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QDRO Basics

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Our mission is to enhance the independence and quality of life for older adults by empowering them, by protecting their interests and by facilitating their access to resources

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Staffed by experienced attorneys

Pre-set 30 minute appointments

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Qualified Domestic Relations Order Basics

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Terminology

Terms and acronyms for the Order can include:

- “QDRO” – Qualified Domestic Relations Order
- “DRO” – Domestic Relations Order
- “DPO” or “DOPO” – Division of Property Order
- “COAP” – Court Order Acceptable for Processing
- “MPDO” - Military Retired Pay Division Orders

Identification of the Parties:

- “Participant” (P) – Employee
- “Alternate Payee” (AP) – Ex-spouse receiving share of employee’s pension

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Division of Pension Plans in a Divorce

- A qualified domestic relations order (QDRO), is a court order that specifies how to divide a retirement plan or pension fund during a divorce.
- The QDRO is an order that creates or recognizes the existence of a former spouse's right to receive all or a portion of the benefits payable to a participant under a retirement plan.
- Pension cannot be divided without a QDRO or DPO
- State law generally provides for the division of marital property. In Ohio, for example, R.C. 3015.171(C)(1) provides that the division of marital property shall be equal.

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How to Accomplish a Pension Division in a Divorce

- Completion of a Qualified Domestic Relations Order (QDRO) (governed by ERISA, state and/or federal law)
- QDRO is an order in aid of execution of the property division ordered in the divorce decree
- QDRO identifies the Plan, Plan Participant, Alternate Payee, how the benefit will be divided, and the amount of time or number of payments to be made to the Alternate Payee

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Rules Governing QDRO Qualification (ERISA Plans)

ERISA Plans

- IRS Code Section 414(p)
- Employee Retirement Income Security Act of 1974 “ERISA”, Section 206(d)(3)
- Applies to most private pension plans

Non-ERISA Plans

- Most federal government pension plans (e.g. OPM, Military) governed by federal law specific to that particular plan
- State and local pension plans (OPERS, STRS, OP&F) governed by state statute (In Ohio governed by ORC Sections 3105.80 – 3015.90)

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Types of Orders

- QDRO – generally used for private pension plans governed by ERISA
- DPO or DOPO– statutory form required for public retirement systems in Ohio
- COAP – applicable to FERS (Federal Employees Retirement System) through OPM
- MPDO - Military Retired Pay Division Order through DFAS (Defense Financing and Accounting Service)

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Difference Between DPO and QDRO

- Ohio uses a standard DPO form for state employees governed by state law (exempt from ERISA)
- An Ohio DPO does not establish a separate account for the AP
- Under an Ohio DPO, the AP can only receive funds from the retirement system when the member receives a benefit that is subject to the DPO
- The Ohio DPO does not provide survivorship rights for the AP
- In Ohio, must use the standard form DPO created by statute without alterations
- Other states may also have state and local plans exempt from ERISA governed by state law that may or may not have a standard form

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Types of QDROs

Shared Interest

- Based on P's retirement date and life expectancy with the AP's benefits generally beginning and ending the same date as the P
 - Can do shared interest QDRO if Participant is or is not in pay status
 - *Only* method for benefits when P is in pay status
 - P's benefit payments are divided with no actuarial adjustments in the P's balance
 - All DPOs are shared interest per statute in Ohio
 - AP's benefits based solely on life of Participant and AP can only start receiving benefits when Participant retires and goes into pay status.

