

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

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On May 27, 2020, a federal district court ruled that the Social Security Administration (“SSA”) may not deny survivor’s benefits to same-sex spouses who were prevented from being married for at least nine months because of state marriage bans. The court held that applying a requirement of 9 months of marriage to same-sex couples 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-20046 SEN REV 2, instructing agency staff about how to implement this ruling. Here is some general information about what this ruling means and how you may be protected.

What is *Ely v. Saul*?

Ely v. Saul is a class action brought on behalf of surviving same-sex spouses across the country who were or would be denied Social Security survivor’s benefits because they were prevented from being married for at least nine months at the time of their spouses’ deaths because of discriminatory marriage laws. Though SSA generally requires any couple to have been married at least nine months for the survivor to receive benefits, when same-sex partners were blocked from marrying by unconstitutional marriage laws, that requirement is anything but evenhanded. On May 27, 2020, the federal district court in *Ely* struck down as unconstitutional SSA’s categorical denial of survivor’s benefits to surviving same-sex spouses prevented from meeting the 9-month requirement due to discriminatory state marriage bans, and held that SSA cannot continue discriminating against these surviving spouses. A copy of the court’s decision is available [here](#).

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

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

- who have filed or will file claims for survivor’s benefits,
- whose claims have been or would otherwise

- be denied because they were prevented from being married to their spouses for at least nine months at the time of the spouse’s death, and
- who were prevented from being married for at least nine months 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 can I 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.

How do I apply for these benefits if I have never applied for them before?

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. (Field offices were closed to in-person appointments in March 2020 due to the [COVID pandemic](#).) You cannot apply for survivor's benefits online. You will need both of your social security numbers on hand, and you will be able to submit any necessary documents by mail or other means, such as your marriage certificate, your spouse's death certificate, and any other documents you would like to submit as discussed below. During your appointment, inform the staff that you believe you are a member of the class certified in *Ely v. Saul*, and that your claim should be processed according to Emergency Message EM-20046 SEN REV 2.

What do I need to prove under the ruling when I apply for benefits?

The *Ely* ruling prohibits SSA from automatically denying a same-sex spouse's claim for benefits based solely on the 9-month duration requirement where an unconstitutional law barred the spouses from marriage. In order to overcome that requirement, 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.

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. Under SSA's Emergency Message EM-20046 SEN REV 2, agency staff has been instructed to conduct thorough interviews and consider all evidence of the circumstances that prevented you from being married for nine months at the time of your spouse's death. They will ask about obstacles to your marriage posed by both the law and other life circumstances with the goal of sorting out whether it was the discriminatory marriage laws that prevented you from being married for at least nine months. They may ask you things like:

- Did your state bar same-sex couples from marrying until less than nine months before your spouse's death?
- Would you have been married to your loved one for at least 9 months if your state law did not bar same-sex couples from marriage?
- How long were you together?
- Did you live together? If so, for how long? Did you own property together?
- Did you provide for each other after death 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?
- Did you have or raise children together?

All of these inquiries are aimed at the same key question: whether you would have been married for at least nine months at the time of your spouse's

death if the law had always permitted you to marry. This is not just a matter of whether you would have moved your wedding back to nine months before your spouse's death, or how soon after the marriage ban was lifted you were able to marry, but a question of when in your relationship you would have married had there never been any discriminatory law preventing you from doing so.

If you married in a state other than the state you lived in at the time, you may be asked why you did not travel to marry sooner. We do not believe that is a relevant question, as it is the laws of the state where you were living that posed the unconstitutional obstacle. If you would have been married for at least nine months if the place where you lived had permitted same-sex couples to marry from the start of your relationship, you may wish to reiterate this fact, which we believe should be sufficient. If your application is denied because of a determination related to why you did not travel to marry sooner, please contact [Lambda Legal's Help Desk](#).

You may also be asked for a specific date on which you would have married had you not been barred from doing so. We understand that this question is not actually part of the determination of whether you are eligible for benefits, but is intended as a workaround for the SSA software that defaults to denying benefits if the listed marriage date is less than nine months before the death. 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 answer to whether you would have been married for at least nine months at the time of your spouse's death if the law had always permitted you to marry. That

may include providing a written statement of your direct answer (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 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 spouse 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 for at least nine months if you had been legally permitted to do so.

What do I do if SSA tells me I will just be denied or that they can't even take my application?

If an SSA employee tells you verbally that your application will be denied, please politely insist on being able to file it anyway. Notify them that you believe you are a member of the class certified in *Ely v. Saul*, which has a listing code of 527 and for which the agency has issued Emergency Message EM-20046 SEN REV 2 with instructions for processing claims of class members. You can also point them to the [notice on SSA's own website](#) about the case. Receiving a written denial is important to your

ability to appeal the decision. Persist politely until you are permitted to file an application. If need be, you can explain that you simply wish to preserve your legal rights. If your application is denied solely because you were not married for nine months 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 9-month requirement?

The *Ely* ruling requires the agency to determine whether, absent the marriage bans, you would have been married for nine months at the time of your spouse's death. If, after you have provided SSA with information about your relationship, your marriage, and how you were impacted by discriminatory marriage laws, the agency determines that something *other than the marriage ban* caused you to be married for less than nine months, you can appeal that factual determination through [SSA's appeals process](#).

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 for at least nine months 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 *Ely v. Saul*, and that your claim should be processed according to Emergency Message EM-20046 SEN REV 2, 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 for nine months and you have filed 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 for at least nine months 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.

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 *Ely v. Saul* and ask them to ensure that your appeal has been coded as being subject to the ruling in this case (listing code 527), and is being processed according to Emergency Message EM-20046 SEN REV 2. If you need assistance, please contact [Lambda Legal's Help Desk](#).

What if SSA denied my application for survivor's benefits before the Ely 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 9-month duration requirement 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. 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 your original application. If you file a new claim, you will only receive benefits going forward. 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 class certified in *Ely v. Saul* for which SSA has issued Emergency Message EM-20046 SEN REV 2 with reopening instructions for staff, mention listing code 527, 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, but you may be able to request what is known as a "deemed filing date." We do not yet know how SSA will respond to these requests from people seeking benefits under the *Ely* ruling, but as a general matter, the agency will take a signed statement from you that describes your past contact with the agency and ask for any evidence. You can find more information about making this request [here](#), including the kinds of evidence the agency will consider.

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

In short, we do not know. SSA's instructions indicate that claimants can follow up 90 days after submitting their request if SSA has not yet taken any action, but at any point that you want more information about the status of your claim, you can check in with your local field office. If the local field staff is not able to provide you with additional information or you have concerns or questions about your status as an *Ely* class member, you can contact your SSA [Regional Communications Director](#) for additional assistance. 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 if I have remarried?

If you remarried before the age at which you became eligible for survivor's benefits, you are not eligible for survivor's benefits, unless the later 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 *Ely* 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 spouse'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 spouse'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 spouse'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 benefit your child received, the total does not exceed the [maximum family benefit](#) amount, which is generally between 150 and 180 percent of your deceased spouse'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 never able to marry my same-sex partner?

This FAQ does not address that issue. There is a separate class action lawsuit, *Thornton v. Saul*, on behalf of same-sex surviving partners who were barred from marrying their loved ones before they died and who were denied access to survivor's benefits as a result. You can learn more about that case [here](#).

If you have further questions about the *Ely* 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.