2012 IL App (1st) 113054

FOURTH DIVISION
May 7, 2012

No. 1-11-3054

In re MARRIAGE OF LORI M. PERRY, Petitioner-Appellant, and FRANK M. PERRY, Respondent-Appellee.	)))))))))))	Appeal from the Circuit Court of Cook County. 11 D 02116 The Honorable Edward R. Jordan, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court, with opinion.
Justices Fitzgerald Smith and Sterba concurred in the judgment and opinion.

OPINION

¶1 The instant case is an appeal by the wife, Lori Perry, from the entry of an order of the circuit court granting the husband, Frank Perry, temporary custody of the parties' children and possession of the home upon hearing on Lori's petition for temporary custody of the children and temporary possession of the home. Lori contends: (1) the circuit court erred in granting Frank temporary custody and exclusive possession of the home because he did not have a pleading on file; (2) the court erred in granting Frank temporary custody of the children; (3) the circuit court erred in admitting into evidence a flash drive containing photographs that were allegedly copies

of photos of Lori from an escort service agency Web site; and (4) the circuit court abused its discretion in denying Lori's motion to reopen the proofs to enter Frank's cell phone as rebuttal evidence, as she contended the photos were actually photos on Frank's cell phone.

¶2 We hold the following: (1) The circuit court did not err in granting relief to Frank because Lori's petition presented a justiciable issue and Lori did not object when Frank sought custody of the children at the hearing. (2) The trial court's order awarding temporary custody of the minor children to Frank was not against the manifest weight of the evidence or an abuse of discretion where the court considered the statutory factors and the best interest of the children under section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2008)). (3) The circuit court did not abuse its discretion in admitting the photographs on Frank's flash drive where Frank established a proper foundation and authenticated that the photographs are photographs of Lori, but there was insufficient foundation that the photographs were specifically from the Web site "Chix Escorts." Nevertheless, any error in admission of the photographs on this basis was harmless because the circuit court had other evidence before it that Lori was working as an escort and did not base its decision on the fact that she was working for this particular escort agency, and the court had other evidence before it that granting temporary custody to Lori was not in the children's best interest. (4) The circuit court did not abuse its discretion in denying Lori's motion to reopen the proofs to admit Frank's cell phone where there was no need for cumulative rebuttal evidence, the evidence was not of the utmost importance to her case, and the circuit court articulated a cogent reason for denying the request, in that there was a chain of custody problem with the cell phone. Therefore, we affirm

the order of the circuit court granting temporary custody of the children and temporary possession of the home to Frank.

¶3 BACKGROUND

¶4 Frank and Lori were married on April 17, 2000. Frank and Lori have three minor children, Frank Jr., Michael, and Christopher. An additional child, Hillary, was born on November 27, 1992, is Lori's child from a previous relationship and was adopted by Frank. Hillary is no longer a minor. The parties lived in Frank's nonmarital residence, which he purchased prior to the marriage, at 708 N. Rockwell, Chicago. Frank is a fire inspector for the city of Chicago and works 10-hour shifts, starting at 7 a.m. and ending at 5 p.m., Mondays through Thursdays. Frank also works as an exam proctor for the college of the city of Chicago every Friday from between 2 and 5 p.m. and ending at 10 p.m., and on Saturdays beginning at 7 a.m. working all day. Lori has been a stay-at-home mother since the parties' marriage in 2000.

¶5 On or about February 15, 2011, Frank left the house because Lori threatened him, stating, "If I could kill you and get away with it I would." Lori had been physically violent with Frank in the past, and Frank felt it was in his best interest to leave. Frank spent two nights at his mother's house and then stayed in a hotel for two nights. Even though Frank left the house, he sent texts to Lori to try to resolve their problems. While Frank was out of the house, Lori changed the locks. According to Frank, he repeatedly asked for the opportunity to see the boys but his requests were denied. Lori prevented Frank from seeing the children for six weeks. According to Lori, from February 15, 2011 to March 18, 2011, Frank did not visit with the children or pay any support to Lori or the children. On March 18, 2011, the parties entered into an order which

provided that Lori would have temporary "possession" of the minor children and "exclusive possession" of the residence and Frank would have visitation every Sunday and pay Lori $175 per week for groceries and pay other household bills directly.

¶6 On March 3, 2011, Lori filed a petition for dissolution of marriage. On March 17, 2011, Frank filed his response to the petition. On March 15, 2011, Lori filed a motion for interim relief seeking: (1) temporary custody of the children; (2) temporary child support; and (3) temporary exclusive use and possession of Frank's nonmarital home. The hearing on Lori's motion began on July 27, 2011 and concluded on October 11, 2011. The court heard testimony from three witnesses over four days of contentious hearings.

¶7 Frank testified both as an adverse witness and on his own behalf in his case-in-chief. In Lori's case-in-chief, Frank testified as an adverse witness. Lori then testified on her own behalf and then rested. At the close of Lori's case-in-chief, Frank made an oral motion pursuant to section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2010)) for exclusive possession but the court denied the motion.

