

Pay day for Wealthy Support Payors
Is the Pendulum swinging?
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Being rich has its rewards: Private schools for children, fancy cars, nice homes, ski vacations abroad, and the sense of security that a large income and significant assets provide.

However, as many wealthy payors of spousal support will advise, a large income is of no assistance in acrimonious matrimonial proceedings. Aside from the division of assets, the wealthy payor of support also has to divide his/her income by way of both child and spousal support. In some cases this can leave him/her with less than 50% of their net income after support payments. While child support eventually ends as children get older and hopefully become financially independent, spousal support may last indefinitely, depending on the length of the relationship and the degree of financial dependency of the recipient spouse.

Pursuant to section 4 of the *Child Support Guidelines*, if a payor's income is over \$150,000 the Court may exercise some discretion to reduce the amount of table child support that is required to pay. In reality, however, the \$150,000 threshold was conceived in 1997 with the commencement of the Child Support Guidelines, and the Court today rarely will award a reduction in child support unless the payor's income significantly exceeds \$150,000, sometimes \$1,000,000 or more.

However, on the spousal support side of the support equation, courts have been making some strides to rein in both the length and quantum of spousal support. In recent Court of Appeal cases, the Court has determined that in appropriate circumstances, it may terminate a long standing spousal support obligation. It may also recognize that high income earners should not always have to pay spousal support calculated on their entire income, but on a portion thereof.

In the 2019 case of *Choquette v. Choquette*, the Court of Appeal upheld a trial decision whereby Mr. Choquette was permitted to terminate all support payments to his ex-wife, after 22 years of payment. In 1996 Mr. Choquette was ordered to pay \$4750 per month, premised on the fact that Ms. Choquette would be soon going back to work. Mr. Choquette's income over the years grew to over \$1,000,000 per annum, and at the time of trial he had a net worth over \$14 million. On the other hand, it was determined that Ms. Choquette had not made serious efforts to look for employment over the years. Her main source of income had been from spousal support. She had acquired a net worth significantly below that of the payor, approximately \$700,000. At the time of trial Ms. Choquette was not working and 62 years old.

The trial judge determined that after 22 years Ms. Choquette was no longer entitled to receive spousal support. The maximum range of spousal support under the Spousal Support Advisory Guidelines is 15 years. While the Court of Appeal agreed with the Wife's counsel that the Order terminating support for Ms. Choquette may seem "harsh" in the circumstances, it would not intervene with the trial judge's discretion to terminate support immediately as opposed to

lowering it or reducing the amount for a set period of time until eventually eliminating it all together.

Factors that no doubt influenced the decision to terminate spousal support in *Choquette* was that Mr. Choquette was the primary caregiver of the children post separation and perhaps most important, Ms. Choquette's total lack of meaningful efforts to move towards any degree of self-sufficiency.

In an earlier Court of appeal case, the 2017 case of *Halliwel v. Halliwel*, the Court had to determine the issue of spousal support where the Husband earned approximately \$1,000,000 per annum. The parties were involved in a 32 year marriage, and at the time of trial, had two independent adult children. The Wife worked with the Husband in the businesses that he had established. Her position in the business was terminated post-separation.

At trial, the Court awarded the Wife spousal support of \$30,028 per month, which was the low end of the Spousal Support Guideline calculation. The Trial judge noted correctly that the payor spouse had an income above the Support Guidelines ceiling of \$350,000; the \$350,000 ceiling does not operate as a hard "cap"; the Spousal Support formulas give way to discretion when the payor's income exceeds \$350,000 per annum; the analysis is fact specific; and the Spousal Support Guideline ranges remain relevant.

The Court of Appeal determined that the trial judge had erred in the determination of spousal support by failing to give proper consideration to the equalization payment that the Wife would receive. This was an error in principle given that the Husband's income was over \$350,000 and an individualized approach to support determination is therefore required. In determining spousal support, the Court considered only \$675,000 of the Husband's \$1,000,000 per annum income, which was the half way point between the \$350,000 ceiling set out in the Spousal Support Guidelines and his \$1,000,000 per annum actual income. The Court of Appeal thus lowered spousal support to \$21,000 per month.

A number of other cases have since followed this "Halliwel" approach to the calculation of income for high income earners in spousal support cases. See for instance the 2019 Superior Court motion in *Zapfe v. Zapfe*.

Choquette and *Halliwel* suggest a greater flexibility regarding the treatment of high income earning payors. Spousal support is not necessarily a life-long obligation and at a certain point in time "enough may be enough". Further, while a long time spouse of a high income earner is entitled to maintain an affluent standard of living, affluent does not necessarily translate to an equal sharing of income between payor and recipient.