



# Consider Social Security

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**S**ocial Security is a system of social entitlement that is neither welfare nor means-based. The Social Security system provides benefits not only during retirement, but also for survivors and dependents in case of death or disability. Although Social Security benefits are not marital property, they constitute income and deserve consideration in a divorce case. Benefits are not only a potential source of child support, spousal support, or alimony, but also may be additional income that lessens alimony obligations. Social Security benefits are received in one of two ways: (1) they are paid upon retirement, based on one's contributions to the Social Security system, or (2) they are paid to a spouse or child of a contributor, in which case benefits are called "derivative benefits."

## Benefits for a Married Couple

For a married couple, the spouse of a contributor is eligible for the spousal benefit provided the marriage has lasted at least one year, and provided that the contributing spouse has already started receiving benefits. A recipient spouse will receive one-half of the contributor's Social Security benefit amount as long as he or she has waited until his or her full retirement age. A spouse may claim the spousal benefit before he or she has reached full retirement age (but not before age 62), but the benefit will be reduced. A recipient

who has his or her own work history and is therefore eligible for both types of benefits will receive the higher benefit.

## Benefits for a Divorced Spouse

In divorce, after a 10-year (or longer) marriage, benefits may be based on the contributions of a former spouse. This amount is equal to one-half of the contributing spouse's full retirement amount, as long as the dependent spouse begins receiving benefits at full retirement age. These derivative benefits are contingent on the former spouse's eligibility for benefits even if not actually receiving benefits, that is, being at least age 62 and fully insured (having contributed to Social Security for 40 quarters and thus qualifying for full benefits). This may be particularly important for a dependent spouse who is older than the "contributing spouse." On the other hand, the dependent spouse qualifies for derivative benefits by (1) being at least 62 years old and (2) remaining unmarried. If the contributing former spouse qualifies for benefits but has not yet applied for them, the dependent spouse must wait two years after the divorce is final to qualify for derivative benefits based on the former spouse's record. If the dependent spouse is eligible for retirement benefits based on his or her own work record and derivative benefits based on the former spouse's record, the retirement benefit will be paid first. If the benefit amount that the former spouse is entitled

to receive based on his or her own earnings record is greater than the derivative benefit amount, he or she will receive the higher benefit amount. Derivative benefits do not reduce the benefits of the former spouse, a common misconception during divorces.

If the dependent spouse remarries, he or she becomes ineligible for derivative benefits from a contributing former spouse. However, if the subsequent remarriage ends in divorce or death, the dependent spouse again becomes eligible for derivative benefits. If a dependent spouse has been married more than once, and each marriage lasted at least 10 years, derivative benefits can come from the former contributing spouse who would “provide” the higher benefits.

### Surviving Spouse Benefits

A widow or widower will become eligible for Social Security survivor benefits upon the death of his or her spouse, provided the marriage lasted nine months or longer. The nine-month requirement is waived when the contributing spouse’s death was accidental (caused by an event he or she did not expect, such as death from violent and external causes), when the contributing spouse died in the line of duty while serving on active duty as a member of the uniformed services, or when the couple shares a child.

To receive survivor’s benefits, the surviving spouse must be at least age 60 (or, if disabled, at least age 50); however, he or she will receive a reduced benefit amount if he or she begins taking benefits before full retirement age. The widow(er) will be eligible for survivor benefits at any age if he or she is caring for the deceased’s disabled child or child that is younger than age 16. The surviving spouse will receive 100 percent of the deceased spouse’s benefit.

### Surviving Divorced Spouse Benefits

Derivative Social Security benefits may be available for a divorced spouse, even if the former spouse predeceases the applicant. These are called widow(er)’s benefits. Again, the couple must have been married for at least 10 years before the final divorce decree, and the contributing spouse must have been fully insured at death. The surviving divorced spouse is ineligible for widow(er)’s benefits if the surviving spouse is receiving a benefit greater than what the benefit would be for the deceased spouse. The surviving spouse is ineligible for widow(er)’s benefits if the surviving spouse was convicted of the felonious and intentional homicide of the deceased spouse.

