

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Lenihan v Bailey*, 2023 NSSC 30

**Date:** 20230130

**Docket:** *SFH*, No. 1201-067098

**Registry:** Halifax

**Between:**

Steven Lenihan

*Petitioner*

v.

Marianne Bailey

*Respondent*

**ENDORSEMENT**

**Judge:** The Honourable Justice Cindy G. Cormier

**Written Submissions:** Petitioner – December 8, 2021  
Respondent - November 22, 2021

**Counsel:** Steven Lenihan, self-represented Petitioner  
Judith Schoen, for the Respondent

**By the Court:**

**1 History**

The parties have a long history before the Court. With respect to costs:

On April 27, 2021, Mr. Lenihan filed letter requesting “costs for the emergency application for enforcement of parenting times” heard in December 2020. He requested “a lump sum of \$2500” for his legal costs.

On May 10, 2021, Ms. Bailey filed her submissions on costs suggesting “the outcome of the urgent motion filed by Mr. Lenihan was, at best, mixed” and each party should bear their own costs as a result or costs should be considered “in the cause” or using Tariff C based on a hearing of ½ day duration, “\$750.00 would be the appropriate quantum.”

An endorsement was issued November 12, 2021, (NSSC 315) indicating costs would be determined “in the cause” after the hearing scheduled in October 2021.

On November 22, 2021, Ms. Bailey requested costs based on Tariff A, scale 3, based on work completed and billed on January 6, 2021 (\$470.93); March 5, 2021 (\$1,376.55); May 10, 2021 (\$2,825.55); July 12, 2021 (\$2,318.40); August 31,

2021 (\$2,571.98); and October 15, 2021 (\$8,404.20); for a total of 80% of the solicitor fees equalling \$17,987.61.

A Variation Order was issued on December 9, 2021

After the Variation Order was issued on December 9, 2021, I was provided with a copy of Mr. Lenihan's correspondence dated December 8, 2021, in which he posed two questions about my oral decision, made suggestions for amendments to the Variation Order.

In his correspondence dated December 8, 2021, Mr. Lenihan stated that in November 2021 he had been prepared to accept Ms. Bailey's offer for him to pay costs of \$7,000, but before he could respond, Ms. Bailey filed her submissions for costs with the Court. He indicated he was still prepared to pay \$7000.00.

I wrote to the parties on February 1, 2022 to clarify any confusion about my decision. Mr. Lenihan wrote to me with further questions on March 21, 2022. An Amended Variation Order was filed with the Court and issued on March 30, 2022.

## **2 Decision:**

Having regard to Tariff A, Scale 3, and court time of almost two days (\$20,000 equivalent per day = \$40,000 = \$9,063 on Scale 3) + (\$2000.00 x 2 = \$4000) for

each day in court = \$13,063.00, just over 70% of Ms. Bailey's solicitors' costs of \$17,987.61. I order Mr. Lenihan to pay costs of \$13,063 to Ms. Bailey forthwith.

### **3 Reasons:**

[1] Mr. Lenihan filed a Notice of Variation Application on August 13, 2020.

Ms. Bailey filed a Notice of Variation Application later in August 2020.

[2] On December 10, 2020, Mr. Lenihan filed a motion for an Emergency Hearing. The matter was heard on December 22, 2020. I determined the existing Order would continue and costs would be dealt with "in the cause."

[3] This endorsement deals with costs requested following an emergency hearing in December 2020 (see Endorsement *Bailey v. Lenihan*, 2021 NSSC 315) and following court appearances on March 26, 2021; April 19, 2021; May 26, 2021 (Consent Order granted); August 16, 2021; October 6, 2021; and a trial held on October 12 and 14, 2021.

#### **3.1 Emergency hearing December 2020**

[4] In December 2020, the parties' children were 20, 17, and 15. The children were no longer complying with the shared parenting arrangement in place pursuant to the parenting terms agreed to by the parties in November 2018 and later confirmed on the record on January 15, 2019.

[5] Mr. Lenihan requested: a variation of the Christmas parenting schedule and sole custody. He suggested Ms. Bailey should not have any time with the parties' youngest child over the holidays. The existing order was continued.

[6] Mr. Lenihan argued that he was the successful litigant because his emergency motion and the comments from Court resulted in his son spending more time with him over the holidays. I did not grant Mr. Lenihan's specific requests at the emergency hearing.

[7] The issue of Mr. Lenihan's request for sole care/custody of the children, or at least the youngest child, was scheduled for a final hearing in October 2021.

