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# **Social Security for Matrimonial Law Practitioners**

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## **I. Introduction**

Matrimonial attorneys often deal with situations where one or both spouses are receiving or claiming Social Security benefits. The rules governing entitlement to benefits and the amount of benefits due can become confusing in situations where there is a current and an ex-spouse, especially of a deceased or a disabled worker; or when a divorced spouse has custody of the minor child of a retired or disabled worker receiving some sort of Social Security benefits.

Clients frequently ask us whether being deemed “disabled” by Social Security and in receipt of Social Security (especially Social Security Disability) benefits can lead to a modification of any support obligations. This is especially relevant in cases where there are children under age 18 living with the non-disabled or retired parent that are receiving child support.

Although we leave it to the matrimonial bar to determine if these benefits can lead to modification of mutually agreed upon or court-ordered support or other payments, we will attempt to delineate some of the common entitlement scenarios that you may come across and the criteria for receipt of benefits in those situations.

## **II. General Information**

Most people are very familiar with the requirements for Social Security Retirement (SSR) and we will not dwell on it here. Generally, anyone with 40 quarters of coverage in their lifetime will be eligible for reduced benefits at age 62 and full benefits at age 65 and six months in 2003. Full retirement age is increasing by two months per year and will remain age 66 from 2006 to 2016. Early retirement age will continue to be 62. Social Security Retirement recipients are eligible for Medicare at full retirement age.

Questions of disability are more complicated and can lead to many different scenarios depending upon marital status and widowhood. First it may be necessary to determine if someone is or should be entitled to benefits based upon a disability. The Social Security Act has created two programs for the disabled, Social Security Disability (SSD) and Supplemental Security Income (SSI).

While distinct from Social Security Retirement, they are related to each other insofar as the medical criteria and determination process for entitlement are the same and they both pay a monthly benefit to disabled individuals. Disability is defined as the inability to

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engage in any substantial gainful activity (by reason of any medically determinable mental or physical impairment) that can be expected to result in death or to last for a continuous period of not less than twelve months. (42USCA 416(i), 423 (d)).

Auxiliary benefits may be payable to survivors, spouses or children under both Social Security Retirement and Disability and will be discussed in some detail later in this article. There are no auxiliary benefits under the SSI program.

### III. General Disability Criteria

To be found disabled, a claimant must show that he or she cannot perform any work available within the national economy. The test is not whether he or she can perform past work. If the medical condition meets a specified level of severity (called a "Listing"), then the claimant will be found disabled. If, however, the impairment does not rise to the level of severity to meet a Listing, the condition will be evaluated considering the age, education and past work history of the applicant.

To be eligible for SSD, a claimant over the age of 31 must have worked 20 of the 40 quarters (or credits) prior to the onset of disability ("currently insured") and a total number of quarters equal to their age less twenty-one ("fully insured"). A claimant under the age of 31 needs at least six quarters of coverage to be fully insured and a total number of quarters equal to their age less twenty-one to be currently insured. To achieve a quarter of coverage, gross earnings in 2003 must be at least \$835. That figure increases from year to year. A worker can earn no more than four quarters of coverage in any calendar year; however, there is no set time period within the year that the quarters must be earned so that an individual with high earnings can earn their four quarters in a matter of weeks.

While there are no limitations on the amount of unearned income or assets that a SSD recipient can get, other benefit sources such as No-Fault Insurance payments or Long Term Disability generally offset benefit payments based on receipt of SSD or SSI. SSD Payments are based on what the claimant has paid into the system during his or her working life. Those benefits are currently maximized at just under \$1900 per month. The computation of monthly benefits is extremely complex and best left to Social Security. However, a worker can obtain his benefit estimate by accessing the Social Security web site: [www.ssa.gov/mystatement/](http://www.ssa.gov/mystatement/). In the alternative, any individual paying FICA taxes can expect to receive a benefit estimate every year by mail approximately three months before his or her birthday.

