

Cite as 2022 Ark. App. 242

**ARKANSAS COURT OF APPEALS**

DIVISION II

No. CV-21-428

CRYSTAL HUTTON

APPELLANT

V.

ARKANSAS DEPARTMENT OF  
HUMAN SERVICES AND MINOR  
CHILD

APPELLEES

**Opinion Delivered** May 18, 2022

APPEAL FROM THE LAWRENCE  
COUNTY CIRCUIT COURT  
[NO. 38JV-17-25 ]

HONORABLE ROB RATTON,  
JUDGE

AFFIRMED

---

**WAYMOND M. BROWN, Judge**

Appellant Crystal Hutton appeals after the Lawrence County Circuit Court terminated her parental rights to her child, JBH (DOB 02-17-14). Appellant argues on appeal that (1) the Arkansas Department of Human Services (“DHS”) failed to meet its burden of proof as it presented no medical evidence, despite the allegations supporting termination being firmly rooted in unremedied medical neglect and continuing medical risk; (2) that even if the circuit court could properly consider the required statutory grounds and best interest in the absence of medical-expert testimony, the evidence presented clearly demonstrated that time and resources changed the dynamic—not removing JBH from his mother’s custody—as everyone charged with JBH’s care, including feeding and behavioral control, faced the same struggles Crystal faced, but which improved as JBH grew in age and

maturity; and (3) the circuit court abused its discretion in disallowing Crystal to introduce video evidence that clearly and pointedly negated the narrative asserted by DHS that Crystal could not control JBH when he was aggressive, and that error prejudiced Crystal because the court made findings against Crystal that the video refutes. We affirm.

JBH was admitted to Arkansas Children's Hospital (ACH) on February 16, 2017, due to being unable to walk and being in significant pain. He was subsequently diagnosed with moderate to severe malnutrition that led to multiple nutritional deficiencies, including scurvy and osteoporosis. He was also diagnosed with a food-aversion disorder. On March 1, DHS received a report of failure to thrive, malnutrition, and medical neglect after appellant had been consistently argumentative and noncompliant with any medical treatments and/or recommendations set forth by hospital staff. DHS contacted the family the same day and took a seventy-two-hour hold on JBH after concluding that appellant did not have the insight or mental capacity to make informed medical decisions regarding JBH's nutritional deficiencies. At the time of removal, JBH had just turned three and weighed only twenty-five pounds. DHS filed a petition for emergency custody and dependency-neglect and an accompanying affidavit on March 6.<sup>1</sup> The circuit court entered an ex parte order for emergency custody that same day. A probable-cause hearing took place on March 7. In the order entered the same day, the circuit court found that probable cause existed at

---

<sup>1</sup>Appellant filed a response to the petition on April 10, denying the material allegations of DHS's petition and claiming that JBH did not begin to deteriorate until he was in ACH. She maintained that prior to entering ACH, JBH was able to eat on his own and did not need a feeding tube.

the time of JBH's removal and continued to exist such that it was necessary for JBH to remain in DHS custody.

JBH was adjudicated dependent-neglected in an order filed on May 16. The circuit court found that JBH was subjected to medical neglect and that appellant had been noncompliant with medical treatment. The order stated in pertinent part:

[JBH] was subjected to medical neglect. [Handwritten annotation.] ~~By his mother.~~ The court notes that the mother took the juvenile to medical providers on numerous occasions. [End handwritten annotation.] The juvenile was admitted to Arkansas Children's Hospital originally due to a refusal to ambulate. He was diagnosed with being "markedly malnourished with multiple complications of his malnutrition including Hypothyroidism, vitamin D Deficiency osteoporosis and scurvy." Dr. Rachel Clingenpeel determined the proximate cause of his malnutrition was suspected to be an oral aversion but [handwritten annotation] ~~medical neglect~~ lack of recognition and understanding [end handwritten annotation] allowed it to progress to the severity reach at the time of removal which caused substantial harm to the juvenile. If his condition had continued unremedied, then, according to Dr. Clingenpeel, it would have been life threatening or potentially fatal. The hospital staff expressed concern about the mother's lack of insight regarding the juvenile's medical condition and her ability to care for him and make safe decisions for him. Medical records regarding the juvenile from Arkansas Children's hospital including a six-page summary from Dr. Clingenpeel, [handwritten annotation] and medical records from Pediatric Day Clinic [end handwritten annotation] were introduced into evidence.

