

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DAVID RAY YOUNGBLOOD,
Former Husband,

Appellant,

v.

MARCELLA ANN YOUNGBLOOD,
Former Wife,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D06-4946

Opinion filed June 21, 2007.

An appeal from the circuit court for Okaloosa County.
Jack R. Heflin, Judge.

Joseph D. Lorenz of Poché & Lorenz, LLP, Shalimar, for Appellant.

Janis L. Burke, Fort Walton Beach, for Appellee.

WEBSTER, J.

The former husband seeks review of the trial court's order holding him in contempt for failing to pay to the former wife a share of his concurrent disability pay pursuant to the final judgment of dissolution of marriage. Because we agree with the former husband that he was not required to make such a payment pursuant to the final judgment, we reverse the order holding him in contempt and directing him to pay the

former wife a share of his concurrent disability pay.

In 2000, the trial court entered a final judgment dissolving the parties' 43-year marriage. At the time, the former husband, who was retired from the military and disabled, was receiving both military retirement pay and Veterans' Administration (VA) disability benefits. However, as a condition of receiving VA disability benefits, the former husband was required to waive a corresponding amount of his military retirement pay (VA waiver). See Mansell v. Mansell, 490 U.S. 581, 583-84 (1989). Because the former husband was receiving \$2,366.00 each month in VA disability benefits, he waived \$2,366.00 of his gross military retirement pay, resulting in net military retirement pay of \$100.51. The final judgment provided that "[t]he parties have agreed that the Wife shall be due one-half (1/2) of the Husband's military retirement pay as a vested property right, and one-half (1/2) of his VA waiver as permanent periodic alimony." By giving the former wife one-half of the former husband's VA waiver as alimony, the final judgment assured that the former wife would receive her full share of the former husband's military retirement as if no VA waiver had been taken. See Longanecker v. Longanecker, 782 So. 2d 406 (Fla. 2d DCA 2001). Thus, under the final judgment, the former wife received \$50.25 each month in retirement pay and \$1,183.00 (one-half of the VA waiver) in monthly alimony for a total monthly payment to the former wife of \$1,233.25, which was

equivalent to one-half of the former husband's military retirement pay if no VA waiver had been taken.

Effective January 1, 2004, federal legislation provided for the phased restoration of retirement pay currently deducted from certain military retirees' accounts due to their receipt of VA disability benefits. 10 U.S.C. §1414. This restoration of retirement pay has been referred to as "concurrent disability pay." Beginning in February 2004, the former husband received \$750.00 each month in concurrent disability pay. This resulted in a \$750.00 decrease in the VA waiver (from \$2,366.00 to \$1,616.00) and a corresponding \$750.00 increase in the former husband's net retirement pay (from \$100.51 to \$850.51). It also resulted in a reduction in the former wife's monthly alimony (from \$1,183.00 to \$808.00) and an increase in the monthly amount she received from the former husband's military retirement (from \$50.25 to \$425.25) for a total monthly payment of \$1,233.25. In short, the former wife continued to receive her full share of the former husband's military retirement pay as if no VA waiver had been taken.

In March and June 2004, the former wife filed motions for contempt and enforcement which claimed, among other things, that the former husband was not paying her a share of his concurrent disability pay. In July 2004, the trial court entered an order concluding that under the final judgment of dissolution, the former

wife was entitled to receive one-half of the former husband's concurrent disability pay in addition to one-half of his military retirement pay and one-half of his VA waiver. The trial court reserved ruling on the amount of the arrearage in concurrent disability pay and the former wife's motion for contempt. The former husband filed an appeal which this court designated as an appeal from an appealable, non-final order. In May 2005, this court affirmed without opinion. Youngblood v. Youngblood, 905 So. 2d 895 (Fla. 1st DCA 2005) (table). In June 2006, the trial court entered a final order holding the former husband in contempt and directing him to pay an arrearage in concurrent disability pay. This appeal follows.

