

SENATE BILL 39

Introduced by Waterman, et al.

12/06	Introduced
12/06	Referred to Finance & Claims
12/06	First Reading
12/06	Fiscal Note Requested
12/08	Hearing
12/09	Committee Report-Bill Passed as Amended
12/10	Fiscal Note Received
12/10	Fiscal Note Printed
12/10	Referred to Judiciary
12/13	Committee Report-Bill Passed as Amended
12/13	2nd Reading Passed
12/13	3rd Reading Passed
	Transmitted to House
12/14	First Reading
12/14	Referred to Judiciary
12/15	Hearing
12/15	Tabled in Committee
12/16	Motion Failed to Take from Committee and Place on 2nd Reading

1 *Senate* BILL NO. *39*
2 INTRODUCED BY *Mignon Waterman* *(old)*
3 BY REQUEST OF THE DEPARTMENT OF SOCIAL AND
4 REHABILITATION SERVICES AND THE OFFICE OF BUDGET
5 AND PROGRAM PLANNING
6
7 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE
8 DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES TO ADOPT
9 RULES THAT PROVIDE FOR INELIGIBILITY FOR PUBLIC ASSISTANCE
10 WHEN ASSETS ARE DISPOSED OF FOR LESS THAN FAIR MARKET VALUE
11 AND THAT PROVIDE FOR AN UNDUE HARDSHIP EXCEPTION; REQUIRING
12 THE DEPARTMENT TO ADOPT RULES THAT PROVIDE FOR CERTAIN
13 TREATMENT OF TRUSTS ESTABLISHED WITH AN APPLICANT'S OR
14 RECIPIENT'S ASSETS AND THAT PROVIDE FOR AN UNDUE HARDSHIP
15 EXCEPTION; EXPANDING THE AUTHORITY AND RESPONSIBILITY OF THE
16 DEPARTMENT TO RECOVER MEDICAID EXPENDITURES FROM ESTATES OF
17 DECEASED MEDICAID RECIPIENTS; PROVIDING THAT AFTER THE DEATH
18 OF A SURVIVING SPOUSE THE DEPARTMENT MAY RECOVER MEDICAL
19 ASSISTANCE PAID; SPECIFYING THE TIME WITHIN WHICH CLAIMS
20 MUST BE PRESENTED; AUTHORIZING AND DIRECTING THE DEPARTMENT
21 TO CLAIM AND RECOVER MEDICAID EXPENDITURES FROM THE
22 RECIPIENTS OF PROPERTY OWNED BY DECEASED MEDICAID RECIPIENTS
23 IMMEDIATELY PRIOR TO DEATH AND RECEIVED BY DISTRIBUTION OR
24 SURVIVORSHIP; PROVIDING FOR INTEREST ON THE DEPARTMENT'S
25 CLAIMS; SPECIFYING CERTAIN LIMITATIONS UPON DEPARTMENT

1 RECOVERY AGAINST ESTATES, SUCCESSORS IN INTEREST, AND
2 PROPERTY SUBJECT TO LIEN; REQUIRING PARTIES HOLDING PERSONAL
3 FUNDS OF DECEASED NURSING FACILITY RESIDENTS TO PAY THOSE
4 FUNDS TO THE DEPARTMENT; REQUIRING PARTIES HOLDING EXCESS
5 BURIAL FUNDS OR ASSETS TO PAY THOSE FUNDS TO THE DEPARTMENT;
6 PROVIDING FOR DEPARTMENT IMPOSITION OF A LIEN FOR RECOVERY
7 OF MEDICAID EXPENDITURES AGAINST THE REAL PROPERTY OF
8 MEDICAID RECIPIENTS; SPECIFYING THE PERSONS WHO MAY BE
9 SUBJECT TO A LIEN AND CIRCUMSTANCES THAT PRECLUDE CREATION
10 OF THE LIEN; SPECIFYING THE PROCEDURES AND REQUIREMENTS FOR
11 CREATION OF THE LIEN; SPECIFYING THE EVENTS THAT TRIGGER
12 REPAYMENT UNDER THE LIEN; PROVIDING PROCEDURES FOR
13 COLLECTION AND FORECLOSURE OF THE LIEN; PROVIDING FOR
14 DISSOLUTION OF THE LIEN WHEN THE RECIPIENT IS DISCHARGED
15 FROM AN INSTITUTION AND RETURNS HOME; PROVIDING FOR THE
16 DISPOSITION OF THE PROCEEDS OF RECOVERIES; AMENDING SECTIONS
17 53-2-611 AND 53-6-143, MCA; REPEALING SECTIONS 53-2-601 AND
18 53-5-401, MCA; AND PROVIDING EFFECTIVE DATES AND A
19 RETROACTIVE APPLICABILITY DATE."

