

SOCIAL SECURITY BENEFITS

**Pi-Yi Mayo, CELA
Attorney at Law
5223 Garth Road
Baytown, Texas 77521
(281) 421-5774**

*Certified Elder Law Attorney by the National Elder Law Foundation

Nothing in this paper is to be construed as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This publication is intended for educational and informational purposes only.

2003 Copyright, Pi-Yi Mayo, All Rights Reserved

I. Regular Social Security

One of the most important benefits that an attorney may be concerned about will be what is commonly referred to as Social Security. What is meant by the term Social Security is a benefit program that is actually named Retirement, Survivors and Disability Insurance programs (RSDI). This program is considered to be the foundation of our country's safety net. The program provides a monthly cash benefit to eligible persons. Prior to the creation of the Social Security program many elderly or retired persons in America were dependent on the income from their savings and largess of family members. As the recent performance of many financial assets have shown income from investments is subject to wide swings in return. For many Americans their monthly social security check may be their only source of income. The amount of Social Security benefits received will be based on the earnings record of the worker. The higher wages earned and the more paid into the system the higher the benefit check of the beneficiary. The facet of the program that is of most importance to this paper is that a person that is eligible for Social Security benefits is likewise eligible for Medicare Benefits. Eligibility for benefits is usually not a issue for most individuals that have worked at employment where they drew a salary and paid FICA through payroll deductions from their pay. The issue that can arise in many cases is the eligibility for benefits of persons other than a wage earner. There are ways for persons other than the wage earner such as family members to obtain eligibility for benefits as a result of payment into the system by a relative.

1

Importance of Social Security

Social Security is a nonmeans tested program, unlike some government programs the income and assets of a person have nothing to do with eligibility. Eligibility is obtained by paying into the system and is based upon earning a sufficient number of quarters of coverage. Dependants of a wage earner can obtain eligibility on the earnings record of a wage earner in their family. The benefits of obtaining Social Security include a monthly check and access to Medicare coverage.

Another component of RSDI is what is commonly referred to as Social Security Disability (SSD). This is a benefit that a disabled spouse, widow or the disabled adult child of wage earner may qualify to receive. The benefits of SSD include a monthly check and access to Medicare coverage. The SSD program is not a means tested program. Eligibility is conditioned on a qualified event discussed below, the relationship of the applicant to the wage earner and the disability of the applicant.

A.

Spouse Benefits

The regulations that govern who can qualify for Social Security benefits on the earnings record of a spouse are found at 20 CFR § 404.330. The regulations set forth that the wage earner whose record you are attempting to obtain benefits under must be an insured person and must be entitled to old age or disability benefits. That means the spouse or former spouse must have the required number of quarters of coverage and must meet the requirements to draw Social Security or Social Security Disability (qualifying event) themselves.

1. Must be the spouse The spouse must be the insured's wife or husband based the laws of the State where the insured had a permanent home when the application for wife's or husband's benefits was filed. To decide the relationship of the insured's widow or widower, the laws of the State where the insured had a permanent home when he or she died are applied. If the insured's permanent home is not or was not in one of the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, or American Samoa, the marital laws of the District of Columbia are applied. If your client and the insured were validly married under State law at the time of applying for wife's or husband's benefits or at the time the insured died, and if you apply for widow's, widower's, mother's, or father's benefits, the relationship requirement will be met. The relationship requirement will also be met if under State law the applicant would be able to inherit a wife's, husband's, widow's, or widower's share of the insured's personal property if he or she were to die without leaving a will. 20 CFR § 404.345

If your client's relationship as wife, husband, widow, or widower cannot be established under State law they may be able to obtain benefits based upon a deemed valid marriage. An applicant will be deemed to be the wife, husband, widow, or widower of the insured if, in good faith, they went through a marriage ceremony with the insured that would have resulted in a valid marriage except for a legal impediment. A legal impediment includes only an impediment which results because a previous marriage had not ended at the time of the ceremony or because there was a defect in the procedure followed in connection with the intended marriage. For example, a defect in the procedure may be found where a marriage was performed through a religious ceremony in a country that requires a civil ceremony for a valid marriage. Good faith means that at the time of the ceremony the applicant did not know that a legal impediment existed, or if they did know, they thought that it would not prevent a valid marriage. 20 CFR § 404.346

2. Duration Requirement The applicant's relationship to the insured as a wife or husband has lasted at least 1 year. (You will be considered to meet the 1-year duration requirement throughout the month in which the first anniversary of the marriage occurs.)