¶8 During Frank's case-in-chief, Frank called Thomas Jun as a subpoenaed witness. Lori listed Thomas Jun as the children's emergency contact at school and was being paid $5,000 per month by him. At the time of the hearing, Lori was bringing Jun with her to pick up the children from school. Frank believed Jun was one of Lori's escort clients.

¶9 Lori testified as an adverse witness, and Frank testified on his own behalf. Both parties testified to instances where the children were injured while in the care of the other parent, but no issue is raised on appeal regarding the physical safety of the children, nor did the circuit court

base its ruling in any way on any testimony concerning the physical well-being of the children.

¶10 Frank testified that he believed Lori was working as an escort and maintained that her work negatively affected the children, including their schoolwork and their relationship with Lori. Frank maintains Lori denied him visitation with the children for two Sundays in a row. The three children are all experiencing difficulties in school. The oldest child, Frank, refused to do his homework and has thrown it in the garbage. Lori had a difficult time managing the three boys. Frank was willing to retire in order to have custody of the parties' three children. During his testimony Frank was asked about custody and testified, without objection from Lori, that he should be the custodial parent.

¶11 During his case-in-chief, Frank offered into evidence a flash drive containing photographs of Lori which Frank testified he downloaded from a Web site called "Chix Escorts" on the Internet offering escort services. Frank downloaded the pictures and the information offered on the Web site, which included an e-mail and Lori's cell phone number, onto the flash drive. Counsel for Lori objected to the flash drive based on relevance, foundation, and the fact that it was never produced in response to a Supreme Court Rule 214 request (Ill. S. Ct. R. 214 (eff. Jan. 1, 1996)). Frank testified that he ran Lori's escort name, "April," in the search engine Google, found pictures of Lori on the Web site "Chix Escorts," and downloaded copies of the pictures onto his flash drive. Lori's counsel requested that the court open the picture files from the flash drive on the court's computer. The court found the photographs were relevant and admitted them into evidence. There was no further ruling on the remaining objections, and Lori's counsel did not make a motion to strike.

¶12 Lori testified in rebuttal that she did not set up the Web site "Chix Escorts." Lori testified that one of the photographs was an old picture on Frank's cell phone, and she further maintained that all of the photos on the "Chix Escorts" Web site were photos she had previously sent to Frank. Lori had had Frank's cell phone since Frank left the house, but she did not have it with her in court when she gave her rebuttal testimony.

¶13 The guardian *ad litem*, Gloria Block, was given the opportunity to testify but declined. Block indicated that she had some "recommendations or comments" for the court and commented that she found the children "engaging," "bright," and "really pretty well behaved." Block recommended a more specific parenting schedule for Frank. However, Block also commented that she had significant concerns about the oldest child that, even though he is a very bright child, she was getting reports that he throws his homework in the garbage. Both parties agreed to the appointment of a counselor for the children.

¶14 On October 11, 2011, after hearing closing arguments from the parties, the court ruled and denied Lori the relief she sought in her motion and instead granted Frank temporary custody of the minor children and temporary exclusive possession of the house and allowed Lori 14 days to vacate the home. The court found that both parties lied on the stand, but it held that on the issue of credibility, the court had to weight the testimony in a light most favorable to Frank. The court noted that "Frank is one of the angriest people I have met in a long time," but found that it could explain Frank's lies but not Lori's, "other than to attempt to gain an advantage in this litigation." The court specifically took issue with Lori's numerous trips and unexplained income during 2010, which the court inferred was due to her working as an escort. The court also noted

that Lori averred some fairly "dramatic stuff" in her affidavit in her motion, including an alleged attack by Frank when he placed his hand in her mouth and attempted to rip her jaws apart and then twisted her arm behind her back and threw her across the room, but Lori did not testify to any such conduct during the hearing. The court also told the parties' attorneys to arrange for visitation for Lori.

¶15 After the hearing, Lori filed a motion to reopen the proofs to offer Frank's cell phone into evidence to rebut Frank's testimony concerning the pictures on the flash drive. The circuit court denied the motion based on a chain of custody problem because the cell phone had been in Lori's possession and control since the parties broke up.

¶16 On October 21, 2011, Lori filed an emergency motion to stay enforcement of the circuit court's order pending her leave to appeal. On October 21, 2011, the circuit court granted Lori's motion and entered an order staying its order of October 11, 2011. We entered an order December 7, 2011, granting Lori temporary possession and custody of the minor children and temporary exclusive possession of the property pursuant to the trial court's October 21, 2011 stay order. We further ordered that pursuant to the September 21, 2011 order of the trial court, Frank shall pay $300 per week in temporary child support until further order of the trial court and that the trial court shall determine if an additional amount is appropriate to replace funds not paid pursuant to our November 7, 2011 stay order. By our December 7, 2011 order we also reinstated the appointment of Carroll Craddick as the children's therapist with parent involvement and reinstated Leslie Starr as the custody evaluator.

