

# Patching the Safety Net: Survivor's Benefits for LGBTQ Older Adults

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# Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to [NCLER@acl.hhs.gov](mailto:NCLER@acl.hhs.gov).
- Written materials and a recording will be available at [NCLER.acl.gov](http://NCLER.acl.gov). See also the chat box for this web address.

# About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

# About Lambda Legal

Founded in 1973, Lambda Legal is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV through impact litigation, education, and public policy work.

# About the Center for Elder Law and Justice

The Center for Elder Law and Justice is a non-profit civil legal services agency providing free legal representation in eight Western New York counties to older adults, persons with disabilities, low income families, and other disadvantaged individuals. It is the mission of the Center for Elder Law & Justice to improve the quality of life for our clients through the provision of free legal services. Our primary goal is to use the legal system to assure that our clients may live independently and with dignity.

# LGBTQ Older Adults and Supports for Seniors

- Social Security ensures that millions of older adults have the income they need to pay for necessities and provides for the families of deceased workers.
- Amount of benefit is tied directly to earning record over the course of your working life.
- Discrimination over the course of an LGBTQ person's lifetime has an enormous impact on financial security as they age.
  - Prevalence of employment discrimination
  - Inadequate legal protection

# Social Security Survivor Benefits

- Established in 1939 to support the spouses and dependents of workers who pass away.
- To qualify as a spouse for purposes of survivor's benefits, the person must have been married to the worker "for a period of not less than nine months immediately prior to the day on which [the worker] died." 42 U.S.C. § 416(c), (g).
- Duration requirement was originally added to prevent sham death bed marriages.

# How Social Security Survivor's Benefits Help

- Any survivor can apply for benefits at age 60 and survivors living with a disability can apply at age 50.
  - A survivor can collect benefits based on the work record of the deceased spouse instead of their own retirement or disability benefit if the benefit based on the deceased spouse's record would be higher.
  - A survivor can start collecting a survivor's benefit as a way of delaying retiring on their own record, which can increase their ultimate benefit level.
- A survivor can receive benefits at any age while caring for the deceased spouse's child.



# Same-Sex Survivors Were Excluded

- Marriage exclusions = no survivor's benefits
- Federal Defense of Marriage Act – struck down in *Windsor v. United States*, 570 U.S. 744 (2013)
- All laws barring same-sex couples from marriage/barring recognition of the marriages of same-sex couples held unconstitutional in *Obergefell v. Hodges*, 576 U.S. 644 (2015)
- All legal obstacles to same-sex survivors receiving survivor's benefits seemingly removed.

# Legacies of Discrimination

- For those same-sex survivors whose spouses or partners died before or shortly after their exclusion from marriage ended, there was still no path to survivor's benefits.
- Two categories:
  - Couples who were able to marry, but whose marriages ended in death less than nine months after marrying
  - Couples who were never able to marry at all

# *Ely v. Saul*



Michael Ely was denied survivor's benefits because he and James "Spider" Taylor were married for less than nine months when Spider died.

- Met in 1971, and were together for 43 years
- Arizona permitted same-sex couples to marry on October 17, 2014
- Michael and Spider married on November 7, 2014
- Spider died on May 21, 2015 (9 months prior = August 21, 2014)

# *Ely v. Saul*

(D. Ariz. May 27, 2020)

- The court certified a nationwide class of same-sex surviving spouses who were prohibited from being married for at least nine months by unconstitutional laws barring same-sex couples from marriage. The class includes those who already applied for benefits and were rejected and those who apply going forward.
  - Class members include James Obergefell
- The court held that “the duration of marriage requirement cannot be read in a vacuum” and applying it based on unconstitutional state marriage bans is similarly unconstitutional.
- The court barred SSA from using the duration requirement to deny benefits to same-sex survivors who could not meet it because of unconstitutional marriage bans.



# *Thornton v. Commissioner of Social Security*



Helen Thornton was denied survivor's benefits because she and Margery Brown were not married when Marge died.

