

Social Security and the Divorced Spouse: The Lawyer's Primer

by Dale E. Console

In 1997, the median income for elderly unmarried women (widowed, divorced, separated and never married) was \$11,161, whereas the median income for elderly unmarried men was \$14,769. Elderly married couples receive \$29,278. The poverty rate for elderly women was 13.1 percent, compared to 7.0 percent for elderly men. For unmarried elderly women, the poverty rate was significantly higher — around 19 percent.¹

The Social Security benefits available to a divorced spouse are often a crucial factor overlooked or misunderstood in divorce settlements. While we all tend to know something about Social Security benefits, few of us are truly conversant with the law and how it may impact on an individual case. Furthermore, litigants often rely on information which is not reliable, and Social Security personnel, while generally helpful and well-informed, are usually loathe to provide you with the source of their information or any written confirmation of the information they provide.

The Social Security statutes are written in confusing language which is replete with numerous exceptions, exclusions and limitations, as well as cross-references to other provisions of the statute which are equally opaque. While the Social Security Administration Handbook, which is available from Social Security

The Social Security benefits available to a divorced spouse are often a crucial factor overlooked or misunderstood in divorce settlements.

and is on the Internet, is written in plain English, it often fails to cross-reference other relevant sections.

In an effort to provide some coherence to this maze, the following is a primer on the Social Security benefits available to a divorced spouse. This article is limited to the old age benefits, and does not deal with disability benefits which may or may not overlap with old age benefits. Similarly, benefits available to children are not referenced, as these rules rarely apply to the parties who are divorcing in their 60s.

In theory a divorced spouse is entitled to the same benefits as a married spouse. A divorce for Social Security purposes is defined

as a divorce "*a vinculo matrimonii*"² or an absolute divorce. A divorce from bed and board (*a mensa et thoro*) is not a divorce for Social Security purposes, and provides the "divorced" spouse with the same rights as a non-divorced spouse. In some circumstances, the divorced spouse is entitled to greater benefits than the non-divorced spouse.

For married couples there is a family limitation which may limit the amount a spouse may receive, even if he or she meets the other requirements. If you are contemplating a divorce from bed and board for medical insurance or other purposes, you should check with Social Security to find out if the family limitation will apply, and what the reduction will be. This can be a significant amount, which may offset the benefit of the limited divorce.

Old age Social Security benefits are determined by age and work credits. From the worker's history a primary insurance amount (PIA) is calculated, which determines the worker's entitlement and that of a spouse and other qualified dependents. Retirement age, also referred to as full retirement age (FRA), is presently age 65. Beginning in the year 2000 FRA will gradually increase to 67 in the year 2022. The phase-in applies to workers born in 1938 or later. For those born between 1943 and 1955, FRA is

66; for those born in 1960 or later it is 67. Those in between are subject to a phased-in formula.³ A worker who continues to work after FRA may be entitled to enhanced benefits up to age 70 1/2, after which benefits are paid regardless of continued employment. A worker may elect to receive benefits at age 62, provided he or she does not have earned income which exceeds the allotted amounts. From age 62 to 65 the PIA is reduced by 5/9 of one percent for every month before age 62.⁴

To receive benefits under a former spouse's Social Security a divorced spouse must meet the following requirements:

1. A divorced spouse must be age 62 to receive a former spouse's benefits. This rule applies even if there is a dependent child.

2. The divorced spouse must file an application for the divorced spouse's benefits.

3. The parties must have been married for 10 years.

4. The divorced spouse may not receive benefits from a former spouse unless he or she is not entitled to Social Security benefits (usually due to insufficient work credits) or is entitled to a benefit which is less than 50 percent of the former spouse's benefit.

5. The divorced spouse is not married.⁵ There are some very limited exceptions to this rule.⁶

A divorced spouse who meets the above requirements and attains FRA is entitled to 50 percent of the former spouse's PIA.⁷ If the former spouse elected early retirement, the divorced spouse is only entitled to 50 percent of the reduced amount received by the former spouse. If the divorced spouse elects to receive benefits prior to FRA, that amount is reduced by 25/36 of one percent for each month prior to FRA.⁸ This amount is not increased after the divorced spouse attains FRA.

If both spouses receive early retirement benefits, there is a double deduction: The former (worker) spouse's PIA is reduced by the applicable formula and the divorced spouse's 50 percent of

that amount is reduced by the formula applicable due to the divorced spouse's early retirement. This double reduction is often significant, and once elected is irrevocable. There is no subsequent increase (other than cost of living increases).

Social Security statistics indicate that a worker who receives a reduced amount for early retirement on a monthly basis for every month is ahead on total benefits paid for the first 15 years; a divorced spouse who receives a reduced amount is generally ahead on total payments for the first 12 years.⁹ Considering that the average life expectancy of all persons aged 62-63 is 18.58 years and a woman's life expectancy at age 62 may (depending on your source) be another 23 years, these statistics are not particularly comforting.

When representing a dependent spouse it would appear prudent to negotiate for as long a delay — for both parties — in taking Social Security benefits as possible. Just as we provide that the payer spouse will not seek retirement prior to age 65, whenever possible this should extend to Social Security benefits as well. If early retirement is elected by the payer spouse, that spouse should be obligated to pay the difference in the Social Security reduction to the nonemployed spouse.

Another benefit available to a divorced spouse is the monthly survivor benefit that is payable to both the surviving present spouse of the deceased worker and the surviving former spouse of the deceased worker. This benefit is distinguished from the lump sum death benefit of \$257 which is payable to the surviving spouse only. To qualify as a surviving divorced spouse, the nonemployed spouse must be divorced from the individual who has died, must not be remarried, and must have been married to the deceased years prior to the date of the divorce.¹⁰

The surviving divorced spouse is entitled to 100 percent of the deceased worker's actual benefit, less any reduction due to the divorced spouse's election of

benefits prior to FRA.¹¹ For example, if a worker who has attained full retirement age receives \$1,250 per month, the divorced spouse of that worker is entitled to 50 percent of this at age 65, or \$625. However, if the worker dies, the divorced spouse, who was married to the worker for 10 years, is eligible to receive the full \$1,250 per month. A surviving divorced spouse may elect to receive reduced benefits at age 50 if under a disability or at age 60 if not disabled.¹² With few exceptions, this reduction is not adjusted at age 62 or 65.

The availability of this additional fund should not be overlooked in permanent alimony situations. In many cases the extra which the dependent spouse will receive upon the death of the payer spouse may well eliminate or substantially reduce the need for life insurance to replace the alimony after age 65. The surviving divorced spouse's benefit may well replace the alimony which would have been paid, thereby providing the continued income which the life insurance is intended to cover and, at the same time, reducing the cost to the payer who frequently faces skyrocketing rates for the term insurance which was a consequence of the divorce. ■

Endnotes

1. National Economic Council Interagency Working Group on Social Security, *Women and Retirement Security* (1998).
2. 42 U.S.C. sec. 416(d)(8).
3. 42 U.S.C. sec. 416(1).
4. 42 U.S.C. sec. 402(q)(1).
5. 42 U.S.C. sec. 402(b)(1).
6. 42 U.S.C. sec. 402(b)(3).
7. 42 U.S.C. sec. 402(b)(2).
8. 42 U.S.C. sec. 402(q)(1).
9. Social Security Administration Handbook sec. 724.
10. 42 U.S.C. sec. 416(d)(2).
11. 42 U.S.C. sec. 402(e)(2)(A).
12. 42 U.S.C. sec. 402(e)(1)(B).

Dale E. Console is a partner in the Skillman firm of Ulrichsen, Amarel & Eory.