NO. COA10-272

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

IN THE MATTER OF:

J.M.,	Harnett County
[A Minor Child.]	No. 06 J 178

Appeal by Respondent-Mother from order entered 18 December 2009 by Judge Charles P. Bullock in Harnett County District Court. Heard in the Court of Appeals 20 July 2010.

No brief for Petitioner-Appellee Harnett County Department of Social Services.

Mary McCullers Reece for Respondent-Appellant Mother.

Pamela Newell for the Guardian ad Litem to the Respondent-Appellee Minor Child.

Jones and Jones, P.L.L.C., by Cecil B. Jones, for Intervenor-Appellees Foster Parents.

STEPHENS, Judge.

Respondent, the mother of the minor child John,[1] appeals from a permanency planning order which establishes the permanent plan for John as guardianship and appoints Beth and Bryan Smith,[2] John's foster parents, as John's guardians. For the reasons stated herein, we affirm the order of the trial court.

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[1] "John" is a pseudonym.

[2] "Smith" is a pseudonym.

I. Procedural History and Factual Background

The Harnett County Department of Social Services ("DSS") first became involved with Respondent in 2005 when DSS took custody of her son Paul,[3] John's older brother, due to Respondent's mental health condition and incidents of domestic violence between Respondent and Paul's biological father ("Father").[4] DSS provided Respondent and Father (collectively, "Respondents") with a family services case plan to work towards reunification. Respondents did not participate in the case plan, however, and Paul was placed with his maternal grandmother Alice.

Prior to John's birth, Amanda Messer, a social worker with DSS assigned to Respondents' case, contacted Alice to see if she would be willing to have John placed with her after his birth. Alice declined to accept placement of John in her home because she was overwhelmed by the care that Paul required and did not have the time or financial resources to care for a baby. Upon John's birth in August 2006, DSS filed a petition alleging John was neglected and dependent. DSS again asked Alice if she was willing to take John, and again she declined. Two days after his birth and before he left the hospital, DSS assumed nonsecure custody of John and placed him with the Smiths.

Respondents entered into a case plan with DSS. On 8 December 2006, the trial court entered a consent order in which Respondents consented to the adjudication of John as neglected and dependent.

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[3] "Paul" is a pseudonym.

[4] Paul and John have the same biological father.

The trial court adopted a plan of reunification of John with Respondents. In October 2007, the trial court found that Respondents had not sufficiently complied with their case plan and concluded that reunification efforts would be futile. Accordingly, the trial court changed the permanent plan for John from reunification to adoption.

On 28 November 2007, Petitioner filed a motion to terminate Respondents' parental rights to John. The trial court held a hearing on the petition on 30 May 2008. Despite having monthly contact with DSS regarding Paul, Alice did not inquire about John's well-being and did not express an interest in having John placed with her until two weeks before the termination of parental rights hearing. On 10 July 2008, the trial court entered an order terminating Respondents' parental rights to John. Respondents separately appealed to this Court.

By our unpublished opinion *In re J.M.*, No. 08-1184, 2009 N.C. App. LEXIS 98 (N.C. Ct. App., Feb. 3, 2009), this Court found no error in the trial court's finding that grounds existed to terminate Respondents' parental rights, but reversed and remanded the matter to the trial court for reconsideration as to whether it was in John's best interests for Respondents' parental rights to be terminated. This Court also "strongly recommend[ed] that the trial court and DSS pursue guardianship with John's grandmother, Alice . . . [as] it appear[ed to this Court] that this option . . . was not given proper consideration at the trial level." *Id.* at *25-26.

On 5 March 2009, DSS moved the trial court to conduct a permanency planning hearing. The Smiths were permitted to intervene as parties to the proceedings, and the trial court held a permanency planning hearing on five different days between 28 August and 11 December 2009. By order entered 18 December 2009, the trial court ordered the permanent plan for John as guardianship with the Smiths and appointed the Smiths as John's guardians. Respondent filed notice of appeal on 29 December 2009.[5]

II. Discussion

Appellate review of a permanency planning order is limited to determining whether there is competent evidence in the record to support the trial court's findings of fact and whether the findings support the conclusions of law. *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004). If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. *Id.* The trial court's conclusions of law are reviewed *de novo*. *In re J.S.L.*, 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006).