An adult, who is not currently or fully insured but whose income and assets satisfy the limits set by the Social Security Administration, will be entitled to SSI benefits if he or she meets the medical criteria for disability as described above. While the limitations on income and assets are quite low, the benefits are as well. Currently the maximum SSI benefit for a New York resident is \$700 per month. That figure can be reduced depending on a beneficiary's living arrangements or whether he or she is receiving income or assistance (whether financial or in kind). The specifics of SSI benefit calculations are

complex and we have learned to rely on the SSI specialists at the local Social Security Offices in this area to help guide us through the more complicated eligibility issues.

Although an individual getting SSD benefits may have unlimited *unearned* income (from, for example, investments or spousal support) both SSD and SSI recipients are limited in the amount of income that they can *earn* while continuing to receive benefits. For SSI, benefits are reduced one dollar for every two dollars of income per month after the first \$65 of wages or \$20 of other income. For SSD, the amount of allowable monthly earnings goes up yearly. There is a complex interplay between earnings considered to be Substantial Gainful Activity (SGA) and earnings received during a Trial Work Period (TWP).

Work activities resulting in earnings over a certain amount per month will be considered part of a Trial Work Period (TWP). A TWP is a period of nine cumulative months in which a beneficiary earns more than the TWP limit while continuing to receive SSD benefits. In 2001 the monthly amount was \$530, in 2002 it was \$560, in 2003 it is \$570. In 2004 it will be \$580 per month.

At the end of the nine-month period, the Administration reviews any subsequent work activity to determine whether the work performed was SGA. Monthly earnings over the SGA amount after the TWP will lead to a termination of benefits. Ongoing earnings below SGA can continue in addition to the receipt of SSD. The monthly SGA amount for 2001 was \$740, 2002 was \$780, 2003 was \$800 and in 2004 will be \$810 per month. *Any* work activity, even if it is below the SGA and TWP amounts, can trigger a CDR and the Social Security Administration may conduct one at any time regardless of work activity.

A determination of disability does not assume permanency and does not preclude either a beneficiary's return to work (as discussed above) or a Continuing Disability Review (CDR) by the Social Security Administration to determine if the disability continues on a medical basis. In any CDR the burden of proof is on the Social Security Administration to show medical improvement to the level where work can be performed. If current medical evidence shows a lack of medical improvement, benefits will continue, assuming that there are no issues related to work activities to complicate matters. Less than 10% of the people who undergo CDR's ever lose their benefits.

An SSD recipient is eligible for Medicare 30 months after the date that his or her disability is found to have begun. Medicare is only for the insured and does not cover a spouse or dependent under either SSD or SSR. An SSD recipient is eligible to extend COBRA coverage from the normal 18 months up to 29 months to sustain coverage until Medicare eligible. Unfortunately, many SSD recipients are not found disabled until well beyond the 18-month COBRA period and cannot take advantage of this extension. Many others cannot afford to regardless of the time frames.

An SSI recipient is eligible for Medicaid immediately upon being awarded benefits, and retroactive to the date of entitlement; however, it should be noted that many SSI recipients are already receiving Medicaid before their SSI applications are approved.

#### IV. Parent's and Children's Benefits

A) The child of a retired, disabled or deceased wage earner is entitled to child's benefits if that child is unmarried, a dependent of the wage earner as defined in the regulations and either less than 18 years old or over 18 but a full time secondary school student until age 19.

A child over 18 whose disability is found to exist continuously from prior to age 22 can receive disability benefits based on the account of a deceased, disabled or retired parent. This becomes important in the case of a disabled adult child who is receiving SSI while the parents were alive or working. After the child reaches 18 and the death, retirement or disability of a parent occurs, that child will be eligible for what is ordinarily the higher benefit on the parent's account as a Disabled Adult Child (DAC).

The "child" of a wage earner can be a natural child, an adopted child, a stepchild, grandchild, grand stepchild, or equitably adopted child. Furthermore, identifying a child as the natural child of the deceased can involve the examination of State laws of Intestacy as well as Family Court rules on establishing paternity or maternity. In some situations, it is also necessary to prove that the wage earner was either living with the child or was contributing to the child's support. An additional requirement for a grandchild or step-grandchild to receive benefits is that the child's natural or adoptive parents must be either disabled or deceased.

