State of New Hampshire Supreme Court

NO. 97-329

2000 TERM

AUGUST SESSION

LUANDA M. HAPTONSTAHL

v.

DAVID V. HAPTONSTAHL

RULE 7 APPEAL FROM FINAL DECISION OF SUPERIOR COURT

BRIEF OF PLAINTIFF/APPELLANT, LUANDA M. HAPTONSTAHL

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QUESTIONS PRESENTED

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3. Did the court err by basing its decree on David Haptonstahl's self-serving testimony that he was unemployed, and by failing to take into account an affidavit signed by a disinterested party showing that he was in fact employed?

4. Did the court err by basing its decree on motivations alleged by Luanda Haptonstahl's husband when those alleged motivations were contained in letters alleged to have been written by Luanda, but were not entered into the court record, were not authenticated, were not subject to cross examination, and were probably, if authenticated, taken out of context or were the angry rambling of an emotionally disturbed person?

5. Did the court err by not splitting the marital property equally when it was a short marriage, Luanda Haptonstahl came to it with substantial assets, the court relied on untested evidence, and the court neglected to explain the uneven and inequitable split?

6. Did the court err by not awarding Luanda Haptonstahl alimony, when she was impoverished and unable to earn a living because of her emotional collapse caused by the divorce litigation, and her husband had money for alimony?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The parties were married in 1992. In 1994 Luanda Haptonstahl, the plaintiff here, filed a petition for legal separation. The defendant, David Haptonstahl, subsequently filed a libel for divorce.

The procedural history of this case is, as the Superior Court remarked, "long and tortuous." Rather than repeating it here, the Superior Court's nine-page summary contained in an interlocutory order tells the procedural story. ORDER (Nov. 6, 1996), *Appx to Br.* at 25-33, *Appx. to NOA* at 93-100.

During four years of litigation, including five appeals to this Court,[1] there were repeated findings that Luanda was incompetent[2] and unable to adequately represent her own interests. It is also clear that the Superior Court was aware of this.

During the pendency of the litigation, the Superior Court several times found Luanda incompetent. ORDER (Nov. 6, 1996), *Appx. to Br.* at 27. It even appointed a Guardian *ad Litem*, and then ordered the GAL to hire an attorney. *Id.* at 28; DECREE ON PENDING ISSUES (Feb. 5, 1996), *Appx. to Br.* at 1. The court also ordered the parties to apply to the Probate Court for

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[1]Review of all but the current case were declined. N.H. Sup. Ct. No. 97-092, 97-263, and 97-571 (all involving aspects of the mortgage on the marital home); N.H. Sup. Ct. No. 97-109 (interlocutory appeal of divorce); N.H. Sup. Ct. No. 97-329 (case now on appeal).

[2]It was ultimately realized by Luanda Haptonstahl's GAL that a finding of incompetence should have been made by the Probate Court rather than the Superior Court. Thus, as a technical jurisdictional matter, Luanda Haptonstahl was never adjudged incompetent. The Superior Court nonetheless held a hearing on the matter, and it was established that Luanda Haptonstahl was incompetent.

appointment of a guardian over the person.[3] DECREE ON SUSPENSION OF PROCEEDINGS PURSUANT TO RSA 458:12 (Mar. 19, 1996), *Appx. to Br.* at 3.

The Court specifically found that Luanda was unable to "participate meaningfully in these proceedings," *Id.*; ORDER (Nov. 6, 1996), *Appx. to Br.* at 29, and later found she "has neither the financial means nor the capacity to act in her own interest." *Id.* at 32. At one point the court ordered no further *pro se* pleadings or correspondence because she "has satisfied this court that her current emotional condition prohibits her from acting in her own best interest." *Id.*

Because of Luanda's ongoing psychological condition, the Court granted a motion *in limine* to exclude her own testimony, *Id.* at 27, delayed a hearing, *Id.* at 31, and ordered continuation of counseling. DECREE ON PENDING MOTIONS (July 25, 1996), *Appx. to Br.* at 4. The court was aware that Luanda Haptonstahl was involuntarily committed to Portsmouth Pavilion for emotional problems. *See* GUARDIAN AD LITEM STATUS REPORT, (Dec. 24, 1996), *Appx. to Br.* at 8, 10.

