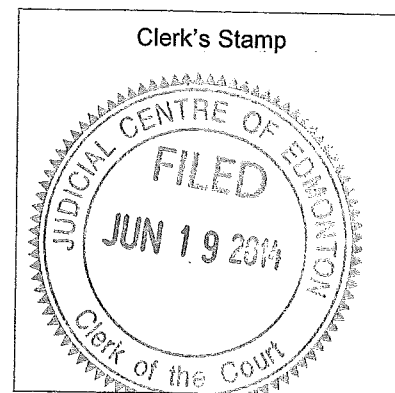


COURT FILE NUMBER 4803-156019
COURT COURT OF QUEEN'S BENCH
OF ALBERTA
JUDICIAL CENTRE EDMONTON
PLAINTIFF (*Indicate if Applicant*) ROLAND NIKOLAUS AUER
DEFENDANT (*Indicate if Applicant*) AYSEL IGOREVNA AUER
DOCUMENT **FAMILY APPLICATION BY
ROLAND AUER,
PLAINTIFF/APPLICANT**



ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT

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Counsel for this Application only

NOTICE TO THE RESPONDENT(S):

This application is made against you. You are the Respondent.

You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard as shown below:

Court Date: **Thursday, July 31, 2014**
Time: **9:00 a.m.**
Where: **Calgary Courts Centre (by direction of the Honourable Mr. Justice M. David Gates dated May 29, 2014)**
Before Whom: **The Honourable Mr. Justice M. David Gates**

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. A declaration that the *Federal Child Support Guidelines*, SOR/97-175 (the "**Guidelines**") are *ultra vires* the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) and are of no force and effect;
2. An Order that evidence taken in Federal Court proceedings T-2064-12 be admitted as evidence in this Application;
3. Advice and directions regarding procedural issues in the Application;
4. The costs of this Application.

Grounds for making this application:

5. The Applicant Roland Auer is a child support payor with respect to one child from his second marriage. Roland Auer also has financial support responsibilities for Phillip Auer and Mark Auer, two current children of the marriage from his first marriage. Further, Roland has support responsibilities for Alex Auer and Vladimir Auer, two children of the marriage in his current third marriage to Victoria Auer.
6. By way of a December 13, 2010 Order of the Court of Queen's Bench of Alberta, the Applicant was given leave to pursue a challenge to the *Guidelines* in Federal Court. The Court granted this leave on a without prejudice basis.
7. The Applicant, and others, brought a challenge to the *Guidelines* in Federal Court. By way of a May 6, 2013 Reasons for Order and Order, the Federal declined to hear Roland Auer's challenge to the *Guidelines*, despite the Federal Court having jurisdiction, on the basis that the Court of Queen's Bench was a more appropriate forum for the challenge.
8. Section 26.1(2) of the Divorce Act dictates that:

The guidelines shall be based on the principle that spouses have a joint financial obligation to **maintain the children** of the marriage in accordance with their **relative abilities to contribute** to the performance of that obligation. [emphasis added]
9. However, the Guidelines (section 3(1)) state:

...the amount of a child support order... is the amount set out in the applicable table, according to the number of children... and the income of the spouse against whom the order is sought; and the amount, if any, determined under section 7.
10. The regulatory Guidelines are inconsistent with the requirements of section 26.1(2) of the Divorce Act as they do not determine or consider the "relative abilities to contribute" of

both spouses (the “Allocation Inconsistency”), and they do not reasonably calculate amounts required “to maintain the children” (the “Purpose Inconsistency”).

11. The Guidelines are based on the following simplistic formula for a two child family (the “Formula”):

$$\frac{\text{Income of Paying Parent} - \text{Taxes} - \text{Child Support}}{1.0} = \frac{\text{Income of Recipient Parent} - \text{Taxes} + \text{Child Support}}{1.0 + 0.4 + 0.3}$$

(where the incomes of the recipient and payor are assumed to be equal, and where the factors of 0.4 and 0.3 reflect the assumed additional costs of 40% and 30% to the recipient household for one and two children respectively)

12. The Allocation Inconsistency renders the Guidelines ultra vires section 26.1(2) of the Divorce Act, as the Guidelines, except in exceptional circumstances, do not take into account the factors necessary to determine both spouses’ “relative abilities to contribute” to the joint financial obligation to maintain the children of the marriage, the particulars of which include that:

- (a) The *Guidelines* fail to account for any and all circumstances where the recipient parent has residential custody of the children of the marriage greater than 60% of the time, including that:
 - (i) The recipient parent is, in general, not required to disclose any financial information as the *Guidelines Formula* deems that information irrelevant;
 - (ii) There is no accounting for economies of scale or contributions from new parent figures within subsequent family situations of the recipient parent;
 - (iii) There is no accounting for many tax and other government benefits to the recipient parent, including child tax benefits or GST rebates for children; and
 - (iv) The *Formula* uses an arbitrary, high and unsupportable equivalence scale.
- (b) There is no accounting or consideration of access and visitation costs of the paying parent who has residential custody of the children of the marriage less than 40% of the time;
- (c) There is no accounting or consideration for the fact that access and visitation costs for the paying parent cannot be the same at every point between 0% - 40% of residential custodial time with the children of the marriage, nor that the recipient parent’s costs to maintain the children cannot be the same at every point over that range;