B) Both a surviving spouse or a spouse of an SSD recipient (whether or not divorced) are entitled to mother's or father's benefits where the following requirements are satisfied: For a widow(er), the requirements are that the applicant is the widow of the insured and the marriage lasted at least nine months prior to the death of the wage earner, the applicant is unmarried and has "in his or her care" the insured's child who is entitled to child's benefits and is under 16 years old or disabled. For both, a second requirement is that the individual collecting mother or father's benefits earn below \$11,520. Any earnings above that amount will reduce the benefits \$1 for every \$2 earned. For a surviving divorced spouse, the requirements are generally the same except that the child must have been born or adopted while the pair was married.

#### V. Spouses and Widow's Benefits

A) As most of you are aware, the surviving spouse of a fully insured worker can receive the spouse's benefit amount if it is greater than their own amount and the surviving spouse is 60 years of age or older and not remarried. However if the surviving spouse opts to take the widow(er)s benefits prior to full retirement age, there is a reduction similar to the wage-earner electing to take retirement benefits prior to full retirement age.

B) A surviving divorced spouse is similarly entitled to benefits on the ex-spouse's account after age 60, if the spouse remained unmarried, and had been married to the wage-earner for at least 10 years prior to the date the divorce became final. The benefits

would only be paid if they are higher than what the surviving party was entitled to on his or her own account.

The advantage of filing in both of the above scenarios is that benefits can be payable at age 60 instead of 62 or 65+, at least 2 years earlier than any benefits due on their own account.

C) A disabled widow(er) may be eligible for a deceased spouse's benefit amount if the disability began no more than seven years after the worker died or no more than seven years after the wage earner's youngest child turned sixteen years old. In a situation where both the widow(er) and the deceased wage earner have earnings posted with the Social Security Administration, the amount of the benefit paid shall be the higher amount.

Although the disability criteria are the same for a widow(er) as for a wage-earner, additional requirements are that the widow(er) must also be at least 50 years old; have been married for at least nine months immediately preceding the death of the wage earner (or have been married less than nine months but where the wage earner was reasonably expected to live for nine months and the death was either accidental or occurred in the line of duty while on active duty in a uniformed service); or is the biological parent of the deceased's child or have been married to the deceased at the time that he or she adopted a child under 18 years old. Where a widow(er) remarries after age 50, he or she will be eligible for widow's benefits if he or she was already in pay status prior to the date of marriage or if the disability existed prior to the date of remarriage (even if no application has been filed).

D) A disabled divorced widow(er) is also eligible for widow (er)'s benefits if he or she satisfies the requirements noted above and if he or she was validly married to the deceased or they were deemed to have been validly married and the marriage lasted for at least ten years prior to divorce.

E) Remarriage of a surviving widow or divorced spouse after age 60 will not prevent entitlement to benefits on the prior deceased spouse's record. However, remarriage prior to age 60 will prevent entitlement unless the subsequent marriage ends, in which case the surviving spouse then becomes reentitled to benefits on the account of the first ex-spouse

Both a current spouse and a divorced ex-spouse can receive benefits simultaneously on the decedent's account without reducing the amount of either one's entitlement.

To protect the rights of a former spouse or estranged children it should also be stated in any separation agreement or stipulation of settlement that an individual filing for Social Security benefits provide the names of any former spouses and all children in the appropriate part of the application. While merely listing the ex-spouses and children on the application will not guarantee that benefits will be paid, it might allow the former spouse an/or children to receive more than the usual 6 months of retroactive benefits if

they do not file for benefits in a timely fashion due to the primary beneficiary's failure to notify the potential auxiliary beneficiaries.

## VI. Miscellaneous situations

In the case of two marriages ending prior to age 60, each lasting over ten years, a surviving ex-spouse may actually be entitled to benefits on more than one account. In that case, the higher amount will be paid, not both.

A surviving spouse, whether or not married at the time of the spouse's death, could receive benefits on the spouse's account from age 60 and then switch to their own account, if the benefits are higher, at age 62 or even later.

As indicated above, the spouse of a disabled or deceased worker may find his/her benefits reduced if they are earning in excess of \$11,520 yearly. Furthermore, there is a family maximum, which, if exceeded, will lead to a reduction of benefits for a spouse or child of a retired or disabled worker.