The same judge who presided over her final hearing informed this court, as part of a previous interlocutory appeal that:

> "The plaintiff, in past hearings, has exhibited conduct which would lead one to conclude that she has some emotional and mental difficulties."

RESPONSE TO THE SUPREME COURT (Feb. 26, 1997), *Appx. to Br.* at 23. Thus, there is no doubt that the Superior Court was fully aware of Luanda's problems.

The evidence supporting these repeated conclusions that Luanda was not capable of

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[3]Because Luanda Haptonstahl can generally function in the world outside the courthouse, she felt that a guardianship was a solution too big for the problem, and opposed it. The Probate Court ultimately dismissed the petition.

representing herself is compelling and uncontradicted.

During a hearing on her competency, psychiatrist Dr. Douglas M. Lanes identified Luanda's condition as "psychothymia," *3/18/96 Super Ct. Hrg.* at 6, 21. Dr. Lanes testified that by being in court Luanda's was likely to be a "disservice to herself," *id.* at 13, and estimated that her ability to emotionally handle a court hearing <u>with</u> a lawyer was just one-in-three. *Id.* at 25-26, 41, 44. He also testified that at the time of the hearing she was incompetent to understand what was going on in the court room and in the litigation generally, and could not assist her attorney. *Id.* at 26-27, 28-29, 41, 44. He informed the court that she was taking a number of drugs to address her emotional and mental condition, *id. passim.*, but that a pharmacological prognosis was poor. *Id.* at 20-21; DECREE ON SUSPENSION OF PROCEEDINGS PURSUANT TO RSA 458:12 (Mar. 19, 1996), *Appx. to Br.* at 3.[4]

At several times her observed behavior in court bore out Doctor Lanes's opinions. During one hearing she was initially present, but became so distraught that she eventually left the building before the hearing commenced. DECREE ON PENDING MOTIONS (July 25, 1996), *Appx. to Br.* at 4. At another, she asked to be excused. ORDER (Nov. 6, 1996), *Appx. to Br.* at 31.

Luanda's inability to understand the court process was further exhibited by her demonstrated disappointment when Master Pamela Kelly recused herself from Luanda's case. This occurred when Master Kelly apparently mistakenly read a letter Luanda sent to her *ex parte*. *Id.* at 30; DECREE ON PENDING MOTIONS (July 25, 1996), *Appx. to Br.* at 4. Luanda Haptonstahl believed that Master Kelly was the only person in the court system who understood her, and her

[4]It is because these medications were expensive that the record is full of references to payment of medical insurance. *See e.g.*, ORDER (Nov. 6, 1996), *Appx. to Br.* 26, 28, 30; ORDER ON PLAINTIFF'S PETITION FOR EX-PARTE RELIEF (May 27, 1997) (after Notice of Appeal).

disappointment with the recusal belies any allegation that she understood the process or intended to manipulate it.

While Luanda can function well in many situations, she is intensely intimidated by court proceedings and by people connected with courts. Dr. Lanes testified that the divorce proceedings, in large part, are the cause of Luanda's mental anxieties. *3/18/96 Super Ct. Hrg.* at 9,12-17, 19, 30-33, 38. Her other psychiatrist, Dr. Gregory Thompson, told her GAL that she should not attend any court hearings. GUARDIAN AD LITEM LIST OF ISSUES (Jan. 24, 1997), *Appx. to Br.* at 20. The Superior Court had understood this. DECREE ON PENDING MOTIONS (July 25, 1996), *Appx. to Br.* at 4. Luanda Haptonstahl sought to dismiss an attorney who briefly represented her because he intimidated her, ORDER (Nov. 6, 1996), *Appx. to Br.* at 28, and sought a "court's aid" to intercede between her and her husband's attorney for the same reason. *Id.*

At her final hearing (the decree following which this appeal was taken), the record makes clear that her condition had not improved. Although her husband's testimony was damning, Luanda did not cross-examine him. She failed to make a single objection to his testimony. Luanda made no attempt to introduce any evidence, including an affidavit in her possession which would have directly contradicted her husband's testimony regarding his wealth. Luanda did not testify, and she filed no proposed decree. *4/3/97 Super. Ct. Hrg.*, *passim*. The transcript shows, in a way paper records rarely do, that when it was her turn to act Luanda had an emotional collapse and was demonstrably incapable of conducting a court hearing on which rode significant consequences. Because she was unable to proceed, the hearing ended. *Id.* at 4, 35-37.

