

## FAQ on Social Security Survivor's Benefits For Same-Sex Partners Prevented From Being Married Because Of Discriminatory Marriage Laws

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On November 25, 2020, a federal district court entered judgment in a case ruling that the Social Security Administration (“SSA”) may not deny same-sex partners who were barred from marriage access to Social Security survivor’s benefits. The court had held that denying these benefits to same-sex partners who had been barred from marrying was just as unconstitutional as the marriage bans themselves.

SSA has posted a [notice about this case](#) and has issued some guidance, known as Emergency Message EM-21007, about how the agency will be implementing this ruling, even while they are appealing it. Here is some general information about what this ruling means and how you may be protected.

### What is *Thornton v. Commissioner of Social Security*?

*Thornton v. Commissioner of Social Security* is a class action brought on behalf of surviving same-sex partners across the country who were barred from marrying their same-sex partners by discriminatory marriage laws and thus denied access to Social Security spousal survivor’s benefits based on the work history of their partners. SSA generally denies claims for survivor’s benefits if the couple was not married—even when same-sex partners were blocked from marrying by unconstitutional marriage laws. On September 11, 2020, the federal district court in *Thornton* struck down as unconstitutional SSA’s categorical denial of survivor’s benefits to surviving same-sex partners who were barred from marrying due to discriminatory state marriage bans. The court held that SSA cannot continue discriminating against people who have applied for survivor’s benefits. A copy of the court’s decision is available [here](#).

On November 24, 2020, the district court issued an [order](#) requiring SSA to re-adjudicate class members’ claims and enjoined SSA from denying survivor’s

benefits without determining whether class members would have satisfied the marriage-related requirements for benefits if they had not been barred from doing so by applicable laws barring them from marriage. The district court’s judgment became final on November 25, 2020.

### Who does this ruling apply to? Who qualifies as a class member?

The court’s ruling applies to all surviving same-sex partners across the country:

- who filed claims for survivor’s benefits any time before November 25, 2020,
- whose claims have been denied because they were prevented from being married to their partners at the time of the partners’ death (and therefore from meeting [the marriage-related requirements](#) for survivor’s benefits), and
- who were prevented from being married because of unconstitutional laws barring same-sex couples from marriage.

### What are the benefits to which the ruling applies?

SSA pays survivor's benefits to spouses and dependents of a person who has died and who has paid into the Social Security system over the course of their working life. There are three forms a spousal survivor's benefit can take:

1. The surviving spouse 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.
2. The surviving spouse can start collecting a survivor's benefit as a way of delaying retiring on their own record, and ultimately increasing their own retirement benefit level.
3. A surviving spouse can also receive survivor's benefits while caring for the deceased spouse's child.

The amount of the benefit will depend on the deceased spouse's earnings, whether they were collecting retirement benefits at the time of their death, and how close to [full retirement age](#) the survivor is when they start collecting the benefits. It may also be affected [if you are still working](#) or if you [receive a government pension](#). More information on survivor's benefits is available on [SSA's website](#).

(Note that the "survivor's benefits" discussed in this FAQ are monthly benefits, and they are different from the one-time lump-sum death benefit of \$255 that surviving spouses can receive.)

### When does a spouse ordinarily become eligible to apply for survivor's benefits?

A surviving spouse can apply for survivor's benefits starting at age 60.

A surviving spouse living with a disability can apply starting at age 50.

A surviving spouse caring for the deceased spouse's child who is under 16 or receiving their own disability-based benefits can apply at any time.

### I think this ruling applies to me. How do I access these benefits?

Whether your claim for survivor's benefits is presently pending at the agency or it was denied years ago, the first step is to contact Social Security at 1-800-772-1213 or look up the phone number for your [local SSA field office](#) to request a telephone appointment to be sure your claim is being considered (or reconsidered) pursuant to the *Thornton* ruling, pursuant to Emergency Message EM-21007. (Field offices were closed to in-person appointments in March 2020 due to the [COVID pandemic](#).) See below for more specific information for those whose claims are currently pending and for those who did not previously appeal a prior denial based on not being able to meet the marriage requirements due to discriminatory marriage laws.

