
THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2009-0307

In the Matter of Donna Malisos and Gregory Malisos

Appeal From Order of the Derry Family Division

BRIEF OF APPELLANT

Gregory Malisos

Jeanmarie Papelian
Adam M. Hamel
McLane, Graf, Raulerson & Middleton, Professional Association
900 Elm Street, P.O. Box 326
Manchester, NH 03105-0326
(603) 625-6464

To Be Argued By: Jeanmarie Papelian

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	i
QUESTIONS PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	6
ARGUMENT	6
I. GREGORY MALISOS IS ENTITLED TO CONDUCT DISCOVERY AND TO HAVE A FULL EVIDENTIARY HEARING ON THE ISSUE OF MUTUAL MISTAKE.....	6
II. STRICT APPLICATION OF THE <i>HODGINS</i> FORMULA IS INAPPROPRIATE BECAUSE THE PENSION AT ISSUE IS CAPABLE OF VALUATION, AND DUE TO THE UNIQUE CIRCUMSTANCES OF THIS CASE.	9
A. The <i>Hodgins</i> formula does not apply when, as here, the value of the pension is ascertainable.....	9
B. The unusual circumstances of this case are such that a strict application of the <i>Hodgins</i> formula will result in a grossly inequitable distribution of the marital assets.	10
CONCLUSION.....	13
REQUEST FOR ORAL ARGUMENT	13

TABLE OF AUTHORITIES

STATE CASES

<u>Grabowski v. Grabowski</u> , 120 N.H. 745 (1980)	7
<u>Hodgins v. Hodgins</u> , 126 N.H. 711 (1985)	9
<u>In re Lemieux and Lemieux</u> , 157 N.H. 370 (2008)	7, 8
<u>Rothbart v. Rothbart</u> , 141 N.H. 71 (1996)	11, 12
<u>In re Watterworth and Watterworth</u> , 149 N.H. 442 (2003)	9, 10
<u>In re White</u> , 148 N.H. 531 (2002)	9, 10, 11

QUESTIONS PRESENTED FOR REVIEW

- 1.) Whether the Family Division erred by entering judgment in favor of Petitioner and denying Respondent the opportunity to develop an adequate record through discovery to defend against Petitioner's claim, including but not limited to, showing that Paragraph 14 of the parties' Permanent Stipulation should be reformed due to their mutual mistake of law or fact. Tr. 6, 10, & 45-46; Respondent's Motion for Reconsideration at 2.

- 2.) Whether the Family Division erred by strictly applying the *Hodgins* formula to the New Hampshire Retirement System ("NHRS") pension plan at issue. A strict application of the *Hodgins* formula is erroneous because the NHRS pension could be, and in fact was, valued prior to, and at the time of, the parties' divorce. Moreover, a strict application of the *Hodgins* formula is erroneous due to the "unusual circumstances" of this case.

STATEMENT OF THE CASE

When the parties divorced, they negotiated a Partial Permanent Stipulation (the "Stipulation"), which addressed, among other things, the division of Gregory Malisos's New Hampshire Retirement System ("NHRS") pension relating to his work as a Windham police officer. During those negotiations, the parties had the pension valued twice, as of the date of separation and as of the date of the divorce filing. They agreed to use the higher filing-date value for purposes of the property division. The Stipulation, which was approved by the trial court in 2000, provides that Donna is awarded "a portion" of Gregory Malisos's pension "based on the formula set forth in *Hodgins* that the marital coverture period is until the date of filing and/or February 4, 1997."

Approximately eight years later, in 2008, Donna Malisos sought the trial court's approval of a Qualified Domestic Relations Order ("QDRO"), which she claimed comports with the parties' Stipulation, but which substituted the term "a portion" with a specific percentage, "fifty percent (50%) of a marital fraction multiplied times the Participant's Maximum Retirement Allowance." In light of the post-divorce retirement benefits Gregory Malisos earned through substantial amounts of overtime worked in the years leading up to his retirement, the QDRO proposed by Donna Malisos results in her receiving dramatically greater benefits than intended by the parties.