3. Parental Status The applicant and the insured are the natural parents of a child; or

4. Prior Eligible Status In the month before marrying, the insured, your client, was entitled to, or had applied and been old enough to have been entitled to, any of these benefits or payments: Wife's, husband's, widow's, widower's, or parent's benefits; disabled child's benefits; or annuity payments under the Railroad Retirement Act for widows, widowers, parents, or children 18 years old or older;

5. Application Your client must file an application with the Social Security Administration.
6. Age or child caretaker status The applicant is age 62 or older throughout a month and meets all other conditions of entitlement, or are the insured's wife or husband and have *in your care*, throughout a month in which all other conditions of entitlement are met, a child who is entitled to child's benefits on the insured's earnings record and the child is either under age 16 or disabled; and
7. No status of your own You are not entitled to an old-age or disability benefit based upon a primary insurance amount that is equal to or larger than the full wife's or husband's benefit. This means that if the applicant has an earnings record of their own that would entitle them to a benefit higher than the benefit they could obtain on the earnings record of a spouse they will receive the higher benefit from their own record.

B.

Widow's or Widower's Benefits

Your client may be entitled to benefits on the earnings record of their deceased spouse if the deceased spouse was a fully insured individual when they died and the widow or widower meets the following requirements for either regular Social Security or Social Security Disability benefits:

1. Must be spouse The applicant must be a spouse under the requirements set forth above in C. 1.
2. Duration The applicant's relationship to the insured as a wife or husband lasted for at least 9 months immediately before the insured died. If the relationship to the insured as a wife or husband did not last 9 months before the insured died, but at the time of the marriage the insured was reasonably expected to live for 9 months and the death of the insured was accidental. The death is accidental if it was caused by an event that the insured did not expect; it was the result of bodily injuries received from violent and external causes; and as a direct result of these injuries, death occurred not later than 3 months after the day on which the bodily injuries were received. An intentional and voluntary suicide will not be considered an accidental death; or the death of the insured occurred in the line of duty while he or she was serving on active duty as a member of the uniformed services; or

the applicant had been previously married to the insured for at least 9

months.

iii. Parental Status The applicant and the insured are the natural parents of a child; or were married to the insured when either of you adopted the other's child or when both of you adopted a child who was then under 18 years old.

iv. Prior Eligible Status In the month before marrying, the insured your client was entitled to, or had applied and been old enough to have been entitled to, any of these benefits or payments: Wife's, husband's, widow's, widower's, or parent's benefits; disabled child's benefits; or annuity payments under the Railroad Retirement Act for widows, widowers, parents, or children 18 years old or older;

v. Application Your client must file an application with the Social Security Administration. However, there are some complex provisions that explain when it may be possible to obtain eligibility without application. The safer practice is to file an application in all cases.

vi. Age Requirement The applicant must be at least 60 years old; or at least 50 years old and disabled under the SSD rules and the disability started not later than 7 years after the insured died or 7 years after you were last entitled to mother's or father's benefits or to widow's or widower's benefits based upon a disability, whichever occurred last.

vii. No status of your own You are not entitled to an old-age or disability benefit based upon a primary insurance amount that is equal to or larger than the full wife's or husband's benefit. This means that if the applicant has an earnings record of their own that would entitle them to a benefit higher than the benefit they could obtain on the earnings record of a spouse, they will receive the higher benefit from their own record.

viii. Martial Status You are unmarried, unless--

(1) You remarried after you became 60 years old or if you re married and the subsequent marriage ends by death, divorce or annulment ; or

(2) For benefits for months after 1983--

(i) You are now age 60 or older;

(ii) You remarried after attaining age 50 but before attaining age 60; and

(iii) At the time of the remarriage, you were entitled to

widow(er)'s benefits as a disabled widow(er); or

- (3) For benefits for months after 1983--
 - (i) You are now at least age 50 but not yet age 60;
 - (ii) You remarried after attaining age 50; and
 - (iii) You met the disability requirements in paragraph (6) of this section at the time of your remarriage (i.e., your disability began within the specified time and before your remarriage).

c.