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Types of QDROs Continued

Shared Interest Death Procedures:

- If AP predeceases P after the pension benefits begin, QDRO can provide that AP's share reverts to P
- AP's benefit terminates at P's death unless there is a provision for survivor benefits through:
 - Qualified Pre-Retirement Survivor Annuity (QPSA) provision in a QDRO if P predeceases AP and neither have commenced benefits
 - Qualified post-retirement Joint and Survivor Annuity (QJSA) provision in a QDRO if P predeceases AP after benefits have commenced
 - Election of a survivor annuity with AP as beneficiary pursuant to an Agreed Entry for state retirement system pensions (i.e. DPO's)

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Types of QDROs

Separate Interest

- Generally fairest method to both parties
- Provides greater control and much less risk to the AP
- Splits the Plan balance between the P and AP before payments have begun
- Can only use if P has not retired and is not in pay status
- AP can make own elections regarding their share of the pension
- AP's benefits are based on AP's lifetime (no survivor annuity needed)
- Gives P and AP control over how their share of plan benefits will be paid and eliminates AP's risk of payments ending at P's death.
- AP can usually start receiving benefits from P's pension at P's earliest retirement age under the Plan

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Types of QDROs

Shared Interest Example 1:

Mr. T has pension credits in a state public employees retirement system that requires a DPO for division of the pension. Mrs. T is entitled to 50% of the marital portion of Mr. T's pension pursuant to the divorce decree, so a DPO would need to be completed. Mrs. T would not receive any pension benefits until Mr. T becomes eligible and applies for his pension. Once Mr. T goes into pay status, Mrs. T will receive 50% of the marital share of Mr. T's state pension. If Mr. T dies before he becomes eligible for and applies for pension benefits, Mrs. T receives nothing. If Mr. T dies after he is eligible for and applies for pension benefits, Mrs. T's benefits will terminate *unless* Mr. T elected a survivor annuity with Mrs. T as beneficiary pursuant to an Agreed Entry.

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Types of QDROs

Shared Interest Example 2:

Mr. and Mrs. X are recently divorced. Mr. X was employed by Black Corp and has a DBP pension. Mr. Black was already in pay status with his pension at the time of his divorce. Mrs. X was entitled to receive 50% of the marital portion of Mr. X's pension with Black Corp. pursuant to the divorce decree. A shared interest QDRO must be completed in order for Mrs. X to receive her portion of Mr. X's pension since Mr. X is already in pay status.

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Types of QDROs

Shared Interest Example 3:

Mr. and Mrs. C are recently divorced. Mrs. C is the participant in a DBP pension with Yellow Corp. Mr. C (the A.P.) is entitled to 50% of the marital portion of Mrs. C's pension pursuant to the divorce decree. Mr. C is 10 years older than Mrs. C and is terminally ill with cancer and Mrs. C is close in age to retirement, but has not yet gone into pay status. Although a separate interest QDRO is an option since Mrs. C has not yet gone into pay status, the attorney representing Mrs. C drafts a shared interest QDRO with a provision allowing Mr. C's A.P. share to revert back to Mrs. C after Mr. C's death (either prior to, or after benefit commencement date) due to the statistical likelihood that Mr. C will predecease Mrs. C.

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Types of QDROs

Separate Interest Example:

Mr. B is the participant in a DBP pension with Blue Corp. Mr. B still works for Blue Corp and has not yet retired. Mrs. B is entitled to 50% of the marital portion of Mr. B's Blue Corp pension pursuant to the divorce decree. A separate interest QDRO is completed so that Mrs. B will receive her share of Mr. B's pension, which she can elect at Mr. B's earliest retirement age (regardless of whether or not he retires at that time). Mrs. B's share of Mr. B's pension is placed in a separate account that she controls with benefits based on her life expectancy. Mrs. B's share will be unaffected by Mr. B's death.

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Ways to Divide a Pension in a QDRO

Generally 3 different methods used:

- Coverture fraction (traditional or “frozen”)
- Specific percentage as of a defined valuation date
- Specific dollar amount

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What is a Coverture Fraction?

