

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000367-MR

CHRISTOPHER HUTCHINSON

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE MARC I. ROSEN, JUDGE  
ACTION NO. 01-CI-00133

CYNTHIA HUTCHINSON  
AND MARY HALL SERGENT

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, DYCHE, AND MINTON, JUDGES.

BARBER, JUDGE: This appeal stems from a dissolution of marriage proceeding originating in Boyd County, Kentucky. On February 7, 2001, Appellee, Cynthia Hutchinson (Cynthia) filed for a divorce from Appellant, Christopher Hutchinson (Christopher). The parties had been married seventeen years and have two teenage children. Their divorce process has been an on-going battle.

The parties were continuously before the circuit court, primarily concerning the financial obligations of Christopher to Cynthia. Christopher was found in contempt of

court orders on two occasions, December 28, 2001 and April 8, 2002. A bifurcated decree<sup>1</sup> was entered January 27, 2003, reserving all issues related to the distribution of property and assignment of debt until a later date.

A lengthy final hearing was held before Hon. Anna H. Ruth, Domestic Relations Commissioner (DRC), on August 26, 2002; October 7, 2002; December 9, 2002; and December 16, 2002.<sup>2</sup> Christopher appeared at all final hearing dates pro se.<sup>3</sup> The DRC issued her Report and Recommendation (Report) on June 20, 2003. Christopher filed his exceptions to the report pro se June 30, 2003. Cynthia filed her response to Christopher's exceptions August 15, 2003. Subsequently, Judge Marc I. Rosen held a hearing on Christopher's exceptions August 15, 2003. Following the hearing, on October 30, 2003, an order was issued overruling Christopher's exceptions and adopting the DRC's Report in its entirety. Christopher now appeals the DRC's valuation of the parties' marital assets and distribution thereof, as well as the DRC's award of maintenance to Cynthia.

Christopher first argues that the circuit court failed to make findings in compliance with Ky CR 52.01 and KRS 403.190

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<sup>1</sup> Issued in accordance with Putnam v. Fanning, 495 S.W.2d 175 (Ky.App. 1973).

<sup>2</sup> Dates of final hearing according to the DRC's Report and Recommendation. No trial videos were made during any of the final hearings nor were transcripts prepared.

<sup>3</sup> Christopher had been represented by three (3) different attorneys prior to the final hearing.

in relation to the division of marital property. Kentucky Rule of Civil Procedure 52.01 states in pertinent part "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment. . ." In relation to the division of marital property, KRS 403.190(1)(a)-(d) states in relevant part:

[The court] also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(b) Value of the property set apart to each spouse;

(c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

We now turn to the Report and Recommendation of the DRC adopted by the circuit court in its entirety to determine what, in fact, were the DRC's findings in relation to the division of the parties' marital property.

The following portions of the DRC's Report and Recommendation are specifically related to the parties' marital property:

Findings

5. The parties' "primary" corporation was Early Warning Security, Inc. (formerly The Security Group, Inc.) with related businesses operating as LLC's and corporations. However, the primary corporation now seems to be East Coast Security, Inc., according to the parties' testimony. (At a hearing held on May 13, 2002 it was determined that, due to [Christopher] making numerous changes in corporate names, moving bank accounts and other actions, meaningful discovery was almost impossible. Therefore, an Order was entered which directed that there were to be no changes in business names, no moving of bank accounts, and all uses of funds were to be meticulously documented with receipts for all expenditures.) [Christopher] reportedly then moved the business offices to 301 4<sup>th</sup> Avenue, Huntington, W.V. on or about September 2002. (Prior to the parties' separation, the business was located at 3901 Brown Street, Ashland, KY. After the parties' separation and several fires at the Brown Street property in November, 2001, [Christopher] then moved the offices to the 2<sup>nd</sup> floor at 1200 Bath Avenue, Ashland, KY, 1401 Winchester Avenue, Ashland, KY, employee Robert Hunt's apartment on Woodland Avenue, Ashland, and possibly in Lexington, KY at one point.[])

6. From the time of the parties' separation on or about January 15, 2001 until at least the date of the portion of the final hearing in October 2002, [Christopher] continued to change bank accounts, dispose of items, buy other items and use the marital business assets as his personal funds. Numerous

corporate names were used by [Christopher] to buy items in an attempt to hide marital assets. [Christopher] then subsequently denied that he had any ownership (or asserted that he had a minimal interest) in many of these corporations.