## What do I need to prove under the ruling to qualify for benefits?

The *Thornton* ruling prohibits SSA from automatically denying a same-sex 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 partners from marriage. 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 those marriage-related requirements if the discriminatory laws hadn't prevented you from doing so.

Most commonly, in addition to determining that you would have been married if the law had not prohibited it, the agency will need to conclude that your marriage would have lasted at least nine months at the time of your partner's death. For couples who adopted children together (whether yours, your partner's, or a previously unrelated child), [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, you will need to show that you would have been married for at least nine months before your partner's death but for the discriminatory marriage ban.

## How will the agency determine that we would have been married and met the requirements if we hadn't been barred from marriage?

They will make this determination based on the information you provide them, and may ask you a variety of questions about your relationship history to do so. Agency staff has been instructed to conduct thorough interviews and consider all evidence that you would have been married at the

time of your partner's death, and when you would have married, if you were not unconstitutionally barred from doing so. They may ask you or you may want to offer information about things like:

- Would you have married if there were no law barring same-sex couples from marriage? If so, when?
- Did your state bar same-sex couples from marrying at all times before your 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?
- Would you have been eligible to marry each other in your state if not for the unconstitutional bar on marriage for same-sex couples? Would you have satisfied requirements related to age, not being closely related, and not being married to anyone else?

All of these inquiries are aimed at the same key questions about (a) whether you and your partner would have been married if the law had permitted you to marry and (b) whether you would have been married for at least nine months before your

partner's death. This is not just a mechanical assessment of the timing of your loved one's death and when the marriage ban was lifted, but a deeper question of whether and when in your relationship you would have married had there never been any discriminatory law preventing you from doing so.

You will likely be asked for a specific date on which you would have married had you not been barred from doing so. In part, this will be to assess whether you would have been married for at least nine months prior to your partner's death. But not having a specific date to point to should not prevent you 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. For some, listing an alternate date may be straightforward based on previous relationship milestones, but if you do not have a specific date to offer, you can just suggest that the agency use the date that is nine months and one day before your spouse's death.

### What kinds of proof, documents, or statements should I provide SSA?

You have the opportunity to provide SSA with any and all evidence that supports your answers to whether you would have been married if the law had not barred you from doing so, and whether your marriage would have lasted at least nine months before your partner's death. That may include providing a written statement of your direct answers, along with any factual support, such as copies of documents demonstrating your commitment, celebrating milestones in your relationship, or establishing protections for each other. This might include copies of estate planning or decision-making documents like wills, powers of attorney, health care proxies, life insurance policies

or retirement accounts designating each other as beneficiaries. It might include proof of joint property ownership or leases, joint financial accounts, or joint insurance policies. It might include information about ceremonies you held, partnership agreements you made, domestic partner protections you were able to obtain, or other signifiers of your commitment. And it could include copies of photos, greeting cards, or other memorabilia that demonstrate your relationship's history and commitment. You may want to inform them about any communications you had with your partner about wanting to marry each other, even though you were barred from doing so at the time. You can share with them the ways in which discriminatory laws affected your relationship and your ability to be married, as well as the ways you viewed your relationship regardless of the law. All of this will be assessed to determine whether you would have been married at the relevant times for being eligible for survivor's benefits if you had been legally permitted to do so.

### What happens if the district court's opinion is overturned on appeal?

SSA has appealed the district court's opinion, and the appeal is currently pending. Please be aware that federal law may require these benefits to be repaid if the opinion is overturned or altered on appeal. That repayment obligation may be waived by the agency or altered by a court, but receiving these benefits now may have financial implications for you down the road.

### What do I do if my application for benefits is already pending at SSA?

If you have not yet received an initial determination on your application and would like to provide more information to show that you would have been married and met the other requirements if not for the discriminatory marriage laws, reach out to the SSA field office where you applied. Notify them that you believe you are a member of the class certified in *Thornton v. Commissioner of Social Security*, and that your claim should be processed according to Emergency Message EM-21007, the instructions issued by the agency for how to process class members' claims.

