SUPREME COURT OF NOVA SCOTIA
Citation: *Googoo* v *Googoo*, 2010 NSSC 49

Date: 20100210
Docket: SFPAF - 12013
Registry: Port Hawkesbury

Between:

Laura Marie Googoo

Applicant

v.

Roderick Albert Googoo

Respondent

Judge:	The Honourable Justice Gregory Warner
Heard:	December 21, 2009, at Port Hawkesbury, Nova Scotia
Final Written Submissions:	January 25, 2010
Written Decision:	February 12, 2010
Counsel:	**M. Louise Campbell**, counsel for the Applicant **Wayne MacMillan,** counsel for the Respondent **Steven Michael Googoo**, not present or represented **Ryle Gabriel Googoo**, not present or represented

By the Court:

A. **Litigation History**

[1] Laura Marie Googoo, age 35, is the mother, and Roderick Albert Googoo, age 57, is the father of *, born May 11, 2006.

[2] The mother applies for custody of and child support for their child. In addition, she applies for equitable relief pursuant to the *Assignments and Preferences Act* and *Statute of Elizabeth* resulting from what she says was the fraudulent assignment of his assets by the Respondent to three of his children for the purpose of avoiding payment of child support. Two of the three children (Steven and Ryle) were served with the Application but have not responded nor appeared at the hearing. It appears that efforts to arrange for Rayanna to be served before the hearing were not successful.

[3] The Applicant and Respondent never cohabited and were never married. The Respondent has, by his choice, no ongoing relationship with the child.

[4] When the Applicant was pregnant, the Respondent paid the Applicant to obtain an abortion. She did not do so. In September 2006, the Applicant commenced an application under the *Maintenance and Custody Act* ("*Act*") for custody and child support. When that application was filed, the Respondent commenced paying child support of $1,000.00 per month and the Applicant withdrew the application.

[5] In early 2007, the Respondent reduced child support to $350.00 per month. The Applicant asked for more. When the Respondent said that he could not afford more, the Applicant filed, on August 13, 2007, the present application for custody and child support. The Respondent immediately ceased paying any child support; he has paid no child support since July 2007. He says that the Applicant was harassing him and his family. (The Respondent separated about 1999 from his wife; he says they are presently exploring reconciliation.) The Applicant says that the Respondent told her that he had no money and could not afford to pay any more.

[6] A central factual issue in this application is whether the Court should impute income to the Respondent. He owned and operated a very successful business on the Waycobah Band lands at Waycobah (sometimes called "Whycocomaugh"), Cape Breton - a business known as "Rod's One Stop", which was a combination convenience store, gas station and VLT casino. In March 2000 he sold the business to the Waycobah Band Council for 2.5 million dollars plus commissions on gross sales, payable over time.

[7] The terms of the sale to Band Council were not known to the Applicant at the time of the making of this application. In a process that took more than two years and resulted in several adjournments of the hearing of the application on its merits, the financial circumstances of the Respondent have become known, primarily by reason of:

(1) an order obtained by the Applicant from the Court directed to the Waycobah Band Council to disclose the terms of the sale;
(2) obtaining the Respondent's bank statements for the period July 2001 to August 2008;
(3) Interrogatories made by the Applicant of the Respondent on July 14, 2008, which Interrogatories were answered over a long period - the last answers being provided on December 14, 2009, a week before the hearing;
(4) the discovery examination of the Respondent on November 14, 2008;
(5) the answers to 16 undertakings given at the discovery, the last of which were provided on December 11, 2009.

[8] During the process of this application, there were several appearances before the Supreme Court (Family Division) both to obtain disclosure of the Respondent's finances and to set down the application for hearing and to adjourn the hearing to obtain disclosure requested in Interrogatories and discovery undertakings.

[9] Counsel for the Respondent, in his post-hearing brief, spends considerable effort explaining how the Respondent cooperated in providing financial disclosure in accordance with the *Act* and *Child Maintenance Guidelines ("Guidelines")* under the *Act*. The Court is satisfied that the Respondent was not at all responsive to the requests made by the Applicant for full disclosure of his income and finances.