The Court (*Gray*, J.), even though it was aware of Luanda inability to represent her own interests, took no action, and allowed the hearing to go forward without any effort to aid her.

After the hearing, the court issued an order that adopted – in full – the proposed decree filed by Luanda's husband. DECREE OF DIVORCE (Apr. 4, 1997), *Appx. to NOA* at 37-43. The decree undid all previous temporary decrees, rescinded alimony that was owed, made no provision for future alimony, left Luanda without a place to live, took from Luanda all awards stemming from an accident in which she had been involved, and did not even attempt to create the even split of assets required by divorce law. DEFENDANT'S PROPOSED DECREE (Apr. 3, 1997), *Appx. to NOA* at 38. The proposed decree appears to have been a bargaining position offered by Luanda's husband, yet the court entertained it as a serious property division and entered it as an order.

After the decree was issued, this appeal followed.

SUMMARY OF ARGUMENT

The plaintiff, Luanda Haptonstahl, first argues that an indigent divorce litigant who is incapable of representing her interests *pro se* is entitled to a court-appointed attorney. Balancing her interests against the state's, and taking into account the high risk of an unjust decision and the value of counsel to both her and the integrity of the judiciary, due process accords her a lawyer. She further argues that the Americans with Disabilities Act, as well as the court's obligations to incapable litigants, also give her a right to a lawyer.

Ms. Haptonstahl then argues that the success of the adversarial system assumes both parties cases will be competently presented, and that a decree based on evidence that is lopsided due to her incapacity should be reversed.

Luanda Haptonstahl finally argues that the court failed to state reasons for its division of property, and that the division is therefore void.

ARGUMENT

I. The Court Should Have Appointed Luanda Haptonstahl an Attorney

The issue of whether Luanda Haptonstahl should have been appointed an attorney in her divorce action was raised by her GAL.[5] GUARDIAN AD LITEM'S MOTION FOR COUNSEL (Dec. 24, 1996), *Appx. to Br.* at 14; ADDENDUM TO GUARDIAN AD LITEM STATUS REPORT (Jan. 9, 1997), *Appx. to Br.* at 16. The GAL recognized that while an appointed attorney is not generally a right in a divorce case, the circumstances of this case warrant it. GUARDIAN AD LITEM STATUS REPORT (Dec. 24, 1996), *Appx. to Br.* at 8, 9-10.

A. Due Process Required Appointment of Counsel

1. There Is a Due Process Right to Counsel in Some Circumstances

It is conceded that there is no general right to an appointed attorney for indigents in divorce or separation cases. *Lyon v. Lyon*, 765 S.W.2d 759 (Tenn. App. 1988); *State ex rel. Ondracek v. Blohm*, 363 N.W.2d 113 (Minn. App. 1985); *Borkowski v. Borkowski*, 396 N.Y.S.2d 962 (1977); *Kiddie v. Kiddie*, 563 P.2d 139 (Okl. 1977); *Farrell v. Farrell*, 390 N.Y.S.2d 87 (1976); *In re Smiley*, 330 N.E.2d 53, 369 N.Y.S.2d 87 (N.Y. 1975); *Menin v. Menin*, 359 N.Y.S.2d 721 (1974); *Wilson v. Wilson*, 280 A.2d 665 (1971); *Parsley v. Knuckles*, 346 S.W.2d 1 (Ky. 1961). *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process right to waiver of court fees in divorce cases). There is also no general right to an appointed attorney in other civil cases. *Wilson v. New Hampshire*, 18 F.3d 40 (1st Cir. 1994).

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[5] Attorney David N. Sandberg was Luanda Haptonstahl's GAL, but because she was otherwise unrepresented, he felt some obligation to act as her attorney as well, a situation that caused him some conflict. Luanda Haptonstahl's right to an attorney appears to have been raised in his role as attorney.

Due process may require appointment of counsel, however, in some circumstances. "[I]f there is a right to counsel in a civil . . . action, its source must be found in the due process clause." *Duval v. Duval*, 114 N.H. 422, 426 (1974). New Hampshire's due process clause provides that:

> "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

N.H. CONST., Pt. 1, Art 15; U.S. CONST., Amd. 14. New Hampshire's due process right is regarded as broader than federal due process and also broader than some other states. *See State v. Scarborough*, 124 N.H. 363 (1983); *Stapelford v. Perrin*, 122 N.H. 1083 (1982).

