} A dispositional hearing was held on December 19, 2007. Following the hearing, the trial court issued a judgment entry adjudicating D.H., C.H., and R.H. neglected and dependent children. At that hearing, the trial court continued its prior temporary custody and protective supervision orders. Thereafter, the trial court conducted quarterly progress hearings in March, July, and September 2008.

{¶9} Several case plans were filed throughout this matter. In regard to appellant, the case plans ordered her to attend two counseling sessions per month to "address relationship issues, mental health issues, and parenting issues." Also, she was to remain free of drugs and alcohol.

{¶10} On January 29, 2008, the court transferred temporary custody of D.H. from Brenda Stegmann to Patti Carey.

{¶11} In April 2008, GCJFS was granted temporary custody of all three children as a result of Patti Carey informing the court that she was unable to care for them. The children were placed with foster parents.

{¶12} C.H. reported that she was sexually abused by appellant's former boyfriend when he lived in appellant's home. In March 2008, C.H. was taken to the Portage County Children's Advocacy Center at Robinson Memorial Hospital for an examination and interview regarding the alleged abuse. Mark Clark from the Geauga County Prosecutor's Office was assigned to investigate the matter to determine if criminal charges should be filed against appellant's former boyfriend. Clark testified that

the matter was not presented to the grand jury due to a lack of evidence, since the only evidence was C.H.'s statement.

{¶13} In September 2008, GCJFS filed a motion for permanent custody of the children.

{¶14} Sometime in late summer 2008, Assistant Public Defender Paul Mooney became appellant's attorney of record. However, a formal notice of appearance was not filed in the record.

{¶15} On October 31, 2008, appellant filed a motion to withdraw her true plea. Appellant attached a copy of a July 2007 order from an eviction case, which stated Attorney Yanchar represented the landlord in the action against her. In addition, she attached her own affidavit, wherein she states Attorney Yanchar represented her former landlord in the eviction case against her and that she believes his representation of her in this matter was ineffective due to a conflict of interest. The trial court denied appellant's motion to withdraw her true plea.

{¶16} A hearing was held on GCJFS's motion for permanent custody over three nonconsecutive days in November and December 2008. At the hearing, several witnesses testified for GCJFS, including: the children's aunts, Patti Carey and Brenda Stegmann; Mark Clark; Dr. Paul McPherson and Nurse Carlyn Johnson from Portage County Children's Advocacy Center; several mental health professionals from Ravenwood Mental Health Center who provided services to the children; social workers from GCJFS; and Stephen Thomson, one of the appointed guardians ad litem. Appellant testified on her own behalf. In addition, appellant called Lisa Lutz and Dr.

Thomas Robb, her counselor and psychiatrist, respectively, at Coleman Behavioral Health Center.

{¶17} In a judgment entry filed January 12, 2009, the trial court granted GCJFS's motion for permanent custody.

{¶18} Appellant has timely appealed the trial court's judgment to this court.

{¶19} Appellant raises three assignments of error. Her first assignment of error is:

{¶20} "The trial court erred in granting Geauga County Job and Family Services' motion for permanent custody as the specific findings of the court are against the manifest weight of the evidence."

{¶21} In cases involving the termination of parental rights, this court employs the civil manifest weight of the evidence standard. *In re S.M.*, 11th Dist. No. 2008-G-2858, 2009-Ohio-91, at ¶17. (Citation omitted.) See, also, *In re B.M.*, 11th Dist. No. 2008-G-2868, 2009-Ohio-1718, at ¶31. The civil manifest weight of the evidence standard is: "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C. E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶22} R.C. 2151.414 sets forth the guidelines for ruling on a motion for permanent custody and provides, in part:

{¶23} "(B)(1) Except as provided in division (B)(2) of this section, the court may grant permanent custody of a child to a movant if the court determines at the hearing held pursuant to division (A) of this section, by clear and convincing evidence, that it is

in the best interest of the child to grant permanent custody of the child to the agency that filed the motion for permanent custody and that any of the following apply:

{¶24} "(a) The child is not abandoned or orphaned, has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period, or has not been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period if, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state, and the child cannot be placed with either of the child's parents within a reasonable time or should not be placed with the child's parents."