21 WHEREAS, the cost of funding the Montana Medicaid
22 program has escalated rapidly in recent years and threatens
23 to continue escalating beyond the capacity of Montanans to
24 fund the program;

25 WHEREAS, while the Medicaid program pays for the cost of

1 the individual's medical care, prior laws and regulations
2 have permitted individuals to retain or dispose of valuable
3 assets through the use of various transfers, trusts, and
4 other arrangements, and have precluded recovery of Medicaid
5 benefits even after the individual's death in certain cases;

6 WHEREAS, under prior laws and regulations, valuable
7 assets often have been transferred, disposed of or
8 dissipated prior to the individual's death, making the
9 assets unavailable for recovery by the Medicaid program even
10 when not needed by a surviving spouse, dependent children,
11 or other dependent family members;

12 WHEREAS, unused funds belonging to Medicaid-eligible
13 nursing facility residents set aside for burial often become
14 unavailable for recovery by the Medicaid program; and

15 WHEREAS, the United States Congress has recently enacted
16 amendments to the federal Social Security Act that require
17 the states to deny eligibility if assets have been disposed
18 of for less than fair market value; to treat trusts as
19 available resources, income, or transferred assets for
20 eligibility purposes; to pursue estate recoveries in a
21 broader range of cases; to expand the definition of estates
22 beyond the probate estate to allow the states to recover
23 more Medicaid benefits and to reflect a federal policy
24 intended to prevent uncompensated transfers of assets; to
25 prevent sheltering of income and assets through the use of

1 trusts and similar arrangements; and to prevent dissipation
2 of assets that could be used to repay Medicaid benefits and
3 to ensure that Medicaid benefits are available only to the
4 truly needy.

6 STATEMENT OF INTENT

7 A statement of intent is required for this bill because
8 [sections 1, 2, 4, and 9] grant the department of social and
9 rehabilitation services rulemaking authority to implement
10 the provisions of [this act].

11 (1) The legislature intends that in adopting rules
12 under [this act], the department of social and
13 rehabilitation services establish criteria for undue
14 hardship waivers and exception procedures that are narrowly
15 drawn so as to minimize eligibility for medical assistance
16 and maximize recovery of medicaid benefits to the greatest
17 extent allowed by federal requirements.

18 (2) The legislature intends that the department adopt
19 rules that specify the criteria and procedures for obtaining
20 a recovery exception under 53-6-143(5)(b)(ii) and an
21 exception from application of the transfer of assets rules
22 (with respect to a transfer to an applicant's or recipient's
23 child who provided care that permitted the applicant or
24 recipient to reside at home rather than in an institution)
25 so as to ensure that exceptions are drawn as narrowly as

1 permitted under federal requirements.

2 (3) The legislature intends that the department adopt
3 rules that, to the greatest extent allowed by federal
4 requirements, provide for ineligibility for medical
5 assistance as a result of transfers of assets without regard
6 to the purpose of the transfer, except as specifically
7 relevant under federal requirements.

8 (4) (a) The legislature intends that the department
9 adopt rules that, to the greatest extent possible under
10 federal requirements, provide for treatment of trusts and
11 similar devices as available income, available resources, or
12 transferred assets and prevent sheltering of assets through
13 those devices.