Social Security benefits may be taxable if other income exceeds \$25,000 for a single filer and \$32,00 for those married, filing jointly. Regardless of other income, however, Social Security benefits are taxable at less than the regular income rate. Clients should consult their tax professionals with regard to this matter. As a rule, we have found that the issues surrounding taxation of Social Security benefits are a simple matter for those professionals.

While the rate of taxation of benefits is not complicated, problems frequently occur when trying to determine what Social Security benefits are taxable. Specifically, the 1099-SSA forms that are issued to beneficiaries each year are often confusing, illogical or simply unfair. They include, for example, benefits that were not really paid to a beneficiary, but were offset due to receipt of Workers' Compensation over an allowable figure or withheld and paid directly to an attorney by Social Security as a fee for services in a disputed claim. In these situations, we recommend deferring to a tax practitioner on how to deal with these issues.

## VII. Suggestions and Resources

It is important to note that the benefits we have been discussing are not automatic and an additional requirement for all of these benefits is that the auxiliary beneficiaries must apply for their benefits even though they may be mentioned in the initial application. Contrary to what much of the public believes, Social Security is not automatically aware of the existence of, and certainly not the location of, a surviving divorced spouse and/or children. In cases where spouses and children are estranged from the deceased or

disabled individual, that can lead to a loss of benefits as Social Security will only pay benefits up to six months retroactive to the date of an application.

Because of the filing requirement it is imperative that practitioners include language in any separation agreement or divorce decree obligating the parties to keep each other informed of their Social Security status, specifically whether they have applied for or are receiving any Social Security benefits.

That family maximum amount mentioned above, as well a good deal of other information, can be found on the Benefit Estimate and Earnings Record form. That form is available from Social Security's website [www.ssa.gov](http://www.ssa.gov) and is mailed to most workers annually in the third month before their birthday month. Your clients should be advised to check the posted earnings closely, as mistakes are often made. Fortunately, mistakes are easily rectified by bringing the appropriate W-2 and tax records to the local Social Security office.

Besides the Social Security website referred to above, a wealth of information regarding entitlement to benefits and all aspects of Social Security can be found in the Social Security Manual, published annually by the National Underwriter Company. Although designed for use by the insurance industry, it is written by a lawyer, and easy to use.

Practitioners desiring the Regulations supporting the content of this article are referred to Title 20 of the Code of Federal Regulations (CFR), Parts 401-404, 416 and 422.

Finally, we are happy to discuss specific or general questions regarding Social Security law and practice with members of the bar at any time.



## I. AGREEMENTS

### A. CONSTRUCTION & PENSIONS

1. Daloia v. Burt - 761 N.Y.S.2d 91 (2nd Dept., 2003)

Summary: Where the Defendant failed to exercise his right to buy the marital residence within the time set forth in the parties' stipulation, the Court had no authority to extend his time. Violated principle requiring strict compliance with the terms of an option.

2. Grieco v. Grieco - 761 N.Y.S.2d 750 (3rd Dept., 2003)

Summary: Error for the Court to order Defendant to select pop-up allowance and that the parties share the cost, where the parties' agreement specifically provided that the Wife could select the option but that she would bear the cost.

3. Link v. Link - 759 N.Y.S.2d 133 (2nd Dept., 2003)

Summary: In 1993, Husband and Wife signed an agreement which provided that the Wife receive 50% of the marital portion of Husband's pension. In 2000, Husband was injured on duty and was granted disability and retirement benefits which were paid in one check. The Wife received her 50% of the total which was error. The Wife is entitled to ½ of the marital portion of so much of the pension as represents deferred compensation and no part of what constitutes compensation for personal injuries.

### B. CONSTRUCTION

1. Edwards v. Poulmentis - 763 N.Y.S.2d 677 (2nd Dept., 2003)

Summary: Where the parties' agreement expressly provided that the parties would resolve a dispute as to education through mediation, Father was required to participate in mediation. Parties' Agreement provided in part that it is anticipated that the subject child would attend a particular parochial school unless the parties agree upon another parochial or private school or a