

November 1, 1952.

Mr. Thomas F. Joyce
 Attorney, State Welfare Department
 Silver Bow Block
 Butte, Montana

Dear Mr. Joyce:

You have asked my opinion upon the following questions:

1. Where a recipient of old age assistance under the public welfare act deeds property to the county, either expressly or impliedly, in consideration of the assistance given or to be given by the welfare department, does such property become the sole property of the county to which it is deeded?

2. If so, does the state department of public welfare have any claim to any of the property when such property is sold by the county?

Property deeded to the county, either expressly or impliedly, in consideration of assistance given or to be given by the welfare department does not become the sole property of the county to which it is deeded. A county has no legal right under the public welfare act to demand a conveyance of the property belonging to a prospective recipient of old age assistance in return for the grant of assistance. I call your attention to the eligibility requirement of Section 71-402, Revised Codes of Montana, 1947:

"Eligibility Requirements for Old Age Assistance. Old age assistance shall be granted any person who:

(a) Has attained the age of sixty-five (65) years.

(b) Has income which is inadequate to provide a reasonable subsistence compatible with decency and health.

(c) Has been a resident of the state of Montana for at least five (5) years during the nine (9) years immediately preceding his application for old age assistance.

(d) Has resided in and been an inhabitant of the state and county in which application is made for at least one (1) year immediately preceding the date of the application. Any person otherwise qualified who has resided in the state for five (5) years or more during the nine (9)

Opinion No. 127

**Public Welfare—Old Age Assistance—
 Property Transfers to Counties By
 Old Age Assistance Clients.**

Held: 1. A county may not demand a transfer of a person's property in return for a grant of old age assistance.

2. Property received by a county in return for a grant of old age assistance is held upon constructive trust for the grantor, or, if he is dead, for his heirs.

3. The only claim that the state or county has against the property of an old age assistance recipient is the statutory claim set up by section 71-412, R. C. M., 1947.

years immediately preceding the application, one (1) year of which state residence shall have been immediately prior to the date of the application, and who has no legal county residence, shall file his application, in the county in which he is residing, and his assistance shall be paid entirely from state funds until he can qualify as having a legal residence in the said county. For the purpose of this act, every person who has resided one (1) year or more in any county in this state shall thereby acquire a legal residence in such county, which he shall retain until he has been absent voluntarily and continuously for one (1) year therefrom.

(e) Is not at the time of receiving assistance an inmate of any public institution, except in the case of temporary medical or surgical care in a hospital.

(f) Has not made an assignment or transfer of property for the purpose of rendering himself eligible for assistance under this act at any time within two years immediately prior to the filing of application for assistance pursuant to the provisions of this act."

Under this section old age assistance must be granted to any person who fulfills these requirements. The functions of the county welfare department in administering this section of the public welfare act are investigative only. The second paragraph of Section 71-406, Revised Codes of Montana, 1947, clearly provides this. It says:

"Upon the completion of such investigation, the county public welfare board shall decide whether the applicant is eligible for and should receive an old age assistance grant under this act, the amount of the assistance, and the date on which the assistance shall begin. It shall make an award which shall be binding upon the county board and be complied with by such county board until modified or vacated. It shall notify the applicant of its decision in writing."

An agreement between a county and an old age assistance recipient, in which the county granted the assistance in return for a conveyance of the

recipient's property, would be an invalid agreement since it would be without consideration upon the part of the county. If the recipient is eligible according to the requirements of Section 71-402, *supra*, the county is legally bound to grant him the assistance. Doing an act which one is already legally bound to do is not good consideration. (*Baker vs. Citizens State Bank*, 81 Mont. 543, 264 Pac. 675; also, *Murphy vs. Nett*, 51 Mont. 82, 149 Pac. 713). Any property received by a county as a result of such a bargain would thereafter be held as a constructive trust for the grantor or, if he is dead, for his heirs under Section 86-210, Revised Codes of Montana, 1947, which provides:

"Involuntary Trust Resulting From Fraud, Etc. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

Under this statute, it would be immaterial whether the conveyance was made by the recipient because of a mistaken belief that he must convey or because he was required to do so by county officials. (See, 65 C. J., *Trusts*, Section 218 and 220, pages 461, 462. Also, *Huffine vs. Lincoln*, 52 Mont. 585, 160 Pac. 820; *Lutey vs. Clark*, 31 Mont. 45, 77 Pac. 305; *McGuinness vs. Lester*, 86 Cal. App. 454, 260 Pac. 925. Also, see, 31 C. J., *Influence*, Section 2, page 1183). In any case in which a person conveyed his property to a county under the impression that it was necessary for him to do so in order to receive a grant of old age assistance, the county would hold the property upon a constructive trust under Section 86-210, *supra*.