14 (b) The legislature intends that exceptions to
15 treatment of trusts and similar devices be limited to those
16 exceptions that are mandatory under federal requirements and
17 that any exceptions be limited, to the extent possible under
18 federal requirements, to cases in which the state of Montana
19 will receive the funds remaining in the trusts, to the
20 extent of medical assistance paid on behalf of the
21 individual upon the individual's death.

22 (c) The legislature intends that, if the department
23 establishes a maximum income limitation of 300% of the
24 federal supplemental security income (SSI) benefit for
25 persons who reside in institutions or who require an

1 institutional level of care, the department adopt rules
2 providing:

3 (i) that income trusts described in 42 U.S.C.A.
4 1396p(d)(4)(B) are exempt from treatment as available
5 resources or income for nursing facility residents only if
6 all of the individual's monthly income is paid to the trust
7 and the trust distributes monthly to the individual an
8 amount no less than the maximum income allowable for
9 purposes of medicaid eligibility;

10 (ii) that the income distributed to a nursing facility
11 resident as provided in subsection (4)(c)(i), less the
12 individual's monthly personal needs allowance, less any
13 amount that may be diverted to a community spouse under the
14 department's spousal impoverishment rules, and less any
15 other amount specified by department rule, must be applied
16 to the individual's cost of nursing facility care;

17 (iii) that the exemption of these trusts applies only to
18 the extent that the individual requires services to which
19 the income limit described in subsection (4)(c) applies;

20 (iv) that the exemption of these trusts must be limited
21 to individuals whose income, immediately prior to
22 establishment of the trust, is in excess of the income limit
23 described in subsection (4)(c) and below the private cost of
24 nursing facility care;

25 (v) that the exemption of these trusts applies only if

the trust is established and actually maintained for the sole benefit of the recipient; and

(vi) procedures and criteria under which a transfer to a trust described in subsection (4)(c)(i) is a disposal of assets for purposes of [section 1].

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Rules providing for period of ineligibility for medical assistance when assets disposed of for less than fair market value -- undue hardship exception.

(1) Subject to subsection (2) and to the extent allowed by federal law, the department shall adopt rules that provide for a period of ineligibility for medical assistance under this part when the applicant or recipient or the applicant's or recipient's spouse directly or indirectly disposes of any assets for less than fair market value.

(2) An applicant or recipient is not ineligible for medical assistance under this part by reason of a disposition of assets under subsection (1) to the extent that the department determines that the denial of eligibility would cause an undue hardship, as defined by department rule. The department shall adopt rules establishing procedures and criteria for determining whether a denial of eligibility would work an undue hardship.

(3) This section does not prohibit the department from

adopting rules that provide for a period of ineligibility for public assistance programs other than medical assistance when an applicant or recipient directly or indirectly disposes of assets for less than fair market value.

NEW SECTION. Section 2. Rules requiring certain treatment of trusts established with applicant's or recipients assets -- undue hardship exception. (1) Subject to subsection (2), and to the extent allowed by federal law, the department shall, for the purposes of eligibility for medical assistance under this part, adopt rules to require that the corpus, income, accumulated income, and distributions from or of a trust or similar legal instrument or device, established in whole or in part with the applicant's or recipient's assets or with assets to which the applicant or recipient is entitled, be considered as available income, available resources, or assets disposed of for less than fair market value.

(2) The rules must include a procedure and criteria for a waiver of application of the rules provided for in subsection (1) if the applicant or recipient demonstrates that application of the rules would cause an undue hardship on the applicant or recipient.

Section 3. Section 53-2-611, MCA, is amended to read:

"53-2-611. Recovery of medicaid benefits following from recipient's estate death. (1) Upon Following the death of

any recipient of medical assistance under Title 53, chapter 6, part 1, the department shall execute and present a claim:

(a) against the recipient's estate of--such-person, within the time specified in the published notice to creditors in the estate matter proceeding, for the total amount of recoverable medical assistance paid under this title, separately stating the amount of all assistance paid on or after July 17, 1993. The department's claim is subject to the limitations specified in 53-6-143(3). to or on behalf of the recipient; and

(b) against a person who has received property of the recipient by distribution or survival for an amount equal to the recoverable medical assistance paid on behalf of the recipient or the value of the property received by the person from the recipient by distribution or survival, whichever is less.