"The purpose of [a] permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time." N.C. Gen. Stat. § 7B-907(a) (2009). If, at the conclusion of the hearing, the juvenile is not returned home, the court shall consider the following factors and make written findings regarding those factors that are relevant:

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[5] Father did not appeal the permanency planning order and is not a party to this appeal.

> (1) Whether it is possible for the juvenile to be returned home immediately or within the next six months, and if not, why it is not in the juvenile's best interests to return home;
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> (2) Where the juvenile's return home is unlikely within six months, whether legal guardianship or custody with a relative or some other suitable person should be established, and if so, the rights and responsibilities which should remain with the parents;
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> (3) Where the juvenile's return home is unlikely within six months, whether adoption should be pursued and if so, any barriers to the juvenile's adoption;
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> (4) Where the juvenile's return home is unlikely within six months, whether the juvenile should remain in the current placement or be placed in another permanent living arrangement and why;
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> (5) Whether the county department of social services has since the initial permanency plan hearing made reasonable efforts to implement the permanent plan for the juvenile;
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> (6) Any other criteria the court deems necessary.

N.C. Gen. Stat. § 7B-907(b) (2009). Furthermore, the trial court must also make specific findings as to the best plan of care to achieve a safe, permanent home for the juvenile. N.C. Gen. Stat. § 7B-907(c) (2009). Such plan may include appointing a guardian for the juvenile pursuant to N.C. Gen. Stat. § 7B-600 and placing the juvenile in the custody of a relative, private agency offering placement services, or some other suitable person. N.C. Gen. Stat. § 7B-907(c); N.C. Gen. Stat. § 7B-903(a)(2)(b) (2009). However, if the trial court places the juvenile in out-of-home care,

> the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper care and supervision in a safe home, then the court shall order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile.

N.C. Gen. Stat. § 7B-903(a)(2)(c) (2009).

Respondent argues that the trial court erred in finding and concluding that placement with Alice was contrary to the best interests of John. We disagree.

The trial court made the following relevant findings of fact:

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> e. [John] has now been in foster care and out of the parents' home for more than 36 months.
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> h. [John's] current plan is adoption.
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> l. [DSS] was already involved with [Respondent's] family when [John's] mother . . . was pregnant with him. [John's] older brother, [Paul], had previously been removed from [Respondent's] home. [Paul] was living with his maternal grandmother, Alice []. Before [John] was born, Amanda Messer, a social worker with DSS assigned to [Respondent's] case, asked [Alice] on more than one occasion if she would be willing to have [John] placed with her after his birth. [Alice] declined to accept placement.
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> m. [John] was born on August 1, 2006. [DSS] removed [John] from the custody of

his parents two days later, on August 3, 2006, before he left the hospital. [John] was placed with foster parents Beth and Bryan [Smith] on the same day as his removal.

n. From August 3, 2006 until October 5, 2007, DSS pursued a plan of reunification for [John] with his natural parents. [John's parents] were allowed regular visitation with [John]. Other [] family members could also visit at the same time as [John's parents]. [Alice], [John's] maternal grandmother, never visited with [John], and did not attempt to do so, during this time period.

o. Amanda Messer continued to be the social worker assigned to [John's] and [Paul's] cases until February, 2009. In this role, Ms. Messer had regular contact with Alice [] regarding [Paul's] case. Prior to the hearing on termination of parental rights for [John] held on May 30, 2008, [Alice] never asked Ms. Messer about [John] or his health or well-being. [Alice] never asked Ms. Messer, nor any other employee of DSS, that [John] be placed with her before May, 2008.

p. During the more than three (3) years [John] has been in foster care, [Alice] has only sent him one birthday card. She has not sent him any gifts of any kind.

