DIVISION ONE
FILED: 04/03/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Matter of:	)	1 CA-CV 11-0039
	)	1 CA-CV 11-0433
DEBORAH LYNN WALLISER,	)	(Consolidated)
	)	
Petitioner/Appellant,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ALLEN RAYMOND MAY,	)	(Not for Publication –
	)	Rule 28, Arizona Rules of
Respondent/Appellee.	)	Civil Appellate Procedure)
	)	

Appeal from the Superior Court in La Paz County

Cause No. D0-2006-0162

The Honorable Michael J. Burke

AFFIRMED

Deborah Lynn Walliser — Aptos, California
In Propria Persona

Law office of John C. Churchill — Parker
By John C. Churchill
Julie A. LaBenz
Attorneys for Respondent/Appellee

H A L L, Judge

¶1 Deborah Lynn Walliser (Mother) appeals from the order awarding sole legal custody of the parties' minor child to Allen Raymond May (Father) and the denial of her post-judgment motion

for relief from judgment and motion for temporary order modifying child custody. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In a 2008 consent decree, the parties agreed to share joint legal custody and give Mother primary physical custody of their minor child. The parties co-parented without incident until July 2010. On July 13, 2010, the parties had a disagreement over child care that escalated to a physical confrontation. Following the July 13 incident, Mother obtained an order of protection after an ex parte hearing. The court entered a temporary emergency custody order stating that Father could not exercise parenting time pending a hearing on September 17, 2010. Mother moved to California two days later and registered this order in a California court.

¶3 Father filed a motion for relief from the temporary order/motion for temporary order modifying custody and parenting time, both without notice, and asked the court to accelerate the September 17th hearing. He served this motion on Mother by mail to her Parker address. The court set the hearing for August 25, 2010 pursuant to Rule 48(B), Arizona Rules of Family Law Procedure. A copy of the order setting this hearing date was mailed to Mother's Arizona address.

¶4 Mother was not present at the hearing on temporary orders on August 25, 2010.[1] The court vacated the temporary emergency custody order and ordered Mother to return the child to Arizona within ten days. Father was permitted to exercise his parenting time as set forth in the decree and awarded his attorneys' fees.[2]

¶5 In September 2010, both parents filed petitions for custody of the child: Father in Arizona and Mother in California. The Arizona and California judges conferred and determined that Arizona had home state jurisdiction pursuant to the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA).

¶6 At the November 2, 2010 hearing, the court interviewed the child in chambers. After the hearing, the court awarded Father sole legal custody and primary physical custody of the child. Mother was allowed to exercise "reasonable" parenting time in Arizona. Mother appealed from this order awarding custody to Father.

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[1] Mother claimed she had no notice of that hearing but does not raise this as an issue on appeal.

[2] Mother states she is appealing from that award of attorneys' fees. However, she did not properly raise this issue on appeal. *See* ARCAP 13(a)(6) (appellant's brief shall contain an argument with citations to authority, statutes, and parts of the record relied upon in support of the reasons set forth in support of the argument).

¶7 There were subsequent motions and orders regarding Mother's exercise of parenting time. Mother also filed a motion for new judge, which was denied.

¶8 Mother then filed a motion for relief from the custody order and a motion for temporary order modifying custody. After a one-day hearing, the court denied Mother's motions. Mother filed a timely notice of appeal from the denial of her request for relief from the custody orders and the denial of her petition for temporary custody modification. These two appeals were consolidated.

¶9 We have jurisdiction over all orders except the denial of Mother's motion for temporary custody. *See* Arizona Revised Statutes (A.R.S.) section 12-2101 (Supp. 2011). We have a duty to examine our own jurisdiction. *See Riendeau v. Wal-Mart Stores, Inc.,* 223 Ariz. 540, 541, ¶ 4, 225 P.3d 597, 598 (App. 2010). A temporary custody order is not appealable pursuant to A.R.S. § 12-2101. *See DePasquale v. Superior Court (Thrasher),* 181 Ariz. 333, 337, 890 P.2d 628, 632 (App. 1995). Because the denial of a temporary order is not appealable under § 12-2101, we lack jurisdiction to consider it.