The circuit court set the case's goal as reunification with a concurrent plan of adoption or permanent guardianship or permanent custody. Appellant was ordered to submit to a neuropsychological evaluation and follow the recommendations; get a physical exam; submit a completed affidavit of financial means and affidavit of background information to the court and to the Department; cooperate with the Department, comply with the case plan, and obey the orders of the court; view "The Clock is Ticking" video; remain drug-free and submit to random drug screens, with a refusal to comply and/or failure to produce a specimen within an hour being deemed a positive test ; keep the Department

informed of current address and notify the Department of any change in address or marital status; if requested by the Department, submit to a drug-and-alcohol assessment and follow the recommendations thereof and provide a copy of the results to the Department; submit to a psychological evaluation and follow the recommendations thereof and provide a copy of the results to the Department; participate in and complete parenting classes; obtain and maintain clean, safe and stable housing, with utilities turned on; obtain and maintain stable employment or sufficient income to support the family; resolve all criminal issues; allow the Division of Children and Family Services access to the home; if requested by the Department, attend and participate in counseling and follow the recommendations thereof; and if requested by the Department, attend AA/NA meetings and provide proof of attendance to the Department.

On June 22, 2017, appellant received a forensic psychological evaluation from Dr. Kristin Addison-Brown with NEA Neuropsychology. As a result, appellant was diagnosed with autism spectrum disorder (ASD) level 1, avoidant restrictive food intake disorder, borderline intellectual functioning (with an IQ of 72), obsessive compulsive personality disorder, and medical issues. Among other things, it was recommended that appellant seek a medical workup and inpatient treatment for her eating issues, an evaluation by a dietician, family therapy, and close collaboration between her providers. Dr. Addison-Brown opined that appellant's ASD and borderline intellectual functioning would create substantial difficulty with learning, recalling, and applying and comprehending complex information; and further, that appellant's own feeding disorder and lack of insight would preclude her ability to understand JBH's needs and rationale and for her to consistently and accurately

implement recommendations for JBH's dietary intake. The evaluation suggested that intense treatment would likely be required.

In review orders entered on August 22 and November 14, the circuit court found that appellant was in compliance with the case plan and was demonstrating progress.

The circuit court held a permanency-planning hearing (PPH) beginning on February 20, 2018, and concluding on March 6. In the order entered on March 6, the circuit court found that appellant had complied with the case plan and orders of the court. It found that appellant was diligently working toward reunification and opined that placement of JBH in appellant's home should occur no later than three months from the date of the hearing. Appellant was ordered to cooperate with DHS, comply with the case plan, and obey the orders of the court; obtain and maintain stable income and housing; maintain a form of transportation or access to transportation for her appointments and to get to JBH's appointments; continue counseling; and maintain contact with DHS and discuss things with them.

In June 2018, a fifteen-month-review hearing was held at which the circuit court determined that the case goal should be permanent relative custody with a concurrent goal of reunification. The circuit court noted that although appellant had complied with the case plan, she "has had issues understanding how hot her home gets during visits and how her son is sweating. She has also struggled with disciplining [JBH] and with getting [him] to eat (he does so when told/redirected to eat by [DHS] staff). She also has issues with adapting when her schedule is disrupted or interrupted and had shown that she has to be reminded about [JBH's] feeding times." In July, JBH was placed in a provisional foster home with

relatives, Cami and Bryan Alexander, who had come forward.<sup>2</sup> In September, appellant began exercising eight-hour visits with JBH.

A review hearing was held on September 18. In the order filed on February 13, 2019, the circuit court noted that appellant had requested special accommodations under the ADA and that her visitation with JBH would increase from four hours once a week, to eight hours.<sup>3</sup>

On October 1, 2018, appellant filed a motion for services under the ADA as well as other things. DHS filed a response and supporting brief in response to appellant's motion on October 11, acknowledging that appellant's conditions are covered disabilities under the ADA and contending that it had attempted to provide individualized support and efforts to assist reunification between appellant and JBH.

