[Cite as *In re J.F.*, 2011-Ohio-6695.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN THE MATTER OF:	**:**	**O P I N I O N**
J.F.	**:**	**CASE NO. 2011-T-0078**

Civil Appeal from the Trumbull County Court of Common Pleas, Juvenile Division, Case No. 2009 JC 0042.

Judgment: Reversed.

Carlo A. Ciccone, Ciccone Law Office, L.L.C., Reisman's Theater Building, Suite 1000, 42 S. Main Street, Niles, OH 44446 (For Appellant-Ryan Williamson).

Susan Porter Collins and *Tammy Richardson,* 2282 Reeves Road, N.E., Warren, OH 44483 (For Appellee-Trumbull County Children Services Board).

Terry A. Swauger, 1129 Niles-Cortland Road, S.E., Warren, OH 44484 (Guardian ad litem).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Ryan Williamson, appeals from the judgment of the Trumbull County Court of Common Pleas, Division of Domestic Relations, Juvenile Department, adopting the magistrate's decision terminating his parental rights relating to his son, J.F. For the reasons discussed in this opinion, we reverse the trial court's judgment adopting the magistrate's decision terminating Mr. Williamson's parental rights.

{¶2} On February 9, 2009, J.F., the biological son of Mr. Williamson and Shailaunda Folmar, was born. At the time of J.F.'s birth, Ms. Folmar already had two other children, H.F. and I.F, from a previous relationship. H.F.'s and I.F.'s biological father, however, had no involvement in their lives. After J.F.'s birth, both Mr. Williamson and Ms. Folmar shared custody of the infant until March 20, 2009, when all three children were placed in foster care. Later, on April 16, 2009, the children were adjudicated dependent and, on August 18, 2010, Trumbull County Children Services Board ("TCCSB") filed a motion for permanent custody.[1] The matter proceeded to hearing on January 6, 2011 and January 20, 2011. The following facts are derived from the record as well as the evidence adduced at the hearing:

{¶3} On February 11, 2009, TCCSB was contacted by the hospital at which Ms. Folmar delivered J.F. Hospital staff reported concerns for J.F.'s as well as Ms. Folmar's safety because Ms. Folmar was exhibiting anger and "situational depression." The agency opened a case and assigned a caseworker. At the time, Ms. Folmar, who was unemployed, resided with her mother and her other children in a single-family dwelling. Mr. Williamson was also unemployed and living with his mother in an apartment complex predominantly occupied by the elderly.

{¶4} Several weeks after J.F.'s birth, Ms. Folmar, apparently unable to fully care for the infant, voluntarily surrendered temporary custody to the agency. At the time, Mr. Williamson was not considered a viable placement option because paternity had not been established and TCCSB determined it would be in J.F.'s and Mr.

1. TCCSB moved for permanent custody of each of Ms. Folmar's three children. This appeal, however, relates only to the trial court's judgment as it pertains to J.F.

Williamson's best interests to avoid nurturing a further bond between the two. J.F. was subsequently placed with a foster family apart from his half-siblings.

{¶5} In June of 2009, Mr. Williamson was declared the biological father of J.F. and was formally included in the family case plan. Mr. Williamson underwent a psychological evaluation, a drug and alcohol evaluation, and attended general parenting courses as well as one-on-one parenting classes. Mr. Williamson continued to live with his mother in the same one-room apartment and began taking college courses at Kent State University's Trumbull Campus. Although appellant remained unemployed, he applied for various jobs on campus but was never hired. At the time of the hearing, appellant was still unemployed but was scheduled to graduate with an associate's degree in business administration in 2012.

{¶6} In August 2009, the agency conducted its first case review since Mr. Williamson had established parentage. Upon review, the amended case plan indicated that J.F. should remain in foster care because Ms. Folmar was emotionally as well as mentally unstable. The case report also indicated she regularly tested positive for marijuana. With respect to Mr. Williamson, the report stated appellant was interested in reunification with J.F. but noted concerns regarding his lack of independent housing and a stable income.