Gregory Malisos objected to Donna Malisos's proposed QDRO on the grounds that, due to a mutual mistake, the parties' Stipulation failed to articulate their intent, and because the strict application of the *Hodgins* formula in this case is inappropriate and would lead to a grossly inequitable property division. Gregory Malisos asked the trial court for an opportunity to conduct additional discovery and to have a full evidentiary hearing on the issue of mutual mistake. The trial court refused and held that there was no mistake, and that the *Hodgins* formula should be strictly applied.

STATEMENT OF FACTS

Gregory and Donna Malisos were married in 1981. They separated in April 1994, and three years later, in February 1997, Donna Malisos filed for divorce. The parties set out to resolve by agreement the division of the marital assets, including Gregory Malisos's New Hampshire Retirement System ("NHRS") pension relating to his work as a Windham police officer. To that end, they agreed to have the pension valued as of two dates: the date of separation and the date of filing for divorce. Pension Appraisers, Inc. determined that, as of

April 1, 1994 (the date used for separation), the pension had an equitable distribution value of \$7,476.41, translating to a monthly benefit to Gregory Malisos of \$485.91. As of March 1, 1997 (the date used for filing of the divorce petition), the pension's equitable distribution value was \$21,853.70, resulting in a monthly benefit to Gregory Malisos of \$801.50. Following negotiations, the parties agreed to use the higher March 1, 1997 valuation for purposes of dividing the pension.

The parties entered into a Partial Permanent Stipulation (the "Stipulation"), which was approved by the trial court in October 2000. Relevant to this appeal is the portion of the Stipulation dealing with the division of Gregory Malisos's pension. Specifically, Paragraph 14 of the Stipulation provides:

The Petitioner is awarded a portion of the Respondent's pension based on the formula set forth in *Hodgins* that the marital coverture period is until the date of filing and/or February 4, 1997.

The Respondent shall name the Petitioner as the beneficiary of any death benefit associated with the Petitioner's share of the pension. If this cannot be done by allocation and/or through a QDRO, the Respondent may elect to obtain a life insurance policy covering the present value of the Petitioner's pension benefit.

App. at 10. Although it was her responsibility to do so, Donna Malisos did not prepare a QDRO in the years following the trial court's approval of the Stipulation. *See* Order of March 6, 2009, App. at 65.

Following the divorce, Gregory Malisos continued to work as a Windham police officer. As his retirement approached, Gregory Malisos took steps to maximize his pension benefits. First, he purchased (with post-divorce assets) credit for four-and-a-half years of additional service.¹ Also, because his retirement benefit amount is based on his average compensation,

¹ Recognizing that the four-and-a-half years of additional service were purchased with post-divorce funds and therefore beyond the scope of the Stipulation, the trial court, in its March 6, 2009 Order, specifically

including overtime, during the three highest-paid years of his employment, Gregory Malisos accumulated as many overtime hours as he could in the years immediately preceding his retirement. *See, e.g.*, Tr. at 45, App. at 59.

In October 2008, a full eight years after the divorce, following Gregory Malisos's retirement from the Windham Police Department, Donna Malisos filed a Petition to Bring Forward and Motion for Qualified Domestic Relations Order.² The QDRO proposed by Donna Malisos, which she asserted in her Petition "comports with the parties' Decree," would provide Donna Malisos with "fifty per cent (50%) of a marital fraction times the Participant's Maximum Retirement Allowance calculated at the time of Participant's retirement." *See* Proposed QDRO, App. at 6. The proposed QDRO provides that the "marital fraction" is to be calculated under the *Hodgins* formula: the number of months of credited service earned during the marriage divided by the total months of credited service. *Id.*

