

2008

# Michael Blocker v. Neil Morkel, Isabel Morkel : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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MICHAEL BLOCKER,

Petitioner/Appellee,

vs.

NEIL AND ISABEL MORKEL,

Respondent/Appellant.

Appeal No. 20080415

Trial Case No. 070402784

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BRIEF OF APPELLANT

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Appeal from Civil Stalking Injunction entered against Respondent/Appellant,  
Isabel Morkel on March 26, 2008 by the Honorable Samuel McVey of the Fourth Judicial  
District Court in and for Utah County, State of Utah.

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UTAH APPELLATE COURTS

AUG 11 2008

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### **Identification of Individuals Involved**

<b><u>Name</u></b>	<b><u>Identification</u></b>
Michael Blocker	Petitioner/Appellee; child, Mackay's father; ex-husband to Kirsteen Morkel (formerly Blocker); current husband to Trudy Blocker (formerly, Southwick).
Isabel Morkel	Respondent/Appellant; Kirsteen's mother; Mackay's maternal grandmother.
Neil Morkel	Kirsteen's father; Mackay's maternal grandfather.
Kirsteen Morkel (fka Blocker)	Ex-wife of Michael; Mackay's mother; adult daughter of Neil and Isabel Morkel.
Mackay Blocker	Minor child; son of Kirsteen and Michael.
Chevonne Day	Neil and Isabel's adult daughter.
Trudy Blocker (fka Southwick)	Michael's current wife.
Marie Blocker	Michael's mother (deceased).
Nathan Blocker	Michael's adult brother.
Loretta Demke	Michael's adult sister.
Thomas McClure	Michael's neighbor/former neighbor of Neil and Isabel

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**IN THE UTAH COURT OF APPEALS**

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MICHAEL BLOCKER,

Petitioner/Appellee,

vs.

NEIL AND ISABEL MORKEL,

Respondent/Appellant.

Appeal No. 20080415

Trial Case No. 070402784

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**JURISDICTIONAL STATEMENT**

This Court has jurisdiction pursuant to Utah Code Annotated §78A-4-103(2)(h) (2008) (recodified 2/07/08, previously §78-2a-3). The Honorable Judge Samuel McVey of the Fourth Judicial District Court, in and for Utah County, State of Utah, presided over the Evidentiary Hearings held on December 21, 2007, January 30, 2008 and February 14, 2008, and entered Civil Stalking Injunction against Isabel Morkel on March 26, 2008.

**ISSUES ON APPEAL, STANDARDS OF REVIEW and PRESERVATION**

Issue 1: Did the district court err in issuing a 3-year Civil Stalking Injunction against the Respondent/Appellant, Isabel Morkel regarding evidence presented, offered and accepted, and the court's Findings that Appellant had caused emotional distress to the Appellee?

Standard of Review: The adequacy of the district court's Findings of Fact are reviewed under a clearly erroneous standard of review. *See Towner v. Ridgway*, 2008 Utah 23; *Young v. Young*, 979 P.2d 338, 342 (Utah 1999); and *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 937 (Utah 1998). Furthermore, whether a Petitioner met his/her

burden of proof for entry of a Civil Stalking Injunction is a question of law, which the Appeal Court would review for correctness, affording no deference to the district court's legal conclusions. Gutierrez v. Medley, 972 P.2d 913, 914-15 (Utah 1998); and State v. Pena, 869 P.2d 932, 935 (Utah 1994). Moreover, Rule 52(a) of the Utah Rules of Civil Procedure states that: “[f]indings of fact, whether based on oral or documentary evidence, 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.”

Furthermore, Rule 52(a) states that: “the [trial] court shall find the facts specifically and state separately its conclusions of law thereon.” *See also*, Towner v. Ridgway, 2008 UT 23; Jeffs v. Stubbs, 970 P.2d 1234, 1242 (Utah 1998); Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979); Williamson v. Williamson, 1999 UT App 219, ¶9 (emphasizing the importance of a trial court issuing adequate findings of fact). The adequacy of a trial court's findings of fact are reviewed under a clearly erroneous standard of review. *See*, Towner v. Ridgway, 2008 UT 23; Young v. Young, 979 P.2d 338, 342 (Utah 1999); and Pennington v. Allstate Ins. Co., 973 P.2d 932, 937 (Utah 1998). Furthermore, whether a Plaintiff met his/her burden of proof for entry of a Civil Stalking Injunction is a question of law, which the appeal court would review for correctness, affording no deference to the district court's legal conclusions. Gutierrez v. Medley, 972 P.2d 913, 914-15 (Utah 1998); and State v. Pena, 869 P.2d 932, 935 (Utah 1994).

Preservation: This issue was preserved: Sufficient evidence was presented by Respondent/Appellant, Isabel Morkel to support that the district court erred in issuing a



3-year Civil Stalking Injunction against Isabel Morkel. This issue was raised and preserved by counsel in transcript from Evidentiary Hearing held on February 14, 2008 (See Transcript of February 14, 2008 hearing (hereafter “2/14/08 Trans.”) 26:15-25; 27:1-22; 41:6-25; 42:1-25; 43:1-25; 44:1-25; 45:1-6).

Issue 2: Did the district court err in interpreting and applying the Civil and Criminal Stalking Statutes? Utah Code Ann. §§77-3a-101 and 76-5-106.5 (2003).

Standard of Review: Interpretation and application of a statute is a question of law, which is reviewed for correctness, affording no deference to the district court’s legal conclusions. See Towner v. Ridgway, 2008 Utah 23; Gutierrez v. Medley, 972 P.2d 913, 914-15 (Utah 1998); and State v. Pena, 869 P.2d 932, 935 (Utah 1994).

Preservation: This issue was preserved: Sufficient evidence was presented by Respondent/Appellant, Isabel Morkel to support that the district court erred in interpreting and applying the civil and criminal stalking statutes. This issue was raised and preserved by counsel in transcript from Evidentiary Hearing held on February 14, 2008. (See 2/14/08 Trans. 26:15-25; 27:1-25; 32:3-25; 33:1-4).