If your initial application was denied solely because you were unable to be married and meet the requirements for benefits, and you have filed either a request for reconsideration, a request for a hearing before an Administrative Law Judge, or a request for review by the Appeals Council, you should be hearing from SSA with notice either that your claim has been approved or that they need more information. The agency has given instructions to its staff for reviewing these appeals. In some instances, there may already be enough in your record for the agency to determine that you would have been married and qualified for spousal survivor's benefits were it not for discriminatory marriage laws. If not, agency staff has been instructed to advise applicants that more information is needed and you should have the opportunity to provide it at that time.

We do not know how long it will take to hear from SSA about your pending appeal. Please contact your [local field office](#) if you want to inquire about its status. You do not need to wait to hear from the agency. Notify them that you believe you are a member of the class in *Thornton v. Commissioner of Social Security* and ask them to ensure that your

appeal has been coded as being subject to the ruling in this case (listing code 529) and is being processed according to Emergency Message EM-21007. If you need assistance, please contact [Lambda Legal's Help Desk](#).

### What if SSA denied my application for survivor's benefits before the Thornton ruling and I did not fully appeal that denial?

If the sole reason you were previously denied survivor's benefits is that you could not meet the marriage-related requirements due to discriminatory marriage laws, you can request that SSA reopen your claim even if you did not pursue any or all available appeals and the denial was final. Contact Social Security at 1-800-772-1213 or look up the phone number for your [local SSA field office](#) to schedule a telephone appointment to request that your previous claim be reopened because you believe you are a member of the class certified in *Thornton v. Commissioner of Social Security*. Be clear that you are requesting what is known as "reopening" rather than applying for benefits for the first time. If your previously denied claim is granted, you should receive benefits dating back to at least your original application. If you file a new claim rather than having your prior claim reopened, you may only receive benefits going forward, and your claim will likely be held because you would be filing it after the *Thornton* court's order. If you are told that reopening the claim requires either a lawsuit or a change in the law by Congress, please tell them that you believe you are a member of the *Thornton* class for which SSA has issued Emergency Message EM-21007 with reopening instructions for staff, mention listing code 529, and politely persist in your request that they reopen your previous claim.

### What if I asked SSA about applying for survivor's benefits in the past and SSA staff did not let me submit an application because they said it would be denied?

If you were deterred from filing for benefits based on the information given to you by SSA staff, you will need to submit a new application for survivor's benefits and simultaneously request what is known as a "deemed filing date," essentially asking them to treat your new application as if it had been filed at the time you originally attempted to apply. These requests usually involve providing a signed statement from you that describes your past contact with the agency and ask for any evidence. If you were misled by information on SSA's website and publications to believe you had no pathway to access survivor's benefits, you may wish to explain that as well. You can find more information about making this request [here](#), including the kinds of evidence the agency will consider. It is possible that SSA will treat these requests as new applications and put them on hold. Please notify [Lambda Legal's Help Desk](#) if that happens to you.

### How quickly will SSA act on my appeal or request to reopen my previous claim?

In short, we do not know. SSA issued instructions to their employees suggesting that holds on these claims of up to 90 days may occur. At any point that you want more information about the status of your claim, you can check in with your local field office. Feel free to contact Lambda Legal's Help Desk if your claim has been held for more than that time and you have been unable to get further information from SSA.

### What do I do if my partner died before we were allowed to marry but I have never applied for survivor's benefits? Can I apply for them now?

We understand that there may be many people in this situation, who have not applied yet either because they weren't old enough or because they just assumed there was no point since they were never able to marry. Though we argued to the court that surviving same-sex partners who were barred from marriage who apply for survivor's benefits going forward should have their claims processed in the same way as those who have already applied, the district court's order in this case is limited to people who had submitted applications before November 25, 2020. We have filed an appeal of this part of the district court's ruling. In the meantime, although the court was clear that the Constitution requires the agency not to automatically exclude from benefits those surviving same-sex partners barred from marriage, we do not know if the agency will ultimately process future applications in a manner consistent with those principles.