q. [Alice] did not request placement of [John] after reunification efforts with the parents were ceased in October, 2007. She did not make any inquiry of DSS about [John] after reunification efforts were ceased.

r. Alice [] first said that she wanted [John] placed with her approximately two (2) weeks before the termination of parental rights hearing on May 30, 2008. Her interest was expressed through a telephone call with Ms. Penny Bell, attorney for [Respondent]. [Alice] did not contact DSS about potential placement or visitation before the termination hearing. At the time [Alice] spoke with

Ms. Bell, [John] had been in foster care and living with Beth and Bryan [Smith] for more than one year and nine months.

s. Alice [] allowed her grandson [John] to remain in foster care for nearly two years without making any inquiry of DSS about him and without expressing any willingness to have [John] live with her. In fact, [Alice] specifically declined offers of placement.

t. [Alice] appeared at the termination of parental rights hearing in May, 2008 and testified that she was willing to accept placement of [John]. The termination hearing was the first court proceeding at which [Alice] appeared. Several hearings had been held in the case before that date.

u. [Alice] visited one time with [John] after the termination of parental rights hearing, in June, 2009. [John's] older brother [Paul], who is sixteen years of age, also visited on that occasion. The June, 2009 visit is the only time that either [Paul] or [Alice] have ever seen [John] in person. It is the only time they have spoken with him.

v. [Alice] testified at the permanency planning hearing . . . that she was willing to have [John] placed with her and to provide a permanent home. The statements of [Alice] in that regard, and other aspects of her testimony, are not credible. [Alice] has previously refused specific offers of placement, and has failed to inquire of DSS about [John] or his needs or well-being. [Alice] did not seek to see [John] for nearly two years. In addition, [Alice's] testimony at the permanency planning hearing lacks credibility in that she was evasive with respect to questions about her age, health, taxes, income and other matters. The Court's observation of [Alice's] demeanor while testifying also supports its finding that her testimony as to her willingness to accept placement or to provide a permanent home is not credible.

w. Alice[’s] [] testimony to the effect that she reasonably relied on information from her daughter, [Respondent], in not asking DSS about [John] or his situation lacks credibility. [Alice] was aware of [Respondent’s] history of mental illness, personal instability, neglect of her children and lack of credibility. [Alice] also knew that placement of a child in kinship care, as [Paul] had been placed with her, did not prevent efforts at reunification with the natural parents. [Alice] has demonstrated a lack of permanent commitment to this particular child.

x. [John] does not know Alice [] or [Paul] and does not have any actual bond or emotional relationship with either of them.

y. [John] has received excellent care during the more than three (3) years he has been placed in the home of Beth and Bryan [Smith]. All of [John’s] physical, emotional, educational and developmental needs are being met. While in the care of the [Smiths], [John] has developed appropriate peer relationships with other children his age, and he is a leader among children in his age group.

z. [John] has thrived in the [Smith] home, where he is provided with a nurturing environment. He has a strong bond and a mutual, loving relationship with both Beth and Bryan [Smith] and with the children of the [Smiths]. [John] is strongly attached to Mr. and Mrs. [Smith] and their family.

aa. The [Smiths] have a suitable home with sufficient space in which [John] can live. . . . All [John’s] material needs have been met. The [Smiths] have sufficient means to continue to meet [John’s] needs.

. . . .

cc. [John] knows Beth and Bryan [Smith] as his “Mommy” and “Daddy.” Mr. and Mrs.

[Smith] are the only people who have ever parented [John]. [John] knows and regards [the Smiths] as his parents.

dd. The [Smiths] are willing, able and have a strong desire to have physical custody of [John] and to act as his parents in law and fact. The [Smiths] have a strong desire for [John] to become a permanent part of their family. They in fact wish to adopt him if possible.

. . . .

ff. The Guardian Ad Litem recommended to the Court that the permanent plan for [John] continue to be placement in the home of Beth and Bryan Smith, and that the [Smiths] be allowed to adopt [John].