[10] First, the Respondent filed a Statement of Financial Information ("SFI") simply showing no taxable income. He argued that this was in compliance with the *Act* (Sections 29 and 29(a)) and Section 21 of the *Guidelines*. While normally the filing of an SFI with copies of one's income tax returns and notices of assessments for the three most recent years are acceptable disclosure, income for child support purposes is not synonymous with income for income tax purposes. Both the *Act* and the *Guidelines* clearly require income from any source be disclosed.

[11] In this case, the Respondent's SFI and income tax returns show no taxable income. Because of the Respondent's status as a member of a First Nation, he would not have taxable income to report, but he did have income and income generating assets that his SFI failed to disclose, contrary to the express provisions of the *Guidelines*.

[12] I will refer later to the events that preceded the filing by the Respondent of a sworn Statement of Property that led the Court to conclude that the Respondent was clearly attempting to mislead the Applicant and the Court as to his financial circumstances and his ability to pay child support as of *'s birth date and the date that the application was filed.

[13] The terms of the sale of Rod's One Stop by the Respondent were obtained by the Applicant by a Court Order addressed to the Waycobah Band Council. The disclosure was received in May 2008. The disclosure showed an agreement by which the Respondent was to receive, over time, 2.5 million dollars for the sale of his business, plus commissions on the gross sales of the business for a period of time after the sale. The disclosure showed the payments received by the Respondent

between March 2000 and March 2004, when the Band Council prepaid the balance owing to the Respondent under the purchase and sale agreement.

[14] After receipt of the records of the sale from the Band's lawyer, on July 14, 2008, the Applicant tendered Interrogatories on the Respondent to determine what happened with the proceeds of the sale. These were partially answered, with minimalist answers, on July 31, 2008, and not fully answered until December 14, 2009 - seven days before this hearing commenced.

[15] The Respondent was discovered on November 14, 2008. He undertook to provide further answers and documents by 16 undertakings. These undertakings were answered in small snippets over several months between January 23, 2009, and December 11, 2009 - ten days before the commencement of this hearing.

[16] The hearing of the Applicant's claim for child support was set down and adjourned on several occasions as a result of the lack of full disclosure by the Respondent of his financial circumstances. For some of the scheduled hearings, the Respondent did not appear as required. I accept the evidence of the Applicant that on one occasion when she was driving to court she saw him going to the Dundee Golf Course (golfing at that course as being one his passion). On another occasion, he supposedly was at a medical appointment in Sydney but when a court official attempted to find him, he was driving his motor home into a campground. Counsel for the Applicant requested that the Respondent provide proof (from the doctor) of a doctor's appointment; none was provided. Eventually, the Respondent testified that there had been a mix-up and the doctor had no record of an appointment. His explanations with respect to two of those occasions were not credible.

[17] The Respondent's affidavit in response to the August 14, 2007, application was filed on December 14, 2009 - more than two years after the application was first filed and disclosure ordered, and only one week before the hearing was held.

B. **Respondent's Finances**

[18] As noted, the evidence of the sale of Rod's One Stop did not come from the Respondent. The Applicant applied for, and the Court issued, an order directing the Band Council to disclose it. In May 2008, the Applicant received the disclosure of the circumstances surrounding the sale of the Respondent's business, and of the payments made to him. Exhibit 3, Tab 1, contains the agreement and record of payments made pursuant to the agreement. Exhibit 8 was a detailed summary of the payments.

[19] No financial statements of his business were produced by the Respondent at any time. No disclosure, before the hearing commenced, suggested that any business or personal debts existed at the time of the sale. In oral evidence at the hearing, the Respondent suggested, in a vague declaratory way, that he had bills to pay from the sale of the business. He did not, at any time from the commencement of the application to and including the hearing, produce any evidence of what those bills may be or their quantum.

[20] I am not satisfied that there were any significant bills owing by the Respondent at the time of the sale. It appeared that he "grew" his business from the profits generated by the business over the ten years that he operated it.

[21] The Respondent sold the business for 2.5 million dollars, plus interest at the rate of 7% per annum on the portion of the purchase price not paid to him forthwith, plus a commission of 1% of annual gross sales over 5 million dollars per year. The monies received by him from the sale were tax-free.

[22] Exhibit 8 was a summary of the financial terms of the sale and the monies received by the Respondent. The payments to him were as follows: in 2000, $368,743.00; in 2001, $394,440.00; in 2002, $391,253.00; in 2003, $454,514.13; in 2004, $996,755.58. In addition, the Respondent accepted a core lobster license in lieu of part of the sale price; this license was valued at that time at $140,000.00. He sold it in March 2001 to Albert Leo Sampson for $120,000.00. Between March 2000 and March 2004, the Respondent received, tax free, approximately 2.6 million dollars and the core lobster license.