Issue 3: Did the district court err by failing to weigh the effect of the entire course of conduct/totality of the circumstances between the parties in relation to Appellee’s contentious divorce and pending post-divorce custody proceedings with Appellant’s adult daughter?

Standard of Review: Under Utah law, whether the district court erred in interpreting and applying the civil and criminal Stalking statutes of §§77-3a-101 and 76-5-106.5 U.C.A. (2003) is reviewed with a correction of error standard of review. The

Appellate Court will reverse only where a district court findings is against the clear weight of the evidence, or if the Appellate Court otherwise reaches a firm conviction that a mistake has been made. Towner v. Ridgway, 2008 Utah 23; Ellison v. Stam, 2006 UT App. 150; Abernathy v. Mzik, 2007 UT App. 259; and State v. Pena, 869 P.2d 932, 935 (Utah 1994).

Preservation: This issue was preserved: Sufficient evidence was presented by Respondent/Appellant, Isabel Morkel to support that the district court erred by failing to weigh the effect of the entire course of conduct/totality of the circumstances between the parties in relation to Appellee's contentious divorce and pending post-divorce proceedings with Appellant's adult daughter regarding Appellant's 5-year-old grandson. This issue was raised and preserved by counsel in transcript from Evidentiary Hearing held on February 14, 2008. (See 2/14/08 Trans. 26:15-25; 27:1-25; 33:5-25; 34:1-25; 35:1-23).

**CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**  
(Text of Utah Code Provisions and Rules provided in separate Addendum)

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## **STATEMENT OF THE CASE**

### **A. Nature of the Case:**

This case is before the Court of Appeals to determine whether the district court erred in issuing a 3-year Civil Stalking Injunction against Respondent/Appellant, Isabel Morkel; whether the district court erred in interpreting and applying the civil and criminal Stalking Statutes; and whether the district court erred by failing to weigh the effect of the entire course of conduct and totality of the circumstances between the parties in relation to Appellee's contentious divorce and pending post-divorce/custody proceedings with Appellant's adult daughter regarding Appellant's then 5-year-old grandson. In July/August 2002, Isabel Morkel's daughter, Kirsteen Morkel (fka Blocker) separated from her then-husband, the Petitioner/Appellee, Michael Blocker, a few weeks after their son, Mackay's birth on July 20, 2002. Mackay has resided with his mother, Kirsteen and her parents, Neil and Isabel Morkel ever since. Neil and Isabel are very involved with their daughter and grandson's daily living and routines.

Over the last six (6) years, since the time of Kirsteen and Michael's separation, the history between Mr. Blocker, and Kirsteen and her parents, has been emotionally charged and contentious with much of the conflict stemming from the divorce and custody proceedings. Kirsteen and Michael have had ongoing legal disputes regarding parent-time with their son, Mackay, who is currently six (6) years old. Due to the history of animosity and legal contention between Michael and the Appellant's daughter, Kirsteen, there was frequent conflict when Michael came to Appellant's home for purposes of conducting parent-time, or during the pick-up and/or exchange of Mackay for the same.

There have been allegations and claims, including police reports, made by both parties in relation to their tumultuous history. (See Addendum #6). Subsequently, Michael filed for a Civil Stalking Injunction against his ex-wife's parents, Neil and Isabel Morkel on September 18, 2007. (See Addendum #2). Immediately thereafter, on or about October 1, 2007, Michael Blocker filed Petition to Modify Decree of Divorce, seeking a change of physical custody, or alternatively, joint physical custody of his son, Mackay from his ex-wife, Kirsteen. (See Addendum #4). The basis for Mr. Blocker's Petition to Modify Decree of Divorce largely pertains to the same allegations recited in his Affidavit in Support of his Request for Civil Stalking Injunction against his ex-wife's parents, Neil and Isabel Morkel. (Addendum #2). After three Evidentiary Hearings before the Honorable Judge Samuel McVey of the Fourth Judicial District Court, 3-year Order for Civil Stalking Injunction was entered against Isabel Morkel on March 26, 2008, but Ex Parte Temporary Civil Stalking Order was dismissed in regards to Neil Morkel. (See Addendum #1).

**B. Course of Proceedings:**

1. Michael and Kirsteen Blocker's divorce was entered on July 8, 2004.
2. An Ex Parte Child Protective Order was obtained on behalf of Kirsteen for her son, Mackay, from the Third District Court, Case No. 074401624, on July 24, 2007. Mr. Blocker was served with the Ex Parte Order on July 25, 2007.
3. The Domestic Relations Commission subsequently held a hearing on August 13, 2007, and ordered all of Appellee's parent-time between he and his son, Mackay be supervised.

4. On September 18, 2007, Mr. Blocker filed Request for Temporary Stalking Injunction against Appellant's, Neil and Isabel Morkel. Ex Parte Temporary Civil Stalking Injunction was entered September 18, 2007.
5. On September 28, 2007, both Neil and Isabel Morkel were served with Ex Parte Civil Stalking Injunction obtained by the Petitioner/Appellee, Michael Blocker.
6. On or about October 1, 2007, Mr. Blocker filed Petition to Modify Decree of Divorce against his ex-wife, Kirsteen Morkel, seeking a change of physical custody, or alternatively, joint physical custody of their son, Mackay. Such Petition was filed in the Divorce Court.
7. Neil and Isabel Morkel filed a Request for Hearing in the Civil Stalking Injunction matter on October 5, 2007.
8. Review hearing was held before the divorce court on October 31, 2007, which dismissed the Child Protective Order against Michael Blocker and awarded him make-up parent-time with his son, Mackay.
9. On December 18, 2007, an Order of Consolidation of Neil and Isabel's two (2) separate stalking legal matters was entered by the Stalking Court.
10. Thereafter, three (3) Evidentiary Stalking Hearings occurred between December 2007 and February 2008 before the Honorable Judge Samuel McVey. On March 26, 2008 Order was entered by the Honorable Judge McVey which dismissed the Ex Parte Civil Stalking Injunction against Neil Morkel. However, the court entered three (3) year Civil Stalking Injunction against Isabel Morkel.

