

SOCIAL SECURITY BENEFITS AND THE DEFENSE OF MARRIAGE ACT:

*CAN I DO ANYTHING NOW TO
PRESERVE MY RIGHTS?*

YES

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Can married same-sex couples count on Social Security spousal protections like other married couples can?

NO

At present, the Defense of Marriage Act Section 3 (“DOMA”) erases the marriages of same-sex couples for all federal purposes. In the Social Security context, DOMA means that a person married to someone of the same sex cannot claim the Social Security benefits that might be due to a spouse, including:

- the **spousal retirement** benefit;
- the **spousal disability** benefit;
- the **lump-sum death** benefit; and
- the **survivor** benefit.

DOMA also can limit a child’s access to Social Security benefits. For example, when a married working parent dies, DOMA means that a child of the marriage may be denied benefits unless the worker is that child’s birth or adoptive parent or the family lives in a State where the child could inherit from that parent under the State’s intestacy law (this should include all States that permit same-sex couples to marry and Washington, D.C. as well as States that recognize marriages of same-sex couples from other states).

Does it matter?

YES

Social Security is a complex federal program. This document is intended to provide general information only and cannot substitute for guidance or legal advice as to one's specific situation. Moreover, this publication is based upon the information that is known to us as of September 2012. For guidance on your particular situation, you must consult a lawyer. The provision of this information is not meant to create an attorney-client relationship.

For a governmental explanation of the Social Security program, visit the Social Security Administration website, www.socialsecurity.gov

Social Security is an important safety net in this country. It can make the difference between living in poverty and having enough to get by. In 2004, the Congressional Budget Office judged that 30% of married same-sex couples would receive higher benefits as a retired couple than they would as two single people. And, if their marriages were recognized for the purposes of Social Security, about half of same-sex couples would collect higher benefits after one partner died than they would under current law. DOMA prevents married same-sex couples who have paid into the system their entire working lives from receiving vital Social Security protections as other married couples do.

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Is there anything I can do now to try to preserve my Social Security rights while DOMA is challenged in court?

YES

GLAD is challenging the constitutionality of DOMA in two separate lawsuits. In addition, efforts are ongoing to repeal DOMA. If you or your child(ren) are disqualified by DOMA from the important protections Social Security offers to other families, you can apply for Social Security benefits **now** to preserve your rights and possibly receive benefits based on the date of your application if DOMA is ruled unconstitutional.

This document details the different types of Social Security benefits for which you, as a spouse, or your child(ren) might be eligible but will be denied because of DOMA. It explains how to apply for those benefits now, how to appeal the denial of benefits based on DOMA, and how to keep your appeal alive to preserve your rights while the court challenges are pending.

Spousal Retirement Benefit

The “spousal retirement benefit” is based on the earnings record of your spouse, as opposed to your own earnings record, and is claimed when both spouses are living. You as the spouse of a retired worker—assuming that you meet age and other requirements—are eligible to receive the greater of either your own Social Security retirement benefits or an amount equal to 50% of your retired spouse’s benefit (subject to reduction for starting benefits before full retirement age).

One-earner families: One-earner couples receive a spousal benefit of an extra 50% of the worker’s retirement benefit while both spouses are alive (subject to reduction if the non-wage earning spouse starts benefits before full retirement age).

EXAMPLE: *Lee’s spouse receives a Social Security retirement benefit of \$2,000 and Lee never worked. At Lee’s full retirement age of 66, Lee’s spousal benefit will be \$1,000. If Lee takes his benefit before his full retirement age, his spousal benefit will be reduced. See page 10 for more information on early retirement.*

| | without DOMA | DOMA in effect |
|----------------|---|---|
| LEE | \$ 1 0 0 0 spousal benefit | \$ 0 spousal benefit |
| LEE’S SPOUSE | \$ 2 0 0 0 retirement benefit | \$ 2 0 0 0 retirement benefit |
| TOTAL BENEFITS | \$ 3 0 0 0 | \$ 2 0 0 0 |

Two-earner families: If both spouses have worked long enough to earn worker benefits, each may be “dually entitled.” The lower-earning spouse can receive his or her own benefit plus a spousal benefit to bring his or her total benefit up to 50% of the primary wage earner’s benefit.

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The spousal benefit can help two-earner couples in a second way. Depending on your age, you may be able to receive benefits as a spouse while delaying your own Social Security retirement (to increase your own benefit). If you are full retirement age and your spouse is receiving Social Security benefits, you can choose to file and receive benefits on just your spouse’s Social Security record and delay filing for benefits on your own record up until age 70.²

In calculating your own benefit and the spousal benefit, you must take into account rules that may reduce benefits, such as early retirement, the Windfall Elimination Provision and the Government Pension Offset. In addition, if your spouse’s children are also eligible for Social Security, your spousal benefit may be subject to a cap on total family benefits under a single earnings record.

These potential reductions are described on page 10.

EXAMPLE:

Mary Ann qualifies for a retirement benefit of \$1,000 on her own earnings record. Her spouse receives a monthly retirement benefit of \$2,400. At Mary Ann’s full retirement age, she will receive her own \$1,000 retirement benefit, and Social Security will add \$200 from her spouse’s benefit, for a total of \$1,200.

If she takes her retirement benefit before her full retirement age, both amounts will be reduced.¹

However, were Mary Ann’s retirement benefit \$1,300 instead of \$1,000, she would not receive any spousal benefit.

