

2010

# Michael J. Boggess v. Tina A. Bogess : Appellant's Opening Brief

Utah Court of Appeals

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Michael J. Boggess.

Tina A. Boggess (Jenkins).

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD DISTRICT COURT**

**MICHAEL J. BOGGESS  
PETITIONER – APPELLANT**

**Vs.**

**Appeal Case No: 20100507**

**TINA A. BOGGESS (JENKINS)  
RESPONDENT – APPELLEE**

On Appeal from the Third District Court, Salt lake County, Judge Dever

Civil Case No: 064905394

**APPELLANT’S OPENING BRIEF**

Michael J. Boggess – Appellant

795 Geranium Street

Sandy, Utah 84094

Tina A. Boggess (Jenkins) – Appellee

1280 Serpentine Way

Sandy, Utah 84094

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## RULES CITED

Utah Rules of Civil Procedure, Rule 60 (b)

## STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah State Code Ann. § 78A-4-103 (2) (a) and Utah Rules of Civil Procedure Rule 60 (b)(2).

## STATEMENT OF ISSUES AND FACTS

This is an appeal from a decision in the United States District Court for the District of Utah, the Honorable Lee Dever presiding. The decision granted summary judgment in favor of the Appellee Tina A. Boggess, the award of one-half payment of debt for the foreclosed residence and attorney fees garnered from hearings which were deemed unnecessary.

I. The trial court abused its discretion when it failed to give weight to the Appellee's admission of fraudulent acts surrounding the marital residence. Had the truth been brought to light the residence may not have gone into default then subsequently foreclosure. The Appellee did knowingly commit Perjury before the court regarding her ability to make the mortgage payments timely and completely; thus the Appellant should not have been found responsible for any obligations concerning the former marital residence. The trial court disregarded the Appellee's misrepresented statements regarding her ability to retain the

residence. Abuse-of-Discretion Standard applies to missed acknowledgement of the Appellee's confession as to misleading the court in her ability to pay for the residence.

II. The trial court's finding that the Appellant should be accountable for the Appellee's attorney fees is clearly erroneous. No court hearings were held without merit in which the Appellee's Attorney was present; thus the Appellant should not be held accountable for Appellee's Attorney's Fees. The trial court did not thoroughly investigate the Appellee's Attorney's fees. Clearly Erroneous standard applies as the Attorney was noted as counsel, but however did not attend the hearings in question.

Rule 60(b), Utah Rules of Civil Procedure, expressly states that it has no effect on a court's inherent power to set aside a judgment procured through "fraud upon the court." Utah R. Civ. P. 60(b)(2).

## SUMMARY OF AGRUMENTS

I. The Appellee did in fact commit perjury before the court by knowingly and willfully filing motions and affidavits indicating that she could afford the mortgage payments for the party's marital residence due to the rent payments she was receiving from her uncles. In her final argument filed April 09, 2010, the Appellee admitted to her act of misrepresenting and deceiving the Court. The Admission to this fact came again in open court before Judge Dever. Due to this fact the Appellant asks to have judgment decision number 2 reversed from the final divorce order and the Appellee held accountable for her dishonest behavior. These facts are evidence of Fraud and Perjury before the court and therefore relief is sought.

II. The Appellee's attorney fees are generated from hearings that the attorney did not attend. The judgment decision number 3 should be reversed.

## ARGUMENT

### POINT I.

The Appellant in this case argues that the issue of the marital residence's remaining debt should be placed solely upon the Appellee due to the fact she misled the Appellant as well as the Court from the on set of the divorce proceedings. Rule 60(b) provides that a party may file an independent action for relief from a judgment, order or proceeding for "fraud upon the court." The Appellant was unaware at the time of the final hearing to determine the exact weight of the Appellee's confession. The Appellee admitted in open court that she had previously lied in her motions that were filed under oath stating that her uncles were in the residence with the purpose of providing rent. See **Addendum 9** Bench Trial Transcription Pg. 25 lines 14-25 and pg. 26 lines 1-20 and **Addendum 7**) RESPONDENT'S FINANCIAL DECLARATION; filed April 09, 2010; Page 2, Number 2, lines 13 and 14.

