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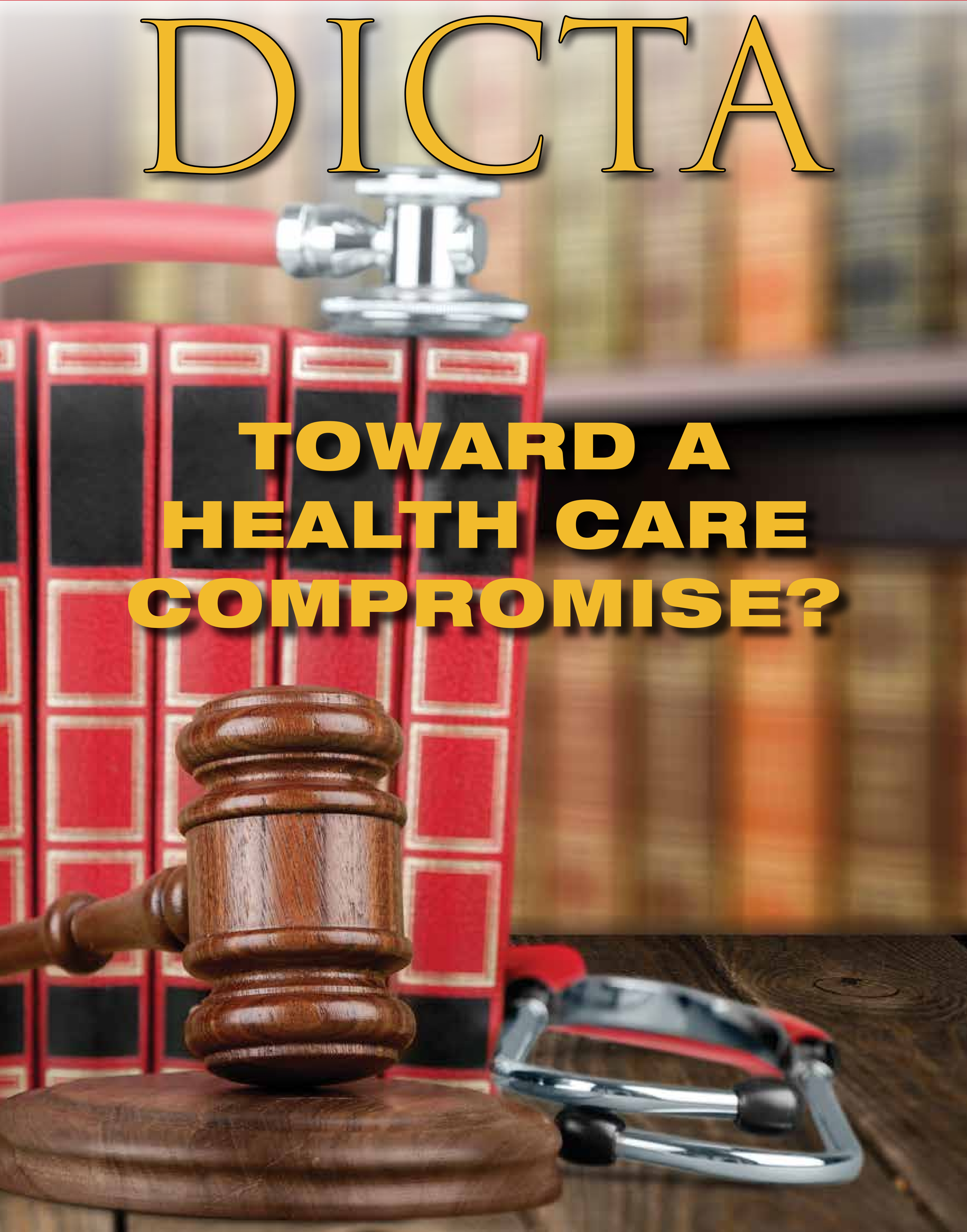

TOWARD A HEALTH CARE COMPROMISE?

By: Kathy D. Aslinger
Kennerly, Montgomery & Finley
Kristi Paczkowski
Executive Director, City of Knoxville Pension Board


GOVERNMENTAL PLAN QDROS: NOT YOUR TYPICAL RETIREMENT PLAN DIVISION

Family law practitioners are very familiar with using a Qualified Domestic Relations Order, or "QDRO," to divide 401(k) and other retirement plan benefits. A QDRO is a domestic relations order issued by a court that creates or recognizes the existence of an "alternate payee's" right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan. The "alternate payee" is typically a plan participant's former spouse, but could be a child or other dependent.