¶17 ANALYSIS

¶18 I. Award of Temporary Custody to Frank and Exclusive Possession of the Residence Where Frank Did Not Have a Pleading on File in Response to Lori's Motion

¶19 On appeal, Lori first argues the circuit court exceeded its authority when it granted Frank temporary custody of the minor children and exclusive possession of the residence and lacked authority to do so because Frank did not have a pleading on file requesting such relief. Frank responds that the trial court's authority to exercise jurisdiction and resolve a justiciable question is granted by our state constitution and invoked through the filing of a complaint or petition, citing *In re Marriage of Baniak*, 2011 IL App (1st) 092017, and that here Lori's petition presented the justiciable issue that the court had authority to determine.

¶20 We find Lori's assertion without merit. Circuit courts have " 'original jurisdiction of all justiciable matters.' " *Ligon v. Williams*, 264 Ill. App. 3d 701, 707 (1994) (quoting Ill. Const. 1970, art. VI, § 9). The court's authority to exercise its jurisdiction and resolve a justiciable question is invoked through the filing of a complaint or petition and pleadings that function to frame the issues for the trial court and circumscribe the relief the court is empowered to order. *Ligon*, 264 Ill. App. 3d at 707. Thus, Lori's own motion placed the children's custody and possession of the house in issue.

¶21 Further, Frank is correct that Lori failed to object at the hearing when Frank indicated he was seeking custody and that he was the better parent. "Where a party proceeds with the case as though his adversary's pleadings joining issue were on file, he waives the adversary's failure to plead." *Nerini v. Nerini*, 140 Ill. App. 3d 848, 851 (1986) (citing *Public Electric Construction Co. v. Hi-Way Electric Co.*, 62 Ill. App. 3d 528, 532 (1978)).

¶22 Lori sought temporary custody and possession of the house, thereby making these issues justiciable to allow their determination by the court. The fact that the court resolved these issues in a manner not in her favor does not undermine its authority to have made this determination. In dissolution proceedings, " 'the court has the authority and the responsibility to act for the child's care, custody and support until it reaches majority,' " and " 'the court's primary concern obviously is not the wishes of the parents but rather the best interests of the child.' " *In re A.W.J.*, 197 Ill. 2d 492, 498 (2001) (quoting *Sommer v. Borovic*, 69 Ill. 2d 220, 233 (1977)). The circuit court did not exceed its authority under our constitution to determine justiciable issues.

¶23 II. Awarding Temporary Custody to Frank Based on Alleged Conduct of Lori

¶24 Lori argues that the court should not have considered her work as an escort in awarding temporary custody to Frank because it has no bearing on her parenting. Frank concedes that the circuit court indeed considered her work as an escort in awarding temporary custody of the children to Frank. However, Frank argues, it was not Lori's work as an escort that was at issue but, rather, the impact of her line of work on the children. We agree with Frank and we agree with the circuit court's determination.

¶25 Section 603 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/603 (West 2010)) provides the following regarding temporary custody orders:

"§603. Temporary Orders.

(a) A party to a custody proceeding, including a proceeding to modify custody, may move for a temporary custody order. The court may award temporary custody under the standards of Section 602 [(750 ILCS 5/602)] and the standards and

procedures of Section 602.1 [(750 ILCS 5/602.1)], after a hearing, or, if there is no objection, solely on the basis of the affidavits." 750 ILCS 5/603 (West 2010).

¶26 Section 602 of the Act, in turn, provides the following mandatory factors to consider in determining the custody of a child:

"§602. Best Interest of Child.

(a) The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

(1) the wishes of the child's parent or parents as to his custody;

(2) the wishes of the child as to his custodian;

(3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;

(4) the child's adjustment to his home, school and community;

(5) the mental and physical health of all individuals involved;

(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;

(7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 [(750 ILCS 60/103)], whether directed against the child or directed against another person;

(8) the willingness and ability of each parent to facilitate and encourage a

close and continuing relationship between the other parent and the child;

(9) whether one of the parents is a sex offender; and

(10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed.

(b) The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.

(c) Unless the court finds the occurrence of ongoing abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 [(750 ILCS 60/103)], the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child. There shall be no presumption in favor of or against joint custody." (Emphasis added.) 750 ILCS 5/602 (West 2010).

¶27 When making an initial determination of custody, a court must use the "best interest" standard of section 602 of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602 (West 2010)). *In re Custody of D.R.*, 295 Ill. App. 3d 115, 119-20 (1998) (citing *In re Koca*, 264 Ill. App. 3d 291, 294 (1993)). "[C]ustody proceedings under the Marriage and Dissolution of Marriage Act are guided by the overriding lodestar of the best interests of the child or children involved." *In re A.W.J.*, 197 Ill. 2d 492, 497-98 (2001) (citing *Moseley v. Goldstone*, 89 Ill. App. 3d 360, 369 (1980)). When deciding what custodial orders will serve the best interest of child, the trial court has broad discretion, and we will afford great deference to the

court's determination in recognition of its "far superior position for evaluating the parents, child, and all other evidence." *In re Marriage of Dobey*, 258 Ill. App. 3d 874, 876 (1994). "Accordingly, this court will not disturb the trial court's ruling on appeal unless it is against the manifest weight of the evidence or the trial court abused its discretion." *In re Marriage of Dobey*, 258 Ill. App. 3d at 876 (citing *In re Marriage of Lee*, 246 Ill. App. 3d 628, 641 (1993) and *In re Marriage of Evans*, 229 Ill. App. 3d 932, 936 (1992)).