. . .

The only listing for Skyview Properties is Skyview Properties, LLC incorporated in 1998 with a principal office in Elsmere, KY with no apparent connection to any of the individuals, Robert Hunt and Julie Rase, which were alleged by [Christopher] to be the owners of the corporation. There is no listing for a DBA in that name either.

. . .

7. In late 2001 and the first part of 2002 [Christopher] used business assets as well as other marital funds to buy furniture for his then girlfriend, Julie Rase, as well as kitchen cabinets, carpet, and other items to remodel her home in Ohio. [Christopher] then moved with Ms. Rase to an apartment located at 6128 Skyline Drive owned by Joy Fairchild Griffiths where he promptly started remodeling the apartment and buying more furniture, again using marital funds from the business account.

"Skyview Properties" then entered into an agreement on January 1, 2002 to purchase the six (6) rental units from Joy Griffiths. Although [Christopher] wrote a check to Ms. Griffiths, he denied having any interest in the property. [Christopher] testified that Ms. Rase and Mr. Hunt were the owners. However, Ms. Rase testified that it was [Christopher] that wanted to purchase the property and that she and Mr. Hunt were to then convey their interest in the property to [Christopher] in April 2002. Neither Ms. Rase nor Mr. Hunt contributed any funds to the purchase.

Ms. Rase testified that she did not know who was collecting the rental payments for the other apartments (for a short period of time she and [Christopher] were living in one of the apartments) or who was making the payments of \$1,356.73 per month. (Ms. Griffiths initiated an action against Mr. Hunt and Ms. Rase and they ultimately conveyed any interest they may have had back to her.)

8. [Christopher] and Ms. Rase moved from the apartment to a house on King Richard Court in Ashland in mid January 2002. Ms. Rase signed a purchase agreement on that house on January 11, 2002. However, [Christopher] actually provided the funds for the \$1,500 earnest money deposit and the rental payments of \$1,200 per month for the time Ms. Rase and [Christopher] lived in the house.

Ms. Rase had previously entered into an agreement to purchase a house at 2430 Division Street in Ashland with an earnest money deposit of \$1,000 (also provided by [Christopher]). The documents submitted indicate that the money was refunded. However, Ms. Rase testified that she did not receive those funds and had no knowledge concerning whether the funds were actually refunded or not.

9. [Christopher] also paid for Ms. Rase to take a class at Morehead State University, provided a vehicle for her to drive, gave her money for car insurance, paid for her tennis lessons at the Ashland Tennis Center, paid for personal items, took her on trips and gave her cash. Ms. Rase testified that she was never employed by East Coast Security and denied that she had ever submitted a credit application indicating that she was employed by East Coast Security. She also testified that she did

have a joint bank account with [Christopher] with her name listed as "Julie Hutchinson."

. . .

11. [Christopher] also submitted and allowed to be auctioned by Allen Auctions, marital property including business property that was marital. This occurred on August 3, 2001 after [Christopher] had been ordered not to dispose of marital property. The advertisement for the auction listed the items as being owned by Southwest, Inc. [Christopher] deposited approximately \$24,000 in checks from the auction with each check made payable to Southwest, Inc. [Christopher] added his name to each of the checks.