¹ <http://bit.ly/retirementbenefitsfamily>.

² <http://bit.ly/delayandreceivespousebenefits>;
<http://bit.ly/retirementbenefitsfamily>.

Who qualifies for the Social Security spousal retirement benefit?

Maine, Maryland, and Washington State may allow same-sex couples to marry after the November 2012 elections. Mainers will vote on a ballot initiative to permit same-sex couples to marry. Maryland and Washington State have both passed laws permitting same-sex couples to marry but those laws will not go into effect while ballot measures to repeal them are pending.

In addition, the following States recognize marriages of same-sex couples in certain circumstances:

- **California**
(if the marriage was performed in California between June 16, 2008 and November 4, 2008 or out-of-state before November 4, 2008); and
- **Maryland, New Mexico and Rhode Island**
(if the marriage was lawfully performed in another state).⁴

This section states the eligibility requirements for the spousal retirement benefit. If you do not meet these requirements, you do not qualify for this Social Security benefit irrespective of DOMA. The requirements are:

- 1) at the time of your application for Social Security, your spouse, the wage earner on whose record benefits are being sought, must be domiciled in a State that recognizes your marriage to a spouse of the same sex or in Washington, D.C. or in any foreign country³. Temporary residence in one of these jurisdictions is not sufficient;

In addition to Washington D.C., as of September 2012, the States that permit same-sex couples to marry are:

- **Connecticut**
- **Iowa**
- **Massachusetts**
- **New Hampshire**
- **New York**
- **Vermont**

See sidebar for additional states where your marriage may be recognized.

Neither a domestic partnership nor a civil union can serve as the basis for a Social Security spousal retirement benefit under current law. You must be married.

- 2) you and your spouse must have **been married for at least 12 months** prior to your application for spousal benefits (for Social Security purposes, you will have been married for a period of 12 months on the first day of the month of your first anniversary);

- 3) **you must be at least age 62** or have a qualifying “child” in your care who is entitled to a child’s insurance benefit based on the earnings record of your spouse (by a qualifying child, Social Security means a “child” under age 16 or who receives Social Security disability benefits. “Child” is defined by the Social Security Act as explained on page 30);
- 4) **your spouse**, on whose earnings record you are applying, **must have applied for retirement benefits and be “fully insured”** according to the Social Security Administration, which means that he or she worked and paid into the system long enough to qualify for this particular benefit; and
- 5) **you must not be entitled to a higher Social Security benefit on your own earnings record** (unless you want to apply for the spousal benefit to delay retirement based on your own earnings record).

If your spouse is of full retirement age but wants to delay receipt of benefits (to draw a greater benefit later), your spouse can apply for retirement benefits and then request to have payments suspended. That way, you can receive a spousal benefit and your spouse can continue to earn delayed retirement credits until age 70.⁵

For a Consumer Reports article on how to maximize your Social Security benefits visit: <http://bit.ly/timingssbenefits>. For an AARP publication on “How to Maximize Your Social Security Benefits” visit <http://bit.ly/maximizessbenefits>

³ 42 U.S.C. § 416(h)(1)(A)(i) (An applicant is the wife, husband, widow, or widower of a fully or currently insured individual for purposes of this title if the courts of the State in which such insured individual is domiciled at the time such applicant files an application, or, if such insured individual is dead, the courts of the State in which he was domiciled at the time of death, or, if such insured individual is or was not so domiciled in any State, the courts of the District of Columbia, would find that such applicant and such insured individual were validly married at the time such applicant files such application or, if such insured individual is dead, at the time he died.”)

⁴ R.I. Exec. Order No. 12-02 (May 14, 2012), available at <http://bit.ly/outofstatemarriagesri> & Letter from Patrick C. Lynch, Attorney General for the State of Rhode Island, to Jack Warner, Commissioner of the Rhode Island Board of Governors for Higher Education (Feb. 20, 2007), available at <http://bit.ly/patricklynchletter>; Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid In The State Of Celebration May Be Recognized In Maryland, 95 Md. Op. Atty. Gen. 3, 2010 WL 886002 (Feb. 23, 2010); N.M. Stat. Ann. § 40-1-4; Are same-sex marriages performed in other jurisdictions valid in New Mexico?, N.M. Op. Atty. Gen. 11-01, 2011 WL 111243 (Jan. 4, 2011).

⁵ <http://bit.ly/spousebenefits>.

Potential Reductions to Benefits

In calculating benefits, you must consider rules that could reduce your benefits, including:

- (a) **early retirement**;
- (b) if your children are also receiving Social Security under the same earnings record, the **maximum family benefits limit**; and
- (c) if the worker or spouse worked for an employer that did not withhold Social Security taxes and receives a pension from that work,
 - (i) the **Windfall Elimination Provision**; and
 - (ii) the **Government Pension Offset**.

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Early retirement. You may start receiving Social Security as early as age 62 or as late as age 70. However, if you start benefits early, before the full retirement age set for you by Social Security, your monthly benefits are reduced.

The full retirement age for people born between 1943 and 1954 is 66.

