

Social Security Considerations in Divorce

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In and of itself, Social Security stands as one of the most complex areas in planning—let alone divorce settlement planning—yet most people downplay its importance. For divorcing couples, if proper planning is not done, the result can be significant. Within this article, we will present the basic rules, some comparisons between married and divorced couples, and a few helpful hints. With over 2,700 rules governing retirement benefits, and 567 possible filing strategies available to a typical couple, this article will only touch upon some of the more common issues and questions. Of course, nothing that we do is ever typical.

Let's start with a few basic rules for a divorced spouse to receive spousal benefits on the former spouse's earnings.

(1) The couple must have been married for a minimum of 10 years.

(2) Both spouses must be 62 years of age or older.

(3) The applicant seeking benefits must be unmarried at the time of the application.

(4) If the applicant is under the full retirement age (FRA) and is eligible for benefits on their own, then their own benefit must be less than 50 percent of their former spouse's benefit at FRA.

(5) If the applicant's age is greater than FRA, they are eligible to receive spousal benefits even if their own benefit is greater than 50 percent of their spouse's benefit at FRA.

(6) If the applicant's former spouse has not filed for benefits at the date of the divorce, then the applicant must wait a minimum of two years from the date of divorce before they are eligible to file.

(7) Divorced spousal benefits (DSB) are excluded from the "Family Maximum Calculation," but surviving divorced spouse caregiver benefits are included.

(8) There are no available benefits for a divorced spouse with child-in-care. However, there are benefits for surviving divorced spouse with child-in-care.

(9) If a divorced spouse continues to work while receiving either divorced spousal or survivor benefits, the "earnings test" rules apply and may result in a reduction or elimination of benefits if received prior to FRA.

(10) If a divorced spouse, who previously qualified for DSB, gets remarried, they will no longer be eligible for DSB unless the subsequent marriage also ends. If that occurs, the divorced spouse again becomes eligible for benefits off of the first ex-spouse.

There are a few significant differences in Social Security benefits between married and divorced couples that benefit divorced spouses. For example, for married couples, the worker whose earnings record is the basis for benefits must file for benefits before the spouse becomes eligible. In contrast, a divorced spouse whose ex-spouse has not filed becomes eligible two years after the divorce has been finalized. For married couples, either spouse may have their spousal benefits reduced or eliminated based on the "earnings test." For divorced couples, this is not the case and reductions in ex-spousal benefits due to the earnings test do not apply. A third difference is that married couples cannot both file concurrently for spousal benefits on the other, whereas divorced spouses are eligible to do so. Lastly, the benefits

being received by an ex-spouse do not affect the benefits that a new spouse can receive.

A divorced spouse also has eligibility for survivor benefits, assuming certain criteria are met. The marriage must have had a duration of at least 10 years; the applicant for divorced survivor benefits must be 60 years of age or older (50 if they are disabled); and the applicant did not remarry before age 60. It is important to note that the "deemed filing rule" does not apply for divorced survivor benefits. This means that a divorced survivor who files for divorced survivor benefits prior to FRA and whose own benefit is greater than 50 percent of that benefit, is not required to take their own benefit. The surviving divorced spouse will not be eligible to collect divorced survivor benefits upon remarriage unless they get remarried after age 60. In other words, if a person remarries after age 60 and the ex-spouse dies, that person will be eligible to collect ex-spousal survivor benefits. If your clients are contemplating remarriage, this is an important point for you to counsel them.

Furthermore, if the divorced survivor is caring for the decedent's child, including an adopted child, who is under age 16 or disabled, and who is entitled to receive benefits on the decedent's record, then the above rules for age and length of marriage do not apply. For example, assume the duration of the marriage was only five years when they divorced. At the time, the wife was 30 years old and they had two children, ages three and one. The ex-husband died one year after their divorce. To simplify things, assume that his first wife had predeceased him. The now second ex-wife has become the caregiver for their children. She is

entitled to receive child-in-care benefits for each child equal to 75 percent of the deceased ex-husband's FRA benefit until the youngest child reaches age 16. Each child also is eligible to receive 75 percent of the father's FRA benefit until that child turns 18. The same would be true if she were caring for children that the decedent had with his first wife, as long as they were under the age of 16.