12. [Christopher] purchased a 1998 Lincoln Navigator, a 2001 Ford crew cab truck, a Bose sound system, remodeled the Brown Street property to add an apartment for his use [sic] personal use prior to the first fire there, wrote checks to businesses allegedly owned by family and friends for work done on the Brown Street property after the fire, paid for extensive renovations to the Bear Creek property where he lives currently, traveled, etc. In addition, he has transferred vehicles and cash to relatives. There are several checks written to family members with notations "loan repayment," checks made out to cash and business checks written to family and friends. Several of the family members and friends that business checks indicate were employees, testified that they had never worked for the business and did not receive the funds noted on the checks. Others testified that they did not receive compensation for work done on the Brown Street property [or] the Bear Creek property.

A review of the bank records, receipts, cancelled checks and other documents that

[Cynthia] introduced reflect that [Christopher] spent in excess of \$400,000 in personal and business assets in a little over a year to year and a half on himself, his girlfriend or other nonbusiness related purposes for which [Cynthia] received no benefit.

. . .

14. There is quite simply no way to determine with specificity the parties' [marital] assets. [Christopher] moved money in and out of numerous accounts in numerous banks; bought, sold and traded items; and transferred assets to friends and family.

It is unknown whether [Christopher's] actions were a show of bravado, an elaborate shell game, a true attempt to hide assets or some combination thereof. Regardless, the [DRC] has the obligation to make a finding as to the marital assets and make a just division of those assets.

15. Based on all of the foregoing, the [DRC] FINDS that [Christopher] had in his control marital assets consisting of cash and businesses valued at a minimum of \$400,000.

#### Recommendations

5. [Christopher] shall have full ownership and possession of the parties' security alarm business and bank accounts as well as the responsibility for all debts, both business and personal.

6. [Christopher] shall pay to [Cynthia] the sum of Two Hundred Thousand Dollars (\$200,000), which represents her interest in the parties' business and bank accounts, on or before June 30, 2003. Should it not be paid by that date, [Cynthia] shall have a judgment against [Christopher] for the amount of \$200,000. This award shall be in



the nature of maintenance to [Cynthia] and not dischargeable pursuant to 11 U.S.C. 523.

7. Unless otherwise specifically noted, each party shall have ownership of the furniture, vehicles and personal items currently in their possession.

The DRC was quite detailed in her Report to the court as to her findings and what she felt was the appropriate distribution of marital assets between the parties. We believe the Report complied with Ky CR 52.01. While the Report did not contain a separate section titled "Conclusions of Law", which is ideal, the DRC did state her conclusions of law within her findings. We now turn to whether the DRC properly considered the factors of KRS 403.190(2)(a)-(e) in making her findings related to division of the parties' marital property.

Kentucky Rule of Civil Procedure 52.01 states in pertinent part, for actions tried without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court." As a result, when the trial court adopts the recommendations of the Commissioner, those recommendations fall under the same standard of review as applied to a trial court's findings. See Greater Cincinnati Marine Service, Inc. v. City of Ludlow, 602 S.W.2d 427, 429,

(Ky. 1980) and Wells v. Sanor, 151 S.W.3d 819, 822 (Ky.App. 2004).

Our court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous. Cochran v. Cochran, 746 S.W.2d 568, 569-570, (Ky.App. 1988), (citing Johnson v. Johnson, 564 S.W.2d 221 (Ky.App. 1978)), see also Rife v. Fleming, 339 S.W.2d 650, 652, (Ky. 1960). Findings of fact are not clearly erroneous if supported by substantial evidence. Black Motor Company v. Greene, 385 S.W.2d 954 (Ky.App. 1964), (citing Massachusetts Bonding & Insurance Co. v. Huffman, 340 S.W.2d 447 (Ky. 1960)). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Secretary, Labor Cabinet v. Boston Gear, Inc., a Div. of IMO Industries, Inc., 25 S.W.3d 130, 134, (Ky. 2000).

Evidence was submitted by each party in relation to marital assets. Relevant evidence submitted by Cynthia consisted of copies of business bank records, copies of cancelled checks, copies of receipts from various purchases made by Christopher, and documents relating to the auction of marital assets held by Christopher. Evidence submitted by Christopher consisted primarily of self-made ledger sheets of his income and

expenses as well as copies of alleged marital debts with no additional authentication. The DRC chose to rely upon the documentation provided by Cynthia. Following a review of the record, we believe these DRC's findings of the value of the parties' marital assets was equitable and supported by substantial evidence.