Divorced Spouse's Benefits

The divorced spouse of a wage earner is entitled to benefits under certain circumstances. The specific requirement of eligibility under these rules may be an important factor in how a divorce of a couple approaching retirement age is handled. *In some cases the issue of the loss of these benefits may play a role in a couple's decision on whether they will enter a marriage or remain single.* These are fact situations of particular interest to the family law attorney. Your client may be entitled to wife's or husband's benefits as the divorced wife or divorced husband of an insured person who is entitled to old-age or disability benefits (that is the former spouse of your client has reached retirement age or become disabled themselves). In other cases your client may be entitled to benefits even though the insured person (former spouse) is not yet entitled to benefits, if the insured person is at least age 62. 20 CFR § 404.331 The surviving divorced spouse is also eligible for both Social Security and Social Security Disability on the earnings record of their deceased former spouse.

i. Divorced spouse entitled to old age or disability benefits

- (1) Your client is the insured's divorced wife or divorced husband and--
 - (a) They were validly married to the insured under State law as described in section C. 1 and
 - (b) They were married to the insured for at least 10 years immediately before your divorce became final;
- (2) Your client must file an application with the Social Security Administration.
- (3) Your client has not remarried. (For purposes of meeting this requirement, you will be considered not to be married throughout the month in which the divorce occurred);
- (4) Your client is age 62 or older throughout a month in which all other conditions of entitlement are met; and
- (5) Your client is not entitled to an old-age or disability benefit based upon a primary insurance amount that is equal to or larger than the full wife's or husband's benefit.

ii. Divorced spouse at least 62 years of age and not yet entitled to benefits Your client will be entitled to these benefits even though the

insured person (their former spouse) is not yet entitled to benefits, if the insured person is at least age 62 and your client meets the requirements of prior section E. 1. above and if they have been divorced from the insured person for at least 2 years.

d.

Widow's or Widower's Benefits as a Surviving Divorced Spouse

The surviving divorced spouse of a deceased wage earner is entitled to Social Security benefits on the earnings record of their deceased former spouse if: 20 CFR § 404.336

i. They are the insured's surviving divorced wife or surviving divorced husband and—

(1) (1) They were validly married to the insured under State law as described in C. 1. above.

(2) (2) They were married to the insured for at least 10 years immediately before their divorce became final;

ii. Your client must file an application with the Social Security Administration. However, there are some complex provisions that explain when it may be possible to obtain eligibility without application. The safer practice is to file an application in all cases.

iii. The applicant must be at least 60 years old; or at least 50 years old and disabled under the SSD rules and the disability started not later than 7 years after the insured died (the former spouse) or 7 years after you were last entitled to mother's or father's benefits or to widow's or widower's benefits based upon a disability,

iv. Your client is not entitled to an old-age or disability benefit based upon a primary insurance amount that is equal to or larger than the full wife's or husband's benefit. This means that if the applicant has an earnings record of their own that would entitle them to a benefit higher than the benefit they could obtain on the earnings record of a spouse they will receive the higher benefit from their own record.

v. Your client remains unmarried, unless for benefits for months after 1983—

(1) Your client remarried after they became 60 years old; or

(2) They are now age 60 or older;

(a) They remarried after attaining age 50 but before attaining age 60; and

(b) At the time of the remarriage, they were entitled to widow(er)'s benefits as a disabled widow(er); or

-
- (3) They now at least age 50 but not yet age 60;
 - (a) They remarried after attaining age 50; and
 - (b) They met the disability requirements in paragraph (5) of this section at
 - (c)
 - e.