. . . .

hh. [John] needs a permanent home. The [Smiths] will provide such a home immediately. Alice [] had a reasonable time to provide a permanent home prior to the May, 2008 termination of parental rights hearing. [Alice] failed to take reasonable steps to provide a permanent home.

ii. Given [John's] emotional ties to the [Smiths], Alice [] cannot provide a permanent home within a reasonable time.

jj. Removing [John] from his current placement with the [Smiths] would have a devastating and traumatic effect on him, both in the short and long term.

kk. [John] would suffer emotionally and developmentally if his extremely close relationship with Beth and Bryan [Smith] and their family is severed. Among other things, [John's] ability to form lasting bonds and close relationships with other people would be negatively affected for the rest of his life if he were removed from the [Smith] home. In the short term, [John] would suffer extreme trauma and confusion by being removed [f]rom the people he knows as his parents.

Based upon these findings, the trial court concluded, *inter alia*:

> 6. There is not a relative willing and able to provide proper care and supervision for [John] in a safe home.
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> 7. Even if Alice [] is deemed willing and able to provide proper care and supervision in a safe home, placement with [Alice] and outside the home of Beth and Bryan [Smith] is contrary to the best interests of [John].

Respondent first contends that the trial court's finding that "[g]iven [John's] emotional ties to the [Smiths], Alice [] cannot provide a permanent home within a reasonable time" is not supported by the evidence. We disagree.

John has been in the Smiths' home since he was two days old. When the permanency planning order was entered, John had been in the Smiths' home for approximately three years and four months. John had met Alice on only one occasion before entry of the order and received only one birthday card from her during the time he was in foster care. John "needs a permanent home" and "the [Smiths] will provide such a home immediately." Although "Alice [] had a reasonable time to provide a permanent home [for John, she] . . . failed to take reasonable steps to provide a permanent home."

Melanie Crumpler, a licensed clinical social worker, conducted an evaluation to assess John's attachment to the Smiths, Alice, and Paul, and to determine whether, in her opinion, it was in John's best interest to be moved into Alice's care. Crumpler spent approximately 13 hours reviewing John's history, talking with DSS, observing the Smiths, Alice, and Paul with John, interviewing the

parties, and interviewing an employee at the daycare John attended. Crumpler found that John was "strongly attached to Mr. and Mrs. [Smith]" and that he "gravitates to them before anyone else for nurturing, affirmation and comfort." John refers to the other children in the Smith home as "brothers" and "sisters," and he believes that to be true. Crumpler further found that "[i]n all areas of life that are of value to an almost 3 year old, Mr. and Mrs. [Smith] are [John's] parents, in fact, the only parents he knows."

Crumpler noted that John's first meeting with Alice and Paul occurred as a result of the assessment and, thus, it was not expected that John be attached to his grandmother or brother. While John "interacted positively with his grandmother and older brother" during the first and only visit they had together, "[John's] confusion and stress were evident by the end" of the visit and John "began asking for 'Mommy' (Mrs. [Smith])."

Based on her research and observations, her review of the current research pertaining to attachment and child development, and her consideration of John's age at the time he was placed with the Smiths, Crumpler opined "that removing [John] from his current placement with Mr. and Mrs. [Smith] would likely have [a] devastating and traumatic effect on [John]."

Crumpler "strongly recommended" that if the court should determine that it was in John's best interests to be placed with Alice, "visits [should] be facilitated by a supervised visitation center or a clinician who could offer an on-going assessment of

[John's] adjustment and ability to transition to a new home environment[.]"

Amy Hallett, a clinical social worker with DSS, reported that John "has established familial bonds with the family members in the [Smith] home." Hallet testified that John has gotten "very good care" with the Smiths and that "he has a very good attachment with them." She indicated that he refers to Mrs. and Mr. Smith as "Mommy" and "Daddy."