Whether due process requires the appointment of counsel in a civil action is determined on a case by case basis and "would depend on various factors such as the capability of a [party] to speak for himself, the character of the proceeding and the complexity of the issues." *Duval*, 114 N.H. at 426. It depends "on circumstances which show that the [party] would be treated unfairly if the assistance of counsel were not provided." *Id.* In complex non-criminal cases, "it would be unfair to deny . . . the benefit of counsel if [parties] were unable to retain a lawyer because of their financial condition." *Id.*

In *Peace v. Peace*, 288 N.E.2d 602 (Mass. 1972), a divorce case, the Supreme Judicial Court recommended the appointment of counsel upon remand to determine a constitutional question regarding the jurisdiction of a lower court. *Peace* is similar to *Duval* in that it allows for appointment of counsel when the issues are unlikely to be well presented by a non-lawyer.

In *Salas v. Cortez*, 593 P.2d 226 (Cal. 1979), *cert. denied*, 444 U.S. 900, the court found

that due process may require the appointment of counsel in a paternity case. "The touchstone of due process is fundamental fairness. Whether due process requires the appointment of counsel in a particular case depends on the interests involved and the nature of the proceedings." *Salas*, 593 P.2d at 229. Likewise, in *Flores v. Flores*, 598 P.2d 893 (Alaska 1979), a child custody dispute, the court held that when one of the parents has a legal aid lawyer at government expense the other parent has a due process right to appointed counsel.

Even when no due process right attaches, decisions have held that trial courts have the discretion to appoint counsel in divorce actions. *See, e.g. In re Smiley*, 330 N.E.2d 53, 369 N.Y.S.2d 87 (N.Y. 1975). Accordingly, even without due process guarantees, the trial court in Luanda Haptonstahl's case should have exercised its discretion to appoint counsel.

2. On Balance, Luanda Haptonstahl Should Have Been Given Counsel

In determining whether due process requires appointment of counsel in a particular case, this court has adopted a balancing test, and must consider the following factors:

> "(1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

In re Tracy M., 137 N.H. 119, 122 (1993); *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27-32 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

a. Luanda Haptonstahl's Interests

Many divorce cases involve merely the division of property. Because Luanda Haptonstahl is unemployable, however, her interest in alimony and the marital property is her ability to support herself. In this way, her interest is greater than the mere property. When one's

livelihood is at stake, due process provides a remedy. *Goldberg v. Kelly*, 397 U.S. 254 (1970) ("[W]elfare provides the means to obtain essential food, clothing, housing, and medical care. . . . [T]ermination of aid . . . may deprive an eligible recipient of the very means by which to live."); *Wheeler v. State*, 115 N.H. 347, 351 (1975) (interest in unemployment compensation same as *Goldberg*).

b. Government's Interests

The government has several inconsistent interests. One is the obvious fiscal burden with which the executive branch might be encumbered. Luanda Haptonstahl, however, is not requesting that this court enunciate broad rights to appointed counsel in all divorce cases; rather she is stating that some divorce cases involve litigants who, because of their mental or emotional condition, cannot proceed without a lawyer. Such cases are few, and the state's burden is likely small. *See State v. P.E.*, 664 A.2d 1301, 1305 (N.J. Super. 1994).

The other governmental interest is the judiciary's in having the discretion to appoint attorneys in divorce cases when they are necessary. One study found that at least one party is *pro se* in as many as 60 percent of New Hampshire marital cases. Robert M. Daniszewski, *Coping with the* Pro Se *Litigant*, 36 N.H. B.J. 46 (1995). *Pro se* litigants may cost as much as three-quarters of court clerks' time. *Id.* The family courts in New Hampshire are facing growing problems due to the number of *pro se* divorces. *Chief Justice's Mid-Winter Meeting Remarks*, N.H. BAR NEWS, FEB. 4, 1998 at 26. Although initially counter-intuitive, because of the efficiency of the process, it is likely that the appointment of counsel may make divorces less, rather than more, costly. "[T]he conduct of litigation by a non-lawyer creates unusual burdens . . . for his adversaries and the court." *State v. Settle*, 129 N.H. 171 (1987). The present case,

which Judge Gray called "very uncomplicated," RESPONSE TO THE SUPREME COURT (Feb. 26, 1997), *Appx. to Br.* at 23, has been in four courts in as many years, and may have moved more efficiently had counsel been afforded.

