



# NOVEMBER 2015 CHANGES TO SOCIAL SECURITY LAW AFFECT DIVORCING SPOUSES

BY JOSEPH W. CUNNINGHAM, JD, CPA

The Bipartisan Budget Act of 2015 (Act), enacted November 2, 2015, includes significant changes which limit two strategies previously used by spouses and divorcing spouses to maximize Social Security benefits.

Though Social Security benefits are not subject to division in divorce, they are a source of income often taken into account in determining “money available” with respect to spousal support.

## “File and Suspend”

### Law Prior to the Bipartisan Budget Act of 2015

Since 2000, a worker – assume H – could file for benefits at full retirement age – currently 66 – then suspend payment until age 70 while continuing to work and accumulate additional retirement credits, thus increasing the benefit payable at age 70.

However, because H filed for benefits – notwithstanding that his benefit payments are suspended – his spouse (W) – or ex-spouse married to him for 10 years – could then draw a spousal benefit based on his earnings record. The spousal benefit is 50% of the worker’s benefit.

And, if W is working, she may continue accumulating additional retirement credits based on her earnings while collecting the spousal benefit. Then, when she retires, she can draw the higher of the spousal benefit or the benefit based on her own earnings record.

### Revision by the Bipartisan Budget Act

Under the Act, the “file and suspend” option remains intact. But, during the suspension period, no benefits may be paid to a spouse or a child based on the worker’s earnings record.

So, in short, any benefits based on the worker’s earnings record – including the spousal benefit – may not be paid until the worker begins receiving benefits.

### Effective Date and Planning Opportunity

The Act’s new restriction does not apply to any “file and suspend” arrangements currently in place or to those established within 6 months of the law’s November 2, 2015, enactment date.

This provides a “window of opportunity” to do so between now and May 1, 2016.

### Example:

- H, 66, and W, 62, are divorcing.
- H is working and plans to continue to so until age 70, health permitting.
- W is also working, albeit at a lower earning level than H.
- The parties, aware of the Act’s provisions, agree that H will file for Social Security before May 1 and then immediately elect to suspend benefit payments.
- This allows W to elect to receive a spousal benefit while she continues to work and, correspondingly, to



increase her ultimate benefit based on her earnings record in case it happens to exceed the spousal benefit.

- After May 1, it will not be possible for H to “file and suspend” and enable W to receive a spousal benefit before H actually begins to receive his benefits.

- But, if W had not attained age 62 before 2016 and filed for benefits, she could not elect the spousal benefit but would be paid the higher of the two at that time.
- And, recall that after May 1, W cannot receive a spousal benefit unless and until H is receiving his benefits.

## “Restricted Application”

### Law Prior to the Bipartisan Budget Act of 2015

A spouse who has attained full retirement age – again, currently 66 – could elect to receive a spousal benefit and continue working, hence increasing the spouse’s own earnings record. Then, at age 70 – or before – the spouse could retire and choose the higher of the spousal benefit or the benefit based on the spouse’s earning record

But, a spouse under age 66 who files for benefits is not allowed to defer the election between the spousal benefit or the benefit based on the spouse’s earning record. Rather, the spouse receives the higher of the two at the time of initial receipt of benefits.

### Revision by the Bipartisan Budget Act

The Act eliminates the right to elect to receive the spousal benefit at age 66 or older if the spouse is also entitled to a benefit based on the spouse’s earnings record. In other words, the rule that applied to those filing for benefits before reaching age 66 now applies to all under age 70.

So, the practical effect is that at any age a spouse who files for benefits will then automatically receive the higher of the (1) spousal benefit or (2) the benefit based on the spouse’s earnings. This eliminates the ability to draw the spousal benefit while increasing one’s own earning record, and then choosing the higher of the two at retirement.

### Effective Date and Planning Opportunity

The new rule regarding “restricted application” applies to those attaining age 62 after 2015. For those who reached 62 before 1/1/16, the restricted application for the spousal benefit is available, albeit subject to phase-out over the next 4 years.

Thus, for spouses who attained age 62 by 12/31/15, the restricted application remains available.

### Example:

- Using the facts in the above example, if H “files and suspends” before May 1, and W reached age 62 by 12/31/15, she could elect to receive the spousal benefit while continuing to grow her benefit based on her earnings record. She could then choose the higher of the two at age 70 or earlier if she retires before then.

## Comment On Changes

If divorcing parties are in their 60’s, particularly if Social Security is significant in the case, consider whether either (1) “file and suspend” before May 1 and/or the (2) restricted application by a spouse age 62 by 12/31/15 may be advantageous.

## About the Author

*Joe Cunningham has over 25 years of experience specializing in financial and tax aspects of divorce, including business valuation, valuing and dividing retirement benefits, and developing settlement proposals. He has lectured extensively for ICLE, the Family Law Section, and the MACPA. Joe is also the author of numerous journal articles and chapters in family law treatises. His office is in Troy though his practice is statewide.*