DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE THE MATTER OF:	)	No. 1 CA-CV 09-0366
	)	
JOEL SALAS,	)	DEPARTMENT C
	)	
Petitioner/Appellee,	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
v.	)	Rule 28, Arizona Rules
	)	of Civil Appellate
CELINA HERNANDEZ,	)	Procedure)
	)	
Respondent/Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. FC 2006-050026

The Honorable Ruth H. Hilliard, Judge

AFFIRMED IN PART; REMANDED IN PART

Gust, Rosenfeld P.L.C. Phoenix
By Melanie G. McBride
Attorneys for Respondent/Appellant

D O W N I E, Judge

¶1 Celina Hernandez ("Mother") appeals from custody and parenting time orders entered by the family court. For the reasons that follow, we remand for additional findings regarding

domestic violence and child abuse; we affirm the family court's judgment in other respects.

FACTUAL AND PROCEDURAL HISTORY

¶2 Mother and Joel Salas ("Father") are the parents of three boys: E.H., born September 8, 2000; J.S., born October 7, 2002; and A.S., born July 9, 2006.[1] Mother and Father never married, but at times lived together with the children.

¶3 In January 2006, Father filed a paternity petition as to E.H. and J.S., asking, *inter alia,* for a joint custody order. On January 23, 2006, the petition was reportedly served on Mother "at the usual place of abode 2907 N. 40th Dr. Phoenix, AZ 85019, by leaving a copy with Mary Hernandez, mother, authorized to accept." Mother did not respond to the petition. On February 21, Father filed an application for entry of default and mailed a copy to Mother at the Phoenix address where service was effectuated. On April 20, 2006, the court issued a Default Judgment of Paternity, awarding joint custody of E.H. and J.S. to the parties and naming Father as the primary residential parent.

¶4 Sometime after April 2006, Mother and Father reconciled and lived together with the two younger boys. In July, Mother went to Colorado for the birth of A.S. because she

[1] The record includes various dates of birth for A.S. We use the date contained in the November 21, 2008 ruling.

had state-provided medical coverage there. E.H. and J.S. stayed with Father.

¶5 After Mother left, Child Protective Services ("CPS") investigated a report that the paternal grandfather hit E.H. with a belt and grabbed him by the arm, causing "several imprint bruises" on his arm and "a two-inch long red mark on his back." The CPS investigation was closed, with the allegation unsubstantiated. In August 2006, CPS investigated a report that E.H. was bruised on his nose and mouth. E.H. reported that Mother "showed up for some unknown reason," and E.H. wanted to leave with her, but Father would not let him. When Mother left, E.H. "cried so long and so hard that his father slapped him to make him be quiet." The CPS investigation was closed, with the allegations unsubstantiated.

¶6 On September 15, 2007, Mother reported to police that Father had assaulted her the previous night and had threatened to kill her in the past. Father admitted "get[ting] in [Mother's] face but only because he was angry and frustrated." Four days later, Mother obtained an order of protection against Father. She moved to a domestic violence shelter. Father was later convicted of misdemeanor assault against Mother.

¶7 On October 16, Father filed a petition to modify custody, alleging Mother was keeping the children's whereabouts secret. He asked for sole custody, with supervised parenting

time for Mother. Father also filed a paternity petition regarding A.S., making the same custody and parenting time requests. Lastly, Father filed an "Emergency Motion for Civil Warrant Returning Children to Petitioner."

¶8 Mother admitted Father's paternity as to all three boys. In response to Father's petition, she sought sole custody, with restricted parenting time for Father.

¶9 In November 2007, Mother reported to the police that E.H. was injured while with Father. E.H. told officers his teenaged uncle became angry and struck him on the arm, "causing a half dollar sized welt." Additionally, the paternal grandfather reportedly hit E.H. with a shoe, causing a smaller bruise. Mother told officers she would not allow the children to return to Father's home until CPS investigated.

¶10 CPS interviewed the parties and children. Its assessment noted that Father "has sporadic incidents of assaultive behaviors . . . which could result in minor injury" and rated him a "moderate risk" in the general history of violence category. Father was rated "low/moderately low risk" in the domestic violence section based on his "isolated incidents of domestic violence." CPS determined that no intervention was needed and that both parents "seem to practice appropriate parenting."