That said, if you believe you meet the class definition set out above *other than having already submitted an application*, you may nevertheless wish to apply for survivor's benefits now. SSA has instructed its staff to hold all such applications filed on or after November 26, 2020. Though SSA will likely not grant you benefits immediately, applying now will preserve your ability to receive benefits dating back to your filing date if either the Court of Appeals or SSA ultimately extends the constitutional principles embodied in the district court's order to those who applied for benefits after it entered. You can apply by contacting Social Security at 1-800-772-1213 or looking up the phone number for your [local SSA field office](#) to request a telephone appointment.

If you apply and you are denied solely on the basis that you were not married due to discriminatory marriage laws, please contact [Lambda Legal's Help Desk](#). If you apply and your benefits are granted, we would appreciate your letting us know that, too.

### **What if SSA tells me I will be denied or that they can't take my application or request to reopen?**

If an SSA employee tells you verbally that your application will be denied, politely insist on being able to file it anyway. Notify them that you believe you are protected by the court's ruling in *Thornton v. Commissioner of Social Security*, which has a listing code of 529 and for which the agency has issued Emergency Message EM-21007 instructing how to process class members' claims. You can also point them to the case [notice on SSA's own website](#). Receiving a written denial is important to your ability to appeal the decision. Persist politely until you are permitted to apply or reopen. If need be, you can explain that you simply wish to preserve your legal rights. If your request is denied solely because you were not married despite being barred from meeting that requirement by discriminatory marriage laws, please contact [Lambda Legal's Help Desk](#).

### **What do I do if SSA denies my application for another reason or concludes that the discriminatory marriage laws were not the reason we did not meet the requirements for survivor's benefits?**

The *Thornton* ruling requires the agency to determine whether, absent the marriage bans, you would have been married at the time of your partner's death and met the marriage-related requirements for survivor's benefits. If, after you

have provided SSA with information about your relationship and how you were impacted by discriminatory marriage laws, the agency determines that something *other than the marriage ban* caused you to not meet those requirements, you can appeal that factual determination through [SSA's appeals process](#).

### **What if I married someone else after my partner's death?**

If you married before the age at which you became eligible for survivor's benefits, you are not eligible for survivor's benefits, unless the marriage has ended by the time of your application for survivor's benefits. If you remarried after age 60 (or age 50 if you live with a disability), your eligibility for survivor's benefits is not affected.

### **What if I started collecting my own retirement benefits since my previous application for survivor's benefits was denied?**

The *Thornton* ruling requires that you be restored to the position you would have been in had you not been discriminated against by having your original application for survivor's benefits denied. The implications of having your original application for survivor's benefits granted depends on the age at which you first requested benefits and both your and your partner's earnings.

If receiving survivor's benefits would have given you a higher benefit level at all times, you can ask SSA to pay you the difference, as well as paying you at your partner's benefit level going forward.

If receiving survivor's benefits would have allowed you to delay collecting your own retirement benefits in order to maximize your benefit level, you

can ask SSA to (a) withdraw your application for your own retirement benefits, (b) pay you the full amount of the survivor's benefits you should have been receiving minus the amount you were already paid in retirement benefits, and (c) ensure that when you do eventually apply for your own retirement benefits, you are awarded them at their full value without any deductions for having purportedly taken them early.

### **What if our child was awarded survivor's benefits after my partner's death but I was not?**

You can ask SSA to reopen your claim for survivor's benefits as well. In calculating the amount of any back benefits you are owed, SSA will look to ensure that, when combined with the survivor's benefit your child received, the total amount does not exceed the [maximum family benefit](#) amount, which is generally somewhere between 150 and 180 percent of your deceased partner's benefit rate. If it does, SSA will reduce the benefits proportionately. More information about this can be found on [SSA's website](#).

### **What if I was able to marry my same-sex partner but our marriage could not last more than nine months because of discriminatory marriage laws?**

This FAQ does not address that issue. There is a separate class action lawsuit, *Ely v. Saul*, on behalf of surviving same-sex spouses who were prevented by discriminatory marriage laws from being married for at least nine months before their spouses died and who were unable to access to survivor's benefits as a result. You can learn more about that case [here](#).

If you have further questions about the *Thornton* ruling, contact [Lambda Legal's Help Desk](#). Please take note that this document only provides general legal information and is not intended as legal advice. For individual legal advice, please contact an attorney.