In the case of early retirement, a benefit is reduced five-ninths (5/9) of 1% for each month before normal retirement age, up to 36 months. If the number of months exceeds 36, then the benefit is further reduced five-twelfths (5/12) of 1% per month.⁶ To compute the effect of early (or delayed) retirement, visit: <http://bit.ly/earlyorlate>

On the other hand, you are rewarded for postponing collecting Social Security. Beginning with the month in which you reach your full retirement age, your check is increased by two-thirds (2/3) of 1% (or 8% every 12 months) for each month that you delay starting Social Security. These delayed retirement credits cease once you turn 70, so there's no advantage in delaying the start of benefits after

that. To compute the effect of early (or delayed) retirement visit: <http://bit.ly/earlyorlate>

According to Social Security, as a general rule based on estimates of an average person's life expectancy, early or late retirement will give someone about the same total Social Security benefits over their lifetime. If a person retires early, the monthly benefit amounts will be smaller to take into account the longer period benefits will be paid. If someone retires late, the person will get benefits for a shorter period of time but the monthly amounts will be larger to make up for the months when the person did not receive anything. Look through factors Social Security suggests you consider in deciding when to retire: <http://bit.ly/consideringyourretirement>

⁶ <http://bit.ly/earlyorlate>.

Maximum Family Benefits Limit. There is a limit to the amount of money that can be paid to a worker's family—usually 150-180% of the worker's benefit payment. If the total benefits due to you and the worker's children are more than this limit, each family member entitled to a monthly benefit will receive a monthly benefit, but it will be reduced to meet the benefits maximum. If the family maximum benefit is reached, that amount is divided among all entitled dependents. The more dependents who receive benefits on the worker's Social Security record, the lower the benefit amount will be for each dependent. However, the family maximum does not affect the wage earner's benefit.⁷ Contact Social Security for more information.

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Windfall Elimination Provision ("WEP"). Where a worker worked for an employer that did not withhold Social Security taxes from the worker's salary, such as a federal, state or local government agency, a nonprofit organization or another country, the pension based on that work may reduce the worker's Social Security benefits because of Social Security's Windfall Elimination Provision ("WEP"). Since the spousal retirement benefit is derived from the worker's

EXAMPLE: *A worker and spouse both claim their benefits at full retirement age. Because the worker receives a pension based on work not covered by Social Security, the worker's Social Security benefit amount after WEP is \$700. The spouse's benefit is at most \$350 (one half of the worker's benefit amount).*

benefit, WEP affects the spousal benefit as well.⁸ While benefits are lowered because of the WEP, they are never totally eliminated. Under a special rule, the reduction under the WEP can be no more than one-half of the amount of the pension from employment that is not covered by Social Security. For example, if the person's pension is \$500 per month, the WEP reduction could not exceed \$250.⁹ The maximum reduction under the WEP formula for 2012 is normally \$383.50 per month.

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Government Pension Offset ("GPO"). The GPO applies to spousal benefits (whereas the WEP applies to the worker's benefit). The spousal benefit can be reduced based on the GPO if you receive a pension from a federal, state, or local government based on work where you did not pay Social Security taxes.¹⁰ If the GPO applies to you, your Social Security benefits will be reduced by two-thirds of your government pension.

This is just a brief explanation of the WEP and GPO.

Visit <http://bit.ly/windfallelimination> and <http://bit.ly/govtempemployees> for more information about the WEP, including examples and exceptions.

Visit <http://bit.ly/govtpensionoffset> for more information about the GPO, including examples and exceptions.¹¹

Visit <http://bit.ly/benefitsgpoandwep> and <http://bit.ly/govtempemployees> for information about how Social Security benefits are calculated when both the WEP and GPO reduce your benefits.

⁷ <http://bit.ly/familymaximumeffect>.

⁸ <http://bit.ly/windfalleliminationeffect>.

⁹ <http://bit.ly/wepeliminatemonthlybenefit>.

¹⁰ <http://bit.ly/govtpension>.

¹¹ *Id.*

What can I do if I qualify for the Spousal Retirement Benefit but DOMA prevents me from receiving it?

If you would meet the qualifications for the spousal retirement benefit but for DOMA, you have **two** possible courses of action: you can apply now to try to preserve your claim back to the date of application or wait to see if DOMA is repealed or found unconstitutional in court and then apply. Specifically:

- 1) **You can apply now** to Social Security for the spousal benefit. *(See page 38 for information about filing an application for Social Security.)*

Until DOMA is overturned in court or repealed by Congress, **expect your claim to be denied.** *(You will*



David Wilson and Rob Compton, plaintiffs in GLAD's *Goodridge* case that brought marriage equality to Massachusetts

then follow the appeals process described on page 40.)

If your appeal process is still ongoing at a time when DOMA is invalidated by a court, you should then receive the spousal retirement benefit; you should also be entitled to retroactive benefits based on the date of your application.

If your appeal process is over (or if you never appealed a denial of the benefit) before DOMA's constitutionality is decided, then if GLAD wins its challenges to DOMA (or if DOMA is repealed by Congress), you should be allowed to apply again for and receive the higher benefit from the time of your renewed application and going forward.

OR

- 2) **You can wait** to see if DOMA is found unconstitutional by the courts or repealed by Congress. At that time, you should be able to apply for and receive the spousal retirement benefit just like any other married person. There is **no deadline for applying for a spousal retirement benefit**, though the date benefits can begin is determined by the date you file an application.

Spousal Disability Benefit

Social Security pays benefits to people who cannot work because they have a medical condition that is expected to last at least one year or result in death. Federal law requires this very strict definition of disability. While some programs give money to people with partial disability or short-term disability, Social Security does not.¹²

A spouse may be eligible for a monthly benefit of up to 50% of the disabled worker's benefit. The requirements are very similar to the spousal retirement benefit described on page 8.

