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# Wilson v. Wilson: The Effect of QDROs on Appealing Divorce Decrees

Joshua A. Dean

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## **WILSON V. WILSON: THE EFFECT OF QDROS ON APPEALING DIVORCE DECREES**

*Joshua A. Dean*

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### I. INTRODUCTION

In most divorces today, the largest asset held by the divorcing couple is a retirement fund belonging to one of the spouses.<sup>1</sup> Courts in

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1. Mark S. Maddox & Margaret K. Cassidy, *Division of Employee Benefits Upon Divorce: An Analysis of the Retirement Equity Act of 1984 and a Framework of Distribution of Benefits*, 58 OHIO BAR 436, 436 (1985) (stating that in most divorces, “the pension rights or employee benefits of one or both spouses are the most significant marital assets owned by the couple. Accordingly, employee benefits are increasingly subject to division in state divorce proceedings.”). See also Jessica Straub, Note, *Erb v. Erb: A Step Toward Clarification in Public Pension Division*, 33 U. TOL. L. REV. 915, 916 (2002) (stating that pensions earned during marriage are usually marital property and are crucial in divorce because the pension is often the largest marital asset, along with the marital home); Hilary Greer Fike, *Qualified Pension Trends and Divorce Considerations*, 14 AM. J. FAM. L. 234, 234-35 (2000) (stating that pensions provide the largest block of private capital in the country and the Federal Reserve estimated that twenty five percent of financial assets in the United States were held in pensions, and that the average American couple has a pension worth as much as their home); David L. Baumer & J.C. Poindexter, *Women and Divorce: The Perils of Pension Division*, 57 OHIO ST. L.J. 203, 203-04 (1996) (stating that for most couples, the most valuable assets they own are the family home and their pension plan or plans); Dylan A. Wilde, Student Article, *Obtaining an Equitable Distribution of Retirement Plans in a Divorce Proceeding*,

every state must decide how to divide a married couple's property in order to provide each spouse his or her proper share.<sup>2</sup> But when there are no assets large enough to offset the value of the retirement pension, divorce courts must find a way to "equitably distribute" the proceeds of the plan.<sup>3</sup> Dealing with this large asset presented problems in the past<sup>4</sup> as Congress sought to limit the ability to assign proceeds of retirement plans to anyone who was not the named beneficiary.<sup>5</sup>

In 1974, Congress passed the Employees Retirement Income Security Act (ERISA)<sup>6</sup> in an attempt to protect the employee's right to

49 S.D. L. REV. 141, 141 (2003) (stating that a U.S. Department of Labor study from 1998 indicated over ninety-nine million participants of private retirement plans with assets totaling over four-trillion dollars).

2. Cheyaña L. Jaffke, *Death, Taxes, and Now Divorce – The Dyad Expands to a Triad: ERISA's Social Policy Harms Women's Rights*, 35 U.S.F. L. REV. 255, 268-69 (2001) (describing the two main ways that states divide property in divorce, one under the community property system, in which nine states treat all property obtained during the marriage as community property that is equally divided upon divorce and the other under the common law property system, in which marital property is merely equitably divided amongst spouses upon divorce, yet the question of what is marital property differs by state). See also David S. Rosettenstein, *The ALI Proposals and the Distribution of Stock Options and Restricted Stock on Divorce: The Risks of Theory Meet the Theory of Risk*, 8 WM. & MARY J. WOMEN & L. 243, 245-46 (2002) (stating that the ALI concluded that most jurisdictions adopt the principle of equitable distribution of property at divorce, yet there were different methods of deciding which assets are subject to distribution). Further, the author states that every state must decide what assets to distribute as marital property in a divorce. *Id.*; Baumer & Poindexter, *supra* note 1, at 207 tbl.1 (classifying states by their respective property distribution methods, showing that thirty-one states used some form of equitable distribution, while nine states used a form of community property and ten used only alimony as of 1996).

3. Timothy C. Voit & James L. Parris, *Fundamentals of Qualified Domestic Relations Orders*, 12 S.C. LAW. 24, 24 (2001) (stating that a court order to distribute the present value of a pension is needed when "the lump-sum present value of the pension is too large to adequately offset the value of the pension against other assets of the marriage or when the parties to the divorce cannot agree on the present value of the pension in question.").

4. Maddox & Cassidy, *supra* note 1, at 436-37 (stating that after Congress passed the Employee Retirement Income Security Act of 1974 (ERISA), but before the passing of the Retirement Equity Act of 1984 (REA), state courts were unsure of what authority they had to divide pensions in favor of non-employee spouses upon divorce). Plan administrators feared the plan would lose its tax exempt status if divided. *Id.* Some courts continued to divide pensions, although ERISA seemed to preempt any state law authorizing such division under § 514(a). *Id.* See also Julie Anne Barbo, Note, Ablamis v. Roper: *Preemption of the Nonemployee Spouse's Community Property Rights in ERISA Pension Plans*, 49 WASH & LEE L. REV. 1085, 1086-87 (1992) (stating that before ERISA was passed, the lack of pension regulation resulted in a lack of uniformity among the state laws and unstable financial plans). After ERISA was enacted, courts were split on whether ERISA's ban on assigning pension plan benefits applied to divorce decrees that gave rights to a pension to a non-employee spouse. *Id.* at 1087.

5. 29 U.S.C.S. § 1056(d)(1) (Lexis 2007) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.").

6. Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829. See also 29 U.S.C.S. §§ 1001-1461 (Lexis 2007); Keron A. Wright, "Stuck on You": *The Inability of an Ex-Spouse to Waive Rights Under an ERISA Pension Plan* [McGowan v. NJR Serv.

keep his or her pension.<sup>7</sup> Congress protected the pension funds of employees by eliminating the ability to assign a vested pension, thereby excluding pensions from possible creditor claims.<sup>8</sup> The unfortunate side effect of ERISA was the difficulty that divorce courts faced in dividing retirement pensions between ex-spouses in order to achieve an equitable property division.<sup>9</sup> Congress cured this deficiency with the Retirement Equity Act of 1984 (REA).<sup>10</sup> The REA carved out a specific exception to allow the assignment of pensions in matters of divorce.<sup>11</sup> In order to

Corp., 423 F.3d 241 (3d Cir. 2005)], 45 WASHBURN L.J. 687, 690 (2006) (stating that President Gerald Ford signed ERISA into law on Labor Day, 1974).

7. 29 U.S.C.S. § 1001(a) (Lexis 2007) (“[I]t is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of [employee benefit plans].”). See also T. Leigh Anenson & Dr. Karen Eilers Lahey, *The Crisis in Corporate America: Private Pension Liability and Proposals For Reform*, 9 U. PA. J. LAB. & EMP. L. 495, 495 (2007) (“On September 2, 1974, Congress enacted the Employment Retirement Income Security Act (ERISA) to preserve and protect the pension plans of millions of American workers.”); Jaffke, *supra* note 2, at 260 (describing how the shut down of the Studebaker plant in 1963, which led to over 2,900 workers losing all their pension rights, led to Congress regulating the field of retirement pensions).

8. Leslie A. Kulick, *What Are the Limitations On QDROS?*, 61 J. MO. B. 89, 89 (2005) (stating that Congress required anti-alienation clauses in all ERISA-qualified plans so that the plans would be largely non-attachable by creditors). See also Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275, 278 (7th Cir. 1990) (“ERISA provides that a pension plan must prohibit the alienation or assignment of benefits. These ‘spendthrift’ provisions are designed to prevent unwise alienation or assignment.”) (internal citations omitted); Margaret R. Cooper, *A Family Practitioner’s Guide To Overcoming QDRO Phobia*, 8 DEL. L. REV. 213, 214 (2006) (“[The] purpose of ERISA is to protect pension benefits and protect employees by barring pension benefits from being used to satisfy judgments.”).

9. Cooper, *supra* note 8, at 214, stating:

Throughout the 1970s and early 1980s the anti-assignment clause conflicted with evolving state law that recognized pension rights as marital property subject to division as a part of a divorce. Congress resolved this dilemma in 1984 when it amended ERISA by passing the Retirement Equity Act (REA). REA provided for certain exceptions to the anti-assignment clause of ERISA, allowing assignment of pension benefits pursuant to court orders that meet the statutory requirements of a qualified domestic relations order.

*Id.* See also Maddox & Cassidy, *supra* note 1, at 437-40 (describing the hurdles a court had to work through in order to divide a pension in a divorce proceeding under state law without running afoul of ERISA and the Supremacy Clause of the United States Constitution).

10. Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426. See also Cooper, *supra* note 8, at 214; Maddox & Cassidy, *supra* note 1, at 440 (“The [REA] was enacted in part to clarify the scope of ERISA’s spendthrift and preemption provisions insofar as they pertain to state court orders dividing a participant’s interest in an ERISA-qualified plan.”).

11. 29 U.S.C.S. § 1056(d) (Lexis 2007), providing:

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order,

divide a pension, the parties and the court must file a Qualified Domestic Relations Order (QDRO).<sup>12</sup> However, in order to become “qualified,” the pension plan administrator must approve the Domestic Relations Order (DRO).<sup>13</sup>

The process of drafting a QDRO can be time-consuming and costly.<sup>14</sup> The QDRO must conform to ERISA and the pension plan’s specifications and guidelines.<sup>15</sup> A pension plan administrator may have a specific format or form for QDROs that parties submit for his approval.<sup>16</sup> This boilerplate form may not be advantageous to the non-

except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

*Id.*

12. Aaron Klein, Note, *Divorce, Death, And Posthumous QDROs: When Is It Too Late For A Divorcee To Claim Pension Benefits Under ERISA?*, 26 CARDOZO L. REV. 1651, 1653-54 (2005) (stating that in order for a former spouse to receive benefits from a ex-spouse’s retirement plan, the non-employee spouse must first obtain a domestic relations order (DRO) and then transform the DRO into a QDRO).

13. Voit & Parris, *supra* note 3, at 26 (“[A] court order to divide retirement benefits is not a QDRO until it is qualified or approved by the plan or the plan administrator. It is not qualified by the court.”). See also Klein, *supra* note 12, at 1654 (stating that the any domestic relations order (DRO) must meet “stringent formalistic and substantive requirements before the pension plan may deem it ‘qualified.’”); Cooper, *supra* note 8, at 223 (explaining that a judge must sign the order for it to become a DRO).

14. Klein, *supra* note 12, at 1654, 1655 (stating that the process of drafting and gaining approval of a QDRO is long and complex and that sometimes a participant in a pension plan will actually die before a QDRO is issued). Klein states: “nowhere does ERISA state that a former spouse must obtain a QDRO before the plan participant’s death. ERISA does not contain an express provision mandating a former spouse obtain a QDRO as of a certain date.” *Id.* See also Gary Shulman, *QDROs -- The Ticking Time Bomb*, 23 FAM. ADV. 26, 26 (2001) (“Most family law attorneys are aware of the potential adverse consequences of a participant’s dying before the QDRO is drafted.”); Friesen v. Friesen, No. 07-AP-110, 2008 WL 603191, at \*1 (Ohio Ct. App. 2008) (stating that the parties in that particular case took six years to draft and file a QDRO).

15. Klein, *supra* note 12, at 1663-64 (stating the QDRO must satisfy “exacting procedural requirements” of ERISA). Once a spouse receives benefits pursuant to a divorce decree, the ex-spouse must have the DRO “qualified” by the pension plan administrator who has the right to reject the DRO as unqualified. *Id.* See generally Voit & Parris, *supra* note 3 (describing the differences between defined benefit and defined contribution plans and how a QDRO must be drafted so that it can be carried out under the plan specifications). See also Cooper, *supra* note 8, at 215-16 (describing the requirements of the QDRO set forth in ERISA as well as limitations which the QDRO may not specify).

16. Cooper, *supra* note 8, at 222, stating that:

Most Plans provide a sample QDRO that may be set up as a fill-in-the-blank form. These forms can be dangerous if the blanks are simply filled in with little or no regard to the language of the stipulated order. Samples are designed to simplify the approval process for the Plan Administrator and do not safeguard important rights and negotiated terms.

*Id.*

employee spouse, thus requiring modification.<sup>17</sup> The process of drafting, modifying, and obtaining final approval from a pension plan administrator can take considerable time,<sup>18</sup> drawing out the divorce proceedings and further inconveniencing the parties involved.<sup>19</sup> This time delay also has an impact on the rights of the ex-spouse concerning other areas of the divorce decree besides the right to a pension.<sup>20</sup>

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17. *Id.* See also *QDROs: the Division of Pensions through Qualified Domestic Relations Order*, U.S. DEP'T OF LABOR AND WELFARE BENEFITS ADMIN. at Q 3-1 (1997), available at <http://library.findlaw.com/1999/Mar/8/130758.pdf> [hereinafter *Division of Pensions*] (stating that “[t]here is no single ‘best’ way to divide pension benefits in a QDRO” and that the specific facts of the case will determine the best way to divide a pension).

18. Klein, *supra* note 12, at 1655, 1666-67 (stating that participants in pension plans can die before a QDRO is drafted and that the process of “obtaining a QDRO can be extensive and time-consuming.”). See also Jaffke, *supra* note 2, at 298 (recognizing that there are costs and time delays in processing QDROs in divorce cases); Shulman, *supra* note 14, at 26 (indicating that participants in a pension plan at times have died before a QDRO is drafted); *Division of Pensions*, *supra* note 17, at Q 2-10 (stating that there is no time limit in which a Plan Administrator must determine whether a DRO is a QDRO, but that the determination must be within a reasonable time, depending on the circumstances); 29 U.S.C.S. § 1056(d)(3)(G)(i)(II) (Lexis 2007).

19. Derrit v. Derrit, 836 N.E.2d 39, 43 (Ohio Ct. App. 2005) (stating that it would be impractical to withhold hearing an appeal due to the lack of a QDRO because the parties should not have to wait on actions of non-parties to draft a proper QDRO before litigating their disputed issues). See also *Division of Pensions*, *supra* note 17, at Q 2-4, Q 2-10 (stating that there is no specified time limit on how long a Pension Plan Administrator can take to decide whether a DRO is a QDRO, but only that the time must be reasonable). ERISA provides that a Pension Plan Administrator must preserve separate accounts for each party subject to the DRO for up to 18 months after payments are due under the pension plan while the DRO is in dispute. *Id.* at Q 2-11. See also 29 U.S.C.S. § 1056(d)(3)(H)(iii)(II) (Lexis 2007) (providing provisions for how the Pension Plan Administrator should handle pension plan proceeds when the QDRO is disputed for longer than eighteen months after the time in which pension plan payments are to start under the plan).

20. Cody v. Riecker, 594 F.2d 314, 315 (2d Cir. 1979) (stating that a state court can split up an employee’s pension in order to pay court-ordered support obligations and not run afoul of ERISA); Lyddy v. Lyddy, No. L-89-245, 1990 Ohio App. LEXIS 4519, at \*6-7 (Ohio Ct. App. 1990) (allowing a QDRO to use pension benefits to pay alimony obligations ordered by the court); Levine v. Levine, Case No. 96CA17, 1997 Ohio App. LEXIS 4312, at \*13-14 (Ohio Ct. App. 1997) (following a previously superseded case, Holcomb v. Holcomb, 542 N.E.2d 597, 601 (Ohio 1989), for the proposition that a spouse’s pension is marital property that does not have to be divided up equally, but can be used after other property has been distributed in order to help sustain the other spouse for a specified amount of time). *Holcomb* was superseded by OHIO REV. CODE ANN. §§ 3105.171 & 3105.18 (2007), which eliminated the concept of alimony in Ohio by dividing it into its component parts, as stated in Barber v. Barber, Case No. 1804, 1992 Ohio App. LEXIS 4056, at \*8 (Ohio Ct. App. 1992); Moser v. Moser, C.A. No. 94CA005959, 1995 Ohio App. LEXIS 2036, at \*7 (Ohio Ct. App. 1995) (providing, “[t]o qualify as a QDRO, an order must relate to the provision of child support, alimony payments or marital property rights . . . , and it must be made pursuant to state domestic relations law.” (quoting Albertson v. Ryder, 621 N.E.2d 480 (Ohio Ct. App.1993))).