Each party provided the DRC with testimony and evidence as to their marital property. The DRC could have relied on Christopher's testimony and evidence to reach a different result. The fact that the DRC chose not to does not provide evidence of error warranting a reversal on appeal. Because the DRC's finding relating to the value of the parties' marital property was supported by substantial evidence, the findings fail to satisfy the clearly erroneous standard and must be affirmed. Further, we believe the DRC considered the factors of KRS 403.190(1)(a)-(d) to the best of her ability considering Christopher's conduct throughout the proceedings. We now turn to Christopher's second basis of his appeal.

Christopher next argues that the award of maintenance must be reversed pending compliance with the property distribution statute, KRS 403.190. Christopher also argues that the DRC did not adequately comply with the standard for awarding maintenance in KRS 403.200, specifically that the DRC's findings were not complete or specific. We have determined the DRC, in

fact, did comply with KRS 403.190. Therefore, we now consider whether the DRC complied with KRS 403.200.

A trial court's decision regarding maintenance will not be reversed unless the trial court abused its discretion or based its decision on findings of fact that are clearly erroneous. Powell v. Powell, 107 S.W.3d 222, 224 (Ky. 2003). Before awarding maintenance to either party to a dissolution, the trial court must find that the party: (a) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (b) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home. Gentry v. Gentry, 798 S.W.2d 928, 936-937 (Ky. 1990), (citing KRS 403.200(1)). Once this determination has been made, the court is then required to consider the factors listed in KRS 403.200(2)(a)-(f) before ordering the amount and duration of maintenance. Gentry v. Gentry, 798 S.W.2d 928, 937 (Ky. 1990). Kentucky Revised Statute 403.200(2)(a)-(f) states:

The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support

of a child living with the party includes a sum for that party as custodian;  
(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;  
(c) The standard of living established during the marriage;  
(d) The duration of the marriage;  
(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and  
(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

In her Report and Recommendation, the DRC stated the following in relation to the award of maintenance to Cynthia:

Findings

2. At the time of the hearings [Cynthia] was 36, resided at 1116 Highland Ave., Ashland, Kentucky and had just become employed by ReMax Real Estate.

[Christopher] was 37, resided at 11709 Bear Creek, Catlettsburg, KY and was self-employed at East Coast Security operating in Huntington, WV.

. . .

13. [Christopher] produced a summary of financial information in which he claims that the parties' marital debts substantially outweigh the parties' assets. The listed debts include several owed to the Internal Revenue Service. Although the parties received nothing from the sale of the former marital residence as the IRS attached those funds (\$71,832.00), given [Christopher's] penchant for creating his own reality, the [DRC] is unwilling to accept the submitted documents at face value without independent verification of their accuracy. The dates on many of the documents are several years

old and it was impossible to determine if there are duplications of some of the claims.

Likewise, [Christopher's] list of assets is questionable. From the date of the parties' separation [Christopher] had had control of all of the parties' assets with the exception of their son's Bronco, a Jeep purchased after the separation and driven by [Cynthia] and furniture and personal items.

17. [Cynthia] requests that [Christopher] pay maintenance and pay her rent each month.

Prior to the parties' separation, [Cynthia] worked in the parties' business. At one time she also took classes to become a licensed real estate agent. She also did some private investigation. For a period of time after the separation, [Cynthia] worked at minimum wage jobs. As of the hearing date, she had become employed by ReMax Realty with an approximate income of \$1,200 per month.<sup>4</sup>

Previously, [Cynthia] submitted a budget showing that her monthly expenses were \$3,700 not including rent of \$600 and utilities. However, included in that \$3,700 figure was \$678 for a car payment on the Expedition, \$600 for clothes and \$300 for gas for her vehicle and the parties' son's vehicle. After adjustments for no car payment and further reductions for gas and clothes but including rent and utilities,

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<sup>4</sup> Cynthia's income was calculated by the DRC in paragraph 16 dealing with child support. It stated in pertinent part, "[Cynthia] earns \$7.00 per hour at ReMax Realty or approximately \$1,200 per month if she works forty (40) hours per week."

