

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Rafuse v. Rafuse*, 2020 NSSC 2

**Date:** 20200110

**Docket No:** 1203-004043

**Bwt No.:** 107081

**Registry:** Bridgewater

**Between:**

Branden Wade Rafuse

Petitioner

v.

Delitha Elizabeth Ann Rafuse

Respondent

**DECISION**

**Judge:** The Honourable Justice James L. Chipman

**Heard:** December 3 and 4, 2019 and January 10, 2020, in  
Bridgewater, Nova Scotia

**Oral Decision:** January 10, 2020

**Written Release:** January 15, 2020

**Counsel:** Kathryn M. Dumke, Q.C., for the Petitioner  
Delitha Elizabeth Ann Rafuse, Respondent, on her own behalf

By the Court (orally):

## **INTRODUCTION**

[1] This matter was originally scheduled and heard on December 3 and 4, 2019 with the Court reserving judgment. January 13, 2020 was set aside for the decision to be rendered orally. On January 2, 2020 I received a letter, addressed to the prothonotary, sent by counsel for Mr. Rafuse dated the same day. Ms. Dumke's letter stated as follows:

Dear Ms. Langille :

**Re : Branden Wade Rafuse v. Delitha Elizabeth Rafuse....**

I am writing on the above captioned matter because subsequent to the trial, information has come to the attention of Mr. Rafuse that suggests that the respondent, Delitha Rafuse, materially misrepresented matters to the Court.

On December 22, 2019, at 1:06 p.m., a voice message was left on the petitioner's, Branden Rafuse, cell phone from Russell Wile, the father of Delitha Rafuse and grandfather to the children.

In the voicemail, Russell Wile advised that Delitha was no longer living with him and apparently had returned to live with Matthew Clarke. He further advised that Delitha had not been home for a week and that Mr. Wile was wondering where the kids are (the grandchildren). He further advised that she will not answer his phone calls.

Since one of the substantial concerns in the trial was the constant change of residences by Ms. Rafuse, and Ms. Rafuse assured the Court that she would be living with her father Russell Wile for a "good long while," we are asking the Court to hold off on the decision and request that the trial be reopened so that we may present this evidence to the Court.

Would you please be so kind and bring this letter to the attention of Justice Chipman as soon as possible.

...

Kathryn M. Dumke, Q.C.

[2] Later on January 2, I received and read an email from Ms. Rafuse sent on that day at 1:36 p.m. The email states as follows (as it appears in the original, without grammatical corrections):

Hello Justice Chipman,

I recieved a letter from Kathryn Dumke, that was filed to the court stating that I had moved again. I want to assure you that I have not and still live with my father at 296 Rhodenizer Rd.

This is all a misunderstanding. As I went away to over branden's vacation time with the children to vist my brother whom I havent seen in 2 years due to being away at university while he was home visiting over christmas break. I font not live with Matthew Clarke.

Although we were in a previous relationship before we are not romantically involve but continue yo stay friends . He is willing to email you or testify on this matter. I believe this is a quick move by Mr. Rafuse again to have the children taken away from me.

If there is anything i can do on this matter please do not hesitate to contact me.

Thank you,

Delitha Rafuse

[3] In the circumstances I asked Court staff to email counsel and Ms. Rafuse in order to reconvene. Today I decided, with the consent of the parties, to re-open the case so that the important matter of Ms. Rafuse's residence could be further addressed.

[4] In addition to oral submissions by the parties, the Court heard evidence today from Ms. Rafuse's father, Russell Wile, who gave evidence under subpoena issued by Mr. Rafuse. Also received during his evidence was exhibit 5 (described later in this decision). Furthermore, today the Court heard rebuttal evidence from the respondent, Ms. Rafuse.

[5] I have considered all of today's evidence along with the evidence from December 3 and 4, 2019. In all of the circumstances and as I indicated before the recess this morning, I have decided to deliver my oral decision now, rather than on Monday.

