SUMMARY
January 26, 2023

**2023COA9**

**No. 21CA1678, *Pinnacol v. Laughlin* —
Creditors and Debtors – Garnishments – Exemptions – Social Security Benefits – Child Support Payments – Commingled Funds**

A division of the court of appeals holds that even if a recipient of social security benefits commingles the benefits with other funds, he is entitled to protection from garnishment for those funds that are reasonably traceable to social security income, but if the funds are not reasonably traceable, they are not exempt from garnishment.

COLORADO COURT OF APPEALS **2023COA9**

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Court of Appeals No. 21CA1678
City and County of Denver District Court No. 21CV30219
Honorable Michael A. Martinez, Judge

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Pinnacol Assurance,

Plaintiff-Appellee,

v.

Patricia Laughlin, as personal representative for the estate of Todd Wilson, deceased,

Defendant-Appellant.

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ORDER AFFIRMED

Division I
Opinion by JUDGE RICHMAN*
Dailey and Furman, JJ., concur

Announced January 26, 2023

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Ruegsegger Simons & Stern, LLC, Michele Carey, Denver, Colorado, for Plaintiff-Appellee

Irwin Fraley, PLLC, Roger Fraley, Jr., Centennial, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Defendant, Patricia Laughlin, appeals the district court's order denying a claim of exemption from a writ of garnishment filed by plaintiff, Pinnacol Assurance (Pinnacol). We affirm.

## I. Background

¶ 2 Todd Wilson was injured on the job in 2015 and began receiving temporary workers' compensation benefits from Pinnacol. Years later, the Social Security Administration (SSA) determined that Wilson was entitled to disability benefits from July 2016 onward. As a result, Wilson received two large back payments from the SSA: $8,585.25 in December 2019 and $48,308.75 in January 2020. Because the back payments accounted for a period during which Wilson had also received benefits from Pinnacol, Pinnacol sought to recover the amount of overpayment. In July 2020, an administrative law judge (ALJ) determined that Wilson owed Pinnacol $22,938.89 as an overpayment. The district court subsequently converted the ALJ's order into a judgment.

¶ 3 In June 2021, with no amount of the judgment having been paid, Pinnacol initiated garnishment proceedings against Wilson. Wilson filed a claim of exemption, asserting that approximately $18,000 of the money being withheld from his bank accounts was

exempt from garnishment under 42 U.S.C. § 407(a), which provides that social security benefits cannot be garnished. He later argued that other funds were exempt from garnishment under section 13-54-102(1)(u), C.R.S. 2022, which shields court-ordered child support payments from garnishment. The district court held a hearing on the matter.

¶ 4 During the hearing, Wilson's mother, Laughlin, testified, explaining that she was the representative payee for Wilson and handled both the distribution of his SSA payments and his banking affairs generally. According to her, the back payments from the SSA were first deposited into Wilson's checking account before she transferred the bulk of the money into his savings account. Subsequent SSA payments, she testified, were deposited directly into the checking account and left there for Wilson to live on. She also testified that, in addition to the ongoing SSA payments, Wilson received monthly maintenance payments from his ex-wife that were deposited into the checking account and monthly child support payments that were routinely deposited into a third account that was created just for the child support money. When the monthly SSA and maintenance payments were insufficient to cover Wilson's

expenses, Laughlin explained, she would transfer funds from the savings account into the checking account.

¶ 5 On cross-examination, Laughlin disclosed a third source of money flowing into the checking account: gifts from her. As she admitted, she had transferred thousands of dollars from her own checking account to Wilson's checking account after the ALJ's order.

¶ 6 Laughlin was the only witness at the hearing. After she testified, Wilson's attorney argued that all of the money that was garnished from Wilson's savings account and the so-called child support account was exempt from garnishment because the money in the former was exclusively SSA money and the money in the latter was solely for child support. No money had been garnished from his checking account, as it contained only a nominal balance at the time.

¶ 7 Ruling from the bench, the court found that Wilson's SSA payments had been commingled with other, nonexempt funds, so much of the money that was garnished from his accounts was not reasonably traceable as exempt property. But rather than deny Wilson's exemption claim outright, the court left it to Pinnacol's

counsel to comb through Wilson's bank records for deposits, like the gifts from Laughlin, that were made after the ALJ's order and were not reasonably traceable as exempt property. The court reasoned that Wilson would be ordered to pay Pinnacol the sum of those deposits.

¶ 8 Ultimately, the court entered a written order directing that Wilson pay Pinnacol $22,898.80, representing $21,110 in purportedly untraceable deposits, plus interest on that amount.

