The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
July 3, 2024

2024COA70

No. 23CA1338, *In re Marriage of McClure* — Family Law — Post-dissolution — Modification and Termination of Provisions for Maintenance, Support, and Property Disposition — Spousal Maintenance — Gross Income — Social Security Benefits

In this post-dissolution of marriage proceeding, a division of the court of appeals concludes, as a matter of first impression in Colorado, that a maintenance award that effectively results in the payor using a portion of his monthly social security retirement benefits to pay the other party does not violate the Social Security Act's anti-assignment provision, 42 U.S.C. § 407(a). Applying an exception to the anti-assignment provision, 42 U.S.C. § 659(a), the division holds that the district court may consider social security retirement benefits as included in the payor's gross income when determining maintenance. The division therefore affirms the

district court’s order modifying the appellant’s maintenance

obligation.

COLORADO COURT OF APPEALS **2024COA70**

Court of Appeals No. 23CA1338
El Paso County District Court No. 04DR1691
Honorable William H. Moller, Judge

In re the Marriage of

Jane Elizabeth McClure,

Appellee,

and

Riley Sinclair McClure,

Appellant.

ORDER AFFIRMED

Division III
Opinion by JUDGE YUN
Dunn and Moultrie, JJ., concur

Announced July 3, 2024

No Appearance for Appellee

Visioli Legal, Steven M. Visioli, Denver, Colorado, for Appellant

¶ 1 In this post-dissolution of marriage proceeding involving Riley Sinclair McClure (husband) and Jane Elizabeth McClure, now known as Jane Elizabeth Townsley (wife), we are asked to resolve a novel question in Colorado: whether a maintenance award that effectively results in the payor using some portion of his monthly social security retirement benefits to pay the other party violates the Social Security Act's anti-assignment provision, 42 U.S.C. § 407(a). We conclude that it does not. Applying an exception to the anti-assignment provision, 42 U.S.C. § 659(a), we hold that the district court may consider social security retirement benefits as included in the payor's gross income when determining maintenance. Accordingly, we affirm the district court's order modifying husband's maintenance obligation.

I. Background

¶ 2 The district court dissolved the parties' twenty-three-year marriage in 2004. As part of the permanent orders, the court ordered husband to pay wife $2,500 in monthly maintenance for an indefinite term. Eighteen years later, husband filed a verified motion to terminate or modify maintenance, asserting that he had reached full retirement age and that his only income was his

monthly social security retirement benefit. Thus, husband contended that a substantial and continuing change of circumstances had rendered his original maintenance obligation unfair. Husband later amended his motion to include additional allegations concerning the parties' respective financial circumstances.

¶ 3 Following a hearing, the district court found that husband had retired in good faith and had credibly testified that he earned roughly $300 per month in net rental income and received approximately $3,400 per month in social security retirement benefits. And the court found that wife received $800 per month from her own rental property, plus approximately $1,400 per month in social security retirement benefits.

¶ 4 After finding that the parties' sworn financial affidavits established their respective living expenses, the district court found that wife could not independently support her reasonable needs and that husband could continue paying some form of maintenance while also meeting his own needs. However, the court concluded that, because husband had retired and was surviving solely on his rental and social security income, there had been a substantial and

continuing change of circumstances that made his $2,500 monthly maintenance obligation unfair. Accordingly, the court reduced husband's maintenance obligation to $700 per month.

¶ 5 Husband then filed a motion for post-trial relief arguing, among other things, that the anti-assignment provision preempted the district court from awarding spousal maintenance to the extent that it required him to use his social security retirement benefits to make the payments. The district court denied the motion, stating that husband made "no showing that the maintenance awarded will be derived from his [social security] benefits."

II. Discussion

¶ 6 Husband contends that the modified $700 monthly maintenance obligation violates the anti-assignment provision because it effectively requires him to pay wife roughly $400 per month from his social security income. *See* 42 U.S.C. § 407(a). Thus, husband says that the anti-assignment provision preempted the district court's consideration of his social security income under section 14-10-114(8)(c)(I)(P), C.R.S. 2023, to the extent that the modified maintenance award exceeded his non-social security sources of income. We are not persuaded.