A QDRO is part of the property settlement in a divorce decree.<sup>21</sup> In order to appeal a divorce decree, it must be a final appealable order.<sup>22</sup> A divorce decree is not a final appealable order unless all ancillary issues to the divorce are determined, including the property division.<sup>23</sup> An issue arises when a pension plan administrator has not yet approved a QDRO and the parties wish to appeal a decision by the divorce court.<sup>24</sup> Important issues such as child custody, child support, alimony, or rights to personal property may be in dispute.<sup>25</sup> These rights granted by the

21. *Bohnlein v. Bohnlein*, 463 N.E.2d 666, 667 (Ohio Ct. Com. Pl. 1983) (ruling for the first time in Ohio on the issue of whether a pension is marital property). “[I]n a divorce action, an employee-spouse’s contractual rights to a pension or profit-sharing plan constitute marital property which should be divided between the spouses.” *Id.* *Baker v. Baker*, Case No. 13-95-36, 1996 Ohio App. LEXIS 307, at \*7-9 (Ohio Ct. App. 1996) (“Subject to the trial court’s discretion, pension benefits are to be considered in the marital property division, and divided equitably.”); *Schrader v. Schrader*, No. L-03-1171, 2005 WL 195487, at \*6 (Ohio Ct. App. 2005) (“It is well-settled that pension and retirement benefits earned during the course of the marriage are marital assets subject to division upon a divorce.”); *Hoyt v. Hoyt*, 559 N.E.2d 1292, 1294-95 (Ohio 1990) (“The general rule is that pension or retirement benefits earned during the course of a marriage are marital assets and a factor to be considered not only in the division of property, but also in relationship to an award of alimony.”).

22. OHIO REV. CODE ANN. § 2505.02(B) (2008) (providing seven methods in which an order can become a final appealable order that can be “reviewed, affirmed, modified, or reversed, with or without retrial”). *See also* *Atkinson v. Atkinson*, 856 N.E.2d 1023, 1025 (Ohio Ct. App. 2006) (stating that a final appealable order “is one that affects a substantial right and, in effect, determines the action, or . . . an order that affects a substantial right made in a special proceeding.”). The court found that the trial court’s judgment was not a final appealable order because the order did not fully determine the divorce because there was not a child support order entered by the court. *Id.* at 1026.

23. OHIO CIV. R. 75(F) (2007). *See also infra* note 147 and accompanying text.

24. *Musci v. Musci*, No. 23088, 2006 WL 3208558, at \*1-2 (Ohio Ct. App. 2006) (stating that parties had previously been before the court to litigate child support issues, but were denied an appeal because the court-ordered QDRO had not been entered. The parties had to go back and have the trial court enter an order that a QDRO was not necessary and have that portion of the divorce decree vacated before the appellate court would hear the appeal.). *See also* *Batt v. Batt*, Nos. 82740 & 83452, 2004 WL 717373, at \*1 (Ohio Ct. App. 2004); (dismissing an appeal in which the trial court ordered two QDROs to be entered and only one had been filed). In *Batt*, the wife wished to appeal the QDRO that the court filed because she claimed it did not reflect the parties’ agreement. *Id.* The appellate court would not hear the case due to a lack of jurisdiction because the second QDRO had not yet been entered. *Id.* at \*1-2.

25. *In re James*, 866 N.E.2d 467, 468-69 (Ohio 2007) (appealing a child custody decision); *Justice v. Justice*, No. CA2006-11-134, 2007 WL 2821794, at \*1 (Ohio Ct. App. 2007) (appealing a child support order); *Abbott v. Abbott*, No. F-06-020, 2007 WL 2874282, at \*1 (Ohio Ct. App. 2007) (appealing a divorce decree based on determinations of child support, child custody, property settlement, and spousal support); *Handy v. Handy*, No.2006AP110064, 2007 WL 2429735, at \*1-2 (Ohio Ct. App. 2007) (appealing a divorce decree due to the division of marital assets, a distributive award made to one spouse, and the trial court’s failure to reserve jurisdiction to modify spousal support); *Kassicieh v. Mascotti*, Nos. 05AP-684 & 06AP-1224, 2007 WL 2800374, at \*1 (Ohio Ct. App. 2007) (appealing the trial court’s allocation of guardian’s fees between the ex-spouses, child support obligation, child support overpayment by one spouse, and the court’s finding that ex-husband’s debt to the ex-wife was non-dischargeable in bankruptcy). *See also* *Laura Beresh Taylor*,

trial court in a divorce decree may become irreversible as time passes and an ex-spouse uses or sells personal property, places a child in a new home or school, or makes alimony and child support payments.<sup>26</sup> If parties must wait for approval of a QDRO, the right to appeal may be of little use. In the past, a minority of Ohio courts chose to resolve this inequity by allowing parties to appeal a divorce decree before a pension plan administrator approved the QDRO, provided the divorce decree met certain requirements.<sup>27</sup> A majority of Ohio courts, however, required approval of the QDRO before a divorce decree became final and appealable.<sup>28</sup> This split in authority prompted the Ohio Supreme Court

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Note, C.R.B. v. C.C. and B.C.: *Protecting Children's Need for Stability in Custody Modification Disputes Between Biological Parents and Third Parties*, 32 AKRON L. REV. 371, 371 (1999) (“More than one million American children are affected by their parents’ divorce each year, and custody decisions are ‘among the most difficult decisions judges must make today.’”).

26. Robert E. Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 30 (2005) (stating that “contact between divorced fathers and their children is infrequent” and decreases as time passes). The authors believe this is a product of how adults manage the grief and pain of divorce, by turning away from the ex-spouses and, as a result, end up divorcing the marital children as well. *Id.*; John H. Grych, *Interparental Conflict as a Risk Factor for Child Maladjustment: Implications for the Development of Prevention Programs*, 43 FAM. CT. REV. 97, 99 (2005) (stating that as time passes, ex-spouses become less contentious and start to lead increasingly separate lives). *See also* Sarah L. Gottfried, Note, *Virtual Visitation: The New Wave of Communication Between Children and Non-Custodial Parents In Relocation Cases*, 9 CARDOZO WOMEN’S L.J. 567, 567 (2003) (stating that mothers are the heads of households for ninety percent of children of divorce and seventy-five percent of them relocate at least one time within four years after the divorce); *See generally* Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes Over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747 (2007) (describing the problem of one spouse relocating and how the courts have dealt with the child custody issues involved in such moving).

27. *Derrit v. Derrit*, 836 N.E.2d 39, 43 (Ohio Ct. App. 2005) (allowing an appeal to go forward despite the fact that a QDRO had not been filed “so long as [the trial court] had directed in its judgment entry and finding of facts how the pension/retirement assets are to be divided”).

28. *Forman v. Forman*, No. 9-06-63, 2007 WL 2757630, at \*3 (Ohio Ct. App. 2007) (dismissing due to the lack of an appealable order because a Division of Property Order, the Ohio equivalent of a QDRO, had not been filed); *Musci*, 2006 WL 3208558 at \*2 (previously denying an appeal because a QDRO was not filed); *Cooper v. Cooper*, No. 84652, 2005 WL 376608, at \*1 (Ohio Ct. App. 2005) (dismissing appeal for lack of a QDRO); *Green v. Green*, No.04AP-61, 2005 WL 468234, at \*2 (Ohio Ct. App. 2005) (dismissing an appeal because the trial court had not yet entered a QDRO or DOPO); *Stare v. Stare*, No. 03 CA 109, 2004 WL 2004152, at \*2 (Ohio Ct. App. 2004) (stating that a “clear majority of Ohio appellate courts have consistently held that divorce orders are not final and appealable if a QDRO has been ordered but not prepared”). The court declined to follow a case in which an appeal was granted despite the fact that a QDRO had not been filed. *Id.* at \*3; *Batt*, 2004 WL 717373, at \*1 (stating that a judgment dividing pension rights between spouses is not appealable until a QDRO has been entered); *Proconiar v. Proconiar*, C.A. Case No. 95-CA-19, 1995 Ohio App. LEXIS 3929, at \*5-6 (Ohio Ct. App. 1995) (rejecting an argument that an appeal was not timely because it was not filed until the QDRO was filed). The *Proconiar* court stated that there was no substantial right affected until the QDRO was filed. *Id.* at \* 6.

to grant review of *Wilson v. Wilson*<sup>29</sup> in December of 2006. In November of 2007, the Court held that divorce decrees are appealable before the parties file a QDRO.<sup>30</sup>

This Comment focuses on when a divorce decree should become a final appealable order if the decree requires the filing of a QDRO. Part I describes the evolution of the law surrounding pensions. It sets forth the relevant sections of ERISA and REA, and how the courts have applied these laws. Part I contains a brief description of the kinds of pensions that a QDRO does and does not cover. Part II analyzes the issue of appealable orders and the Ohio Appellate Courts' split on the issue of when a divorce decree that requires a QDRO becomes appealable. Part III reviews the *Wilson v. Wilson* decision and its effects. Part IV is a critique of the Ohio Supreme Court decision in *Wilson v. Wilson*. By allowing couples to appeal a divorce decree before a QDRO filing, the Ohio Supreme Court correctly resolved an important issue in Ohio family law with the *Wilson* decision. There remains an issue, however, of proper procedure in dealing with an appeal from the QDRO itself, as well as the impact of *Wilson* on other areas of law.

## II. BACKGROUND

Pension plans became popular after World War II when labor unions began actively bargaining for retirement plans in collective bargaining agreements.<sup>31</sup> The United Auto Workers union (UAW) and the United Steelworkers unions pioneered efforts to establish retirement plans to provide financial security for aging workers and more job opportunities for young laborers.<sup>32</sup> But many of these plans met with

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29. *Wilson v. Wilson*, No. 05CA0078, 2006 WL 2336871, at \*1-2 (Ohio Ct. App. 2006) (dismissing an appeal on August 14, 2006, from the parties' divorce decree due to the fact that a QDRO had not yet been filed with the court; therefore the divorce decree was not a final appealable order and the Appellate Court lacked jurisdiction), *review granted*, *Wilson v. Wilson*, 859 N.E.2d 557 (Ohio 2006) (Table) (noting the Ohio Supreme Court granted review of the appellate decision on December 27, 2006).

30. *Wilson v. Wilson*, 878 N.E.2d 16, 18 (Ohio 2007).

31. James A. Wooten, "The Most Glorious Story of Failure in the Business": *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 686-87 (2001) (recounting the events in the automobile industry and steel industry during the late 1940s that increased need for pension plans and caused union officials to bargain for pension plans that covered more employees than just the top management).

32. *Id.* at 686-89. Unions associated with the Congress of Industrial Organizations (CIO) began bargaining for retirement plans in their collective bargaining agreements in the late 1940s. *Id.* at 686-87. The UAW and the Steelworkers unions followed suit. *Id.* at 687. The desire for the pension plans came from the aging workforce that was encouraged to stay on the job during World War II and then could not retire on Social Security, which had diminished in value due to wartime

financial disaster as the costs of keeping the plans alive were too high for failing businesses.<sup>33</sup> This caused Congress to start regulating pension plans<sup>34</sup> and how employers funded them.<sup>35</sup>

### A. Evolution of the Law

Congress passed ERISA in 1974.<sup>36</sup> Before Congress enacted ERISA, it was common for employers to pay out retirement benefits to an employee only if the employee kept his job until retirement age.<sup>37</sup>

inflation. *Id.* Unions used pensions as a way of inducing older workers to retire and create job opportunities for younger workers in a more mechanized and productive industry. Wooten, *supra* note 31, at 689. *See also* Anenson & Lahey, *supra* note 7, at 498 (stating that pension plans allow employers to “systematically replenish” the workforce by encouraging older, less productive workers to retire and allow younger workers to be promoted).

33. Wooten, *supra* note 31, at 692-97, 730. In the years immediately after World War II, small independent automobile manufacturers such as Nash, Packard, Studebaker, and the Kaiser-Frazer Corporation did very well, and the UAW successfully negotiated for pension plans with these manufacturers in the early 1950s. *Id.* at 691-93. However, the automobile market declined sharply in 1953, forcing mergers among these companies that required a large number of workers to lose out on their pension benefits that had not vested. *Id.* at 693-94. These losses pushed UAW to obtain vested pension rights for employees with ten or more years of service after age 29. *Id.* at 697. The vested pension plan rights proved of little use as companies such as Packard-Studebaker went out of business, defaulting on their pension obligations. *Id.* at 730. For example, when Studebaker finally closed its plant in South Bend, its pension plan fund was more than \$15 million short of meeting its obligations for the 4,392 employees entitled to receive benefits. Wooten, *supra* note 31, at 697.

34. Employee Retirement Income Security Act of 1974, § 2(b), Pub. L. No. 93-406, 88 Stat. 829. Stating:

It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

*Id.* *See also* 29 U.S.C.S. § 1001(b) (Lexis 2007).

35. ERISA § 2(c). Stating:

It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

*Id.* *See also* 29 U.S.C.S. § 1001(c) (Lexis 2007).

36. *See generally* ERISA. *See also* Michael B. Snyder, Qualified Dom. Rel. Ord. § 1:4 (2007) (describing how ERISA was enacted and the committees that played a role in negotiating the passing of the law).

37. Snyder, *supra* note 36, at § 1:4. Stating:

Prior to the enactment of [ERISA], it apparently was not uncommon for an employee to be promised a retirement benefit on the condition that he remain employed until he or she retired.

There was often no letter or document; a handshake was the law of the retirement plan.

Nothing more than a handshake may have evidenced the agreement to provide pension benefits.<sup>38</sup> ERISA changed the landscape of pension law, mandating certain reporting procedures,<sup>39</sup> record keeping,<sup>40</sup> funding requirements,<sup>41</sup> and creating the Pension Benefit Guaranty Corporation (PBGC) to provide protection for pension plan participants against plan termination.<sup>42</sup>

ERISA contains four titles.<sup>43</sup> Title I deals with the reporting requirements to which a pension plan administrator must adhere.<sup>44</sup> The pension plan administrator can be a designated person under the plan, a sponsor, employer, or anyone the Secretary of Labor prescribes as the administrator if the secretary cannot find a named administrator or sponsor.<sup>45</sup> The administrator must provide an annual report that includes a financial statement and opinion,<sup>46</sup> number of employees in the plan,<sup>47</sup> names and addresses of any fiduciary,<sup>48</sup> and an actuarial statement.<sup>49</sup>

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There was sufficient anecdotal evidence by the early 1970s of abuses in the private retirement system to cause a ground swell of congressional interest. Too many employees, it was said, were being denied the benefits they had been promised. Congressional action began to move toward the creation of ERISA.

*Id.*

38. *Id.*

39. ERISA §§ 101-111. ERISA requires certain disclosures and reporting, including a plan description (§ 102) and annual reports (§ 103). *See also* 29 U.S.C.S. §§ 1021-1031 (Lexis 2008).

40. ERISA §§ 107, 209. ERISA requires the plan administrator to keep records for each employee that shows for what benefits the employee is eligible and what benefits the employee may become eligible. *See also* 29 U.S.C.S. §§ 1027, 1059 (Lexis 2008).

41. ERISA § 302. ERISA requires minimum funding standards for covered plans each year. *Id.* *See also* 29 U.S.C.S. § 1082 (Lexis 2008).

42. ERISA §§ 4002-4003. ERISA established the Pension Benefit Guaranty Corporation (PBGC) as a non-profit corporation that has the power to enforce ERISA, investigate pension plans, and sue for violations of ERISA. *Id.* *See also* 29 U.S.C.S. §§ 1302-1303 (Lexis 2008).

43. ERISA § 1. ERISA's table of contents divides the act into four titles: Title I – Protection of Employee Benefit Plans, Title II – Amendments to the Internal Revenue Code Relating to Retirement Plans, Title III – Jurisdiction, Administration, Enforcement; Joint Pension Task Force, etc., and Title IV – Plan Termination Insurance.