c. Risk of Erroneous Decision and Value of Additional Process

The risk of an erroneous decision in this case is apparent. In the court's temporary decree, Luanda Haptonstahl was awarded alimony of $3,500 per month (later reduced to $2,000 per month when her obligation to pay the mortgage ceased), provided health insurance for her and her son, assured payment of uninsured medical and mental health bills, was made beneficiary of her husband's life insurance, and given other items. TEMPORARY DECREE (Oct. 19, 1994), *Appx. to NOA* at 111; *see* ORDER (Nov. 6, 1996), *Appx. to Br.* at 25. The final decree rescinded both past due and future alimony, took from Luanda Haptonstahl all awards stemming from an accident in which she had been involved, made no provision for health or life insurance, gave her husband all financial assets, and denied her ownership of other items. DECREE OF DIVORCE (Apr. 4, 1997), *Appx. to NOA* at 37. The contrast between the two could not be greater, and reflects the unbalanced representation of the parties.

During the trial, the only witness, David Haptonstahl, was not cross examined. His lawyer easily lead him through a recitation of facts necessary to support the proposed decree which the court ultimately adopted *in toto*.

Had Luanda Haptonstahl been represented by counsel, the trial would have gone much differently. David would have been cross examined on each point. The most damning evidence, his reading of letters purportedly written by Luanda Haptonstahl, would have been challenged for authenticity. If authentic, their supposed value as evidence of Luanda's maliciousness toward

David would have attacked by putting the entire letter into evidence, and having the entire letter read so that the alleged statements could be put into context. An objection would have been offered upon David's testimony of Luanda's known pre-marriage criminal history. Luanda herself may have testified. An attorney would have ensured that a variety of items that Luanda Haptonstahl possessed, but did not present to the court, were entered as evidence. Among these was an affidavit showing that David was well employed, despite his testimony that he had no job. A lawyer would have filed, as David's did, a proposed decree. With an attorney's assistance, Luanda could have disputed those portions of her husband's testimony capable of dispute, offered an explanation of the allegations her husband made, recited facts necessary to support a proposed decree she would have filed, and no doubt floated allegations concerning her husband's bad character. Had all this happened, the court would have had both sides presented and it is very likely that the outcome would have approached the even property split required by RSA 458:16-a. In addition, an attorney would have ensured an adequate appellate record.

The American system of justice is adversarial, and depends upon the assumption that both sides' cases will be adequately presented. When only one of the parties is effectively before the court, the system fails, and remedial measures are necessary.

Had an attorney conducted Luanda Haptonstahl's case the way she did, Luanda would now have a claim for ineffective assistance of counsel or legal malpractice. No reasonably appropriate actions were taken, and Luanda Haptonstahl was prejudiced therefrom. In addition, if any attorney attempted to manipulate the judicial system as Luanda Haptonstahl is alleged to have done, there is little doubt that an actionable professional conduct complaint would have been filed by the other party or the court. *See, e.g., Robertson's Case*, 137 N.H. 113 (1993). The

presence of an attorney, therefore, would have eliminated the supposed malicious intent which was largely the basis of the court's ruling.

Balancing the due process elements, the Superior Court should have appointed Luanda Haptonstahl an attorney. Her interests are significant. The government's fiscal interests are minimal, and it has substantial countervailing interests in the efficiency and integrity of the administration of justice. The risks of a wrong decision, in this case, were high, and the value of an attorney are apparent. On the due process scales, therefore, there is little weighing against the appointment of counsel, the much weighing for.

B. The Americans with Disabilities Act Required Appointment of Counsel

Title II of the Americans with Disabilities Act (ADA) ensures nondiscrimination on the basis of disability in state and local government services, 42 U.S.C. § 12101 *et seq.*, 28 C.F.R. § 35.101 *et seq.*, and requires that disabled people be given "reasonable accommodation" of their disability. 42 U.S.C. § 12111.

"Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 28 C.F.R. § 35.104. A mental impairment includes "[a]ny mental or psychological disorder such as . . . emotional or mental illness." 28 C.F.R. § 35.104(1)(B). State courts are a "public entity" under the Act. 42 U.S.C. § 12131(1). *See, e.g.*, *State ex rel. Oklahoma Bar Ass'n v. Busch*, 919 P.2d 1114 (Okl. 1996); 42 U.S.C. § 12111(9). Provision of an attorney for a covered person is a "reasonable accommodation" within the act. *State v. P.E.*, 664 A.2d 1301 (N.J. Super. 1994). Denial of a reasonable accommodation constitutes discrimination. 42 U.S.C. § 12132.

Luanda Haptonstahl is a disabled person pursuant to the ADA, and she made a request for

an attorney. Because it was denied, she was subject to discrimination.

The appropriate remedy is a new trial with appointed counsel. *State v. P.E.*, 664 A.2d 1301 (N.J. Super. 1994).

C. The Court's Duties Required Appointment of Counsel

The court itself has a duty to ensure that both sides in an adversarial proceeding are fully heard.

> "A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law."

SUP. CT. R. 38, Code of Judicial Conduct, Canon 3A(4). A "full right to be heard" cannot be satisfied by self-representation of a person unable to represent her own interests.

Courts also have obligations to unrepresented parties, *see Austin v. Ellis*, 119 N.H. 741, 743 (1979) (approving relaxation of rules of evidence and aid in presenting case by *pro se* party), and to unrepresented witnesses, *see State v. Mills*, 136 N.H. 46 (1992), to ensure that their rights are not inadvertently waived.

Finally, courts have an obligation to inquire into the competency of parties before them.

> "The trial court must, on its own initiative, order an evidentiary hearing whenever a *bona fide* or legitimate doubt arises whether a criminal defendant is competent to stand trial."

State v. Zorzy, 136 N.H. 710, 714-15 (1993) (quotations, citations, brackets omitted); *State v. Gagne*, 129 N.H. 93, 97 (1986). *See also* N.H. R. PROF. COND. 1.14 (lawyers' obligations to disabled litigants). Where substantial issues are at stake, the court's obligation extends to civil actions too.

D. The Court Should Have Appointed a Lawyer

It is apparent that Luanda Haptonstahl can file motions, sometimes lucidly. But it is also apparent that she cannot valuably or competently appear at – never mind conduct – a court hearing, or adequately represent her own interests. In light of the superior court's repeated recognition of her emotional and mental inabilities, as well as her indigency, it should have provided a remedy; it should have appointed a lawyer. Because it is a rare case in which an incompetent person twists herself in the legal system, granting Luanda Haptonstahl an attorney will not open the state budget to all poor people who want to get divorced.

II. The Court Erred by Basing its Decree on Evidence That Was, Because of Luanda Haptonstahl's Debilities, One Sided, Incomplete, and Not Subject to Scrutiny

"One of the legacies of Anglo-Saxon jurisprudence and the common law is the adversarial process. Properly used, including cross-examination and discovery, it is an effective tool in the search for truth." *Daigle v. City of Portsmouth*, 137 N.H. 572, 576 (1993). When the adversarial process is eclipsed, the system loses a piece of its integrity, and the court loses its ability to find the truth of the matter before it. *See State v. Henderson*, 142 N.H. ___, (1997) (upon claim of ineffective assistance of counsel, when trial attorney's error prevents meaningful adversariness, prejudice is presumed); *State v. Cigic*, 138 N.H. 313 (1994) (integrity of adversarial process compelled adoption of "Idaho rule" rather than "Anders brief" approach to frivolous claim on appeal); *State v. Yates*, 137 N.H. 495, 503 (1993) (Thayer, J, dissenting) ("ours is an adversarial system").

In this case, because only one side was capable of presenting its case, there was not the requisite adversariness and, consequently, the court could not find the truth.

In such an instance, given the standard of review, this court may reverse and order a new trial. "On appeal, [this court] will affirm the findings and rulings of the marital master unless they are unsupported by the evidence or are legally erroneous." *Shafmaster v. Shafmaster*, 138 N.H. 460, 464 (1994). Factual findings are supported by evidence if a reasonable person could have arrived at the same conclusion based on the evidence presented. *See, e.g.*, *Patterson v. Tirollo*, 133 N.H. 623 (1990). When a trial court makes an error that leads to no presentation of the evidence, however, this court will not affirm. *See In re Gina D.*, 138 N.H. 697 (1994); *Palazzi Corp. v. Stickney*, 136 N.H. 250 (1992).