{¶7} TCCSB ultimately received Mr. Williamson's psychological and drug and alcohol evaluation reports. According to Patricia Carfollo, the assigned agency caseworker, TCCSB had no concerns for appellant's mental health and determined appellant had no problems with alcohol or drugs. Carfollo also testified appellant completed each of the parenting classes into which he enrolled and possessed

appropriate parenting skills. Thus, Mr. Williamson was granted weekly supervised visitation with J.F.

{¶8} According to Carfollo, Mr. Williamson regularly attended his weekly visitations and was very cooperative with the agency. During his visits, Mr. Williamson played and interacted appropriately with J.F. And, when communicating with the boy, Mr. Williamson routinely established eye-to-eye contact to which the child responded well. As a result of her observations, Carfollo opined Mr. Williamson possessed fine parenting skills and had established a clear, observable bond with J.F.

{¶9} In February 2010, the agency conducted its next case review. In the report, the agency underscored that Mr. Williamson's visitations were going well. The report also noted that Mr. Williamson had the support of his mother, with whom he was living. The report emphasized, however, that Mr. Williamson failed to recognize the agency's concerns with his unemployment and lack of independent housing.

{¶10} In April of 2010, Mr. Williamson earned the opportunity to have home visits with J.F. After two successful visits, however, appellant lost his home visitation privilege due to a domestic violence allegation leveled by Ms. Folmar. Ms. Folmar later admitted the allegation was false and the charge was never prosecuted. Mr. Williamson subsequently resumed supervised visitation with J.F. [2]

{¶11} By August of 2010, J.F. had been in foster care for 17 months. On August 16, 2010, the agency filed semi-annual case review. The report reflected that, although TCCSB was "hopeful" J.F. could be placed with a family member, Mr. Williamson was not an appropriate option because, despite agency concerns, he had neither obtained

2. There was also evidence that Mr. Williamson, at some point during the case, obtained a civil stalking protection order against Ms. Folmar which was eventually lifted.

employment nor independent housing. The report further emphasized that Mr. Williamson "does not demonstrate an understanding of why his unemployment and lack of independent housing [would] affect his ability to care for [J.F.]" Notwithstanding Mr. Williamson's cooperation and compliance with all other aspects of his case plan, the agency filed its motion for permanent custody on August 18, 2010, two days after the final case review was dated. The record does not indicate any additional case reviews took place after the motion was filed.

{¶12} At the hearing, Ms. Folmar testified that she was not contesting the agency's motion as it pertained to her. She stated she had been living in Louisiana since November, 2010. And, although she had recently returned to Warren, Ohio, Ms. Folmar's testimony suggested she was not prepared to undertake the responsibilities of moving forward with a case plan. She specifically testified that she was not seeking custody of her children at the time of the hearing and acknowledged she was "not an option for [her] kids to be with." Her testimony indicated that she had not had regular, let alone frequent, contact with her children or appellant in the recent past. She did testify, however, that she felt J.F. should be placed in Mr. Williamson's custody rather than the permanent custody of TCCSB.

{¶13} Ms. Carfollo testified she had no concerns with Mr. Williamson's parenting abilities or his love and affection for J.F. Moreover, she conceded that Mr. Williamson and J.F. had established a visible, mutual bond. Because, however, the young boy had lived with his foster family for 18 consecutive months, Ms. Carfollo surmised J.F. had established a stronger bond with his foster family than with Mr. Williamson. Moreover, Ms. Carfollo testified she had concerns that Mr. Williamson may be unable to provide a

long-term, stable living environment for J.F. As a basis for these concerns, Ms. Carfollo cited appellant's lack of independent housing and failure to secure employment.

{¶14} Despite her concern relating to Mr. Williamson's living arrangement, Ms. Carfollo testified that the residence is "a one-floor apartment with quite a large living room, kitchen, then a small hallway, the bedroom to the back, and a bath." She testified the home was clean, organized, and functional. She also testified there were no safety hazards and, although it had only one bedroom, the apartment had adequate space for a toddler bed.