Another review hearing was held on November 13. In the order filed on February 13, 2019,<sup>4</sup> the circuit court ordered that JBH be referred for additional testing to determine whether he has autism.

On January 7, 2019, DHS filed a motion to reduce or modify the visitation schedule, contending that appellant had not made appreciable progress during the visits and that she was less able to control JBH and effectively parent him than when the visits first began. DHS further claimed that JBH had been adversely affected by the visits in that he had shown

---

<sup>2</sup>Prior to this placement, JBH had stayed shortly in different foster homes after leaving the home of Jeanette Frye.

<sup>3</sup>The order mistakenly said once a day instead of once a week.

<sup>4</sup>The presiding judge, Judge Kevin King, passed away on January 18, 2019.

numerous behavioral problems that had gone uncorrected by appellant and that those behaviors “had flowed over into the foster home and school.” Appellant responded on January 23, denying the material allegations of DHS’s motion.

A PPH began on March 25, but was recessed. In the order filed on April 26, the circuit court denied DHS’s motion to reduce visitation. Instead, it found that the visit should be broken into two four-hour sessions, with the first four hours being a “working visit” in which DHS can offer instruction to appellant on caring for JBH, and the second four hours being solely “recreational” with no interference from DHS, although DHS would be allowed to observe this portion of the visits. Appellant was ordered not to use any form of corporal punishment during either part of the visits, and the foster parents were also ordered not to use corporal punishment to correct JBH. DHS was ordered to refer appellant and JBH to family counseling.

DHS filed a motion to change the goal to relative guardianship and/or relative custody on October 8. In the motion, DHS contended that JBH was in foster-care placement with relatives who were willing to make a long-term commitment to his health, safety, and welfare. It noted that appellant had not remedied the issues that caused removal, that JBH could not be returned home to appellant, and that it was in his best interest to be in an alternate permanent placement. Appellant filed a response on October 11 denying the material allegations of the motion. She asked that JBH be returned to her custody and for other just and proper relief she was entitled to.

A hearing was held on October 15, and a recess order was entered on July 7, 2020.<sup>5</sup> The circuit court noted that the PPH that was continued in March remained unfinished.

DHS filed a petition for the termination of parental rights on July 14, 2020. It alleged three grounds for termination: twelve months failure to remedy; subsequent other factors; and aggravated circumstances based on the fact the JBH was found to be dependent-neglected as a result of abuse or neglect that endangered his life and that there is little likelihood that further services will result in successful reunification.<sup>6</sup> Appellant filed a response on July 29, denying the material allegations in DHS's petition.

The PPH took place from August 19–21, 2020. In the order filed on December 17, the circuit court found that appellant had not made significant measurable progress toward remedying the conditions that caused JBH's removal. The case goal was changed to adoption.

DHS filed an amended petition for the termination of appellant's parental rights on February 25, 2021. The grounds for termination were the same as the grounds in the initial petition. DHS also noted in its petition that since the goal of the case was changed, appellant had canceled family counseling and failed to take advantage of in-person visitation and counseling, opting instead for Zoom visits.

---

<sup>5</sup>Judge King's replacement, Judge Tom Garner, also passed away during the pendency of this case on November 3, 2019.

<sup>6</sup>The petition stated "successful termination," but this appears to be a typographical error.



The termination hearing took place March 10, 11, 12, and 18. At the time of the termination hearing, JBH was in the foster home of Judy Reinerston.<sup>7</sup> The circuit court took the matter under advisement at the conclusion of the hearing and requested that the parties submit their closing arguments in brief form by noon on April 5. All parties complied, and on June 17, 2021, the circuit court entered a letter opinion granting DHS's petition. The termination order was filed on July 1. The circuit court granted DHS's petition on all grounds alleged. The order stated in pertinent part:

7. The Court finds that the Department has proven by clear and convincing evidence that the petition for termination should be granted. Specifically, the Court finds as follows:

- a. [JBH] came into care on March 1, 2017, and has been in foster care for more than four years. He is entitled to permanency.
- b. At the time [JBH] was brought into care he was diagnosed with being markedly malnourished and had multiple complications of malnutrition including hypothyroidism, Vitamin D deficiency, osteoporosis and scurvy. At the time of removal [JBH's] condition was life threatening and potentially fatal.
- c. The Department of Human Services has provided services to Crystal Hutton for reunification including a forensic psychological evaluation, inpatient and outpatient treatment for Crystal Hutton's eating disorders, individual counseling, working with a psychologist to develop parenting techniques, nutrition education, parenting classes, visitation and modeling and instruction by her caseworker and others. The department has made a meaningful effort to assist Crystal in remedying the conditions that caused removal.
- d. Crystal Hutton has been diagnosed as being on the Autism Spectrum, having borderline intellectual functioning, avoidant restrictive food intake disorder, and Obsessive-Compulsive Personality Disorder. The Department has made reasonable accommodations for Ms. Hutton's disabilities by the numerous services they have provided. Ms. Hutton

---

<sup>7</sup>The Alexanders requested that he be removed from their home in July 2020.

has demonstrated an unwillingness to change so that she can meet the needs of [JBH].

- e. Despite these services, Crystal Hutton has not remedied the conditions which caused the removal of [JBH]. Ms. Hutton has failed to use the techniques she has been taught to get [JBH] to eat. Ms. Hutton's attempts to feed [JBH] typically turn into an argument between [JBH] and Ms. Hutton which results in Ms. Hutton becoming upset and emotional. This results in [JBH] not getting his required number of calories.
- f. Since being placed in foster care, [JBH] has shown steady improvement in his ability to eat and gain weight.
- g. Crystal Hutton makes inappropriate statements to [JBH]. For example she has stated "he would never be fat, that fat people are lazy." Ms. Hutton has stated to [JBH] that DHS stole him from her. Ms. Hutton has told [JBH] that he would not have to do homework when he comes home, and that he would not have to follow rules.
- h. Ms. Hutton has continued to maintain that [JBH] was medically kidnapped and she doesn't need to take parenting instruction from other people.
- i. Crystal Hutton has refused to have in-person visits with [JBH] since August of 2020.
- j. Crystal Hutton has no regular employment or source of income to support or provide for [JBH], she has refused to apply for food stamps.
- k. Crystal Hutton has refused to allow DHS to have complete access to her home. She will not allow DHS to enter a particular bedroom.
- l. The Court finds that [JBH] has been out of Ms. Hutton's home for over 48 months, and that based on the testimony of Witnesses, the reason for removal has not been remedied and that there is little, if any likelihood that the conditions would ever be remedied, the court also finds that DHS made meaningful and reasonable efforts to assist Ms. Hutton in remedying these conditions.
- m. The Court finds that [JBH] is adoptable, and it is likely that [JBH] will be adopted.

- n. The Court finds that [JBH] would be at risk of harm if returned to the custody of his mother based on the above findings.
- 8. Specifically, at [sic] to the Grounds, the Court finds the following grounds have been proven by clear and convincing evidence:
  - a. Ark. Code Ann. 9-27-341(b)(3)(B)(i)(a) the juvenile has been adjudicated dependent neglected, has continued out of the home for twelve months and despite a meaningful effort by the department to rehabilitate the parents and correct the conditions which caused removal, those conditions have not been remedied. As previously noted, [JBH] was removed from the home of the mother on March 1, 2017, adjudicated dependent neglected on May 16, 2017, and has remained out of the home of the mother for more than four years. Despite a meaningful effort by the department to rehabilitate the mother and correct the conditions which caused removal, those conditions have not been remedied the parent. Crystal Hutton still cannot appropriately feed [JBH] and exhibits behavior that shows a lack of understanding of what is necessary to address this issue.
  - b. Ark. Code Ann. 9-27-341(b)(3)(B)(vii) that there are other factors or circumstances arose subsequent to the filing of the initial petition for dependency neglect that demonstrate that the placement of the juvenile is contrary to the juveniles health safety or welfare and despite the offer of appropriate family services, the parents have manifested the incapacity or indifference to remedying the subsequent factors or rehabilitate the circumstances which prevent placement of the juvenile in the custody of the parent. Subsequent to removal, Crystal has continued to have problems parenting [JBH] appropriately. Despite numerous services by the Department to assist Crystal in parenting [JBH], she has demonstrated an unwillingness to change to meet the needs of [JBH] and she has stated that she does not need to take parenting instructions from other people. Further, Crystal has failed to follow the case plan and Court orders in her failure to obtain a stable source of income or even apply for food stamps, allow the department into her home, or maintain appropriate behavior during visitation. The Court specifically finds the Department of Human Services has made reasonable accommodations in accordance with the Americans with Disabilities Act and Crystal Hutton has had meaningful access to reunification services.
  - c. Ark. Code Ann. 9-27-341(b)(3)(B)(ix) aggravated circumstances exist in this case, in that there is little likelihood that further services to the family will result in successful reunification, and [JBH's] life was