- Met in 1978, together 27 years
- Marge died July 9, 2006

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9 months prior to Marge's death: Oct. 9, 2005

- WA RDPs - July 23, 2007
- WA marriage equality - Dec. 6, 2012

# *Thornton v. Comm’r of Social Security*

(W.D. Wash. Sept. 11, 2020)

- The court certified a nationwide class of same-sex surviving partners who were barred from meeting the marriage requirements for survivor’s benefits by unconstitutional marriage exclusions. The class included only those who had *already* applied for benefits and were rejected.
  - Class members include Keith Bradkowski
- The court held that “for same-sex partners like Ms. Thornton, who were barred from marrying their partner by state law, the Administration has erected an unconstitutional barrier to survivor's benefits by conditioning those benefits on the marriage requirement.”
- In its final judgment, the court enjoined SSA from denying benefits to class members without determining whether they would have satisfied the marriage requirements but for the unconstitutional marriage laws.

# Implementing the Rulings

- SSA began enforcing the injunctions even during the appeals:
  - Emergency Messages – instructions to field staff
  - *Ely*: EM-20046 SEN REV 2
  - *Thornton*: EM-21007 SEN REV
- On Nov. 1, 2021, SSA dismissed its appeals in both cases and agreed to extend benefits to *ALL* surviving same-sex partners and spouses barred from meeting the marriage requirements by unconstitutional laws, whether or not they had previously applied for benefits.

# Which Same-Sex Survivors Can Apply for Benefits? (1 of 2)

- Those who can show that they would have met the marriage requirements if there had been no law preventing their marriage.
- Those who are at least 60 years old, or if living with a disability, at least 50.
- Those who either:
  - a) never married anyone else;
  - b) married someone else after the age they became eligible for survivor's benefits; or
  - c) married someone else before eligibility but whose marriage has ended.



# Which Same-Sex Survivors Can Apply for Benefits? (2 of 2)

- It does not matter how long ago the spouse or partner passed away.
- It does not matter whether the survivor has attempted to apply for the benefits before or not.
- It does not matter whether the survivor appealed a previous denial.
- It does not matter whether the survivor has already started collecting their own retirement benefits.

# How Same-Sex Survivors Can Seek Benefits

- Contact Social Security and request a telephone interview with the local field office.
  - Tell them that you are a member of the *Ely* (married for less than 9 months) or *Thornton* (never married) class.
  - If you have never applied for survivor's benefits before, ask to apply.
  - If you previously applied and were denied, ask to have your original claim reopened (benefits date back to the date of application).
- Provide documentation that shows you would have married and met the requirements had there been no law preventing it.

# What Does a Same-Sex Survivor Need to Show to Get Benefits?

## Ely (married < 9 mos.)

- SSA will need to determine that you would have been married for at least 9 months at the time of your spouse's death if the discriminatory law hadn't prevented you from doing so.

## Thornton (never married)

- SSA will need to determine that you would have been married at the time of your partner's death and that you would otherwise have met the marriage-related requirements if discriminatory laws hadn't prevented you from doing so.
- Most commonly, this means SSA will need to conclude that your marriage would have lasted at least nine months at the time of your partner's death.

# Ways a Same-Sex Survivor Can Show They Would Have Been Married

- SSA staff has been instructed to ask detailed questions about the relationship history, shared property or finances, estate planning, etc.
- Survivors can submit:
  - a written statement addressing those topics; copies of documents demonstrating their commitment, establishing protections, or celebrating relationship milestones; photographs; greeting cards or other memorabilia.
- All of this will be assessed to determine whether the couple would have been married at the relevant times for being eligible for survivor's benefits if they had been legally permitted to do so.

# Don't Get Tripped Up on the Wrong Things

- The relevant question is not why you did not marry sooner, but whether you would have married at an earlier point if there had been no law preventing it.
- The relevant question is not why you did not travel somewhere else to marry, but whether the law where you lived would allow you to marry.

# How SSA Can Make Same-Sex Survivors Whole

- Administrative withdrawal of retirement benefits claims
  - For those survivors who would not have claimed their own benefits if they had access to survivor's benefits
  - If they eventually switch from survivor's to retirement benefit, should be at full value without deductions for taking them early.
- Deemed filing dates
  - For those survivors who were deterred by SSA staff from submitting an application in the past

# Other Marriage Duration Requirements

- Federal law allows private pensions to have a one-year marriage duration requirement.
  - Some private pensions have been willing to amend plans to waive this, but no requirement
- Certain benefits for survivors of veterans have marriage duration requirements.
  - 1-year requirement for basic survivor's benefits
  - *Vilord v. McDonough*, pending at U.S. Ct. of App. for Veterans Claims – challenges 8-yr. requirement for enhanced survivor's benefits
  - Veteran's Legal Clinic at Harvard