¶28 We agree with the circuit court's determination that Lori's work as an escort was relevant to the issue of custody and the best interest of the children. "Evidence is deemed relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." (Internal quotation marks omitted.) *Lambert v. Coonrod*, 2012 IL App (4th) 110518, at ¶ 29 (quoting *Ford v. Grizzle*, 398 Ill. App. 3d 639, 648 (2010)). The relevant factors in determining child custody are the factors listed in section 602 of the Illinois Marriage and Dissolution of Marriage Act, with the best interests of the children constituting the overriding concern. 750 ILCS 5/602 (West 2010). Frank's argument for seeking temporary custody was that Lori's work as an escort was negatively affecting the children and was not in their best interest. Evidence was adduced at the hearing that Lori was bringing an individual, Thomas Jun, around the children, and that this individual may be one of her clients in her escort business. One of the specific factors to consider under section 602 is "the interaction and interrelationship of the child with his parent or parents, his siblings *and any other person who may significantly affect the child's best interest*." (Emphasis added.) 750 ILCS 5/602(a)(3) (West 2010). Where the language of a statute is clear and unambiguous, a

court must give effect to the plain and ordinary meaning of the language without resort to other tools of statutory construction. *In re Marriage of Bates*, 212 Ill. 2d 489, 511-12 (2004) (citing *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 255 (2004)). Further evidence was provided by Frank's testimony that Lori was neglecting the children because of her escort business and as a result their schoolwork was deteriorating and her relationship with the children was deteriorating. Thus, Lori's work as an escort was indeed relevant in determining custody.

¶29 The circuit court found that her work as an escort negatively impacted her care of the children, and there was evidence in the record to support the court's determination. The court noted Lori's insufficient explanation of her numerous out-of-town trips and influx of income in 2010. There was also evidence that Thomas Jun, who may have been one of Lori's escort service clients, was paying Lori $5,000 a month and was present with Lori on a continual basis around the children. Frank testified that when Lori began working as an escort again she began ignoring the children and had a difficult time managing the three boys. Both Frank and the guardian *ad litem*, Gloria Block, noted their significant concerns about the fact that the parties' eldest child, Frank, was throwing his homework in the garbage.

¶30 As Frank rather cogently argues, "The fact that Lori works as an escort is not the issue. It is how her work impacts the children that is material." We also note Frank's very candid, fair, and unbiased treatment of the issue when he argues that "[a]ny prejudice from the use of the word 'escort' and the connotation of that term has no place in this case." It is clear that Frank's argument is firmly grounded on the best interest of the children. A custody determination does not require a showing that one parent is a " 'better' " or " 'worse' " person than the other; it is the

children's best interest that is paramount. *In re Marriage of Milovich*, 105 Ill. App. 3d 596, 609 (1982).

¶31 We agree also that there is no evidence in the record that the court was prejudiced against Lori in making its temporary custody determination due solely to her chosen occupation. Rather, we find the court correctly based its determination granting Frank temporary custody on the best interest of the children, and the record supports the court's determination.

¶32 In her reply, Lori argues that the court should not have granted Frank temporary custody because "there is no evidence that Lori is a bad mother, an unfit parent, nor that she did anything that harmed" the children. However, this is not the law in Illinois. Under both the long-standing precedent of our state and our state constitution, there is no requirement that the mother must receive custody unless she is shown to be unfit or that she harmed the children. See *In re Custody of Switalla*, 87 Ill. App. 3d 168, 173 (1980) (holding that "there is no rule in Illinois that unless she is shown to be unfit, custody should be given to the mother" (internal quotation marks omitted) and further noting that our Illinois Constitution provides that equal protection of the law shall not be denied or abridged because of sex (citing (Ill. Const. 1970, art. I, § 18)). Therefore, we affirm the order of the circuit court granting Frank temporary custody of the children.

¶33 III. Admission of Flash Drive With Photographs Into Evidence

¶34 Finally, Lori argues that the court erred in admitting the flash drive into evidence because Frank did not sufficiently authenticate and establish a foundation for the photographs, and because the photographs were not produced pursuant to Supreme Court Rule 214 (Ill. S. Ct. R. 214 (eff. Jan. 1, 1996)). Our standard of review is that the admissibility of evidence rests in the

sound discretion of the trial court, and that determination will not be reversed on appeal absent an abuse of discretion. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 92 (1995).

¶35 However, we first must address Lori's failure to preserve her objections to the evidence based on foundation and Supreme Court Rule 214. At the hearing counsel for Lori objected to the photographs on the flash drive based on: (1) relevance; (2) foundation; and (3) nondisclosure in response to a Supreme Court Rule 214 request.[1] The court ruled the photos were relevant and allowed them into evidence and allowed Lori's counsel an opportunity to examine Frank regarding the photographs. At the hearing, Lori's counsel objected to admitting the photographs on the flash drive for the following reasons:

> "Several. One, I don't think it's relevant. Two, I don't think she's laid a proper foundation for the admission of the documents. Three, I've never seen this before. We did do a notice to produce under Rule 214. This has never been produced before. So before you admit it I'd like to have the opportunity to cross-examine him as to the foundation."

