

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

NO. 2008-CA-000086-MR

BILLIE BATES (GIBSON)

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT  
HONORABLE SAMUEL T. WRIGHT, III, JUDGE  
ACTION NO. 00-CI-00079

CHARLIE GIBSON

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE AND DIXON, JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

ACREE, JUDGE: Billie Bates appeals an order of the Letcher Circuit Court relieving Charlie Gibson of a provision of a divorce decree requiring him to make

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<sup>1</sup> Senior Judge J. William Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

payments on a debt consolidation bill. Because the trial court did not provide Bates the required hearing, we reverse.

Bates and Gibson were married on November 17, 1998. On March 6, 2000, they entered into a separation agreement, and on March 30, 2000, their divorce decree, which incorporated the separation agreement, became final.

Paragraph 8 of the separation decree provides,

That the parties agree that the Respondent [Gibson] shall be responsible for the indebtedness of the parties on the debt consolidation bill to Community Trust Bank, N.A., and on the 1996 Norris Mobile Home to Greenpoint Credit. That the parties agree that as of the date of signing this agreement each shall be responsible for indebtedness in their name along [sic].

On two occasions, after Gibson missed payments on the bill, the trial court held him in contempt in orders issued on March 8 and September 2, 2005.

Gibson eventually learned that the bill required a balloon payment of more than \$20,000. This caused him to believe the debt he had been paying was not marital debt, and that Bates had concealed that fact from him. According to the bank, Gibson was not a party to the loan he was paying and denied him access to information on the account. Gibson's attorney eventually acquired the loan documents by subpoena. After reviewing those documents, Gibson came to believe the loan was used to pay for Bates' non-marital property. Gibson returned to the trial court, alleging that Bates fraudulently induced him to agree to repay the loan by misrepresenting that the loan had a marital purpose.

The trial judge ordered the parties to conduct an evidentiary hearing before a Domestic Relations Commissioner, who in turn ordered the parties to take depositions and to submit those depositions to the DRC, along with proposed orders. Ultimately, the DRC found Bates had committed fraud, and recommended the trial judge: (1) relieve Gibson of his obligation to repay the bill to Community Trust Bank, and (2) set aside the orders finding Gibson in contempt. On January 11, 2007, the DRC prepared recommended Findings of Fact, Conclusions of Law, and Order and tendered them to the circuit court.

On January 22, 2007, the circuit clerk sent to counsel of record a Notice of Filing by the DRC of the proposed order.

On January 30, 2007, Bates served timely written objections to the proposed order upon Gibson. In conformity with Kentucky Rules of Civil Procedure (CR) 56.03(2), Bates moved for a hearing on the exceptions to be conducted before the circuit court. The motion was to be heard on February 15, 2007. However, Bates passed the motion and re-noticed it to be heard before the DRC and not before the circuit court.<sup>2</sup>

The DRC conducted a hearing on Bates' exceptions on March 13, 2007. On July 1, 2007, the DRC prepared a recommended order overruling Bates' exceptions and tendered that proposed order directly, and only, to the circuit judge.

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<sup>2</sup> Apparently it is a custom of local domestic practice to allow the DRC to address the exceptions prior to their consideration under CR 53.06(2) by the circuit judge. However, we could find no local rule to that effect.

Because the circuit clerk was unaware of the DRC's recommendation to overrule Bates' exceptions, Bates received no notice of it.

On August 1, 2007, the circuit court adopted the DRC's recommendation and entered an order overruling Bates' exceptions.<sup>3</sup> That order was mailed to Bates' attorney and was her first notice of the DRC's recommendation. However, the circuit court had yet to adopt the DRC's January 11, 2007 recommendation to relieve Gibson of his obligation to pay the bill to Community Trust Bank.

On August 8, 2007, Bates filed a motion to amend, alter or vacate the August 1, 2007 order. The specific relief sought was that the August 1, 2007 order be vacated and that a hearing be set for a hearing on Bates' exceptions to the DRC's January 11, 2007 recommended order. The motion was heard on August 23, 2007. Significantly, there was no consideration of the exceptions themselves; only the motion to vacate the August 1, 2007 order was addressed.

On October 12, 2007, the circuit court entered two conflicting orders.<sup>4</sup>

The first order found that the clerk failed to provide Bates with notice of the DRC's July 1, 2007 recommended order. That was just cause for her failure to timely file objections to that recommended order. This first order allowed Bates "ten (10) days from [October 12, 2007] to file Exceptions to the Findings of Fact,

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<sup>3</sup> The motion actually refers to the "Order of July 26, 2007" because that is the date the circuit judge signed the order that was entered by the circuit clerk a few days later. Though the parties refer to the dates orders were signed, we follow the rule that the date of an order or judgment is the date of its entry on docket by clerk. See *Arnett v. Kennard*, 580 S.W.2d 495, 496 (Ky. 1979).

<sup>4</sup> The parties refer to these orders as dated October 4, 2007. However, see footnote 3, *supra*.

Conclusions of Law and Order of the Domestic Relations Commissioner to be heard by the Circuit Court.”

The second order stated,

the Court having reviewed the record and in all things being sufficiently advised, IT IS HEREBY ORDERED that the Petitioner’s Motions are OVERRULED, and the Findings of Fact, Conclusions of Law and Order filed by the Domestic Relations Commissioner of this Court on January [11], 2007<sup>5</sup> are hereby adopted.