44. ERISA § 1. *See also* Snyder, *supra* note 36, at § 1:4. Snyder describes Title I of ERISA as including provisions “relating to fiduciary standards, reporting and disclosure, and employee protection and enforcement.” *Id.*

45. ERISA § 3(16). *See also* 29 U.S.C.S. § 1002(16) (Lexis 2008).

46. ERISA §§ 103(a)(1)(B)(i), 103(a)(3)(A). Section 103 of ERISA requires that an opinion by an “independent qualified public accountant” that the financial statements conform to generally accepted auditing standards and that all information fairly represents information in the context of the whole financial statement. *See also* 29 U.S.C.S. § 1023(a)(1)(B)(i) (Lexis 2008).

47. ERISA § 103(c)(1). *See also* 29 U.S.C.S. § 1023(c)(1) (Lexis 2008).

48. ERISA § 103(c)(2). *See also* ERISA § 3(21) (defining a fiduciary as someone who exercises discretionary authority or discretionary control over the management of the plan or its assets, gives investment advice to the plan for a fee, or has discretionary responsibility or authority over the administration of the plan). *See also* 29 U.S.C.S. §§ 1002(21), 1023(c)(2) (Lexis 2008).

The administrator must also provide a plan description to all participants and beneficiaries of the plan,<sup>50</sup> updated plan descriptions every five years to those receiving benefits,<sup>51</sup> and a written statement of what benefits have accrued, or will become non-forfeitable, for each participant of the plan upon request.<sup>52</sup> The Secretary of Labor established the office of Pension and Welfare Benefits Administration (PWBA) to enforce the disclosure and reporting requirements of ERISA.<sup>53</sup> These reporting requirements are very complicated.<sup>54</sup> Title I also requires minimum funding for pension plans<sup>55</sup> and provides for certain fiduciary responsibilities of pension plan administrators.<sup>56</sup>

Title II of ERISA deals with the changes made to the Internal Revenue Code.<sup>57</sup> The authority to issue regulations for the funding and

49. ERISA §§ 103(a)(1)(B)(ii), 103(a)(4). An “enrolled actuary” must form an opinion as to whether the financial statements are “in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and represent his best estimate of anticipated experience under the plan.” ERISA §103(a)(4)(B)(i) & (ii). *See also* ERISA § 103(d) (describing eleven specific items that must be included in the actuarial statement); ERISA §§ 3041-3043 (establishing the Joint Board for the Enrollment of Actuaries for the purpose of establishing standards for enrolling actuaries, and enforcing those standards). An “enrolled actuary” means a “person who is enrolled by the Joint Board for the Enrollment of Actuaries . . . .” *Id.* at § 3043; 29 U.S.C.S. §§ 1023(a)(1)(B)(ii), (a)(4)(A), (d), 1241-1242 (Lexis 2008); 26 U.S.C.S. § 7701(a)(35) (Lexis 2008).

50. ERISA §§ 104(a)(1)(C), 104(b). *See also* 29 U.S.C.S. § 1024(b) (Lexis 2008).

51. ERISA § 104(b)(1)(B) (“The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 102 which integrates all plan amendments made within such five-year period . . .”). *See also* 29 U.S.C.S. § 1024(b)(1) (Lexis 2008).

52. ERISA § 105(a).

Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information –

- (1) the total benefits accrued, and
- (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

*Id.* *See also* 29 U.S.C.S. § 1025(a) (Lexis 2008).

53. Snyder, *supra* note 36, at § 1:4. *See also* 29 C.F.R. §§ 2520 & 2560 (2008) (detailing the various reporting requirements that the Secretary of Labor has mandated under Title I of ERISA); 5 C.F.R. § 2641, App. B (2007) (stating that the Employee Benefits Security Administration, formerly the Pension and Welfare Benefits Administration, became effective on May 16, 1997 under the Department of Labor).

54. *See* 29 C.F.R. §§ 2520 & 2560 (2008) (detailing the numerous reporting requirements that have been developed under ERISA).

55. ERISA §§ 301-306. *See also* 29 U.S.C.S. §§ 1081-1085(b) (Lexis 2008).

56. ERISA §§ 401-414. The fiduciary responsibilities include providing adequate benefits to plan participants, minimizing expenses, and diversifying investments. *Id.* at § 404(a)(1). *See also* 29 U.S.C. §§ 1101-1114 (2000).

57. ERISA §§ 1001-2008. Title II of ERISA is labeled “Amendments To The Internal Revenue Code Relating To Retirement Plans.” *Id.* Section 1001 states: “Except as otherwise

vesting of ERISA plans was originally given to the Department of Labor, but in 1978, the authority was transferred to the Internal Revenue Service.<sup>58</sup> But the Department of Labor still enforces Title III of ERISA,<sup>59</sup> dealing with jurisdiction and administration.<sup>60</sup> Title III also establishes the Joint Pension Task Force,<sup>61</sup> which had the duty of studying the effect of ERISA on pension plans and reporting to Congress.<sup>62</sup> Title IV deals with plan termination,<sup>63</sup> establishes the PBGC,<sup>64</sup> and sets out the types of benefits guaranteed by the PBGC.<sup>65</sup> Title IV also contains the procedure for terminating a pension plan<sup>66</sup> and the liability of employers upon plan termination.<sup>67</sup>

Congress amended ERISA several times during the 1980s.<sup>68</sup> One of the amendments in 1984<sup>69</sup> was the Retirement Equity Act (REA).<sup>70</sup>

provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1954.” *Id.* at § 1001. *See also* 26 U.S.C. §§ 410-415 (2000).

58. Snyder, *supra* note 36, at § 1:4 (“The ERISA Reorganization Plan realigned and clarified the joint responsibility of qualified and nonqualified plans between the DOL and the Service. By executive order of President Jimmy Carter, this plan transferred all authority to issue regulations, rulings, opinions, variances, and waivers pertaining to participation, vesting, and funding from the Secretary of Labor to the Secretary of the Treasury.”). *See also* 44 Fed.Reg. 1065 (Jan. 3, 1979) (mandating that Reorganization Plan No. 4 become effective on December 31, 1978 by executive order of President Jimmy Carter); Reorganization Plan No. 4 of 1978, 43 Fed.Reg. 47,713 (Oct. 17, 1978).

59. Snyder, *supra* note 36, at § 1:4 (stating that the DOL still governs issues of jurisdiction, enforcement, and administration under Title III).

60. ERISA §§3001-3043. Title III of ERISA is labeled “Jurisdiction, Administration, Enforcement; Joint Pension Task Force, etc.” *Id.* *See also* 29 U.S.C.S. §§ 1201-1242 (Lexis 2008).

61. ERISA § 3021. The Joint Pension Task Force was made up of “[t]he staffs of the Committee on Ways and Means and the Committee on Education and Labor of the House of Representatives, the Joint Committee on Internal Revenue Taxation, and the Committee on Finance and the Committee on Labor and Public Welfare of the Senate . . . .” *Id.* *See also* 29 U.S.C.S. § 1221 (Lexis 2008).

62. ERISA § 3022. *See also* 29 U.S.C.S. § 1222 (Lexis 2008).

63. ERISA §§ 4001-4068. Title IV of ERISA is labeled “Plan Termination Insurance” and includes such subdivisions as Coverage, Termination, and Liability. *Id.* *See also* 29 U.S.C. §§ 1301-1453 (2000).

64. *See supra* note 42.

65. ERISA § 4022. The PBGC guarantees all nonforfeitable benefits under a plan’s terms. *Id.* *See also* 29 U.S.C.S. § 1321 (Lexis 2008).

66. ERISA § 4041-4048. A plan may be terminated by a plan administrator under Section 4041 or by a corporation under Section 4042. *See also* 29 U.S.C.S. §§ 1341-1348 (Lexis 2008).

67. ERISA § 4061-4068. The PBGC has the right to collect payment from employers who are liable upon termination of a pension plan under Sections 4062 (single employers), 4063 (a substantial employer of a plan), and 4064 (multiple employers). *Id.* at § 4067. *See also* 29 U.S.C.S. §§ 1361-1368 (Lexis 2008).

68. Snyder, *supra* note 36, at § 1:5 (listing the amendments to ERISA passed in the 1980s, such as the Economic Recovery Tax Act of 1981, the Tax Equity and Fiscal Responsibility Act of

Congress enacted REA in order to remedy ERISA's anti-alienation provisions.<sup>71</sup> In an attempt to protect a worker's right to receive his or her pension, ERISA contained an anti-alienation provision that prevented courts from dividing pensions upon divorce.<sup>72</sup> REA allowed a divorce court to divide ERISA pension plans upon divorce pursuant to a QDRO.<sup>73</sup> The QDRO is a Domestic Relations Order (DRO)<sup>74</sup> that meets certain specific requirements set out in REA.<sup>75</sup> As long as a divorce

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1982, the Deficit Reduction Act of 1984, the Retirement Equity Act of 1984, the Tax Reform Act of 1986, the Omnibus Budget Reconciliation Act of 1986, the Pension Protection Act, and the Omnibus Budget Reconciliation Act of 1993).

69. *Id.* (showing two amendments to ERISA in 1984, the REA and the Deficit Reduction Act of 1984).

70. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426.

71. Charles T. Caliendo, Jr., Note, *Removing the "Natural Distaste" from the Mouth of the Supreme Court with a Criminal Fraud Amendment to ERISA's Anti-Alienation Rule*, 68 ST. JOHN'S L. REV. 667, 677 (1994) (stating that the REA amended ERISA so that the anti-alienation provision would not apply in certain situations by way of QDROs).

72. ERISA § 206(d)(1)-(2). It provides:

(d) (1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignments of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act . . . .

*Id.* See also Caliendo, *supra* note 71, at 678 ("Prior to the enactment of REA, the courts were split on whether there was an implied exception to the anti-alienation rule for family support judgments. Several courts had difficulty creating such an exception because of the anti-alienation mandate, but also because ERISA preempts 'any and all State laws insofar as they may now or hereinafter relate to' an ERISA pension plan. Consequently, in addition to the QDRO provision, REA effected a conforming amendment to ERISA exempting QDROs from ERISA's state law preemption provision.").

73. REA § 104(a)(3)(A). Amending ERISA § 206(d) by adding:

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

*Id.*

74. REA § 104(a)(3)(B)(1984). REA defines a domestic relations order as:

(ii) the term 'domestic relations order' means any judgment, decree, or order (including approval of a property settlement agreement) which –

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

*Id.*

75. REA § 104(a)(3)(B), (C), (D). REA defines a qualified domestic relations order as:

(B) For purposes of this paragraph –

(i) the term 'qualified domestic relations order' means a domestic relations order –

court issued a DRO that was qualified under REA, an ERISA pension plan could be divided, and thus the QDRO was born.<sup>76</sup>

### B. Types of Pension Plans Covered by ERISA

ERISA does not apply to all pension plans. ERISA expressly does not apply to government pension plans,<sup>77</sup> church plans,<sup>78</sup> plans maintained for workers' compensation or unemployment,<sup>79</sup> pension

(I) which creates or recognizes the existence of an alternative payee's right to, or assigns to an alternative payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, . . .

\* \* \*

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –

(i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternative payee covered by the order.

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternative payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order –

(i) does not require a plan to provide any type of form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternative payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

*Id.*

76. Wright, *supra* note 6, at 693 (stating that the REA was known as the "QDRO amendment," and that a QDRO has to meet the requirements of § 1056(d)(3)(C) in order to assign part of the participant's pension plan benefits to another individual).

77. 29 U.S.C.S. § 1003(b)(1) (Lexis 2008). See also GARY A. SHULMAN & DAVID I. KELLEY, DIVIDING PENSIONS IN DIVORCE § 21.1 (2d ed. 1999). The authors write:

Government pensions such as from the Civil Service Retirement System (CSRS), the Federal Employees Retirement System (FERS), the Military Retirement System, and the Railroad Retirement Board allow for the equitable division of pension benefits through independent statutory vehicles that are outside the realm of qualified domestic relations orders (QDROs). Governmental plans are not ERISA-governed plans and are therefore exempt from the standard QDRO provisions of the law.

*Id.*

78. 29 U.S.C.S. § 1003(b)(2) (Lexis 2008). See also VICTOR B. MEYEN & MARK W. DUNDEE, QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK 13-28 (2d ed. 1998) (stating that church plans are subject to applicable state and local laws and may be subject to ERISA if the plan elects to be covered, which may be an attractive option for a church plan that has no specific rule for dividing pensions on divorce).

79. 29 U.S.C.S. § 1003(b)(3) (Lexis 2008).

plans maintained outside the United States for the benefit of nonresident aliens,<sup>80</sup> and “excess benefit plans.”<sup>81</sup> Even with these exclusions, however, ERISA governs most pension plans in the United States.<sup>82</sup> The most prominent plans covered by ERISA are the defined benefit and defined contribution pension plans.<sup>83</sup>

The defined benefit pension plan was at one point in time the most popular type of pension plan in America.<sup>84</sup> The defined benefit plan is a pension in which the employer promises to pay the employee a set amount of money upon retirement.<sup>85</sup> The employer could pay the amount in one lump sum, in monthly payments, or a mixture of both.<sup>86</sup> The monthly payments may continue until the death of the employee or

80. 29 U.S.C.S. § 1003(b)(4) (Lexis 2008).

81. 29 U.S.C.S. § 1003(b)(5) (Lexis 2008). *See also* 29 U.S.C.S. § 1002(36) (Lexis 2008) (defining an “excess benefit plan” as a plan that provides certain employees benefits that exceed limits set out in 26 U.S.C.S. § 415); GARY A. SHULMAN & DAVID I. KELLEY, *DIVIDING PENSIONS IN DIVORCE* 395 (2d ed. Supp. 2007) (“[T]raditional QDROs do not apply to nonqualified retirement plans, such as those afforded to CEOs and other company executives”).

82. T.P. Gallanis, *Public Policy for Retirement Security in the 21st Century: Reform of Qualified Retirement Plans: ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185, 186 (2004) (“ERISA federalized pension law, establishing federal rules governing the creation, administration, and termination of most pension plans.”).

83. Jeffrey M. Gorris, Comment, *Waivers of ERISA Plan Benefits: Preventing Judicial Interpretations of a Complex Statute from Frustrating the Statute’s Simple Purpose*, 155 U. PA. L. REV. 717, 719-20 (2007) (“There are two types of ERISA employee benefit plans: ‘employee welfare benefit plans’ . . . and ‘employee pension benefit plan[s]’ . . . Pension plans can be categorized further as either ‘defined contribution plans’ (also called ‘individual account plans’) or ‘defined benefit plans.’”). *See also* Susan J. Stable, *Pension Plan Investments in Employer Securities: More Is Not Always Better*, 15 YALE J. ON REG. 61, 66 (1998) (“ERISA recognizes two broad categories of pension plans: defined benefit plans and defined contribution plans.”). 29 U.S.C.S. § 1002(34), (35) (Lexis 2008) (defining the “defined contribution plan” and “defined benefit plan”).

84. Matthew Venhorst, Note & Commentary, *Helping Individual Investors Do What They Know Is Right: The Save More for Retirement Act of 2005*, 13 CONN. INS. L.J. 113, 115 (2006/2007) (stating that the defined benefit pension plan became popular after World War II and peaked in popularity in the 1970s with as many as sixty-two percent of all workers being covered only by a defined benefit plan; however, that number dropped to only thirteen percent by 1997).

85. Anenson & Lahey, *supra* note 7, at 500 (stating that the employer pays a “determinable benefit” that is usually tied to the employee’s earnings for the employee’s career or “final average”); Angela Boothe Noel, *The Future of Cash Balance Plans: Inherently Illegal or a Viable Pension Option?*, 56 ALA. L. REV. 899, 899-900 (2005) (describing how the formula for determining the benefits for a defined benefit pension plan can become “backloaded” due to the high salaries earned by long-time employees in the last three to five years of employment, making the defined benefit pension plan extremely expensive for employers).