¶36 The court ruled that the photographs were relevant. However, Lori never obtained a ruling from the court on her objections based on foundation or Supreme Court Rule 214. "[A] party waives an objection where a ruling is not requested after the trial court fails to make one." *Shields Pork Plus, Inc. v. Swiss Valley Ag Service*, 329 Ill. App. 3d 305, 313 (2002) (citing *In re Marriage of Pylawka*, 277 Ill. App. 3d 728, 734 (1996)). The long-standing rule is that "[i]n order to preserve an issue for review, an appellant must first obtain either a ruling on the issue or

[1] Lori does not raise any argument as to the relevance of the photographs on appeal.

a refusal to rule thereon from the trial court." *In re Appointment of Special State's Attorney*, 305 Ill. App. 3d 749, 762 (1999) (citing *Goodrich v. Sprague*, 376 Ill. 80, 86 (1941)).

¶37 Here, Lori's counsel seemed to abandon the objections and indicated he would like to merely cross-examine Frank as to foundation before the court admitted the evidence. Lori's counsel then cross-examined Frank regarding the photos, asking questions regarding when he downloaded the photos from the Web site and which computer he used to download the images onto his flash drive. Frank testified he searched the Internet for the name "April" and found Lori's pictures on the Web site. Lori never renewed the foundation objection or the Rule 214 objection when the court determined to allow the photos into evidence, nor did she obtain a ruling from the court on her initial objections. Thus, Lori waived her foundation and Rule 214 objections to the admission of the photos.

¶38 Further, any error in the court viewing and admitting the photos was invited by Lori's counsel and further waived by Lori's failure to renew the objection and move to strike the evidence. The record reveals that while Lori's counsel was cross-examining Frank on foundation regarding how he found and downloaded the photos from the Web site, the court apparently inserted the flash drive and the following exchange between Lori's counsel and the court took place:

"MR. MIRABELLI: Your Honor, may I take a look at what you're looking at?

THE COURT: Right now I'm looking and it's bothering me. Are you suggesting that I open one of these, Mr. Mirabelli?

MR. MIRABELLI: Yes. Let's see what it is he says he downloaded."

¶39 The court then proceeded to open the files identified as photos of Lori. The second photograph opened as "Chix Escorts" and was a photo of a woman seminude in a tub, captioned "Sweet Little April." Frank identified "Sweet Little April" as Lori. Lori cannot complain that the court's viewing of the photographs was error when her counsel specifically requested the court to view them. "A party cannot complain of evidence which he himself has introduced or brought out." *Tokar v. Crestwood Imports, Inc.*, 177 Ill. App. 3d 422, 428 (1988) (citing *Romanek-Golub & Co. v. Anvan Hotel Corp.*, 168 Ill. App. 3d 1031, 1040 (1988)).

¶40 Lori did not renew her foundation objection, nor did she move to strike the evidence. After her counsel finished questioning Frank regarding foundation, the following exchange occurred between Lori's counsel and the circuit court:

> "MR. MIRABELLI: I have no further questions on foundation.
>
> THE COURT: Anything else?
>
> MS. TAMELING: Not on foundation, Judge.
>
> THE COURT: And your objection is? I've already ruled on relevance.
>
> MR. MIRABELLI: Judge, you keep ruling on relevance, but I don't know why it's relevant and you never let me make my argument.
>
> THE COURT: Relevance is defined by the four corners of your petition. The petition was filed on March 15th. Count I is for temporary custody, Count II is for temporary support, Count III is for exclusive possession. I can see how this evidence could connect to Count [I] and Count II and Count III. So I told you before – I already told you that it's relevant. Do you have any other objection now that you cross-examined

on foundation?

MR. MIRABELLI: No, not at this time.

THE COURT: All right. The objections [*sic*] having been overruled, Respondent's Exhibit 18 being a flash drive, black in nature from Staples named Relay, R-e-l-a-y, will be admitted and received into evidence over objection."

¶41 Thus, Lori waived her foundation objection as well as her Supreme Court Rule 214 objection.

¶42 "However, the rule of waiver is a limitation on the parties, and not on the reviewing court." *In re Marriage of Kostusik*, 361 Ill. App. 3d 103, 114 (2005) (citing *In re Madison H.*, 215 Ill. 2d 364, 371 (2005)). We may decline to apply the rule of waiver and consider the issue on the merits where the case is a matter affecting child custody and the issue is an issue of first impression. See *In re Marriage of Kostusik*, 361 Ill. App. 3d at 114 (declining to apply the waiver doctrine to an argument despite the party's failure to object regarding an emergency motion for a change in temporary custody).