{¶25} This court has previously held:

{¶26} "The standard of proof required under R.C. 2151.414 is clear and convincing evidence. *** 'Clear and convincing evidence is that evidence "which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established."' *** The standard of clear and convincing evidence is higher than that of proof by a preponderance of the evidence but is not as high as the standard of proof beyond a reasonable doubt. ***" *In re Cather*, 11th Dist. Nos. 2002-P-0014, 2002-P-0015, & 2002-P-0016, 2002-Ohio-4519, at ¶27. (Internal citations omitted.)

{¶27} First, we will review the evidence presented regarding the trial court's finding that the children could not be placed with appellant within a reasonable time or should not be placed with appellant.

{¶28} "(E) In determining at a hearing held pursuant to division (A) of this section *** whether a child cannot be placed with either parent within a reasonable period of time or should not be placed with the parents, the court shall consider all relevant evidence. If the court determines, by clear and convincing evidence, at a hearing held pursuant to division (A) of this section *** that one or more of the following exist as to each of the child's parents, the court shall enter a finding that the child cannot be placed with either parent within a reasonable time or should not be placed with either parent:

{¶29} "(1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.

{¶30} "(2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing pursuant to division (A) of this section ***;

{¶31} "***

{¶32} "(4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child;

{¶33} "***

{¶34} "(11) The parent has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to this section or section 2151.353 or 2151.415 of the Revised Code, or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections, and the parent has failed to provide clear and convincing evidence to prove that, notwithstanding the prior termination, the parent can provide a legally secure permanent placement and adequate care for the health, welfare, and safety of the child.

{¶35} "***

{¶36} "(14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

{¶37} "***

{¶38} "(16) Any other factor the court considers relevant." R.C. 2151.414(E).

{¶39} Initially, appellant contends the trial court's conclusion that she "previously lost custody of a group of children who were placed with relatives" was not relevant or supported by the record. We note a finding that a parent "had parental rights involuntarily terminated with respect to a sibling of the child" is a statutory consideration

pursuant to R.C. 2151.414(E)(11). Accordingly, if properly supported by the record, such a finding is relevant.

{¶40} However, in this case, appellant asserts there was no evidence submitted supporting the trial court's finding. GCJFS does not refute appellant's assertion by pointing to such evidence in the transcript. We have found minimal evidence in the record to support the trial court's finding. First, in the guardian ad litem report filed in the record on November 7, 2008, the guardians state that appellant's daughter Vanessa was "removed" from her. Also, Lisa Lutz testified that she contacted Social Worker Amanda Ward and Ward "was concerned about the past involvement with children's services with her first children that were given to relatives." We note there is a distinction between the terms "losing custody," having a child "removed," and having children "given" to relatives, as compared to the involuntary termination of parental rights – a relevant factor pursuant to 2151.414(E)(11). Accordingly, we agree with appellant that there was a lack of competent, credible evidence to support a finding that appellant had previously been subjected to the involuntary termination of her parental rights.

{¶41} Next, we address the alleged sexual abuse of C.H. C.H. claims appellant's former boyfriend sexually abused her when he lived in appellant's home. Further, she claims that she reported the abuse to appellant and that appellant did not take appropriate steps to stop the abuse. According to Carlyn Johnson, a nurse who examined C.H. regarding the alleged abuse, C.H. told her "half of the time" appellant did not believe C.H.'s allegations and one time appellant yelled at her former boyfriend for his actions.

{¶42} Appellant argues that the trial court's finding that she showed a lack of concern for C.H.'s well-being regarding the abuse was not supported by the evidence. Appellant contends that neither Mark Clark nor Amanda Ward would discuss C.H.'s allegations of sexual abuse with her. Thus, she argues, she was not given an opportunity to address the issues. However, we note the trial court's finding could have related to appellant's actions when C.H. was in her home. There was evidence presented that C.H. informed appellant that appellant's former boyfriend was sexually abusing her and that appellant did not take measures to stop the abuse.