{¶15} Throughout her testimony, Ms. Carfollo continued to reiterate her concern that appellant had failed to obtain independent housing. She nevertheless testified that there are no reason(s) why the apartment would be inappropriate for J.F.; and, in fact, Ms. Carfollo opined that Mr. Williamson's living arrangement was "appropriate" for a child of J.F.'s age. She further acknowledged there are no inherent problems with Mr. Williamson living with his mother and ultimately conceded that sharing domestic chores with another adult is an efficient and effective means of managing a household.

{¶16} With respect to appellant's lack of income, Ms. Carfollo acknowledged that Mr. Williamson was in college and had been in college for approximately 18 months. She further acknowledged that, notwithstanding his lack of income, he is motivated and, after graduating, his ability to gain employment would increase. Mr. Williamson had also told Ms. Carfollo that, after he graduates, he plans on moving out of his mother's apartment and obtaining a job.

{¶17} Ms. Carfollo nevertheless recommended the agency be granted permanent custody of J.F. She specifically testified:

{¶18} "My concern for [J.F.] is not with his father's love, care and attention, it is for permanency. During the course of the case, [appellant] has said that he was going to do this, do this. He is now enrolled in school and has been for about a year and a half at Kent State. He plans to move out of his home and get independent housing, he plans to get his degree and get a job.

{¶19} "Currently, again, it's not the care, it's the ability to keep his son with him long term.

{¶20} "***

{¶21} "Through the course of the case, we had - - I will do this, I will do this, I will do this, and it's been 18 months and we're still at the same place that we were before, except for his current enrollment in college."

{¶22} Attorney Terry Swauger, J.F.'s guardian ad litem ("GAL"), provided testimony similar to that of Ms. Carfollo. He identified no concerns with appellant's parenting abilities or his love for J.F. Mr. Swauger testified "[appellant] was very appropriate, paid attention to his son, played with him, did everything appropriate." Mr. Swauger further testified that J.F. is "clearly" happy to see appellant during his visits and thus there was no doubt J.F. was bonded with his father. Mr. Swauger testified, however, that J.F. was likely most bonded with his foster family because "he's basically been raised almost since birth by them." Mr. Swauger also echoed Ms. Carfollo's concerns regarding Mr. Williamson's long-term ability to provide housing and income.

{¶23} Like Ms. Carfollo, Mr. Swauger testified that the apartment Mr. Williamson shared with his mother is clean and appropriate. Although the home was small and not designed for a large number of people, Mr. Swauger testified there is "nothing wrong

with it." In fact, Mr. Swauger opined a toddler crib could be placed in the bedroom with no inconvenience. Further, with respect to Mr. Williamson's current lack of employment, Mr. Swauger testified Mr. Williamson is committed to J.F., is in school and "seems to have a plan."

{¶24} In his GAL report, however, Mr. Swauger ultimately recommended permanent custody be granted to TCCSB because of concerns relating to Mr. Williamson's ultimate future ability to provide for J.F. At trial, Swauger elaborated:

{¶25} "*** the biggest issue with [Mr. Williamson] was the lack of independent housing and income. I just - - the future and stability of the child on a consistent basis would be affected by his inability to obtain independent housing and provide any income to support - - to raise the child with. Those were the biggest issues with [Mr. Williamson]."

{¶26} Finally, Mr. Williamson testified on his own behalf. He conveyed he had completed parenting courses and learned a great deal. He testified he loved J.F. and knew he could provide a safe and secure home for the boy. Mr. Williamson confirmed that he was currently living with his mother and attending Kent State University where he is majoring in business management and carrying better than a B minus G.P.A. Mr. Williamson recognized that independent housing and seeking employment were part of his case plan. He also indicated, however, he had continued to reside with his mother because it provided a mutual benefit for both himself and his mother while he was in school.

{¶27} With respect to seeking employment, Mr. Williamson testified that he had applied for jobs at the university but the positions he sought were already filled.[3] He further testified he receives grant and loan monies for tuition, books, and living expenses. After his school costs are covered, he testified he has approximately $3,000 per semester, which is sufficient to cover living expenses. Mr. Williamson's projected graduation date is 2012; once he graduates, he testified his interests are geared towards "the real estate industry and securities industry." He intends to ultimately manage his own business.