¶43 We will not excuse Lori's waiver of her argument based on Supreme Court Rule 214 because not only did she fail to preserve her objection, but she has also failed to present us a sufficient record to determine the issue. Lori does not provide a copy of her alleged Supreme Court Rule 214 requests to Frank, nor Frank's responses to same. In her brief, she merely cites to a page in the transcript of the hearing where her counsel refers to the Rule 214 requests. Since Lori failed to include the requests and answers in the record, her Supreme Court Rule 214 argument fails. Without the benefit of the requests for our review, we cannot determine if this

allegation by Lori is correct. " 'Any doubts arising from the inadequacy of the record will be resolved against the defendant.' " *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 155 (2005) (quoting *Weaver v. Midwest Towing, Inc.*, 116 Ill. 2d 279, 285 (1987), citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). The appellant has the burden of showing error, and any doubt arising from incompleteness of the record will be resolved against the appellant. *People v. Kirkpatrick*, 240 Ill. App. 3d 401, 406 (1992). Without viewing the actual production requests and responses, we cannot determine whether Lori has a valid argument. In the absence of a sufficient record, we must resolve any doubts arising from the incompleteness of the record against the appellant and presume the trial court's order was in conformance with the law and supported by the evidence, or lack thereof. *Foutch*, 99 Ill. 2d at 392. Since Lori has failed to present a sufficient record regarding her Supreme Court Rule 214 requests, we resolve any doubts regarding the production requests against her and presume the trial court's ruling allowing the photographs was in conformance with the law. Further, an argument regarding a failure to produce under Supreme Court Rule 214 is not an issue of first impression. Thus, we decline to ignore the waiver of her Rule 214 argument.

¶44 On the other hand, we choose to review Lori's remaining argument as to the foundation of the photographs. Here we decline to apply waiver to the foundation objection because child custody is at issue, though we acknowledge it is only temporary custody, and the issue involving foundation for the admission of electronic duplicates of photographs from a Web site which were saved onto a flash drive is a novel issue which has not yet been addressed by Illinois courts.

¶45 In reaching the merits of the issue, we find that Frank established a proper foundation and

authenticated that the photographs are photographs of Lori. The circuit court never ruled on foundation and authentication. We find that Frank laid a sufficient foundation and sufficiently authenticated the photographs as photographs of Lori to allow their admission into evidence. However, we do not believe that there was a sufficient foundation that the photographs were specifically from the Web site "Chix Escorts." Nevertheless, any error in admission of the photographs on this basis was harmless because the circuit court had other evidence before it that Lori was working as an escort and did not base its decision on the fact that she was working for this particular escort agency, and it had other evidence before it of Lori's poor parenting skills.

¶46 Our newly adopted Rules of Evidence and precedent support a conclusion that the admission of the photographs as photographs of Lori was not an abuse of discretion. Neither party mentions the Illinois Rules of Evidence, which were adopted September 27, 2010, effective January 1, 2011, and thus in effect at the time of the hearing in this case. In adopting the Rules of Evidence, the Committee "incorporated into the Illinois Rules of Evidence the current law of evidence in Illinois whenever the Illinois Supreme Court or the Illinois Appellate Court had clearly spoken on a principle of evidentiary law within the last 50 or so years." Ill. R. Evid., Committee Commentary (eff. Jan. 1, 2011). The Rules of Evidence now govern proceedings in the courts of Illinois. Ill. R. Evid. 1101(a) (eff. Jan. 1, 2011).

¶47 Under Rule of Evidence 901, the testimony of a witness that a matter is what it is claimed to be is sufficient to satisfy the requirement of authentication. Ill. R. Evid. 901(b)(1) (eff. Jan. 1, 2011). Further, "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result" is sufficient for authentication. Ill. R.

Evid. 901(b)(9) (eff. Jan. 1, 2011). Under Rule of Evidence 1001, a duplicate is defined as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." Ill. R. Evid. 1001(4) (eff. Jan. 1, 2011). Under Rule of Evidence 1003, "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Ill. R. Evid. 1003 (eff. Jan. 1, 2011). The adopted Rules of Evidence do not apply to "[t]he determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule of Evidence 104." Ill. R. Evid. 1101(b)(1) (eff. Jan. 1, 2011). Under Rule of Evidence 104, "[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court," and "[i]n making its determination, the court is not bound by the rules of evidence except those with respect to privileges." Ill. R. Evid. 104(a) (eff. Jan. 1, 2011).