Had the Appellee been honest in this matter it would have given the Appellant the opportunity to motion to retain the

residence and save the marital investment. The Appellee's decision to misrepresent the facts did allow the residence to go into foreclosure due to no payments being made towards the mortgage from April 2007 to September 2007. As stated in the Protective Order which was obtained by the Appellee on April 03, 2007, the Court was under the impression the Appellee wanted to retain the residence for the sake of "stability" in her children's lives. The Appellee used this reasoning in her effort to keep possession of the residence which ultimately led the Court to decide in the best interest of the children. Unfortunately the Appellee filed misrepresentations of fact to the Court and allowed the residence to be foreclosed upon. see: 4 Addendums filed by the Appellee and the Appellee's Attorney requesting possession of the residence. Also noting that all statements reflect that the Respondent's Uncles should be allowed to remain in the residence to help with mortgage payments.

**Addendum 3) MEMORANDUM IN SUPPORT OF MOTION  
FOR TEMPORARY ORDERS – ARGUMENT SECTION;**

dated March 06, 2007; ITEM #3 MARITAL HOME, Pg 6 ,  
Lines 1 – 2.

**Addendum 4)** RESPONDENT’S AFFIDAVIT IN SUPPORT  
OF MOTIONFOR TEMPORARY ORDERS; dated March 06,  
2007; ITEM #16, Pg 4. Lines 1 - 5

**Addendum 5)** AMENDED MOTION FOR TEMPORARY  
ORDERS; dated March 15, 2007; ITEM #6 Pg. 2

**Addendum 6)** RESPONSE TO PETITIONER’S MOTION  
FOR TEMPORARY ORDERS; dated March 19, 2007; ITEM  
C MARITAL HOME Pg 2. Lines 6 - 5

The Appellant believes the agreement filed to sign a Quit  
Claim Deed was made under duress as the Appellee was in fact  
filing motions to retain the residence under false pretenses. Had it  
been known to the Appellant that the Appellee was in fact not  
making mortgage payments and the uncles were in fact not paying  
her rent, the Appellant would have filed a motion to have the  
property returned in an effort to save the investment. The  
Appellee’s willingness to file misrepresentations of fact in and

under the act of perjury to retain the property was a malicious act which in the end forced the foreclosure of the property.

The Judge's decision that the Appellant's claim to be waiting for the Quick Claim Deed is in fact with merit. The Appellant was named on both the instrument as a signer and also named in the Notary clause. A normal person would not apply the need of two signatures to a document that would only require one unless the intent was to obtain a second signature. See **Addendum 8**, Quit Claim Deed.

The foreclosure action is also a violation of the terms regarding possession of the residence as stated in the Protective Order. The Appellee was ordered not to "dispose of the residence", however she did not make any payments towards the mortgage; effectively disposing of the residence. The Protective Order is the instrument the Appellee acquired to gain control of the residence. See **Addendum 2**, Page 2, Item 6 Property Orders.

The Appellant did raise the issue of the uncles not paying rent as previously stated, See **Addendum 8** Bench Trial Transcription

Pg. 06 lines 9-14. This information however did not seem to affect the Court's decision in determining the burden.

Therefore, as the Appellant was deceived into believing that, with uncles there supplying rent, there was extremely little chance of being awarded the house during or after separation. As brought on by the actions of the Appellee, the Appellant had little recourse but to relinquish any interest he had in the residence before the court. The deceptive actions of the Appellee have led to the residence being sold at a foreclosure auction in November 2007. The Appellant's credit is now burdened with a foreclosure report against him.

The Appellee should be held accountable for her actions not only by holding the remaining debt from the foreclosure, but also for contempt for committing perjury and fraud before the court.

## POINT II.

After searching the minutes and court rulings the Appellant cannot find a single hearing in which the Appellee's Attorney was present in which his motions were found without merit standing

alone. It is fact that after the Appellant released his counsel on September 12, 2007 the Appellee's Attorney was not present for any other hearing. The Appellee's Attorney however did not formally withdraw before the Court. She was noted as to being counsel to the Appellee but did not appear before the court at trial time.