### **C. Disposition of the Case:**

In regards to the Ex Parte Civil Stalking Injunctions entered against Neil and Isabel Morkel, three (3) Evidentiary Hearings occurred before the Honorable Samuel McVey on December 21, 2007, January 30, 2008 and February 14, 2008. After hearing testimony from multiple witnesses, receiving multiple documents into evidence, and hearing argument from both parties, the court dismissed the Civil Stalking Injunction against Neil Morkel and entered a Civil Stalking Injunction against Respondent/Appellant, Isabel Morkel. The court found that Isabel Morkel committed at least four (4) incidences of stalking against Petitioner/Appellee, Michael Blocker, and caused Mr. Blocker to suffer emotional distress. The court found Isabel Morkel committed four (4) incidences of stalking against Michael Blocker as follows: 1) A phone call by Isabel to Michael and his mother, Marie on March 23, 2005; 2) a phone call from Isabel to Marie in June 2007; 3) Isabel repeatedly calling Michael's cell phone during court hearings in September and October 2007; and 4) an e-mail sent by Isabel to Michael's new wife, Trudy Blocker on September 17, 2007 containing information about her and Michael's wedding and making disparaging remarks against him.

On April 24, 2008, Neil and Isabel Morkel filed Notice of Appeal with the Third Judicial District Court, and on June 2, 2008, Docketing Statement for such appeal was filed with the Utah Court of Appeals.

### **STATEMENT OF FACTS**

1. Petitioner/Appellee, Michael Blocker (hereafter, "Michael Blocker") is the ex-husband of Respondent's/Appellant's daughter, Kirsteen Morkel. Michael and

Kirsteen Blocker separated a few weeks after the birth of their only child, Mackay. Mackay was born July 20, 2002. Since such separation, Kirsteen and Mackay have resided with Kirsteen's parents, Neil and Isabel Morkel, Respondent/Appellant, (hereafter, "Isabel Morkel"), whom are both very much involved in their grandson's daily activities and routines.

2. Michael and Kirsteen were divorced on July 8, 2004 in a contentious divorce/custody proceeding.
3. There is a long history of animosity and legal contention between the Blocker and Morkel families since the separation of Michael and Kirsteen in July/August 2002. Such relationships have been tumultuous and difficult.
4. Due to the incessant conflict between these two families, court order was entered at a post-divorce/modification hearing held August 13, 2007 in which Michael and Kirsteen were ordered to facilitate parent-time exchanges of their son, Mackay, through the Academy for Child Advocacy and Family Support ("ACAFS"), rather than at either family's home.
5. Although the exchanges of Neil and Isabel Morkel's grandson have generally occurred at a supervised parent-time center, there continues to be a long-standing sense of friction and contention between both families. Such friction includes, but is not limited to, bilateral accusations of physical altercations, upsetting phone calls, e-mails, picture taking, exchange of disparaging remarks, multiple police reports from both sides, and general heated disagreements regarding different aspects of care for child, Mackay.



6. Based on court order, exchanges at either family's home stopped when Kirsteen Morkel filed, on behalf of Mackay, an Ex Parte Child Protective Order in relation to allegations of sexual abuse by Michael Blocker. During the pendency of the Ex Parte Child Protective Order, for the most part, the parent-time exchanges of Mackay were facilitated through ACAFS. Such Ex Parte Child Protective Order was filed on or about July 24, 2007 with the Third District Court, Salt Lake County, Utah, Case No. 074401624, and served upon Michael on July 25, 2007. Such Order temporarily restricted/halted Michael's parent-time with his son. The case was then transferred to the Fourth District Court, Utah County, and consolidated with the post-divorce/custody modification matter, Case No. 024402553.
7. At post-divorce hearing on August 13, 2007, the Domestic Relations Commissioner Ordered that all of Michael's parent-time with his son, Mackay be supervised. Thereafter, parent-time visitations between Michael and Mackay were supervised until a modified Order was subsequently entered which unsupervised such visits. The Ex Parte Child Protective Order was subsequently dismissed and Michael was awarded make-up parent-time with his son pursuant to an October 31, 2007 review hearing before the divorce court.
8. In the midst of the conflict regarding the Child Protective Order, Michael Blocker filed his Request for Civil Stalking Injunction against Neil and Isabel Morkel on September 18, 2007; and further, an Ex Parte Temporary Civil Stalking Injunction was entered thereon on September 18, 2008.

9. On September 28, 2007, Neil and Isabel Morkel were served with the Ex Parte Temporary Civil Stalking Injunction.
10. Immediately after Michael's filing Request for Entry of Temporary Civil Stalking Injunction against Neil and Isabel Morkel, on or about October 1, 2007, Michael filed Petition to Modify Decree of Divorce seeking a change of physical custody, or alternatively, joint physical custody of his son with the divorce court. Michael's basis for the Petition to Modify Decree of Divorce is largely the same as that recited in his Affidavit in support of his Request for Civil Stalking Injunction against his ex-wife's parents, Neil and Isabel Morkel.
11. On October 5, 2007, Neil and Isabel filed a Request for Hearing regarding the Ex Parte Temporary Civil Stalking Injunction filed against them by Michael.
12. Order of Consolidation of Neil and Isabel's stalking matters was entered December 18, 2007, consolidating the two (2) separate Civil Stalking matters into one case. As a result of Neil and Isabel's request for hearing, Evidentiary Hearings occurred before the Honorable Judge Samuel McVey on December 21, 2007, January 30, 2008 and February 14, 2008.
13. As a result of the three (3) Evidentiary Hearings before Judge McVey, the Civil Stalking Injunction against Neil Morkel was dismissed; however, Civil Stalking Injunction was entered against Isabel Morkel on March 26, 2008 by the Honorable Judge Samuel McVey.  
  
(See Addendum #1).