[23] The Respondent testified at the hearing and in his discovery that he did not drink nor use drugs. He had three legitimate children from his marriage (he separated in 1999), and other children from other relationships, none of whom he supported financially. Other than the gifts referred to below, he did not financially support his three children nor his estranged spouse at the times relevant to this application. His children's post-secondary education was being paid by the Band Council. There was no evidence as to how, or upon what, the Respondent spent the 1.6 million dollars he received between 2000 and March 2004, when the Band Council paid out the final $944,755.18. There was no evidence as to whether the money was spent entirely or where it might be. The Respondent testified that he was penniless but his evidence was not credible.

[24] When the Respondent sold the lobster license, he testified that part of the proceeds went to purchase a mini-home. An answer to an Interrogatory given on January 23, 2009, contains a handwritten "To whom it may concern" letter informing that, effective April 21, 2006, he was transferring this residence to his son Ryle. He also purchased a $16,000.00 car for Ryle. He testified that he had no legal support obligation to Ryle at the time.

[25] In the spring of 2004, the Band Council paid off the balance of the purchase price in the amount of $944,755.18. The Respondent's investment records show that he deposited $1,000,000.00 into an investment account with RBC at the same time. The records of the investment account's activities between May 13, 2004, when the original deposit was made, and December 2007, when the investment account was closed, are summarized as followings:

Year	Investment Income Earned	Withdrawals by Respondent	Balance in account (at year end)
May 13 to December 31, 2004	$96,745.00	$73,000.00	$1,023,745.00

2005	$109,980.00	$180,000.00	$953,725.00
2006	$75,439.00	$172,000.00	$857,164.00
2007	$4,718.00	$861,882.00	$0.00

[26] The final $800,000.00 was withdrawn after the Respondent stopped paying child support - mostly in November 2007.

[27] Exhibit 12 was disclosed and introduced by the Respondent for the first time during the hearing. It is part of a bank record showing a loan payment of $310,000.00 on November 9, 2007. Also disclosed and introduced by the Respondent for the first time at the hearing was Exhibit 14 - five pages that appear to reflect an increase of a credit line in the name of the Respondent from $75,000.00 on July 7, 2005, to $325,000.00 in April 2006. The purpose of the credit line is not described on the exhibit. The Respondent testified that the payout in November 2007 related to the credit line (Exhibit 14), and that the credit line was money borrowed for investment purposes.

[28] The investment account records show that no monies were added to that account after the initial investment in May 2004. I conclude that it is unlikely that the credit line was used for the RBC investment account that the Respondent acknowledged (Exhibit 3, Tab 6). If I am wrong, the borrowed amount could not have exceeded the $75,000.00 limit on the credit line on July 7, 2005 (more than a year after the only deposit was made into the investment account).

[29] A summary of the Respondent's circumstances, as of the time of *'s birth on May 11, 2006, appears to have been as follows. He owned:

a) an investment account with approximately $850,000.00 in it;
b) a Royal Bank account (Exhibit 2, Tab 3, Page 38 of 54) with approximately $106,443.00 in that account on that date;
c) a residence at Valley Mills, Inverness County;
d) a 2006 and a 2007 GMC Sierra truck, both of which appear to have been fully financed;
e) a 2006 motor home valued by the Respondent at $50,000.00;
f) two 4-wheelers and two snowmobiles.

At this time (May 11, 2006), the Respondent had been separated from his wife for seven years, and his three children were of age and their educations were being paid for by the Band Council. His evidence at his discovery was that he was paying no support for them.

[30] The Respondent testified that he gifted to his son Ryle on April 21, 2006, a home that he had purchased with part of the proceeds from the sale of the lobster license and which property he had acquired in 2001. In July 2007, his evidence is that he purchased for his son Ryle a Chev Impala, at a cost of $16,000.00, which he paid for in part by the sale of a 4-wheeler and snow mobile.

[31] In December 2007, he gifted his Valley Mills residence to his son Steven and daughter Rayanna (Exhibit 2, Tab 1). On December 20, 2007, he gifted to each of his three children (Ryle, Steven and Rayanna), none of whom were dependents at the time, $75,000.00 each (Exhibit 3, Tab 5) for a total of $225,000.