Social Security Benefits for Children

The ability of a child to obtain Social Security benefits is limited to three circumstances. If the child is disabled and under age 18 with limited income and resources or living in a home with limited income and resources they may be able to qualify for Supplemental Security Income (SSI). This is a means tested program and the ability to qualify based on income and assets is very complicated. The issue of SSI eligibility will be discussed below. The other benefits are both regular social security benefits and their eligibility is not means tested. A child's ability to qualify for these benefits is based on his or her relationship to a wage earner and the child's age and if they are disabled. The first category of eligibility is when a child of a wage earner is under age 18 and their parent is deceased. The second category of eligibility is when the wage earner is living and the parent is either retired or disabled themselves, their child will be eligible for benefits. A child may qualify for RSDI benefits on the earnings record of a parent even if his or her parents are divorced. 20 CFR § 404.350

i. Must meet SSA definition of a child A child will be entitled to child's benefits on the earnings record of an insured person who is entitled to old-age or disability benefits or who has died if the child is the insured person's child, based upon a relationship described in 20 CFR § 404.355. Any of the following will allow a child to qualify for benefits from a wage earner:

- (1) The child must be able to inherit the insured's personal property as his or her natural child under State inheritance laws. If the State's inheritance law requirement is used, there is no statute of limitations even if the State law imposes such a requirement. If the State law requires a paternity action, the SSA will not require the filing of such
- (2) action but will make a determination by using the same standard of proof as the State court would use.
- (3) The child is the natural child of the insured and the insured and their mother or father went through a ceremony which would have resulted in a valid marriage between them except for a "legal impediment" as described above in C. 1.
- (4) The child is the insured's natural child and their mother or father has not married the insured, but the insured has either acknowledged in writing that the child is his or her child, been decreed by a court to be the father or mother, or has been ordered

by a court to contribute to the child's support because he or she is a parent of the child. If the insured is deceased, the acknowledgment, court decree, or court order must have been made or issued before his or her death.

(5) The child is shown to be the natural child of the insured by other evidence and additionally, the child must have evidence to show that the insured was either living with the child or contributing to their support at the time the application for benefits is filed or at the death of the insured.

ii. The child is a dependent of the insured The definition of a dependant is found at 20 CFR §§ 404.360 through 404.365. *This is the section that allows children to qualify on the earnings record of stepparents and grandparents or step-grandparents.* A child can be considered a dependant of an insured if:

(1) A child is considered "dependent" upon the worker if the child has not been legally adopted by someone other than the worker during the worker's lifetime and the child is either of the following:

- (a) The legitimate child of the worker;
- (b) A child born out of wedlock who would have the right under applicable State law to inherit intestate property from the worker as a child;
- (c) The child of a void or voidable marriage;
- (d) The child of an invalid ceremonial marriage;
- (e) A deemed child under G.1.a.(3) or (4) above, the section dealing with acknowledgment of paternity voluntarily or by court decree; or
- (f) The legally adopted child of the worker adopted before the worker's entitlement to benefits.

(2) A child is considered "dependent" upon the worker even if the child has been legally adopted by someone other than the worker during the worker's lifetime and the child is and the child has been living with or receiving contributions from the worker at the applicable time, including the date of application or the death of the insured.

(3) A child is considered "dependent" upon a stepparent if the stepparent was contributing at least one-half of the child's support at the applicable time. 20 CFR § 404.363

(4) A child is considered "dependent" upon a grandparent or step-grandparent if the grandchild began living with the worker

before the grandchild became 18 years old; and lived with the worker in the U.S. and received at least one-half support from the worker for the year before the month the worker became entitled to retirement or disability insurance benefits or died. If the grandchild was born during the one-year period, the worker must have lived with and provided at least one-half of the grandchild's support for essentially the entire period from the date of the grandchild's birth to the worker became entitled to retirement or disability insurance benefits or died.

iii. The child must file an application.

iv. The child is unmarried; and

v. The child meets the age requirements The child must be under age 18; or 18 years old or older and have a disability that began before age 22; or are 18 years or older and qualify for benefits as a full-time student at as a full-time elementary or secondary school student. 20 CFR § 404.367.