86. Anenson & Lahey, *supra* note 7, at 500, 502 (describing the benefits paid out under a defined benefit plan as an annuity for the life of the employee and a cash balance plan as a hybrid defined benefit plan in which the benefit is typically distributed in one lump sum); Noel, *supra* note 85, at 901-02 (stating that a cash balance plan is a defined benefit plan in which the employee can choose to receive a lump sum payment or a stream of payments).

the death of both the employee and his or her spouse.<sup>87</sup> The employer bears the risk that the employee or the employee's spouse will live long enough to consume all the benefits paid into the pension plan.<sup>88</sup> ERISA covers defined benefit pension plans,<sup>89</sup> insures them,<sup>90</sup> and sets minimum funding standards for such plans.<sup>91</sup>

A defined contribution pension plan is a plan in which the employee and employer make set contributions over the employment period of the employee.<sup>92</sup> Upon retirement, the employee receives the whole pension plan account and then may cash out the whole account, receive income from the account, or receive a mixture of both.<sup>93</sup> The defined contribution plan is becoming increasingly popular as employers try to shift the risk of funding retirement to the employee.<sup>94</sup> The

87. Maria O'Brien Hylton, Constance Hiatt, Shannon Minter, & Teresa S. Collett, *Same Sex Marriage and its Implications for Employee Benefits: Proceedings of the 2005 Meeting of the Association of American Law Schools Sections on Employee Benefits, and Sexual Orientation and Gender Identity Issues*, 9 EMPL. RTS. & EMPLOY. POL'Y J. 499, 503 (2005) (describing how a defined benefit pension plan must provide survivorship benefits to a spouse of an employee under ERISA if the employee dies and if the employee dies before he or she retires, the spouse gets the pension). See also 29 U.S.C.S. § 1055(a), (b)(1)(A) (2008) (mandating that any defined benefit plan provide a survivor annuity in the form of a "qualified joint and survivor annuity" or a "qualified preretirement survivor annuity").

88. Kathleen H. Czarney, Note, *The Future of Americans' Pensions: Revamping Pension Plan Asset Allocation to Combat the Pension Benefit Guaranty Corporation's Deficit*, 51 CLEV. ST. L. REV. 153, 166 (2004) (stating that if there are not enough funds invested to pay for the employee's retirement benefits under a defined benefit pension plan, the employer has a duty to "make up the difference", therefore bearing the risk of investment).

89. *Supra* note 83.

90. Anenson & Lahey, *supra* note 7, at 504 ("Pursuant to ERISA, defined benefit pension plans are insured by the PBGC.").

91. 29 U.S.C.S. § 1082 (Lexis 2008).

92. Anenson & Lahey, *supra* note 7, at 501 (describing the defined contribution plan as a plan in which the employer merely makes a fixed contribution and the employee gets whatever benefit has accumulated upon retirement, an example being the 401(k) plan); Czarney, *supra* note 88, at 168 (describing the defined contribution plan as an immediately vesting pension plan that can take the form of an IRA, 401(k), or a Simplified Employer Pension (SEP)).

93. Edward A. Zelinsky, *The Defined Contribution Paradigm*, 114 YALE L.J. 451, 463-64 (2004) (describing how a defined contribution pension plan is normally paid to the employee in one lump sum upon retirement and then it is up to the employee to invest the funds or purchase an annuity contract).

94. Paul J. Donahue, *Plan Sponsor Fiduciary Duty for the Selection of Options in Participant-Directed Defined Contribution Plans and the Choice Between Stable Value and Money Market*, 39 AKRON L. REV. 9, 9, 11 (2006) ("During 2002, employees and their employers contributed over \$84 billion to defined contribution pension plans (DC Plans), bringing the amount held in such plans on behalf of many of America's working people to nearly \$2 trillion: a staggering amount that exceeded by over \$200 million the amount held in defined benefit pension plans (DB Plans)."). Dr. Donahue goes on to write:

[I]n recent years the economic importance of [defined contribution plans] has grown significantly. At present, nearly 54 percent of total private pension plan assets are held

employee bears the risk of outliving the available funds in a defined contribution plan.<sup>95</sup> ERISA covers the defined contribution pension plans of private employers.<sup>96</sup>

### C. Treatment of the Law

The ability to transfer rights from a pension fund under ERISA is very limited. The United States Supreme Court has ruled several times that the ability to assign pension plan funds with a QDRO is a limited exception, not to be expanded to cover any other situations, no matter how equitable they may be.<sup>97</sup> In 1990, the Supreme Court explained its rationale in one such case, *Guidry v. Sheet Metal Workers Nat'l Pension Fund*.<sup>98</sup>

In *Sheet Metal*, Curtis Guidry embezzled funds from the union for which he worked.<sup>99</sup> While incarcerated, Mr. Guidry attempted to collect his pension from several pension plans he had through the union from which he had embezzled funds.<sup>100</sup> The pension plans refused to allow Mr. Guidry to collect his pension, claiming Mr. Guidry forfeited his right to the pension when he stole from the Union.<sup>101</sup> The Union intervened and claimed the funds should be paid to the Union until the Union had collected the \$275,000 judgment against Mr. Guidry.<sup>102</sup> The trial court ruled that Mr. Guidry did not forfeit the pension plan funds, but they were to be paid into a constructive trust for the Union until the Union's judgment was satisfied.<sup>103</sup> The trial court created an equitable

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in [defined contribution plans] – and this percentage is likely to increase, because while \$80 billion was contributed to [defined contribution plans] in 2002, only \$39 billion was contributed to [defined benefit plans].

*Id.* at 11 (footnotes omitted). *See also* Czarney, *supra* note 88, at 169. Ms. Czarney writes, “between 1984 and 1993 alone, defined contribution plans have grown by almost 900 percent. The contributing factors for this shift in pension plans include the increased government regulation of defined benefit pensions, increased administrative costs, employment growth in small businesses, and the greater mobility that defined contribution plans offer.” *Id.* (footnotes omitted).

95. Noel, *supra* note 85, at 901 (stating that in a defined contribution plan the employee decides how the money is invested, is entitled only to the account balance at the time of retirement, and therefore the employee bears the investment risk); Anenson & Lahey, *supra* note 7, at 501 (stating that the potential disadvantage to the defined contribution plan is that the employees could “outlive their retirement resources”).

96. *Supra* note 83.

97. *See infra* notes 98-115 and accompanying text.

98. *Guidry v. Sheet Metal Workers Nat'l Pension Fund et al.*, 493 U.S. 365 (1990).

99. *Id.* at 367.

100. *Id.* at 368.

101. *Id.* at 368-69.

102. *Id.*

103. *Guidry v. Sheet Metal Workers Nat'l Pension Fund et al.*, 493 U.S. 365, 369-70 (1990).

exception to ERISA's anti-alienation provisions for situations in which "the viability of a union and the members' pension plans was damaged by the knavery of a union official."<sup>104</sup> The Supreme Court struck down the constructive trust, stating:

Nor do we think it appropriate to approve any generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA's prohibition on the assignment or alienation of pension benefits. *Section 206(d)* [29 U.S.C.S. § 1056(d)] reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.<sup>105</sup>

The Supreme Court interpreted ERISA's anti-alienation provision broadly and REA's QDRO exception narrowly, allowing pensioners to keep their pension benefits, despite inequitable results.<sup>106</sup>

In 1997, the Supreme Court further strengthened ERISA in the case of *Boggs v. Boggs*.<sup>107</sup> *Boggs* involved a marriage of over thirty years that ended upon the death of Mrs. Boggs.<sup>108</sup> Mr. Boggs remarried, and then died nine years later.<sup>109</sup> The children of the first marriage had a right to Mr. Boggs' pension under state law because the first Mrs. Boggs devised her right in the pension to the children in her will, under Louisiana's community property provisions.<sup>110</sup> But the second Mrs. Boggs claimed she had the sole right to the pension under ERISA.<sup>111</sup> The Supreme Court ruled that ERISA pre-empted any state law that was in conflict with ERISA, such as community property laws.<sup>112</sup> The Court

104. *Id.* at 370.

105. *Id.* at 376.

106. Sharon Reece, *The Gilded Gates of Pension Protection: Amending the Anti-Alienation Provision of ERISA Section 206(d)*, 80 OR. L. REV. 379, 407-09 (2001) (recounting other court cases in which a guilty party was not forced to pay his or her victims restitution from a pension plan, such as the O.J. Simpson case).

107. *Boggs v. Boggs*, 520 U.S. 833 (1997).

108. *Id.* at 836.

109. *Id.*

110. *Id.* at 837.

111. *Id.*

112. *Boggs v. Boggs*, 520 U.S. 833, 854 (1997). *See also* Tony Vecino, Note, *Boggs v. Boggs: State Community Property and Succession Rights Wallow in ERISA's Mire*, 28 GOLDEN GATE U. L. REV. 571 (1998) (setting out a detailed explanation of the *Boggs* case and its ramifications). Vecino writes

[T]he case of *Boggs v. Boggs* . . . held that [ERISA] preempted Louisiana community property and succession laws and prohibited the inheritance of a nonemployee spouse's community interest in pension plan benefits. Although the *Boggs* holding involved

also explained that the QDRO exception to ERISA's anti-alienation provision is a narrow exception that courts cannot use to give effect to a predeceasing non-participant spouse's testamentary transfer.<sup>113</sup> *Boggs*, in effect, made ERISA the only means of dividing a pension,<sup>114</sup> and the QDRO one of only two processes by which a pension could be assigned.<sup>115</sup>

Ohio courts have not been as restrictive as the United States Supreme Court. Ohio state courts have attempted to find ways to expand the power of the QDRO or get around ERISA's narrow exceptions to dividing pensions.<sup>116</sup> In 1990, the Ohio Supreme Court

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preemption of a claim based on community property and succession rights, the Court's holding is sufficiently broad to preempt any state laws that conflict with ERISA . . . .  
*Id.* at 571 (footnotes omitted); Jayne Elizabeth Zanglein, "Meyered" in the Bogg of ERISA Preemption: Employee Benefits in the Fifth Circuit, 29 TEX. TECH. L. REV. 581, 588 (1998) ("The [*Boggs*] Court appears to have abandoned the use of this 'relates to' test and has substituted a conflict preemption test."); Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1165-76 (1998) (discussing the different types of preemption used by the Supreme Court and the use of a kind of "Implied Preemption" in the *Boggs* case).

113. *Id.* at 848. Justice Kennedy wrote:

It should cause little surprise that Congress chose to protect the community property interests of separated and divorced spouses and their children, a traditional subject of domestic relations law, but not to accommodate testamentary transfers of pension plan benefits. As a general matter, "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. Support obligations, in particular, are "deeply rooted moral responsibilities" that Congress is unlikely to have intended to intrude upon. In accord with these principles, Congress ensured that state domestic relations orders, as long as they meet certain statutory requirements, are not pre-empted.

*Id.* (citations omitted). Justice Kennedy went on to write, "ERISA's pension plan anti-alienation provision is mandatory and contains only two exceptions, see §§ 1056(d)(2), (d)(3)(A), which are not subject to judicial expansion." *Id.* at 851. *But see* Edward A. Zelinsky, *Egelhoff, ERISA Preemption, and the Conundrum of the 'Relate to' Clause*, 91 TAX NOTES 1917, 1919-21 (2001) (describing the Supreme Court's differing views on ERISA preemption in the last 20 years).

114. William J. Kluwin, *Using QDROs to Fund a Divorce: Recent Decisions Illustrate the Opportunities and the Pitfalls of QDROs*, 34 AZ ATTORNEY 26, 37-38 (1997) (arguing that since Mr. *Boggs* had cashed out his pension plan and rolled it into an IRA that was not covered by ERISA, the Supreme Court seemed to allow the ERISA preemption to follow the pension funds even though the funds were not in a covered pension). *See also* Erica S. Phillips, Casenote & Comment, *Equality in Life, Inequality in Death: The Ramifications of the United States Supreme Court Decision in Boggs v. Boggs*, 34 IDAHO L. REV. 623 (1998) (giving a detailed explanation of the *Boggs* case and criticizing the holding).

115. Phillips, *supra* note 114, at 641-47 (stating that the *Boggs* Court limited the ability to assign a pension to only the provisions expressly provided for by ERISA and REA, which include the QDRO and the qualified joint and survivor annuity, both of which were created by REA).

116. *See infra* notes 117-140 and accompanying text.

heard the case of *Hoyt v. Hoyt*.<sup>117</sup> The parties in *Hoyt* were married for eighteen and one-half years and had four children when they divorced in 1988.<sup>118</sup> The trial court awarded the wife one-half of the husband's General Motors (GM) pension and a survivorship benefit.<sup>119</sup> The pension was vested but unmaturing at the time of the divorce.<sup>120</sup> The husband appealed the decision, claiming the court could not grant the wife a survivorship benefit in the pension,<sup>121</sup> and that the trial court could only divide the present value of the pension, not the potential future value.<sup>122</sup> The court of appeals affirmed the trial court's decision.<sup>123</sup> The Ohio Supreme Court reversed and remanded the case for a re-determination of the wife's proper share of the GM pension.<sup>124</sup> The Ohio Supreme Court held that the wife was entitled to a survivorship benefit and that the unmaturing "Pension Plan A" could be divided and a share awarded to the wife.<sup>125</sup> The importance of the *Hoyt* decision was not the reversal or remand of the trial court's decision, but the amount of discretion the Ohio Supreme Court gave the trial court in awarding a QDRO. The Ohio Supreme Court held that a trial court could take into account any circumstances of the case, status of the parties, or term of the pension when dividing a pension plan.<sup>126</sup> Any pension earned during the marriage was held to be marital property and could be used in property division or as alimony.<sup>127</sup> Although the court held that a QDRO providing specific information and instruction to the

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117. *Hoyt v. Hoyt*, 559 N.E.2d 1292, 1294-95 (Ohio 1990).

118. *Hoyt v. Hoyt*, C.A. No. 4365, 1988 Ohio App. LEXIS 4685, at \*1 (Ohio Ct. App. 1988) *rev'd*, 559 N.E.2d 1292 (Ohio 1990).

119. *Id.* at \*1-2.

120. *Id.* at \*1.

121. *Id.* at \*5-6.

122. *Id.* at \*2. General Motors offered two types of pension plans, Plan A and Plan B. *Hoyt*, 1988 Ohio App. LEXIS 4685 at \*2. Plan A did not mature until after 30 years of service and the husband only had 20 years of service at the time of divorce, so the present value of Plan A was \$0. *Id.* at \*2-4. Plan B was a pension in which the employee could contribute to his or her own pension. *Id.* at \*2. The husband had a total of \$439 in the Plan B, and he claimed that this was the only amount that the trial court could divide and give to his ex-wife. *Id.* at \*2-3.

123. *Id.* at \*9.

124. *Hoyt v. Hoyt*, 559 N.E.2d 1292, 1300 (Ohio 1990).

125. *Id.* at 1298-99.

126. *Id.* at 1295 ("[T]his court holds that when considering a fair and equitable distribution of pension or retirement benefits in a divorce, the trial court must apply its discretion based upon the circumstances of the case, the status of the parties, the nature, terms and conditions of the pension or retirement plan, and the reasonableness of the result . . .").

127. *Id.* at 1294-95.

plan administrator<sup>128</sup> was the only method of dividing the pension under REA,<sup>129</sup> there were alternatives to an REA pension division.<sup>130</sup> These alternatives include “an immediate offset or a current assignment of proportionate shares, with either a current distribution or a deferred distribution.”<sup>131</sup> Thus, it is the court’s responsibility to value a pension plan and either draft a QDRO to equitably distribute the asset or proportionally distribute other assets to compensate for the pension.<sup>132</sup> The Ohio Supreme Court used the *Hoyt* decision not only to expand on the discretion a trial court could use in drafting a QDRO, but also to allow for the “equitable division” of a pension by using other marital assets, bypassing the QDRO altogether.<sup>133</sup>

Ohio courts expanded their discretion further in the case of *Clay v. Clay*.<sup>134</sup> In 2007, the Ohio Seventh Appellate District held in *Clay* that a divorce decree ordering the husband to pay his ex-wife \$9,975 out of his 401(k) plan was a valid order despite the fact that a QDRO was not prepared.<sup>135</sup> Although the court went on to state that a divorce decree is not a substitute for a QDRO when it comes to a waiver of rights to an ex-spouse’s pension,<sup>136</sup> the court still upheld the division of the husband’s pension without a QDRO.<sup>137</sup> The appellate court claimed the payment to the wife was a payment from the husband and not the pension plan administrator, taking it outside of the realm of ERISA.<sup>138</sup> The court stated that a QDRO was merely a tool to be used by the divorce court and that the QDRO could be avoided by using other

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128. *Id.* at 1296 (“The QDRO must be drafted to include very specific information with explicit instructions to the plan administrator. It is then the responsibility of the plan administrator to review the order of the trial court and determine whether it constitutes a QDRO . . .”).