## **SUMMARY OF ARGUMENTS**

**POINT I. THE DISTRICT COURT ERRED IN ISSUING A 3-YEAR CIVIL STALKING INJUNCTION AGAINST RESPONDENT/APPELLANT, ISABEL MORKEL REGARDING EVIDENCE PRESENTED, OFFERED AND ACCEPTED; AND FURTHER, IN FINDING THAT ISABEL MORKEL HAD CAUSED EMOTIONAL DISTRESS TO PETITIONER/APPELLEE, MICHAEL BLOCKER.**

There was ample evidence in the hearing transcripts to support the conclusion that neither Michael Blocker, his mother, Marie Blocker nor his new wife, Trudy Blocker suffered actual emotional distress, nor did any of Michael Blocker's behavior over the years support he feared Isabel Morkel or had emotional distress as a result of any interactions between himself and Isabel Morkel.

**POINT II. THE DISTRICT COURT ERRED IN INTERPRETING AND APPLYING THE CIVIL AND CRIMINAL STALKING STATUTES, UTAH CODE ANNOTATED SECTION 77-3a-101 (2003) AND 76-5-106.5 (2003).**

Petitioner/Appellee, Michael Blocker has the burden to show, by preponderance of the evidence, that the elements of the above-stated statute have been satisfied against Respondent/Appellant, Isabel Morkel. Michael Blocker has failed to present sufficient evidence to meet this burden. The evidence presented supports the existence of a long-standing family feud, but is not enough to satisfy the elements of the Civil Stalking or related criminal statutes sufficient enough to justify entry of a 3-year Civil Stalking Injunction against Isabel Morkel.

POINT III: THE DISTRICT COURT ERRED BY FAILING TO WEIGH THE EFFECT OF THE ENTIRE COURSE OF CONDUCT/TOTALITY OF THE CIRCUMSTANCES BETWEEN THE PARTIES IN RELATION TO APPELLEE'S CONTENTIOUS DIVORCE AND PENDING POST-DIVORCE CUSTODY PROCEEDING WITH APPELLANT'S ADULT DAUGHTER REGARDING APPELLANT'S THEN 5-YEAR OLD GRANDSON.

In considering the entire course of conduct and the totality of the circumstances between the parties, it is evident there has been a long-standing bilateral contentious relationship between Appellee and Appellant. Inappropriate conduct and fault has fallen on both sides of the fence, making it improper to single out Isabel Morkel and determine that her conduct gives rise to the entry of a Civil Stalking Injunction.

### ARGUMENT

POINT I. THE DISTRICT COURT ERRED IN ISSUING A 3-YEAR CIVIL STALKING INJUNCTION AGAINST RESPONDENT/APPELLANT, ISABEL MORKEL REGARDING EVIDENCE PRESENTED, OFFERED AND ACCEPTED; AND FURTHER, IN FINDING THAT ISABEL MORKEL HAD CAUSED EMOTIONAL DISTRESS TO PETITIONER/APPELLEE, MICHAEL BLOCKER.

As a note of clarification for this Court, it is acknowledged that Utah Code Annotated 76-5-106.5 stalking statute was amended and passed by the 2008 Utah General Legislative Session as House Bill 943. However, Michael Blocker filed his Civil Stalking Injunction against Isabel Morkel in September 2007 and the court cannot retroactively apply the May 5, 2008 amendment to the stalking statute for purposes of this case. As the Utah Court of Appeals has identified in Wilde v. Wilde, 969 P.2d 438 (Utah App. 1998), “[t]he general rule followed in Utah is that ‘the substantive law to be applied throughout an action is the law in effect at the date the action was initiated.’” (Citing State v. Shipler, 869 P.2d 968, 970 (Utah Ct. App. 1994) (citations omitted)).

Additionally, pursuant to Utah Rule of Civil Procedure 15(c), “[t]he initiation date of an action is the filing of the original, rather than the amended, complaint or petition.” See Utah R. Civ. P. 15(c).

Pursuant to the Utah Code Annotated Section 76-5-106.5 (2003) (hereafter, “stalking statute”), there are three (3) required elements which Petitioner must prove, by preponderance of evidence, in order for the court to issue a Civil Stalking Injunction. The three (3) requirements are as follows: (1) First, the court must find that the alleged stalker intentionally or knowingly engaged in a course of conduct that would cause a reasonable person to fear bodily injury or suffer emotional distress; (2) second, the court must find that the accused stalker had or should have had knowledge that the victim of his stalking would fear bodily injury or suffer emotional distress; and (3) lastly, the court must find that the victim actually feared bodily injury or suffered emotional distress as a result of the accused stalker’s conduct. Utah Code Ann. § 76-5-106.5(2)(a)(b) and (c) (2003). (See also, Towner v. Ridgway, 2008 UT 23).

Emotional distress can result from conduct that is outrageous or intolerable; that offends the normal standards of decency and morality; that a reasonable person situated in the Petitioner’s position would suffer emotional distress as Respondent’s conduct was severe enough and outrageous enough to cause emotional distress. In reviewing the same, the Court must examine all the facts and circumstances surrounding the Petitioner. Ellison v. Stam, 2006 UT App. 150. The *Ellison* Court held that “[e]motional distress results from conduct that is ‘outrageous and intolerable in that it offends the generally accepted standards of decency and morality.’” (Citing Salt Lake City v. Lopez, 935 P.2d

1259, 1264, quoting Russell v. Thompson Newspapers Inc., 842 P.2d 896, 905 (Utah 1992)). “The consideration of whether a Respondent has acted outrageously must be undertaken in light of all of the facts and circumstances of the particular case.” Ellison v. Stam, 2006 UT App. 150, ¶ 29. The *Ellison* court further identified that, “[e]motional distress and the reasonable person standard are contingent upon one another. Both the plain language of the statute and accepted concepts of tort law, reveal that the phrases “emotional distress” and “reasonable person” are not exclusive concepts, but must be considered together to evaluate whether a Respondent has violated the civil stalking statute. The *Ellison* court, in citing Russell v. Thompson Newspaper, Inc., 842 P.2d 896, 905 (Utah 1992), held that “[t]he tort of intentional infliction of emotional distress requires proof of three distinct elements . . . a Petitioner must show (a) that the *Respondent* intentionally engaged in some conduct toward the Petitioner considered outrageous and intolerable in that it offends the generally accepted standards of decency and morality; (b) with the purpose of inflicting emotional distress or where any reasonable person would have known that such would result; and (c) that severe emotional distress resulted as a direct result of the Respondent’s conduct.” Ellison at ¶ 34 (citing Russell v. Thompson Newspaper, Inc.) *Id.* [Emphasis added].