## **BACKGROUND**

[6] This is a divorce proceeding brought by the petitioner husband against the respondent wife. I am satisfied that all jurisdictional requirements of the *Divorce Act*, RSC, 1985, c. 3 (2<sup>nd</sup> Supp.) are met and there is no possibility of reconciliation. I am further satisfied that there has been a permanent breakdown of the marriage.

[7] The parties reside in Lunenburg County, Nova Scotia and they have continued to live separate and apart from one another in Nova Scotia for a period in excess of one year from the commencement date of this proceeding. A divorce judgment will be issued.

[8] The parties were married on September 24, 2011. They have two children; Ella Rose Rafuse (d.o.b. March 16, 2013) and Aubree Elizabeth Rafuse (d.o.b. August 7, 2016). The parties separated on July 17, 2016 and the wife moved out of the matrimonial home in September, 2016.

[9] On October 5, 2016 the parties entered into a Separation Agreement which provided for, among other things, that:

- a) the parties shall have joint and shared custody of the children;
- b) until February 7, 2017 (the date that Delitha was to return to work), Branden would exercise parenting time of Ella during every second weekend and every Tuesday and Thursday night and would exercise parenting time with Aubree at reasonable times upon reasonable notice to Delitha;
- c) following February 7, 2017, and lasting until the sooner of Delitha's return to work or August 7, 2017, Branden was to continue to exercise parenting time with Ella during every second weekend and every Tuesday and Thursday night, and Branden would have parenting time with Aubree at reasonable times upon reasonable notice to Delitha including but not limited to weekend days from 9:00 a.m. to 6:00 p.m.;
- d) once Delitha would return to work, or August 7, 2017, Branden would exercise parenting time with both children on the days and nights when Delitha was at work, and when Delitha was not at work, she would have parenting time with the children;
- e) there were additional provisions for holidays and special occasions, a consultation about substantial questions with regards to the religious upbringing, educational programs, etc., and the exchange of information with respect to medical emergencies, etc.

[10] On November 7, 2017 the parties participated in a judicial settlement conference which led to a February 20, 2018 Order. The parenting schedule resulting from the Order meant that the husband and wife would share parenting on a rotating two-week schedule, where the wife would have the children on Monday, Tuesday, Friday, Saturday, and Sunday in Week 1, and the husband would have the children on Wednesday and Thursday; in Week 2, the wife would have the children on Wednesday and Thursday, and the husband would have the children on Monday, Tuesday, Friday, Saturday, and Sunday.

[11] In the time since the February 20, 2018 Order there have been significant developments, which will be touched upon during my review of the evidence. In terms of the issues before the Court, the parties agree, and I have determined there are three:

- I. Is it in the best interest of the children, Ella and Aubree, that the current custody and access order continue?**
- II. What is the appropriate amount of child support payable and s. 7 expenses?**
- III. Is the petitioner's partial interest in the woodland property matrimonial property?**

#### **EVIDENCE**

[12] By agreement, five exhibits were entered by consent. The first of these exhibits predominantly consisted of the Court filings, as follows:

<b>Tab</b>	<b>Date</b>	<b>Description</b>
1	March 9, 2017	RCMP Undertaking
2	September 28, 2017	Petition for Divorce
3	September 28, 2017	Statement of Property of Branden Rafuse
4	September 28, 2017	Statement of Income of Branden Rafuse
5	September 28, 2017	Statement of Expenses of Branden Rafuse
6	October 31, 2019	Response Affidavit of Delitha Rafuse
7	October 31, 2019	Affidavit of Russell Wile
8	November 3, 2017	Answer of Delitha Rafuse
9	November 3, 2017	Statement of Income of Delitha Rafuse
10	November 3, 2017	Statement of Expenses of Delitha Rafuse
11	November 3, 2017	Statement of Special or Extraordinary Expenses of Delitha Rafuse