Gregory Malisos objected to Donna Malisos's Petition on the grounds that it did not comport with the parties' Stipulation. *See* Respondent's Memorandum of Law in Objection to Petition/Motion for QDRO, App. at 9. Gregory Malisos asserts that the language of Paragraph 14 of the Stipulation, and the parties' intent, establish that they understood that the pension was to be divided based upon the March 1, 1997 appraisal value. *Id.*, App. at 1-. Gregory Malisos argued that, to the extent that the Stipulation failed to achieve the equitable division of the pension based on the March 1, 1997 appraisal value, it should be reformed due to the parties' mutual mistake. *Id.*, App. at 11.

excluded those years of service from the calculation of Donna Malisos's share of Gregory Malisos's retirement benefits. App. at 65-66. This portion of the trial court's Order is not being appealed.

² Although the Petition to Bring Forward was filed in October 2008, Donna Malisos did not make service on Gregory Malisos in January 2009. Tr. at 5, App. at 19.

At the hearing on this matter before Family Division Justice Paul S. Moore, which was set down for a thirty-minute offers-of-proof hearing, *see* Notice of Hearing, App. at 14, Gregory Malisos's counsel asked the trial court for leave to conduct discovery on the issue of mutual mistake. Tr. at 6, 10 & 46, App. at 20, 24 & 60. Further, counsel contended that strict application of the *Hodgins* formula is inappropriate in this case because the value of Gregory Malisos's pension could be, and was, valued, and the parties agreed that the appraised value would be used to determine Donna Malisos's share of the pension benefits. Tr. at 9, 21, App. at 23, 35. The application of the *Hodgins* formula is also inappropriate, counsel argued, because the parties agreed that Donna Malisos would be entitled to "a portion" of the pension benefits, and not to equal division. Tr. at 8-9, 29-30, App. at 22-23, 43-44. There is nothing in the record, as it stands, that would provide a basis for awarding Donna Malisos half of Gregory Malisos's retirement benefits, further demonstrating the need for additional discovery on the parties' intentions.

The trial court denied Gregory Malisos's request for additional discovery, and found that the parties intended to use the *Hodgins* formula to include all of Gregory Malisos's years of service, other than the four-and-a-half years of additional service purchased with post-divorce funds, and that the pension benefits be divided equally, although the evidence in the record does not support such a finding, the . Order of March 6, 2009, App. at 65-67. Gregory Malisos filed a Motion to Reconsider, which was denied. Order of April 14, 2009, App. at 68. This appeal followed.

SUMMARY OF ARGUMENT

This Court should reverse the trial court's Order finding that there was no mutual mistake in the Stipulation and strictly applying the *Hodgins* formula, and should remand the case for further discovery and a full evidentiary hearing on the issue of mistake. First, it was error for the trial court to find that there was no mutual mistake without first allowing Gregory Malisos the opportunity to conduct discovery to marshal the evidence necessary to establish, through a full evidentiary hearing, the existence of a mutual mistake resulting in the Stipulation failing to articulate the parties' intent.

Second, it was inappropriate for the trial court to apply the *Hodgins* formula strictly in this case where the value of pension at issue could be, and in fact was, determined, and where, due to the unique circumstances of the case, the strict application of the formula will result in a grossly inequitable division of the marital assets. The trial court's Order would result in Donna Malisos receiving a substantial windfall, which the parties did not intend for her to receive, from the significant post-divorce efforts of Gregory Malisos.

ARGUMENT

I. GREGORY MALISOS IS ENTITLED TO CONDUCT DISCOVERY AND TO HAVE A FULL EVIDENTIARY HEARING ON THE ISSUE OF MUTUAL MISTAKE.

Gregory Malisos maintains that, through a mutual mistake, the parties' Stipulation fails to articulate the parties' intent as to the division of his retirement benefits, and accordingly, he seeks to have the Stipulation reformed. During the hearing on this matter, Gregory Malisos's counsel asked the trial court for leave to conduct additional discovery to marshal the evidence necessary to establish the existents of the mistake, and to justify the need for reformation. Tr. at 6, 10 & 46, App. at 20, 24 & 60. The trial court improperly denied this request, and instead,

found that there was no mistake. Order of March 6, 2009, at 2, App. at 65. That was error, and the Court should reverse the trial court's order and remand these proceedings with instructions that Gregory Malisos be allowed to conduct discovery to develop the evidence of mutual mistake.