¶11 In November 2007, Father sought police assistance because Mother was keeping the children from him, notwithstanding his status as primary residential parent. Mother refused to relinquish the boys. An officer wrote a report but took no further action, noting that the custody order was "extremely vague."

¶12 Mother filed a Motion for Temporary Order Without Notice on November 26, 2007, alleging that Father posed a threat to her and the children and asking for a temporary custody order until a hearing could be held. The family court denied Mother's request for a custody order without notice, but set an evidentiary hearing to consider her motion, as well as Father's "emergency motion" requesting a civil arrest warrant.

¶13 Mother and Father both appeared and testified at a December 7 hearing. The court denied both emergency motions, ordered that the children not be left alone with the paternal grandfather or uncle, granted Father parenting time every weekend, and set an evidentiary hearing on the petition to modify custody and parenting time. At the ensuing hearing, both parents were represented by counsel and testified. A court-appointed advisor participated telephonically for part of the hearing.

¶14 On November 21, 2008, the family court issued a ruling awarding sole custody of the children to Father, with specified

parenting time for Mother. Mother filed a motion for new trial, which the court denied. Mother moved for reconsideration, which was denied.

¶15 Mother filed a notice of appeal, challenging both the November 21, 2008 ruling and the denial of her motion for new trial. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B), (C) (2003).

DISCUSSION

¶16 Mother raises four issues on appeal.[2] Before addressing them, we first consider a jurisdictional issue. *See Soltes v. Jarzynka,* 127 Ariz. 427, 429, 621 P.2d 933, 935 (App. 1980) (an appellate court has a duty to inquire into its own jurisdiction).

1. Jurisdiction

¶17 The family court denied Mother's motion for new trial in an unsigned minute entry dated January 27, 2009. Before filing her notice of appeal, Mother asked the court to "sign a final judgment denying [Mother's] motion for new trial." The court did so on April 23, 2009, but voiced concern that Mother's request was "an attempt to extend the time for appeal." It

[2] Father did not file an answering brief. Failure to file an answering brief may be regarded as a confession of reversible error. ARCAP 15(c); *Blech v. Blech,* 6 Ariz. App. 131, 132, 430 P.2d 710, 711 (1967). However, when the best interests of children are involved, we may decline to apply the confession of error doctrine. *In re Marriage of Diezsi,* 201 Ariz. 524, 525, ¶ 2, 38 P.3d 1189, 1190 (App. 2002) (citation omitted).

therefore entered its order "*nunc pro tunc* to January 27, 2009" and specified that the time to appeal was not extended.

¶18 A notice of appeal must be filed "not later than 30 days after the entry of the judgment from which the appeal is taken." ARCAP 9(a). Judgments must be in writing and signed by a judge; filing the signed order with the clerk constitutes entry. Ariz. R. Fam. L.P. 81(A). A signed order denying a motion for new trial is required before the time for appeal begins to run as to the underlying judgment and the denial of the motion for new trial. *See Tripati v. Forwith*, 223 Ariz. 81, 84-85, ¶¶ 15, 17, 219 P.3d 291, 294-95 (App. 2009).

¶19 Had Mother appealed from the unsigned minute entry denying her motion for new trial, we would have suspended the appeal and required her to obtain a signed order. *See Eaton Fruit Co. v. Cal. Spray-Chem. Corp.*, 102 Ariz. 129, 130, 426 P.2d 397, 398 (1967) (allowing the court to suspend an appeal to allow the trial court to enter a signed order). Despite the family court's suggestion to the contrary, we find that Mother's appeal is timely.

2. Issues Raised on Appeal

¶20 Mother claims the court erred by: (1) giving Father sole custody, despite his "significant history of domestic violence and child abuse"; (2) failing to make findings about relevant custody factors; (3) awarding Father sole custody as a

"sanction" for her violation of a court order; and (4) denying her motion for new trial.