¶48 We believe Frank laid a sufficient foundation that the photographs were photographs of Lori. " 'In general, photographs are admissible into evidence if they are identified by a witness who has personal knowledge of the subject matter depicted in the photographs and the witness testifies that the photographs are a fair and accurate representation of the subject matter at the relevant time.' " *Lambert v. Coonrod*, 2012 IL App (4th) 110518, ¶ 29 (quoting *People v. Martinez*, 371 Ill. App. 3d 363, 380 (2007)). "A photograph 'may be excluded if it is irrelevant or

immaterial or if its prejudicial nature clearly outweighs its probative value.' " *Lambert*, 2012 IL App (4th) 110518, ¶ 29 (quoting *Boren v. BOC Group, Inc.*, 385 Ill. App. 3d 248, 255 (2008)). "Photographs, like any evidence, may be admitted into evidence when authenticated and relevant either to illustrate or corroborate the testimony of a witness, or to act as probative or real evidence of what the photograph depicts." *People v. Smith*, 152 Ill. 2d 229, 263 (1992). "A sufficient foundation is laid for a still photograph, a motion picture, or a videotape by testimony of any person with personal knowledge of the photographed object at a time relevant to the issues that the photograph is a fair and accurate representation of the object at that time ***." (Emphasis omitted.) (Internal quotation marks omitted.) *People v. Flores*, 406 Ill. App. 3d 566, 572 (2010) (quoting Michael H. Graham, Cleary & Graham's Handbook of Illinois Evidence § 401.8, at 135 (8th ed. 2004)). We note further that expert testimony is not required to establish a foundation for photographic evidence; all that is needed is testimony of any person with personal knowledge of the photographed object, at the time relevant to the issues, and that the photograph is a fair and accurate representation at that time. *Tokar*, 177 Ill. App. 3d at 429. "The decision to admit a photograph into evidence is best entrusted to the trial court's sound discretion" and "[c]onsiderable deference is accorded the exercise of that discretion on appeal." *Smith*, 152 Ill. 2d at 263 (citing *People v. Fierer*, 124 Ill. 2d 176, 193 (1988)). " 'The threshold for finding an abuse of discretion [on an evidentiary ruling] is high.' " *Scales v. Benne*, 2011 IL App (1st) 102253, ¶ 33 (quoting *In re Leona W.*, 228 Ill. 2d 439, 460 (2008)).

¶49 The photographs of Lori depicted Lori in suggestive poses, and Frank identified that the photographs were of Lori because he recognized her, even though her face was blurred. Contrary

to Lori's assertions that Frank did not authenticate the relevant time of the photographs, the record reveals that Frank testified that the photographs are a fair and accurate representation of Lori at the relevant time he downloaded them prior to the hearing on temporary custody because of the length of her hair. Frank specifically testified that at one time it was shorter and then she had added extensions to her hair, and the photographs were an accurate representation of the current length of Lori's hair.

¶50 However, whether Frank laid a sufficient foundation to establish that the photographs were copies of photographs from the "Chix Escorts" Web site is a closer question. Lori cites cases from other jurisdictions analyzing the authentication of screen shot images from social network Web sites such as MySpace and determining there was inadequate authentication because anyone can create such an account. See, *e.g.*, *Griffin v. State,* 19 A.3d 415 (Md. 2011). Lori also cites to *United States Equal Employment Opportunity Comm'n v. E.I. Du Pont de Nemours & Co.*, 2004 WL 2347559 (E.D. La. 2004), as an example of proper authentication where the court found the printout was authenticated where the printout contained the Internet domain address and the date it was printed and the court accessed the Web site and verified the Web page.

¶51 Of course, these decisions have no precedential value in our state. However, even in considering decisions from other jurisdictions, we note there is a growing trend nationally to allow similar Web site screenshot evidence, based either on some distinctive evidence that the photo or screenshot had some distinctive characteristic of the Web site or based on authentication by a witness's testimony or affidavit. See *Haines v. Home Depot U.S.A., Inc.*, 2012 U.S. Dist.

LEXIS 47967, at *23 (E.D. Cal. 2012) (acknowledging that in considering Internet printouts, courts have considered the " 'distinctive characteristics' " of the Web site in determining whether a document is sufficiently authenticated); *Giggle, Inc. v. netFocal Inc.*, 2012 U.S. Dist. LEXIS 29622, at *16-17 (S.D.N.Y. 2012) (holding that over 40 screenshots of Web sites showing that third parties have been using a trademark were authenticated by an affidavit from counsel for the defendant).

¶52 Here, only one of the photographs on Frank's flash drive bore the logo for the "Chix Escorts" Web site. Frank testified that all of the photos were from the Web site. Frank testified that he had personal knowledge of seeing the photographs on the "Chix Escorts" Web site and downloading them onto the flash drive. Frank testified that he ran her escort name, "April," in a search engine and found her escort photographs on the "Chix Escorts" Web site. Frank testified that he is not a computer expert and simply downloaded the images from this specific Web site onto his flash drive and denied that he copied images from his cell phone or elsewhere. Lori presented no evidence or argument that the act of downloading images from a Web site to a flash drive is somehow an unreliable method of creating a duplicate of a photograph. Under Illinois Rule of Evidence 1001(4), "[a] 'duplicate' is a counterpart produced *** by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original." Ill. R. Evid. 1001(4) (eff. Jan. 1, 2011). "The requirement of authentication is satisfied where the evidence is sufficient to support a finding by a reasonable juror that it is more probably true than not true that the matter in question is what its proponent claims." *Flynn v. Golden Grain Co.*, 269 Ill. App. 3d 871, 886 (1995) (citing Michael H.