In evaluating whether or not Petitioner has met his burden in presenting sufficient evidence to sustain a claim of emotional distress, there are certain “buzz phrases” within the statutes themselves which must be examined closely. In review of the three (3) elements required under the stalking statute, they are as follows:

(1) The court must find that the alleged stalker *intentionally or knowingly* engaged in a course of conduct that would cause a *reasonable* person to fear bodily injury or suffer emotional distress;

(2) The court must find that the accused stalker *had or should have had knowledge* that the victim of his stalking would fear bodily injury or suffer emotional distress; and;

(3) Lastly, “the court must find that the victim *actually feared* bodily injury or *suffered emotional distress* as a result of the accused stalker’s conduct.

Utah Code Ann. § 76-5-106.5(2)(a)(b) and (c) (2003) (emphasis added).

In examining each one of these elements separately, and associating the evidence presented, this Court will be able to discern that Michael Blocker has failed to meet his burden by a preponderance of the evidence. The Civil Stalking Injunction Order, as entered by the Honorable Judge Samuel McVey, states that his decision was made upon four (4) incidences of stalking by Isabel Morkel against Michael Blocker. Such incidences entail: 1) A phone call by Isabel to Michael and his mother, Marie on March 23, 2005; 2) a phone call from Isabel to Marie in June 2007; 3) Isabel repeatedly calling Michael’s cell phone during court hearings in September and October 2007; and 4) an e-mail sent by Isabel to Michael’s new wife, Trudy Blocker on September 17, 2007 containing information about her and Michael’s wedding and making disparaging remarks against Michael.

First, this Court should note that the two phone calls made by Isabel Morkel to Michael Blocker’s parent’s house, as above-mentioned above, were in essence two (2) years apart. The first such phone call occurred in March 2005 (See 2/14/08 Trans. 59:6-25; 60:1-12. *See also*, January 30, 2008 Evidentiary Hearing transcript (hereafter

“1/30/08 Trans.”), 91:2-22). The second phone call occurred in June 2007. (See 2/14/08 Trans. 90:2-25; 91:1-17). Isabel Morkel had an amicable relationship with Michael Blocker’s mother, Marie as stated in testimony. (See 2/14/2008 Trans., 59:24-25; 60:1-25, 61:1-8, 62:3-7). Such phone calls made by Isabel Morkel were not random calls to an unknown member of Michael Blocker’s family, but to a former co-mother-in-law for the purpose of discussing concerns regarding the father, Michael and for the interest of their shared grandchild, Mackay. Had Isabel Morkel’s intent been to purposefully attempt to induce emotional distress upon Michael or his mother, it would be fair to say that a reasonable person can conclude that these two (2) phone calls would have been closer in proximity instead of more than two (2) years apart.

Furthermore, the June 2007 phone call was in close relation to two other issues at hand, as follows: 1) At the time Isabel Morkel made the phone call, Michael was exercising his interrupted vacation time with Mackay and had denied Kirsteen access for her mid-week parent-time visit. Isabel Morkel and Kirsteen were trying to identify the location of Mackay and discern the circumstance as to Michael’s failure to facilitate parent-time between Mackay and his mother. (See 2/14/2008 Trans., 63:5-25; 64:1-25; 65:1-25; 66:1-8).

Second, Isabel Morkel’s June 2007 phone call was approximately one month prior to Kirsteen filing for Child Protective Order against Michael based on allegations of suspected child abuse of child, Mackay. With these two issues at the core of this phone call, it is safe to recognize that Isabel Morkel made this phone call purely out of a



significant concern of her grandson's whereabouts and welfare. (See 2/14/08 Trans 63:5-25; 64:1-25; 65:1-25; 66:1-8; 96:13-23).

The third issue at hand, which the court identified as an incident of stalking which caused emotional distress to Michael Blocker, involves accusations that Isabel Morkel repeatedly called Michael during court hearings held September 24, 2007 and October 31, 2007. (See 1/30/08 Trans.166:23-25; 167:1-23). The evidence presented to the court by Appellee was, in essence, because Isabel was not at the divorce court hearings, she must have been the person calling him. (See 2/14/08 Trans. 13:17-25; 14:1-25; 15:1-24; 166:13-25; 167:1-25; 168:1-11). Considering private cell phone use is prohibited in court rooms, a reasonable person would shut-off their personal cell phone if receiving multiple phone calls. What is unreasonable, is for a person to sit in a court room with their personal cell phone turned on, then claim that receiving multiple phone calls, without answering the same, was creating emotional distress. Michael Blocker could have easily turned his cell phone off in order to cease the incoming calls. Moreover, Michael Blocker was unable to discern, with any kind of certainty, whom the phone calls came from. (See 1/30/08 Trans. 166:23-25; 167:1-5; and 2/14/08 Trans. 15:3-22).

The final incident identified as support for entry of Civil Stalking Injunction against Isabel Morkel, was a September 2007 e-mail received by Michael Blocker's new wife, Trudy Blocker. Michael and Trudy were married on September 7, 2007. Trudy Blocker stated in her own words, per her testimony at Evidentiary Hearing held January 30, 2008, referring to the substance of the e-mail as follows: "She explained describing that Kirsteen's wedding was a full meal and our wedding was - - what it was, sandwiches,

crackers, cheese and fruit. And that it looked like I got the better end of the deal. And I don't know the exact wording, but something along that line.” (See 1/30/08 Trans. 81:10-25, 82:1-21). Clearly, the comparison of who had a full meal versus crackers and cheese at two separate weddings is not the type of correspondence that gives rise to emotional distress to the extent of requiring a Civil Stalking Injunction. Trudy Blocker also testified that “[m]ost of the e-mails that affected me that put distress and made me emotional was prior to our marriage, Your Honor. (See 1/30/08 Trans. 79:10-12).