The Appellant is not aware of, nor can locate any "billings submitted by the attorney" as stated by Judge Dever in the Final Judgment Order number 3. The Appellee had filed a copy of a Transaction File List in her last Motion to the court before the Final Hearing. Faxed pages 1 through 4 of the Financial Declaration filed April 09, 2010. In this filing it is also noted that no work was done by the Appellee's Attorney after September 14, 2007.

The Appellant was not capable of addressing any issues with the Appellee due to the Protective Order. The only alternative the Appellant had to addressing his complaints was to bring them before the Commissioner. These complaints had to do with missed/denied holiday, vacation and regular visitation time with

the Appellant's daughter; as well as insidious and reprehensible behavior by individuals present when the Appellant's daughter was picked up from the Appellant's residence.

### CONCLUSION

1. The Appellant asks now for the Court to remove the order placed against him making him responsible for one-half of the obligation owed as a result of the foreclosure.

The Appellant also asks that the Court find the Appellee to be found in Contempt of Court for the charge of Perjury.

The Appellee's misrepresentation of the fact that her uncles were paying rent to validate her claims that she could afford the mortgage payments and retain the residence have placed undue stress and harm upon the Appellant. The Appellant feels that the perjury charges are just and fair; due to the fact the Appellee openly admitted in her final filing and to Judge Dever that her uncles were in fact not paying rent. "It generally is recognized and well settled that perjury may be punishable as a contempt of

court”, See generally, 12 Am.Jur., Contempt, Section 17. And in the divorce case of Crute v. Crute the appellate court upheld the trial court’s finding that the husband was in contempt of court for "deliberately attempting to mislead the court and conceal from the court evidence in the case." Also noted "a witness who seeks to conceal the truth or to give evasive answers or to falsify or mislead the court is not acting respectfully to the court and his conduct is reprehensible”. Crute v. Crute, 86 Ga.App. 96, 97, 70 S.E.2d 727, 728 (1952) and also Phelps v. State, 80 Ga. App. 544 (56 S. E. 2d, 837). Once again the admissions regarding the uncles were stated under oath. This is not a case of “he said, she said” that requires investigation. This is a blatant admission by the Appellee to the complete disregard for the rules of the court and as Stated by Nevada Supreme Court; the Court has recognized that "[t]he power of courts to punish for contempt and to maintain decency and dignity in their proceedings is inherent, and is as old as courts are old." Lamb v. Lamb, 83 Nev. 425, 428, 433 P.2d 265 (1967).

2. The Appellant asks for another review of court hearings to  
1) determine if they were in fact necessary and 2) verify the  
presence of the Appellee's Attorney.

3. Base upon evidence found in Conclusion Request 3, the  
Appellant asks the Court to reverse the decision to hold the  
Appellant accountable for \$2, 089.00 of the Appellee's Attorney  
Fee's.

4. All costs associated with this appeal should be transferred  
to the Appellee. This is to include: Filing fee, Bond fee, and  
Transcription cost.

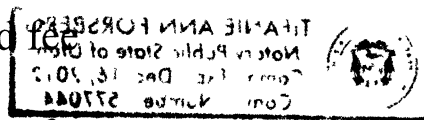
These costs are:

\$122.00 transcription fee of hearing April 14, 2010

\$525.00 File for appeal

a. \$300 Bond fee

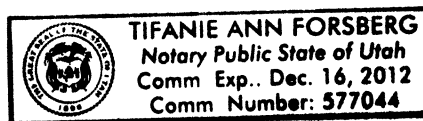
b. \$225 Filing fee



Signed Michael J. Boggess  
Michael J. Boggess

Dated 10-19-2010

Notary of the Public Tifanie Ann Forsberg



## CERTIFICATE OF SERVICE


I certify that a copy of the attached APPELLANT'S OPENING BRIEF was served upon the party listed below by mailing it by first class mail, personal delivery, or fax to the following addresses:

Name: Tina A. Jenkins

\* Certified mail

Address: 1280 Serpentine Way

Sandy, Utah 84094

By:   
Signature

Date: 10-18-2010