- A coverture fraction is a tool used to separate the portion of benefits earned during the marriage, from the portion of benefits earned outside of the marriage.
- The coverture fraction represents that portion of the value of the benefits attributable to the marriage.
- The numerator of the fraction represents the total period of time P participated in the plan during the marriage.
- The denominator is the total period of time the P participated in the plan as of the cut-off date, which generally can be when the participant stops accruing benefits in the plan (“traditional coverture”) (most states) or it can be the date of separation or divorce using a hypothetical pension amount as of the assignment date (“frozen coverture”) (FL, TX and VA)

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Traditional Coverture Fraction Example

Decree grants AP 50% of the marital portion of P's pension

Marriage Date: June 30, 1970

Divorce: June 30, 1990

Employ. Start Date: January 1, 1970

Employ. stop date: January 1, 2000

P's gross monthly accrued benefit at retirement = \$600/month

Total years P was in pension plan during the marriage = 20 years (6/30/70-6/30/90)

Total years P was in the pension plan = 30 years (1/1/70 to 1/1/00).

Coverture fraction calculation:

20 Years married and employed/30 years employed/accruing benefits (20/30) = 0.67

Applying the coverture fraction:

\$600/month gross pension benefit X 50% X .67 = \$201/month benefit to the AP

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Drafting the QDRO: Required ERISA Provisions

- P and AP info. (name, current or last known mailing address, DOB, SSN)
- Identification of the Plan and the Plan Administrator
- Amount of AP's benefit
- Commencement Date and Form of Payment to AP
- Savings Clause - Order cannot require the Plan to:
 - (a) provide a type or form of benefit not available under the plan
 - (b) provide increased benefits payable under the plan, or
 - (c) pay benefits already being paid to another alternate payee.

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Additional QDRO Provisions

- Order entered pursuant to DR laws of state of Ohio or other applicable state
- Provision of Marital Property Rights
- Death Procedures
- Valuation Date is the date as of which to calculate the Participant's Accrued Benefit from the Plan in order to determine the Alternate Payee's designated portion
- Continued Qualified Status of Order
- Reservation of Jurisdiction
- Whether investment gains or earnings and losses are included

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Additional QDRO Provisions (Continued)

- Whether AP receives share of any early retirement or other available subsidies
- Loan Provision - generally, should **include** any loans in P's total account balance for purposes of calculating AP's assigned share, so AP's share is not *reduced* by any loan balance.
- Qualified Pre-Retirement Survivor Annuity (QPSA) provision if P predeceases AP and neither have commenced benefits in shared interest QDRO
- Qualified post-retirement Joint and Survivor Annuity (QJSA) provision if P predeceases AP after benefits have commenced in shared interest QDRO
- Escrow provision re division of any funds that may be in escrow either divided equally between P and AP or paid to the AP as a lump sum.

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Placing a Freeze/Restriction on the Account

- Whether a plan is willing to place a freeze or restriction on a participant's pension account pending completion of a QDRO, depends on the plan and the plan's written procedures.
- If a freeze is permitted, submission of the decree and/or a draft QDRO is generally required
- If a freeze is permitted, there may be time limits regarding how long the Plan will maintain the freeze
- Best practice is to send in a copy of the Decree and/or draft QDRO to the Plan as soon as possible and request a freeze on the P's account while the QDRO is pending, particularly if the pension is a DCP such as a 401K to prevent P from wrongfully withdrawing funds from the account before a QDRO can be completed
- State and federal retirement DBP plans will generally not place restrictions on an account while a QDRO, COAP or DRO are pending

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Retroactive Benefits for AP if P already in Pay Status

- If P has been in pay status for months or years before a QDRO is completed, AP would need to seek retroactive benefits distributed to P that they were entitled to, directly from P unless Plan put some or all of the funds in escrow before the QDRO was completed (important to include escrow provision in QDRO)

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Agreed Entries

- An Agreed Entry may be needed if the parties agree to terms in the QDRO that are not consistent with the divorce decree to explain what was done to the court
- In Ohio, an Agreed Entry would be necessary to add a survivor interest for AP if the pension is a state pension since the Ohio statute does not provide for a survivor interest in the statutory DPO.