[32] On January 24, 2008, he applied for social assistance from the Department of Indian and Northern Development and Nova Scotia Indian Band (Exhibit 3, Tab 5). He declared on his application that he had no dependent children, had no cash or income from any source, no cash on hand and none in the Bank, no bonds and no securities. He declared that he owned at 2006 GMC Sierra on which he owed $25,000.00. He declared that he was a college graduate and was able to do "any kind of work".

[33] The Respondent testified that since January 2008, his only income has been $180.16 biweekly in social assistance received pursuant to that application.

[34] On February 18, 2008, he filed in this proceeding a sworn Statement of Property. This was in response to demands for financial disclosure made as part of the initial application in August 2007. In this sworn Statement of Property he showed that he held no interest in real property, had no savings or accounts or securities or accounts receivables or business interests. He declared his only assets were two GMC Sierra trucks, on which he owed $64,000.00, two 4-wheelers and two snowmobiles.

[35] It is clear, despite his evidence and the submissions of his counsel, that he filed a sworn Statement of Property as to his assets after he had disposed of his real property, closed out his substantial investment account, gifted some of the proceeds to his three children, and done something with the rest of the proceeds of the investment account.

[36] The Respondent at no time explained to the satisfaction of the Court where any of his assets or investments obtained at any time since the sale of his business went, except: (a) the gift of his two residences to his three children; and, (b) the gifts totalling $225,000 in cash to the same three children.

[37] In his discovery examination, he says that he made loans to persons, some of which loans he did not recover. He described each of those loans as between a few hundred dollars and $1,000.00. There was no evidence that he led an extravagant lifestyle, or had extraordinary expenses.

[38] A review of the bank account records of his primary bank account for the period July 31, 2001, to August 1, 2008, (Exhibit 2, Tab 3) does not explain where his money went or where it might be.

C. **Imputing Income**

C.1 **Applicant's Submissions**

[39] The Applicant asked the Court to impute income to the Respondent on the basis of: (a) the assets owned by him at the time of *'s birth, and what a person, acting reasonably, had the capacity to earn with those assets, and (b) employment for which the Respondent is suited.

[40] The Applicant refers the Court to *Bolt* v *Bolt*, [2006] O.J. 968 (OSCJ); *Riel* v *Holland*, 2003 CarswellOnt 3828 (ONCA); *Coadic* v *Coadic*, 2005 NSSC 291; *Marshall* v *Marshall*, 2008 NSSC 11, and, in particular *Hanson* v *Hanson*, 1999 CarswellBC 2545 (BCSC) at ¶ 14, for the relevant principles for interpretation of Section 19 of the *Child Maintenance Guidelines*.

C.2 **Respondent's Submissions**

[41] The Respondent's pre-hearing brief referred the Court to *Hunt* v *Smolis-Hunt*, 2001 ABCA 229, at ¶ 42, where the Court of Appeal states that the imputation of income should occur where the payor pursued a deliberate course of conduct for the purpose of evading child support obligations. In the Respondent's post-hearing brief. It is submitted that the burden is on the applicant on a balance of probabilities to prove that income should be imputed. He directs the Court to the second consideration in ¶ 14 in *Hanson*, which consideration asks the Court to consider the age, education, experience and skills of the payor and the availability of work.

[42] Counsel for the Respondent notes that:

a) the Respondent is 57 years of age;
b) the Respondent has not been involved in the work force since selling his business in 1999;
c) unemployment "is a huge problem on native reserves in Nova Scotia";
d) the Respondent has limited skills, no "specific occupation" and no history of employment earnings, and therefore it is not reasonable to expect "non-native employers" to hire him;
e) income cannot be imputed to the Respondent "out of thin air" or arbitrarily;
f) there is no evidence of what his investments could have earned; and,
g) the Respondent has no actual income.

C.3 **The Law**

[43] The law applicable to the imputation of income for the purpose of child support is set out in Section 19 of the *Guidelines* made under Section 55 of the *Act*. Section 19 of the *Guidelines* is identical to Section 19 of the *Federal Child Support Guidelines*, made pursuant to the *Divorce Act*. In my view, the analysis is the same for both provisions, and the case law applicable to Section 19 of the *Federal Child Support Guidelines* is relevant to the interpretation of Section 19 of the *Guidelines*.