12	November 3, 2017	Statement of Property of Delitha Rafuse
13	January 22, 2018	Letter to Susan MacDonnell
14	January 29, 2018	Supplemental Statement of Financial Information of Branden Rafuse
<b>Tab</b>	<b>Date</b>	<b>Description</b>
15	February 28, 2019	Order for Production
16	March 8, 2019	Amended Statement of Expenses of Delitha Rafuse
17	March 8, 2019	Amended Statement of Income of Delitha Rafuse
18	March 22, 2019	Supplemental Statement of Income of Branden Rafuse
19	May 27, 2019	Affidavit of Service of Joe Lee
20	October 17, 2019	Affidavit of Branden Rafuse
21	October 17, 2019	Affidavit of Michelle Crowell
22	October 17, 2019	Affidavit of Douglas Ferguson
23	March 21, 2019	Affidavit of Disclosing Documents (Individual)

[13] The October 17, 2019 affidavits of the husband, Michelle Crowell and Douglas Ferguson trace much of the history between the parties in the time since the February 20, 2018 Order. Mr. Ferguson was not cross-examined. His unchallenged evidence references a November, 2018 conversation between the wife's father, Russell Wile and the husband. He states as follows at paras. 7 – 9 of his affidavit:

7. Mr. Wile told Branden that he had meat in the freezer for the “girls”, his grandchildren.
8. Mr. Wile then proceeded to tell Branden, and I verily believed him, that he was concerned that the girls were not properly looked after while in his daughter Delitha's care.
9. Mr. Wile further stated, and I verily believe, that he had had no contact with his grandchildren for many months and that he was missing them.

[14] Mr. Wile was called by the wife. He testified he had not seen any signs of bad parenting on his daughter's part. On cross-examination, Mr. Wile allowed that during the several occasions when his daughter had not been living with him, he did not see the children very often. Mr. Wile gave further evidence today. He was called by the petitioner and under subpoena. Exhibit 5 was entered. This consists of a December 22, 2019 voice-mail message which Mr. Wile confirmed he left with Mr. Rafuse. It reads as follows:

Russell. Hi, Branden, this is Russell. I know you probably don't want to hear from me, or every talk to me, but that Delitha is hanging out, living back at Matthew Clarke's. She hasn't been home for a week and I'm just wondering where the kids are. She won't answer the phone or nothing and I'm just curious. So if you want to talk to me or tell me you know that, just let me know. All right, bye. Sorry, bye.

[15] During his testimony today Mr. Wile said he had not seen his daughter for an extended period of time until the early morning of Christmas day. He believed she was at Mr. Clarke's on December 18, 2019 because he saw the car he believed she had been using, her aunt Darlene Kaiser's 2008, grey Hyundai Sonata in the driveway. I note that Mr. Wile was not cross-examined on his evidence.

[16] Ms. Rafuse gave her evidence this morning. She confirmed she did not stay at her father's residence from December 12 until the morning of the 25<sup>th</sup>. She said she spent this time at her aunt Darlene's so that she could see her younger brother, Tyler Kaiser, who was home from university. On cross-examination she agreed that she did not speak with her father from December 12<sup>th</sup> to 24<sup>th</sup>.

[17] She said she has not moved and continues to reside with her father at his residence.

[18] Apart from herself, the other two witnesses called by the wife were her mother, Linda Kaizer and aunt, Darlene Kaizer. Both gave very limited testimony; their key evidence being that they had never seen signs of bad parenting. Neither Ms. Kaizer was cross-examined.

[19] Ms. Crowell and Mr. Rafuse began dating in the spring of 2017. They become intimate in the summer of 2017 and consider themselves "partners" although they do not live together fulltime. Ms. Crowell operates a childcare service out of her home in Bridgewater. During her entire lifetime, Aubrey has gone to this service and Ella has attended for all but the first 14 months of her life.

[20] During cross-examination Ms. Crowell was challenged on paras. 16, 17, 33, 34 and 40 of her 42-para. affidavit. Through this process it confirmed the Court's view (based on Ms. Crowell's affidavit) that there is considerable animus between Ms. Rafuse and Ms. Crowell.