{¶28} On January 21, 2011, the magistrate issued his decision. The magistrate initially found that J.F. had been in the temporary custody of TCCSB for more than 12 months since his dependency adjudication on March 20, 2009, *and* he cannot be placed with Mr. Williamson within a reasonable time or should not be placed with Mr. Williamson. The court further found that Mr. Williamson failed to substantially remedy the conditions causing J.F.'s removal. In support of this conclusion, the magistrate found Mr. Williamson has failed to obtain independent housing suitable for J.F.'s age and also failed to demonstrate he can support J.F.

{¶29} Next, the magistrate concluded Mr. Williamson failed or was unwilling to provide an adequate, permanent home for J.F. Finally, the court found that, although Mr. Williamson and J.F. have a strong bond, J.F.'s "strongest bonds are with his foster-to-adopt family" because they have raised him for all but two or three months of his life. Based upon these findings, the magistrate recommended that Mr. Williamson's parental rights "be permanently and forever severed and terminated."

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3. Mr. Williamson testified that, prior to applying for school, he had worked full time as a forklift and press operator. The company for which he worked, however, closed, which caused him to go to school. He testified that if anything happened to his mother, he would be able to return to this type of work.

{¶30} Mr. Williamson timely objected to the magistrate's decision alleging the conclusion was against the manifest weight of the evidence. After a transcript was prepared, the trial court overruled Mr. Williamson's objections. In support of its conclusion, the trial court found appellant failed to meet his case plan goals of finding independent housing and seeking employment. With respect to these issues, the court found that the apartment Mr. Williamson shares with his mother was not appropriate for J.F. And, even if it were appropriate, the court found that Mr. Williamson's mother failed to appear at the hearing and testify that the child could live in the residence with her and Mr. Williamson. The court additionally found there was no evidence Mr. Williamson made efforts to seek work. Finally, based upon the opinions of Ms. Carfollo and Mr. Swauger, the court found J.F.'s strongest bonds were with his foster family. In light of these conclusions, the court ordered the agency to prepare an order approving the magistrate's decision. The order was filed on July 12, 2011, and Mr. Williamson filed this timely appeal.

{¶31} Mr. Williamson assigns three errors for this court's review. For his first assignment of error, appellant asserts:

{¶32} "R.C. 2151.414(B)(1)(d) imposes a statutory presumption of parental unfitness if a Trial Court finds that a child has been in the temporary custody of Children Services for twelve or more months of a twenty-two month period and violates a parent's substantive and procedural due process rights as guaranteed under the Ohio and United States Constitutions."

{¶33} Under his first assignment of error, Mr. Williamson contends the statutory scheme enabling a trial court to permanently divest a parent of his or her parental rights

is facially unconstitutional as it violates both substantive and procedural due process protections. In particular, Mr. Williamson argues the "twelve/twenty-two month" criterion creates a presumption of parental unfitness and, under certain circumstances, may be a sufficient basis for a court to enter judgment terminating a parent's rights.

{¶34} Preliminarily, Mr. Williamson failed to raise this issue before the trial court. The failure to challenge the constitutionality of a statute in the trial court waives all but plain error for purposes of appeal. See *In re A.J. and S.M.*, 11th Dist. No. 2010-T-0041, 2010-Ohio-4553, at ¶44. The doctrine of plain error, however, is not favored in civil matters and will be applied only in very rare cases where the overall fairness and integrity of the proceeding has been affected. See, e.g., *Heerlein v. Farinacci*, 11th Dist. No. 2008-G-2818, 2008-Ohio-4979, at ¶17.