¶ 9 Wilson then appealed, contending that the court's order was erroneous. While the appeal was pending, however, Wilson died, so Laughlin, after appointment as his personal representative, was substituted as the appellant.

¶ 10 We next recount the relevant law and then address the issues raised on appeal.

## II. Standard of Review

¶ 11 This case presents mixed questions of law and fact. We review the district court's interpretations of law — for example, the statutory exemptions for social security benefits and child support funds — de novo. *Roup v. Com. Rsch., LLC*, 2015 CO 38, ¶ 8. But we review its factual findings for clear error, meaning that we will

not disturb those findings unless they are unsupported by the record. *Martinez v. Mintz L. Firm, LLC*, 2016 CO 43, ¶ 17. Further, because this case involves the tracing of funds, a matter left to the sound discretion of the district court, we will not overturn the court's decision absent a showing of an abuse of discretion. *United States v. Henshaw*, 388 F.3d 738, 739-40 (10th Cir. 2004). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *People v. Lindsey*, 2020 CO 21, ¶ 23.

## III. Applicable Law

¶ 12 Colorado's garnishment process is detailed in C.R.C.P. 103. As is relevant to this case, section 6 of the rule permits a judgment debtor to claim an exemption and to have a hearing on his claim.

¶ 13 Two exemptions are at issue in this case.

¶ 14 First, federal law provides that "none of the moneys paid or payable [as social security benefits] 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). The Supreme Court has explained that this provision "imposes a broad bar against the use of any legal process to reach all social

security benefits." *Philpott v. Essex Cnty. Welfare Bd.*, 409 U.S. 413, 417 (1973).

¶ 15 Laughlin relies on *Philpott* and *Anderson Boneless Beef, Inc. v. Sunshine Health Care Center, Inc.*, 852 P.2d 1340, 1344 (Colo. App. 1993), for the proposition that § 407(a) "unambiguously rules out any attempt to attach social security benefits." But the rule is not absolute — if the recipient of social security benefits commingles the benefits with other funds, he is entitled to protection for those funds that are reasonably traceable to social security income. *See NCNB Fin. Servs., Inc. v. Shumate*, 829 F. Supp. 178, 180-81 (W.D. Va. 1993) (citing *Philpott*, 409 U.S. at 416-17), *aff'd sub nom. Nationsbank of N.C. v. Shumate*, 45 F.3d 427 (4th Cir. 1994). If the funds are not reasonably traceable, the funds are not exempt from garnishment.

¶ 16 Second, the state law in effect at the time of Wilson's garnishments provided that child support payments required by a support order are "exempt from levy under writ of attachment or writ of execution for any debt owed by either parent," provided two things are true: (1) the money is not commingled with other funds and (2) the money "is deposited in . . . a custodial account for the

benefit of the child designated for child support payments." § 13-54-102.5(1)-(2), C.R.S. 2021.[1] We liberally construe this exemption in favor of debtors. *Roup*, ¶ 10.

¶ 17 But how do we know if money falls into either the social security benefits exemption or the child support payments exemption?

¶ 18 With respect to child support payments, it is as straightforward as determining whether the deposit of the funds at issue complied with the requirements of section 13-54-102.5, as it existed at the time of the garnishments.

¶ 19 Social security benefits are a bit trickier, but we are persuaded by the analytical approach articulated in *Schaefer Shapiro LLP v. Ball*, 941 N.W.2d 755, 758 (Neb. 2020), and embraced by the district court here: When a bank account consists solely of checks directly deposited by the SSA, there is no question that the funds are exempt. But when such payments are commingled with

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[1] Section 13-54-102.5 was amended in 2022 to delete the commingling prohibition and the requirement that the funds be deposited into a custodial account. Ch. 74, sec. 7, § 13-54-102.5, 2022 Colo. Sess. Laws 380. But we apply the statute as it read at the time of the garnishments.

nonexempt funds, the payments remain exempt from garnishment only "so long as the source of the exempt funds is reasonably traceable." *Id.* This is the method that the majority of state and federal courts employ, *id.*, and we see no reason to take a different tack.

¶ 20 Which brings us to our next issue: the appropriate way to trace commingled funds.

¶ 21 Laughlin asks us to mandate a "first in, first out" method of accounting, whereby the first dollar deposited into an account is the first one spent. And certainly, that is one way of doing things. But it is not the only way. *See In re Lantz*, 451 B.R. 843, 847 (Bankr. N.D. Ill. 2011) (identifying other accounting methods, including "last-in, first-out approach"). Moreover, because tracing is "an equitable substitute for the impossibility of specific identification," we think it best that courts should "exercise case-specific judgment to select the method best suited to achieve a fair and equitable result on the facts before them." *Henshaw*, 388 F.3d at 741 (quoting William Stoddard, Note, *Tracing Principles in Revised Article 9 § 9-315(B)(2): A Matter of Careless Drafting, or an Invitation to Creative Lawyering?*, 3 Nev. L.J. 135, 142 (2002)).

