

IN THE SUPREME COURT OF NOVA SCOTIA
(Cite as: *Eisnor v. Eisnor*. 2001 NSSC 140)

BETWEEN:

KENDALL ERIC EISNOR

APPLICANT

- and -

DEBORAH ANN EISNOR (BARNETT)

RESPONDENT

DECISION

HEARD: before The Honourable Justice Margaret J. Stewart

DATE HEARD: at Liverpool in Chambers, N.S. on July 25, 2001.

WRITTEN RELEASE: September 28, 2001.

COUNSEL: Brent Silver, counsel for the Applicant
Deborah Barnett, self represented

[1] The applicant Kendall Eisnor, (Eisnor) seeks to vary the maintenance provision for his two children in the August 2000 Corollary Relief Judgment with attached February 10, 2000 Agreement and Minutes of Settlement from \$592.00 per month to \$362.00 per month based on a decrease in his income. No proportionate sharing of payments for the children's medical, dental, eye and orthodontic expenses is sought rather, Eisnor agrees to pay half of the those expenses.

[2] At issue is whether the Court should impute income to Eisnor for being "intentionally under employed" without excuse pursuant to s. 19(1)(a) of the Federal Child Support Guidelines or, more specifically, whether child support of \$592.00 per month should be varied to \$362.00 per month, given Eisnor's resignation on threat of being fired, if not tendered, from his \$43,000.00 per year general manager of a pharmacy position to be employed by this new wife as manager of a newly opened convenience store/gas station/restaurant operation at \$25,000.00 per year, some two months after his 12 month severance package at his regular salary ended.

[3] The parties married on September 17, 1983, and separated in 1998 and were divorced on August 25, 2000. They are the joint custodial parents of two children, Ashley and Stephanie ages 14 and a half years and 13 years respectively, who reside on a day to day basis with the respondent, Deborah Barnett (Barnett).

[4] Barnett earns \$44,000 as an accounts manager and has remarried. Since June 2001 her husband who had been unemployed for three months has been employed in sales and expects to earn \$18,000 in 2001.

[5] At the time of the divorce, Eisnor had resigned three months earlier as general manager of Kinburn Pharmasave in Mahone Bay, where he had been employed for 28 years, 20 years of which were in a managerial capacity. Correspondence from his employer in May and December of 1999 reflected concerns of a job performance nature and of personal issues being brought to the work place, to the point of advising it was his last chance "to get the old Kendall back and improve the management at Kinburn". It was Eisnor's clear understanding that if he had not resigned on May 17, 2000 and accepted the severance package, he would have been fired. Their agreement reflected continuation of his current bi-weekly pay for 12 months (\$43,000.00) with a

deduction of fifty percent (50%) of new earnings, if new employment was obtained within one year, a continuation of purchase discounts, health, dental, life insurance for 12 months, an opportunity to present to staff if desired, stated reason for leaving due to personal issues, and an offer of assistance with job placement if desired.

[5] For approximately six weeks preceding August 6, 2001 Eisnor was the recipient of \$413.00 per week Employment Insurance and on August 6, 2001 commenced employment with Kenverlee Convenience Limited as store manager of the convenience store/gas station and restaurant operation, located in East LaHave. Officially opened on August 21, 2001, the operation is owned by Eisnor's common-law spouse of two years and now wife, as of July 2001, Verna Shaw, who purchased it with the assistance of her father pending the sale of her Rose Bay property. Eisnor's annual salary is \$25,000.00 and he works with his wife who does not intend to draw a monthly salary but will take advice from her accountant at the end of the year concerning a draw, if any. Long term plans for the business include a laundromat and campground. As store manager, Eisnor will be responsible for general management, day to day overseeing of the store and operation, as well as assisting Ms. Shaw in interviewing and hiring of what is anticipated to be a staff of four.

[6] Ms. Shaw who was under doctor's care for the last two and half years for depression following the break up of a 26 year marriage, has never worked in any capacity outside of the home. Since March, 1999 she and her son have relied upon her father's financial support and since June of 1999 has shared expenses of her Rose Bay home with Eisnor who assists in the physical maintenance and up keep of the property. Throughout the negotiations to purchase the operation, Eisnor acted as the company's assignee. Ms. Shaw intends to and has relied on Eisnor's expertise. She is no longer receiving regular monthly assistance from her father. On the sale of her home, she intends to pay back her father for his interest free loan to purchase the business and she and Eisnor will reside in an apartment located above the business complex.