To qualify, a surviving divorced spouse must be at least age 60 (or, if disabled, at least age 50) and not have remarried before age 60. To prevent a loss of survivor benefits, a former spouse who is contemplating remarriage shortly before age 60 should delay the wedding until after his or her 60th birthday. The surviving divorced widow(er) will receive 100 percent of benefits, instead of 50 percent, as is the case if the former spouse is alive. The benefits the surviving

divorced widow(er) receives will not have any effect on the amount that any other surviving members of the contributing spouse’s family receive. For disabled surviving spouses or disabled divorced surviving spouses who marry between ages 50 and 59, remarriage does not preclude eligibility.

When a former spouse dies, the surviving divorced spouse should apply for the higher widow(er)’s rates. A widow(er) is due between 70 percent (at age 60) and 100 percent (at age 65) of what the former spouse was receiving.

### The Marriage Relationship

For the purposes of receiving benefits as a spouse, a divorced spouse, or a surviving spouse, there needs to have been a valid marriage. A qualifying marriage may be a legal marriage, a common law marriage (as determined by law of the state of residence), or a deemed marriage. The Social Security Administration may deem the marriage valid for benefit purposes when the marriage cannot be established under state law, but a person, in good faith, went through a marriage ceremony that would have resulted in a valid marriage, except for a legal impediment. A legal impediment may exist when the prior marriage had not been dissolved at the time of the new marriage or where there is a procedural defect in connection with the marriage, such as when the marriage is performed in a religious ceremony in a county that requires a civil ceremony. A person acting in good faith either did not know that a legal impediment existed or, if he or she did know, did not believe that it would prevent the marriage from being valid.

### Benefits to Children

Social Security benefits are paid to children when at least one parent becomes disabled, retires, or dies. Often, in separated or divorced families, the issue is whether the support obligor gets credit for benefits paid to dependents. In some states, when determining a parent’s obligation to pay child support, there is a rebuttable presumption of credit for Social Security benefits paid directly to a child of a retired parent. Ask your lawyer to check your state rules regarding credit for support obligations.

To be eligible for benefits, the child must be the contributing spouse’s biological child, adopted child, stepchild, or even a dependent grandchild and under the age of 18 or, if still in high school, under age 19 (unless he or she is disabled). The child also must (1) have a parent who is disabled or retired and entitled to Social Security benefits or (2) have a parent who died after having worked long enough to be entitled to Social Security benefits. Within a family, a child may receive up to one-half of the contributor’s retirement or disability benefits, or 75 percent of the deceased parent’s basic Social Security benefit (up to the family maximum). If a stepchild is receiving benefits, and the contributing spouse becomes divorced from the child’s parent, the stepchild’s benefits will end the month after the divorce becomes final.

## Disability Benefits

The Social Security Administration provides disability benefits under two programs: Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI). SSDI provides disability benefits based on prior work credits. Disability benefits are payable, provided there are sufficient work credits, to blind or disabled workers, widow(er)s, or adults disabled since childhood who are otherwise eligible. The amount of the monthly disability benefit is based on the Social Security earnings record of the insured worker.

Under SSI, payments are made on the basis of financial need to adults or children who are disabled or blind, have limited income and resources, meet the living-arrangement requirements, and are otherwise eligible. SSI is funded by taxes paid to the federal government. The monthly payment varies up to the maximum federal benefit rate, which may be supplemented by the state. Unlike SSDI, SSI is not based on a worker's earning record.

To be eligible for disability benefits under either program, a worker must also have a medical condition that falls under the definition of disability under the Social Security Administration, using a five-question process: (1) Are you working?; (2) is your condition "severe"?; (3) is your condition found in the list of disabling conditions?; (4) can you do the work that you did previously?; and (5) can you do any other type of work? When a parent's income and/or earning capacity is at issue in the context of a child or spousal support calculation, a state court cannot preempt a determination of a parent's disability by the Social Security Administration.

Some couples never apply for disability benefits for a disabled spouse until divorce, when the additional income becomes desirable. However, before age 65, Social Security disability benefits will only be available if the disabled spouse worked and paid Social Security taxes in five of the preceding 10 years.

## Benefits as Income

When computing income to determine spousal and/or child support obligations, Social Security benefits should be included. Federal taxes may be imposed on some of Social Security benefits, depending on the combined income (the sum of adjusted gross income plus nontaxable interest plus one-half of Social Security benefits). See Internal Revenue Service (IRS) Publications 554 (tax guide for seniors) and 915 (federal income tax rule for Social Security benefits) for accurate computations and amounts of exclusions, which change annually.