The record evidence indicates that while John is presently secure in the Smith's home and thriving with the "nurturing, affirmation and comfort" they provide, a considerable amount of time and effort would have to be expended in an attempt to transition John into Alice's home. Even if such transition is attempted, there is no guarantee that John would adjust well to his new environment and, thus, any attempt should be closely monitored. Given John's young age, his need for immediate and continued stability and consistency, his secure attachment to the Smiths, and his total unfamiliarity with Alice, there is ample evidence to support the trial court's finding of fact that "Alice [] cannot provide a permanent home within a reasonable time."

Respondent further argues that the italicized portions of the trial court's findings that "removing [John] from his current placement with the Smiths would have [a] devastating and traumatic effect on him, *both in the short term and long term*," and "[John's] ability to form lasting bonds and close relationships with other people *would be negatively affected for the rest of his life* if he

were removed from the [Smith's] home" exceeded Crumpler's testimony and, thus, were not supported by the evidence. Again, we disagree.

Crumpler stated in her report:

> [Alice] underestimated the needs of an infant by stating her opinion that all [John] needed when he was born was "someone to put a bottle in his mouth." . . . Attachment, attending and consistent nurturing are necessary to ensure the healthy physical and emotional growth and development of all mammals. Research has repeatedly demonstrated that the absence of a parent/child attachment from infancy through adolescence literally impacts physical and emotional development of a child.
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> . . . .
>
> It is the finding of this assessment that removing [John] from his current placement with Mr. and Mrs. [Smith] would likely have [a] devastating and traumatic effect on [John].

Removing John from the Smiths would disrupt the "consistent nurturing" that is "necessary to ensure" John's healthy physical and emotional growth and development. Moreover, removing John from "the only parents he knows" would destroy his parent/child attachment with the Smiths which is so vital "from infancy through adolescence [and] literally impacts physical and emotional development of a child." Moreover, it is unrefuted that

> [John] has thrived in the home [of the Smiths], where he is provided with a nurturing environment. He has a strong bond and a mutual, loving relationship with both [the Smiths] and with the children of [the Smiths]. [John] is strongly attached to [the Smiths] and their family.

On the other hand, it is likewise unrefuted that John presently has no bond or attachment with Alice. Furthermore, there

is no guarantee that John and Alice, a complete stranger to John at this point, would ever form the strong bond that John enjoys with the Smiths, especially since, as Crumpler noted, Alice was not part of John's life during the critical first nine months of his life when John was beginning to form such bonds. Placing John in a situation where there is an absence of a parent/child attachment would negatively impact John's physical and emotional development which would have a lifelong negative impact on John. Thus, we conclude that the trial court's findings of fact are supported by competent evidence.

We further conclude that the findings of fact thoroughly support the trial court's conclusion of law that "[e]ven if Alice [] is deemed willing and able to provide proper care and supervision in a safe [] home, placement with [Alice] and outside the home of Beth and Bryan [Smith] is contrary to the best interests of [John]." In addition, the trial court's findings of fact concerning John's immediate need for permanency and the fact that John's emotional ties to the Smiths preclude permanency with Alice within a reasonable period of time adequately address the gradual transition issue. Respondent's argument is overruled. In light of our conclusion, we need not address Respondent's argument that the trial court erred in concluding that Alice was not "willing and able to provide proper care and supervision for [John] in a safe home."

Respondent next argues that the trial court erred in awarding guardianship of John to the Smiths "before giving [John] the opportunity to know his grandmother and brother." We disagree.

The trial court has broad discretion to fashion a permanent plan for a child based upon the best interests of the child. *In re B.W.*, 190 N.C. App. 328, 336, 665 S.E.2d 462, 467 (2008). A trial court's conclusion that the best interests of the child would be served by establishing guardianship as the permanent plan for the child and naming a guardian for the child is reviewed only for an abuse of discretion, and will be overturned only upon a showing that the decision was so arbitrary that it could not have been the result of a reasoned decision. *See In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007) ("We review a trial court's determination as to the best interest of the child for an abuse of discretion.").

Respondent argues that "by ordering a permanent plan of guardianship but allowing the child to know his grandmother and brother before awarding guardianship to either party[,]" the trial court could have "more meaningfully complied with the statutorily mandate[d]" effort to place children with their biological families. We disagree.