[44] A useful understanding of the scope of Section 19 can be obtained from the following three commentaries and six appellate decisions.

Commentaries

a) **D.A. Rollie Thompson**, *Slackers, Shirkers and Career Changers: Imputing Income for Under/Unemployment*, (2006) 26 C.F.L.Q. 135;

b) **James C. MacDonald** and **Anne C. Wilton**, *Child Support Guidelines: Law and Practice*, *2nd Edition*, (Toronto: Carswell, looseleaf to Release 2 in 2009) Chapter 19; and,

c) The late **James G. McLeod** and **Alfred A. Mamo**, *Annual Review of Family Law: 2009*, (Toronto: Carswell, 2009) pp. 318 to 335.

[45] The case law from across Canada in not consistent. The decisions most often referred to by this Court are, in chronological order:

1. *Montgomery* v *Montgomery*, 2000 NSCA 2
2. *Donovan* v *Donovan*, 2000 MBCA 80
3. *Hunt*, supra, 2001 ABCA 229
4. *Drygala* v *Pauli*, [2002] O.J. 3731 (ONCA)
5. *Riel*, supra, 2003 ONCA
6. *Barker* v *Barker*, 2005 BCCA 177
7. *M(JA)* v *M(DL)*, 2008 NBCA 2

[46] On one extreme is the ratio in *Hunt* (recently reaffirmed in *Taylor* v *Taylor*, 2009 ABCA 354), that Section 19(1)(a) requires proof of a specific intention to undermine or avoid support obligations or proof of circumstances from which the Court may infer that the payor's intention is to undermine his child support obligations (that is, evidence of bad faith conduct) before income will be imputed.

[47] At the other end of the spectrum, according to **Rollie Thompson**, is *Montgomery*. At Paragraph 35, the Court expressly rejected limiting Section 19 to those situations where the payor intended to evade child support obligations (the *Hunt* test) or acting in reckless disregard of the needs of his/her children. While the Court used the term "reasonable" as the foundation for its analysis, it appeared to have rejected as unjustified any reduction in a payor's income produced by voluntary conduct unless it could be shown that the reduced income (in that case resulting from the payor's upgrading of his professional qualification) was beneficial to the payor's dependents in the short term.

[48] A checklist of relevant principles for determining capacity to earn income, set out by Dr. Julian D. Payne in the 1999 edition of his text *Child Support in Canada*, was expressly adopted by the British Columbia Supreme Court in *Hanson* and by the Manitoba Court of Appeal in *Donovan* and subsequently by most appellate and trial courts across Canada as an appropriate guide for the interpretation of Section 19(1)(a).

[49] The courts in *Drygala*, *Riel*, *Barker* and *M v. M*, clearly decide that the appropriate approach for interpretation of Section 19 is a contextual and purposeful approach. The approach uses the mechanism of imputing income to give effect to the joint and ongoing obligation of parents to support

their children in accordance with their capability to earn income. In doing so, the legislation provides flexibility to recognize, on the one hand, what Justice Gillese recognized as the balancing of the fundamental importance of work to a person's life (the governing principle in *Hunt*) with, on the other hand, the paramountcy of parents' obligation to support their children to the best of their ability (the governing principle in *Montgomery*).

[50] In *Drygala*, at ¶ 35, the debate between the paramountcy of the payor's right to pursue work that gave him or her a sense of identity, self-worth and emotional well being, and the paramountcy of the parents' obligation to maximize child support was viewed as unwarranted. The court said that the law was flexible enough to consider both.

[51] In *Drygala*, the court considered the other factors enumerated by Dr. Payne and previously adopted in *Donovan* (¶ 21) and *Hanson* (¶ 14). In *Drygala*, the court found the educational goals of the payor parent to be reasonable (unlike the court in *Montgomery*) but found that the payor could work part-time and should be imputed with one-half his prior income.

[52] The same principles were applied in *Riel*, in rejecting the payor's decision to wind up a successful business for a salaried position at less than half his self-employed income. Similarly, in overturning a trial decision that applied the *Hunt* analysis, the British Columbia Court of Appeal in *Barker* again adopted Dr. Payne's analysis and placed the burden on the payor to justify a reduction in income that resulted in the payor earning less than what he was capable of earning.