[7] By way of a prenuptial agreement Eisnor has no interest in Ms. Shaw's company or its assets. Eisnor retains sole interest in his van, used furniture and approximately \$37,000.00 in RRSP contributions that he has not touched since division of the matrimonial assets. He continues to pay approximately \$400.00 per month on the former matrimonial debts that he assumed and besides monthly

lawyer fees relating to the divorce, has acquired two additional monthly debt payments totaling \$162.00 for the purchase of a new computer and a new line of credit. Even earning \$43,000.00 per year he functions at best at break even, tending towards overdraft and, in doing so, makes no provision in his budget for accommodations or food or the increase in monthly medical expenses for one of the children.

[8] Eisnor contends his job efforts since June 2000 to find other employment has not resulted in a position any more promising than the one he has accepted. He points to inventory computer programming at time of sale (point of sale registration system) effecting and eliminating what has proven to be an important aspect of his managerial skills over the years, i.e., inventory control and ordering. On cross he acknowledged some pharmacies like Lawtons still continue to employ managers with his managerial expertise which he rates at the top of the scale and general manager positions still exist. As he himself notes, he has 28 years of experience in the retail field with proven skills and abilities in many areas. He was responsible for the day to day management of a large staff of some 15 people, preparing yearly budgets, forecasting sales, as well as buying merchandise, seeing to local promotions and using his computer skills.

[9] Of the nine noted employers he approached on his own initiative and of the five newspaper advertised job applications he submitted during January, February and March of 2001 one, Pharma Choice, with whom he met three times was specifically related to a pharmacy chain. He did not approach others like Shoppers Drug Mart and did not go directly to Sobeys Lawtons Pharmacy division but did apply to Sobeys Managerial Human Resource Nova Scotia Division office for an advertised position in its store manager trainee program. He was in phone contact with peers concerning work in Bridgewater, Antigonish and New Brunswick but in all likelihood would probably not have taken a job located in New Brunswick. He did not pursue the offer of assistance with job placement made by his former employer. He left Pine View Farms with the impression that he declined their \$25,000.00 per year offer as sales manager in charge of a retail staff of six people, "as he felt it was not sufficient to meet his financial obligations" and his concerns related to being away three months from his children due to the necessity of traveling in New Brunswick and Prince Edward Island were not noted or known. The advertised jobs he applied for, other than Sobeys, were in the nature of a sales representative and included such companies as Hersey and Pepsi. The jobs sought out on his own initiative entailed a small scale managerial position and a number of

retail sales in new areas such as automobiles, real estate, pools, advertisement web sites, as well as basic work as a labourer involving carpentry and communications installation. None of these nor his follow up with Barnett's Proctor and Gamble lead came to fruition.

[10] Eisnor contends the onus is on Barnett as she wants the Court to impute income. It is for her to show there is in fact a job out there that would pay more and that he readily qualifies for and would in all likelihood obtain and has avoided or not pursued and in this regard, she has failed.

[11] In the leading Nova Scotia case *Montgomery v. Montgomery* (2000) 3 R.F.L. (5th) 126 (N.S.C.A.) the Nova Scotia Court of Appeal held that s. 19(1)(a) does not restrict the Court to imputing income only in those situations where the payor intended to evade child support or recklessly disregarded the needs of the children. The Court asked whether the conduct of the payor was reasonable in all of the circumstances and determined a self-induced change to one's circumstances that results in a reduced income from a \$60,000.00 per year managerial job to a \$20,000.00 per year articling position was not objectively justifiable and imputed income.

[12] Case law reflects it is not acceptable as a payor spouse to make employment or career choices that reduces one's current income unless the payor can show the decision to be "reasonable". Even when no deliberate or intentional malfeasance is found, income is imputed where there is an on going situation of "intentional" under employment or unemployment such as where the payor simply does not try hard enough or exert himself enough to earn income. (*Donovan v. Donovan* (2000), 9 R.F.L. (5th) 306; *Schick v. Schick* (2000), 6 R.F.L. (5th) 421.)

[13] The question is whether the payor's present situation is one where income should be imputed. The focus is on the issue of reasonableness which is "not confined to an examination of the circumstances surrounding the applicant alone, but all of the circumstances". (*Montgomery v. Montgomery* supra, paras. 36 and 37.) Reasonableness is determined not only by reference to current income but also by reference to the payor's capacity to earn, having regard to such factors as age, health, employment history, education, skills, the standard of living during the marriage, freedom to relocate and available employment opportunities. (*Donovan v. Donovan*, supra at page 310.) Each case must be decided on its own facts.