The findings cited, *supra*, reveal that John was in the Smiths' home for nearly two years before Alice ever inquired about his well-being. Furthermore, during the more than three years John was in the Smiths' home prior to the entry of the permanency planning order, Alice visited with John only once and sent him only one

birthday card. As a result, John does not know Alice and does not have any actual bond or emotional relationship with her.

On the other hand, John has received excellent care in the home of the Smiths. All of his physical, emotional, educational, and developmental needs are being met and John has thrived in the Smiths' home. John knows and regards the Smiths as his parents, and the Smiths are willing, able, and have a strong desire to have physical custody of John and to act as his parents in law and in fact.

These factual findings, which evidence Alice's lack of involvement with John during the first three years of his life and the successful placement John has with the Smiths, amply justify the trial court's conclusion that guardianship with the Smiths was the appropriate permanent plan for John. We note that the trial court took into consideration the importance of "giving [John] the opportunity to know his grandmother and brother" and found that "[a] plan of guardianship with the [Smiths] will allow [] supervised visitation to occur." Accordingly, the trial court established a visitation schedule with John for Alice and Paul.

We conclude that the trial court did not abuse its discretion by concluding that guardianship with the Smiths was the best plan "to achieve a safe, permanent home for [John] within a reasonable period of time" as contemplated by N.C. Gen. Stat. § 7B-907(a). Respondent's argument is overruled.

Finally, Respondent argues that the trial court erred by excluding evidence regarding the Smiths' actions concerning another

foster child they sought to adopt because it was relevant to the trial court's best interests determination. Again, we disagree.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. N.C. Gen. Stat. § 8C-1, Rule 401 (2009). Generally, all relevant evidence is admissible while irrelevant evidence is inadmissible. N.C. Gen. Stat. § 8C-1, Rule 402 (2009). Thus, "[w]henever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court, subject to the discretionary powers of the trial court to exclude cumulative testimony." *In re D.Y.* __ N.C. App. __, __ 688 S.E.2d 91, 93 (citation and quotation marks omitted), *disc. review denied*, 364 N.C. 129, __ S.E.2d __ (2010). While a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under an abuse of discretion standard, such rulings are given great deference on appeal. *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *appeal dismissed*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

In this case, counsel for Respondent attempted to question Mrs. Smith about another foster child who had been placed in the Smiths' home. The trial court sustained the guardian *ad litem's* objection to the evidence. Counsel for Respondent made an offer of proof which indicated the following: The child lived with the

Smiths for almost a year, and the Smiths were planning to adopt her. While the child's mother first agreed to the Smiths' adoption of the child, she subsequently withdrew her consent. As the Smiths were involved in these proceedings concerning John, and Mrs. Smith did not feel that she had the "emotional wherewithal to fight for two children at the same time[,]" the Smiths requested that the child be removed from their home. The trial judge ruled that the evidence was irrelevant and, thus, inadmissible.

Respondent contends that this evidence was relevant to the trial court's best interests determination because the trial court scrutinized Alice's commitment to John, "and ultimately found that she was lacking because she was unable to take John at birth . . . [but] then refused to hear evidence regarding the Smiths' actions with respect to another child in their home who was in very much the same situation as John." Respondent's argument completely misses the mark.

At issue is the best interest of John, not the child who was removed from the Smith's home. The excluded evidence arguably shows the Smiths' commitment to John in choosing to "fight" for him instead of the other child. Thus, any error in excluding the evidence would have been beneficial, not prejudicial, to Respondent. Furthermore, the evidence is wholly irrelevant to show that John was not "permanently settled" in the Smiths' home, as argued by Respondent. Accordingly, the trial court did not err in sustaining the guardian *ad litem's* objection, and Respondent's argument is overruled.

For the reasons stated herein, the order of the trial court is AFFIRMED.

Judges STEELMAN and ERVIN concur.

Report per Rule 30(e).