

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

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## Introduction

In November 2021, judgments became final in two class action lawsuits on behalf of surviving same-sex partners and spouses across the country who were denied Social Security survivor's benefits because discriminatory state marriage laws barred them from being married for at least nine months before their partners and spouses died. *Ely v. Saul* applies to same-sex spouses who married their loved ones, but were prevented from being married for nine months. *Thornton v. Commissioner of Social Security* applies to same-sex partners who were barred from marrying their loved ones at all. In both cases, the courts held that denying these benefits to same-sex partners and spouses who had been barred from marrying was just as unconstitutional as the marriage bans themselves.

The Social Security Administration ("SSA") has posted notices about these cases—*Ely* and *Thornton*—and has issued some guidance, known as Emergency Messages (EM-20046 SEN REV 2 for *Ely* and EM21007 SEN REV for *Thornton*), about how the agency will be implementing these rulings.

Legal assistance, elder rights, and aging services advocates play a critical role in identifying and assisting eligible LGBTQ older adults in accessing these survivor's benefits. Many surviving same-sex partners will never have thought of applying before because they would have thought it futile. Others may have applied in the past and dropped their appeals. All of these survivors can now apply or ask for past claims to be reopened. This tip sheet provides the basic eligibility guidelines and the information and documents that claimants will need to provide to SSA.

## Eligibility for Survivor's Benefits

The *Ely* and *Thornton* rulings prohibit SSA from automatically denying a same-sex spouse or partner's claim for survivor's benefits based solely on their not being able to meet the marriage-related requirements for benefits where an unconstitutional law barred the couple from marriage.

For same-sex spouses (*Ely*), SSA will need to determine that the couple would have been married for at least 9 months at the time of the spouse's death if the discriminatory law hadn't prevented them from doing so.

For same-sex partners (*Thornton*), SSA will need to determine that:

- The couple would have been married at the time of the partner's death; and
- The couple would otherwise have met the marriage-related requirements if discriminatory marriage laws hadn't prevented them from doing so.

Most commonly, SSA will also need to conclude that the couple's marriage would have lasted at least nine months at the time of the partner's death.

## Practice Tip

For couples who adopted children together, there is an [additional route for eligibility](#) for survivor's benefits, but for most couples who did not share children, apart from [some extremely limited circumstances](#) in which the nine-month requirement does not need to be met, they will need to show that they would have been married for at least nine months before their partner's death but for the discriminatory marriage ban.

## Providing Information for Eligibility Determination

SSA has been instructed to conduct thorough interviews and consider all evidence that the couple would have been married for at least nine months at the time of the spouse or partner's death if they were not unconstitutionally barred from doing so. SSA will make an eligibility determination based on the information the claimant provides and may ask a variety of questions about the couple's relationship history to do so. Advocates can prepare claimants to answer questions such as:

- When would you have married if there were no law barring same-sex couples from marriage?
- Did your state bar same-sex couples from marrying either completely or until shortly before your spouse or partner's death?
- Were you in a committed relationship with one another?
- How long were you together? When did you consider each other family?
- Did you live together? If so, for how long? Did you own property together?
- Did you share joint responsibility to care for one another?
- Did you rely on one another financially?
- Did you provide for each other after death, including through wills or insurance policies?
- Did you have a commitment ceremony? Did you register as domestic partners with a city or state government or with an employer, if that was an option?
- Did you have or raise children together? Were you both able to be considered legal parents to your children?

All of these inquiries are aimed at the same key question about whether the claimant and their spouse or partner would have been married for at least nine months before their loved one's death if the law had permitted them to marry. This is meant to determine whether and when in the relationship they would have married had there never been any discriminatory law preventing them from doing so.

## Practice Tip

The claimant will likely be asked for a specific date on which they would have married had they not been barred from doing so, in part, to assess whether they would have been married for at least nine months prior to their partner's death. But not having a specific date to point to should not prevent the claimant from being eligible for benefits. SSA needs to include some alternate date as a workaround for its software, which defaults to denying benefits if there is no marriage date listed or the date is shorter than nine months before the death. If the claimant does not have a specific date to offer, advocates can suggest that they use the date that is nine months and one day before the claimant's spouse's death.

## Providing Documentation

Claimants will have the opportunity to provide SSA with any and all evidence that supports their answers to whether they would have been married for at least nine months if the law had not barred them from doing so. This evidence may include providing a written statement of the claimant's direct answers (because oral statements must be reduced to writing to be considered evidence for SSA's purposes), along with any factual support, such as copies of documents demonstrating their commitment, celebrating milestones in their relationship, or establishing protections for each other. Examples of such documentation include:

- Copies of estate planning or decision-making documents like wills, powers of attorney, or health care proxies
- Life insurance policies or retirement accounts designating each other as beneficiaries
- Proof of joint property ownership or leases, joint financial accounts, or joint insurance policies
- Information about ceremonies they held, partnership agreements made, domestic partner protections they were able to obtain, or other signifiers of their commitment
- Copies of photos, greeting cards, or other memorabilia that demonstrate the relationship's history and commitment

## Conclusion

Advocates assisting older LGBTQ older adults in accessing survivor's benefits can use this tip sheet to help their clients prepare to provide the best possible evidence of how discriminatory laws affected their relationship and ability to be married, as well as the ways they viewed their relationship regardless of the law. Lambda Legal's [Information for Surviving Same-Sex Partners and Spouses Previously Excluded from Social Security Survivor's Benefits Because of Unconstitutional State Marriage Laws](#) provides even more information for advocates and older adults on eligibility, appeals, and the process for applying. Additional support is also available through [Lambda Legal's Help Desk](#).

## Additional Resources

- [Lambda Legal: FAQ on Social Security Survivor's Benefits For Same-Sex Spouses Prevented From Being Married For At Least Nine Months Because Of Discriminatory Marriage Laws \(Ely\)](#)
- [Lambda Legal: FAQ on Social Security Survivor's Benefits for Same-Sex Partners Prevented from Being Married Because Of Discriminatory Marriage Laws \(Thornton\)](#)
- [Lambda Legal: Ely v. Saul Information and Legal Documents](#)
- [Lambda Legal: Thornton v. Commissioner of Social Security Information and Legal Documents](#)
- [NCLER: Title II Auxiliary Benefits: Social Security Benefits You've Never Heard of and Who is Eligible for Them](#)
- [Justice in Aging: How Can Legal Services Better Meet the Needs of Low-Income LGBT Seniors?](#)
- [National Resource Center on LGBT Aging: Inclusive Services for LGBT Older Adults: A Practical Guide to Creating Welcoming Agencies](#)

**Please contact [ConsultNCLER@acl.hhs.gov](mailto:ConsultNCLER@acl.hhs.gov) for free case consultation assistance. Sign up for our email list and access more resources at [NCLER.acl.gov](https://www.ncler.acl.gov).**

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