A. Preservation

¶ 7 As an initial matter, we note that husband failed to present any of his anti-assignment contentions to the district court until he raised the issue in a C.R.C.P. 59 motion. Normally, arguments raised for the first time in a post-trial motion are not preserved for appellate review. *See Fid. Nat'l Title Co. v. First Am. Title Ins. Co.*, 2013 COA 80, ¶ 51. But the question of whether the anti-assignment provision preempts a state court from taking a certain action in a dissolution proceeding implicates the state court's subject matter jurisdiction, and a challenge to subject matter jurisdiction may be raised at any stage of the proceedings. *In re Marriage of Anderson*, 252 P.3d 490, 493-94 (Colo. App. 2010); *In re Marriage of Akins*, 932 P.2d 863, 866 (Colo. App. 1997). Moreover, we have the discretion under certain circumstances to consider federal preemption questions for the first time on appeal. *See People in Interest of E.Q.*, 2020 COA 118, ¶ 27 (citing *Fuentes-Espinoza v. People*, 2017 CO 98, ¶ 19). Accordingly, we review husband's contention of error.

B. Standard of Review

¶ 8 We review preemption questions de novo. *Anderson*, 252 P.3d at 493; *see also Timm v. Prudential Ins. Co. of Am.*, 259 P.3d 521, 525 (Colo. App. 2011) ("Federal preemption is a question of law that we review de novo."). And we may affirm the district court's order on any ground supported by the record. *Taylor v. Taylor*, 2016 COA 100, ¶ 31.

C. The Anti-Assignment Provision

¶ 9 Under Colorado law, "[s]ocial security benefits" are included in the definition of "gross income" for purposes of determining a maintenance award. § 14-10-114(8)(c)(I)(P). But husband argues that the anti-assignment provision preempts a state court from indirectly distributing or dividing social security benefits as part of a new maintenance obligation.

¶ 10 The anti-assignment provision provides as follows:

> The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a). It is well established that the anti-assignment provision prevents a state court from distributing or dividing a party's social security benefits as part of a marital property division. *See Anderson*, 252 P.3d at 494 (holding that "state courts are without power to enforce private agreements dividing future payments of [s]ocial [s]ecurity benefits" as marital property); *In re Marriage of Morehouse*, 121 P.3d 264, 265-66 (Colo. App. 2005) (holding that a court may not offset the value of a party's anticipated social security benefits as part of a marital property division); *In re Marriage of James*, 950 P.2d 624, 628-29 (Colo. App. 1997) (recognizing that state courts are prohibited from "valuing anticipated [s]ocial [s]ecurity retirement benefits as a marital asset subject to distribution").

¶ 11 But in 1975, Congress created an exception to the anti-assignment provision to allow the use of legal process to collect child support and alimony. *See* 42 U.S.C. § 659(a); Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975). Section 659(a) specifically provides that,

> [n]otwithstanding any other provision of law (including [the anti-assignment provision in] section 407 of this title . . .), . . . moneys . . .

> due from, or payable by, the United States . . . to any individual . . . shall be subject, in like manner and to the same extent as if the United States . . . were a private person, to withholding . . . and to any other legal process brought . . . by an individual obligee, to enforce the legal obligation of the individual to provide child support or alimony.

"The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of the individual . . . ." 42 U.S.C. § 659(i)(3)(A). In 1977, Congress added a new definitional section, *see* 42 U.S.C. § 659(i)(3)(B); Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, 91 Stat. 126, clarifying that the term "alimony" in § 659(a) does not include "any payment or transfer of property . . . in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses." *See McCarty v. McCarty*, 453 U.S. 210, 230 (1981) (discussing the history of the § 659(a) exception), *superseded by statute on other grounds*, Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982).

¶ 12 The United States Supreme Court has observed that Congress created the § 659(a) exception in order "to help children and divorced spouses get off welfare." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 587 (1979).[1] Moreover, as to the statutory definition of alimony, the Supreme Court has explained that Congress intended to draw a distinction between marital property divisions and awards of maintenance and child support: "It is . . . logical to conclude that Congress . . . thought that a family's need for support could justify garnishment, even though it deflected other federal benefit programs from their intended goals, but that community property claims, which are not based on need, could not do so." *Id.*

¶ 13 No Colorado case has considered the interplay of the anti-assignment provision and the § 659(a) exception. But along with *Hisquierdo*, jurisdictions that have done so conclude that § 659(a) allows courts to consider social security retirement benefits, as well as other non-assignable federal benefits, in

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[1] *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), involved retirement benefits under the federal Railroad Retirement Act of 1974, 45 U.S.C. § 231a. Like social security retirement benefits, railroad retirement benefits are non-assignable absent a statutory exception. *See* 45 U.S.C. § 231m.

awarding maintenance or child support, even in circumstances where the order effectively results in an indirect assignment of those benefits.