On October 18, 2007, in compliance with the first October 12, 2007 order and disregarding the second, Bates filed exceptions to the DRC’s January 11, 2007 recommended order. She noticed her exceptions to be heard before the circuit court on November 8, 2007, and the clerk placed the matter on the docket for that date. Other than the docket entry itself, there is no indication in the record that the circuit court conducted the scheduled hearing on Bates’ exceptions.

On October 19, 2007, Gibson filed a motion to vacate the October 12, 2007 motion that granted Bates’ motion to vacate the August 1, 2007 order that overruled Bates’ exceptions. Gibson’s motion was noticed to be heard on November 29, 2007. According to the video record, neither party made an appearance on that motion.

On December 14, 2007, the trial judge granted Gibson’s October 19, 2007 motion, stating,

that the Order permitting [Bates] ten (10) days from the date of said Order to file Exceptions to the Findings of

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<sup>5</sup> Gibson stated the date as January 22, 2007, but this was the date the circuit clerk sent notice to counsel that the DRC had tendered the recommended order on January 11, 2007.

Fact, Conclusions of Law and Order of the Domestic Relations Commissioner, be and is hereby VACATED, and the Findings of Fact, Conclusions of Law and order filed by the Domestic Relations Commissioner of this Court are adopted.

This order also implicitly, though effectively, denied Bates' motion to alter, amend or vacate the August 1, 2007 order overruling her exceptions. This appeal followed.

Bates has raised several arguments on appeal to support her contention that the trial judge's order was improper. We must reverse because no hearing was conducted in conformity with CR 53.06(2), despite Bates' efforts to obtain a hearing before the circuit court.

A trial court's denial of a motion to alter, amend, or vacate an order must be reviewed for abuse of discretion. *Brenzel v. Brenzel*, 244 S.W.3d 121, 125 (Ky.App. 2008).

We first address Bates' assertion the doctrine of *res judicata* barred the trial court from vacating the contempt orders and relieving Gibson of the obligation to repay the loan. It clearly did not. *Res judicata* acts to preclude parties from re-adjudicating matters already finally resolved in prior actions. *Hopkins v. Jones*, 235 S.W. 754, 756 (Ky.App. 1921). Here, the trial court has not attempted to re-address the matter in separate litigation, but has set aside orders issued in the original action. *Res judicata* does not prevent this. *Webb v. Compton*, 98 S.W.3d 513, 516 (Ky.App. 2002). Additionally, in the case of fraud, a party may move to set aside orders provided the motion is made within a

reasonable time. CR 60.02(d). It was proper for the trial court to reconsider the orders holding Gibson in contempt.

Additionally, it was not improper for the DRC to address Gibson's claim that his agreement to be responsible for the Community Trust Bank obligation was procured by a fraud perpetrated by Bates and not because of a meeting of the minds. Whether there was a meeting of the minds is precisely the question the circuit judge directed the DRC to determine. *Provident Sav. Life Assur. Soc. v. Wayne's Adm'r*, 29 Ky.L.Rptr. 160, 93 S.W. 1049, 1051 (Ky. 1906)("fraud practiced by a successful party in the obtention of a contract will vitiate it [for i]t was never intended that either party could be bound except by a meeting of their minds upon matters material to the contract.").

Bates also contested the trial judge's December 14, 2007 order to the extent it adopted the DRC's recommended order relieving Gibson of an obligation under the settlement agreement without granting Bates a hearing on the exceptions she presented.

Without recounting the sequence of events delineated *infra*, we conclude that Bates, through no fault of her own, was deprived of any hearing at all before the circuit court. By local custom, Bates presented her exceptions to the DRC. But that is merely an extra step in the process. The important point to note is that no hearing before the DRC will satisfy the requirement of CR 53.06(2), as interpreted in *Kelley v. Fedde*, 64 S.W.3d 812 (Ky. 2002), of the circuit court's requirements to conduct a hearing. She did not waive her right to present

exceptions to the circuit court after the DRC overruled them because she did not receive notice of that recommendation until after the circuit court adopted it as its own.

Furthermore, the circuit court's own October 12, 2007 order authorized the filing of exceptions more than ten days after the DRC's recommended order relieving Gibson of his obligation under the settlement agreement. *See Eiland v. Ferrell*, 937 S.W.2d 713, 717 (Ky. 1997)(trial court may review untimely exceptions and conduct a hearing should circumstances so warrant).

Given the circumstances of this case, we believe the Letcher Circuit Court was clearly erroneous in entering its October 12, 2007 order denying Bates' motion to vacate the August 1, 2007 order and conduct a hearing on her exceptions.

Having said this, we alert the circuit court and the parties to the fact that "while a full-blown evidentiary hearing is not contemplated by the rule, the parties must be afforded an opportunity for oral argument." *Id.* at 814, *citing Haley v. Haley*, 573 S.W.2d 354 (Ky.App. 1978). Under the holding in *Kelley*, this case must be reversed and remanded for a hearing. The scope of the hearing, however, we leave to the discretion of the circuit court.

For the foregoing reasons, we vacate the order of the trial court and remand for further proceedings consistent with this opinion.

ALL CONCUR.



BRIEFS FOR APPELLANT:

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