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## Social Security for Same-Sex Couples

*By Elaine Floyd, CFP®*

**Spousal and survivor benefits for same-sex couples have been in limbo over the years. Obergefell v. Hodges granting same-sex couples the right to marry provided much-needed clarity.**

Since 1939, nonworking spouses of covered workers have been able to receive a spousal benefit equal to 50% of the working spouse's primary insurance amount (PIA). If the worker-spouse dies, the spouse may receive a survivor benefit generally equal to the amount the deceased spouse was receiving at the time of death.

In the original legislation the spousal benefit was called a "wife's benefit." This was based on the assumption that all marriages were between a husband and a wife, and it was generally the wife who did not work. But Social Security has always been gender-neutral: any benefit payable to a wife could, under the same circumstances, be paid to a husband. The term "spouse" is now used to reflect this gender neutrality. SSA's term "spouse benefit" has been replaced with "spousal benefit" to distinguish between a spouse's own benefit, based on their own work record, from the benefit they might receive as a spouse based on their spouse's work record.

The Social Security rules have always been clear about how long a couple must be married in order for one spouse to receive benefits off the other spouse's record: one year for spousal benefits or nine months for survivor benefits, with some exceptions. It's the definition of marriage itself that has undergone changes in recent years.

## STATE VS FEDERAL LAW

Originally, SSA looked to the laws of the state of residence to determine if a marriage was valid for Social Security purposes. This was done primarily in connection with common-law marriage. If a couple had lived together and held themselves out as a married couple but never legalized the union, they could be considered married under the common law, providing the state where they lived recognized common-law marriage.

The rules for same-sex couples, however, have not been so straightforward. Massachusetts was the first state to recognize same-sex marriage in 2004, followed by other states. However, even if a couple married and lived in a state that recognized same-sex marriage, the federal defense of marriage act (DOMA), which defined marriage as the union of one man and one woman, superseded state law in determining the legality of a marriage for Social Security benefits. Under DOMA, no spousal or survivor benefits could be paid to spouses of same-sex marriages.

On June 26, 2013, DOMA was struck down as unconstitutional by the Supreme Court. The case, *U.S. v. Windsor*, was initiated by Edith Windsor who had married her same-sex partner, Thea Spyer, in New York, a state that recognized same-sex marriage. When Spyer died and left her estate to Windsor, the federal government denied her the federal marital exemption citing DOMA. The Supreme Court ruled in favor of Windsor, saying that Section 3 of the Defense of Marriage Act (DOMA), which denied federal recognition of same-sex marriages, was a violation of the Due Process Clause of the Fifth Amendment. Once DOMA was struck down by the Supreme Court, federal agencies, including SSA, could once again

look to each state's laws to determine the validity of a marriage. This, of course, led to great inequities. Couples who lived in states that recognized same-sex marriage could enjoy spousal or survivor benefits the same as any married couple, while those who did not could not.

## GUARANTEED RIGHT TO MARRY

On June 26, 2015, the Supreme Court ruled in the *Obergefell v. Hodges* case that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This ruling requires all fifty states to perform and recognize the marriages of same-sex couples on the same terms and conditions as the marriages of opposite-sex couples, with all the accompanying rights and responsibilities. Nearly instantly, SSA began processing applications for spousal and survivor benefits by spouses in same-sex marriages throughout the United States.

The rights of same-sex couples to spousal and survivor benefits are now clear. A person who is or was married to a person of the same or opposite sex is equally entitled to benefits under the same rules.

However, there could still be complications arising from prior benefit denials—that is, a person who was denied spousal or survivor benefits because they did not meet the marriage requirements at the time but would have if today's laws had been in existence then.

## PRIOR DENIALS

In September 2018, Helen Thornton filed a lawsuit against SSA when she was denied survivor benefits following the death of her partner in 2006, before same-sex couples in the state of Washington were allowed to marry. They had been together 27 years. Two years later, in September 2020, a federal judge struck down as unconstitutional SSA's denial of survivor benefits in cases where same-sex couples were barred from marrying due to discriminatory state marriage bans. But benefits had been in limbo because the Social Security Administration and the

Justice Department under President Trump appealed the ruling.

On November 1, 2021, with Trump now out of office, those appeals were dropped. SSA is now processing survivor benefit claims for ALL surviving same-sex partners and spouses who were barred from marriage, regardless of whether they had applied for those benefits at any point in the past.

Here's what SSA says: More surviving same-sex partners may now qualify for Social Security survivors benefits. If you were in a same-sex relationship with a partner who passed away, you may qualify for Social Security survivors benefits based on your partner's record. You may qualify for survivors benefits if either of the following are true:

- You would have been married at the time of your partner's death if unconstitutional state laws hadn't prevented you from doing so.

- You would have been married longer if not for unconstitutional state laws that prevented you from marrying earlier.

If you think you may qualify based on the categories above, please contact SSA to apply. Even if you were previously denied survivors benefits because you did not meet the marriage requirement due to unconstitutional laws, you can ask us to reopen, or take another look at, your claim. If you were previously denied and we find that you qualify for benefits, you may be due retroactive benefits. For more information, see the SSA brochure *Survivors Benefits for Same-Sex Partners and Spouses* (<https://www.ssa.gov/pubs/EN-17-019.pdf>) or call SSA at 800-772-1213.

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