### **3.2 Final hearing**

[8] The trial began on October 12, 2021, and continued October 14, 2021. On October 12, 2021, Mr. Lenihan was not able to conclude his cross-examination of Ms. Bailey and he requested an additional hour for cross-examination on another date.

[9] Mr. Lenihan's cross-examination of Ms. Bailey was adjourned to October 14, 2021 and took more than an hour. At the conclusion of the trial, I found Mr. Lenihan's ongoing negativity about Ms. Bailey generally and about her parenting

specifically, whether justified or not, created a stressful environment for the children.

[10] I recognized Mr. Lenihan's concerns about the children's education, for example his concerns about whether one child should continue in French immersion or not and another concern about how to address another child's progress in math or chemistry and that child's behaviour in school. I recognized that Mr. Lenihan's approach to those issues was different than Ms. Bailey's approach to the same issues, but I did not make a finding regarding which parenting approach was best for each child.

[11] However, I did find that the parties' two older children especially did not respond well to Mr. Lenihan's attempts to guide and support them. I recognized that Mr. Lenihan does have significant knowledge (math and chemistry) to impart to his children but found the two eldest children at least, were not receptive to his guidance and they found his involvement in their lives stressful.

[12] I did find that the parties' second child appeared to be reaching out to Mr. Lenihan. I encourage Mr. Lenihan to seriously consider what that child was asking of him and what the child's needs were from that child's perspective.

[13] I found that despite the two eldest children deciding not to have contact with Mr. Lenihan, they had been quite successful with their academic goals. The two eldest children appeared to be getting along well in other areas of their life.

[14] I found the parties' youngest child appeared less sensitive or more receptive to Mr. Lenihan's parenting style. The youngest child was still in touch with Mr. Lenihan, and I find he was benefiting from Mr. Lenihan's support.

[15] Given the circumstances, and especially the ages of the children, I found Mr. Lenihan's request that I order the parties' youngest child to live primarily with him, without any contact with his mother and with his two older siblings for six months, was an unreasonable request.

[16] I considered: the youngest child's age of 16 years old; the child's decision to live with his mom; the expert's report; and the lack of evidence regarding the availability of a "reintegration program" suggested by Mr. Lenihan to address these circumstances. I was not convinced it would be in the youngest child's best interests to live primarily with Mr. Lenihan without contact with his mother and siblings.

[17] I found it was in the parties' youngest child's (16 years old at that time and turning 17 in May 2022) best interests to continue to reside primarily with Ms.

Bailey, as he had been doing since at least January 2020. I found that Mr. Lenihan's negativity toward Ms. Bailey, whether justified or not, created a stressful environment for all the children, including for the youngest child who had discussed certain negative comments Mr. Lenihan had made toward his mother with the assessor.

[18] I found the parties had different parenting approaches and that all three children had apparently gravitated toward Ms. Bailey's parenting style, and they had all been managing quite well in most aspects of their lives.

[19] Of greatest concern for me was Mr. Lenihan's apparent ongoing negativity about Ms. Bailey's parenting without any apparent willingness to consider that his approach was not working. Specifically, I found that under these circumstances, while the parties' youngest child was managing to spend some positive time with Mr. Lenihan, it was in that child's best interests to be permitted to decide what parenting time he would have with Mr. Lenihan on a go forward basis.

### **3.3 Undue Hardship application request**

[20] On October 14, 2021, the second day of trial, despite not filing the necessary documentation for an undue hardship application with notice and the relevant calculations, Mr. Lenihan raised the issue of an undue hardship application. I



advised Mr. Lenihan he could not bring an undue hardship application in the middle of the trial without prior notice to Ms. Bailey.

[21] I also commented that given Mr. Lenihan's income was over \$80,000, as reflected in the Costs and Fees Order I referred to at that time, Mr. Lenihan was not likely to have succeeded with such an application. Despite my comments, in a letter to the Court dated December 8, 2021, Mr. Lenihan suggested I had forgotten to address the issue, requiring me to review the court audio record and correspond with the parties after the trial had concluded.

### **3.4 Prospective and retroactive child support pursuant to section 3**

[22] Both parties acknowledged the two youngest children had been residing primarily with Ms. Bailey since "at least" January 2020. Mr. Lenihan confirmed on the record that he was prepared to pay the balance of the table amount (section 3) owed by him for the two youngest children. Despite his agreement on the record in October 2021, in December 2021 Mr. Lenihan wrote to the Court to question the period of retroactivity and to argue that the child support paid for the eldest child, arguably for post secondary expenses (section 7 per previous order), should have some relevance to the table amount owing for the two youngest. I did not accept Mr. Lenihan's suggestion.