DISCUSSION[3]

Domestic Violence

¶10 Mother argues that the court erred in awarding sole legal custody to Father because the evidence established that there was "significant" domestic violence. Father argues Mother waived this argument by failing to object below. Mother asked the trial court to apply the domestic violence presumption. Therefore, we find no waiver.

¶11 The trial court shall not order joint child custody if it finds "significant domestic violence" or "a significant history of domestic violence." A.R.S. § 25-403.03(A) (Supp. 2011). This statute does not apply to joint custody orders. Moreover, the presumption is rebuttable, A.R.S. § 25-403.03(D), and does not apply if both parents have committed an act of domestic violence. *Id.* "We will not disturb a trial court's decision on child custody absent a clear abuse of discretion." *In re Marriage of Diezsi,* 201 Ariz. 524, 525, ¶ 3, 38 P.3d 1189, 1190 (App. 2002) (citation omitted).

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[3] In the first appeal, Father's answering brief sets forth an argument supporting the trial court's jurisdiction under the UCCJEA. Mother's opening brief did not raise sufficiently this issue. *See* ARCAP 13(a)(6). Mother first addresses UCCJEA jurisdiction in her reply brief. We generally do not address arguments made for the first time in a reply brief. *See Phelps v. Firebird Raceway, Inc.,* 210 Ariz. 403, 404 n.1, 111 P.3d 1003, 1004 n.1 (2005). Therefore, we will not address UCCJEA jurisdiction as it was not properly raised on appeal.

¶12 The court found no major problems between the parties until July 13, 2010. Regarding the incident on July 13, the court found that the parties argued, and Father attempted to take the child with him. Mother threw a bottle at Father, and Father pushed Mother and the child into the pool. Mother suffered a fractured arm from falling into the pool. There is no transcript of this hearing in the record on appeal.[4] The exhibits include the police report of this incident, which contains conflicting accounts of the incident.

¶13 There are also copies of 2004 and 2007 orders of protection. In 2004 Mother alleged that Father threatened to kill her after finding out she was looking into crisis shelters. In 2007, Mother alleged a series of escalating threats, one incident where Father shoved Mother and an attack on an unnamed victim in an unrelated incident. However, after a hearing on the 2007 order of protection, the court allowed Father to continue parenting time with the child upon successful drug testing.

¶14 All of this information was presented to the trial court. We will not set aside a trial court's findings of fact unless they are clearly erroneous, *McNutt v. McNutt*, 203 Ariz. 28, 30, ¶ 6, 49 P.3d 300, 302 (App. 2002), because the trial

[4] Although Mother claims she purchased the transcripts, she failed to ensure that they were filed with the court.

court "is in the best position to weigh the evidence, observe the parties, judge the credibility of witnesses, and resolve disputed facts." *Ariz. Dep't of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, 334, ¶ 4, 100 P.3d 943, 945 (App. 2004). "We will not set aside findings of fact unless clearly erroneous, and we give due regard to the opportunity of the trial court to judge the credibility of witnesses." *In re Marriage of Berger,* 140 Araiz. 156, 161, 680 P.2d 1217, 1222 (App. 1983); Ariz. R. Fam. Law. P. 82(A). We presume, in the absence of a transcript of the hearing, that the testimony supports the trial court's findings of fact. *Biddulph v. Biddulph,* 147 Ariz. 571, 574, 711 P.2d 1244, 1247 (App. 1985); *see also* Rule 11(b), ARCAP (holding appellant shall order copy of any transcript deemed necessary for appeal). Based on the record on appeal, we cannot say that the trial court's findings were unsupported by the evidence. Thus, we find no abuse of discretion in finding the presumption in § 25-403.03(B) did not apply. *See Little v. Little,* 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (holding "[a]n abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is 'devoid of competent evidence to support' the decision.").[5]

[5] Mother raises two new arguments in her reply brief regarding the definition of a victim and the court's failure to apply § 25-403.03(D)(3) (stating that a person commits an act of

¶15 Mother also argues that the court failed to properly apply A.R.S. § 25-403(A)(6) (Supp. 2011). This section and § 25-403.03(I) state that a parent's relocation or denial of parenting time shall not be held against that parent if such act is to protect the child from witnessing or being a victim of domestic violence or in response to an act of domestic violence by the other parent. Mother argues that her actions were based upon her good faith belief that she was protecting the child from witnessing or becoming a victim of domestic violence.