[21] During Mr. Rafuse's cross-examination, he spoke of the numerous addresses where he picked-up and dropped off the children in the 3 ½ years since the parties split. As well, his evidence confirmed the communication problems between the parties. For example, Mr. Rafuse said it was easier to obtain information from the school safe arrival system or Ella's teacher, concerning her attendance than from Ms. Rafuse.

[22] Mr. Rafuse's answers resulted in further examples – beyond what is contained in his affidavit – with regard to his concerns for his daughters, while in their mother's care. For instance, he told of how Ella did not like being dressed in the clothes of the boys of Ms. Rafuse's former boyfriend, Matthew Clarke. He also spoke of Ms. Rafuse not attending various extra-curriculars and not offering to pay for any of the activities. On re-direct it emerged that Ms. Rafuse had not enrolled the children in any extra-curriculars from the time of separation until September, 2019.

[23] During her examination in chief, Ms. Rafuse was adamant that she wants to continue with equal parenting time. She said she had been "bullied" into the schedule which gave her less time. Ms. Rafuse did acknowledge "on a few occasions" asking her husband to keep the children during her times.

[24] Ms. Rafuse gave compelling evidence about her "really tough year filled with losses". She spoke about losing her son – a still birth on June 5, 2018. Her grandmother died and she lost an uncle and friend to suicide. Ms. Rafuse said that she lost her job on account of "the assault charge Branden placed on me".

[25] Ms. Rafuse stated she has been in a "better situation" since August, 2019. She has been living with her father and says the children have a stable environment. Ms. Rafuse said that parenting time is presently, "exactly 50/50".

[26] Ms. Rafuse gave evidence to the effect that her husband frustrated her attempts to keep in contact with the children saying he "alienated" her. She said they need a detailed Court order to decrease tension and that she requires more than \$100.00 monthly child support.

[27] Ms. Rafuse testified she has been unemployed since June, 2018. She said her criminal record was “flagged” and this was why she lost her job. In late November, 2019 she applied for social assistance and is waiting on benefits. Ms. Rafuse lost her driver’s license and is not eligible to re-apply until September, 2020.

[28] Ms. Rafuse stated that she has an interest in the Somerset property. She said she was unaware her husband had acquired it until after their Separation Agreement was signed. She described herself and Mr. Rafuse as avid hunters and said that over the years they hunted, fished, cut and sold firewood and camped on the land in question.

[29] With respect to the Somerset property, on cross-examination, Ms. Rafuse was referred to paras. 69 – 73 of Mr. Rafuse’s affidavit. She agreed she did not have any evidence to challenge this sworn testimony.

[30] During his rebuttal evidence Mr. Rafuse was adamant that his wife never fished, cut fire wood or camped on his Somerset property. He said she hunted there on one occasion; with him sometime prior to 2016. Mr. Rafuse said that it was his wife’s decision to enroll Ella in the Bridgewater school.

[31] Ms. Rafuse said the affidavit evidence to the effect that she had neglected the children was “all false”. She called this “a witch hunt” against her. She added she is “not a bad person” and “sacrificed a lot to do what is best for them”, referring to her daughters.

[32] On cross-examination, exhibits 2 – 4 were introduced demonstrating Ms. Rafuse had ignored the 10 requests or undertakings from her May 31, 2019 discovery examination. She also agreed she had not complied with a February 20, 2019 Court Order to produce materials or with any of the production / filing deadlines referable to the trial.

[33] Ms. Rafuse agreed she was off work and on stress leave when she became pregnant with her son. She said that “a big factor” for being terminated by Shannex was on account of the assault charges laid against her by Mr. Rafuse. She was then reminded of her discovery evidence when she said she was terminated because her medical paperwork was not in order. In any event, Ms. Rafuse agreed that the February, 2019 trial resulted in a finding of not guilty. She has not brought this information to Shannex’s attention and allowed that she did not want to work

there anymore. She said she has been handing out resumes “everywhere” since starting to look for work in mid-May, 2019.

[34] The respondent elaborated that she had not been in “a great mental state” to go back to work.

[35] Ms. Rafuse said she had been driving with expired insurance and that is why she lost her driver’s license. She said she “tried her best to keep track” but was unaware that she was driving without insurance.

[36] The respondent was stepped through her various residences since separation – in the order of 5 – over the course of 3 ½ years.

[37] Ms. Rafuse said she had not been in a relationship with Mr. Clarke since March, 2019. She was then reminded of her discovery evidence that they were still seeing one another as of the end of May, 2019.

[38] Ms. Rafuse spoke of having been in a “dark place” and seeking mental health counselling at the Lunenburg Hospital. She said she still suffers from side effects from what she described as a “toxic relationship” with Mr. Rafuse.

[39] On cross-examination she said she did not pay for extra curriculums because she had not been provided with invoices.

[40] On cross-examination she said Ms. Crowell was “lying” when she alleged child neglect on the part of Ms. Rafuse. With respect to para. 25, she then acknowledged, “we did at one point have a cat with fleas and it was treated, this was addressed through Child Protection Services”.

[41] Ms. Rafuse stated she intended to live with her father “for quite awhile” until she can obtain “suitable work.”

## **GOVERNING LAW, ANALYSIS AND DISPOSITION**

[42] Section 16 of the *Divorce Act*, deals with custody orders. The applicable ss. are 16(1), (4), (5), (6), (8), (9) and (10). Further, s. 17(5) is also relevant for the determination of the custodial arrangement. Factors composing the best interests test are stated in s. 18(6) of the *Parenting and Support Act*, RSNS, c. 44 (as amended). In addition, I am mindful of the factors stated in *Foley v. Foley* (1994), 124 NSR (2d) 198 (SC), which are similar to those found in the legislation. My

analysis of these factors must be balanced and comparative: *D.A.M. v. C.J.B.*, 2017 NSCA 91.

[43] In my view there has been a material change in circumstances since the February 21, 2018 Order. From the evidence it is clear that almost immediately following the Order, Ms. Rafuse began reducing her time with the children. By August, 2019, Ms. Rafuse's parenting time had shrunk to less than 20 percent.

[44] Without question, Ms. Rafuse had a low point in her life with the still born birth of her son in early June, 2018. Indeed, I accept her evidence that she had a very difficult year; however, based on all of the evidence, I cannot confine this period of time to 12 months. Rather, the evidence demonstrates that for closer to two years (i.e., the time since the February 21, 2018 Order), Ms. Rafuse has experienced a number of set-backs which have resulted in a less than ideal situation for Ella and Aubrey. In particular, Ms. Rafuse has experienced:

- unemployment;
- mental health problems;
- a host of moves/different residences; and
- a significant period of time being "off the road" on account of driving without valid insurance.

[45] This has been a most unfortunate time for Ms. Rafuse. In this regard, I have no doubt about the love she has for her two daughters and her wish to have a 50/50 shared parenting arrangement. Nevertheless, and despite her expression of love and sacrifice for Ella and Aubrey, it is my determination that the children have indeed suffered over the course of this time, as documented through the affidavit and other evidence. In particular, there have been demonstrated times that while in Ms. Rafuse's care, the children have not had appropriate clothing, personal hygiene, food and housing. I would add that the totality of the evidence, inclusive of today's, causes me to question the stability of Ms. Rafuse's living situation. To pick up on Ms. Dumke's term, I do find it "baffling" that the Christmas experience for Ella and Aubrey would have been reduced to such a last minute situation even if appropriate planning had been carried out earlier.