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Pre-Approval

- If the Plan will pre-approve a draft QDRO, submit a draft to the Plan for pre-approval *before* getting signatures and entering it with the Court
- Most private and state plans in Ohio will pre-approve
- Most Federal public Plans will NOT pre-approve (i.e. CSRS (Civil Service)/OPM, FERS, MILITARY)

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Plan Administrators/Third Party Administrators

- Pension Plans (particularly larger pension plans) may choose to outsource their QDRO administration to a Third Party Administrator (TPA).
- Third Party Administrator is an organization that contracts with a retirement plan to review and process QDROs for the plan.
- Law firms can sometimes act as third party administrators for a pension plan.
- Examples of Third Party Administrators, e.g. Lifeworks (fka Morneau Sheppell), Fidelity, QDRO group, QDRO Consultants, One America, Empower, Vibrantz.
- Certain third Party Administrators, (e.g. Fidelity, OneAmerica and Vibrantz) refuse to provide notices to AP's attorney or provide any information re QDRO status without the P or AP on the line.

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QDRO Considerations with Different Types of Pensions

401K's

- Plans generally won't allow using a historical value (i.e. coverture fraction), so need to use either a specific dollar amount or a specific percentage of the account as of a certain valuation date (generally date of the divorce or date of separation)

IRA's

- The division of an IRA generally does not require a QDRO
- IRA's can generally be divided with the divorce decree or a separation agreement

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QDRO Considerations/Different Pensions cont.

PBGC PENSIONS

- Must have correct name of the Plan.
- PBGC *does* pre-approve draft QDROs and does have model orders available:
<https://www.pbgc.gov/sites/default/files/qdro.pdf>

Ohio Deferred Compensation

- QDRO under ERISA
- Link to Procedures and Model:
<https://cdn.ohio457.org/contentpdf/QDROProcedures.pdf>
- Procedures indicate pre-approval, but ODC won't provide any information to AP/AP's attorney re results of the pre-approval without a signed release from P
- Link to PDF for ROI (not on ODC website): <https://www.proseniors.org/wp-content/uploads/2024/09/Ohio-Deferred-Compensation-Release-of-Information.pdf>

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QDRO Considerations/Different Pensions cont.

- **DPO's for Ohio Public Employee Pensions (OPERS, STRS and OP&F)**
- Link to statutory form (fillable): <https://www.opers.org/forms-archive/Division-of-Property-Order-form-fillable.pdf>
- Need to provide the numerator of the coverture fraction (II.B.2.c, p. 4 of the form)
- Retirement program will reject DPO if the numerator is greater than the number of years P was both contributing member of Plan and married
- Retirement program provides the denominator of the coverture fraction
- Obtain a voluntary release from P or court ordered release to confirm the correct numerator of the coverture fraction
- Link to OPERS ROI form: <https://www.opers.org/forms-archive/LL-2.pdf>
- Link to STRS ROI form: https://www.strsoh.org/_pdfs/forms/40-121.pdf
- Link to OP&F ROI form: <https://www.op-f.org/Files/Authorization%20to%20Release%20Records.pdf>
- Link to OPERS pamphlet on Domestic Relations that includes sample Judgement Entry for Survivorship and Entry for ROI (have used with other public retirement programs):
<https://www.opers.org/pubs-archive/leaflets/ISL-O-Domestic-Relations.pdf>

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Examples of other state Public Retirement System DRO's

Links to statutory forms for DRO's governed by state law applicable to state public employee retirement systems in other states:

- MI: https://www.michigan.gov/documents/orsstatedb/R0323G_DRO_10_1_2013_437013_7.pdf
Standard form Domestic Relations Order applicable to the State Employees Retirement System in Michigan pursuant to Michigan statutory requirements
- IA: <https://ipers.org/retirees/retiree-divorce>
Model QDRO provided applicable to Public Employee Retirement Systems in Iowa pursuant to IA statutory requirements
- IL: <https://ilsrs.illinois.gov/content/dam/soi/en/web/srs/gars/resources/documents/qildro/gars-qildro-handbook.pdf>
"QILDRO" – handbook applicable to the General Assembly Retirement System of Illinois pursuant to IL statutory requirements
- CA: <https://www.calpers.ca.gov/docs/forms-publications/model-domestic-relations-orders.pdf>
"CalPERS Domestic Relations Order" applicable to public employee retirement systems in California pursuant to CA statutory requirements

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QDRO Considerations/Different Pensions cont.