{¶35} The arguments advanced by Mr. Williamson under his first assignment of error have been previously addressed and rejected by this, as well as other, districts. See *In re A.J. and S.M.*, supra.; see, also, *In re Stillman*, 155 Ohio App.3d 333, 2003-Ohio-6228. *In re C.R.*, 7th Dist. No. 06 BE 53, 2007-Ohio-3179, at ¶49; *In re Workman*, 4th Dist. No. 02CA574, 2003-Ohio-2220, at ¶40; *In re Bray*, 10th Dist. No. 04AP-842, 2005-Ohio-1540, at ¶7-9; *In re Fricke*, 3d Dist. Nos. 1-02-75, 1-02-76, 1-02-77, 2003-Ohio-1116, at ¶9. With respect to the issue of an unconstitutional presumption, this court has observed:

{¶36} "'Contrary to appellant's assertion, we believe that inherent within R.C. 2151.414(B)(1)(d) rests the finding that the parent is unable, unsuitable, or unfit to care for the child. If the child has been placed in the children services agency's temporary custody for at least twelve months of the prior twenty-two months, some reason must

exist why the child has not been in the parent's care. The reason normally would be because the parent has been unable to demonstrate that the parent is able, suitable, or fit to care for the child.'

{¶37} "Therefore, 2151.414(B)(1)(d) does not create an unjustified presumption of parental unfitness." *In re A.J. and S.M.*, supra, at ¶42-43, quoting *In re Workman*, supra, at ¶39.

{¶38} Moreover, even if, as Mr. Williamson speculates, R.C. 2151.414(B)(1) could technically, under certain fact patterns, permit a court to terminate based only upon the "twelve/twenty-two" criterion, he did not suffer this fate. The court did not rely solely upon the "twelve/twenty-two" criterion in this case. Thus, Mr. Williamson lacks standing to assert this argument. See, e.g., *In re A.J. and S.M.*, supra, at ¶48.

{¶39} As we find no plain error, Mr. Williamson's first assignment of error lacks merit.

{¶40} We shall next consider Mr. Williamson's second and third assignments of error together. They provide:

{¶41} "[2.] The Trial Court's award of permanent custody to Trumbull County Children Services is not supported by sufficient credible evidence meeting the burden of clear and convincing evidence that permanent custody of the minor child should not have been placed with the child's biological father.

{¶42} "[3.] The magistrate's Decision granting permanent custody to Trumbull County Children Services is based on suppositions and conclusions contradictory to the manifest weight of the evidence."

{¶43} Mr. Williamson's second and third assigned errors challenge the sufficiency and weight of the evidence upon which the ultimate decision to terminate was based.

{¶44} A parent possesses a fundamental liberty interest in the care, custody, and management of his or her child. See, e.g., *In re Phillips*, 11th Dist. No. 2005-A-0020, 2005-Ohio-3774, at ¶22 citing *In re Hayes* (1997), 79 Ohio St.3d 46, 48. It therefore follows that "parents who are suitable persons have a 'paramount' right to the custody of their minor children." *In re Johnston*, 11th Dist. No. 2008-A-0015, 2008-Ohio-3603, at ¶33. A parent's interests in the custody of his child, however, do not supersede the child's welfare. Thus, the essential inquiry at the dispositional phase of a termination proceeding is not whether the parents are fit or unfit but whether termination of a parent's rights is in the child's best interest. *In re Cunningham* (1979), 59 Ohio St.2d 100, 105.

{¶45} R.C. 2151.414 provides the framework to which a juvenile court must adhere in adjudicating a motion for permanent custody. R.C. 2151.414(B) authorizes a juvenile court to grant permanent custody to a public agency if, after a hearing, the court concludes, by clear and convincing evidence, that such a decision is in the best interests of the child and any of the following apply: (1) the child has not been abandoned, orphaned, or in the custody of an agency for 12 or more months of a consecutive 22 month period, but he or she cannot be placed with either parent within a reasonable time or should not be so placed; (2) the child is abandoned; (3) the child is orphaned and has no relatives able to accept permanent custody; or (4) the child has been in the temporary custody of one or more public children services agencies or

private child placing agencies for 12 or more months of a consecutive 22 month period. R.C. 2151.414(B)(1)(a)- (d); see, also, *In re Krems*, 11th Dist. No. 2003-G-2535, 2004-Ohio-2449, at ¶31.

{¶46} If the juvenile court determines that the circumstances are such that the child cannot be placed with either parent within a reasonable time or should not be placed with the parents, it must be determined, by clear and convincing evidence, that one or more of the conditions enumerated under R.C. 2151.414(E)(1) through (16) are applicable to each parent.