In calculating the worker's disability benefit and your possible spousal benefits, you must take into account rules that may reduce benefits, such as the Windfall Elimination Provision and the Government Pension Offset. In addition, if your spouse's children also are eligible for Social Security, your spousal benefit may be subject to a cap on total family benefits. See page 12.



The next section states the eligibility requirements for the spousal disability benefit. If you do not meet these requirements, you do not qualify for this Social Security benefit irrespective of DOMA. The requirements are:

Who qualifies for the Social Security spousal disability benefit?

- 1) at the time of your application, your spouse, the wage earner on whose record benefits are being sought, must be domiciled in a State that recognizes your marriage to a spouse of the same sex or in Washington D.C. or in any foreign country (*see page 8 for a list of such places as of September 2012*);
- 2) you and your spouse must have **been married for at least 12 months** prior to your application for spousal disability benefits (for Social Security purposes, you will have been married for 12 months on the first day of the month of your first anniversary);
- 3) **you must be at least age 62** or have a qualifying “child” in your care who is entitled to a child’s insurance benefit based on the earnings record of your spouse (By a qualifying child, Social Security means a “child” who is under age 16 or who receives Social Security disability benefits. “Child” is defined by the Social Security Act as explained on page 30);
- 4) **your spouse**, on whose earnings record you are applying, **is entitled to disability benefits**; and
- 5) **you must not be entitled to a higher Social Security benefit on your own record** (unless your benefit is higher than the spousal disability benefit and you want to apply for the spousal disability benefit to delay retirement based on your own earnings record as described on page 7).

¹² <http://bit.ly/disabilitybenefits>;
see also <http://bit.ly/disabilityplanner>.

What can I do if I qualify for the Spousal Disability Benefit but DOMA prevents me from receiving it?

If you would meet the qualifications for the Spousal Disability Benefit but for DOMA, you have **two** possible courses of action: you can apply now to try to preserve your claim back to the date of application or wait to see if DOMA is repealed or found unconstitutional in court and then apply. Specifically:

- 1) **You can apply now** to Social Security for the spousal disability benefit. *(See page 38 for information about filing an application for Social Security.)*

Until DOMA is overturned in court or repealed by Congress, **expect your claim to be denied**. *(You will then follow the appeals process described on page 40.)*

If your appeal process is still ongoing at a time when DOMA is invalidated by a court, you should then receive the spousal disability benefit; you should also be entitled to retroactive benefits based on the date of your application.

If your appeal process is over (or if you never appealed a denial of the benefit) before DOMA's constitutionality is decided, then if GLAD wins its challenges to DOMA (or if DOMA is repealed by Congress), you should be allowed to apply again for and receive the higher benefit from the time of your renewed application and going forward.

OR

- 2) **You can wait** to see if DOMA is found unconstitutional by the courts or repealed by Congress. At that time, you should be able to apply for and receive the spousal disability benefit just like any other married person. There is **no deadline for applying for a spousal disability benefit**, though the date benefits can begin is determined by the date you file an application.



Betty Jo Green and JoAnn Whitehead,
challenging DOMA in GLAD's case *Gill v. OPM*

Lump-Sum Death Benefit

LUMP-SUM DEATH BENEFIT

There is a one-time death benefit of \$255 payable to a surviving spouse, or, if there is no spouse, to a minor child—if certain conditions are met. If no spouse or child meeting these requirements exists, the lump-sum death payment will not be paid.¹³

Who Qualifies for the Lump-Sum Death Benefit?

- (a) **Surviving spouse.** This section states the eligibility requirements for a surviving spouse to qualify for the lump-sum death benefit. If you do not meet these requirements, you do not qualify for this Social Security benefit irrespective of DOMA. The requirements are:
- 1) at the time of your spouse's death, your spouse must have been domiciled in a State that recognizes your marriage to a spouse of the same sex or in Washington D.C. or in any foreign country (*see page 8 for a list of such places as of September 2012*);
 - 2) you and your spouse must have been **married for at least 9 months** immediately prior to the day on which your spouse died;
 - 3) your deceased spouse must have been **"fully insured" according to the Social Security Administration**, which means that he or she had worked and paid into the system long enough to qualify for this particular benefit;
 - 4) you and your spouse must have been **living in the same household** at the time of the death (with certain exceptions for things like hospital and nursing home stays); and
 - 5) you, as surviving spouse, must apply for the \$255 death benefit **within two years** of the date of your spouse's death.

- (b) **Surviving child.** If a qualifying surviving spouse exists for purposes of the lump sum death benefit, a surviving child will **not** receive the benefit. If there is no spouse eligible to receive the payment, a child who is receiving benefits on the deceased worker's earnings record during the month in which the worker died or is eligible to receive benefits can claim the lump-sum death benefit.¹⁴

To determine if a child is eligible for benefits on the deceased person's record, see page 30.

¹³ 42 U.S.C. § 202(i); <http://bit.ly/lumpsumdeathpayment>.

¹⁴ <http://bit.ly/lumpsumdeathbenefit>.

What can I do if I qualify for the Lump-Sum Death Benefit but DOMA prevents me from receiving it?