¶ 14 For example, in *Evans v. Evans*, 434 S.E.2d 856, 860 (N.C. Ct. App. 1993), the husband argued that an order requiring him to pay his former wife thirty percent of his social security benefits each month as alimony violated the anti-assignment provision. Relying on § 659(a), the North Carolina Court of Appeals held there was no violation of the anti-assignment provision. *Id.* The court reasoned that the

> purpose of the anti-assignment clause . . . is to protect the [s]ocial [s]ecurity benefit recipient and those dependent upon him from claims of creditors. But where a wife seeks her husband's [s]ocial [s]ecurity benefits in the form of alimony, she is not a creditor as such; and the statute should not apply, therefore, to defeat her claim for alimony.

Id. (citations omitted). Accordingly, "[i]t would be inconsistent to hold that a wife could not reach [s]ocial [s]ecurity benefits under § 407(a) because the statute allowing benefits to be subject to legal process for a claim of alimony, § 659(a), was enacted partially to protect her as a dependent." *Id.* The court thus concluded that the

§ 659(a) exception "to the general bar against assignments in the case of [s]ocial [s]ecurity benefits paid to individuals obligated to pay alimony" included "[f]uture [s]ocial [s]ecurity benefits payable to [the husband]." *Id.* at 861.

¶ 15 Similarly, in *Miller v. Miller*, 632 P.2d 732, 733-34 (N.M. 1981), the New Mexico Supreme Court considered whether a state court could award alimony when the sole source of funds for payment was the husband's federal disability benefits. The court found "no federal bar to the award of alimony where the source for its payment is [non-assignable] disability compensation payable under federal programs." *Id.* at 734. It relied on § 659(a) and *Hisquierdo*, 439 U.S. at 587, reasoning that, under § 659(a), "Congress has seen fit to create an exemption to the general provision of non-assignability of benefits . . . to allow for spousal support." *Miller*, 632 P.2d at 734.

¶ 16 Other courts have reached similar conclusions. *See In re Marriage of Rogers*, 817 N.E.2d 562, 566 (Ill. App. Ct. 2004) (holding that, notwithstanding the anti-assignment provision, when setting alimony, "[w]e see no reason for a court to ignore the circumstance that one party is *currently* receiving a social security

benefit of $1,321 per month while the other is receiving $216 per month"); *In re Marriage of Mikesell*, 916 P.2d 740, 742 (Mont. 1996) ("[L]egal process brought for the enforcement of a party's legal obligations to provide child support or make maintenance payments is a specific exception to the broad exemption from garnishment provided to social security benefits by 42 U.S.C. § 407."); *Kennedy v. Kennedy*, 918 S.W.2d 197, 201 (Ark. Ct. App. 1996) (finding "no merit to appellee's contention that the award of alimony beyond his retirement age violates federal law" concerning non-assignable benefits); *Baker v. Baker*, 419 So. 2d 735, 736 (Fla. Dist. Ct. App. 1982) (holding that permanent alimony based on a percentage of a spouse's social security benefits may be awarded because federal law does not expressly preclude the use of such benefits for the purpose of support); *Robinson v. Robinson*, 412 So. 2d 633, 635 (La. Ct. App. 1982) (determining that, where wife's own social security income was insufficient to meet her needs, an increase in husband's alimony obligation based on his social security benefits would be consistent with § 659(a)).

¶ 17 We are persuaded not only by these sound authorities, but also by the federal regulations implementing § 659(a), which define

a "legal obligation" for purposes of processing garnishment orders to include "*current as well as past due* alimony and/or child support debts." 5 C.F.R. § 581.102(g) (2023) (emphasis added). This definition refutes husband's assertion that the § 659(a) exception applies only to past due — not current — maintenance obligations. And husband has not pointed us to any legal authority holding that the § 659(a) exception is limited to past due maintenance obligations.

¶ 18 Accordingly, we conclude that the § 659(a) exception allows an award of maintenance that indirectly results in the reallocation of social security benefits to a former spouse without violating the anti-assignment provision. This means that a district court may consider social security retirement benefits under section 14-10-114(8)(c)(I)(P) as included in a party's gross income when determining maintenance. It follows that the district court's order modifying maintenance did not violate the anti-assignment provision, even though the order will effectively require husband to pay wife part of his monthly social security benefits.

III. Disposition

¶ 19 The order is affirmed.

JUDGE DUNN and JUDGE MOULTRIE concur.