Christopher's income was also calculated by the DRC in paragraph 16. The DRC stated "At a temporary hearing in April 2001 [Christopher] testified that he was earning \$900 per week for \$3,900 per month. However, on July 5, 2001 [Christopher] listed his income as \$8,000 per month on a credit application. A copy of a payroll check submitted with the application shows his weekly salary to be \$2,000 per week, with year to date earnings of \$62,000 as of June 24, 2001. On a credit application in November 2001, [Christopher] listed his gross annual income as \$75,000 and submitted a copy of a payroll check showing that he earned \$1,442.31 per week with year to date earnings of \$69,230.88 as of November 4, 2001. There was no testimony concerning his current income. However, it is doubtful that he withdraws less than \$6,000 per month from the business."

[Cynthia's] monthly expenses are approximately \$3,200.

Assuming actual receipt of the monthly child support obligation<sup>5</sup> (for the next two years), [Cynthia] will have access to approximately \$1,900 per month before taxes or a net of approximately \$1,700 per month leaving a shortfall of \$1,500 per month.

Clearly when [Cynthia] receives her portion of the marital assets she will have sufficient funds to provide for her reasonable needs. However, until such time as she actually receives those funds, she cannot adequately support herself with reasonable employment even including [Christopher's] child support obligation.

Based on all of the foregoing, the [DRC] FINDS that [Cynthia] meets the qualifications for an award of maintenance in the sum of \$1,500 per month until such time as she receives her portion of the marital assets.

#### Recommendations

8. [Christopher] shall pay to [Cynthia] the sum of \$1,500 per month as maintenance, effective June 30, 2003 until such time as he provides [Cynthia] with a clear title to the 2000 Cadillac Escalade and upon payment of \$200,000 to [Cynthia] also free of any possible attachments from any creditors for any marital debts resulting from the parties' business or personally.

Again, we believe the DRC considered the factors stated in KRS 403.200(2) to the best of her abilities considering Christopher's conduct. We will now determine

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<sup>5</sup> In paragraph 16, the DRC calculated child support in the amount of \$721 per month to be paid by Christopher, based upon monthly income of \$1,200 for Cynthia and \$6,000 for Christopher.

whether the DRC's findings were clearly erroneous or an abuse of discretion occurred.

The DRC considered the evidence presented to her and awarded maintenance to Cynthia to cover her needs until she received her award of the marital property from Christopher. The parties each submitted evidence related to their respective financial conditions. The DRC again chose to rely upon evidence submitted by Cynthia rather than that of Christopher. The DRC clearly stated she was hesitant to believe any documentation provided by Christopher without proper authentication due to his continued improper behavior throughout the proceedings.<sup>6</sup> Based on the record, we believe the DRC's findings related to the award of maintenance are supported by substantial evidence and are not clearly erroneous. Further, we are unable to substantiate any abuse of discretion in the award of maintenance to Cynthia which would warrant a reversal.

For the reasons set forth above, we believe the findings by the DRC adopted by the circuit court in their entirety related to the distribution of marital assets and the award of maintenance are supported by substantial evidence and

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<sup>6</sup> Based on the record, Christopher consistently utilized marital assets for his personal use despite numerous orders explicitly prohibiting the same. The first order was an agreed order by the parties entered on February 23, 2001. A second order was entered by the court on August 27, 2001. A third order was entered July 1, 2002. None of the orders appeared to have any deterrent effect upon Christopher.



not clearly erroneous. Therefore, we affirm the Boyd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

James W. Lyon, Jr.  
Greenup, Kentucky

BRIEF FOR APPELLEE:

Mary Hall Sergent  
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