While Trudy stated that having Isabel relay the details about their wedding was a sense of concern for her, she did not call the police. (See 1/30/08 Trans. 80:25; 81:1-3). Trudy Blocker also stated in her testimony, access to information regarding the happenings or location of a wedding is not difficult to obtain. (See 1/30/08 Trans. 81:10-20). Michael Blocker and Kirsteen Morkel had a scheduled parent-time exchange of their son, Mackay the day of Trudy and Michael's wedding on September 7, 2007. (See 1/30/08 Trans. 56:23-25; 57:1-18). Such, in itself, gives way to information regarding the location and events of the wedding, especially as children talk about exciting happenings and events in their life from day to day. Local newspapers carry much information regarding locations of wedding ceremonies. While the e-mail from Isabel Morkel to Trudy Blocker may have invoked an emotional reaction from Trudy, there is no evidence in Trudy's testimony that suggests she experienced emotional distress as a result of such.

Again, the Utah's stalking statute requires the Petitioner to prove three (3) elements by a preponderance of the evidence. Michael Blocker has failed to show that

(1) Isabel Morkel intentionally or knowingly engaged in a course of conduct that would cause a reasonable person to suffer emotional distress; (2) that Isabel Morkel knew, or should have had known, that any of the afore-named individuals would suffer emotional distress; and (3) lastly, that any individual actually suffered any emotional distress as a result of Isabel Morkel's conduct. To determine otherwise, this Court would have to make that decision based on 1) hearsay in regards to the two phone calls made to Mr. Blocker's mother, Marie as, at the time of the Evidentiary Hearings, Marie Blocker was deceased (See 1/30/08 Trans. 59:9-25; 60:1-25); 2) that Michael Blocker suffered emotional distress from receiving multiple phone calls while present at post-divorce court hearings on September 24, 2007 and October 31, 2007. Considering such phone calls resulted in no actual conversation or message(s), only indications of a missed call; and 3) that Trudy Blocker suffered emotional distress over an e-mail discussing a comparison of two weddings.

POINT II. THE DISTRICT COURT ERRED IN INTERPRETING AND APPLYING THE CIVIL AND CRIMINAL STALKING STATUTES, UTAH CODE ANNOTATED SECTION 77-3a-101 (2003) AND 76-5-106.5 (2003).

Pursuant to the criminal definitions in the stalking statutes of Section 76-5-106.5 et seq., such is applicable to the civil portion of a Request for Entry of a Civil Stalking Injunction. The relevant definitions used and requisite elements for entry of a Civil Stalking Injunction under such section are as follows:

- (1)(a) Course of conduct means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person.

- (1)(b) Immediate family means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.
- (2) A person is guilty of stalking who:
  - (a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:
    - (i) to fear bodily injury to himself or a member of his immediate family; or
    - (ii) to suffer emotional distress to himself or a member of his immediate family;
  - (b) has knowledge or should have knowledge that the specific person:
    - (i) will be placed in reasonable fear of bodily injury to himself or a member of his immediately family; or
    - (ii) will suffer emotional distress or a member of his immediate family will suffer emotional distress; and
  - (c) whose conduct:
    - (i) induces fear in the specific person of bodily injury to himself or a member of his immediate family; or
    - (ii) causes emotional distress in the specific person or a member of his immediate family.

Section 76-5-106.5(1) and (2) Utah Code Ann. (2003).

Relevant case law assists in laying foundation and defining the elements of this statute. In Ellison v. Stam, 2006 UT App. 150, the Court concluded that the Respondent, after having sexually assaulted the Petitioner, continued to place himself in the physical presence of Ellison, glaring at her. The *Ellison* Court held that, “[w]hile it may be simply ‘ungentlemanly’ for a man to glare at a woman and place himself in close proximity to her when he has no prior history with her, to do the same shortly after making her the ‘victim of a vicious sexual assault’ may indeed be outrageous under generally accepted standards of decency and morality. Because we believe the trial court inappropriately

limited its analysis in such a way that negated the cumulative effect of the alleged conduct, we reverse and remand.” Id. ¶33.

Additionally, in Abernathy v. Mzik, 2007 UT App. 259, the Court of Appeals reviewed the interpretation of “emotional distress,” finding that “[f]rom the first incident to the third incident, the father’s conduct appeared to have been escalating in both hostility and aggressiveness. That was important because in cases involving civil stalking injunctions, appellate courts looked at the totality of the circumstances in evaluating whether or not certain behavior cause the requisite emotional distress or fear of bodily injury.” Abernathy at page 1, Overview. (See also, Ellison v. Stam, 2006 UT App. 150, “[a]ny evaluation of a Respondent’s conduct must be considered in the context of all of the facts and circumstances existing in the case.” Id. at ¶ 27; and Salt Lake City v. Lopez, 935 P.2d 1259 (Utah App. 1997), which defined the legal standard for “emotional distress”).

Lastly, The Utah Supreme Court, in decision filed March 4, 2008, Towner v. Ridgway, 2008 UT 23, remanded the matter back to the trial court for further findings regarding the three (3) requisite elements of stalking as required by Section 76-5-106.5 (2003) of the Utah Code Annotated. Although the trial court concluded that “[t]he Towners had a reasonable basis for fearing Mr. Ridgway,” the Supreme Court made no finding that they *in fact* feared bodily injury or *suffered emotional distress*. [Emphasis added]. Towner at ¶ 16. Fear of bodily harm or actual emotional distress are exclusive of one another. Additionally, Section 76-5-106.5(2)(a) incorporates a reasonable persons standard in the stalking definition. Accordingly, “[a] person is guilty of stalking as

defined in § 76-5-106.5(2)(a)(i)-(ii), if, on two or more occasions, he intentionally engages in conduct that causes a reasonable person to (i) fear bodily injury, or (ii) suffer emotional distress. § 76-5-106.5(1)-(2).” Abernathy v. Mzik, 2007 UT App. 259, ¶ 11.