{¶43} In addition, we note there was evidence that appellant was not merely ignorant to the sexual abuse of C.H., but that she actively subjected C.H. to inappropriate sexual behavior. C.H. informed Misty Beuck, a counselor at Ravenwood Mental Health Center, that appellant and appellant's former boyfriend had sexual intercourse with each other on a couch in the living room when C.H. was sleeping on another couch in the same room. C.H. asked them to stop and fell back asleep. When C.H. awoke, she observed appellant and her former boyfriend, both naked, on the other couch and Mark Hall was yelling at appellant for having sex with appellant's former boyfriend. This evidence, if believed by the trier of fact, demonstrates that appellant actively subjected her daughter to inappropriate sexual behavior and was aware of appellant's former boyfriend's indifference to being naked in front of C.H.

{¶44} The trial court found that appellant had a history of engaging in unhealthy relationships with men. There was evidence in the record that appellant continued to have contact with her former boyfriend after the children were removed from the home.

In addition, she brought a new boyfriend to one of the visitation sessions with the children, which upset them.

{¶45} Appellant argues that she complied with the case plan by attending counseling sessions and remaining drug free. While appellant did attend counseling sessions, the trial court found that appellant only made progress addressing her mental health concerns after the motion for permanent custody was filed.

{¶46} Next, we will address the evidence presented in relation to the trial court's finding that it was in the children's best interest to grant GCJFS's motion for permanent custody. R.C. 2151.414(D) provides, in part:

{¶47} "(D)(1) In determining the best interest of a child at a hearing held pursuant to division (A) of this section or for the purposes of division (A)(4) or (5) of section 2151.353 or division (C) of section 2151.415 of the Revised Code, the court shall consider all relevant factors, including, but not limited to, the following:

{¶48} "(a) The interaction and interrelationship of the child with the child's parents, siblings, relatives, foster caregivers and out-of-home providers, and any other person who may significantly affect the child;

{¶49} "(b) The wishes of the child, as expressed directly by the child or through the child's guardian ad litem, with due regard for the maturity of the child;

{¶50} "(c) The custodial history of the child, including whether the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a consecutive twenty-two-month period or the child has been in the temporary custody of one or more public children services agencies or private child placing agencies for twelve or more months of a

consecutive twenty-two-month period and, as described in division (D)(1) of section 2151.413 of the Revised Code, the child was previously in the temporary custody of an equivalent agency in another state;

{¶51} "(d) The child's need for a legally secure permanent placement and whether that type of placement can be achieved without a grant of permanent custody to the agency;

{¶52} "(e) Whether any of the factors in divisions (E)(7) to (11) of this section apply in relation to the parents and child."

{¶53} The trial court noted the children have a positive relationship with their foster family. Evidence of this is demonstrated by the children's expressed desire to continue living with the foster family.

{¶54} The trial court found the children had a "conflicted" relationship with appellant. Both D.H. and C.H. expressed anger at their mother for bringing appellant's former boyfriend into their home. In addition, C.H. was concerned about her mother's ability to protect her.

{¶55} As for the wishes of the children, the trial court noted that D.H. wished to remain in the foster home or be placed with other family members – he did not want to be placed with appellant. C.H. stated that she also wanted to stay in the foster home. She said she did not believe appellant could keep her safe. Finally, R.H. stated he wanted to live with the foster parents or with Mark Hall.

{¶56} In this matter, the children were of sufficient ages to adequately voice their wishes. In addition, we note the fact the children wished to remain in foster care is

significant. Apparently, they recognized the structure of the foster home environment was in their own best interest.