- (d) There is no accounting or consideration for any responsibilities of the paying parent to maintain children from prior or subsequent relationships;
 - (e) There is no accounting for spousal support payments received by the recipient parent from the paying parent, or otherwise;
 - (f) Only paying parents are subjected to income deeming provisions such as deemed underemployment or under-utilization of assets; and
 - (g) Such further and other particulars as will be proven at the hearing of this Application.
13. Further, the Purpose Inconsistency results in the unreasonable upward distortion of child maintenance costs requiring the paying parent (and not the recipient parent) to pay costs in excess of the reasonable maintenance needs of children at any income level and leading to net wealth transfers to the recipient parent and aggravating the Allocation Inconsistency, the particulars of which include that the Formula and the Guidelines:
- (a) Are not based on any studies of actual expenditures on children by parents at different economic levels;
 - (b) Disregard the fact that the parents have finite combined resources yet the costs of the two resulting households are greater than one, by focusing only on the recipient parent's increased costs, causing a negative relative impact on the standard of living of the children during the time spent with the paying parent;
 - (c) Are based on a formula, which actually escalates the amount paid as a percentage of after tax income as income increases, and which does not account for increased savings and capital expenditures by parents as income increases;
 - (d) Do not provide any ability to the Court or the paying parent to enquire into the actual use of amounts paid and this effectively amounts to a denial of the paying parent's rights;
 - (e) Do not account for a paying parent's reduced income where spousal support is paid;
 - (f) Do not account for economies of scale enjoyed by the recipient parent in subsequent relationships;
 - (g) Do not account for differing maintenance levels required for children of differing ages;
 - (h) Do not account for differing maintenance levels required for children living in small urban or rural areas in comparison to larger urban areas; and
 - (i) Such further and other particulars as will be proven at the hearing of this Application.

14. The Allocation Inconsistency and the Purpose Inconsistency are further exacerbated by numerous fundamental but erroneous and baseless assumptions underlying the Guidelines, which assumptions invariably favour the recipient parent. Those assumptions include that:
- (a) Both parents always have equal incomes;
 - (b) The recipient parent always contributes an amount to child maintenance in a proportion equivalent to the table amounts that the *Formula* requires the paying parent to pay;
 - (c) The household of the paying parent has only one member: the paying parent, and that the payor incurs no child maintenance costs;
 - (d) The household of the receiving parent is made up of one parent and all the children of the marriage, and that the recipient parent incurs all of the child maintenance costs;
 - (e) The second person in a household generates the same costs of an adult, regardless of age; and
 - (f) Certain material financial government benefits, including child tax credits and GST rebates for children, are not considered to be part of the recipient parent's finances.
15. In addition, for the reasons set out above, the Guidelines are ultra vires s.26.1(2) of the Divorce Act as they:
- (a) Are unreasonable;
 - (b) Are unequal in their treatment of parents; and
 - (c) Are manifestly unjust.
16. Further, the Guidelines do not apply in Quebec despite the citizens of that province being subject to the federal Divorce Act. In contrast to the federal Guidelines, the Quebec guidelines take into consideration, in all cases, the incomes of both parents and the percentage of residential custodial time of the children of the marriage with each parent (where over 20%). Further, the Quebec guidelines recognize that the percentage of income devoted to child maintenance costs is not linear nor increasing as a percentage of after tax income and instead decreases as income increases. The Quebec guidelines were promulgated under the same enabling section 26.1(2) of the Divorce Act as were the Guidelines, and the Quebec guidelines therefore further emphasize the fundamental inconsistencies of the Guidelines with that enabling statutory provision.

Material or evidence to be relied on:

17. Affidavit of Roland Nikolaus Auer, sworn October 1, 2013;
18. Affidavit of Iwona Auer-Grzesiak, sworn September 17, 2013;
19. Affidavit of Mark Auer, sworn September 23, 2013;
20. Affidavit of Professor Chris Sarlow, sworn July 8, 2013;
21. Affidavit of Professor Douglas W. Allen, sworn June 7, 2013;
22. Affidavit of Andrew H. Heft, sworn June 10, 2013;
23. Affidavit of Hakim Kapasi, sworn June 4, 2013;
24. Affidavit of Lucien Khodheir, affirmed October 2, 2013; and
25. Affidavit of Alar Soever, sworn June 12, 2013.

Applicable rules:

26. Part 12, Division 6 and Rules 1.4 and 6.11(f) of the Alberta *Rules of Court*.

Applicable Acts and regulations:

27. The *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) and the *Federal Child Support Guidelines*, SOR/97-175.

Any irregularity complained of or objection relied on:

28. The *Guidelines* are *ultra vires* the *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) and are of no force and effect.
29. The *Guidelines* are unreasonable, unequal in the treatment of parents, and manifestly unjust.

How the application is proposed to be heard or considered:

30. In person, on Affidavit evidence and transcripts of any questioning.

WARNING

If you do not come to Court on the date and at the time shown above either in person or by your lawyer, the Court may give the Applicant(s) what the Applicant wants in your absence. You will be bound by any order that the Court makes.

If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must:

- Swear or affirm an affidavit;
- File the affidavit or other evidence with the Clerk of the Court; and
- Serve the affidavit or other evidence on the applicant a reasonable time before the application is scheduled to be heard or considered.

TO: Denise J. Kiss
Rand Kiss Turner LLP
Counsel for Defendant/Respondent,
Aysel Igorevna Auer

AND TO: Minister of Justice and Solicitor General

AND TO: Attorney General of Canada

AND TO: Attorney General of Canada
c/o Jaxine Oltean
Department of Justice Canada