In the instant case, in examining the four (4) instances in which the district court found stalking had occurred against Michael Blocker, Marie Blocker and Trudy Blocker, this Court must consider and give weight to the definitions as laid out in the pertinent case law. First in Ellison, the court identified outrageous behavior under the generally accepted standards of decency and morality in relation to a perpetrator stalking his victim after having sexually assaulted her. Next in Abernathy, the alleged stalker had been escalating in both hostility and aggressiveness and the court considered the totality of the circumstances in evaluating whether or not certain behavior caused the requisite emotional distress or fear of bodily injury. Lastly in Towner, the Supreme Court remanded the matter back to the trial court for further findings in regards to the three (3) requisite elements of stalking; and further, the Supreme Court made no findings that the Petitioner *in fact* feared bodily injury or *suffered emotional distress*. [Emphasis added].

Clearly, in the midst of a long-standing contentious family feud centering around divorce modification and child custody, a few phone calls/e-mails with disparaging remarks does not, under the totality of the circumstances, qualify as outrageous and intolerable conduct that offends the general accepted standards of decency and morality. Furthermore, there has been insufficient evidence to support that Michael Blocker, his mother, Marie or Trudy Blocker in fact feared bodily injury or suffered emotional distress due to the action(s) of Isabel Morkel.

POINT III: THE DISTRICT COURT ERRED BY FAILING TO WEIGH THE EFFECT OF THE ENTIRE COURSE OF CONDUCT/TOTALITY OF THE CIRCUMSTANCES BETWEEN THE PARTIES IN RELATION TO APPELLEE'S CONTENTIOUS DIVORCE AND PENDING POST-DIVORCE CUSTODY PROCEEDING WITH APPELLANT'S ADULT DAUGHTER REGARDING APPELLANT'S THEN 5-YEAR OLD GRANDSON.

As stated previously in Ellison v. Stam, “the consideration of whether a Respondent has acted outrageously must be undertaken in light of all of the facts and circumstances of the particular case.” Ellison v. Stam, 2006 UT App. 150, ¶ 29. In looking at the totality of the circumstances in this case, the big picture is of a long-standing feud between two families in relation to a contentious divorce and the tumultuous aftermath in relation to the custody and well-being of Michael and Kirsteen's only child, Mackay. Unfortunately, such disputes spread beyond Michael and Kirsteen to involve collateral family members, such as grandparents and siblings. Although, Michael Blocker denied any ulterior motive for filing his Civil Stalking Injunction request against his ex-wife's parents (See 1/31/08 Trans. 155:6-10).

Isabel Morkel does not deny making disparaging remarks and having heated conversations with Michael Blocker and his family members. However, under the totality of the circumstances, it must be recognized that such, as well as Michael and his own family's behaviors which belie “fear” or “emotional distress” of or by Isabel Morkel, has also occurred. Several of such incidences include, but are not limited to, the following:

(i.) On January 20, 2003, Kirsteen and Isabel Morkel were upset regarding some food Michael had brought to the Morkels' home for Mackay. When asked to leave

the bags outside, Michael refused to do so. (See 1/30/08 Trans. 116:8-25). Isabel and Neil Morkel's daughter, Chevonne Day, testified that Michael was at the Morkels' house having a verbal dispute, was very angry, and that Michael actually chest-buted her. (See 1/30/08 Trans. 20:6-25; 21:1-19). Chevonne Day also testified that Michael had come to the Morkel's house on a day which parent-time was not scheduled between Mackay and his father, and Michael had become insistent about entering the home. Such occurred in the evening hours as it was dark outside, and Michael was thumping on the front door and walking around to the back of the house trying to find entry into the Morkels' home. The Morkels were concerned enough about Michael's behavior to call the police. (See 1/30/08 Trans. 23:3-25; 24:1-2).

(ii.) Also on January 20, 2003, Michael Blocker admitted in his own words that he had made a derogatory comment toward Neil Morkel, stating, "[i]f he was half a man, he wouldn't have let his wife get so involved in our marriage." (See 1/30/08 Trans. 123:17-25; 124:1). This remark caused an alleged altercation between Neil and Michael in the Morkel's residence, resulting in Michael claiming Neil had struck him. There was no evidence to indicate the same. (See 1/30/08 Trans. 124:12-25; 125:1-25; 126:1-12).

(iii.) On January 20, 2003, the Appellee claims that the Appellant, Neil Morkel assaulted him during a parent-time exchange at Appellant's home. Appellee claims Appellant "struck him with a closed fist on the left, back side of his neck." (See 1/30/08 Trans. 90:8-23; 115:10-2; 119:1-7). (Appellee's medical report identifies that he was facing Appellant, Neil Morkel, when the alleged assault occurred. See Addendum #3). This claim was disputed by the statements of the Appellants whom attested to the fact



that there was a verbal argument that day but not any physical violence or threats of violence. Furthermore, at the time of the Appellee's reporting of such incident on January 20, 2003, and subsequently, ten (10) days later on January 30, 2003, there was absolutely no evidence that Appellee had been the victim of any physical harm, threat of physical harm, or intentional emotional distress by Respondents/Appellant(s). During the January 20, 2003 incident between the Respondent, Neil Morkel and the Appellee, the Provo Police Department was called. The responding Provo Police Officer did not see so much as a red mark on the Appellee's neck either on the date of the alleged assault, January 20, 2003 or one week later when the Appellee again saw the responding police officer. (See 1/30/08 Trans. 124:12-25; 125:1-25; 125:1-16). (See also, Addendum #6).