Graham, Cleary and Graham's Handbook of Illinois Evidence § 901.1, at 713 (5th ed. 1990)). Frank's testimony that the photographs on the flash drive were accurate duplicates of the photos on the "Chix Escorts" Web site may have been sufficient to satisfy the requirements of the Illinois Rules of Evidence for admission of a duplicate of a photograph by electronic means under Rules of Evidence 1001(4) and 1003. Ill. R. Evid. 1001(4), 1003 (eff. Jan. 1, 2011).

¶53 However, at the hearing Lori raised a genuine question as to the authenticity of the original photographs. See Ill. R. Evid. 1003 (eff. Jan. 1, 2011). Lori maintained that the pictures were old photos she had sent personally to Frank that were on his cell phone. None of the photos were screenshots of the Web site, nor did they include the Internet address on the photos. Given the ability to manipulate such digital images, and given Lori's concerns regarding the ability of others to post pictures online, we cannot conclude that there was a sufficient foundation that the photographs of Lori were specifically from the "Chix Escorts" Web site, and we cannot conclude that the admission of the photographs to prove that Lori was specifically part of the online "Chix Escorts" service was not an abuse of discretion.

¶54 However, we find that any such error in admitting the photos for the purpose of establishing that Lori was specifically part of the "Chix Escorts" online escort service was harmless. The circuit court had other evidence before it that Lori was working as an escort and did not base its decision on the fact that she was working for this particular escort agency. The circuit court also had other evidence before it that granting temporary custody to Lori was not in the children's best interest.

¶55 IV. Denial of Motion to Reopen Proofs to Present Rebuttal Evidence

¶56 The trial court denied Lori's motion to reopen the proofs to present Frank's cellular telephone as rebuttal evidence because there was a "chain of custody problem." "To determine whether to permit a party to reopen a case, we consider: '(1) whether the failure to introduce the evidence occurred because of inadvertence or calculated risk; (2) whether the adverse party will be surprised or unfairly prejudiced by the new evidence; (3) whether the new evidence is of the utmost importance to the movant's case; and (4) whether any cogent reason exists to justify denying the request.' " *In re Marriage of Carrillo*, 372 Ill. App. 3d 803, 814 (2007) (quoting *Polk v. Cao*, 279 Ill. App. 3d 101, 104 (1996)). "The denial of a motion to reopen proofs is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1120 (2004) (citing *In re Marriage of Davis*, 215 Ill. App. 3d 763 (1991)).

¶57 We find the trial court properly denied Lori's motion to reopen the proofs because there was no need for further rebuttal evidence. Frank concedes that, in fairness to Lori, there would not have been any surprise or prejudice. However, Lori had already testified in rebuttal that the photographs were on Frank's cell phone, and thus Lori's position on the issue was before the court. Whether the photos were also on Frank's cell phone was not of the utmost importance to Lori's case. There was additional evidence that Lori could not manage the children and was ignoring them and that their schoolwork was suffering.

¶58 Further, the circuit court identified a cogent reason in denying the request – a chain of custody problem. Here Lori encounters her own evidentiary foundation problem. "[I]f the offered evidence is not readily identifiable or is susceptible to alteration by tampering or

contamination, a chain of custody must be proved." *Van Hattem v. K mart Corp.*, 308 Ill. App. 3d 121, 134 (1999) (citing *People v. Winters*, 97 Ill. App. 3d 288, 289-90 (1981)). "This chain of custody must be of sufficient completeness to render it improbable that the object has either been exchanged with another or subjected to contamination or tampering." *Van Hattem*, 308 Ill. App. 3d at 134-35 (citing *Winters*, 97 Ill. App. 3d at 290). The fact that Lori had Frank's cell phone meant that the cell phone was subject to tampering by Lori, especially after the hearing. There was no abuse of discretion in the circuit court's denial of Lori's motion to reopen the proofs.

¶59 CONCLUSION

¶60 We conclude the following: (1) The circuit court did not err in granting Frank temporary custody and exclusive possession of the home even though he did not have a pleading on file because Lori's motion raised the justiciable issue and she failed to object to Frank seeking custody during the hearing. (2) The trial court's order awarding temporary custody of the minor children to Frank was not against the manifest weight of the evidence or an abuse of discretion where the court considered the statutory factors and the best interest of the children under section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2008)). (3) The circuit court did not abuse its discretion in admitting the photographs on Frank's flash drive as photographs of Lori where Frank established a proper foundation and authenticated that the photographs are photographs of Lori, but there was insufficient foundation that the photographs were specifically from the Web site "Chix Escorts." Nevertheless, any error in admission of the photographs on this basis was harmless because the circuit court had other evidence before it that Lori was working as an escort and did not base its decision on the fact that

she was working for this particular escort agency, and it had other evidence before it that granting temporary custody to Lori was not in the children's best interest. (4) The circuit court did not abuse its discretion in denying Lori's motion to reopen the proofs to admit Frank's cell phone where there was no need for cumulative rebuttal evidence, the evidence was not of the utmost importance to her case, and the circuit court articulated a cogent reason for denying the request, in that there was a chain of custody problem with the cell phone. Therefore, we affirm the order of the circuit court.

¶61 Affirmed.