{¶57} Appellant claims the children's perception of her was skewed because the children were not informed of her progress in treatment. However, appellant has not cited any requirement that the assigned social worker provide updates to the children regarding appellant's status. Further, we note the children had an opportunity to visit with appellant on a regular basis and could make independent determinations regarding her progress.

{¶58} Appellant asserts the trial court did not adequately consider the fact that the children resided with her for many years prior to their removal. However, the trial court did consider this factor, holding "the children resided with their parents until the removal from their parents' custody in October of 2007."

{¶59} The trial court found the children have a strong need for legally secure placement. As a result of appellant's decision to permit her former boyfriend to live in the family home, the children were subjected to witnessing domestic disputes between appellant, their father, and appellant's former boyfriend. In addition, appellant's former boyfriend threatened to harm the children. Finally, as noted by the trial court, "[C.H.] reports having been sexually abused by [appellant's] previous boyfriend and having reported the abuse to [appellant] without [appellant] taking appropriate steps to protect her." In light of these factors, there was evidence in the record that the children needed a legally secure placement to address their physical and emotional needs.

{¶60} The trial court's judgment granting GCJFS's motion for permanent custody was supported by competent, credible evidence. Thus, it was not against the manifest weight of the evidence.

{¶61} Appellant's first assignment of error is without merit.

{¶62} Appellant's second assignment of error is:

{¶63} "The trial court erred to the prejudice of appellant in denying her motion to withdraw true plea."

{¶64} Appellant contends the trial court should have granted her motion to withdraw her true plea, since her plea was entered as a result of advice from an attorney with whom there was a conflict of interest.

{¶65} Initially, we will address whether a conflict existed between appellant and her former attorney, Jason Yanchar. This court reviews a trial court's determination as to whether an attorney should be disqualified due to a conflict of interest for an abuse of discretion. *Avon Lake Mun. Utils. Dept. v. Pfizenmayer*, 9th Dist. No. 07CA009174, 2008-Ohio-344, at ¶13. (Citation omitted.) "'The term "abuse of discretion" connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.'" (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶66} Rule 1.7 of the Ohio Rules of Professional Conduct provides, in part:

{¶67} "(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

{¶68} "(1) the representation of that client will be directly adverse to another current client;

{¶69} "(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests." (Emphasis sic.)

{¶70} A determination must be made as to whether Attorney Yanchar's representation of appellant's landlord was directly adverse to appellant pursuant to subsection (a)(1).

{¶71} "'The representation of one client is directly adverse to another in litigation when one of the lawyer's clients is asserting a claim against another client of the lawyer. *** Further, absent consent, a lawyer may not act as an advocate in one proceeding against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.'" *Avon Lake Mun. Utils. Dept. v. Pfizenmayer*, 2008-Ohio-344, at ¶15, quoting General Comment II to Rule 1.7 of the Ohio Rules of Professional Conduct.

{¶72} In this matter, the trial court found there was no evidence presented that Attorney Yanchar's representation of appellant's former landlord was contemporaneous with his representation of appellant. Accordingly, Rule 1.7 (a)(1) does not apply since appellant was not a "current client" at the time Attorney Yanchar represented her landlord.

{¶73} Next, we look to Rule 1.7 (a)(2) to determine whether there was a substantial risk that Attorney Yanchar's ability to represent appellant was limited by his responsibilities to his former client, appellant's former landlord. Appellant does not assert what information Attorney Yanchar would have obtained in the eviction action

that would have rendered him unable to effectively represent her in this matter. Accordingly, we cannot conclude there was a substantial risk that Attorney Yanchar's representation of appellant's landlord impaired his ability to adequately represent appellant. We conclude that the trial court did not abuse its discretion by failing to find a conflict between appellant and Attorney Yanchar.

{¶74} That being said, we acknowledge that there was potential for an appearance of a conflict. Attorney Yanchar had a duty to competently represent appellant and assist her in retaining custody of her children. Attorney Yanchar assumed this responsibility only months after diligently seeking to remove appellant from her home. As such, we believe the better practice would have been for Attorney Yanchar to have obtained appellant's informed consent, in writing, of the potential conflict pursuant to (b)(1) of Rule 1.7 prior to serving as her counsel.