endangered. Ms. Hutton is unwilling to make changes to meet the needs of [JBH] and has stated that she does not need parenting advice from other people. There is little likelihood that further services to the family can remedy this.

9. The Court finds by clear and convincing evidence that it is in the best interest of the juvenile to terminate parental rights. In making this finding, the court specifically considered (A) the likelihood that the juvenile will be adopted if the termination petition is granted, and (B) the potential harm on the health and safety of the juvenile caused by returning the juvenile to the custody of the parent(s).

10. The Court finds the testimony of the [sic] Tasha Meeks to be credible and the Court finds that [JBH] is adoptable, and it is likely that he will be adopted. The Court further finds that [JBH] would be at risk of harm if he was returned to the home of his mother, based on all the findings that have been made previously.

Appellant filed a timely notice of appeal on July 2.

A circuit court's order terminating parental rights must be based on findings proved by clear and convincing evidence.<sup>8</sup> Clear and convincing evidence is defined as that degree of proof that will produce in the fact-finder a firm conviction as to the allegation sought to be established.<sup>9</sup> On appeal, the appellate court reviews termination-of-parental-rights cases de novo but will not reverse the circuit court's ruling unless its findings are clearly erroneous.<sup>10</sup> A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made.<sup>11</sup> In determining whether a finding is clearly erroneous, an appellate

---

<sup>8</sup>Ark. Code Ann. § 9-27-341(b)(3) (Supp. 2021).

<sup>9</sup>*Posey v. Ark. Dep't of Health & Hum. Servs.*, 370 Ark. 500, 262 S.W.3d 159 (2007).

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

court gives due deference to the opportunity of the circuit court to judge the credibility of witnesses.<sup>12</sup>

In order to terminate parental rights, a circuit court must find by clear and convincing evidence that termination is in the best interest of the juvenile, taking into consideration (1) the likelihood that the juvenile will be adopted if the termination petition is granted; and (2) the potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent.<sup>13</sup> The order terminating parental rights must also be based on a showing by clear and convincing evidence of one or more of the grounds for termination listed in section 9-27-341(b)(3)(B). However, only one ground must be proved to support termination.<sup>14</sup>

The intent behind the termination-of-parental-rights statute is to provide permanency in a child's life when it is not possible to return the child to the family home because it is contrary to the child's health, safety, or welfare, and a return to the family home cannot be accomplished in a reasonable period of time as viewed from the child's perspective.<sup>15</sup> Even full compliance with the case plan is not determinative; the issue is whether the parent has become a stable, safe parent able to care for his or her child.<sup>16</sup> Moreover, a child's need for permanency and stability may override a parent's request for

---

<sup>12</sup>*Id.*

<sup>13</sup>Ark. Code Ann. § 9-27-341(b)(3)(A)(i) & (ii).

<sup>14</sup>*Reid v. Ark. Dep't of Hum. Servs.*, 2011 Ark. 187, 380 S.W.3d 918.

<sup>15</sup>Ark. Code Ann. § 9-27-341(a)(3).