### **3.5 Prospective and retroactive child support pursuant to section 7**

[23] The parties came to an agreement on how to deal with all section 7 expenses for the two younger children. Ms. Bailey has suggested, and I accept, that she “conceded” on financial issues merely to avoid having continued “discussions” with Mr. Lenihan regarding s. 7 expenditures for the two youngest children, as section 7 expenses for the eldest was a settled matter.

[24] The parties agreed:

Youngest child (16 approximately)

- (a) Mr. Lenihan owed \$774.48 (of a cap of \$1,500) for the youngest child’s expenses in 2021; the parties agreed to a cap of \$1,500 per year for any further special or extraordinary expenses for the youngest child (barring his attending a post-secondary program in future which I advised the parties could not be dealt with in advance). This agreement was reached despite Mr. Lenihan knowing that the youngest child’s hockey fees alone were \$3,000.00, not accounting for equipment or other costs, or any other extraordinary expenses that may come up for that child.

The second or middle child (18 approximately)

- (b) Mr. Lenihan owed \$250 for the middle child's counseling. He agreed he would release the RESP money for that child, approximately \$8000, to the child or to Ms. Bailey, for them to apply to her education. Ms. Bailey then agreed to cover all other s. 7 expenses for the middle child, including future post-secondary expenses for her; and

The eldest child (21 approximately)

- (c) Mr. Lenihan must to comply with the Amended Variation Order issued July 2019, with respect to the eldest child's expenses. The parties agreed there was \$7,528 owing up to October 2021. The parties had previously agreed that Mr. Lenihan would contribute \$6000.00 per year for the eldest child until she finished her post-secondary degree.

[25] Civil Procedure Rule 77.03(3) provides that "costs of a proceeding follow the result." Costs are in my discretion. A decision not to award costs must be principled. Mr. Lenihan requested: sole custody of the parties' youngest child; that I deny Ms. Bailey parenting time for at least six months; and I grant an order prohibiting the youngest child's two older siblings from having contact with him

for up to six months while “reintegration” services were provided to the family. He was not successful.

[26] Civil Procedure Rule 77.02(1) states that I “may, at any time, make any order about costs as I am satisfied will do justice between the parties.”

[27] Pursuant to Civil Procedure Rule 77.02(2) I have a general discretion to award costs so as to do justice between the parties.

### **3.6 Appearances**

[28] The approximate amount of time involved is almost two days, with regular trial time running 10:00 – 12:30 and 2:00 – 4:30 each day:

December 22, 2020 (14:06-15:25, 1 hour and a half)

March 26, 2021 (9:48-10:23, 25 minutes);

May 26, 2021 (14:53-15:14, 20 minutes);

August 16, 2021 (12:56-14:14, 1 hour and 20 minutes);

October 6, 2021 (9:01-9:48, 48 minutes);

October 12, 2021 (10:03 – 12:43, 2 hours and 40 minutes); and

October 14, 2021 (10:29 – 12:37, 2 hours and 6 minutes)

[29] I have considered complicating factors such as the granting of a Voice of the Child Order and the preparation of a report (\$508.31 to be paid by Mr. Lenihan / \$469.20 by Ms. Bailey); and the granting of an Order for Production for Lockview High School records.

[30] I consider Mr. Lenihan's requests: for an order that he be granted primary care of the parties' youngest child with no parenting time for Ms. Bailey or for his older siblings for six months; that I consider his undue hardship argument which he raised on the second day of trial without notice to Ms. Bailey; that after the Court denied his request to consider an undue hardship claim raised on the second day at trial without notice, he raised the issue again by corresponding with the Court after trial and suggesting the Court had forgotten to consider an undue hardship claim; and after trial, writing to the Court to suggest that this Court consider section 7 expenses he was paying for the eldest child per previous Court Order, when accounting for the table child support he owed for the two youngest children, to have been unreasonable requests in these circumstances.

[31] Having regard to Tariff A, Scale 3, and court time of almost two days ( $\$20,000$  equivalent per day =  $\$40,000 = \$9,063$  on Scale 3) + ( $\$2000.00 \times 2 = \$4000$ ) for each day in court =  $\$13,063.00$  just over 70% of solicitors' costs of  $\$17,987.61$ . I order Mr. Lenihan to pay costs of **\\$13,063** to Ms. Bailey forthwith.

Cormier, J.