

Social Security Benefits for Same-Sex Couples: A Brief Update
December 15, 2015

After the Supreme Court handed down its opinion in *U.S. v. Windsor* (June 26, 2013), all federal agencies had to determine which same-sex spouses it would recognize. Most agencies adopted a “place of celebration” rule, which recognized valid marriages entered into in marriage recognition states even if the couple was domiciled in a non-recognition state. But the Social Security Administration determined it could not adopt such a rule. The definition of spouse for Social Security benefits is controlled by statute. See 42 USC §416(h):

Determination of family status

(1)(A)(i) An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this subchapter if the courts of the State in which such insured individual is **domiciled at the time such applicant files an application**, or, if such insured individual is dead, the courts of the State in which he was **domiciled at the time of death**, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.

Now that the Supreme Court has handed down its decision in *Obergefell*, holding that all states must recognize marriages of same-sex spouses, the domicile rule does not create any problems. But, unlike the tax law rules, a person who is seeking a spousal benefit cannot file an “amended application” to seek past benefits. Benefits are available only from the date an application is filed. If an application has been filed and denied, the person seeking benefits should be allowed past due benefits, dating back to the date of initial application. There is case law supporting this position. See *Hurvich v. Califano*, 457 F. Supp. 760 (N.D. Cal. 1978).

Here are the most important points for same-sex couples to consider regarding social security benefits:

1. Spouse A is entitled to one-half of the social security benefit of Spouse B so long as that 50% benefit is higher than Spouse A’s own benefit, based on his or her earnings record.
2. Spouses used to be able to manipulate the social security rules so that one spouse would claim the spousal benefit and “suspend” the application for her own benefit until age 70 at which time the benefit would be much larger. Congress recently enacted legislation preventing spouses from engaging in this practice any more, although the option is still available for spouses who are already 62.

3. An ex-spouse is entitled to a spousal benefit (50% of the worker's benefit) provided the marriage lasted at least ten years.
4. A surviving spouse is entitled to 100% of the deceased spouse's benefit (if larger than the surviving spouse's own benefit) provided the couple was married at least 9 months.
5. Registered Domestic Partners (RDPs) and Civil Union Partners (CUPs) are entitled to spousal benefits because 42 U.S.C. §416(h)(1)(A)(ii) provides that even if the applicant is not recognized as a spouse under state law the applicant shall nevertheless be deemed to be as spouse "if such applicant would, under the laws applied by such courts in determining the devolution of intestate personal property, have the same status with respect to the taking of such property as a [spouse] of such individual." This rule will apply to state-recognized relationships that are not spousal equivalents if the relationship benefits include a spousal intestacy right. See, e.g., Hawaii's Reciprocal Beneficiary provisions.
6. In calculating the time limits mentioned above, a couple can "tack" RDP or CUP years to marriage if the relationship is converted from a partnership to a marriage.
7. A divorced or surviving spouse will lose the spousal benefit if he or she remarries. That rule is contained in a different part of the Social Security Act from the definition of family status provision. The statute mentions marriage, not spouse. Marriage is not defined in the statute and so is controlled by state law. RDPs and CUPs under state law are not married. And so even though they can claim spousal benefits under the special intestacy rule defining family status, they should not lose any spousal benefit by entering into another RDP or CUP.