Now let's look at a few more complicated situations. Assume a divorced woman is 66 years of age and is collecting ex-spousal benefits attributable to her first husband. She has a significant other, who is 64 years old and still working. He, too, is divorced and technically eligible to collect ex-spousal benefits courtesy of his first wife. However, his income is too high, and because of the earnings test, he would not receive any spousal benefits. He plans on filing for benefits when he turns 66 and the earnings test no longer applies. They have indicated that they would like to get married, but don't want to lose any benefits. A possible solution is for them to wait until he turns 66, when he can file for his ex-spousal benefits. At that point, he will be deemed "entitled" to benefits and not just "eligible" for benefits. The act of filing changes the status. Since both spouses would be "entitled" to ex-spousal benefits, they can marry each other and still retain the benefits they can receive from their earlier marriages.

To put the rules into perspective, let's look at a few case studies.

Married with Children: While the wife stayed at home to raise their children, the husband worked for a major corporation, earning well over the statutory maximum for Social Security. They were married for nine-and-a-half years. Both parties want the divorce finalized as quickly as possible. There

are no real issues as everything is amicable. They have agreed on alimony, equitable distribution and child-rearing issues. All you have to do is write up the agreement. As indicated earlier, the first rule for eligibility for Ex-Spousal Social Security is that the marriage must have lasted for 10 or more years. Although it usually is in the client's best interest to finalize the divorce as quickly as possible, you must be cognizant of the time frame. This is especially important when one spouse worked and the other stayed home with the children. By waiting the additional six months, the wife would qualify for ex-spousal benefits. Over her lifetime, that could be roughly \$500,000 and, should he predecease her, it could go as high as \$1 million.

Dazed and Confused: A couple was married for over 10 years and has been divorced for more than two years. The ex-wife has not remarried and just turned 64 years old. The ex-husband is 66 years old. His benefit at FRA is \$2,600 per month. Her benefit, when she reaches FRA, would be \$1,500 per month, but she is considering collecting now. What to do? She is eligible to file for ex-spousal benefits, but would receive a reduced amount if she did so prior to her FRA. Also, she would be subject to the "deemed filing rule," whereby she would be required to take her own benefit since her own benefit is greater than 50 percent of her ex-spouse's benefit, which, in turn, ends her eligibility for ex-spousal benefits. Additionally, if she were still working, she would be subject to the earnings test. However, if she waits until age 66 (FRA) to file, she could collect ex-spousal benefits and defer her own benefits until age 70, allowing it to increase by roughly 8 percent per year plus cost-of-living adjustments. Then at age 70, she should switch to her own higher benefits.

Death of a Salesman: We have a divorced couple who were married for more than 10 years and have been divorced for over two years and neither has remarried. At FRA, the ex-husband's monthly benefit would be \$2,500. He just died at age 58. The ex-wife is 57 and is collecting \$900 per month in Social Security Disability benefits. Now what? She is eligible to collect ex-spousal survivor benefits. Normally, the earliest that she could collect would be at age 60 and she would receive a 28.5 percent reduction from the full survivor benefit if she waited until age 66 to collect. However, since she is disabled, she is eligible to receive the reduced benefit now. Disabled individuals are eligible to file as early as age 50. However, her best strategy may be to continue receiving the Social Security Disability benefits until she reaches age 66 and then switch to the full survivor benefit.

As the above examples demonstrate, counseling clients on decisions related to Social Security benefits is complicated but imperative because accurate advice can ensure the receipt of significantly more funds for the client. In light of the revisions to alimony laws in New Jersey, it is increasingly important to discuss retirement decisions with clients during the case and at settlement. Several key questions can provide a picture of your client's retirement needs and allow you to counsel on how to obtain the maximum Social Security benefit. As always, the best advice is to consult with a professional with knowledge of the Social Security rules, all 2,700 of them.

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