Moreover, on January 20, 2003, the Appellee sought medical report from an IHC Instacare. (See Addendum #3). The IHC Instacare medical record indicates that the physician observed "no swelling" on the Appellee's neck and that the Appellee indicated that he was visiting the doctor because he "needs this visit for evidence of assault" and not because of any bona fide injury, fear of injury, or need for medical assistance.

Although the Appellee requested formal criminal charges be filed against Appellant, Neil Morkel, regarding the alleged January 20, 2003 assault, the Provo Police Department declined to charge Appellant due to lack of evidence of any assault, and/or lack of any corroboration of any assault or other crime occurring. (See Addendum #6).

(iv.) In February 2003, Michael came to the Morkel residence for his scheduled parent-time and was asked by the Morkel's not to bring his video camera into the house

or take pictures of Mackay. By his own testimony, Michael refused the Morkels' requests. (See 1/30/08 Trans. 135:16-25; 136:1-3).

(v.) In the Fall of 2005, Michael was at a local Chuck-E-Cheese with members of his family when Neil Morkel appeared to obtain Michael's signature on a passport form regarding Mackay, to which Michael refused. When Neil left the establishment, Michael, his brother, Nathan and other family members displayed themselves in the window of the Chuck-E-Cheese and simultaneously gave Neil a harassing and sarcastic "parade wave." Such was testified to by Nathan Blocker, Michael's brother, "in support of his brother." (See 1/30/08 Trans. 47:4-25; 48:1-25; 49:1-10).

(vi.) In November 2006, again at Neil and Isabel Morkel's house, another incident occurred in which Michael was standing next to Isabel while filming other family members unload a truck while they were helping move some furniture into the house. The family members being video taped became upset and questioned Michael as to why they were being filmed. Such is evidenced by testimony of Isabel Morkel. (See 2/14/08 Trans. 79:12-25; 80:1-21; and 1/30/08 Trans. 157:11-25; 158:1-25; 159:1-10).

(vii.) In July 2007, Michael entered the Morkels' home for visitation and took a photograph of Isabel Morkel in her nightgown, as evidenced by Isabel Morkel's testimony. (See 2/14/08 Trans. 86:16-25; 87:1-12, 101:2-10).

(viii.) As part of Appellee's request for Civil stalking injunction against Appellants, Appellee also claimed that Appellant, Neil Morkel assaulted him four (4) years later on July 10, 2007, by pushing him and knocking his camera to the ground. The alleged July 10, 2007 incident also took place during a parent-time exchange for the

Appellant's grandson. During such exchange, Appellant, Neil Morkel was facilitating his grandson going with his father, Appellee. Appellant, Isabel Morkel was watching such exchange from a window inside the Appellant's home, when the Appellee "chest-butted" 62-year-old Respondent Neil Morkel in front of Appellant's then 5-year-old grandson. Appellee did not report such alleged assault until three (3) days after the fact, indicating "[i]t was my word against theirs." (See 1/30/08 Trans. 136:4-25; 137:1-25; 138:1-25; 139:1-25; 140:1-25; 148:8-14; and 12/21/07 Trans. 116:18-25; 117:1-23).

(ix.) Appellee affirmatively testified that he voluntarily and intentionally made contact with Respondent(s)/Appellant, Neil and Isabel Morkel after the January 2003 incident, as well as prior to the July 10, 2007 incident by attending Mackay's dental visits with Dr. Howl, accompanied by his ex-wife and Isabel Morkel. (See 1/30/08 Trans. 155:23-25; 156:1-25; 157:1-10; 162:15-25; 163:1-25; 164:1-20).

(x.) During the January 30, 2008 Evidentiary Hearing, Michael's neighbor, Thomas McClure testified: "I would be very surprised to think that of either of them." Such was in regards to a question whether he felt Isabel or Neil meant any physical or emotional harm toward Michael Blocker. (See 1/30/08 Trans. 36:15-21; and 12/21/07 Trans. 118:6-25; 119:5-25).

In consideration of the totality of the circumstances, there is testimony from multiple family members of both the Morkels and the Blockers. The evidence of such makes it clear that petty torments and disparaging remarks were a common theme between these two families. However, the totality of the circumstances also shows that Michael Blocker is wielding a Civil Stalking Injunction as a weapon against his ex-wife,

Kirsteen Morkel and her family, including Isabel Morkel, for the purposes of the continuation a family feud, and possibly, for purposes of a pending custody modification.

**REQUEST FOR ATTORNEY'S FEES & COSTS**

Pursuant to Rule 33 and 34 of the Utah Rules of Appellate Procedure, Appellant respectfully requests attorney fees and costs incurred in filing this appeal.

**CONCLUSION**

Respondent/Appellant, Isabel Morkel respectfully requests that this court overturn the district court's findings regarding 1) the issuance of the Three (3) Year Civil Stalking Injunction entered against her; and overturn 2) that sufficient evidence was presented to show, by preponderance of the evidence, that Isabel Morkel committed four (4) incidences of stalking against Petitioner/Appellee, Michael Blocker that caused Mr. Blocker, or his immediate family, to fear bodily injury or actually suffer emotional distress.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of August, 2008.

**LEMS LAW OFFICE, P.C.**

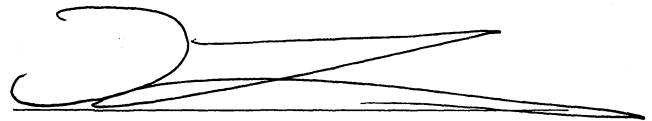
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Wendy J. Lems  
*Attorney for Respondent/Appellant, Isabel Morkel*

**CERTIFICATE OF SERVICE**

I certify that on this 11 day of August, 2008, a true and correct copy of the forgoing was sent via U.S. mail, postage pre-paid, to the following:

Ronald D. Wilkinson/Kristin Gerdy  
815 East 800 South  
Orem, Utah 84097  
*Attorneys for Petitioner/Appellee*

A handwritten signature in black ink, appearing to be a stylized 'J' or 'K' followed by a long horizontal stroke.