



NSCLC

National Senior Citizens Law Center

Protecting the Rights of Low-Income Older Adults

December 12, 2012

Social Security Benefits Now Based on Same Sex Marriage?

This presentation is made possible by a grant from the Evelyn & Walter Haas, Jr. Fund and Gay & Lesbian Advocates & Defenders.

The National Senior Citizens Law Center is a non-profit organization whose principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of local advocates, we seek to ensure the health and economic security of those with limited income and resources, and preserve their access to the courts. For more information, visit our Web site at www.NSCLC.org.

Role of Social Security Benefits

- For two-thirds of older Americans, Social Security is a majority of their income.
- For older African Americans, Latinos and Asian Americans, Social Security plays an even more important role.
- For women, Social Security is especially important

General SSA Rule on Marital Recognition

- Look to the law of the state in which the wage earner is domiciled.
- DOMA, by banning federal recognition of same sex marriages, establishes an exception to this otherwise universal rule.

Two Appellate Decisions Finding DOMA Unconstitutional

- *Gill v. Office of Personnel Management*, 682 F.3d 1 (1st Cir. 2012)
- *Windsor v. United States*, 699 F.3d 169 (2nd Cir. 2012)
 - *Windsor* now before U.S. Supreme Court

Why Submit a Claim for Benefits Now?

- Additional months of retroactive benefits if DOMA ruled unconstitutional while your claim pending in administrative appeal process
- Lengthy administrative appeal process
- No additional retroactive benefits if Congress repeals DOMA

Who Should Apply Now?

- Only those who are married, not those who are in domestic partnership or civil union
- Only where the wage earner is domiciled in a state that recognizes your marriage or in the District of Columbia or in any foreign country

Jurisdictions With Same Sex Marriage

- Connecticut, Iowa, Maine, Maryland Massachusetts, New Hampshire, New York Vermont, Washington, and the District of Columbia

Other Jurisdictions Where One Might Qualify for Benefits Based on Same Sex Marriage

- New Mexico, Rhode Island
- California for marriages performed in California between June 16, 2008 and Nov. 4, 2008 and for all out of state marriages performed prior to Nov. 4, 2008
- Any foreign country whether that country recognizes your marriage or not

Requirements for Spousal Benefit

- Spouse who is ***entitled*** to old age or disability benefits on her work record
- You are in at least the 12th month of your marriage

Requirements for Spousal Benefit

- You are at least 62 years old or have in your care a child of the wage earner who is either under age 16 or disabled.
- You are not ***entitled*** to a higher benefit on your own earnings record

Who Can Benefit From Spousal Benefits?

Examples

- If both spouses are already receiving benefits and the benefit of one is less than half the benefit of the other, the spouse with the lower benefit can file for a spousal benefit to bring her total benefits up to one-half the amount of the spouse with the higher benefit.

Examples

- If A is already receiving old age or disability benefits and B, her spouse, is between the ages of 62 and 70 she may want to file for a spousal benefit now and wait until age 70 to apply on her own earnings record, thereby assuring a much higher benefit in later life. **CAVEAT** If B is still working and is between ages 62 and 66, she will be subject to an earnings test which reduces her benefits once her earnings exceed a certain amount. Once she reaches age 66, the earnings test no longer applies.

Examples

- If neither spouse is receiving benefits and both are age 62 or over, spouse A may want to consider filing for old age benefits and immediately suspending, thus allowing spouse B to apply for a spousal benefit which he can continue to receive until age 70 when he will file on his own earnings record. This allows both spouses to maximize their long term benefits.

Requirements for Widows or Widowers benefits

- Geographic eligibility based on domicile of deceased
- Deceased must be fully insured (40 quarters unless age 31 or under)
- Married for 9 months immediately preceding death with certain exceptions

Requirements for Widows or Widowers benefits

- Must be age 60 or older (50 if disabled) unless you have in your care a child of the deceased who is either under age 16 or disabled
- You must not be ***entitled*** to a benefit on your own earnings record greater than the widow or widower's benefit.

Application Process

- You will need to submit an application in person at your local Social Security office and bring with you a copy of your marriage certificate as well as a death certificate if applying for widows or widowers benefits.