If you would meet the qualifications for the lump-sum death benefit but for DOMA, you have **two** possible courses of action: you can apply now to try to preserve your claim back to the date of application or wait to see if DOMA is repealed or found unconstitutional in court and then apply. Beware, though, that you **must** apply for this benefit within two years of the date of your spouse's death. Specifically:

- 1) **You can apply now** to Social Security for the lump-sum death benefit. *(See page 38 for information about filing an application for Social Security.)*



Herb Burtis (left, with late spouse **John Ferris**), challenging DOMA in GLAD's case *Gill v. OPM*

Until DOMA is overturned in court or repealed by Congress, **expect your claim to be denied.** *(You will then follow the appeals process described on page 40.)*

If your appeal process is still ongoing at a time when DOMA is invalidated by a court, you should then receive the lump-sum benefit.

OR

- 2) **You can wait** to see if DOMA is found unconstitutional by the courts or repealed by Congress. At that time, you should be able to apply for and receive the lump-sum death benefit just like any other married person, as long as the date of your application is within two years of your spouse's death.

Surviving Spouse Benefit

When a worker dies, the surviving spouse may be entitled to benefits based on the worker's earnings record. Specifically, a surviving spouse—assuming that he or she meets age or other requirements—is entitled to receive the greater of either his or her own Social Security retirement benefit or the deceased worker's Social Security benefit.

A surviving spouse can also use the survivor's benefit to delay retiring on his or her own record, thereby earning delayed retirement credits and increasing his or her own benefit.¹⁵

EXAMPLE 1: *Tricia's spouse receives a Social Security retirement benefit of \$2,000 and Tricia receives a benefit based on her own earnings record of \$1,200. Both have reached full retirement age. If Tricia's spouse dies first, Tricia is entitled to receive her spouse's higher payment of \$2,000 as a surviving spouse. If Tricia dies first, her spouse would continue receiving the spouse's own retirement benefit of \$2,000, and will receive no additional benefit based on Tricia's earnings record.*

EXAMPLE 2: *George is 67 and currently receives \$1,500 in Social Security retirement benefits based on his own earnings record. George's spouse is 64, two years short of full retirement age and would receive a monthly benefit of \$2,000 upon retirement. George's spouse dies. George could apply now for the survivor's benefit and begin receiving a monthly benefit of \$2,000 (that George's spouse would have received upon retirement). The age that matters here is the age of the survivor, not the age of the deceased.*

EXAMPLE 3: *Karen is 61. If she begins drawing Social Security based on her own earnings record at age 62, her monthly benefit will be \$750. If she waits until she is 66, her monthly benefit will be \$1,000, and if she waits until she is 70, her monthly benefit will be \$1,310. Karen's spouse is retired and receives a monthly benefit of \$1,000. Karen's spouse dies. Because Karen is over 60, she can apply for a survivor benefit based upon her spouse's earnings record and begin receiving a survivor's benefit now (reduced for early retirement). At age 70, Karen will be able to switch over to her own earnings record and receive a monthly benefit of \$1,310.*

| | WITHOUT BENEFIT | WITH BENEFIT |
|--------|---|---|
| AGE 62 | \$ 750 retirement benefit | \$ 1 000 survivor's benefit |
| AGE 66 | \$ 1 000 retirement benefit | \$ 1 000 survivor's benefit |
| AGE 70 | \$ 1 3 1 0 retirement benefit | \$ 1 3 1 0 retirement benefit |

¹⁵ <http://bit.ly/survivorsplanner>.

Who qualifies for a survivor's benefit as a widow or widower?

This section states the eligibility requirements for a surviving spouse to receive the widow or widower's benefit. If you do not meet these requirements, you do not qualify for this Social Security benefit irrespective of DOMA. The requirements are:

- 1) at the time of your spouse's death, your spouse must have been domiciled in a State that recognizes your marriage to a spouse of the same sex or in Washington D.C. or in any foreign country (see page 8 for a list of such places as of September 2012);
- 2) you and your spouse must have been **married for at least 9 months** immediately prior to the day on which your spouse died;
Note: There are several exceptions to the duration requirement. For a full list, visit: <http://bit.ly/marriagerequirement>
- 3) your deceased spouse must have been **"fully insured" according to the Social Security Administration**, which means that he or she had worked and paid into the system long enough to qualify for this particular benefit;

- 4) you must be:
 - (a) 60 or older;
 - (b) 50 or older and disabled; or
 - (c) caring for a qualifying “child” who is entitled to a child’s insurance benefit based on the earnings record of your spouse (By a qualifying child, Social Security means a “child” under age 16 or who receives Social Security disability benefits on your spouse’s earnings record. “Child” is defined by the Social Security Act as explained on page 30);

- 5) you must not have re-married before age 60 (or, if you are disabled, age 50) unless the later marriage has ended at the time of application, whether by death, divorce, or annulment¹⁶; and

- 6) **your monthly Social Security benefit must be lower than the monthly amount your deceased spouse was receiving** (unless your own benefit is higher than what you would receive from the survivor’s benefit and you want to apply for the survivor’s benefit to delay retirement based on your own earnings record).

¹⁶ <http://bit.ly/survivorsplanner>.