<sup>16</sup>*Cobb v. Ark. Dep't of Hum. Servs.*, 2017 Ark. App. 85, 512 S.W.3d 694.

additional time to improve the parent's circumstances.<sup>17</sup> Finally, a parent's past behavior is often a good indicator of future behavior.<sup>18</sup>

Appellant makes three arguments challenging the circuit court's termination of her parental rights: (1) that DHS failed to meet its burden of proof as it presented no medical evidence, despite the allegations supporting termination being firmly rooted in unremedied medical neglect and continuing medical risk; (2) that even if the circuit court could properly consider the required statutory grounds and best interest in the absence of medical-expert testimony, the evidence presented clearly demonstrated that time and resources changed the dynamic—not removing JBH from his mother's custody—as everyone charged with JBH's care, including feeding and behavioral control, faced the same struggles Crystal faced, but which improved as JBH grew in age and maturity; and (3) the circuit court abused its discretion in disallowing Crystal to introduce video evidence that clearly and pointedly negated the narrative asserted by DHS that Crystal could not control JBH when he was aggressive, and that error prejudiced Crystal because the court made findings against Crystal that the video refutes.

In her first point on appeal, appellant contends that DHS failed to meet its burden because it did not present any expert medical evidence to support its position that JBH would continue to be at risk if returned to appellant's custody. She maintains that to prove that JBH continued to be at risk in regard to malnutrition, expert medical testimony is required. She further contends that she presented the only medical expert opinion from Dr.

---

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

Carol Campbell,<sup>19</sup> who opined that any risk to JBH would be “minimal” considering that he is older, can communicate clearly, can feed himself, and is seen by multiple caregivers a day, making it easier to discern if he is having malnutrition issues. Appellees contend that we should reject this argument for a number of reasons: (1) it is not preserved for our review; (2) appellant’s interpretation of the circuit court’s findings at the adjudication hearing is inaccurate, and to the extent she wishes to challenge those findings, the time has passed for her to do so; (3) there is no requirement for the circuit court to consider medical evidence in order to terminate a parent’s parental rights; and (4) even if the circuit court was required to consider medical evidence before granting termination in this case, that information was at the circuit court’s disposal. We agree with appellees that appellant’s argument is not preserved for our review. There is no indication that appellant made this argument before the circuit court during the hearing or even in her closing brief. She hinted that DHS’s case may have been stronger had they presented expert medical testimony and that DHS’s failure to put on current medical evidence was “mindboggling,” but she never maintained that DHS failed to meet its burden of proof because it did not put on expert medical evidence of potential harm. Even in termination cases, we will not address arguments raised for the first time on appeal.<sup>20</sup>

As her second point on appeal, appellant contends that even if expert medical evidence was not required, her parental rights should not have been terminated because the

---

<sup>19</sup>There is no indication that Dr. Campbell, a nurse practitioner, was qualified as an expert by the circuit court in this case.

<sup>20</sup>*Sills v. Ark. Dep’t of Hum. Servs.*, 2018 Ark. App. 9, 538 S.W.3d 249.

evidence presented clearly demonstrated that time and resources changed the dynamic—not removing JBH from his mother’s custody—as everyone charged with JBH’s care, including feeding and behavioral control, faced the same struggles Crystal faced, but which improved as JBH grew in age and maturity. Here, the circuit court’s termination of appellant’s parental rights was based on three separate grounds. Only one ground is needed to support termination. DHS pled that appellant’s parental rights should be terminated because although JBH had been out of her custody for over twelve months, appellant had not remedied the conditions that caused removal.<sup>21</sup> DHS removed JBH from appellant’s custody on March 1, 2017, while JBH was a patient at ACH, alleging medical neglect, failure to thrive, and malnutrition. DHS also stated that appellant lacked the insight or mental capacity to make informed medical decision for JBH. JBH was adjudicated dependent-neglected on May 16 due to his oral aversion and appellant’s lack of recognition and understanding that allowed it to progress to the severity reached at the time of removal, causing him substantial harm. The adjudication order stated that, according to Dr. Clingenpeel, if JBH’s condition had continued unremedied, it would have been life threatening or potentially fatal. The evidence showed that due to JBH’s condition, he required monitoring, redirection, and patience during meals for him to eat the required number of calories to stay healthy. Despite being given a case plan explaining what was expected, appellant still could not get JBH to eat most times and often required the assistance of DHS or some other person assigned to the case. In fact, there was never a point that she was able to show that she understood the necessity of JBH eating a full meal or that she was

---

<sup>21</sup>Ark. Code Ann. § 9-27-341(b)(3)(B)(i)(a).