129. *Hoyt v. Hoyt*, 559 N.E.2d 1292, 1297 (Ohio 1990).

130. *Id.*

131. *Id.* The court cautioned, however, “that the trial court cannot violate the terms of the plan when fashioning a division of the asset.” *Id.*

132. *Id.* at 1298-99 (stating that it is the court’s responsibility to value the pension plan, not the plan administrator’s, and to equitably divide the pension so that both parties receive the most benefit). See also *Straub*, *supra* note 1, at 916 (discussing the equitable distribution method of property division that Ohio courts use).

133. *Id.* at 179.

134. *Clay v. Clay*, No. 06 BE 40, 2007 WL 2582211 (Ohio Ct. App. 2007).

135. *Id.* at \*4 (“The divorce decree specifically ordered Darwin [ex-husband], and not the pension plan administrator, to make the arrangement for the payment of \$9,975 to Linda [ex-wife] from his 401(k) plan. The record does not indicate a need for a QDRO in this case, since Darwin, and not the 401(k) plan administrator was ordered to make this payment . . .”).

136. *Id.* at \*8. The court was referring to an argument made by the husband’s second wife that the ex-wife waived any right to her ex-husband’s pension when she divorced him, an argument the appellate court rejected. *Id.*

137. *Id.* at \*4.

138. *Id.*

marital assets.<sup>139</sup> Apparently, the court viewed the funds obtained by the husband through the 401(k) plan as “other marital assets” and not part of a pension plan regulated by ERISA.<sup>140</sup> This ruling is in stark contrast to the Supreme Court’s ruling in *Boggs* in which Mr. Boggs rolled over his pension plan into a 401(k) plan that ERISA did not govern, yet the Court held that ERISA still applied to the 401(k) funds.<sup>141</sup>

These cases demonstrate the view that a QDRO is an important aspect of a divorce, although it may not be a necessary one. When it is determined that the parties need a QDRO, the issue of when an ex-spouse can appeal the divorce decree becomes relevant.

### III. APPEALING A DIVORCE DECREE

#### A. Appealable Orders

In order for an appellate court to have jurisdiction over an appeal, the trial court must have issued a final order.<sup>142</sup> In Ohio, a final order is defined by Ohio Revised Code § 2505.02(B).<sup>143</sup> If a trial court’s order

139. *Clay v. Clay*, No. 06 BE 40, 2007 WL 2582211, at \*4 (Ohio Ct. App. 2007) (“A domestic relations court, though, is not required to use a QDRO in a divorce whenever the marital assets include a pension. The QDRO is a tool available to the trial court to order the administrator of the pension plan to actually redirect benefits to another payee, if that is necessary as part of the divorce. The trial court may avoid using a QDRO by designating other marital assets to offset the value of the pension, or by requiring one party to pay the equivalent value of those benefits or assets to the other party, rather than by requiring the pension plan administrator to pay an alternate payee . . . . trial courts have a number of ways to effectuate the division of pension benefits in a divorce other than using a QDRO . . . .”).

140. *Id.* at \*1. The husband was ordered by the trial court not just to pay his ex-wife \$9,975, but to pay the amount “from his 401(k) retirement fund within 30 days of the divorce.” *Id.* The original divorce decree stated, “Darvin is ordered to have his 401(K) make the appropriate payment to Linda pursuant to this order within 30 days of Judge Sargus’ final Judgment Entry, Decree of Divorce.” *Id.*

141. *Supra* note 114.

142. *Wohleber v. Wohleber*, No. 06CA009018, 2007 WL 2229284, at \*1 (Ohio Ct. App. 2007); *Gehm v. Timberline Post & Frame*, 861 N.E.2d 519, 522 (Ohio 2007). “Under Section 3(B)(2), Article IV, Ohio Constitution, courts of appeals have jurisdiction only to ‘affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district.’” *Id.* See also Michael L. Buenger, *Ohio Appellate Practice Before and After Polikoff: Are Things Really All That Much Clearer?*, 28 AKRON L. REV. 1, 2-10 (1994) (recounting the unique history of the “final order” rule in Ohio and impact that has on rights to appeal).

143. *Myers v. City of Toledo*, 852 N.E.2d 1176, 1178 (Ohio 2006). See also OHIO REV. CODE ANN. § 2505.02 (2007). It provides:

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following;

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

does not fulfill one of the categories set out in § 2505.02(B) the appeal cannot be heard.<sup>144</sup> As the Ohio Ninth District Appellate Court has stated:

R.C. 2505.02(B)(1) requires that an order affect a substantial right and determine the action or prevent a judgment. As this Court has frequently emphasized, the primary function of a final order or judgment is the termination of the case before the court. This court must look to the language employed in the purported judgment entry to ascertain whether the trial court's entry accomplishes that result. To terminate a claim between the parties, the order must contain a statement of relief to which the parties are entitled that is sufficiently complete so that the parties can enforce their rights and obligations through an execution on that judgment.

A final statement of relief reserve[s] no further questions or directions for future determination and leaves nothing to be done but to enforce by execution what has been determined. A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order. However, when the remaining issue is mechanical and unlikely to produce a second appeal because only a ministerial task similar to *assessing costs* remains, then the order is final and appealable.<sup>145</sup>

In Ohio, a final appealable order of divorce must address all issues that relate to the property division, parental rights, support, and the responsibilities of the parties.<sup>146</sup> Therefore, a divorce decree must not

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(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;  
 (3) An order that vacates or sets aside a judgment or grants a new trial;  
 (4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

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(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

*Id.*

144. *Wenger v. Wenger*, No. 05CA0057, 2006 WL 1791171, at\*2 (Ohio Ct. App. 2006).

145. *Id.* (citations and quotation marks omitted, emphasis in original).

146. *Miller v. Miller*, No. 2003-P-0065, 2003 WL 22952573, at \*1 (Ohio Ct. App. 2003).

only meet the requirements of § 2505.02(B), but also dispose of any additional claims relating to the divorce, unless there is just cause for delay.<sup>147</sup> For example, a divorce decree that does not provide for an equitable division of all the marital property is not a final appealable order, even if the trial court deals with all other issues in the decree.<sup>148</sup> Child custody<sup>149</sup> and child support<sup>150</sup> issues, if applicable to the case, must be fully determined. But the divorce decree is final and appealable despite the fact that a trial court retains jurisdiction to modify support<sup>151</sup> or the court allows the parties to motion the court for further action.<sup>152</sup> A party has thirty days to appeal a divorce decree once that decree becomes final and appealable.<sup>153</sup>

After the time for appeal has passed, a party may receive relief from a divorce decree by filing a motion for Ohio Civil Rule 60(B) relief.<sup>154</sup> Ohio Civil Rule 60(B)<sup>155</sup> allows a party to reopen a closed

147. *In re Nichols*, No. 03CA41, 2004 WL 868364, at \*2 (Ohio Ct. App. 2004). *See also* OHIO CIV.R. 75(F) (2007) (stating, for purposes of OHIO CIV.R. 54(B), that a domestic relations court shall not enter a final order for divorce unless: the judgment deals with all matters of property division, spousal support, and parental rights and responsibilities; or those claims were settled by previous orders and incorporated into the divorce decree; or the judgment expressly determines that the court lacks jurisdiction to issue such an order or it is untimely to issue such an order); OHIO CIV.R. 54(B) (2007) (stating that unless there is a determination that there is a just reason for delay, any judgment that does not dispose of all claims or rights of all parties is not a final appealable order).

148. *Reed v. Reed*, No. 14-03-43, 2004 WL 1488861, at \*2 (Ohio Ct. App. 2004); *Scott v. Scott*, No. 2002-T-0185, 2005 Ohio App. LEXIS 974, at \*6-7 (Ohio Ct. App. 2005).

149. *Salisbury v. Salisbury*, Nos. 2005-P-001 & 2005-P-0084, 2006 WL 1882298, at \*8 & n. 1 (Ohio Ct. App. 2006).

150. *Atkinson v. Atkinson*, 856 N.E.2d 1023, 1025-26 (Ohio Ct. App. 2006).

151. *CSEA ex rel. Spencer v. Gatten*, No. 89398, 2007 WL 2269693, at \*3 (Ohio Ct. App. 2007) (stating that, although the trial court retained jurisdiction for further action, an order was final and appealable and that, "Ohio courts have long recognized that a court retains continuing jurisdiction over its orders concerning the custody, care, and support of children").

152. *Ortiz v. Ortiz*, No. 05 JE 6, 2006 WL 1851730, at \*5 (Ohio Ct. App. 2006). The trial court did not value marital property contained in a storage bin. *Id.* at \*4. The trial court's order was determined to be final and appealable despite the non-valuation of marital property because the trial court always retained jurisdiction to enforce its order and provide for proper distribution of the items in the storage unit. *Id.* at \*5. The court stated:

A court always retains jurisdiction to enforce its orders. As Appellee points out, this is normally done through the filing of a contempt of court motion. The divorce decree is not interlocutory and nonappealable simply because the court "reserved" jurisdiction to enforce the order, since the authority to enforce this order is inherent in the order itself.

*Id.* (citations omitted).

153. OHIO REV. CODE ANN. § 2505.07 (2007); OHIO APP. R. 4 (2008); *Thompson v. Thompson*, No. 1156, 1975 Ohio App. LEXIS 7194, at \*2-3 (Ohio Ct. App. 1975).

154. *See e.g.* *El-Tatawy v. El-Tatawy*, No. L-02-1235, 2003 WL 22739938, at \*3 (Ohio Ct. App. 2003); *Rainieri v. Rainieri*, No. 2004-P-0017, 2005 WL 1713546, at \*3 (Ohio Ct. App. 2005); *Lambert v. Lambert*, No. F-05-002, 2005 WL 3093449, at \*2 (Ohio Ct. App. 2005); *Smith v. Smith*, No. 9-06-41, 2007 WL 730234, at \*1 (Ohio Ct. App. 2007).

case, if it meets certain criteria. A court can reopen a case within one year from the date of judgment if there is newly discovered evidence, fraud, or mistake.<sup>156</sup> A party may motion to have a case reopened under 60(B) more than a year after a court closes the case, if there is a “reason justifying relief from the judgment”<sup>157</sup> and the party makes the motion within a reasonable time.<sup>158</sup> But Rule 60(B) is not a substitute for an appeal.<sup>159</sup> A motion for Rule 60(B) relief is limited to the situations specifically mentioned and not for general review.<sup>160</sup>

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155. OHIO CIV.R. 60 (2007). It provides:

(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

*Id.*

156. *Id.* See also *Brown v. Brown*, No. 07AP-144, 2007 WL 2327072, at \*1 (Ohio Ct. App. 2007).

157. OHIO CIV.R. 60(B) (2007); *Brown*, 2007 WL 2327072 at \*1.

158. OHIO CIV.R. 60(B) (2007). See also *Hardesty v. Hardesty*, Nos. 2004-G-2582 & 2005-G-2614, 2006 WL 3059849, at \*8 (Ohio Ct. App. 2006). In considering a Rule 60(B) motion with regards to an undisclosed pension plan, the court stated:

In considering Rule 60(B) motions pertaining to this type of alleged error, courts should consider the following factors: “what caused the delay in making the motion; whether the delay was reasonable; what personal knowledge the movant had about the nature, extent and value of all the marital assets (whether included or omitted); what the movant should have known about them in the exercise of ordinary care; whether the movant expressly or implicitly concurred in the property provisions of the separation agreement; what deceptions, if any, were used by the other spouse; and what has intervened between the decree and the motion (such as, remarriage of either spouse or both spouses).

*Id.* (citations omitted).

159. *Key v. Mitchell*, 689 N.E. 2d 548, 549 (Ohio 1998).

160. *Wilson v. Wilson*, No. 86817, 2006 WL 2373409 at\*1 (Ohio Ct. App. 2006) (“In order to prevail on a Civ. R. 60(B) motion, the movant must demonstrate that: 1) she has a meritorious claim or defense; 2) she is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and 3) the motion is made within a reasonable time.” (quoting *GTE Automatic Electric, Inc. v. ARC Industries*, 351 N.E.2d 113, 115 -16 (Ohio 1976))). See also *Forman v. Forman*, No. 9-06-63, 2007 WL 2757630, at \*4 (Ohio Ct. App. 2007) (stating that Rule 60(B) can only be used for final orders and that a party may only file a motion to reconsider for any non-final or interlocutory order).

### B. Ohio's Split on QDROs

The procedure for appealing a divorce that requires a QDRO is no different from any other court order.<sup>161</sup> The QDRO must be a final order before the divorce is appealable<sup>162</sup> and Ohio Civil Rule 60(B) can only be used in limited circumstances.<sup>163</sup> Before *Wilson*, however, there was an issue of when a divorce decree requiring a QDRO became a final order, thereby allowing the parties to appeal the divorce decree as well as the QDRO.<sup>164</sup> The appellate courts have split<sup>165</sup> on whether a divorce decree could be appealed after the trial court set out the conditions that the QDRO must meet, but before the QDRO was actually approved by the pension plan administrator and filed with the divorce decree.

A majority of appellate districts in Ohio followed the rule that the divorce decree and the QDRO were not final appealable orders until the pension plan administrator had approved the QDRO, and the court entered the QDRO as part of the divorce decree.<sup>166</sup> The Sixth District

161. *Southworth v. Southworth*, No. 80704, 2003 WL 23116, at \*2 (Ohio Ct. App. 2003) (stating the standards for relief under Ohio Rule of Civil Procedure 60(B) in the case of a QDRO).

162. *Lamb v. Lamb*, No. 11-98-09, 1998 Ohio App. LEXIS 6007, at \*4-5 (Ohio Ct. App. 1998) (dismissing an appeal from a QDRO because the QDRO was not signed and was not itself a final appealable order).

163. *See, e.g. Hamlin v. Hamlin*, No. 1629, 2004 WL 1178754, at \*5 (Ohio Ct. App. 2004) (dismissing a ground for appeal of a QDRO because the time to file a Rule 60(B)(1)-(4) motion had expired, and Rule 60(B)(5) could not be used to open a case after one year if based on a ground that would have relied on Rule 60(B)(1)-(4) if it had been filed within one year from the close of the case); *Stetler v. Stetler*, No. 15-05-16, 2006 WL 1459768, at \*1-2 (Ohio Ct. App. 2006) (ruling that the passing of sixteen years was too long to file a Rule 60(B) motion to reopen a case in order to divide an ex-husband's pension). *See also supra* note 160.

164. *See infra* notes 166-173 and accompanying text.

165. *See infra* notes 166 & 174.