Our present welfare act was enacted in 1937. The act in force just prior to that time empowered the county old age pension commission to require as a condition of the grant or continuance of assistance in any case that all or any part of the property of a person applying for it should be transferred to the county old age pension commission. Section 335.39, Revised Codes of Montana, 1935, provided:

"Assignment of Property By Recipient—Return of Property On Discontinuance of Assistance—County Attorney to Assist Commission. If the county old age pension commission shall deem it necessary, it may with the consent of the state old age pension commission, require as a condition to the grant or continuance of assistance in any case, that all or any part of the property of a person applying for aid be transferred to said county old age pension commission. Such property shall be managed under rules and regulations of the state old age pension commission by the county old age pension commission, which shall pay the net income thereof to such person; said county old age pension commission shall have power to sell, lease, or transfer such property or defend or prosecute all suits concerning it and to pay all just claims against it and to do all things necessary for the protection, preservation and management thereof. If the assistance to such person is discontinued during his lifetime, the property thus transferred to the county old age pension commission shall be returned to him subject to a lien on such property for any sums paid to him as assistance under this act, or the remainder of such property after deducting therefrom the sums paid to him as assistance under this act shall be returned to him. In the event of his death, the remainder of such property, after deducting therefrom the sums paid him as assistance under this act, shall be considered as the property of the beneficiary for proper administrative proceedings. The county old age pension commission shall execute and deliver all necessary instruments to give effect to this section. The county attorney at the request of the county old age pension commission shall take the necessary proceedings and represent the county old age pension commission in respect to any matters arising under this act."

This section was expressly repealed by Chapter 82 of the Session Laws of 1937, part VII, Section II. There is no provision in our present public welfare act granting to counties any of the powers enumerated in Section 335.39, supra. The express repeal of this sec-

tion indicates the intent of the legislature to remove completely all of the county commission's power under this section. A repealed statute is ineffective to the same extent as though it had never been enacted (*Westchester Fire Insurance Co. vs. Sullivan*, 45 Mont.18, 121 Pac. 472; *City of Bozeman vs Merrell*, 81 Mont. 19, 261 Pac. 876). Explicit repeal of a portion of a statute in which a power is expressly conferred ordinarily forbids continued existence of the power being implied. (*Hauserman vs. Board of Commissioners of Clay County*, 89 Kan. 555, 132 Pac. 212).

This opinion is not intended to preclude the possibility that persons who have received or may be receiving old age assistance may deed their property to the county as a gift. If such a bona-fide gift is made with the complete understanding on the part of the grantor that it is a gift and is not required because of his receipt of old age assistance, it may be taken and held by the county and used in the same manner as any other gift to a county. However, if any county holds property acquired by mistake, it holds the property in constructive trust for the grantor or if it has disposed of the property it must hold the funds received in constructive trust for the grantor. See, 65 C. J., *Trusts*, Section 218, page 461. The sole claim which either the state or the county has upon the property of an old age recipient is the statutory claim set up by Section 71-412, Revised Codes of Montana, 1947, which provides for recovery from the estate of a deceased recipient as follows:

"Recovery From The Estate Of A Decedent—Claim For Assistance Paid. Upon the death of any recipient of old age assistance his estate, to the extent of five hundred dollars (\$500.00), shall be exempt from claim for old age assistance paid under this act. If upon the death of any recipient of old age assistance he shall leave an estate of five hundred dollars (\$500.00) or less, according to the inventory and appraisal filed in the matter of the estate of such person, no claim shall be allowed against the estate of such person for assistance paid under this act. If such person shall leave estate in excess of five hundred dollars (\$500.00), according to the inventory and

appraisement filed in the matter of the estate of such person, the state department of public welfare shall execute and present a claim against the estate of such person within the time specified in the published notice to creditors in the estate matter for the total amount of assistance paid under this act. No claim shall be enforced against any real estate of a recipient while it is occupied by the surviving spouse, or dependent, as a home.

If the federal law so requires, the federal government shall be entitled to a share of any amounts collected from recipients or their estates in proportion to the amount which it has contributed to the grants recovered, and the amount due the United States shall be promptly paid by the state to the United States government. The remaining portion of the amount collected shall be distributed to the state and county in proportion to the total amount paid by each."

Therefore, it is my opinion that in any case where a county has received property in return for a grant of old age assistance the county is constructive trustee of that property for the grantor during his lifetime and for his heirs after his death. In the case of a deceased recipient, the property should go into his estate and be subject to the claims of the state department under Section 71-412, supra, to the extent provided in that section.

Very truly yours,
ARNOLD H. OLSEN
Attorney General