The former husband claims that the trial court erred in holding him in contempt upon concluding that the former wife was entitled to one-half of his concurrent disability pay (\$375.00 per month) in addition to the monthly payment of \$1,233.25. The trial court's conclusion appears to be based on the mistaken belief that concurrent disability pay increased the former husband's gross retirement pay when, in reality, it merely restored retirement pay that the former husband previously was required to waive in order to receive VA disability benefits. The trial court's ruling results in the former wife receiving more than one-half of the former husband's military retirement pay which is clearly inconsistent with the final judgment. Although the former husband filed a non-final appeal challenging this ruling and this court affirmed

without opinion, we must reconsider and correct this erroneous ruling, which has become the law of the case, because failure to do so would result in a manifest injustice. See Fla. Dep't of Transp. v. Juliano, 801 So. 2d 101, 106 (Fla. 2001); Logue v. Logue, 766 So. 2d 313, 315 (Fla. 4th DCA 2000). Requiring the former husband to make a payment not required by the final judgment would result in a manifest injustice, particularly where the former husband was held in contempt for failing to make the payment.

We acknowledge that the concurrent disability pay legislation contemplates that the former husband eventually will be allowed to receive the full amount of both his military retirement pay and VA disability benefits which will provide him with significantly more income than the former wife. However, we cannot read the final judgment of dissolution as permitting the former wife to receive half of all the former husband's income related to his military service. Since this is merely an action to enforce the final judgment, there is no jurisdiction to consider whether modification of the final judgment is warranted in light of the subsequent concurrent disability pay legislation. Based on the clear language of the final judgment, we reverse the trial court's final order holding the former husband in contempt and directing him to pay an arrearage in concurrent disability pay.

REVERSED.

ALLEN, J., CONCURS; BENTON, J., DISSENTS WITH WRITTEN OPINION.

BENTON, J., dissenting.

The order under review is far from a manifest injustice, and it faithfully implements our first ruling on the exact same question earlier in this very case. Originally, the trial court worded the parties' divorce decree—in light of the intricacies of federal law then obtaining—to require Mr. Youngblood to split his retirement income with Mrs. Youngblood, who had been his wife for more than four decades. Later, in post-judgment proceedings she instituted to give full effect to the divorce decree—in light of an intervening change in federal law—the trial court required him to pay her half of his “concurrent disability pay” in addition to half of his “military retirement pay.” On interlocutory appeal, we affirmed.

Even accepting for present purposes the premise of the majority opinion that, on general principles, our original pronouncement of the law was erroneous, the law of the case ought to be given effect here. Under the doctrine of the law of the case, the ruling of the highest appellate court that decides a question is presumptively binding on the parties in all subsequent stages of the proceeding, trial and appellate.

Our supreme court has shown great flexibility in applying the law of the case doctrine, see Fla. Dep't of Transp. v. Juliano, 801 So.2d 101, 106 (Fla.2001) (“Moreover, even as to those issues actually decided, the law of the case doctrine is more flexible than res judicata in that it also provides that an appellate court has the power to reconsider and correct an erroneous ruling that

has become the law of the case where a prior ruling would result in a ‘manifest injustice.’”), and has said:

This is the same suit and we have not lost jurisdiction thereof. Consequently, we have the power to correct any error which the Chancellor or we may have heretofore made in the progress of this litigation. There is no question of res adjudicata because this is the same, not a new and different, suit. However this Court, among others, has gone so far as to hold that it will not invoke the doctrine of res adjudicata if to do so would work injustice. The propriety of such ruling can not be questioned when one reflects upon the fact that the primary purpose for which our courts were created is to administer justice. In the case of Wallace v. Luxmoore, 156 Fla. 725, 24 So.2d 302, 304, we said:

“Stare decisis and res adjudicata are perfectly sound doctrines, approved by this court, but they are governed by well-settled principles and when factual situations arise that to apply them would defeat justice we will apply a different rule. Social and economic complexes must compel the extension of legal formulas and the approval of new precedents when shown to be necessary to administer justice. In a democracy the administration of justice is the primary concern of the State and when this cannot be done effectively by adhering to old precedents they should be

modified or discarded. Blind adherence to them gets us nowhere.”

