

VOLUME NO. 43

OPINION NO. 10

COUNTIES - Lack of statutory authority to file lien against real property of general assistance recipient;

LIENS - County's lack of statutory authority to file lien against real property of general assistance recipient;

PROPERTY, REAL - County's lack of statutory authority to file lien against real property of general assistance recipient;

PUBLIC ASSISTANCE - County's lack of statutory authority to file lien against real property of general assistance recipient;

MONTANA CODE ANNOTATED - Sections 25-9-301, 25-13-305, 25-13-402, 45-6-301(4), 53-2-107, 53-2-108, 53-3-112(2);

REVISED CODES OF MONTANA, 1947 - Section 71-243.

HELD: A county welfare department has no statutory authority to file a lien against the real property of a general assistance recipient who received more general assistance funds than those to which the recipient was entitled.

April 20, 1989

Russell R. Andrews
Teton County Attorney
Teton County Courthouse
Choteau MT 59422

Dear Mr. Andrews:

You have requested my opinion concerning the following question:

May a county welfare department cause a lien to be filed against the real property of a county general assistance recipient who received more general assistance funds than those to which the recipient was entitled?

As a general rule, a lien can be created only by contract, or by statute or other fixed rule of law. 51 Am. Jur. 2d Liens § 6 (1970); 53 C.J.S. Liens § 4 (1987). I understand that there is no contract providing for the creation of a lien in the situation you have described. Thus, the focus of this opinion is whether there is a lien created by statute. There is no statute authorizing the assertion of such a lien in Title 53, MCA, pertaining to general assistance programs. To the contrary, the Legislature in 1973 repealed a statute creating a "lien against the real property of the recipient" of public assistance. § 71-243, R.C.M. 1947, repealed by 1973 Mont. Laws, ch. 299, § 3. By rescinding section 71-243, R.C.M. 1947, the Legislature clearly withdrew statutory authorization to assert a lien against the real property of a general assistance recipient.

I therefore conclude that a county welfare department has no statutory authority to assert a lien against the real property of a general assistance recipient who has received an excess of general assistance funds. However, you have indicated that the overpayment in question may be due to fraud or

mistake on the part of the recipient. As a result it is pertinent to discuss whether or not the Teton County Board of Public Welfare may proceed with a civil action pursuant to sections 53-2-108(2) and 53-3-112, MCA.

Overpayments are a debt due the county, regardless of whether the benefits were obtained by fraud or simply by department or recipient error. See §§ 53-2-108, 53-3-112(2), MCA. Thus, whether an overpayment is obtained by fraud or simply by error, the county may file a civil action for recovery of the overpayment. The county can obtain a judgment lien as of the time the judgment is docketed, see § 25-9-301, MCA, and then proceed to recover the overpayment according to the collection remedies generally available under Montana law to judgment creditors, including a writ of execution directing the sheriff to satisfy the judgment by selling real property of the recipient. See §§ 25-13-305, 25-13-402, MCA. Such execution would, of course, be subject to any prior encumbrances of record.

In the alternative, the county may, under section 53-3-112(2), MCA, offset the overpayment from future general relief payments to the recipient, if the recipient remains eligible for general relief assistance.

Finally, if it is determined that the surplus funds were obtained fraudulently, the recipient may also be subject to prosecution for theft pursuant to sections 45-6-301(4) and 53-2-107, MCA.

THEREFORE, IT IS MY OPINION:

A county welfare department has no statutory authority to file a lien against the real property of a general assistance recipient who received more general assistance funds than those to which the recipient was entitled.

Sincerely,

MARC RACICOT
Attorney General