Potential Reductions to Benefits

In calculating a survivor benefit, you must consider rules that could reduce your benefits, such as early retirement, maximum family benefits, and the Government Pension Offset (GPO). See page 12. *Note, however, that the Windfall Elimination Provision (WEP) does not apply to survivor benefits.*

EXAMPLE:

A worker and spouse both claim their benefits at full retirement age. Because the worker receives a pension based on work not covered by Social Security, the benefit amount under the WEP benefit formula is \$700. Based on the WEP benefit amount, the spouse's benefit is \$350 (one-half of the worker's WEP benefit amount).

When the worker dies, the WEP reduction is removed. The surviving spouse's benefit is refigured using the regular benefit formula.¹⁷

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If you would meet the qualifications for the survivor's benefit but for DOMA, you have **two** possible courses of action: you can apply now to try to preserve your claim back to the date of application or wait to see if DOMA is repealed or found unconstitutional in court and then apply.

Specifically:

What can I do if I qualify for the Survivor's Benefit but DOMA prevents me from receiving it?

- 1) **You can apply now** to Social Security for the survivor benefit. *(See page 38 for information about filing an application for Social Security.)*

Until DOMA is overturned in court or repealed by Congress, **expect your claim to be denied**. *(You will then follow the appeals process described on page 40.)*

If your appeal process is still ongoing at a time when DOMA is invalidated by a court, you should then receive the survivor benefit; you should also be entitled to retroactive benefits based on the date of your application.

If your appeal process is over (or if you never took an appeal of the denial of your application for the survivor benefit) before DOMA's constitutionality is decided, then if GLAD wins its challenges to DOMA (or if DOMA is repealed by Congress), you should be allowed to apply again for and receive the higher benefit from the time of your renewed application and going forward.

OR

- 2) **You can wait** to see if DOMA is found unconstitutional by the courts or repealed by Congress. At that time, you should be able to apply for and receive the survivor benefit just like any other married person. **There is no deadline for applying for a survivor benefit**, though the date of application will determine the start date of benefits.

¹⁷ <http://bit.ly/windfalleliminationeffect>.

Child's Benefit

CHILD'S BENEFIT

Social Security does not just help older people. It also can help a worker's "child" or "children" when one or both parents are disabled, retired or deceased. Because Social Security provides an important economic safety net, "child" and "children" are defined broadly.

A "child" can receive Social Security benefits under Social Security's disability, retirement, or survivor protections if the worker on whose earnings record he or she is claiming worked long enough in a job where he or she paid Social Security taxes.

The child also must be:

- 1) Unmarried; and
- 2)
 - (a) Younger than age 18; or
 - (b) 18-19 years old and a full-time student (no higher than grade 12); or
 - (c) 18 or older and disabled. (The disability must have started before age 22.)



Geraldine (left) and **Suzanne Artis**, with their three sons, challenging DOMA in GLAD's case *Pedersen v. OPM*

Who is a “child” under Social Security?

The Social Security law has numerous and complicated tests for who can be a “child.” Because this memo focuses on married couples of the same sex, this section sets forth the definitions most relevant to those couples rather than an exhaustive list. If one of these situations does not apply but the child was dependent on the insured worker for support, call GLAD’s InfoLine at (800) 455-GLAD or seek legal counsel.

The term “child” means:

1) **A legally adopted child of an individual.**

Because of the Social Security Act’s broad protections, benefits may be available if an adoption is in process at the time a worker dies and sometimes even for a posthumous adoption. The Act provides:

A person shall be deemed, as of the date of death of an [insured] individual, to be the legally adopted child of such individual if such person was either living with or receiving at least one-half of his support from such individual at the time of such individual’s death and was legally adopted by such individual’s surviving spouse after such individual’s death but only if

- (a) proceedings for the adoption of the child had been instituted by such individual before his death, or*
- (b) such child was adopted by such individual’s surviving spouse before the end of two years after the day on which such individual died.¹⁸*

¹⁸ 42 U.S.C.A. § 416(e).

If an adoption of the child was not completed before the insured worker died, please contact GLAD's InfoLine at (800) 455-GLAD or an attorney that specializes in Social Security.

OR

- 2) A biological child of an insured individual or a child of the insured individual's marriage if the child would be able to inherit intestate (without a will) through the wage earner as a child.¹⁹

This definition should protect a child born into a marriage of a same-sex couple in Washington, D.C. or any State that permits such marriages and may protect a child born into such a marriage in a State that recognizes such marriages lawfully performed elsewhere. See page 8 for a list of such places as of September 2012.

OR

- 3) If an applicant is a son or daughter of an insured individual but is not (and is not deemed to (be) the child of such insured individual under subparagraph (2), such applicant shall nevertheless be deemed to be the child of such insured individual if such insured individual and the mother or father, as the case may be, [GLAD believes this could be read gender neutrally] ... went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment ... would have been a valid marriage;"²⁰

OR

- 4) If the person is not a child under (3), but
 - (a) the insured individual:

- (I) has acknowledged in writing that the applicant is his or her son or daughter,
- (II) has been decreed by a court to be the mother or father of the applicant, or
- (III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter, **AND**

I, II, or III happened in a required window of time as follows:

- In the case of an insured individual entitled to old-age insurance benefits (who was not, in the month preceding such entitlement, entitled to disability insurance benefits) — not less than one year before such insured individual became entitled to old-age insurance benefits or attained retirement age, whichever is earlier.
- In the case of an insured individual entitled to disability insurance benefits, or who was entitled to such benefits in the month preceding the first month for which he or she was entitled to old-age insurance benefits — before such insured individual's most recent period of disability began.
- In the case of a deceased individual — before the death of such insured individual.