[53] More recently, in *M v. M*, the New Brunswick Court of Appeal, after a review of most of the above decisions and the **Thompson** commentary, concluded at ¶ 34, that courts are given a significant degree of discretion when imputing income and no specific formula for the exercise of judicial discretion appeared to exist. Of particular relevance to this case is the New Brunswick Court of Appeal's analysis of the positive duty on a payor to fully disclose financial information and the broad discretion the court has to draw inferences from the payor's failure to explain how their reduced ability/capacity to earn income was reasonable.

[54] Examples of the application of the *Drygala* court's "flexible" approach are found in Justice Forgeron's decisions in *Coadic* and *Marshall*.

[55] Section 19(1) of the *Guidelines* is written in simple, straightforward language. It authorizes the court to impute such income to a spouse "as it considers appropriate in the circumstances, which circumstances include: [nine enumerated circumstances]". This opening statement to the section clearly shows that the list of circumstances is inclusive but not exhaustive. Other circumstances may exist that justify imputing income to meet the purpose of the section and determining whether, from an objective point of view, the parent is contributing to the support of the child as he/she is reasonably capable of - from income or income producing assets.

[56] While five or six of the circumstances enumerated in Section 19(1) appear to be relevant to the factual matrix in this case, the overriding consideration in the judicial exercise of discretion is that there is a rational factual basis, founded on the principles of fairness, to find that the payor has not

acted reasonably in fulfilling his/her legal obligation to contribute to his/her dependent's financial well being according to his/her abilities or means.

[57] The enumerated section 19(1) circumstances relevant to the facts of this case are:

a) whether the Respondent is intentionally underemployed or unemployed;
b) the consequence of the Respondent being exempt from paying income tax;
d) whether it appears that income (or in this case assets which are capable of generating income) have been diverted in a way that reduces or eliminates the ability of the Respondent to pay child support;
e) whether the Respondent's property has not been reasonably utilized to generate income since the time that his child support obligation arose;
f) whether the Respondent has failed to provide income information (that is, complete information as to his financial circumstances relevant to his capacity to generate income); and,
h) whether the income the respondent did receive was from sources that are taxed at a lower rate than normal or that are exempt from tax (this circumstance is repetitive of (b) above).

C.4 **Analysis**

[58] As previously noted, on *'s birth date (May 11, 2006), we know that the Respondent owned at least:

a) the Valley Mills residence, free and clear;
b) an investment account with RBC containing approximately $857,000.00 ($884,906.03 on March 31, 2006, less withdrawals before May 11, 2006, of $27,000.00);
c) a bank account with $106,443.58;
d) a new Sierra truck (financed), 4-wheelers and snowmobiles.

[59] There was no evidence of extravagant living expenses and we know that he was exempt from the payment of income taxes. There was no evidence that he had any legal obligation to support any other person or that he was paying support to any of his three children, whose post-secondary educations were being paid for by the Band Council. He did not drink or use drugs. He had, three weeks before the birth date of *, gifted another residence that he owned to one of his children. He did not work and had no work expenses. At the hearing, the Respondent produced a document that established that he had a line of credit with the Royal Bank, but he did not establish how much was owing on the line of credit as of *'s birth date.

[60] As noted in *DBS* v *SRG*, 2006 SCC 37, the very fact of parentage places a legal, as well as moral, obligation on parents to use their abilities and their resources to respond to the child's right to child support. This obligation is a free standing obligation, independent of any court order. By reason of Section 8 of the *Act*, every parent is under a legal duty to provide for the reasonable needs of their children, absent a lawful excuse. The amount of the maintenance is determined in accordance with the *Guidelines*.

[61] A remedial and purposeful interpretation of Section 8 of the *Act* and Section 19 of the *Guidelines* not only requires that a parent not be under or unemployed when he or she has the reasonable capacity to earn income, but also that he or she deal with those assets which are capable of earning income, in a reasonable manner, in light of this legal obligation to provide for the reasonable needs of dependent children.

[62] Counsel for the Respondent submits that the factual matrices in the case law that I referred counsel to on December 21, 2009, relate to underemployment, and are therefore not relevant to the factual matrix of this case (which deals with the under utilization of the Respondent's assets, in particular his RBC investment account). As noted previously, the *Guidelines* authorize the Court to impute such income to a parent as it considers appropriate in circumstances including, but not limited to, the nine circumstances enumerated in Section 19(1). The extension of the approach applicable to under or unemployment, to the under-utilization of one's assets and investments, is consistent with the purpose of the legislation and the themes contained in the appellate decisions that this Court has cited.