{¶75} Next, appellant asserts that Attorney Yanchar provided ineffective assistance due to the alleged conflict. As a result, she contends she should be permitted to withdraw her true plea. This court has held that a trial court's decision on a motion to withdraw a true plea is reviewed on an abuse of discretion standard. *In re Borntreger*, 11th Dist. No. 2001-G-2379, 2002-Ohio-6468, at ¶35. (Citations omitted.)

{¶76} The two-part test set forth in *Strickland v. Washington* (1984), 466 U.S. 668 is to be used when addressing ineffective assistance of counsel claims in cases involving the termination of parental rights. *In re Ridenour*, 11th Dist. Nos. 2004-L-168, 2004-L-169, & 2004-L-170, 2005-Ohio-349, at ¶9. (Citation omitted.) Accordingly, appellant must show that counsel's performance was deficient and, in addition, that the deficient performance was prejudicial. Id. at ¶10. (Citations omitted.) In the context of

a plea, the appellant must show "there is a reasonable probability that, but for counsel's error, [she] would not have pleaded guilty." *State v. Brunkala*, 11th Dist. Nos. 2007-L-184 & 2007-L-185, 2008-Ohio-3746, at ¶11. (Citation omitted.)

{¶77} In its judgment entry denying appellant's motion to withdraw her true plea, the trial court stated:

{¶78} "In addition, the Court finds that prior to accepting a plea from Gwendolyn Hall the Court satisfied itself that Ms. Hall understood the complaint, understood the possible actions the Court could take if the complaint were found to be true, and understood the rights she was waiving by entering a plea of true to the complaint. The court further determined that Ms. Hall voluntarily entered her plea."

{¶79} Pursuant to App.R. 9(B), appellant had a duty to file the relevant transcripts with this court. Appellant has not submitted a transcript of the initial hearing when she entered her true plea. "[T]his court has previously held that 'if appellant cannot demonstrate the claimed error then we presume the regularity of the trial court proceedings and affirm the judgment.'" *Patterson & Simonelli v. Silver*, 11th Dist. No. 2003-L-055, 2004-Ohio-3028, at ¶31. (Citations omitted.)

{¶80} Accordingly, the trial court's statements are our only indication as to what occurred when appellant entered her true plea. Based on those comments, appellant knowingly and voluntarily entered her true plea.

{¶81} In her affidavit, appellant asserts that Attorney Yanchar advised her to enter the true plea even though she did not want to.

{¶82} We note that the length of time between the alleged cause for withdrawal of a plea and the time when an individual actually files a motion to withdraw her plea is

a factor that may weigh against allowing the plea to be withdrawn. *State v. Gray*, 11th Dist. No. 2008-T-0014, 2009-Ohio-1925, at ¶28.

{¶83} In this matter, appellant waited over one year to file her motion to withdraw her true plea. During that time, Attorney Yanchar appeared at status hearings with her in December 2007, March 2008, and July 2008. This contradicts appellant's contention that she did not trust Attorney Yanchar and was unable to work with him. During this time, there is no indication that appellant informed the trial court of her concerns. It was not until October 31, 2008, more than one month after Attorney Mooney assumed representation of appellant, that appellant voiced her concerns regarding her true plea, which occurred nearly 13 months previous.

{¶84} This case involved the termination of parental rights, where time is of the essence. Appellant's motion was filed only two weeks before the hearing on GCJFS's motion for permanent custody. By that time, the case had been pending for over one year. If appellant's "11th-hour" motion was granted, a continuance would have been necessary and the final resolution of the case would have been significantly delayed.