It is well established in New Hampshire that a marital decree incorporating mutual mistake in property settlement, and thereby failing to express the parties' intent, can be reformed by the court. *In re Lemieux and Lemieux*, 157 N.H. 370, 373 (2008) (citing *Grabowski v. Grabowski*, 120 N.H. 745, 747 (1980)). It is equally well established that parol evidence cannot be used to vary or contradict the terms of an agreement, but may be used to demonstrate that, due to a mutual mistake of the parties, the document's language does not accurately reflect the parties' agreement. *Id.* New Hampshire does not distinguish between mistakes of fact and law, and permits reformation "if justice and common sense require it" to correct "the parties' obvious failure to articulate their true and discoverable intent." *Id.* (quoting *Hovden v. Lind*, 301 N.W.2d 374, 379 (N.D. 1981)). Reformation for mutual mistake comes down to a question of equity: "no one shall be allowed to be enriched unjustly at the expense of another by reason of an innocent mistake of law or fact entertained by both parties." *Id.* 374 (quoting 27 R. Lord, *Williston on Contracts* § 7:125, at 616 (4th ed. 2003)).

Here, the trial court erred in finding that there was "no ambiguity in the language utilized by the parties," and in holding that "the parties intended to use the *Hodgins* formula to include all of the Respondent's years of service in the New Hampshire Retirement System." Order of March 6, 2009, at 2-3, App. at 65-66. This decision was made without hearing any testimony on

the issue of mistake,³ or even giving Gregory Malisos an opportunity to conduct the discovery necessary to marshal evidence establishing that the Stipulation does not articulate the parties' "true and discoverable intent."

In *Lemieux*, a case with very similar facts, this Court reversed the trial court's finding that the petitioner had failed to establish a mutual mistake sufficient to reform the parties' stipulation, and remanded the case for further proceedings. 157 N.H. at 373. Richard Lemieux argued that, due to a mutual mistake, the stipulation between him and his wife failed to carry out their intent to exclude post-divorce raises and cost-of-living adjustments from the calculation of his wife's share of his pension. The trial court dismissed the petition without hearing evidence on the issue of mutual mistake because the trial court found that it was not impossible for the retirement plan administrator to carry out the stipulation's terms as written. *Id.* at 372. This Court found that to be in error, and held that the parties' stipulation "*could*, but not that it *had to*, be reformed. That will be decided on remand." *Id.* (emphasis original). Therefore, Richard Lemieux was entitled to further proceedings, including discovery and an evidentiary hearing, on the issue of mutual mistake.

Similarly, it was an error for the trial court in this case to refuse to find mutual mistake without first affording Gregory Malisos with the opportunity to conduct discovery and giving him an evidentiary hearing.

³ The trial court stated that in reaching its decision it reviewed "the case file, documentation submitted by both parties, as well as the parties' memorandum of law and applicable case law." Order of March 6, 2009, at 2, App. at 65.

II. STRICT APPLICATION OF THE *HODGINS* FORMULA IS INAPPROPRIATE BECAUSE THE PENSION AT ISSUE IS CAPABLE OF VALUATION, AND DUE TO THE UNIQUE CIRCUMSTANCES OF THIS CASE.

The trial court erred in strictly applying the *Hodgins* formula in this case because the value of the pension at issue can be, and in fact was, ascertained, and because the unusual circumstances of the case are such that a strict application of the formula would result in a grossly inequitable distribution of the marital assets.