{¶47} Assuming one of the four circumstances set forth under R.C. 2151.414(B)(1)(a) through (d) applies, the court must proceed to an analysis of the child's best interest. In evaluating a child's best interests, R.C. 2151.414(D)(1) requires the juvenile court to 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 ****

{¶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." R.C. 2151.414(D)(1)(a) – (d).

{¶52} A trial court's decision to grant permanent custody to a public agency must be supported by clear and convincing evidence. *In re C.C.*, 11th Dist. No. 2011-A-0022, 2011-Ohio-3754, at ¶36; see, also, *In re J.S.E., J.V.E.*, 11th Dist. No. 2009-P-0091, 2010-Ohio-2412, at ¶25. "Clear and convincing evidence is more than a mere preponderance of the evidence; it is sufficient to produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *In re Krems*, supra, at ¶36. Here, Mr. Williamson asserts the evidence adduced at the hearing failed to meet this heightened evidentiary bar. As a result, the trial court erred in overruling his objections and abused its discretion in adopting the magistrate's decision.

{¶53} We shall first peremptorily address an argument advanced by TCCSB regarding Mr. Williamson's failure to file a motion for custody of J.F. The agency seemingly argues that Mr. Williamson was required, pursuant to R.C. 2151.353(A)(3), to file a motion for custody of J.F. in order to properly defend against the agency's motion to terminate his rights. TCCSB's argument is a non sequitur.

{¶54} Pursuant to R.C. 2151.353(A)(3), after a child is adjudicated abused, dependent, or neglected, a court may award custody to a parent who moves the court for custody. While a parent whose child has been adjudicated abused, dependent, or neglected, must file a motion to be *considered* for custody, it does not follow that a parent *defending against* an agency's motion to terminate his parental rights must also file such a motion. While a parent may desire custody of his child, he may also be aware that the likelihood of being granted immediate custody after a hearing to terminate is very low. Strategically, therefore, a parent may simply wish to retain his

rights by defending against the agency's motion, rather than specifically seeking to enforce those rights at a hearing on termination.

{¶55} As discussed above, a parent has a fundamental liberty interest in the care and custody of his or her child. Given the rights at stake, we therefore hold a parent in a permanent custody proceeding need not file a motion for custody on his own behalf to preserve his ability to defend his fundamental parental rights. To rule otherwise would imply a parent's procedural failure to file a motion pursuant to R.C. 2151.353(A)(3), either before or after a motion is filed pursuant to R.C. 2151.414, would function to waive his or her constitutionally protected substantive right to raise his or her child. TCCSB's argument is therefore misplaced.

{¶56} That said, the magistrate, in his decision, found J.F. had been in the temporary custody of TCCSB for 12 or more months of a consecutive 22 month period and J.F. could not be placed with appellant within a reasonable time or should not be placed with appellant. Although the former finding is factually accurate and sufficient to trigger the best interest analysis, the latter finding required the magistrate to consider all relevant R.C. 2151.414(E) factors.

{¶57} With respect to this point, the magistrate concluded, pursuant to R.C. 2151.414(E)(1), that Mr. Williamson consistently failed to substantially remedy the conditions causing J.F. to be placed with the agency. The magistrate further found, pursuant to R.C. 2151.414(E)(4), that Mr. Williamson demonstrated an unwillingness to provide an adequate, permanent home for J.F. In support of these conclusions, the magistrate found (1) that, contrary to his case plan, Mr. Williamson failed to obtain independent housing suitable for a child J.F.'s age; (2) failed to demonstrate he could

support J.F.; and (3) failed to adhere to a "seek work order" issued in April of 2010. The court's findings are not supported by clear and convincing evidence.