Application Process

- If you are told you cannot apply based on a same sex marriage, you should politely insist that you have a right to submit an application and obtain a decision. You should say that you understand the application must be denied but that you need to file an application to protect your rights. If you are still not permitted to submit an application you should ask to speak to a supervisor. If you are still not permitted to file an application because of DOMA , you should contact an attorney and/or GLAD's Info Line at 800-455-GLAD and/or NSCLC at info@nsclc.org. Once you file an application you should ask for a date stamped copy.

Application Process

- The denial of your application must be in writing. If they just give you an oral denial, you must ask them to give you a written statement to that effect. If you do not receive a response within a month you should inquire at your local Social Security office and notify GLAD and NSCLC.

Appeals

- As long as you have a pending administrative appeal at the time DOMA is found to be unconstitutional, you will have a right to benefits based on the date of your application even if it is several years before the ultimate Supreme Court ruling.
- It is not uncommon for exhaustion of your administrative remedies to take several years.

Appeals

- After your initial denial, there are 3 further steps in the administrative appeal process. After you get a decision at each stage of the process you will have 60 days (+ 5 days for mailing) to appeal to the next level. It is important that you appeal within that 60 day time limit.

Reconsideration

- Within 60 days of your notice of receiving your denial you must file a Request for Reconsideration on the Social Security Administration's form (Form SSA-561), which is available on the Social Security website at www.socialsecurity.gov/online/ssa-561.pdf. It will ask the reason for your appeal. You need not give a detailed explanation. You can write you are lawfully married and that DOMA is unconstitutional. That is enough to preserve your rights.

Reconsideration

- You should file the Request for Reconsideration in your local Social Security office and obtain a date stamped copy. If you move before receiving a determination on your Request for Reconsideration, you must be sure to notify Social Security of your new address. Otherwise you can just sit back and wait until you receive a Notice of Reconsidered Determination or until the Supreme Court rules on the constitutionality of DOMA, whichever comes first. Many of these requests for reconsideration are not processed and are simply ignored. However, as long as you have proof that you filed a timely Request for Reconsideration, you need not worry. Your rights are protected and you need not harass the people at the local Social Security office for a decision.

Administrative Law Judge Hearing

- If you receive a notice affirming the denial of your benefits, it will tell you that you have a right to request a hearing before a Social Security Administrative Law Judge hearing. Once again it is important that you do so within 60 (+5) days of the date on the notice.

Administrative Law Judge Hearing

- This must be done on Social Security Administration Form HA-501- “Request for Hearing By Administrative Law Judge”
- The form is available on the Social Security website,
www.socialsecurity.gov/online/ha-501.pdf.

Administrative Law Judge Hearing

- The Administrative Law Judge hearing is an in person hearing and will take at least several months to schedule (length of time varies depending on location). You do not need an attorney or other representative at the hearing. You will not be required to make legal arguments. You should again bring your marriage certificate and, if relevant, a death certificate. It would be helpful if, at the hearing, you describe how long you have known each other and when you were married.

Social Security Appeals Council

- If you receive a negative decision from the Administrative Law Judge, you will once again have 60 (+5) days to appeal. The next and final step in the administrative appeal process is the Social Security Appeals Council which is strictly a paper process. You do not have a right to appear in person. In order to request review by the Appeals Council, you must fill out Social Security Administration Form HA-520 “Request for Review of Hearing Decision/Order of Administrative Law Judge.” This form is also available on the Social Security website, www.socialsecurity.gov/online/ha-520.pdf.

Social Security Appeals Council

- It is not uncommon for cases to remain at the Appeals Council for a couple of years. After the Appeals Council, the next step is to a federal district court. However, this is a step which you should not take without consulting an attorney. Hopefully, we will have a U.S. Supreme Court decision well before you receive an Appeals Council decision.

For more information read GLAD's report, *Social Security and the Defense of Marriage Act: Can I Do Anything Now to Preserve My Rights?*

www.nsclc.org/index.php/glad-report-on-doma-urges-same-sex-couples-to-apply-for-social-security-now/

Gerald A. McIntyre
gm McIntyre@nsclc.org

www.NSCLC.org