¶16 The trial court, however, found that Mother's relocation and denial of contact was not the result of domestic violence. The court noted the parties' mutually aggressive and irrational conduct on July 13th. The trial court likewise pointed out that the child was removed from Mother's order of protection after the court heard both parties' versions of the July 13th incident. The child was also not subject to the 2007 order of protection. Given the lack of a transcript, we must

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domestic violence if that person "[e]ngages in a pattern of behavior for which a court may issue an ex parte order to protect the other parent who is seeking child custody or to protect the child[.]"). We generally do not address arguments made for the first time in a reply brief. *See Phelps,* 210 Ariz. at 404 n.1, 111 P.3d at 1004 n.1. Furthermore, these statutes do not negate the court's finding that Mother also committed an act of domestic violence which rendered the presumption in § 25-403.03(D) inapplicable.

presume the evidence supports these findings. *See Biddulph,* 147 Ariz. at 574, 711 P.2d at 1247.

Best Interests Factors

¶17 Mother argues that the trial court failed to consider and properly apply the best interests standard in reaching its custody decision. Mother contends this warrants a new trial pursuant to Rule 83(a)(1), Ariz. R. Fam. L.P.[6] We review the custody decision under an abuse of discretion standard. *See Diezsi,* 201 Ariz. at 525, ¶ 3, 38 P.3d at 1190. We do not reweigh the evidence, but affirm if there is sufficient evidence to support the trial court's ruling. *See Hurd v. Hurd,* 223 Ariz. 48, 52, ¶ 16, 219 P.3d 258, 262 (App. 2009).

¶18 The trial court considered each factor listed in A.R.S. §§ 25-403(A) and -403.03. The court specifically stated its reasons for finding the custody order was in the child's best interests. Mother cites nothing that indicates the court applied an incorrect standard in this case. Accordingly, we reject this claim.

¶19 Mother also argues the trial court failed to consider several relevant facts in making its decision. She argues that

[6] Rule 83(a)(1) provides: "A ruling, decision or judgment may be vacated and a new trial granted on motion of the aggrieved party for any of the following causes materially affecting that party's rights: (1) irregularity in the proceedings of the court or party, or abuse of discretion, whereby the moving party was deprived of a fair trial[.]"

Father has a criminal record. However, there was no evidence of any criminal record other than Father's arrest for assault on July 13th. The trial court was aware of this arrest. Mother also argues the court failed to consider Father's drug abuse. Again, there is nothing in the record showing Father had a drug problem. Absent a transcript of the proceedings, we must presume there was no evidence that Father had a drug problem or other criminal record. *See Biddulph,* 147 Ariz. at 574, 711 P.2d at 1247. We do not reweigh the evidence on appeal and must presume there is sufficient evidence to support the trial court's ruling. *See id.; Hurd,* 223 Ariz. at 52, ¶ 16, 219 P.3d at 262.

¶20 Mother argues that the child's notes to the trial court do not support the ruling. Mother contends that pictures of the child show she was "in harm's way" and that the child begged to stay with Mother. Mother contends Father in not capable of caring for the child and they live in a cramped, crowded house. Again, in the absence of a transcript of the proceedings, we must presume the evidence supported the trial court's ruling. *See Biddulph,* 147 Ariz. at 574, 711 P.2d at 1247. We do not reweigh the evidence on appeal. *See Hurd,* 223 Ariz. at 52, ¶ 16, 219 P.3d at 262.

¶21 Mother argues that the findings do not address the child's relationship with her half-brother or the effect of relocation on the child. *See* A.R.S. § 25-403(A)(3), (4). Mother failed to raise the lack of these findings below and raises them for the first time on appeal in her reply brief. Generally this constitutes waiver. *See Trantor v. Fredrikson,* 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994); *see also Phelps,* 210 Ariz. at 404 n.1, 111 P.3d at 1004 n.1 (holding that appellate courts do not address arguments made for the first time in a reply brief). Nonetheless, we conclude that the trial court did consider these factors when it noted that the child interacted well with all persons in her life and that the child "would be able to readjust to another school if needed." Therefore, the court did not fail to consider these relevant factors.