[63] An extension of this approach to the use of one's assets and investments is not unique to this application. It has founded the analysis and exercise of judicial discretion to impute income in other decisions, including: *DMCT* v *LKS*, 2007 NSFC 22, upheld on appeal at 2008 NSCA 61; *Austin* v *Austin*, 2005 BCCA 253; *Verwey* v *Verwey*, 2006 NBQB 149, affirmed on appeal at 2007 NBCA 102.

[64] The Respondent was entitled to do what he wanted with the proceeds from the sale of his business until May 11, 2006. The reasonableness of his financial conduct thereafter was subject to his obligation to pay for the reasonable needs of his daughter and his daughter's right to child support.

[65] There is very little explanation as to what the Respondent might have done with the first 1.3 million tax-free dollars he received between March 2000 and March 2004. What little explanation that was given made no sense, and the Court is not entirely satisfied as to whether all of that money has been spent. That, however, is not the basis for imputing income in this application.

[66] What is relevant is what income could reasonably have been, or should have been obtained, from the Respondent's assets after May 11, 2006 (the date his legal and moral obligation to support his daughter arose). The Respondent had over $950,000.00 with the Royal Bank. The Respondent failed to provide timely, or much, relevant financial disclosure, except in response to arduous pre-hearing measures by the Applicant. Some of his disclosure was provided during the hearing in a cursory way, with partial documents that might or might not have supported his vague evidence. The evidence lacked credibility, and reliability.

[67] As of *'s birth date, he had other assets, including, a home, a vehicle and other "toys", and no other legal support obligations. He had no expensive habits. His only obsession appears to have been golf.

[68] It appears from his investment statements that he earned a 9.6% return on his investment account in seven months in 2004 (which amounts to an annualized rate of return of about 16%); 11% in 2005; and 8% in 2006. I conclude that a reasonable rate of return on his investment account of $850,000.00, as it existed at the time of *'s birth date, would have been 5% per year. A 5% rate of return is a conservative estimate, and less than he actually earned before *'s birth. A 5% return on his $850,000.00 investment account would produce an income of $42,500.00 per year.

[69] This income would be tax free to the Respondent. I am without the benefit of tax tables, or evidence as to what that benefit amounts to; however, mindful of subsections 19(1)(b) and (h) of the *Guidelines*, I am obligated to estimate the value of that benefit. I conservatively estimate that benefit at $12,500.00.

[70] For the purpose of determining child support, I impute to the Respondent income of $55,000.00 per year.

[71] The Respondent claims to have spent all his savings, except for an unquantified balance in the accounts he gifted to his three children, which accounts he states that he has used to support himself since December 2007. I am not satisfied that he has no other assets, but in any event, it does not relieve the Respondent from his child maintenance obligation.

[72] The Respondent's evidence is that he still occupies one of the residences he gifted to his children while the Band Council is constructing, I understand free to him, a home on the reserve, and that he has used most of the $225,000.00 that he transferred to his children to support himself.

[73] Even if I applied the *Hunt* interpretation of Section 19(1), I would find that the Respondent arranged his affairs in direct response to the Applicant's claim, and for the primary purpose of defeating the Applicant's claim for child support. It is clear that, in response to the Applicant's request for financial disclosure and child support in August 2007, the Respondent intentionally terminated the payment of any child support for two reasons: First, on the false excuse that he had no money when, in fact, at the time, he had significant money available to him; and, second, on the irrelevant excuse that the Applicant was harassing him. He immediately transferred, purportedly as gifts, all of his remaining assets to his three non-dependent children but continued to have the use of the residences and money that he transferred. He then purported to make "disclosure" of his "impecunious" financial position. His actions speak louder than his words. They speak of bad faith.

[74] I could find no clearer example of intentional conduct to evade one's child support obligation in any of the reported case law reviewed in preparation of this decision, than exists in this case. If *Hunt* were the law in Nova Scotia, I would conclude that the Respondent intentionally arranged his financial affairs to avoid paying child support, without any excuse, legal or moral.