{¶85} Appellant cites this court's opinion in *In re Borntreger*, 2002-Ohio-6468 in support of her argument. However, the case sub judice is readily distinguishable from *Borntreger*. In *Borntreger*, the appellant entered a true plea at a hearing where she was not represented by counsel. Id. at ¶6. Further, she was not advised of her rights pursuant to Juv.R. 29. Id. at ¶57. Then, after retaining counsel, she filed a motion to withdraw her true plea only 11 days after the plea was entered and prior to the adjudicatory or dispositional hearings. Id. at ¶8 & 56. In light of these facts, this court

held that the trial court abused its discretion in denying the appellant's motion to withdraw her true plea without a hearing. Id. at ¶59.

{¶86} In the case sub judice, the trial court did not abuse its discretion by denying appellant's motion to withdraw her true plea.

{¶87} Appellant's second assignment of error is without merit.

{¶88} Appellant's third assignment of error is:

{¶89} "The appellant was denied a fair hearing on the motion for permanent custody as complete discovery was not provided from the state."

{¶90} Appellant claims the GCJFS did not comply with Juv.R. 24 by failing to provide discovery materials related to C.H.'s examination and interview regarding the alleged sexual abuse.

{¶91} We review a trial court's determination of discovery matters on an abuse of discretion standard. *In re Z.A.*, 3d Dist. Nos. 05-08-37, 05-08-38, 05-08-39, & 05-08-40, 2009-Ohio-996, at ¶46. (Citation omitted.)

{¶92} In October 2007, appellant filed a discovery request pursuant to Juv.R. 24, seeking, among other matters, any photographs, reports, statements, or medical records that GCJFS intended to introduce or that were favorable to appellant. Thereafter, GCJFS filed a response, indicating appellant could inspect or copy any evidence in the custody of the prosecuting attorney. The pleading also included a potential witness list.

{¶93} In October 2008, GCJFS provided an additional response to appellant. This response included a witness list with the name of "Carly Johnson,"[1] from Portage County Children's Advocacy Center at Robinson Memorial Hospital.

{¶94} At the permanent custody hearing, appellant objected during the testimony of Dr. Paul McPherson, Carlyn Johnson, and Mark Clark. Appellant argued she was not provided with proper discovery from the interview with C.H. at the Children's Advocacy Center. Specifically, appellant argued she should have received the reports, the DVD recording of the interview, and any pictures that were taken. Assistant Prosecutor Craig Swenson argued that appellant was provided with the reports. He acknowledged that the DVD was not provided to appellant, but argued that appellant's counsel was given an opportunity to view the DVD prior to one of the days of the hearing, which Attorney Mooney did not do. In regard to the pictures, they were retained on the computer at the Children's Advocacy Center, they were not given to Mark Clark or GCJFS.

{¶95} The trial court reserved ruling on the objection to the admission of the reports. In its final judgment entry, the court did not admit the reports and indicated it would not consider Dr. McPherson's testimony. The basis of the court's ruling was that a proper foundation was not established. The court did not specifically rule on the alleged discovery violation.

{¶96} Juv.R. 24(A) provides, in part:

{¶97} "(A) Request for discovery

{¶98} "Upon written request, each party of whom discovery is requested shall, to the extent not privileged, produce promptly for inspection, copying, or photographing the

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1. The correct spelling of Ms. Johnson's name is Carlyn Johnson.

following information, documents, and material in that party's custody, control, or possession:

{¶99} "(1) The names and last known addresses of each witness to the occurrence that forms the basis of the charge or defense;

{¶100} "(2) Copies of any written statements made by any party or witness;

{¶101} "(3) Transcriptions, recordings, and summaries of any oral statements of any party or witness, except the work product of counsel;

{¶102} "(4) Any scientific or other reports that a party intends to introduce at the hearing or that pertain to physical evidence that a party intends to introduce;

{¶103} "(5) Photographs and any physical evidence which a party intends to introduce at the hearing;

{¶104} "(6) Except in delinquency and unruly child proceedings, other evidence favorable to the requesting party and relevant to the subject matter involved in the pending action. ***."

{¶105} For the purposes of this appeal, we will presume that the reports were not provided to appellant.

{¶106} Pursuant to Juv.R. 24, GCJFS should have provided the DVD and the reports pertaining to the alleged sexual abuse to appellant.[2] The DVD was provided to Mark Clark, an investigator at the Geauga County Prosecutor's Office, and to GCJFS. These individuals should have notified Assistant Prosecutor Swenson of their receipt of this DVD, so he could have provided it to appellant's counsel in a timely manner.

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2. GCJFS does not argue that the material was privileged or otherwise not subject to discovery. Thus, we do not address this potential issue.

{¶107} Here, we note that the alleged discovery violation "was not a function of gamesmanship or ambush tactics." *In re Savchuk*, 11th Dist. Nos. 2007-L-202, 2007-L-203, 2007-L-204, 2007-L-205, 2007-L-206, & 2007-L-207, 2008-Ohio-6877, at ¶71. Instead, it appears there was a miscommunication between Assistant Prosecutor Swenson, Mark Clark, and the employees of GCJFS.

{¶108} On appeal, appellant argues that had she been provided with these materials, she would have known the details of the sexual abuse allegations and would have been prepared to defend the issue. We note appellant was aware of the nature of the subject materials prior to trial. See, e.g., *In re Savchuk*, 2008-Ohio-6877, at ¶71. The alleged sexual abuse of C.H. is referenced numerous times in the record, including in the trial court's April 2, 2008, July 3, 2008, and September 26, 2008 judgment entries. In October 2008, appellant was provided with a witness list stating that Carlyn Johnson would testify for GCJFS. This document indicates Johnson works at the Portage County Children's Advocacy Center at Robinson Memorial Hospital. Thus, if appellant was not in receipt of any reports at that time, she could have filed an additional request specifically asking for these documents. Further, if appellant believed GCJFS was improperly withholding discovery materials, she could have filed a motion with the trial court pursuant to Juv.R. 24(B).

{¶109} Finally, we note the trial court did not admit the reports, identified as state's exhibit four, or consider the testimony of Dr. Paul McPherson. Therefore, appellant has not demonstrated that she was prejudiced by the alleged discovery violation.

{¶110} Appellant's third assignment of error is without merit.

{¶111} The judgment of the Juvenile Division of the Geauga County Court of Common Peas is affirmed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with Concurring/Dissenting Opinion.

{¶112} I agree with the majority to affirm the trial court with respect to appellant's first and second assignments of error. However, I respectfully dissent with regard to appellant's third assignment of error.

{¶113} The state clearly did not turn over certain relevant evidence, i.e., the video tape interview of the minor child, photographs, and reports of treatment providers pursuant to Juv.R. 24 until the trial had commenced and, as such, appellant should have been given a continuance or other acceptable remedy provided for in Juv.R. 24 so as to allow her defense to be thorough and effective pursuant to the confrontation and due process clauses included in both the Ohio and United States Constitutions.

{¶114} The Rules of Procedure in this section are the procedural mechanism that ensure compliance within the system of constitutional protections guaranteed by the Ohio and United States Constitutions.

{¶115} "*** [T]he termination of parental rights is '(***) the family law equivalent of the death penalty (***).' *In re Phillips*, 11th Dist. No. 2005-A-0020, 2005-Ohio-3774, at

¶22, citing *In re Hoffman*, 97 Ohio St.3d 92, 2002-Ohio-5368, at ¶14, ***. See, also, *In re Murray* (1990), 52 Ohio St.3d 155, 157, *** (parents have a 'fundamental liberty interest' in the care, custody, and management of their children, and an 'essential' and 'basic civil right' to raise them). Accordingly, when the state initiates a permanent custody proceeding, parents must be provided with fundamentally fair procedures in accordance with the due process provisions of the Fourteenth Amendment to the United States Constitution, and Section 16, Article I of the Ohio Constitution. *In re Sheffey*, 167 Ohio App.3d 141, 2006-Ohio-619, at ¶21, ***. This includes effective assistance of counsel. *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, ***, paragraph two of the syllabus; *In re Ridenour*, 11th Dist. Nos. 2004-L-168 and 2004-L-169 and 2004-L-170, 2005-Ohio-349 at ¶9. *In re Brewster* (Mar. 25, 1994), 11th Dist. No. 91-P-2365, 1994 Ohio App. LEXIS 1317, at 3, citing *Jones v. Lucas Cty. Children Services Bd.* (1988), 46 Ohio App.3d 85, 86, ***." *In re Roque*, 11th Dist. No. 2005-T-0138, 2006-Ohio-7007, at ¶7.