Bias & Prejudice

¶22 Mother argues that the trial court was biased and prejudiced in favor of Father and that the court removed the child from Mother's custody as retaliation. Mother also contends the court was biased in ruling on her post-judgment motion.

¶23 There is no transcript of the November 2, 2010 proceeding in the record for this court to review for any

evidence of bias or prejudice. Moreover, Mother did not appeal from the denial of her post-judgment motion for change of judge. Thus, that ruling is not properly before us on appeal.

¶24 The trial court is presumed to be unbiased and the party seeking removal must show actual bias by a preponderance of the evidence. *See State v. Hurley,* 197 Ariz. 400, 404-05, ¶ 24, 4 P.3d 455, 459-60 (App. 2000). Mother offered no admissible evidence or transcripts establishing any improper comments, conduct, or alleged bias in the post-judgment ruling. Mother alleges she saw the trial judge having dinner with Father and his mother in March 2008. Nonetheless, Mother did not request a change of judge prior to the November 2, 2010 proceeding.[7]

¶25 The remaining allegations of bias regarding the post-judgment ruling arise from the trial court's ruling in the case. "It is generally conceded that the bias and prejudice necessary to disqualify a judge must arise from an extra-judicial source and not from what the judge has done in his participation in the case." *Smith v. Smith,* 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977). Thus, Mother failed to establish bias or prejudice in this case.

[7] Mother asserts her request for a change of judge "as a matter of right and cause" was verbally denied in November 2006. This is not supported by anything in the record on appeal.

¶26 Mother cites *Ross v. Superior Court (Ross),* 109 Ariz. 414, 510 P.2d 386 (1973), which holds that a party waives his or her peremptory challenge to a judge if he or she attempts to enforce or modify a decree. Although Mother did not *waive* her right to seek a change of judge for cause, as noted above, she did not establish an appropriate basis for removing the trial judge.

Custody Modification

¶27 Mother contends Father had the burden of proving a change in circumstances to justify the custody modification. Mother's response to Father's petition to modify child custody did not argue that Father failed to establish a change in circumstance. In fact, Mother also sought a change to sole legal custody and supervised parenting time due to the change in the parties' relationship. Therefore, Mother cannot now claim on appeal that Father did not establish changed circumstances.

¶28 Mother also argues that the trial court improperly modified custody less than one year after the previous custody decision. *See* A.R.S. § 25-411(A) (Supp. 2011); Ariz. R. Fam. L.P. 91(D). Father's petition for modification was filed September 2010. This is more than one year after the 2008 decree. The trial court noted that the emergency temporary orders issued in August 2010 resulted in the terms of the decree

being reinstated. Therefore, the temporary emergency orders do not constitute a "custody decree" for purposes of § 25-411(A).

¶29 Father filed a petition to modify Mother's parenting time one month after the November custody order. Mother argued that this was untimely pursuant to § 25-411(A). However, that same month Mother also filed a request to modify her parenting time to confirm to the long distance guidelines. Thus, Mother cannot claim the trial court erred in ruling on Father's petition when she also sought modification only one month after the last custody order. In any event, the trial court denied Father's request for Mother to have supervised parenting time.

¶30 Finally, Father's last petition, filed in February 2011, was not a custody modification petition, but a petition for order to show cause due to Mother violating court orders. Thus, the time parameters in § 25-411(A) did not apply to that petition.

Post-Judgment Motions

¶31 Mother contends the court abused its discretion in denying her motion for relief from judgment/motion for new trial. Mother's motion requested relief from the custody order and from the denial of her change of judge motion pursuant to Rules 83(a) and 85(C), Ariz. R. Fam. L.P., on the grounds of

newly discovered evidence, an irregularity in the proceedings, and/or an abuse of discretion. We review a trial court's denial for relief under Rule 85 for an abuse of discretion. *See Birt v. Birt,* 208 Ariz. 546, 549, ¶ 9, 96 P.3d 544, 547 (App. 2004) (holding appellate court reviews denial of Rule 60(c), Ariz. R. Civ. P., motion under same standard); *see also* Rule 85, Committee Comment (stating Family Law Rule 85 is based on Civil Procedure Rule 60). "The trial court has broad discretion in deciding whether to grant or deny a motion for a new trial, *Melcher v. Melcher*, 137 Ariz. 210, 212, 669 P.2d 987, 989 (App. 1983), and 'we will not overturn that decision absent a clear abuse of discretion.' *Delbridge v. Salt River Project Agric. Improvement & Power Dist.*, 182 Ariz. 46, 53, 893 P.2d 46, 53 (App. 1994)." *Pullen v. Pullen,* 223 Ariz. 293, 296, ¶ 10, 222 P.3d 909, 912 (App. 2009).