able to feed him on her own without being overwhelmed. Additionally, appellant refused instruction and direction and opined that she did not need anyone to tell her how to parent JBH. She also maintained that she did not cause JBH's removal. However, it was appellant's inability to appreciate JBH's eating disorder that led to his being placed in DHS's custody. Four years into the case, appellant still lacked the insight needed to ensure that JBH would not revert to malnutrition. Appellant's case was further complicated when she refused in-person visitation and opted for Zoom instead. The circuit court consistently made reasonable-efforts findings on the part of DHS, and appellant does not argue that she did not receive the necessary services to achieve reunification. To the extent that appellant argues that she was the only one required to follow the case plan and correct the issue(s) that caused removal, she has failed to cite any authority requiring foster parents to also work toward remedying the issue that caused a child's removal from the home. We will not consider an argument, even a constitutional one, when the appellant presents no citation to authority or convincing argument in its support, and it is not apparent without further research that the argument is well taken.<sup>22</sup> And even if there were such a requirement, the evidence showed that JBH thrived<sup>23</sup> while in foster care and gained over ten pounds during this time. Appellant also contends that time and resources have resolved the issues that caused removal, not the removal of JBH from her custody. In any case, she argues that the issue has been resolved, thus making this ground inapplicable. The evidence does not support this

---

<sup>22</sup>See *Wallace v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 67, 595 S.W.3d 396.

<sup>23</sup>His feeding tube was removed in the summer of 2019, and he has been able to eat all of his calories by mouth with encouragement.

contention. Appellant seems to be requesting that we reweigh the evidence in her favor; however, we do not act as super fact-finder or second-guess the circuit court's credibility determinations.<sup>24</sup> Accordingly, we affirm the circuit court's finding that appellant failed to remedy the conditions that caused removal.

Appellant does not challenge the circuit court's adoptability finding. However, she maintains that the evidence was insufficient for the circuit court to find that JBH would be at risk if returned to her custody. Adoptability and potential harm are merely factors to be considered—they are not elements of the cause of action and need not be established by clear and convincing evidence.<sup>25</sup> Rather, after considering all the factors, the circuit court must find by clear and convincing evidence that termination of parental rights is in the best interest of the child.<sup>26</sup> In considering potential harm caused by returning the child to the parent, the circuit court is not required to find that actual harm would result or affirmatively identify a potential harm.<sup>27</sup> Potential harm must be viewed in a forward-looking manner and in broad terms. It is well settled that a parent's past behavior is an indicator of likely potential harm should the child be returned to the parent's care and custody.<sup>28</sup> Here, the potential harm that JBH would face in appellant's custody is obvious because at no time during the case did she show the ability to feed JBH on her own or that she could appreciate

---

<sup>24</sup>*Gamble v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 404, 636 S.W.3d 368.

<sup>25</sup>*Miller v. Ark. Dep't of Hum. Servs.*, 2021 Ark. App. 280, 626 S.W.3d 136.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>*Gonzalez v. Ark. Dep't of Hum. Servs.*, 2018 Ark. App. 425, 555 S.W.3d 915.

how important it was for him to consume a certain number of calories in order to gain and maintain weight. If appellant could not do these things while being watched, it is highly doubtful that she will be able to do it when no one is around to monitor her. Appellant also argues that “to the extent that any risk still remained, *all other adults* who cared for him could do nothing differently from Crystal.” As stated above, the evidence showed that JBH was able to thrive in foster care and gained ten pounds during this time. None of his other caregivers reported that they could not get him to eat full meals, although it sometimes took up to two or three hours for him to do so. Additionally, the statute requires the circuit court to consider the potential harm a child might face if returned to the parent’s home, not if the child remains in foster care. Appellant has failed to cite any authority that may suggest otherwise. Thus, we affirm the circuit court’s finding that the termination of appellant’s parental rights is in JBH’s best interest, including the finding that he would be at risk of potential harm if returned to appellant’s custody.