> "We will uphold the findings and rulings of the trial court unless they are unsupported by the evidence or are legally erroneous. In assessing the sufficiency of the evidence to support the trial court's findings, however, we must review <u>all</u> of the evidence presented to the trial court and determine whether a reasonable person could have found as the trial judge did."

In re Gina D., 138 N.H. 697, 705 (1994) (emphasis added).

When viewing all the evidence, it is apparent that the trial court made a series of errors. By treating Luanda Haptonstahl as a capable *pro se* litigant, it failed to ensure that it heard all the evidence. By ignoring the little evidence she did present, albeit in advance of the hearing, it did not take into account all the evidence. By hearing only one party to the dispute, it based its decree on only one-half the evidence.

Accordingly, this court may reverse and order a new trial to ensure that the benefits of the adversarial process remain intact.

A. The Court Erred by Basing its Decree Solely on the Defendant's Proposal

In contested divorces, lawyers generally file a proposed decree which is intended as a bargaining position for their client, in the expectation that the other side will file a similar such document and the court will combine them and order an equitable distribution pursuant to RSA 458:16-a.

A lawyer who expects their proposed decree to be the one finally adopted by the court is either new to divorce litigation, or perhaps one who has already negotiated most of the terms with opposing counsel. David Haptonstahl's attorney was John A. Macoul, of Salem, who fits neither category. He is a vigorous divorce advocate, and had not negotiated with the then-unrepresented Luanda Haptonstahl. While he may have hoped that the court would adopt his proposed decree, Attorney Macoul probably expected Luanda Haptonstahl to file a similarly one-

sided proposal.

In addition, because of her condition, Luanda Haptonstahl failed to object to any portion of her husband's testimony, and offered none of her own.

That she didn't do these things was obviously caused by her emotional illness, the extent of which was illustrated by her collapse which ended the hearing. The court knew this, and should have taken it into account and devised some way to discern the full facts, and therefore the truth, of the case. That it didn't is error that should be fixed by this court.

B. The Court Erred by Failing to Take into Account Evidence That Directly Contradicted the Testimony it Heard

David Haptonstahl testified that he was unemployed because his company had gone out of business. *4/3/97 Super Ct. Hrg.* at 26-30. Two months before the hearing, Luanda Haptonstahl's GAL submitted to the court an affidavit. GUARDIAN AD LITEM LIST OF ISSUES (Jan. 24, 1997), *Appx. to Br.* at 20. That the affidavit was not introduced at the hearing, but before, is not of consequence. The affidavit was written by Attorney Kimberly A. Shoen. Attorney Shoen had telephoned David Haptonstahl's employer, asked if he was employed or whether he had been terminated, and if employed what his position was. Don Baker said that he was David Haptonstahl's boss, and told Attorney Shoen that David Haptonstahl was a District Branch Manager for the Amre Corporation. AFFIDAVIT OF KIMBERLY A. SHOEN (Jan. 23, 1997), *Appx. to NOA* at 84-85. The affidavit was written by a person who had no interest in the dispute between Luanda and her husband and who is an officer of the court, it evidences the knowledge of David Haptonstahl's employer concerning his employment situation, and it directly contradicted David Haptonstahl's testimony.

Had the court considered all the evidence, its property distribution would not have so dramatically taken everything from Luanda.

C. The Court Erred by Withdrawing Alimony

"The court is not required to award alimony unless it finds that one party has need and is unable to maintain the standard of living enjoyed during marriage and the other party possesses the ability to pay. In addition, the court may order alimony when it is just and equitable, but this award is discretionary." *Holliday v. Holliday*, 139 N.H. 213, 218 (1994) (emphasis in original, citations omitted).

It is clear, from no more than Luanda Haptonstahl's indigency, that she is unable to maintain the standard of living enjoyed during her marriage. It is also clear, from the Shoen affidavit her GAL filed, that her husband has an ability to pay alimony. Thus, under RSA 458:19, I, the court should have awarded her alimony.

In addition, the court was aware that the divorce litigation was the cause of her emotional collapse, and which rendered Luanda Haptonstahl unable to work and provide for herself. Thus, under RSA 458:19, II, also, the court should have awarded her alimony.