¶32 Mother argued there was newly discovered evidence of domestic violence. Mother claimed she did not receive the police report from the July 13, 2010 incident until February 8, 2011, despite requesting it in July and October 2010. On appeal, Mother admits that many of the exhibits she attached to her motion were not newly discovered, but were included to support a claim of mistake, inadvertence, surprise or neglect; and fraud, misrepresentation, or other misconduct of an adverse

party. *See* Rule 85(C)(1)(a) & (c), Ariz. R. Fam. L.P. However, these were not the bases relied on in her motion in the trial court. We will not consider new arguments raised for the first time on appeal. *See Dillig v. Fisher,* 142 Ariz. 47, 51, 688 P.2d 693, 397 (App. 1984).

¶33 The trial court excluded the police video of the July 13, 2010 incident, finding that Mother did not exercise due diligence in obtaining the evidence. *See Tovrea v. Nolan,* 178 Ariz. 485, 491, 875 P.2d 144, 150 (App. 1993) (holding that evidence is not "newly discovered" if moving party "did not exercise due diligence in conducting or attempting any discovery in a timely fashion."). Father offered evidence that the police video was sent to Mother prior to the November hearing. We have no transcript of the hearing to support Mother's claim that she diligently sought this evidence. *See Biddulph,* 147 Ariz. at 574, 711 P.2d at 1247.

¶34 The court allowed the medical records into evidence. These records related to Mother's injury from the July 13 incident. As such, they were merely additional evidence supporting the same unsuccessful argument Mother made at the custody hearing and did not constitute newly discovered evidence entitling Mother to relief. *See Tovrea,* 178 Ariz. at 491, 875 P.2d at 150 (holding that cumulative evidence supporting an

argument already rejected by the trial court does not justify relief under Rule 60(c), Ariz. R. Civ. P.).

¶35 Mother claimed Father was not properly caring for the child, as evidenced by CPS records and photos submitted with her motion. This was not newly discovered evidence because it did not exist at the time of the custody hearing. *See OPI Corp. v. Pima County,* 176 Ariz. 625, 626-27, 863 P.2d 917, 918-19 (Tax 1993) (holding "evidence must have existed at the time of trial or judgment before it can qualify as newly discovered evidence."). Furthermore, the court cites other evidence showing that, to the contrary, the child was not unkept or uncared for. "We will defer to the trial court's determination of the witnesses' credibility and the weight to give conflicting evidence." *Gutierrez v. Gutierrez,* 193 Ariz. 343, 347, ¶ 13, 972 P.2d 676, 680 (App. 1998). We affirm the denial of Mother's motion for relief from judgment.

ATTORNEYS' FEES AND COSTS ON APPEAL

¶36 Mother asks that we order Father to pay her expenses below as well as her costs on appeal. Because she was not the successful party on appeal, Mother is not entitled to an award of costs. A.R.S. § 12-341 (2003). Father also requests an award of attorneys' fees and costs on appeal pursuant to A.R.S. § 25-324(A) (Supp. 2011). Father contends that Mother has taken

unreasonable and frivolous positions on appeal. Although Mother was unsuccessful, we cannot say the appeal was frivolous. In the exercise of our discretion we deny Father's request for attorneys' fees. However, as the successful party on appeal, he is entitled to his costs upon compliance with ARCAP 21. *See* A.R.S. § 12-341 (2003).

CONCLUSION

¶37 We affirm the custody order and the denial of Mother's motion for relief from judgment and for temporary custody modification. We lack jurisdiction to consider the appeal from the denial of Mother's motion for temporary custody modification. We award Father his costs on appeal.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICIA A. OROZCO, Presiding Judge

_/s/_____
JOHN C. GEMMILL, Judge