¶21 We review custody decisions for an abuse of discretion. *Owen v. Blackhawk,* 206 Ariz. 418, 420, ¶ 7, 79 P.3d 667, 669 (App. 2003) (citation omitted). Generally, a trial court abuses its discretion where an error of law is committed in reaching its decision or the record fails to provide substantial support for the decision. *State v. Cowles,* 207 Ariz. 8, 9, ¶ 3, 82 P.3d 369, 370 (App. 2004) (citation omitted). We do not re-weigh conflicting evidence on appeal. *See O'Hair v. O'Hair,* 109 Ariz. 236, 240, 508 P.2d 66, 70 (1973) ("[T]he duty of a reviewing court begins and ends with the inquiry whether the trial court had before it evidence which might reasonably support its action viewed in the light most favorable to sustaining the findings . . . .") (citations omitted).

a. Domestic Violence and Child Abuse

¶22 Section 25-403.03(B) (Supp. 2009) requires the family court to "consider the safety and well-being of the child and the victim of the act of domestic violence to be of primary importance."[3] As such, when determining child custody, the court must "consider evidence of domestic violence as being contrary

[3] We cite to the current version of statutes when no revisions material to this decision have occurred.

to the best interests of the child" and a "perpetrator's history of causing . . . physical harm to another person." Ariz. Rev. Stat. ("A.R.S.") § 25-403.03(B). The court may not award joint custody if it "makes a finding of the existence of significant domestic violence . . . or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence." A.R.S. § 25-403.03(A).

¶23 In the case at bar, the family court stated it had considered the "factors set out in A.R.S. § 25-403," but it did not make any finding about whether there had been significant domestic violence. Additionally, although the court found that Father had committed domestic violence against Mother, it did not discuss the "rebuttable presumption" against awarding Father custody. A.R.S. § 25-403.03(D) (when a court determines that a parent has committed an act of domestic violence against the other parent, a rebuttable presumption arises that awarding custody to the parent who committed domestic violence is contrary to the child's best interests). *See also* A.R.S. § 25-403.03(F) (a parent who commits domestic violence "has the burden of proving to the court's satisfaction that parenting time will not endanger the child or significantly impair the child's emotional development.").

¶24 We cannot discern whether the family court considered the A.R.S. § 25-403.03(B) factors and the rebuttable presumption

in section 25-403.03(D) in awarding sole custody to Father. Nor can we meaningfully review the reasons behind the determination that awarding Father sole custody, with very limited parenting time for Mother, was in the children's best interest--especially given the significant allegations of domestic violence and child abuse.[4] Allegations of abuse and domestic violence are clearly "relevant factors" in determining custody, especially when, as here, there has been a domestic violence-related criminal conviction. We thus remand to the family court for it to clarify its ruling as it relates to A.R.S. §§ 25-403.03(B) and -403(B).[5]

b. Other Findings

¶25 To the extent Mother challenges the adequacy of the family court's other findings, we find no error. This case is unlike *Owen,* 206 Ariz. at 421, ¶ 12, 79 P.3d at 669, where the court made findings regarding only one statutory factor. Mother essentially asks us to reweigh the evidence, arguing that the family court "did not reach reasonable conclusions or

[4] Section 25-403(A) was amended in 2009 and now specifically requires the court to consider "[w]hether there has been domestic violence or child abuse." Under section 25-403(B), in contested custody cases, the court "shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child."

[5] We express no opinion about whether the existing record is adequate for the court to make the required findings on remand or whether additional proceedings are required. The family court shall make that determination.

inferences based on the testimony and evidence presented at trial." As we noted *supra,* our role is not to reweigh conflicting evidence; we instead defer to the trial court's determination of witness credibility and the weight to give conflicting evidence. *See O'Hair,* 109 Ariz. at 240, 508 P.2d at 70; *Jesus M. v. Ariz. Dep't of Econ. Sec.,* 203 Ariz. 278, 280, ¶ 4, 53 P.3d 203, 205 (App. 2002). This is especially true here, where the family court had the parties before it on several occasions, and the same judge presided over the proceedings for an extended period of time.

c. Violation of Court Order

¶26 Mother asserts the custody order was a "sanction" for her failure to follow the court's order to enroll the children at a school in Father's district. However, Mother's failure to abide by this order was merely one factor cited by the court. Nothing suggests that the family court acted punitively toward Mother in applying this finding.

d. Motion for New Trial

¶27 We will not reverse a trial court's ruling on a motion for new trial absent a clear abuse of discretion. *State v. Neal,* 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984) (citation omitted); *State v. Thornton,* 172 Ariz. 449, 452, 837 P.2d 1184, 1187 (App. 1992) (citation omitted).