Although the Internal Revenue Code ("Code") and the Employee Retirement Income Security Act ("ERISA") require plans sponsored by private employers to recognize and divide retirement plan benefits pursuant to a QDRO, governmental plans are exempt from the requirements of ERISA and from some of the Code requirements, including most requirements related to QDROs.[1] Thus, governmental plans are only required to recognize QDROs to the extent required by state law.

Prior to July 1, 2015, Tennessee law effectively prohibited a Tennessee governmental plan from complying with a domestic relations order except in very limited circumstances related to child support or alimony. That all changed in July of 2015 with a change in Tennessee Code Annotated § 26-2-105, which now requires all Tennessee governmental plans to recognize QDROs.

This law change did not, however, subject governmental plans to the same ERISA and Code requirements as private plans. Rather, governmental plans have significantly more leeway in restricting the types of QDROs they will recognize and determining how and when benefits will be paid. Because of that leeway, different governmental employers may have very different rules. These tips may help you navigate this complicated area.

1. Make sure you understand the type of retirement plan you are trying to divide.

While most private employers have 401(k) or other types of defined contribution retirement plans, many governments still sponsor traditional pension, or defined benefit, plans. Benefits under a defined benefit plan are determined based upon a formula that usually considers things such as average compensation and years of service. The formula determines how much money a participant will receive each month after the participant reaches normal retirement age and retires. Although some defined benefit plans may allow the actuarial value of this monthly benefit to be paid to a participant in a single lump sum, most pension benefits are paid as a monthly annuity until the participant's death. Depending on the plan and any annuity election made by a participant, a survivor annuity may be payable beginning on the participant's death for the remaining life of a surviving beneficiary.

If you are trying to divide a governmental defined contribution plan, you may have the same flexibility as you would in a private plan to value the plan account as of a particular date, assign a percentage of those assets to the alternate payee, and direct the plan to pay the alternate payee's share as soon as possible. Dividing a defined benefit plan, on the other hand, can be much more challenging due to restrictions on distribution timing and options and the valuation of the benefit.

2. Ask for a copy of the plan's QDRO rules or procedures.

By now, most governmental employers have adopted QDRO rules and procedures governing the QDRO process. Those rules and procedures may have extremely valuable information on what types of QDROs are permissible under the Plan and the distribution options available to an alternate payee.

For example, the rules for the Tennessee Consolidate Retirement System only permit a "shared interest" QDRO.[2] A shared interest QDRO assigns to the alternate payee a percentage or dollar amount of the benefit payable to the participant, to be paid to the alternate payee at such time as paid to the participant. If the participant dies and no further benefit is payable, then benefits to the alternate payee would stop as well.

Other governmental plans, such as the City of Knoxville Employees' Pension System, have adopted rules permitting separate interest QDROs so long as the participant has not yet retired.[3] A separate interest QDRO assigns a portion of a participant's benefit to the alternate payee as his or her separate interest, and the actuarially adjusted benefit (i.e., based on the age of the alternate payee) will be paid to the alternate payee at the time and in the manner elected by the alternate payee. The alternate payee's benefit is not impacted by the participant's separate choices or death.

3. If a sample QDRO is available, use it.

The plan may either require or encourage the use of a particular QDRO form. Even if a particular form is not required, you may find it easier to comply with the various rules and requirements governing a plan if you use the form suggested, and it will reduce the likelihood that changes will need to be made before the plan administrator will approve it. If the QDRO procedures permit it, also consider asking the plan administrator to review the draft QDRO before you submit it to the court.

4. Be prepared for a fee, particularly for separate interest QDROs.

Although not all plans assess a fee for the review and processing of a QDRO, many do. The amount of the fee may seem shocking to those more accustomed to 401(k) QDRO fees, but they are designed to cover the additional cost necessary for the plan's actuary to calculate the benefit and for legal review.

5. Don't be afraid to ask for help.

Pension plans are confusing, and the differences between plans and QDRO procedures make them even more so. When you have questions, reach out to the plan sponsor or pension board staff. In most circumstances, they are happy to walk you through the process, as it benefits both you and them to follow the rules on the first try.

[1] *See* ERISA § 4(b)(1); Code § 414(p)(9).
[2] *See* Tenn. Comp. R. & Regs. § 1700-03-03-.09.
[3] *See* http://cokpension.org/wp-content/uploads/2017/06/1.-QDRO-Procedure.pdf.