Finally, appellant argues that the circuit court erred by disallowing her to introduce video evidence that clearly and pointedly negated the narrative asserted by DHS that appellant could not control JBH when he was aggressive, and that error prejudiced appellant because the court made findings against her that the video refutes. During the testimony of Tasha Meeks, DHS family service worker, appellant attempted to introduce two twenty-minute videos into evidence. One video was being introduced to refute DHS’s contention that appellant did not know how to handle JBH when he was throwing a tantrum, and the other one was an attempt to show that JBH did not know his *ad litem* and to get her removed from the case. DHS objected to the introduction of the videos because it had

received them after the deadline for discovery. The circuit court ordered that all witnesses and exhibits should be disclosed by February 24, 2021. DHS did not receive the exhibit until March 1. The ad litem also denied being able to view the evidence before the deadline. The circuit court did not allow the exhibit to be entered into evidence since it was provided after the deadline. Appellant's counsel then made the following statement:

Okay. So it's still eight days before trial, if it's -- if it was on the 1st, and I thought I had sent it earlier. I can't find anything earlier than the first. But I had provided all of those to Ms. Miles, whether she could not get the link open or not, I had provided it to her months earlier. She's seen it or had the opportunity to see it. It still was provided eight days prior to trial and this is purely rebuttal because they have not given any dates. And today's the first day that they have given actual dates of these allegations of incidents that have happened or allegedly happened.

The circuit court maintained its ruling. Appellant's counsel then stated that he would proffer the videos "at some point." The videos were subsequently put on a USB drive and proffered. Appellant now argues that the circuit court abused its discretion in denying her request to admit the videos into evidence as a sanction for violating discovery. She contends that the circuit court's sanction was an abuse per se when it did not look at the circumstances surrounding the violation before summarily excluding the evidence based on discovery deadlines. Arkansas Rule of Civil Procedure 37(b)(2)(B) provides that if a party fails to obey an order to provide discovery, the circuit court in which the action is pending "may make such orders [regarding] the failure as are just," including "[a]n order . . . prohibiting [the party] from introducing designated matters into evidence[.]" The imposition of sanctions for the failure to make discovery rests in the circuit court's discretion, and its exercise of

discretion in granting Rule 37 sanctions for discovery violations is “repeatedly upheld.”<sup>29</sup> Finally, “the circuit court need not find a willful or deliberate disregard of discovery rules before imposing Rule 37 sanctions.”<sup>30</sup>

Here, the circuit court entered a scheduling order that required discovery to be completed by February 24. The evidence shows that appellant did not present DHS with the exhibit until March 1. Appellant’s counsel did not dispute that the evidence was sent to DHS after the deadline but attempted to offer an excuse to explain the delay. However, the circuit court declined to allow the videos in evidence once it was shown that they were provided after the discovery deadline. Appellant maintains that this is per se abusive; however, the circuit court did not prevent counsel from offering an excuse, it just did not change its ruling once the excuse was offered. A circuit court has wide discretion when dealing with a party’s failure to follow a discovery deadline, including preventing a party from introducing something into evidence. That is exactly what this circuit court chose to do, and we cannot say that this was an abuse of discretion.

Even if the circuit court disallowed the evidence in error, appellant cannot prove prejudice. Appellant testified about her interaction with JBH when he was having a tantrum; therefore, video evidence from that day would only be cumulative of evidence that had already been allowed in. Exclusion of evidence is not prejudicial if the same evidence was introduced through another source and was before the trier of fact for its consideration.<sup>31</sup>

---

<sup>29</sup>*Nat’l Front Page, LLC v. State ex rel. Pryor*, 350 Ark. 286, 291, 86 S.W.3d 848, 850 (2002).

<sup>30</sup>*Id.*

<sup>31</sup>*Garner v. Ark. Dep’t of Hum. Servs.*, 2022 Ark. App. 33, 639 S.W.3d 421.

There was also no prejudice in disallowing the video showing that JBD did not seem to know his ad litem because it had nothing to do with the termination of appellant's parental rights.

Affirmed.

ABRAMSON and KLAPPENBACH, JJ., agree.

*Leah Lanford*, Arkansas Commission for Parent Counsel, for appellant.

*Ellen K. Howard*, Ark. Dep't of Human Services, Office of Chief Counsel, for appellee.

*Dana McClain*, attorney ad litem for minor child.