[14] Although I find no suggestion of intentional evasion of child support responsibilities or bad faith, I have concerns as to whether Eisnor has acted reasonably in all of the circumstances.

[15] The decision to resign rather than be fired or go through protracted legal proceedings was reasonable in that it resulted in a severance package of one year's salary and health care benefits, given what Eisnor understood to be the inevitable result otherwise.

[16] I note three months prior to resigning in May of 2000, the parties had signed Minutes of Settlement at least resolving on a concrete level personal issues which were apparently finding their way into the work environment of an employee whom the employer respected and wanted when he was the "old Kendall". Although not in sufficient time to help turn around his situation with his employer, certainly a positive in any future endeavors in addressing reasons for leaving.

[17] Eisnor at age 45 years is a high school graduate with 20 years of managerial skills of which the last three years were as a general manager over a staff of 15 people. He ranks himself at the top of the scale when it comes to his work reputation with his peers in the pharmacy business. He has been an active member in the business community. He is articulate and versatile in that he has computer, budgeting, projecting, promoting, retailing and managerial skills. As noted a year following his resignation and two years after his employer raised the issue of personal issues, he has finalized all matrimonial and custody issues, is divorced and within the last month, has remarried and is in a supportive relationship. Other than a torn ligament in his right knee, he references no health issues. He has managed to retain his RRSP's and shares expenses with his new spouse and to May of 2001, given his continued income, has managed an equatable standard of living.

[18] I questioned whether in accepting a \$25,000 a year salary Eisnor's earning capacity is being fully utilized when one considers over at least the last three years he has had the capacity to earn \$40,000 per year or better, given his proven skills and abilities, as he himself notes "in many areas". A salary which he acknowledged in January 2001 was not sufficient to meet his financial obligations.

[19] Eisnor has given no indication that his new job earning \$25,000 per year is temporary and that he intends to continue to seek or pursue employment in keeping with his managerial skills and expertise. He presents as a committed employee to

his new wife's new enterprise and is the only one with work experience and managerial skills. He was intimately involved in the negotiations and knows all of the profit and loss statements. Obviously, a salary of \$25,000 is not problematic. He provided no comment on the operation's potential and what if any relief the household would expect to receive through Ms. Shaw's work efforts other than potentially free rent and obvious business deductions of phone, mileage etcetera.

[20] It is questionable whether the job justifies only a \$25,000 per year salary, given that the operation is more than a convenience store. It includes a gas bar and restaurant. In arriving at a salary of \$25,000 reliance was placed on the opinion of a business counselor at Acadia Centre for Small Business Entrepreneurship "as to the proximate salary for a managerial position within a convenience store establishment within Lunenburg County" being \$20,000 to \$25,000 per year.

[21] It is questionable whether Eisnor over the last year has been even moderately aggressive in his pursuit of employment opportunities. He did not follow up on the assistance offered by his former employer with placement. In order to save 50 percent of his salary, they may well have been willing to pay for a professional employment agency in order to pursue job prospects on his behalf or register him for his expertise or assist in the preparation of professional resume. He did not ask anything of them. Neither did he take any such initiative on his own. Except for his contact with Pharma Choice, he did not prepare a letter of introduction with accompanying resume for consideration by and to be placed on file with the large pharmacy chains. His position still exists within the industry. Although willing to branch out in new retail areas, neither did he follow through with such a process with the local businesses such as building supplies or Michelin. As pointed out by Barnett, he took no steps to investigate his marketability given his occupational profile through Canada Employment Centre and Internet Website.

[22] I am not convinced Eisnor has adduced evidence to show that the resulting change in income was reasonable given his earning capacity, especially in light of the fact he does not present this change as a temporary one while he pursues his efforts to earn an income commensurate with his expertise and is thereby under employed within the meaning of s. 19(1)(a).

[23] Acknowledging an aspect of Eisnor's expertise relating to his management of inventory, at least as it relates to major retail enterprises, has been effected, I am satisfied the \$43,000 per year evidentiary basis for calculating how much income

to impute should be modified. I conclude that Eisnor is capable of earning at least \$35,000 per year and that such a sum is not unattainable. Under the Federal Child Support Guidelines this would translate into monthly child support for two children in the amount of \$494.00 commencing as of August 1, 2001. As noted, he has agreed to contribute towards half of the children's dental, medical, eye, and orthodontic expenses. All other terms remain in place.

[24] If necessary, I will hear the parties as to costs either orally or in writing.

J.