# Lambda Legal's Help Desk



If you or someone you know has a question about these cases or another issue affecting LGBTQ people or people living with HIV, contact the [Lambda Legal](http://www.lambdalegal.org/help)

[Help Desk:](http://www.lambdalegal.org/help)

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# Finding the Right Language

- LGBT → Lesbian, Gay, Bisexual, and Transgender
  - LGBTQ, LGBTQ+, 2SLGBTQIA+, etc.
  - The “Q” Stands for “Queer” or “Questioning”
    - Sometimes omitted to avoid potential for triggering or offending audience
- Older Adults → 50 Years Old and Up
  - Seniors, Elders, etc.
- LGBT Older Adults
  - Always encouraged to have conversations with audience to gauge their preferences

# Three Generations of LGBT Older Adults

- **Invisible Generation**
  - Born in the 1920's; Came of age during the Great Depression & WWII, where there were limited disclosure of LGBT Identities
- **Silent Generation**
  - Born in the 1930's and 1940's; Came of age during the McCarthy Trials ("Lavender Scare")
- **Pride Generation**
  - Born in the 1950's and 1960's; Came of age during tremendous social change and civil rights movements (Stonewall Riots and 1980's AIDS Crisis)

*Source: The Future of LGBT+ Aging: A Blueprint for Action in Services, Policies, and Research, Fredriksen-Goldsen, et al. (2016).*

# “Recent” Events in LGBTQ+ Rights Movement

- The American Psychiatric Association lists “homosexuality” in the DSM until 1973
- The Department of Defense issues the “Don’t Ask, Don’t Tell” policy in 1993
  - This was not repealed until 2010
- President Clinton signs the Defense of Marriage Act into Law in 1996
  - Held unconstitutional by the Supreme Court in United States v. Windsor (2013)
- Marriage Equality in all 50 States achieved in 2015
  - Marriage bans held unconstitutional by the Supreme Court in Obergefell v. Hodges (2015)
  - Patchwork of legal protections prior to 2015

# Effects on Older Adults

- A Lifetime of Discrimination (Devoid of Legal and Social Recognition)
- Hesitancy to Access Services (Health Care, Legal, Governmental)
- Social Isolation (Support from Family of Choice)
- History of Self Reliance and Distrust of Authorities
- Fears of Aging Alone and Long Term Care Planning
- Increased Incidence of Poverty
- Lack of Affirming Housing
- Formation of Domestic Partnership over Marriage

# Marital Benefits

- Social Security Benefits (Survivor Benefits)
- Death Benefits
- Inheritance Rights
- Property Rights
- Tax Benefits
- Pension Benefits
- Veterans Benefits
- Immigration Benefits

# Demonstrating a Couple's Commitment

- Length of time together, family structure (children)
- Financial reliance and commingled property
- Advance planning documents (beneficiary in Will, life insurance policy or other account)
- Holding of a commitment ceremony
- Registration as a domestic partner (if an option)
- Legal landscape of marriage within couple's state

# Things to Keep in Mind

- LGBTQ+ Couples have faced discrimination and a lack of social/legal recognition for decades
- The way that LGBTQ+ couples have structured their lives may not resemble the lives of non-LGBTQ+ couples (and that is okay!)
  - Asking about “Marital Status” may not adequately capture a person’s prior relationships and lived experiences
- Be accepting and affirming when serving Older Adults

# Tips for Building Internal Inclusive Services

## Internal Practices

- Updating Intake Procedures
  - Include Pronouns; Gender Identity; Relationship Status; and Family Structures
- Creating/Revising Non-Discrimination Policies
- Highlighting Confidentiality Policies
- Respecting the person's wishes and preferences for the duration of the services
- Conducting cultural competence trainings



# Tips for Building External Inclusive Services

## External Practices

- Re-branding external marketing materials
- Placing LGBT-Friendly publications and materials in common areas
  - Magazines, flags, brochures for affirming community partners
- Partnering with LGBTQ+ organizations
- Asking questions and listening to community members themselves

Questions?

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# Technical Assistance

Technical assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov).