

## Social Security and Divorce: Essential Considerations for Family Law Practitioners

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According to a recent article put out by the American Association for Retired Persons (hereafter "AARP"), if late-life divorce were a disease, it would be an epidemic. The trend has become so common in matrimonial practice it has derived its own nickname, known as "gray divorce." While the overall divorce rate declined nationwide from its zenith of 5.3 divorced per 1,000 people in 1981 to 3.2 divorced per 1,000 today, incidents of gray divorce doubled over the last 20 years making this a trend worthy of attention for those practicing family law.

Divorcing clients over the age of 50 face a unique and challenging process, often made complicated by concerns regarding healthcare costs, retirement, social security benefits, property division and calculating alimony. It is important that family law practitioners have a strong working knowledge of Social Security Benefits, in order to help navigate conflicts over support related issues. It is also essential that critical deadlines not be overlooked, otherwise divorcing litigants may irretrievably (*and avoidably*) lose entitlements to benefits that would have otherwise been available.

For many Americans, Social Security benefits provide an important piece of their retirement plans. This income stream is also an important consideration for attorneys confronted with alimony issues for persons approaching retirement age. This article is offered as a general roadmap of Social Security issues that may arise during a divorce proceeding while also providing various practice points along the way.

### The Basics

A person qualifies for Social Security Benefits either through marriage, or by working and paying Social Security taxes. In order to qualify for social security retirement benefits, a person needs 40 credits, which equates to 10 years of work as one can only earn a maximum of four (4) credits a year. If a person stops working, the earned credits are not forfeited and a return to work at a later time can add more credits towards qualifying. No benefits will ever be paid until a person qualifies, either through marriage or employment history.

An individual's benefit is calculated based upon how much a person earned over the course of his or her career. It is also impacted by the age at which he or she decides to retire. For example, a person choosing to retire at age 62, will have a smaller benefit than someone retiring at a later age. Additionally, if a person stops working before age 62, this will likely reduce the benefit even if the recipient doesn't yet elect to receive benefits, because they are not paying Social Security tax during those years.

Social Security Benefits begin when a person reaches a qualified age. The benefits can be paid as early as age 62, but the benefit to the recipient is reduced and in most cases, only constitutes

approximately 75% of the full benefit. However, there are limited exceptions to this rule. For example, if the early application for benefits occurs due to a disability, disability benefits are paid at the same rate as full, unreduced retirement benefits, and are converted to retirement benefits once full retirement age is reached.

Social Security Benefits can also be paid at a higher rate if the recipient works beyond full retirement age, up to age 70. Doing so creates benefit increases in two ways. First, the continued employment adds earning years to a person's Social Security record. Second, the benefit is also given a percentage increase for each year the receipt of benefits is delayed beyond the full retirement age, up until age 70. This will also increase the survivor benefit to a spouse.

A person's "full" retirement age is currently defined by the Social Security Administration as follows:

Year of Birth	Full Retirement Age
1943-1954	66
1955	66 and 2 months
1956	66 and 4 months
1957	66 and 6 months
1958	66 and 8 months
1959	66 and 10 months
1960 and later	67

**Practice Point:** In addition to informing attorneys when social security benefits can be fully realized, the above chart is worth noting for other purposes, such as when a person may retire in good faith under New Jersey's alimony statute.

In addition to knowing when and how a person may qualify for social security benefits, there are a few other considerations practitioners should be aware of when addressing alimony issues:

- A person may continue to work and earn as much as her or she wants, while receiving social security benefits. However, if a person does so and elects to receive benefits prior to reaching full retirement age, portions of the benefit payment may be withheld, though this will be credited later when full retirement age is reached.
- About 40 percent of people who receive Social Security Benefits have to pay income taxes on their benefits, based upon income levels. Clearly, an attorney must account for any tax consequences when determining cash flow for alimony purposes.

**Practice Point:** During the course of discovery, it will likely be prudent for attorneys to request a benefits statement for the parties involved in an alimony dispute. This is not difficult for clients to obtain and it may be retrieved online through the Social Security Administration's website, [www.socialsecurity.gov/myaccount](http://www.socialsecurity.gov/myaccount). The Social Security Administration also provides numerous tools on its website that may be useful in addressing alimony issues, such as various retirement calculators.

## Social Security and Divorce

A divorced party is entitled to receive Social Security Benefits on his or her ex-spouse's record. The amount of benefit that an individual can collect is limited to one half of the former spouse's benefit, unless the former spouse predeceases the individual in which case the entire benefit will be paid. The amount of benefits this party receives does not impact the benefits his or her ex-spouse will receive.

However, in order for a divorced party to qualify for benefits from their former spouse, the Social Security Administration requires that the marriage lasted longer than ten years. When an ex-spouse seeks to begin receiving benefits on their ex-spouse's record, the Social Security Administration sets forth the following requirements of the spouse seeking to receive the benefits:

- They must be unmarried;<sup>1</sup>
- They must be age 62 or older;
- Their ex-spouse must be entitled to Social Security retirement or disability benefits; and
- The benefit they are entitled to receive must be less than the benefit they would receive from the ex-spouse's work.

Additionally, if the party seeking to commence benefits meets these parameters but the higher earning ex-spouse has not yet applied for benefits despite qualifying for them, then the lower earning party must have been divorced from the higher earning spouse for at least two years before collecting on this basis.

As an added wrinkle, practitioners may wish to be aware that if they are representing a client born before January 2, 1954, and has reached the age of retirement, he/she may elect to receive the divorced spouse's benefits and delay receiving his/her own until a later time. For those born on or after January 2, 1954, that option is no longer available. In those latter instances, once a party files for a benefit, they lose the right to later change their election.

***Practice Point:** Social Security rules and regulations are subject to frequent change, and the specific election for one's benefits can often be a personal strategic decision. (i.e. whether to elect to one's own benefits or those of an ex-spouse, or whether to receive benefits early, at full retirement age, or to defer the receipt of benefits). It is likely advisable to suggest to divorcing clients that they confer with a financial advisor that can help guide these decisions.*

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<sup>1</sup> There are some exceptions to this requirement worth knowing. First, a party may still be able to receive benefits from the first ex-spouse if their second marriage ends by death or divorce. Second, if a divorced party wishes to receive survivor benefits from their ex-spouse, they may still do so even after re-marrying, so long as they are re-married at age 60 or older.