{¶58} Prior to addressing the court's supportive reasons for its findings, we note the primary, if not the only, reason J.F. was not placed with Mr. Williamson (after Ms. Folmar voluntarily relinquished custody) was the agency's concern that he may not be J.F.'s biological father. In particular, the agency did not think it appropriate to nurture a bond between Mr. Williamson and J.F. if he was not the child's father. Early in the case, however, in June of 2009, Mr. Williamson was declared J.F.'s biological father. Technically, therefore, when J.F. was approximately four months old, Mr. Williamson had remedied the condition that caused the child to be initially placed in TCCSB's custody. A biological father, just as a biological mother, has a fundamental right to care for his child. The trial court's failure to acknowledge, comment on, or consider the fact that Mr. Williamson quickly addressed the issue of paternity, the only ostensible reason J.F. was not initially placed in *his* custody, is highly troublesome.

{¶59} That said, we recognize that the agency was concerned about Mr. Williamson's lack of independent housing**.** There was no testimony; however**,** the apartment Mr. Williamson shared with his mother was unsuitable. To the contrary, both Ms. Carfollo and Mr. Swauger specifically testified the apartment was clean, safe, and appropriate for J.F. Moreover, even though Mr. Williamson's mother did not testify J.F. could reside in the apartment if her son were ultimately awarded custody, Mr. Williamson's testimony demonstrated that, if he were eventually granted custody of J.F., the child could live in the apartment. To the extent the agency caseworker as well as the GAL testified Mr. Williamson's current living arrangements were both appropriate

and suitable for J.F., it is unclear how Mr. Williamson's cohabitation with his mother in the apartment could be reasonably viewed as either inadequate or represent a condition that caused J.F. to be placed with the agency .

{¶60} Furthermore, there was no testimony that Mr. Williamson was impoverished or unable to provide for J.F. Although Mr. Williamson is not employed, he is in college and, according to the GAL, "had a plan." Mr. Williamson also testified he had approximately $3,000 per semester for living expenses. Mr. Williamson shares household expenses and duties with his mother. And, although their lifestyle is not lavish, the evidence tended to show that Mr. Williamson *could*, at the time of the hearing, support J.F. if given the opportunity. The court's finding regarding Mr. Williamson's ability to provide for J.F. was not supported by clear and convincing evidence and therefore cannot be viewed as a condition preventing J.F.'s placement within a reasonable time.

{¶61} Finally, the court found Mr. Williamson had failed to put J.F. before himself by not paying "voluntary support." There is nothing in the record, however, indicating the agency asked Mr. Williamson to so volunteer. And, the record does not indicate the agency filed a motion for a court order of support. Further, regarding Mr. Williamson's unemployment, Mr. Williamson testified he had attempted to obtain jobs on campus, but was never hired. The evidence demonstrated, therefore, he had at least "sought" work thereby complying with the "seek work order."

{¶62} By Ms. Carfollo's admission, Mr. Williamson has no psychological or emotional issues and he is not chemically dependent. Mr. Williamson has further demonstrated, to the agency's and GAL's satisfaction, that he has strong parenting

skills and a loving bond with J.F. Mr. Williamson is in college and expects to graduate in 2012, at which time he intends to obtain employment. Viewed in its entirety, therefore, the evidence did not clearly and convincingly support the trial court's determination that J.F. cannot be placed with Mr. Williamson within a reasonable time or should not be placed with him.

{¶63} Because, however, J.F. was in the custody of the agency for more than 12 months of a consecutive 22 month period, we must consider whether the trial court properly found that permanent custody was in the best interest of J.F. We hold it was not.

{¶64} In ruling in TCCSB's favor, the court engaged in a perfunctory best interest analysis pursuant to R.C. 2151.414(D). The substance of the court's best interest findings were derived from Ms. Carfollo's and Mr. Swauger's hearing testimony as well as Swauger's GAL report. At the hearing, Ms. Carfollo opined J.F.'s best interests would be served by granting permanent custody to the agency because of appellant's potential long-term residential and employment instability. However, she testified that, at the time of the hearing, appellant *was able to provide for J.F.'s basic needs.* Carfollo did not question appellant's current ability to raise and adequately care for J.F., but, instead, premised her recommendation upon appellant's *future* ability to support J.F.