OR

¹⁹ 42 U.S.C.A. § 416(e) & (h)(2)(A).

²⁰ 42 U.S.C.A. § 416(e) & (h)(2)(B). This could occur, for example, if one of the participants was previously married and the marriage had not ended before that participant went through a marriage ceremony with another.

- (b) such insured individual is shown by evidence satisfactory to the Commissioner of Social Security to have been the mother or father of the applicant, and such insured individual was living with or contributing to the support of the applicant at the time such applicant's application for retirement or disability benefits was filed or at such time as the insured individual died in the case of survivor benefits.²¹

OR

- 5) A stepchild who has been such stepchild for not less than one year immediately preceding the day on which application for child's insurance benefits is filed or (if the insured individual is deceased) not less than nine months immediately preceding the day on which such individual died.

The term "stepchild" for purposes of Social Security has not been interpreted in the context of a marriage of a same-sex couple. If this is your situation, please contact GLAD's InfoLine at (800) 455-GLAD or seek legal counsel.

A person can be deemed a stepchild of an insured individual if the insured individual and the child's parent went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment, would have been a valid marriage.

For purposes of this definition of "child," a child shall be deemed to have been the stepchild of an individual for a period of one year throughout the month in which occurs the expiration of such one year.²² (In other words, if a couple were married on June 30, 2011, the child could be deemed the step-child of the insured individual as soon as June 1,

2012.)

Please note that some protections can be available to a person who is the grandchild or stepgrandchild of an individual or his or her spouse in certain circumstances. If you think this might apply to you, contact GLAD's InfoLine at (800) 455-GLAD or an attorney specializing in Social Security.

²¹ 42 U.S.C.A. § 416(h).

²² 42 U.S.C.A. § 416(e).

What If I'm Divorced?

A divorced spouse of a retired worker—assuming the marriage lasted at least 10 years and that the divorced spouse meets age and other requirements—is entitled to receive benefits on the earnings record of a former spouse. This includes the spousal benefit, the spousal disability benefit, and the survivor's benefit, (*see pages 6, 16 and 24, respectively*) though some eligibility differences apply for divorced spouses.

My former spouse is of the same sex.

Because a divorced spouse can only claim benefits based on a marriage that lasted at least 10 years, for couples married in the United States, the earliest date one could claim Social Security based on the earnings record of a spouse of the same sex is May 2014 (marriage was first permitted in the United States on May 17, 2004). Check back with GLAD about the status of DOMA at that time.

My former spouse is of a different sex.

As described above, in some circumstances, a marriage can prevent you from drawing Social Security based on the earnings record of a former spouse (e.g., you cannot claim a survivor's benefit based on the earnings record of a former spouse if you re-marry before age 60 (or age 50 if you are disabled) and the marriage has not ended – *see page 27*). As long as DOMA is in effect, it prevents the Social Security Administration from recognizing your marriage to a person of the same sex and,

therefore, such a marriage will not affect your eligibility to start or continue Social Security benefits.

Because DOMA prevents the Social Security Administration from recognizing your marriage to a person of the same sex, such a marriage will not prevent you from drawing on the Social Security earnings record of your former spouse of a different sex or cause those benefits to stop if you had already started drawing them.

- If you would receive a higher Social Security benefit based on the earnings record of your prior different-sex spouse and you want to maximize your benefits, you should **not** apply for Social Security based on the earnings record of your same-sex spouse.
- If you would receive a higher Social Security benefit based on the earnings record of your same-sex spouse, you can receive Social Security based on the earnings record of the prior different-sex spouse while you are applying for benefits based on the earnings record of your current spouse of the same sex.

Applying for Social Security

You can apply for Social Security benefits in person on your own at your local Social Security Administration Office. (While there are also ways to apply online, the systems do not seem to be set up to recognize same-sex spouses and, as such, an attempt to apply online might not result in a processed application.) Be prepared to provide a copy of your marriage certificate in support of your application and, if you are applying for survivor benefits, a copy of your spouse's death certificate. Be sure to obtain and keep a date-stamped copy of your application or other dated acknowledgment of receipt of your application so that you will have evidence of when you filed in the unlikely event you need to prove later that you did apply for benefits.

You may be told that you cannot apply for marriage-based benefits based on a marriage to a spouse of the same sex. You need to persist, politely, until you are permitted to complete an application. If you are prevented from even filing an application for Social Security benefits because of DOMA, please contact GLAD's InfoLine at (800) 455-GLAD or seek legal counsel.

Because of DOMA, your application for benefits based on your marriage to a person of the same sex should currently be denied. In GLAD's experience, Social Security has used statements such as those in [Examples 1 and 2](#) in denying a benefit based on DOMA.

Visit <http://bit.ly/denialletter1> and <http://bit.ly/denialletter2> to see PDFs of a denial letter from Social

EXAMPLE 1: *Since the Defense of Marriage Act prohibits SSA from finding that you and the insured were married for benefit purposes, you are not eligible for [BENEFIT AT ISSUE].*

Security to an applicant for a benefit based on the earnings record of a spouse of the same sex. If you receive a denial that differs substantially from these examples, please contact GLAD’s InfoLine.