A Court should have less hesitancy in changing “the law of the case” before losing jurisdiction than it would have in refusing to apply the doctrine of res adjudicata when all the requisites thereof are present. We may change “the law of the case” at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice. In such a situation a court of justice should never adopt a pertinacious attitude.

Beverly Beach Props., Inc. v. Nelson, 68 So.2d 604, 607-08 (Fla.1953).

Bush v. Holmes, 886 So. 2d 340, 369-70 (Fla. 1st DCA 2004) (Benton, J., concurring) (collecting cases). Rulings that become law of the case bind the parties in appellate and trial courts alike for the duration of the case, whether correct on general principles or not, so long as the facts on which the appellate decision was based remain the facts of the case. The law of the case governs, unless the initial appellate ruling is both (a) erroneous on general principles and (b) would, if undisturbed, result in manifest injustice.

At most, the majority opinion identifies a categorical, procedural or technical error, not the manifest injustice it hyperbolically proclaims. The thesis is that

“concurrent disability pay” has a discrete legal character requiring that it be treated differently from “military retirement pay.” However that may be, the order under review evinces the same purpose that animated the parties’ divorce decree, and is a product of the same rationale and ongoing effort that produced that decree. The majority opinion “acknowledge[s] that the concurrent disability pay legislation contemplates that the former husband eventually will be allowed to receive the full amount of both his military retirement pay and VA benefits which will provide him with significantly more income than the former wife,” ante p. 5, and also—wisely, in my estimation—seems to leave open the possibility—albeit in a different proceeding—“to consider whether modification of the final judgment is warranted in light of the subsequent concurrent disability pay legislation.” Id.

One of the rationales for the doctrine of the law of the case has been stated thus: “Judicial resources, already heavily taxed, are hardly efficiently allocated when they are used to twice review the same issue.” DeGennaro v. Janie Dean Chevrolet, Inc., 600 So. 2d 44, 45 (Fla. 4th DCA 1992) (Anstead, J., specially concurring). Appellate review also consumes parties’ resources.

Fortunately for litigants and appeals courts alike, most litigation does not involve even a single appeal. Whatever else it may accomplish, an appeal consumes additional resources. Reflecting this reality, an important rule of decision has been devised for litigation that bubbles up

repeatedly into the appellate courts: Once actually decided by the highest court to which the case goes, the law of the case cannot be revisited, with rare exceptions not applicable here.

Edgewater Beach Owners Ass'n, Inc. v. Bd. of County Comm'rs of Walton County,

Fla., 694 So. 2d 43, 45 (Fla. 1st DCA 1997) (Benton, J., specially concurring).

Breaching this “important rule of decision” in the present case can only serve as an inducement to relitigating questions already decided on appeal in other cases, with the attendant waste of resources by courts and litigants alike.

Earlier in the present case, Mr. Youngblood bore the expense of prosecuting an appeal and Mrs. Youngblood bore the expense of defending that appeal to get an answer to the precise question on which the court today somersaults. See Youngblood v. Youngblood, 905 So. 2d 895 (Fla. 1st DCA 2005) (Ervin, Padovano and Thomas) (table). See also Barry Hinnant, Inc. v. Spottswood, 481 So. 2d 80, 83 (Fla. 1st DCA 1986); Exchange Invs., Inc. v. Alachua County, 481 So. 2d 1223, 1227 (Fla. 1st DCA 1985) (“While a PCA has no precedential value, it becomes the law of the case as to the same parties and can be used for res judicata purposes.”) (Ervin, J., concurring in part and dissenting in part). As law of the case, our first decision should govern.

Accordingly, I respectfully dissent.