{¶65} Similarly, Mr. Swauger recommended that the agency be awarded permanent custody based upon appellant's potential for future instability. Mr. Swauger testified:

{¶66} "The biggest issue with [Mr. Williamson] was the lack of independent housing and income. I just - - the future and stability of the child on a consistent basis would be affected by his inability to obtain independent housing and provide any income to support - - to raise the child with."

{¶67} This court has repeatedly emphasized that "'[a] decision based on clear and convincing evidence requires *overwhelming facts*, *not the mere calculation of future probabilities*.'" *In re A.J. and S.M.*, supra, at ¶76, quoting *In re Williams*, 11th Dist. Nos. 2003-G-2498 and 2003-G-2499, 2003-Ohio-3550, at ¶45. When evidence presents the potential for a future removal, that evidence "does not create the firm conviction that such future removal is inevitable to the extent necessary to satisfy the clear and convincing evidentiary standard." Id.

{¶68} Here, the only evidence the trial court had before it to terminate Mr. Williamson's parental rights was the caseworker's and GAL's testimony regarding their concerns that appellant may be unable to adequately care for J.F. *in the future*. Recently, in *In re A.J. and S.M.*, supra, this court determined a juvenile court's award of permanent custody to a public agency based mostly on "what may happen in the future, instead of what is occurring now" was insufficient to withstand appellate scrutiny. Id. at ¶77.

{¶69} In that case, the agency argued the trial court's award of permanent custody should be affirmed because the mother had a history of making strides toward reunification, but subsequently regressed into the lifestyle that caused the children to be removed. The agency asserted that, even though she was doing well at the time of the

hearing, her future stability was highly questionable. This court disagreed with the agency and reversed the juvenile court's determination, holding:

{¶70} "The weight of the competent, credible evidence shows that, presently, Mrs. Meeker has a suitable home and the ability to care for A.J. [The agency] did not present credible evidence showing that the Meekers were unsuitable parents or unable to take care of A.J. As much of the evidence shows that there have been many changes within the Meeker household, the home is not currently unsafe, and that A.J. wishes to live with his mother, we hold that the court's ruling as to A.J. was against the manifest weight of the evidence, as well as unsupported by sufficient evidence." Id. at ¶91.

{¶71} In the case sub judice, the perceived threat of future potential problems is not only speculative and possibly hollow, it is premised upon facts which, when viewed in the context of this case, do not necessarily connect with Mr. Williamson's actual ability to care for J.F. As discussed supra, the record disclosed that Mr. Williamson met nearly all the demands of the agency in a cooperative fashion. With respect to these points, the following evidence is uncontroverted: Mr. Williamson established paternity; he was psychologically evaluated and deemed mentally and emotionally fit; Mr. Williamson was evaluated for substance abuse problems, the results of which were negative; he participated in and successfully completed two parenting courses; he regularly visited J.F. and demonstrated sound parenting skills; and, according to the agency as well as the GAL, had established a strong bond with J.F.

{¶72} Although Mr. Williamson does not have independent housing and is unemployed, these points, as discussed above, do not necessarily impact his current

ability to care for J.F. and, more importantly, do not, at this point, have a negative impact upon J.F.'s best interests. According to Ms. Carfollo and Mr. Swauger, Mr. Williamson's housing is appropriate. And, although unemployed, Mr. Williamson is in school and has sought employment. The evidence, therefore, does not clearly and convincingly support the magistrate's ruling that terminating Mr. Williamson's parental rights was in J.F.'s best interests. Father and son share a strong bond and, notwithstanding J.F.'s custodial history with his foster family, the evidence demonstrates, at this time, a secure, permanent placement with Mr. Williamson could still be achieved without granting permanent custody to the agency. See R.C. 2151.414(D)(1)(a) – (d). The magistrate's decision was against the manifest weight of the evidence and unsupported by sufficient evidence. We therefore hold the trial court abused its discretion in adopting the magistrate's decision.

{¶73} Mr. Williamson's second and third assignments of error are well-taken.

{¶74} For the reasons discussed in this opinion, the judgment of the Trumbull County Court of Common Pleas, Division of Domestic Relations Juvenile Department awarding permanent custody of J.F. to TCCSB is hereby reversed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.