## IV. Analysis

¶ 22 As a threshold matter, we decline to address Laughlin's argument that Pinnacol bore the burden of proving that the money garnished from Wilson's bank accounts was not exempt from garnishment. First, the issue was raised for the first time in her reply brief, so it is not properly before us. *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990). What is more, Wilson did not bring the issue to the attention of the district court — despite the court's statement in no uncertain terms that Wilson bore the burden of proving entitlement to an exemption — and this is not one of the exceptionally rare civil cases that warrants reversal based on an unpreserved claim of error. *Wycoff v. Grace Cmty. Church of Assemblies of God*, 251 P.3d 1260, 1269 (Colo. App. 2010).

¶ 23 Turning to the merits, the money the district court awarded to Pinnacol came from two sources: (1) Wilson's savings account and (2) the so-called child support account. Again, no funds were garnished from Wilson's checking account. Therefore, we must determine whether the district court abused its discretion by concluding that the funds awarded to Pinnacol were not exempt from garnishment. While we agree with the district court that the

garnished funds are not exempt, we arrive at that conclusion taking, in part, a different route.

¶ 24 Beginning with the so-called child support account, we agree that the funds were not exempt. At the time of the garnishments, section 13-54-102.5(2), C.R.S. 2021, provided that a child support payment is only exempt from levy if the funds are deposited in "a custodial account for the benefit of the child designated for child support payments." But as the district court correctly pointed out during the hearing, merely considering a child support account to be a custodial account does not automatically make it so.

¶ 25 Section 11-50-110(1)(b), C.R.S. 2022, provides that a custodial account is created when money is delivered to a financial institution for credit to an account in the name of the transferor "followed in substance by the words: 'as custodian for _____ (name of minor) under the "Colorado Uniform Transfers to Minors Act."'" The evidence at trial did not show the account was so labeled under section 11-50-110(1)(b). The account was not a custodial account under Colorado law as it existed at the time of the garnishments, so the funds contained therein were not exempt from garnishment.

¶ 26 Moving on to the savings account, Laughlin contends that the funds contained in the account are exclusively social security payments and easily traceable as such. But there is an absence of evidence to support her line of reasoning.

¶ 27 First, the two large back payments that Wilson received from the SSA were initially directly deposited into his *checking* account — $8,585.25 on December 13, 2019, and $48,308.75 on January 10, 2020. The records of Wilson's checking account on the two dates when the SSA funds were deposited show balances in excess of the amount of each payment, indicating that the SSA payments were immediately commingled with other funds in the checking account.

¶ 28 The bank records admitted during the hearing, in conjunction with Laughlin's testimony, further show that, within a matter of days after the two back payments from the SSA were deposited into Wilson's checking account, sums approximating, but not exactly equaling, the two back payments were transferred into Wilson's savings account. Specifically, the checking account record shows that $8,134,52 was transferred to the savings account on December 16, 2019, and $45,710.38 on January 22, 2020.

¶ 29 But the evidence admitted at the hearing does not show the balances in the savings account on the dates when the two back payments were transferred. Thus, we cannot conclude that the SSA funds were not commingled again with other funds already in the savings account.

¶ 30 Further, the evidence at the hearing does not show the transactions in the savings account between January 2020 and June 2021, when the garnishments were enforced. Rather, Exhibit 8 — the only record of Wilson's savings account that was admitted during the hearing — shows simply that $20,545.67 was in the savings account at the time of garnishment. The source of the funds in the savings account at that time cannot be determined.

¶ 31 Thus, even if the SSA funds were traceable from Wilson's checking account into his savings account, the evidence presented at the hearing does not show that the savings account contained only SSA funds at the time of garnishment.

¶ 32 To that last point, Laughlin urges us to consider another record of Wilson's savings account — Exhibit L — showing a longer history of the account. We decline to do so because it was not admitted into evidence. Not only did Wilson's attorney have the

opportunity to admit Exhibit L into evidence during the hearing, the court specifically asked if he wanted to do so, and he declined. It would be fundamentally unfair to Pinnacol for us to allow Laughlin a second bite at the apple.

¶ 33 In sum, we cannot say that the district court abused its discretion when it concluded that the funds awarded to Pinnacol were not exempt from garnishment.

## V. Conclusion

¶ 34 The order is affirmed.

JUDGE DAILEY and JUDGE FURMAN concur.