166. *Lyddy v. Lyddy*, 582 N.E.2d 37, 37-38 (Ohio Ct. App.-6th 1989) (stating that after three attempts to file a QDRO, the pension plan administrator finally approved the third QDRO and that the divorce decree issued twenty-one months earlier was most likely not appealable until the QDRO was filed); *Chasko v. Chasko*, No. 88949, 2007 WL 2955585, at \*2 (Ohio Ct. App.-8th 2007) (stating in dicta that the court had jurisdiction to hear the appeal because the QDRO for the husband's pension had been entered); *Musci v. Musci*, No. 23088, 2006 WL 3208558, at \*2 (Ohio Ct. App.-9th 2006); *Hyder v. Hyder*, No. 06CA0014, 2006 WL 2864115, at \*7 & n.1 (Ohio Ct. App.-9th 2006) (mentioning in a footnote that the court had jurisdiction to hear the appeal because no QDRO was ordered to be filed, not that a QDRO was missing); *Green v. Green*, No. 04AP-61, 2005 WL 468234, at \*2 (Ohio Ct. App.-10th 2005) ("However, it is well-established that a judgment apportioning pension benefits between ex-spouses is not a final appealable order until such time as a qualified domestic relations order ("QDRO") or DOPO is entered."); *Streza v. Streza*, No. 05CA008644, 2006 WL 709056, at \*1 (Ohio Ct. App.-9th 2006) (stating that the court could hear the appeal only because the trial court had issued a final QDRO); *Bucalo v. Bucalo*, No. 05CA0011-M, 2005 WL 3193851, at \*2 (Ohio Ct. App.-9th 2005) (stating that the original appeal for the case at bar was dismissed for lack of a filed QDRO, therefore there was no final appealable order); *Vujovic v. Vujovic*, No. 04CA0083-M, 2005 WL 1819527, at \*1 (Ohio Ct. App.-9th 2005) (recounting the prior appeal that was dismissed for lack of a final appealable order because a QDRO

Court of Appeals for Ohio stated that, “a clear majority of Ohio appellate courts have consistently held that divorce orders are not final and appealable if a QDRO has been ordered but not prepared.”<sup>167</sup> These courts viewed the QDRO as subject to change up until the time the court entered the QDRO into the divorce decree.<sup>168</sup> Since the QDRO affected a substantial right<sup>169</sup> of the parties and was subject to change,<sup>170</sup> the

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had not been filed and allowing the current appeal to go forward because the parties had filed a QDRO); *Cooper v. Cooper*, No. 84652, 2005 WL 376608, at \*1 (Ohio Ct. App.-8th 2005) (“A judgment apportioning pension benefits between ex-spouses is not a final order until a Qualified Domestic Relations Order (“QDRO”) is entered that disposes of all the retirement benefits.”); *Stare v. Stare*, No. 03-CA-109, 2004 WL 2004152, at \*3 (Ohio Ct. App.-5th 2004) (“[T]he decree in the case sub judice was not a final appealable order, as the parties’ property division was not complete until the issuance of a COAP/QDRO, as is called for in the decree.”); *Batt v. Batt*, Nos. 82740 & 83452, 2004 WL 717373, at \*1 (Ohio Ct. App.-8th 2004); *Keith v. Keith*, No. L-04-1011, 2004 WL 541077, at \*1 (Ohio Ct. App.-6th 2004); *Sabo v. Sabo*, No. 03CA008245, 2003 WL 22900633, at \*1 (Ohio Ct. App.-9th 2003) (stating the trial court’s order became final and appealable upon the journalizing of the QDRO); *Rash v. Rash*, 799 N.E.2d 226, 228 (Ohio Ct. App.-6th 2003) (reciting the courts that have held a divorce decree to not be final until a QDRO was entered); *Coutcher v. Coutcher*, No. L-02-1054, 2003 WL 397760, at \*2 (Ohio Ct. App.-6th 2003); *Huffman v. Huffman*, Nos. 00CA704 & 01CA709, 2001 Ohio App. LEXIS 4919, at \*4-5 & n.1 (Ohio Ct. App.-4th 2001) (stating that QDROs issued eleven months apart were both final appealable orders subject to appeal); *Peters v. Peters*, No. 18445, 2001 Ohio App. LEXIS 672, at \*3-4 (Ohio Ct. App.-2d 2001) (stating that a previous appeal had been dismissed because the court-ordered QDRO had not been filed); *Bohl v. Bohl*, No. 98CA007276, 2000 Ohio App. LEXIS 2289, at \*2-3 (Ohio Ct. App.-9th 2000) (declining jurisdiction to hear an appeal because a QDRO had not been filed and therefore no final appealable order existed); *Procuniar v. Procuniar*, No. 95-CA-19, 1995 Ohio App. LEXIS 3929, at \*5-6 (Ohio Ct. App.-2d 1995) (allowing an appeal to go forward because it was filed within a timely period after the QDRO was filed, although not within a timely period after the divorce decree was entered); *Middendorf v. Middendorf*, No. 17-93-17, 1994 Ohio App. LEXIS 2550, at \*2-3 (Ohio Ct. App.-3d 1994) (dismissing an appeal for lack of final appealable order due to the fact the trial court did not issue a complete division of marital property, including the issuance of a QDRO); *Scott v. Scott*, No. 1-99-79, 2000 Ohio App. LEXIS 808, at \*4-5 (Ohio Ct. App.-3rd 2000) (“A review of the case law reveals the general consensus that a judgment apportioning pension benefits between ex-spouses is not a final and appealable order until such time as the QDRO is entered.”); *Kofol v. Kofol*, No. 74191, 1999 Ohio App. LEXIS 2726, at \*1-2 (Ohio Ct. App.-8th 1999); *Isaacson v. Isaacson*, No. WD-01-030, 2002 Ohio App. LEXIS 750, at \*3-5 (Ohio Ct. App.-6th 2002) (dismissing an appeal so that the trial court could enter a QDRO).

167. *Keith*, 2004 WL 651077 at \*1.

168. *Scott*, 2000 Ohio App. LEXIS 808, at \*6 (“We pause to note that until the QDRO is entered, the trial judge can change his mind about its contents and that of the judgment ordering it. Additionally, as conceded by Appellant’s counsel at oral argument, until a QDRO is entered and issued to the plan administrator, there can be no certainty that the plan division will be rejected. In our view, these considerations strengthen our conclusion that until a QDRO is issued the judgment entry is not a final and appealable order.”).

169. *Id.* at \*4-5 (“A review of the case law reveals the general consensus that a judgment apportioning pension benefits between ex-spouses is not a final and appealable order until such time as the QDRO is entered. The [rationales] underlying this line of cases is that a “substantial right” has not been affected. In other words, until a QDRO is issued, there is no actual order to the pension plan administrator directing it to divide the benefits in a certain manner and, therefore, the spouses are unable to determine, with certainty, exactly how their respective rights will be affected.

appellate courts would not allow an appeal until the domestic disputes court finalized the QDRO and made it a part of the divorce decree.<sup>171</sup> The fact that a substantial right of the parties was not determined mandated that the appellate courts lacked jurisdiction to hear an appeal.<sup>172</sup> Any change the trial court made to a QDRO could render an appellate court decision moot by making property division fair or rectifying a mistake the appellate court sought to correct. Therefore, the majority of appellate courts refused to hear an appeal on any aspect of the divorce decree unless the court-ordered QDRO had pension plan approval and the court entered it into the decree.<sup>173</sup>

A minority of Ohio appellate districts held that the divorce decree was appealable before the pension plan administrator approved the QDRO and entered it into the record.<sup>174</sup> These courts took the position that the right to appeal should not wait on a disinterested third party to

The bottom line is that there is more to be done in the trial court, that being the issuance of a QDRO made in compliance with federal law. Consequently, until the QDRO is issued, the judgment of the trial court cannot be considered final and appealable because it cannot be said to yet affect a substantial right.”).

170. *Keith*, 2004 WL 541077, at \*1 (finding that the trial court’s divorce decree was not final because a QDRO was ordered on the condition “if” a pension plan exists, creating the possibility that not all the marital property was divided); *see also Green*, 2005 WL 468234, at \*2 (“Divorce is a “special statutory proceeding” and, therefore, all ancillary issues related thereto must be analyzed as a special proceeding under R.C. 2505.02(B)(2). Therefore, because the division of marital property, including pension benefits, is clearly an ancillary issue in a divorce proceeding, the judgment of the trial court is final and appealable so long as it affects a “substantial right.”). The *Green* court went on to find that the divorce decree did not affect a substantial right because the QDRO had not been entered by the court. *Id.*

171. *Cooper*, 2005 WL 376608, at \*1 (“This court has jurisdiction to ‘review, affirm, modify, set aside, or reverse judgments or final orders.’ A judgment apportioning pension benefits between ex-spouses is not a final order until a Qualified Domestic Relations Order (“QDRO”) is entered that disposes of all the retirement benefits.”). The *Cooper* court went on to dismiss the appeal because the court-ordered QDRO was not entered prior to the appeal. *Id.* at \*1.

172. *Green v. Green*, No. 05AP-484, 2006 WL 1391079, at \*1-2 (Ohio Ct. App. 2006) (“In Ohio, appellate courts have jurisdiction over final orders from courts within their appellate districts. However, if an order from a lower court within an appellate district is not final, then an Ohio appellate court does not have jurisdiction to review the matter, and, as a consequence, the matter must be dismissed. ‘[B]ecause the division of marital property, including pension benefits, is clearly an ancillary issue in a divorce proceeding, the judgment of the trial court is final and appealable so long as it affects a “substantial right.”’”).

173. *See supra* notes 166 & 171.

174. *Derrit v. Derrit*, 836 N.E.2d 39, 43 (Ohio Ct. App.-11th 2005); *Wylie v. Wylie*, No. 95CA18, 1996 Ohio App. LEXIS 2341, at \*16 & n.1 (Ohio Ct. App.-4th 1996) (Fourth Appellate District) (affirming the trial court’s distribution of marital assets where the assets included an ERISA-exempt governmental pension, despite the trial court’s failure to issue a “court order to the applicable governmental agency directing . . . payment to appellee from appellant’s retirement benefits”); *Wright v. Wright*, No. 94CA02, 1994 Ohio App. LEXIS 5207, at \*6-8 (Ohio Ct. App.-4th 1994), *overruled in part by* *Liming v. Liming*, No. 05CA3, 2005 Ohio App. LEXIS 2109, at \*5-6 (Ohio Ct. App. 4th 2005).

approve what the court had ordered.<sup>175</sup> The Eleventh Appellate District stated:

This court has decided to overrule appellant's motion to dismiss and hold that the divorce decree is a final appealable order, despite the absence of a QDRO.

In support of this decision, we feel it impractical to withhold a party's right to appeal as they are awaiting the actions of non-parties to divide retirement benefits and to draft a proper QDRO. It is inherent that the court, so long as it had directed in its judgment entry and finding of facts how the pension/retirement assets [sic] are to be divided, may sign and execute the QDRO. Furthermore, in the event that the retirement asset cannot be divided consistently with the judgment entry, the court, pursuant to a properly filed Civ. R. 60(B) motion may subsequently correct said entry consistent with the plan requirements or applicable law.<sup>176</sup>

The Eleventh District adopted a method of allowing appeals without a QDRO as long as the divorce decree described how the parties were to draft the QDRO and divide the retirement funds.<sup>177</sup> This is important in matters of divorce when parties need to litigate important issues such as child custody and spousal support<sup>178</sup> while the QDRO could take years to draft.<sup>179</sup> If the subsequently entered QDRO contained an error or was not the version that the court had ordered, the Eleventh District proposed the parties use Ohio Rule 60(B) to reopen the case and adjust the QDRO to comply with the court order.<sup>180</sup>

The Second and Fourth Appellate Districts have also allowed pre-QDRO appeals. In *Wright v. Wright*, the Fourth District allowed an appeal without a QDRO because the case would otherwise never become appealable.<sup>181</sup> The parties in that case had never filed the court-ordered

175. *Derrit*, 836 N.E.2d 39 at 43.

176. *Id.*

177. *Id.*

178. *Stackhouse v. Stackhouse*, No. 15710, 1996 Ohio App. LEXIS 4853, at \*3 (Ohio Ct. App. 1996) ("In divorce proceedings, particularly as such proceedings relate to custody matters, the need for immediate review sometimes outweighs the harm caused by piecemeal appeals . . .").

179. *See e.g.* *Lyddy v. Lyddy*, 582 N.E.2d 37, 37-38 (Ohio Ct. App. 1989) (taking twenty-one months to approve a QDRO). *See also supra* notes 19-20 and accompanying text.

180. *Derrit*, 836 N.E.2d 39 at 43.

181. *Wright*, 1994 Ohio App. LEXIS 5207, at \*4-9. The trial court had ordered a QDRO, but the parties had not filed one. *Id.* at 4. The appellate court acknowledged the fact that other districts had ruled that "a judgment apportioning pension benefits between ex-spouses was not final and appealable until such time as the QDRO was entered." *Id.* at \*5 (citing *Lyddy v. Lyddy*, 582 N.E.2d 37 (Ohio Ct. App. 1989)). The *Wright* court relied on the Ohio Supreme Court's decision in *State*

QDRO.<sup>182</sup> The Second District, in *Tarbert v. Tarbert*, took the position that a QDRO could not modify a court order, “because the order in which it was granted has since become final.”<sup>183</sup> This view was directly opposed to the majority view, which saw the QDRO as a method of adjusting the property division up until the time of entry.<sup>184</sup> Although *Tarbert* was an appeal from contempt charges,<sup>185</sup> the court seemed to endorse the idea that the court order was final and appealable without a QDRO.<sup>186</sup>

The Ohio Supreme Court resolved the split between appellate districts in the fall of 2007, after the court granted review of *Wilson v. Wilson*.<sup>187</sup>

#### IV. WILSON V. WILSON

On July 19, 2005, the Wayne County Court of Common Pleas issued a divorce decree for Douglas and Jennifer Wilson.<sup>188</sup> The

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*ex rel. Papp v. James*, 632 N.E.2d 889 (Ohio 1994), in which the court determined that divorce was a “special statutory proceeding” and that “all ancillary issues related thereto must be analyzed as a special proceeding under R.C. 2505.02.” *Id.* at 7. The *Wright* court determined that the division of marital property was an ancillary issue in a divorce proceeding and that the trial court’s judgment was final and appealable as long as it affected a substantial right. *Id.* The court held that the trial court’s order determined a substantial right, and that the “judgment entered below is final and appealable (even in the absence of a QDRO).” *Id.* at 7-8. *Wright* was overruled by *Liming v. Liming*, No. 05CA3, 2005 WL 1056263, at \*5-6 (Ohio Ct. App. 2005) which relied on Ohio Civil Rule 75(F), adopted after *Wright* had been decided. See also Merit Brief of Appellant at 4-5, *Wilson v. Wilson*, 2007 WL 927609 (Ohio 2007) (No. 2006-1814) (hereinafter “Appellant Brief”) (explaining the circumstances in which *Liming* overruled *Wright*). Interestingly, the Second District in *Proconiar v. Proconiar*, No. 95-CA-19, 1995 Ohio App. LEXIS 3929 (Ohio Ct. App. 1995), relied on the same Ohio Supreme Court Case (*Papp*) to arrive at an opposite result and denied an appeal before the court entered a QDRO. *Proconiar* at \*5-6.

182. *Wright*, 1994 Ohio App. LEXIS 5207, at \*4.

183. *Tarbert v. Tarbert*, No. 96-CA-0036, 1996 Ohio App. LEXIS 4328, at \*5 (Ohio Ct. App. 1996). The court stated that the QDRO was made “merely in aid of the relief that it granted.” *Id.* “Those orders may not vary from, enlarge, or diminish the relief that the court granted, because the order in which it was granted has since become final.” *Id.*

184. See *supra* note 168 and accompanying text.

185. *Tarbert*, 1996 Ohio App. LEXIS 4328, at \*1. *Tarbert* involved a contempt proceeding in which the former husband refused to sign a QDRO dividing his pension with his former wife. *Id.* The ex-wife’s contempt charges were dismissed by the trial court and the appellate court affirmed. *Id.* at 6.

186. *Id.* at 6 (“At this stage, the court’s power is limited to ordering a QDRO consistent with its prior order, as an adjunct to and in aid of the relief it granted in that prior order.”).

187. *Wilson v. Wilson*, 878 N.E.2d 16, 16 (Ohio 2007).

188. *Wilson v. Wilson*, No. 05CA0078, 2006 WL 2336871, at \*1 (Ohio Ct. App. 2006), *rev’d* by *Wilson v. Wilson*, 878 N.E.2d 16 (Ohio 2007).

