Date: 19971127 **Docket**: C.A. 140123

NOVA SCOTIA COURT OF APPEAL
Cite as: McKay v. McKay, 1997 NSCA 188

Clarke, C.J.N.S.; Chipman and Roscoe, JJ.A.

BETWEEN:

WILLIAM MURRAY MCKAY	)	Appellant in person
	)	
Appellant	)	
- and -	)	
	)	Respondent did not appear
	)	
ALISON GRETA MCKAY	)	
	)	
Respondent	)	Appeal Heard:
	)	November 27, 1997
	)	
	)	
	)	Judgment Delivered:
	)	November 27, 1997

THE COURT: Application to adduce fresh evidence is dismissed and the appeal is dismissed, per oral reasons for judgment of Clarke, C.J.N.S.; Chipman and Roscoe, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The parties were divorced by Justice Gruchy on June 23, 1997.

By agreement of the parties and confirmed by the order of the Court, the respondent (mother) was granted the sole custody of Andrea, born May 3, 1992. She was granted permission to take Andrea to Austin, Texas, where the respondent had obtained gainful employment. All of this was set forth in a detailed agreement entitled ***Custody and Parenting of Andrea Denise McKay***, to which the mother and father consented and which Justice Gruchy found would serve the best interest of the child. He attached it as Schedule "A" to the corollary relief judgment he issued on June 26, 1997.

In paragraph 2(d) the respondent represented as true and accurate that Will Lavalley, a mutual friend of both parties, regularly travels between Austin, Texas and Nova Scotia and is prepared to accompany Andrea as his schedule allows to expedite Andrea's access with her father.

By this appeal the father requests this Court to order a new trial on the issues of custody and access. He seeks leave to introduce fresh evidence to establish that the respondent was involved in a common law relationship before the divorce was granted and that at the time of the hearing she had not approached William Lavalley about

travelling with Andrea. He contends these alleged non disclosures prevented Justice Gruchy from making an informed and considered opinion on custody and access, thus being an error of law requiring a new trial.

After considering the record of the prior proceedings, including the material filed by each of the parties, and the submissions made today, we have concluded that the proposed fresh evidence does not meet the fourth ground of the test described by the Supreme Court of Canada in **Palmer v. Palmer**, [1980] 1 S.C.R. 759 at p. 775. It is that the fresh evidence "must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result." (See also **Thies v. Thies** (1992), 110 N.S.R. (2d) 177 at p. 179, para. 12.)

For these reasons, the appeal is dismissed without costs.

C.J.N.S.

Concurred in:

Chipman, J.A.

Roscoe, J.A.