i. "New Evidence"

¶28 Mother claims the court should have granted her motion to consider "[n]ew information" that Father and his girlfriend abused A.S. A new trial may be granted when newly discovered material evidence comes to light, "which with reasonable diligence could not have been discovered and produced at trial." Ariz. R. Fam. L.P. 83(A)(4). A motion for new trial should be granted only if it appears that: (1) the evidence "could not have been discovered before the granting of judgment despite the exercise of due diligence, (2) the evidence would probably change the result of the litigation, and (3) the evidence . . . was in existence at the time of the judgment." *Boatman v. Samaritan Health Serv., Inc.,* 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990) (citation omitted).

¶29 Mother admits her "new evidence" came to light after the court ruled, so it was not "in existence at the time of the judgment." *Id.* Additionally, Mother brought this information to light for the first time in her reply memorandum below. New arguments raised for the first time in a reply memorandum in the superior court are deemed waived and will not be considered on appeal. *See Westin Tucson Hotel Co. v. Ariz. Dep't of Revenue,* 188 Ariz. 360, 364, 936 P.2d 183, 187 (App. 1997) (citations omitted). Finally, denial of the motion for new trial does not prevent Mother from seeking to modify custody if, *inter alia,*

she has "reason to believe the [children's] present environment may seriously endanger [their] physical, mental, moral or emotional health." A.R.S. § 25-411(A) (Supp. 2009).

ii. CPS Reports

¶30 Mother's claim that the court failed to consider "relevant evidence of abuse, specifically CPS reports" is not supported by the record. Although the court refused to admit "redacted portions" of CPS reports that Mother offered, it did so because the full reports had already been admitted.

iii. Witness Testimony

¶31 Mother contends the court erred by interrupting her testimony and not allowing her witnesses to testify. The record reflects that the court originally allotted one half day for trial, but continued the matter to a second day when that time proved inadequate. On the second day, the court did stop Mother's testimony when the allotted time ran out, but it allowed her "one last question" and gave both parties an opportunity to present closing arguments. Mother did not object, request additional time, or make an offer of proof. Mother raised this issue for the first time in the reply to her motion for new trial. *See Westin,* 188 Ariz. at 364, 936 P.2d at 187. On this record, we find no error.

iv. Default Judgment

¶32 Although Mother stated in various filings that the 2006 default judgment was void because she was not properly served, she never moved to set that judgment aside. *See, e.g.,* Ariz. R. Fam. L.P. 85(C)(1), (2) (providing for a motion for relief from a final judgment within "a reasonable time" when "the judgment is void"). Moreover, when Father's counsel began questioning his client about the service of process issue at trial, Mother's counsel stated, "I don't know why the default is an issue," and she opined that the issue was "moot."

¶33 We conclude that the validity of the default judgment is not properly before us.[6] *See, e.g., Byrer v. A.B. Robbs Trust Co.,* 105 Ariz. 457, 458, 466 P.2d 751, 752 (1970) (noting it "has been the uniform holding of this Court from Territorial days . . . that there is no appeal from a default judgment unless the party appealing first moves the trial court under [Arizona Rule of Civil Procedure] 55(c) to set aside the judgment."). Moreover, the September 2008 hearing revisited all

[6] Even if Mother could challenge the default judgment, evidence in the record supports the family court's resolution of the "factual dispute" about service and its conclusion that Mother received the petition and notice of the original paternity proceedings before the default judgment was entered. Father testified that Mother was living in Phoenix with her mother and admitted two months before the default hearing that she had "been served with papers."

contested issues about the children. The 2006 default judgment applied only to E.H. and J.S., as A.S. had not yet been born. It resolved paternity as to those children--something Mother never contested. To the extent the 2006 judgment also made custody and parenting time orders, those matters were considered anew at the September 2008 hearing.

CONCLUSION

¶34 For the foregoing reasons, we remand to the family court for it to make additional findings relating to domestic violence and child abuse. We affirm in all other respects. We deny Mother's request for attorneys' fees on appeal pursuant to A.R.S. § 25-324 (Supp. 2009).

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
DONN KESSLER, Judge

/s/
PETER B. SWANN, Judge