It is possible that a Social Security representative will tell you orally that your application is denied. If that happens, politely insist on a written denial, which Social Security is required to give you. This is important in order to preserve your right to appeal. If Social Security refuses to give you a written denial, please contact GLAD’s InfoLine.

If you do not receive a decision on your application from Social Security within two weeks, write to Social Security and request a decision. If you still have not received a written decision four weeks after your initial application, please contact GLAD’s InfoLine.

When your application for any Social Security benefit is denied because of DOMA, as you should expect, you must appeal the denial to try to preserve your claim for Social Security back to the date of application.

If your application for benefits is granted, please contact GLAD or an attorney. You should not accept the benefits without obtaining legal advice.

EXAMPLE 2: *On [DATE] you contacted this office to inquire regarding collecting benefits on the record of [NAME]. You are not entitled for benefits on the record of [NAME].*

As per POMS GN 00305.005B5 [a Social Security manual], “An individual whose claim for benefits is based on a State recognized same-sex marriage or having the same status as spouse for State inheritance purposes cannot meet the statutory gender-based definition of husband, wife, widow, widower of the NH [Number Holder], including one who is divorced. Under the Defense of Marriage Act, the word “marriage” means only a legal union between one man and one woman as husband and wife. Therefore, for benefit purposes, SSA does not recognize such individual as the spouse of the NH.”

Appealing a Denial of Social Security Benefits

The Social Security Administration will tell you in the denial how to appeal the decision to the next level and **you should follow the instructions from Social Security**. The first step is to seek reconsideration of the denial.

The standard Social Security denial notice will instruct you as follows:

- You have 60 days to ask for an appeal.
- The 60 days start the day after you receive this letter. Social Security will assume you got this letter 5 days after the date on it unless you show that you did not get it within the 5-day period.
- You will have to have a good reason for waiting more than 60 days to ask for an appeal.
- To appeal, you must fill out a form called "Request for

Reconsideration,” which is form number SSA-561. You can get the form here:

<http://bit.ly/reconsiderationrequestform>

You should be able to complete the form yourself and should do so before going to the Social Security office to file it.

Form SSA-561 asks you to explain why you do not agree with the denial of benefits. Where the form states: “I do not agree with the determination made on the above claim and request reconsideration. My reasons are:” you should indicate that you believe DOMA is unconstitutional. You may use a short statement, such as:

“My spouse and I are (were) married. DOMA is unconstitutional.”

You also could use a more detailed statement, such as:

“I am appealing the denial of [list benefit (e.g., spousal retirement benefit / spousal disability benefit / survivor benefit and lump sum death benefit)]. The denial of this benefit was based on the 1996 federal Defense of Marriage Act (DOMA), 1 U.S.C. § 7. Since DOMA blocks recognition of my marital status/marriage and treats me differently from other married people in [YOUR STATE], I believe DOMA is unconstitutional. That law has now been declared unconstitutional by several federal courts. In addition, the Department of Justice has stated its belief that this law is unconstitutional. For these reasons, I assert that my marriage should be respected and the benefit granted.”

It is important that you personally deliver the completed Request for Reconsideration form to the Social Security office. Bring two copies of the completed form with you. Submit one copy and have the second date stamped for your records so you will have proof that you filed a request for reconsideration.

If Social Security refuses to accept your request for reconsideration, you should immediately - and well before the deadline to appeal - contact GLAD's InfoLine at (800) 455-GLAD.

There is no opportunity for a personal appearance when you file a Request for Reconsideration, which is the first stage of the appeal process. The decision will be made on the record and must be in writing. Sometimes a decision will be issued shortly and other times it may be months later.

After reconsideration, there are three additional levels of appeal. They are:

- Hearing by an administrative law judge;
- Review by the Appeals Council; and
- Federal court review.

For more information from Social Security about the appeals process, visit <http://bit.ly/yourrighttoquestion>. Again, at each step Social Security will tell you how to appeal to the next step. Each time you want to explain that you believe DOMA is unconstitutional.

Because it is possible (though not certain) that DOMA will be struck down as unconstitutional by the Supreme court, **right now you should try to keep your appeal pending as long as possible**. (And the same is true if we must rely on Congress to repeal DOMA.) To extend your appeal process, wait until any deadline nears to file the next challenge to your denial (but be sure not to miss any deadlines).

Once you begin your appeal process or if at any point you have questions, please contact GLAD's InfoLine at (800) 455-GLAD. GLAD would like to have up-to-date information about who is seeking Social Security and how your claim is treated.

Once all of the appeal processes internal to the Social Security Administration are exhausted, you will be given a 60 day deadline to file a lawsuit in federal court to obtain benefits. Again, please advise GLAD as soon as you are given such a deadline.

If Congress Repeals DOMA

Congress passed DOMA and Congress can end DOMA's discrimination by repealing it. The Respect for Marriage Act, a bill that would repeal DOMA, is now pending in Congress and continues to gain supporters. If the courts do not invalidate DOMA, then we must rely exclusively on Congress to repeal it. If that repeal occurs, DOMA will no longer be a bar to same-sex married couples seeking Social Security benefits from the point of repeal. A law repealing DOMA may or may not address retroactive benefits. Check with GLAD for guidance if DOMA is repealed in Congress.

The **GLAD Legal InfoLine**
can be reached from
1:30 – 4:30 p.m.
Monday through Friday
at **(617) 426-1350** or
(800) 455-GLAD (4523)
or anytime at
www.glad.org/rights

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September 2012