[46] I am mindful of the decision relied on by Mr. Rafuse, *E.L.(W.) v. E.L.*, 2019 NSSC 14 and, in particular, paras. 15, 34 – 38, and 47. I also refer to *Nurse v.*

*Holden*, 2019 NSSC 358 and, in particular, Justice Forgeron's comments at paras. 52 – 54:

52 Each party states that a shared parenting arrangement is not in Teagan's best interests. I agree. My decision is based on the following two reasons:

\*Ms. Nurse and Mr. Holden are embroiled in a high conflict parenting dispute. There is little likelihood that communication will improve because neither party has the skills or desire to do so. A shared parenting arrangement will exacerbate the conflict and negatively draw Teagan into the parental dispute. Conflict is not in Teagan's best interests.

\*A shared parenting arrangement is fraught with logistical challenges. The parties do not live in the same community. Mr. Holden lives in St. Margaret's Bay. Ms. Nurse lives in Dartmouth. Teagan attends school and both parties work. It is geographically impossible to have a shared parenting schedule that will ensure Teagan's timely attendance at school without significant travel time.

53 Because a shared parenting plan is not in Teagan's best interests, I must designate a primary care parent. In so doing, I must focus solely on Teagan's best interests. Factors composing the best interests test are stated in s. 18 (6) of the *Parenting and Support Act*, many of which the parties referenced in their evidence and submissions. In addition, the parties also cited the factors stated in *Foley v. Foley*, (1994)124 NSR (2d) 198 (SC), which are similar to those found in the legislation.

54 My analysis of these factors must be balanced and comparative: *D.A.M. v. C.J.B.*, 2017 NSCA 91. I will frame my comparative analysis around the factors highlighted by the parties. These factors are as follows:

- \*Parental Relationships / Facilitation of Contact
- \*History of Care
- \*Child's Physical Needs
- \*Child's Emotional Needs
- \*Child's Social Needs
- \*Child's Educational Needs
- \*Child's Relationship with Other People
- \*Maximum Contact

Factor 1: *Parental Relationships & Facilitation of Contact* - ss.18 (6)(b) and (g)

[47] I find a comparative analysis of the factors overwhelmingly favors Mr. Rafuse such that I hereby order:

- (a) joint custody of the children of the marriage to the parents;
- (b) that the day to day care and control of the children of the marriage be with Branden Rafuse;
- (c) that parenting time for Delitha Rafuse consist of every second weekend from Friday 6:00 p.m. to Sunday 6:00 p.m. and for an additional day in the off week between end of school and return to school the following day.

[48] In this regard, just as I find Ms. Rafuse to have provided an unstable, inconsistent and at times unsupportive environment for the children, the opposite may be said of Mr. Rafuse. He has provided for his children ensuring that they attend pre-school and/or school, are involved in extra-curriculars and has generally provided consistency to Ella and Aubrey. Accordingly, I am of the emphatic view that it is not in the best interests of the children that the equal-shared parenting between the parents continue.

[49] With respect to child support, given the income of the parties and the parenting arrangement, I order that Mr. Rafuse continue to pay Ms. Rafuse \$100.00 monthly. As for s. 7 expenses, these shall continue to be the responsibility of Mr. Rafuse.

[50] Finally, there is the matter of the sole property issue remaining between the parties. Having regard to the totality of the evidence, I find that the Somerset property never was nor became matrimonial property. I find that the two fractional interests were gifted to Mr. Rafuse very shortly before the parties separated in 2016. The third interest was recently willed to Mr. Rafuse. The property was and continues to be the subject of litigation. I venture to say the expense to Mr. Rafuse may outweigh the property's value. In any event, I prefer Mr. Rafuse's sworn and *viva voce* rebuttal evidence concerning this property over the oral evidence of Ms. Rafuse. In the result, I confirm the property to be non-matrimonial. It shall remain entirely with Branden Rafuse.

[51] Ms. Rafuse shall pay costs of \$3,000.00 to Mr. Rafuse plus disbursements of \$1,815.04 within six months of Ms. Rafuse obtaining employment. Ms. Rafuse will advise Mr. Rafuse within 14 days of obtaining employment.

[52] In addition to the substantive matters outlined in this decision, I would ask that the Order, which I direct Ms. Dumke to prepare, address cooperation and appropriate civility between the parties.

Chipman, J.