Military Orders

- Link to Sample Order:
<https://www.dfas.mil/Portals/98/Documents/Garnishments/SAMPLE%20ORDER%20LANGUAGE%202.pdf?ver=2020-01-17-093724-717>
- Submit certified copy of Order to DFAS (no pre-approvals)
- Need Military Standard Form 180 Release to complete the Order and AP will need to complete an application for direct pay to receive their benefits
- Link to Military Standard Form 180 Release of Information:
<https://www.dfas.mil/Portals/98/Documents/FOIA/SF-180%20Request%20for%20Military%20Records.pdf?ver=2020-01-09-135633-213>
- Link to application for former spouse payments from retired pay (DD Form 2293):
https://www.dfas.mil/Portals/98/Documents/Garnishments/DD2293%20Wizard%20Extended%20Final.pdf?ver=ab5K_bzk2G7SKoex1x3_g%3d%3

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QDRO Considerations/Different Pensions cont.

(Military Orders Continued)

- **Survivor Benefit Plan (SBP) Eligibility for an Ex-spouse of Military Member**

A SBP gives retired military members an opportunity to provide a portion of their retired pay to their survivors in the following two situations, both of which have a **1 year time limit**:

1. Request by the Military Member: If the military member elected to cover ex-spouse under SBP prior to the parties' divorce, the divorce would nullify this designation; however the military member has the option to elect to change their spouse coverage to their now former spouse after the divorce, *if* the retired military member makes this request within 1 year of the divorce.
2. If the military member and the former spouse sign an Agreed Entry to continue SBP with former spouse coverage, and a QDRO incorporates, ratifies or approves the agreement, the former spouse may request a deemed election for former spouse coverage if the military retiree fails to elect that coverage IF the request for a deemed former spouse election is received within 1 year of the divorce. (A divorce decree alone does not constitute a deemed election.)

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QDRO Considerations/Different Pensions cont.

City Pensions

- Some city pensions (e.g. City of Cincinnati) do not allow QDROs or DROs
- If City pension is involved that does not allow QDROs or DROs, consider having a pension evaluation performed to value the total value of the pension to offset the value of the pension against other marital property.

DOL Pensions

- Link to booklet on QDROs: <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf>
- Link to DOL frequently asked questions re QDROs: <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/qdro-overview.pdf>

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Steps to Complete a QDRO

- 1) Check with the Plan or Third Party Administrator to see if they have written QDRO Procedures and Model Order publication. If so, obtain and review prior to drafting the QDRO.
- 2) Obtain account information needed to complete the QDRO or DPO (may need voluntary or court ordered ROI)
- 3) Draft the QDRO using the Model Order if available for private plans governed by ERISA
- 4) Draft a DPO or DRO using the statutory form for public retirement systems if available.
- 5) Submit the QDRO or DPO to the Plan for pre-approval if the Plan pre-approves. (Most plans pre-approve in about 30 days, but some longer.)
- 6) Have the parties/attorneys sign the QDRO/DPO.

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Steps to Complete a QDRO (continued)

- 7) Submit QDRO/DPO to Court for processing, filing and request return of a certified copy. (Some courts require a praecipe.)
- 8) Submit certified copy of the court processed QDRO/DPO to the Plan
- 9) For DPO's in Ohio, the agency must receive a certified copy of the DPO directly from the clerk's office
- 10) Plan formally reviews and determines if it will accept the QDRO as qualified
- 11) Once the QDRO is accepted as qualified, Plan sends notice to P and AP re acceptance and sends instructions and forms to the AP re how to access benefits.