Wilson had been married for ten and a half years.<sup>189</sup> During the marriage, Douglas Wilson was a member of the Teamsters Union and had participated in a pension plan.<sup>190</sup> However, Mr. Wilson had only participated in the pension plan for three years before he was permanently laid off.<sup>191</sup> In order for the Teamsters pension to vest, Mr. Wilson had to participate in the plan for five years.<sup>192</sup> The trial court divided the unvested<sup>193</sup> Teamsters pension plan<sup>194</sup> by issuing the following order:

[Jennifer Wilson] shall receive one-half of the coverture value of [Douglas Wilson's] unvested Teamsters pension if and when it becomes vested. This division shall be through a qualified domestic relations order (QDRO) *prepared and signed at the time of the vesting*. The cost of the preparation of the QDRO shall be equally shared between the parties.<sup>195</sup>

Mr. Wilson objected to the Magistrate's decision, but the court overruled his objection and entered the Magistrate's order as the judgment entry on November 1, 2005.<sup>196</sup> Mr. Wilson then appealed the judgment entry, claiming seven errors committed by the trial court for appellate review.<sup>197</sup> The Ohio Ninth District Court of Appeals, Wayne County, dismissed the appeal due to lack of jurisdiction on August 14, 2006.<sup>198</sup>

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189. *Wilson*, 878 N.E.2d at 16 (stating that the Wilsons were married on October 9, 1993 and a complaint for divorce was filed on July 20, 2004).

190. Appellant Brief, *supra* note 181, at 1.

191. *Id.*

192. *Id.*

193. Charles F. Basil, *District of Columbia Survey: The Divisibility of Pension Interests on Divorce: The District of Columbia Ups the Ante*, 33 CATH. U.L. REV. 1087, 1091 (1984) ("Judicial decisions determining the divisibility of rights in a pension plan have focused on the level of vesting of the pension interest in deciding whether to include it in marital property. Accrued pension benefits fall into one of three broad categories. The interest may be vested and matured, vested but not matured, or unvested. If the pension interest is vested and matured, an unconditional right to immediate payment exists. If the interest is vested but not matured, the interest survives discharge or voluntary termination of the employment relationship before retirement. If, however, the interest is unvested, it is completely forfeited upon termination of the employment relationship.")

194. *Siler v. Siler*, No. CA93-10-081, 1994 Ohio App. LEXIS 3266, at \*2-3 (Ohio Ct. App. 1994) (overruling a prior case and holding that a court may divide an unvested pension as marital property and retain jurisdiction to distribute the proceeds of the pension if the pension vested). *See also Lemon v. Lemon*, 537 N.E.2d 246, 249 (Ohio Ct. App. 1988) (holding that an unvested pension is marital property subject to property division upon divorce).

195. Appellant Brief, *supra* note 181, at 1 (emphasis added).

196. *Wilson v. Wilson*, No. 05CA0078, 2006 WL 2336871, at \*1 (Ohio Ct. App. 2006), *rev'd* by *Wilson v. Wilson*, 878 N.E.2d 16 (Ohio 2007).

197. *Id.*

198. *Id.* ("This Court has further recognized that this Court lacks jurisdiction to review a division of marital assets, where the trial court has yet to journalize a Qualified Domestic Relations

Because the parties had not entered a QDRO, the appellate court denied Mr. Wilson the right to appeal any of his seven claims.<sup>199</sup> Although the appellate court realized that the parties might never file the QDRO due to the “speculative” nature of the pension plan vesting,<sup>200</sup> the court nonetheless dismissed the appeal.<sup>201</sup> The Ohio Ninth District Court of Appeals followed the majority view in denying the appeal.<sup>202</sup> Mr. Wilson appealed that decision.

The Ohio Supreme Court granted review on December 27, 2006.<sup>203</sup> Both Douglas Wilson<sup>204</sup> and Jennifer Wilson<sup>205</sup> submitted briefs in support of allowing an appeal before the parties filed a QDRO.<sup>206</sup> Quoting *Lamb v. Lamb*,<sup>207</sup> Mr. Wilson argued that the QDRO is not a final appealable order, but merely a guide to enforcing the trial court’s

Order (QDRO) ordered by the court to be filed. Only after the QDRO is journalized does the divorce decree become a final, appealable order. A QDRO has been defined as ‘a current distribution of the rights in a retirement account that is payable in the future, when the payee retires.’ Accordingly, if the QDRO has not been filed, the parties’ rights have necessarily not been fully adjudicated.”)

199. *Id.* at \*2

200. *Wilson*, 2006 WL 2336871, at \*2 (“In this case, no QDRO has been journalized. In fact, it is merely speculative whether a QDRO may ever be properly journalized, because its filing is contingent on whether appellant’s Teamsters pension vests at some time in the future.”).

201. *Id.* at \*2 (“By contingently ordering the preparation and signing, and presumably the filing and journalization, of the QDRO only upon the speculative happening of an uncertain future event, the trial court has failed to dispose of all issues regarding the division of the parties’ marital assets . . . . Because no QDRO has been filed, thereby distributing the parties’ current rights in the pension, and because the judgment entry disposes of fewer than all the issues in the parties’ divorce, this Court does not have jurisdiction to hear the appeal. Accordingly, this Court dismisses the appeal for lack of a final, appealable order.”).

202. *Id.*

203. *Wilson v. Wilson*, 859 N.E.2d 557 (Ohio 2006) (Table).

204. Appellant Brief, *supra* note 181, at 2. Mr. Douglas Wilson’s brief, filed on March 2, 2007, contained the following proposition of law: “A DIVORCE DECREE WHICH PROVIDES FOR THE ISSUANCE OF A QUALIFIED DOMESTIC RELATIONS ORDER IS A FINAL APPEALABLE ORDER EVEN IF THE QUALIFIED DOMESTIC RELATIONS ORDER HAS NOT YET ISSUED.” *Id.*

205. Merit Brief of Appellee at 3, *Wilson v. Wilson*, 2007 WL 927609 (Ohio 2007) (No. 2006-1814) (hereinafter “Appellee Brief”). Ms. Jennifer Wilson’s brief, filed on March 20, 2007, contained the following proposition of law: “A DIVORCE DECREE WHICH PROVIDES FOR THE ISSUANCE OF A QUALIFIED DOMESTIC RELATIONS ORDER IS A FINAL APPEALABLE ORDER EVEN IF THE QUALIFIED DOMESTIC RELATIONS ORDER HAS NOT YET ISSUED.” *Id.* The brief went on to state, “[t]he Appellee has no direct opposition to the assignment of error and proposition of law submitted by the Appellant.” *Id.*

206. *Wilson v. Wilson*, 878 N.E.2d 16, 17 (Ohio 2007) (“Although the trial court held that the unvested Teamster’s pension is a marital asset, the court of appeals held that it is speculative whether a QDRO may ever be properly journalized because its filing is contingent on whether the pension vests at some time in the future. *Both parties disagree with this holding.*”) (emphasis added).

207. *Lamb v. Lamb*, No. 11-98-09, 1998 Ohio App. LEXIS 6007 (Ohio Ct. App. 1998).

decision.<sup>208</sup> The QDRO itself does not decide the rights of the parties, it only “mimics” the order of the court.<sup>209</sup> The court, not the QDRO, determines the substantial rights of the parties.<sup>210</sup>

Arguing that the divorce decree is final and appealable upon filing the decree, Mr. Wilson’s brief equates the QDRO to other court-ordered filings in divorce cases, such as quitclaim deeds and wage withholding orders.<sup>211</sup> A court will order a party to execute a quitclaim deed in a case where ex-spouses hold joint title to the marital residence.<sup>212</sup> Parties file a quitclaim deed with the county in order to transfer property, but the divorce is final and appealable before filing the quitclaim deed.<sup>213</sup> Courts often use wage garnishment orders for paying child support and spousal support.<sup>214</sup> The parties, however, are able to appeal a divorce decree before they implement the court-ordered wage garnishment.<sup>215</sup> Similar to a QDRO, these filings only execute the court’s order and do not constitute “a further adjudication on the merits” of the case.<sup>216</sup> A QDRO, like the wage garnishment and quitclaim deed, “is merely a tool used to facilitate the implementation of the decree of divorce and serves no purpose other than to distribute to the parties the pension benefits granted to them in the decree.”<sup>217</sup>

Mr. Wilson also argued that if the court required the parties to file a QDRO before appealing the divorce, the court would in effect deny Mr. Wilson’s appeal “*ad infinitum*.”<sup>218</sup> Due to the speculative nature of Mr.

208. Appellant Brief, *supra* note 181, at 5.

209. *Id.* Appellant’s brief quoted the *Lamb* court:

[T]he QDRO in this case does not affect a substantial right of the parties in that it merely mimics the order of the original divorce decree. The original divorce decree was the order which established the parties['] property distribution and provided for an equitable pension division. This is the order which determined the rights of the parties. The QDRO in this case differs in no way from the divorce decree and is itself a ministerial tool used by the trial court in order to aid the relief that the court had previously granted.

*Id.*

210. *Id.*

211. *Id.* at 10-11.

212. Appellant Brief, *supra* note 181, at 10.

213. *Id.* at 11 (“There has never been a suggestion that a party must await the filing of the deed in order to appeal the decree of divorce.”).

214. *Id.* Once a court orders a wage withholding, the Child Support Enforcement Agency (CSEA) must notify the employer to begin withholding wages. *Id.* See also Robert D. Null, Note, Tenancy By The Entirety as an Asset Shield: An Unjustified Safe Haven For Delinquent Child Support Obligors, 29 Val. U.L. Rev. 1057, 1071-72 (1995) (giving a short explanation of the procedures for wage garnishment).

215. Appellant Brief, *supra* note 181, at 11.

216. *Id.*

217. *Id.*

218. *Id.* at 13.

Wilson's pension plan vesting, there was a possibility that Mr. Wilson would never have the opportunity to file a QDRO.<sup>219</sup> In such a case, the court would deny hearing Mr. Wilson's seven grounds for appeal, six of which had nothing to do with his pension.<sup>220</sup> Mr. Wilson cited other cases in which an Ohio appellate court denied an appeal due to the lack of a properly filed QDRO, thereby delaying the adjudication of other rights.<sup>221</sup>

The Ohio Supreme Court held oral arguments on September 11, 2007 and issued an opinion on November 20, 2007.<sup>222</sup> In a short opinion, the court held that "a divorce decree that provides for the issuance of a QDRO is a final appealable order, even before the QDRO is issued."<sup>223</sup> Siding with the minority, the court reasoned that the divorce decree was the final order of the court and that the QDRO was merely a tool used to enforce the decree.<sup>224</sup> The court stated:

A QDRO does not in any way constitute a further adjudication on the merits of the pension division, as its sole purpose is to implement the terms of the divorce decree. Therefore, it is the decree of divorce that constitutes the final determination of the court and determines the merits of the case. After a domestic relations court issues a divorce decree, there is nothing further for the court to determine.<sup>225</sup>

The court ruled that the decree complies with Ohio Civil Rule 75(F) because the decree sets out how the pension plan administrator will divide the pension.<sup>226</sup> The trial court must determine "the value of the pension and the percentage to give to each spouse, which may include . . . expert testimony regarding the value of the unvested pension and the correct percentage discount for the time remaining until the pension becomes vested."<sup>227</sup> Because the QDRO cannot alter the divorce decree, Ohio Civil Rule 75(F) is satisfied upon the filing of the decree.<sup>228</sup> The

219. *Id.*

220. Appellant Brief, *supra* note 181, at 13.

221. *Id.* at 15-16 (citing *Sabo v. Sabo*, 2003 Ohio 6586 (Ohio Ct. App. 2003) (wife was delayed from appealing non-pension issues for over a year due to the lack of a properly filed QDRO), *Bucalo v. Bucalo*, 2005 Ohio 6319 (Ohio Ct. App. 2005) (appellant had to wait until a QDRO was filed in order to appeal five unrelated financial issues), *Vujovic v. Vujovic*, 2005 Ohio 3942 (Ohio Ct. App. 2005) (husband appealed the denial of shared parenting, but was denied a hearing on appeal due to the lack of a filed QDRO)).

222. *Wilson v. Wilson*, 878 N.E.2d 16, 16 (Ohio 2007).

223. *Id.* at 19.

224. *Id.* (citing *Lamb*, 1998 Ohio App. LEXIS 6007, at \*2 (Ohio Ct. App. 1998)).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Wilson*, 878 N.E.2d at 18.

court also stated that if the decree was not appealable, the parties might never be able to bring an appeal due to the unvested nature of Mr. Wilson's pension.<sup>229</sup>

#### V. RAMIFICATIONS OF WILSON V. WILSON

By allowing parties to appeal their substantive claims before they file a QDRO, the Ohio Supreme Court has removed a significant delay to appealing divorce cases. QDROs can take months to prepare.<sup>230</sup> During that time, parties may be neglecting the rights of ex-spouses and children.<sup>231</sup> Much needed support may be awaiting appeal. By allowing a timely appeal, the *Wilson* decision brings Ohio in line with other states that have decided this issue.<sup>232</sup>

Forcing the parties to sacrifice other rights to the divorce decree in order to preserve the right to a pension is inequitable. If the parties to a divorce decree must wait for a pension plan administrator to draft a QDRO in order to appeal other rights, the courts would force the parties into a situation in which they must choose between valuable rights. On the one hand, the parties can choose to preserve their right to the other's pension, wait for the filing of the QDRO, and let their rights to child support, spousal support, or child custody deteriorate. On the other hand, if the parties wish to pursue their claim for child support or child custody on appeal, they may have to agree to forfeit their right to their ex-spouse's pension by giving up any interest in a QDRO in order to pursue an appeal.<sup>233</sup> This type of situation creates bargaining power that

229. *Id.* See also *Wilson v. Wilson*, No. 05CA0078, 2008 WL 2580931 (Ohio Ct. App. 2008). Upon remand, the court sustained one of Mr. Wilson's seven assignments of error. *Id.* at \*6.

230. *Gendreau v. Gendreau (In re Gendreau)*, 122 F.3d 815, 819 (9th Cir. 1997) (stating that drafting a QDRO is "a process which everyone (including Congress) recognizes as time-consuming"). See also 29 U.S.C. § 1056(d)(3)(H) (2000) (providing an eighteen month time period to determine if a DRO is a QDRO).

231. See *supra* notes 25-26 and accompanying text.

232. See *e.g.* *Holland v. Holland*, Record No. 1231-04-3, 2004 WL 2790653, \*1 n.1 (Va. App. 2004) (Virginia); *Incontro v. Incontro*, No. A-01-1068, 2003 WL 1962884, at \*1 (Neb. App. 2004) (Nebraska); *Prol v. Prol*, 935 A.2d 547, 550 (Pa.Super. 2007) (allowing an appeal before the wife filed a QDRO); *In re Marriage of Davis*, 120 Cal.App.4th 1007, 1013-14 (Cal.App. 2d 2004) (addressing an appeal prior to the filing of a QDRO); *In re Marriage of Ward*, 641 N.E.2d 879 (Ill. Ct. App. 1994) (allowing multiple appeals from a divorce, some of which occurred before a QDRO was filed). But see also *Rohrbeck v. Rohrbeck*, 566 A.2d 767,773-74 (Md. Ct. App. 1989) (stating that the trial court's order was not final until the QDRO was denied).

233. *Goulding v. Goulding*, No. 2007-T-0011, 2007 WL 4484781, at \*7 (Ohio Ct. App. 2007) (parties can agree to the conditions of the QDRO which becomes like a legally binding contract that will be carried out on its terms); *Unger v. Unger*, No. 2003CA00356, 2004 WL 2496435, at \*3 (Ohio Ct. App. 2004) (Boggins, J., dissenting). "[C]ourts and orders therefrom are not for the

favors the spouse with the pension that can be used to force the other spouse to not bring a valid claim. At the extreme, this situation mandates that the court forever bar an appeal when the parties might never draft a QDRO, as was the case in *Wilson*.