A. The *Hodgins* formula does not apply when, as here, the value of the pension is ascertainable.

In *Hodgins*, this Court held that if the actual and contingent values of a pension can be ascertained, the trial court should do so, and divide the asset accordingly. *Hodgins v. Hodgins*, 126 N.H., 711, 715 (1985). It is only when these amounts cannot be ascertained in a meaningful way, that the trial court should apply what is now well known among family law practitioners as “the *Hodgins* formula.” *Id.* at 716. Otherwise, the formula does not apply. *In re Watterworth and Watterworth*, 149 N.H. 442, 452 (2003) (“The formula does not apply when the value of the pension is ascertainable.”). As this Court has explained, the *Hodgins* formula was intended to help trial courts “avoid ‘the problem of valuation’ when the value of the pension ‘is, by its nature, impossible to determine at the time of divorce.’” *Id.* (quoting *Rothbart*, 141 N.H. at 74). When there is no “problem of valuation,” or when the parties have settled the issue by agreement, there is no need to resort to the *Hodgins* formula. *Id.* See also *In re White*, 148 N.H. 531, 535 (2002) (“[*Hodgins*] is a default absent the possibility of determining the actual and contingent values of a pension, and absent a settlement agreement by the parties.”).

In this case, the trial court decided to apply the *Hodgins* formula strictly because it found that “at the time the parties entered into their Final Stipulation, it was impossible to ascertain the actual value of the Respondent’s retirement benefits due to the fact that it was anticipated that the

Respondent would continue to work as a police officer.” Order of March 6, 2009, App. at 66. This was an error because the value of Gregory Malisos’s pension was determined, as of two different dates. As a part of their negotiations in arriving at the Stipulation, the parties had the pension valued by Pension Appraisers, Inc. as of two dates. See Respondent’s Memorandum of Law in Objection to Petition/Motion for QDRO, App. at 9. It was valued as of April 1, 1994 (the date used for the separation date) at \$7,476.41 for equitable distribution, resulting in a monthly benefit to Gregory Malisos of \$485.91. *Id.* It was also valued as of March 1, 1997 (the date used for the divorce filing date) at \$21,853.70 for equitable distribution, resulting in a monthly benefit to Gregory Malisos of \$801.50. *Id.* The parties agreed to use the higher March 1, 1997 valuation for the purposes of the Stipulation. Gregory Malisos believes that if he had been allowed by the trial court to conduct additional discovery, the evidence developed would show that the agreement with regard to the retirement benefits was part of a larger overall agreement about property division.

Because the pension’s value can be, and in fact was, ascertained, and because the parties reached an agreement as to that value, the *Hodgins* formula is inapplicable in this case. *In re Watterworth*, 149 N.H. at 452. The reference to the *Hodgins* formula in the Stipulation, as explained above, was a mutual mistake. Accordingly, the trial court erred in finding that the pension’s value cannot be determined, and in strictly applying the *Hodgins* formula.

B. The unusual circumstances of this case are such that a strict application of the *Hodgins* formula will result in a grossly inequitable distribution of the marital assets.

Further, this Court has held that when the “unusual circumstances” of a case are such that application of the *Hodgins* formula would result in a “grossly inequitable distribution of marital

assets,” the trial court may exercise its discretion to adjust the marital share. *Rothbart v. Rothbart*, 141 N.H. 71, 77 (1996).

The trial court’s finding that “there was no suggestion of anything other than an equal distribution of Respondent’s pension related benefits in the parties’ Permanent Stipulations,” Order of March 6, 2009, App. at 66, is not supported by the record, even without the additional discovery requested by Gregory Malisos. The Stipulation states that Donna Malisos is entitled to “a portion of the Respondent’s pension.” App. at 10. Nothing in the Stipulation suggests that the parties contemplated an equal division of the pension. Nor is an equal division required by the law. The *Hodgins* formula is meant to provide “equitable, though not necessarily equal, property distribution.” *Rothbart*, 141 N.H. at 76.

As this Court pointed out in *Rothbart v. Rothbart*, the purpose of the *Hodgins* formula is “to insure that the risks of uncertainty are evenly placed upon the parties.” 141 N.H. 71, 76 (internal punctuation omitted). The *Rothbart* court held that *Hodgins* is a “default formula” to be applied when there is no “possibility of determining the actual and contingent values of a pension, and absent a settlement agreement by the parties.” *Id.* This Court applied these principles in *In re White and White*, when it held that an airline pilot’s post-divorce pay increases and promotions could be considered in the application of the *Hodgins* formula because, at the time the parties were divorced, the pilot had already accrued twenty years of seniority, and without that seniority earned during the marriage, he would not have been eligible for the opportunities for promotion and increased pension that he acquired post-divorce. 148 N.H. 531 (2002). The Court held that it would be inequitable, under those circumstances, to give the pilot alone the benefit of post-divorce increases where they were based upon seniority gained during the marriage. The Court emphasized that the parties in *White* shared the risk of uncertainty as to

the ultimate value of the pilot's pension. The Court noted that, shortly after the parties divorced, the pilot's salary decreased. Had those decreases continued, or had the pilot not had the opportunities for promotion and pay increases, both of the parties' shares of the pension would have been less than they probably anticipated at the time of the divorce. Because of the application of the *Hodgins* formula, this risk was shared by the parties. Of course it came to pass that the pilot did earn significantly more post-divorce than he did during the marriage, but the parties shared that reward equally as well.

The situation here is the opposite of the circumstances in *White*. As noted above, *Hodgins* is to be applied when it is not possible to determine the actual and contingent value of a pension and when the parties have not agreed to a value. *Rothbart*, 141 N.H. at 76. Here, both of those elements are present. The pension's value could be, and in fact was, valued as of the date of separation and as of the date of divorce. Further, the parties agreed to use the date-of-divorce value for purposes of distribution. Therefore, the elements of risk and uncertainty that *Hodgins* was intended to address are not present in this case. Giving Donna Malisos the benefit of the substantial post-divorce overtime worked by Gregory Malisos—2,400 hours in 2008 alone, *see* Tr. at 45, App. at 59—when the parties did not contemplate that her portion of the retirement benefits would include those hours, would lead to a grossly inequitable result.

Had Gregory Malisos known that his pension benefits would be subject to the strict application of the *Hodgins* formula, it is very likely that he would not have worked the substantial amount of post-divorce overtime that he did knowing that half of the benefit derived from that would redound to Donna Malisos. Had the trial court permitted Gregory Malisos the opportunity for additional discovery and an full hearing, it is expected that this is the evidence that would have been presented.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the trial court's Orders of March 6, 2009 and April 14, 2009, and should remand the case to the trial court for further proceedings, including additional discovery and an evidentiary hearing on the issue of mutual mistake.

REQUEST FOR ORAL ARGUMENT

Pursuant to the Court's Order of June 10, 2009, this appeal has been placed on the 3JX Docket. The Appellant, Gregory Malisos, requests oral argument of five minutes as allowed by Supreme Court Rule 12-D(6). Jeanmarie Papelian will argue for the appellant.

Respectfully submitted,

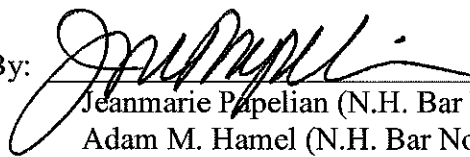
GREGORY MALISOS

By his Attorneys,

McLANE, GRAF, RAULERSON & MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: September 30, 2009

By:



Jeanmarie Papelian (N.H. Bar No. 10584)
Adam M. Hamel (N.H. Bar No. 17110)
900 Elm Street, P.O. Box 326
Manchester, New Hampshire 03105
Telephone (603) 625-6464

Certificate of Service

I hereby certify that on September 30, 2009, I served the foregoing Brief of Appellant by mailing two copies thereof by first class mail, postage prepaid, to Joseph A. Caputo, Esq., counsel of record.


Jeanmarie Papelian