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When Should A QDRO be Done?

- If possible, have the QDRO completed and ready for the parties' signatures at the time of the final hearing
- Prior to the final hearing, obtain any releases needed to complete the QDRO, draft the QDRO and submit the draft to the Plan for pre-approval
- QDRO can also be done after the final hearing, but can run into numerous issues and problems if there is a delay in completing the QDRO.

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Potential Problems if Delay in Completing QDRO

- P goes into pay status shortly after the divorce and before QDRO is completed, but P dies shortly after going into pay status leaving AP with \$0 benefit.
- P withdraws all funds from his 401K immediately after the divorce, spends all the money and is judgement proof
- A QDRO is done several years after the P goes into pay status during which the P receives AP's share. Once the QDRO is completed, AP receives their benefit going forward, but is unable to collect the overpayment/arrearage owed from the P.
- Once P reaches retirement eligibility, plan may refuse to start P's benefits until a QDRO is completed, with significant delay in P receiving benefits.

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When Does the AP Receive Their Share?:

- Depends on the plan and whether P is in pay out status
- If plan is a DPO, AP doesn't receive a benefit until P goes into pay status
- If a private pension QDRO is shared interest, AP doesn't receive a benefit until P goes into pay status
- If plan is separate interest, AP can generally start receiving benefit as of the P's earliest retirement date (regardless of whether P has started drawing benefits)
- If Plan is 401K, AP can generally receive their share as soon as QDRO is completed, accepted as qualified and processed by the plan.

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Tips for Drafting Decrees:

- Research all pension plans before drafting the decree
- For state pension plans in Ohio, must use the standard form using a straight percentage with a traditional coverture fraction, or a specific dollar amount – can't do a lump sum offset and can't include a survivor interest in the DPO itself.
- Be specific when dividing the pension by using a specific % of the marital portion of the pension times the coverture fraction; a specific percentage of the pension plan as of a certain valuation date; or a specific dollar amount.
- If using a valuation date in dividing the pension, be clear in defining the valuation date.
- Always include a provision for court to retain jurisdiction
- Make sure to have the correct name of the pension plan involved, but be aware the name of the pension plan can also change over time

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Tips for Drafting Decrees (continued):

- Avoid using offsets, or dollar amount deductions if using a coverture fraction to calculate AP's share in a QDRO
- Make sure all pension plans of both parties are included, accounted for and covered in the decree
- Include entitlement to/provision for survivor benefits for the AP if pension is shared interest
- For all pensions being divided, include pension division language for each pension in the decree
- Ensure pension is accurately valued and included in the asset division.
- If pension is a pension (e.g. city pension) that does not allow the pension to be divided via QDRO or DRO, consider getting a pension evaluation to value the total value of the pension to offset the value of the pension against other marital property.

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SUMMARY OF QDRO DRAFTING PRACTICE TIPS

- State Pension DPO's - get a release from P for OPERS, STRS, or OP&F or other state agency to confirm correct numerator of coverture fraction or ask court to issue entry for ROI if P refuses to sign a release
- Have QDRO/DPO/COAP/Military Order completed at time of final hearing to get signatures when everyone is present
- If QDRO varies the terms of the divorce decree pursuant to the parties' Agreement, draft an Agreed Entry explaining the agreement.
- If decree grants AP a survivor interest in State Pension Plan, in Ohio, must draft a separate Agreed Entry for Survivor Interest
- If the P of a DBP is close to retirement age, but not yet in pay status, crucial to get the QDRO completed before P does retire if AP wants a separate interest QDRO
- Request freeze placed on P's account while QDRO is pending

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QUESTIONS?

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THANK YOU FOR ATTENDING

For Questions, please feel free to contact:

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