D. The Court Erred by Basing its Decree on Letters Which Were Unauthenticated and Taken out of Context

The court's decree says that "[l]etters not in evidence but in defendant's counsel's possession make abundantly clear that her purpose has been to effect the financial ruination of the defendant." DECREE OF DIVORCE (Apr. 4, 1997), *Appx. to NOA* at 37. During his testimony, David Haptonstahl read excerpted portions of the letters without an effort to put them in any context, and did not offer them as an entirety into evidence. *4/3/97 Super Ct. Hrg*. at 26-30.

Thus, the court's summary of the evidence is incomplete and inaccurate.

These letters, moreover, were not authenticated. The rules of evidence require that the proponent of documentary evidence first prove the documents are what they purport to be before they can be admitted. N.H. R. Ev. 901(a). Authentication could have been by distinctive characteristics, N.H. R.Ev. 901(b)(4), and because Luanda Haptonstahl's handwriting is distinctive this might have been easily accomplished. Authentication may also be by circumstantial evidence, *State v. Reid*, 135 N.H. 376, 383 (1992), but that assumes the party against whom they are offered will have an opportunity to cross examine and to rebut the circumstantial authentication.

The court assumed Luanda Haptonstahl would "cross examine him on these issues," *4/3/97 Super Ct. Hrg*. at 26, including authentication and context. But because no attempt was made to authenticate the letters, and because Luanda Haptonstahl was incapable of cross-examination, the content of the letters should not have been admitted into evidence. Further, what was contained in the letters, if authenticated, was probably merely further evidence of Luanda Haptonstahl's troubled emotions and not a planned campaign of ruination.

Accordingly, the court's central reliance on the letters to establish equities between the parties was reversible error.

III. The Property Division Was Inequitable, and the Court Failed to State its Reasons for Making it Inequitable

In divorce decrees, the trial court must make an even split of property.

> "When a dissolution of a marriage is decreed, the court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable division of property . . . unless the court decides that an equal division would not be appropriate or equitable after considering one or more of [listed] factors."

RSA 458:16-a, II.

In this case, the court gave virtually the entire marital estate to David, and left Luanda Haptonstahl with next to nothing, even though Luanda came to the short marriage with substantial assets. It is conceded that, due to her condition, little evidence favoring Luanda Haptonstahl is in the record. It should be noted, however, that there is little evidence favoring David Haptonstahl in the record either. The court apparently made its inequitable division of property based mostly on its distaste for Luanda Haptonstahl. *See* DECREE OF DIVORCE (Apr. 4, 1997), *Appx. to NOA* at 37.

When a division of property is unequal, the court must consider the statutory factors, RSA 458:16-a, II , and state its reasons. RSA 458:16-a, III ("The court shall specify written reasons for the division of property which it orders."); *Magrauth v. Magrauth*, 136 N.H. 757 (1993). Although a particular asset may be awarded wholly to one party, the court cannot escape its duty to say why. *Holliday v. Holliday*, 139 N.H. 213 (1994). When the court fails to do so, "we are unable to determine the reasons for the property division, and whether the property division was equitable as required under RSA 458:16-a, II." *Magrauth*, 136 N.H. at 762.

In *Magrauth*, the court "simply allocated specific property to each party. . . . The master

abused his discretion . . . when he failed to provide a basis or explanation for the . . . differences in values of the . . . property distribution and when he failed to make reviewable findings and rulings on the disposition of other marital property." *Id.* at 761 (internal quotes and brackets omitted). The Haptonstahl court did the same thing, and the decree should be remanded.

CONCLUSION

The American adversarial system of justice assumes that both sides to a dispute are able to present their case. When one cannot, the assumptions underlying the system falters. Courts have an obligation to the parties and to the integrity of the process to see that this does not happen. In light of her documented condition, as well as Luanda's emotional fragility in court, the Court should have appointed a lawyer. Because she was indigent, the court should have ordered appointment at government expense. Further, because Luanda Haptonstahl was unable to conduct her case effectively, and did not cross-examine the witness, object to evidence that should not have been admitted, present her own documentary evidence, or testify, this Court should order a new trial.

Respectfully submitted,

Luanda M. Haptonstahl
By her Attorney,

Law Office of Joshua L. Gordon

Dated: August 20, 2000

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Luanda M. Haptonstahl requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on August 20, 2000, a copy of the foregoing will be forwarded to David V. Haptonstahl, and, because of the state's interest, to the Attorney General.

Dated: August 20, 2000

____

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