[75] With respect to the Respondent's work history, the Court notes that he was a very successful entrepreneur for over ten years. He operated and sold two businesses. He has some post-secondary education and no health problems. On the stand he appeared to be reasonably intelligent. His success speaks for itself.

[76] The Court recognizes that the opportunities for work on a reserve may be limited, as his counsel submitted in his closing argument. Having accepted that, there is however no evidence that the Respondent has made any effort to create work for himself or to seek employment. On the contrary, he has not.

[77] I am satisfied that if the Respondent wished, or if the need arose, that he could use his experience, intelligence, and resourcefulness to earn an income. I need not quantify the amount of income at this time except to say that I infer and conclude that he has the capacity to earn employment or self-employment income that would earn him sufficient money to pay the ongoing child support that I impose by this decision.

[78] In summary, I impute income to the Respondent, on the basis of Section 19(1)(a), (b), (d), (e), (f) and (h) of the *Guidelines*, in the amount of $55,000.00 per year. This produces a basic child support obligation of **$479.00** per month.

[79] Applying the principles with respect to retroactive child support enumerated in the Supreme Court of Canada in *DBS*, I order that the Respondent paid child support, retroactive to August 1, 2007. I accept that he paid child support to and including July 2007. This produces arrears from August 2007 to and including February 2010 of 31 months, or **$14,849.00**.

D. ***Fraudulent Conveyance - Assignments and Preferences Act***

[80] The Applicant filed a supplementary application naming Roderick Googoo and three of his children as Respondents so as to get access to the assets that the Respondent transferred to the children, for the purpose of recovering any child support and costs that the court might order.

[81] Counsel for the Applicant established that the Respondent and two of the three children had been served with the application. None of the children responded to the application or appeared for the hearing. Counsel for the Respondent stated that he did not represent any of the children.

[82] The Court heard evidence with respect to the Applicant's claim that the Respondent had fraudulently transferred, without consideration, his residence at Valley Mills and $225,000.00 to his children for the purpose of evading his child support obligation. This claim is well founded. I find that the Respondent conveyed legal title to the Valley Mills residence and $225,000.00, without consideration, to fraudulently deprive the Applicant of child support for * when he was otherwise insolvent, and that he retained the beneficial ownership and control of these assets.

[83] The Court was advised after the hearing that the bailiff had been unable to formally serve the application on Rayanna before the hearing, even though it appears likely that Rayanna was aware of it. This decision and the remedies that flow from it are not binding on Rayanna. This decision and the remedies that flow from it bind Ryle and Steven, and shall be enforceable against them.

[84] It was the evidence of the Respondent that he had access to and was using the $225,000.00 transferred to the children for his own support. I find that the transfer of the Valley Mills residence and the transfer of the $225,000.00 to the children was a fraudulent assignment by an insolvent person who, on his own evidence, was unable to pay the child support obligation the Court has imposed upon him at the time of the transfer. The transfer was for the purpose of depriving his lawful creditor (his daughter *, through her mother, the Applicant) of child support. The Applicant is entitled to recover against the interests of the Respondent, Ryle Googoo and Steven Googoo in those assets the claim for child support and costs, together with such other equitable remedies, including accounting and tracing, as flow from this decision.

E. **Costs**

[85] The Applicant says that she should be entitled to substantial indemnity of her legal costs on the basis that she is not on a legal aid certificate, she has no assets, and the conduct of the Respondent was unreasonable. The proceedings were lengthened by over two years while the Applicant pursued disclosure that was not voluntarily provided by the Respondent. During this time the Respondent made himself impecunious or insolvent.

[86] Over more two years there were numerous appearances before the Court, interrogatories, an order for disclosure from a third party and a discovery examination. Counsel for the Applicant seeks costs in the amount of $10,000.00.

[87] Counsel for the Respondent represented to the Court that the Respondent revealed everything that was asked of him, and based on that disclosure, the Applicant should (would) have known early in the proceeding that there were no assets available for the payment of child support.

[88] The Court disagrees. The Respondent did not provide full and fair disclosure of his circumstances. After the application was made, he attempted to hide his assets by the fraudulent conveyance of legal title to those assets to his children and he filed a misleading Statement of Property after he had transferred those assets to his children

[89] In the circumstances of this case, the Applicant's request for costs in the amount of **$10,000.00** is granted.

J.