{¶116} That being said, Juv.R. 24 is specific in its requirement for the parties, particularly the state, to comply.

{¶117} Juv.R. 24 governs discovery in child abuse, neglect, and dependency proceedings. It provides in relevant part:

{¶118} "(A) Request for discovery.

{¶119} "Upon written request, each party of whom discovery is requested shall, to the extent not privileged, produce promptly for inspection, copying, or photographing the following information, documents, and material in that party's custody, control, or possession:

{¶120} "(1) The names and last known addresses of each witness to the occurrence that forms the basis of the charge or defense;

{¶121} "(2) Copies of any written statements made by any party or witness;

{¶122} "(3) Transcriptions, recordings, and summaries of any oral statements of any party or witness, except the work product of counsel;

{¶123} "***

{¶124} "(C) Failure to comply.

{¶125} "If at any time during the course of the proceedings it is brought to the attention of the court that a person has failed to comply with an order issued pursuant to this rule, the court may grant a continuance, prohibit the person from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances."

{¶126} Full discovery is necessary to meet the "best interests of the child" standard in matters involving children. The restrictive nature of Juv.R. 24 does not obviate the necessity or right of liberal discovery in permanent custody cases. R.C. 5153.17 does not preclude discovery in such a case. Parties have a right to access and copy original children services agency documents, rather than a computer disc containing the documents. See *In re Jeter* (Feb. 23, 2001), 118 Ohio Misc.2d 101, 2001-Ohio-4362.

{¶127} However, the majority in the Eleventh District has held:

{¶128} A court may permit an undisclosed witness of the state to testify, notwithstanding a discovery violation, "'if the state's failure to provide discovery was not willful, foreknowledge of the testimony would not have benefitted the defendant in

preparation of his defense, and the defendant was not prejudiced by admission of the evidence.'" *State v. Ballentine* (Nov. 29, 1996), 11th Dist. No. 95-L-076, 1996 Ohio App. LEXIS 5421, at 7, quoting *State v. Dye* (Oct. 6, 1995), 11th Dist. No. 99-T-5996, 1995 Ohio App. LEXIS 4459, at 7.[3]

{¶129} This writer humbly states that carelessness or negligence in assembling discovery by either party does not negate the affirmative duty to provide that discovery and clearly should not compromise the opposing party in presenting their case or having full use of the withheld evidence in the formulation of their case. The requestor for discovery anticipates compliance of the producing party pursuant to the rule. Parties must be held to their continuing duty to supplement, even if they do not plan to use that testimony in their case in chief, as it may be relevant to the opponent's case or defense, even if the state chooses not to use it. Appellant must have that same option. I commend the trial court for suppressing the testimony of the expert whose information was not disclosed. However, it could not replace the ability of the defense to reformulate or strategize its new defense in the middle of the trial or to get an expert of their choosing. The Supreme Court of Ohio has established a very high priority on the adjudication and integrity of the proceedings of permanent custody cases. It stands that the same procedural and constitutional safeguards apply as the most serious criminal proceeding.

{¶130} For the foregoing reasons, I concur in part and dissent in part.

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3. This court adopted and used that rule in *In re Savchuk*, 180 Ohio App.3d 349, 2008-Ohio-6877. However, the dissent notes that *Ballentine* is a criminal case that does not use or apply Juv.R. 24, nor does it address the remedy that must be offered to the defendant to ensure her right to due process.