## Medicare

The Social Security Administration runs the Medicare program, which is the country's health insurance program for individuals age 65 and older. Individuals younger than 65 may be eligible for Medicare if they have certain disabilities, permanent kidney failure, or Lou Gehrig's disease. Workers

become eligible for Medicare regardless of income and assets. Workers pay into Medicare through payroll taxes during their working lives. A divorced or widowed spouse is entitled to Medicare based on the former spouse's earnings record just as he or she is entitled to receive Social Security benefits.

It is important to note that it is possible for a worker to apply for Medicare even though he or she is not ready to retire. A worker can apply for Medicare within three months of his or her 65th birthday. According to the Social Security Administration, Medicare is designed to help with the cost of health care, but it explicitly does not cover all medical expenses or the cost of long-term care. It is advisable to purchase supplemental insurance (Medigap) through a private insurance company to cover these additional costs. If an individual is not eligible for Medicare benefits based on his or her own record or based on a spouse's record, he or she can pay a monthly premium to purchase Medicare coverage.

In negotiating a divorce settlement, it is important to remember that unlike Social Security retirement benefits, which may be available as early as age 62, a worker does not become eligible for Medicare until age 65, so it may be necessary to factor the cost of private health insurance through age 65 into the overall settlement agreement.

## When Benefits Commence

Often, alimony is calculated to terminate or reduce when the recipient spouse becomes eligible for Social Security benefits at age 62 or age 65, reasoning that the alimony recipient should receive less alimony when he or she is eligible for Social Security benefits. It is important to know what the normal retirement age is and the cost of receiving benefits before the normal retirement age. Age 65 is the normal retirement age only for those born before 1937. For those born between 1938 and 1954, the normal retirement age ranges between 65 and two months to 66 years old. From 1955 to 1960, the normal retirement age is 66 years plus 2 months for each year after 1955 (i.e., normal retirement age for those born in 1956 is 66 plus 4 months). People born after 1960 will have to wait until age 67 for normal retirement.

Although retirement benefits are available starting at age 62, the amount received will be 20 percent less than full benefits at normal retirement age. When a divorced recipient spouse receives benefits at age 62, benefits are reduced by about 25 percent. Even if Social Security retirement benefits are secured at age 62, Medicare benefits do not commence until age 65. A reduction in alimony at age 62, which presupposes early Social Security benefits at age 62, will result in a significant lifetime loss of retirement benefits and will necessitate the purchase of healthcare coverage from age 62 until age 65.

Another limitation on when benefits may commence involves a divorced spouse who seeks to collect derivative benefits based on the earnings of a former spouse who has not applied for benefits but can qualify for them and is age 62 or

older. In this situation, the dependent spouse cannot start collecting these derivative benefits until two years after entry of the divorce decree. This is an important fact when planning for Social Security benefits for a dependent divorcing spouse who is older than the working spouse. The dependent spouse can always, if independently entitled to benefits, collect benefits based on his or her own earnings record.

### Working After Benefits Commence

The retirement earnings test applies to people receiving benefits before normal retirement age (between age 65 and 67, depending on date of birth). Earnings over a certain exempt amount will reduce Social Security benefits. One dollar in benefits will be withheld for every two or three dollars in earnings above certain limits. However, there is no benefit reduction, regardless of earnings, for individuals collecting benefits at normal retirement age.

### Conclusion

Divorce should trigger a careful examination of Social Security benefits and options. If a surviving divorced spouse is planning to remarry before age 60, he or she should seriously consider delaying the wedding until after his or her 60th birthday to avoid the remarriage penalty. If a dependent spouse is getting a divorce, at any age, and the marriage is slightly less than 10 years in duration, he or she should defer the divorce decree until after the tenth wedding anniversary. Before having alimony cease at age 62, consider the reduction of Social Security benefits and inability to qualify for

Medicare. If a divorcing dependent spouse is planning to receive benefits based on the earnings record of a former spouse who is not yet receiving benefits, make sure that benefits are not sought until two years after the date of divorce. Find more in-depth analysis, and answers to many benefit-related questions, online at [www.ssa.gov](http://www.ssa.gov) and [www.medicare.gov](http://www.medicare.gov). **FA**



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