But there is also a negative aspect to allowing a pre-QDRO appeal. The pension plan administrator must approve the QDRO before the court can file it with the divorce decree.<sup>234</sup> If the pension plan administrator does not approve the court's determination of the pension division after the divorce decree becomes final, the court may have to adjust the parties' property division in order to accommodate a proper QDRO. Because the court cannot modify its own property division once it is final,<sup>235</sup> the losing party may have limited avenues for redress if the prior court order is final.<sup>236</sup> Another issue arises when the parties agree on a QDRO during divorce proceedings. The QDRO filed with the court may not be what the parties agreed to.<sup>237</sup> If the parties file a QDRO more than thirty days after the divorce decree, the decree is no longer appealable.<sup>238</sup> The parties could be stuck with a QDRO that unfairly favors one spouse.

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benefit of themselves . . . judicial orders are not sacrosanct and . . . parties may agree to other arrangements." *Id.*

234. See *supra* note 13. See also Albert Feuer, *Who is Entitled to Survivor Benefits From ERISA Plans?*, 40 J. MARSHALL L. REV. 919, 1000 (2007) (describing the pension plan administrator's obligation to sequester payments subject to a DRO for eighteen months while the DRO becomes a QDRO and that the QDRO may be modified due to suggestions by the pension plan administrator).

235. *McGee v. McGee*, 860 N.E.2d 1054, 1057 (Ohio Ct. App. 2006) (stating that a court may not modify its own property division, yet the parties to the litigation are free to modify the court order themselves).

236. See e.g. *Miller v. Miller*, No. 07CA0068-M, 2008 WL 1930784, at \*1-2 (Ohio Ct. App. 2008) (applying *Wilson* retroactively to deny an appeal); *Rothman v. Rothman*, No. 07CA009295, 2008 WL 4116089, at \*1 (Ohio Ct. App. 2008) (applying the Ohio Supreme Court's decision in *Wilson* retroactively in order to deny an appeal from a divorce as untimely because the husband filed the appeal five months after the trial court entered its judgment, yet only six days after the parties filed a QDRO); *Poleondakis v. Poleondakis*, No.23981, 2008 WL 2267188 (Ohio Ct. App. 2008); *Zorn v. Zorn*, No. 07CA0077-M, 2008 WL 2079431 (Ct. App. 2008). In this case, the Ohio Ninth District Court of Appeals denied the wife's appeal both before and after the *Wilson* decision, the first time for lack of a final appealable order and the second time for lack of jurisdiction. *Id.* at \*3 & n.1.

237. *Hale v. Hale*, No. 21402, 2007 WL 625813, at \*2 (Ohio Ct. App. 2007). An independent court-appointed pension evaluator drafted a QDRO for the divorcing couple. *Id.* at \*1. The ex-husband attempted to vacate the QDRO because the parties had not agreed to some of the terms of the QDRO and some of the terms were never shown to the ex-husband. *Id.* at \*2.

238. A limited number of cases have allowed separate appeals from both the divorce decree and the QDRO. See *Pierron v. Pierron*, No. 07CA3153, 2008 WL 746948, at \*2 (Ohio Ct. App. 2008); *Wigel v. Wigel*, Nos. 06CA7- & 07CA10, 2008 WL 495896, at \*2 (Ohio Ct. App. 2008).

Courts may also interpret the *Wilson* decision to eliminate the appeal rights of many divorcing couples. Recently, courts have retroactively applied the *Wilson* decision, denying jurisdiction over appeals from divorce decrees that trial courts entered before the *Wilson* decision and months before the parties filed an appeal, but in which the parties were waiting for a QDRO.<sup>239</sup> In *Rothman v. Rothman*, the Ohio Ninth District Court of Appeals used the *Wilson* decision to deny jurisdiction for an appeal filed before *Wilson* was decided.<sup>240</sup> The court denied the parties in *Rothman* the right to appeal because they relied on case law and waited to appeal until they filed a QDRO.

The timing of appeal for divorce cases and the subsequently filed QDRO may also have an effect on bankruptcy law. Many divorcing couples go through bankruptcy prior to, or subsequent to, divorce.<sup>241</sup> The rights to pension benefits in the near future may have an impact on the bankruptcy proceedings,<sup>242</sup> although Ohio exempts certain pensions and IRAs from garnishment or attachment in bankruptcy.<sup>243</sup> If a court files a QDRO that incorrectly gives a large portion of pension income to one spouse, that spouse may become prejudiced in a bankruptcy proceeding.<sup>244</sup> The spouse must have a way of correcting a QDRO that

239. See *supra* note 236.

240. *Rothman*, 2008 WL 4116089, at \*1 (“Although Husband filed his notice of appeal one day before the Supreme Court issued its decision in *Wilson*, this Court has determined that the ruling in *Wilson* is applicable both prospectively, and retroactively . . . . Therefore, *Wilson* is the controlling authority in the case at hand.”).

241. Jonathan D. Fisher & Angela C. Lyons, *Till Debt do us Part: A Model of Divorce and Personal Bankruptcy*, 4 REV. ECON. HOUSEHOLD 35, 36, 44-45 (2006) (finding that “being recently divorced doubles the probability of bankruptcy” and “that filing for bankruptcy almost doubles the likelihood of divorce.”). The authors state:

Research shows that bankruptcy and divorce are positively correlated, such that the unconditional probability of bankruptcy is high after a household becomes divorced. . . .

There are reasons why divorce may be a likely contributor to bankruptcy: (1) divorce imposes high costs on the family (e.g., lawyer fees) causing bankruptcy to become a financially viable option or (2) lawyers cross-market products during their counseling (i.e., inform the participants of the divorce about the benefits of bankruptcy). However, it may just be the case that the factors that drive the bankruptcy decision are the same factors that drive the divorce decision.

*Id.* at 36.

242. See, e.g. C. Scott Pryor, *Rock, Scissors, Paper: ERISA, the Bankruptcy Code and State Exemption Laws for Individual Retirement Accounts*, 77 AM. BANKR. L.J. 65 (2003) (discussing the interaction between ERISA and the Bankruptcy Code exemptions); Alyson F. Finkelstein, Note & Comment, *A Tug of War: State Divorce Courts versus Federal Bankruptcy Courts Regarding Debts Resulting from Divorce*, 18 BANK. DEV. J. 169 (2001); Otilie Bello, Comment, *Bankruptcy and Divorce: The Courts Send a Message to Congress*, 13 PACE L. REV. 643 (1993).

243. OHIO REV. CODE § 2329.66(A)(10) (2007).

244. 11 U.S.C.S. § 707(b) (Lexis 2008) (providing certain debt to income ratio limits to filing a Chapter 7 bankruptcy petition).

the court files more than thirty days after the divorce decree becomes final.

The courts can easily solve most of these issues by allowing parties to re-open their divorce under Ohio Civil Rule 60(B) solely for the purposes of adjusting the QDRO.<sup>245</sup> Under Ohio Civil Rule 60(B)(5), a party to the divorce may motion the court to reopen the case for any reason that justifies relief.<sup>246</sup> An erroneously entered QDRO would certainly qualify as a reason justifying relief.<sup>247</sup> The QDRO may have a large detrimental effect on the financial stability of one or both spouses if it is incorrect. Additionally, the inaccurate QDRO would not be subject to the one-year limitation of Ohio Civil Rule 60(B)<sup>248</sup> because it is not mistake,<sup>249</sup> inadvertence,<sup>250</sup> surprise,<sup>251</sup> excusable neglect,<sup>252</sup>

245. See *Derrit v. Derrit*, 836 N.E.2d 39, 43 (Ohio Ct. App. 2005) (“Furthermore, in the event that the retirement assets cannot be divided consistently with the judgment entry, the court, pursuant to a properly filed Civ. R. 60(B) motion may subsequently correct the entry consistent with the plan requirements or applicable law.”). See also *Kingery v. Kingery*, No. 8-05-02, 2005 WL 1662022, at \*1-2 (Ohio Ct. App. 2005) (upholding a Rule 60(B) motion to modify a QDRO seven months after a final divorce); *Borzy v. Borzy*, No. 3185-M, 2001 WL 1545676, at \*3-4 (Ohio Ct. App. 2001) (upholding trial court’s decision to grant appellant’s 60(B)(5) motion).

246. OHIO CIV.R. 60(B)(5) (2007) (allowing relief from a judgment or order by any reason justifying relief). See also *supra* note 155.

247. *Wilson v. Lee*, 876 N.E.2d 1312, 1315 (Ohio Ct. App. 2007) (describing Ohio Civil Rule 60(B) as, “a ‘remedial rule to be liberally construed so that the ends of justice may be served’”).

248. OHIO CIV.R. 60(B) (stating that there is a one year limitation only applies for re-opening a case on the grounds of mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud). See also *supra* note 155.

249. *Smith v. Smith*, No. 83275, 2004 WL 2361973, at \*3 (Ohio Ct. App. 2004). The court set forth the standard for Ohio Civil Rule 60(B)(1) relief in a divorce case:

Typically, courts will grant relief on the basis of mistake when the mistake is a mutual mistake shared by both parties as to a material fact in the case. However, ‘the courts of this state have generally held that relief from [a divorce] decree will not be granted when the alleged ‘mistake’ was merely a unilateral mistake on the part of one party or her counsel.’ In such situations, the party alleging the mistake ‘must show why he was justified in failing to avoid mistake or inadvertence; gross carelessness is insufficient.’

*Id.* (citations omitted). An inaccurate QDRO is not a mutual mistake shared by both parties at the time the parties agreed upon the terms of the QDRO. Rather, the incorrect QDRO is simply a wrongly drafted document filed post judgment.

250. *Wilson*, 876 N.E.2d at 1317. The court quotes Black’s Law Dictionary to define ‘inadvertence’ for the purposes of Ohio Civil Rule 60(B) as “[h]eedlessness; lack of attention; want of care; carelessness; failure of a person to pay careful and prudent attention to \* \* \* a proceeding in court by which its rights may be affected.” *Id.* (emphasis in original). Drafting a QDRO that is not in conformity with the divorce decree is not due to “lack of attention” or “want of care,” but rather, post-decree mistake or drafting error.

251. OHIO CIV.R. 60(B)(1) (2007).

252. *Heard v. Dubose*, No. C-060265, 2007 WL 424094, at \*\*3 (Ohio Ct. App. 2007). The court summarized the ‘excusable neglect’ standard of Ohio Civil Rule 60(B) as:

[c]ourts have defined excusable neglect in the negative, stating that a defendant’s inaction is not excusable neglect when it shows ‘a complete disregard for the judicial

fraud,<sup>253</sup> or newly discovered evidence.<sup>254</sup> Nevertheless, the parties would have to file the Rule 60(B) motion within a reasonable time from the time the court files the QDRO.<sup>255</sup> By allowing the parties to appeal their divorce decree before filing a QDRO and then allowing them to use Ohio Civil Rule 60(B) to correct any mistakes in the QDRO, the courts would protect the parties' rights in the QDRO as well as allow timely appeal of other ancillary issues to the divorce.

The *Wilson* case correctly allows for a timely appeal from a divorce decree, however, it does not address the need for corrective action if the QDRO is incorrect.<sup>256</sup> Although the QDRO must conform to the mandates of a divorce decree,<sup>257</sup> parties can differ on the proper interpretation. Parties need a procedure for litigating the accuracy of a QDRO entered by the court after the divorce decree is final and the period for appeal has ended. Using Ohio Civil Rule 60(B) is the only method of providing that procedure. The courts, however, should limit the issues to modifying the QDRO to conform to the divorce decree. Any other issues of the divorce are properly handled on appeal.

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system' or it falls substantially below that which is reasonable under the circumstances.

A determination of excusable neglect depends on the facts and circumstances of each case.

*Id.* An incorrect QDRO is not necessarily a result of neglect. The QDRO could be incorrect for a number of reasons, including an error by the plan administrator.

253. *Leibold v. Hiddens*, No. 21587, 2007 WL 1721347, at \*5 (Ohio Ct. App. 2007) ("A claim of actual fraud is established by showing a false misrepresentation of fact that is material to the transaction made with intent to mislead, and which did, in fact, result in justifiable reliance and injury.").

254. *Dunham v. Dunham*, 870 N.E.2d 168, 188 (Ohio Ct. App. 2007). The court explains that in terms of Ohio Civil Rule 60(B), "[n]ewly discovered evidence refers to evidence in existence at the time of trial of which the aggrieved party is excusably ignorant." *Id.* A subsequently filed QDRO is obviously not in existence at the time of a divorce proceeding.

255. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.*, 351 N.E.2d 113, 116 (Ohio 1976). The Ohio Supreme Court described the standards for bringing a successful Ohio Civil Rule 60(B) motion as:

To prevail on his motion under Civ. R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) *the motion is made within a reasonable time*, and, where the grounds of relief are Civ. R. 60(B)(1), (2), or (3), not more than one year after the judgment, order or proceeding was entered or taken.

*Id.* (emphasis added). *See also supra* note 160.

256. *See generally* *Wilson v. Wilson*, 878 N.E.2d 16 (Ohio 2007).

257. *Lamb v. Lamb*, No. 11-98-09, 1998 Ohio App. LEXIS 6007, at \*5-6 (Ohio Ct. App. 1998) ("Indeed a QDRO may not vary from, enlarge, or diminish the relief that the court granted in the divorce decree, since that order which provided for the QDRO has since become final.").

## VI. CONCLUSION

Divorces are on the rise in America<sup>258</sup> and spouses must find ways to disentangle themselves and make a clean break.<sup>259</sup> The Ohio Supreme Court's decision in *Wilson v. Wilson* correctly resolved an important issue in Ohio divorce law, thereby facilitating the divorce process. Allowing a party to appeal the divorce decree before the parties finalize a QDRO is important in preserving the rights of both spouses. One spouse can no longer use the long delay of drafting a QDRO to pressure the other spouse into giving up rights or child custody. The QDRO drafting process does not have to be rushed to the detriment of the parties in order to appeal an issue that one ex-spouse views as more important than the pension plan benefits. Parties may now freely resolve their disputes without waiting for a disinterested pension plan administrator to draft an unrelated document.

The issue of appealing a QDRO, however, is not yet resolved. If the divorce is final and the court enters the QDRO months or years later, how do the parties address problems with the QDRO? The easiest solution is for the parties to file an Ohio Civil Rule 60(B) motion to reopen the divorce case. The court can simply limit the motion to address the issues of the QDRO, allowing the parties to deal with the other issues by appealing the decree. The result would give the parties thirty days to appeal the divorce and the ability to contest the QDRO within a reasonable amount of time after the pension plan administrator

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258. Amy C. Henderson, Comment, *Meaningful Access to the Courts?: Assessing Self-Represented Litigants' Ability to Obtain a Fair, Inexpensive Divorce in Missouri's Court System*, 72 UMKC L. REV. 571, 572-73 (2003) ("The rate of divorce in the United States has increased phenomenally during the last decade. With the number of divorces quadrupling in less than twenty-seven years, 'the United States has the highest divorce rate of any [industrialized] nation in the world.' In 1970, an estimated 4.3 million Americans were divorced. By 1996, that number had soared to 18.3 million. Additionally, 'the divorce rate in 1999 was half the rate for marriages in the same year.'").

259. Straub, *supra* note 1, at 916. Straub explains how Ohio courts approach a divorce case, specifically through property division:

The general view is that marriage is an economic partnership in which both spouses contribute, and in such a circumstance, a court will divide marital property equitably regardless of each person's independent monetary or material earnings during the marriage. For example, Ohio courts approach property division through an equitable distribution viewpoint, and in doing so, strive to fairly and reasonably divide property between the divorcing parties. In making an equitable distribution of property, Ohio courts divide all marital property equally, and then appropriately adjust the division under the specific facts of each case. In sum, divorce courts attempt to end the marriage and fairly separate all the assets in order for the parties to live with as few ties to each other as possible.

*Id.*

files it. Without this option, the parties are subject to being stuck with a poorly drafted QDRO that unfairly favors one spouse.

The courts should also strive to find an equitable solution to those appeals that relied on pre-*Wilson* case law and waited for a QDRO filing before appealing. Courts should not preclude parties from appealing when they were merely following the rule of law. An equitable solution may be to allow the parties to appeal once a QDRO is filed or allow an appeal within thirty days of the *Wilson* decision. For the courts that deal with this issue, however, denying an appeal due to justifiable reliance on case law is not a fair adjudication of the parties' rights to appeal.