(2) Notwithstanding any statute of limitations or claim presentation deadline, a department claim against an estate may not be barred for lack of timely presentation if presented to creditors in the probate proceeding within the time specified in the published notice.

(3) A department claim under subsection (1) bears interest from the date of the recipient's death at the rate specified in 31-1-106.

(4) For purposes of this section, "recoverable medical

assistance" includes any payment under Title 53, chapter 6, part 1, including but not limited to payments made for items and services provided to and insurance premiums, deductibles, and coinsurance paid on behalf of a recipient who:

(a) during the recipient's lifetime, was an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease and, with respect to that institutionalization, the department determined under the provisions of [section 7(1)(c)] that the person was not reasonably expected to be discharged and return home; or

(b) was at least age 55 or a lesser age allowed by federal law when the item or service was provided or when the insurance premium, deductible, or coinsurance was paid.

(5) (a) For purposes of this section, property of a deceased recipient received by distribution or survival is any real or personal property or other assets in which the recipient had any right, title, or interest immediately prior to the time of death, including but not limited to assets passing to one or more survivors, heirs, assignees, or beneficiaries of the deceased recipient through joint tenancy, tenancy in common, right of survivorship, conveyance subject to life estate, living trust, or other arrangement.

(b) Property received by distribution includes but is not limited to:

(i) property distributed to a person through a probated estate or a small estate administration procedure; or

(ii) property otherwise distributed to or in the possession of a person through any other procedure or when a legal procedure for distribution has not been followed.

(6) (a) The department may seek recovery under both subsections (1)(a) and (1)(b) with respect to the estate of the same deceased recipient until its claim is satisfied in full. Upon full satisfaction of its claim, the department may not seek further recovery and shall provide appropriate releases to the deceased recipient's estate and other affected parties.

(b) An estate or other party is not entitled to a reduction or waiver of the department's claim on the grounds that there is or may be another party from whom recovery may be made under this section.

(7) The department's claim is subject to the limitations and requirements specified in 53-6-143.

(8) The department may waive recovery under this section if it determines that the cost of recovery equals or exceeds the amount likely to be recovered.

(9) All money recovered under this section from any source must be distributed to the county and to the state

general fund of the state of Montana according to the county's or state's interests if the federal law requires the federal government is entitled to a share of any amounts collected under this section in proportion to the amounts that it has contributed to the grants recovered. The amount due the United States must be promptly paid by the department and to the United States government as required by applicable state and federal laws and regulations."

Section 4. Section 53-6-143, MCA, is amended to read:

"53-6-143. Limitations on liens and recoveries. (1) Except as provided in this section, the department may not impose a lien upon the property of an applicant for or recipient of medical assistance may not be required to execute an agreement creating a lien on his real property.

(2) A lien for recovery of medical assistance paid or to be paid under this chapter may be imposed against the real or personal property of an individual a medicaid applicant or recipient prior to his the applicant's or recipient's death for recovery of medical assistance paid or to be paid on his behalf under this chapter only:

(a) pursuant to a judgment of a court for recovery of medical assistance incorrectly paid on behalf of the recipient; or

(b) on a third-party recovery as provided in 53-2-612; or

(c) as provided in [section 7].

(3) ~~{a}~~ The department may recover medical assistance correctly paid on behalf of a recipient only:

~~{i}~~ as provided in 53-2-611, ~~except--that--it--may--not recover for any assistance paid on behalf of a recipient for services provided before he reached age 65; or~~

~~{ii}~~ ~~as--provided in 53-2-612, [section 5], [section 6], or [section 7] or as provided in a written agreement between the department and the recipient or the recipient's representative.~~

~~{b}~~(4) (a) The department may not recover under 53-2-611 ~~only~~:

~~{i}~~ ~~--after the death of the recipient's or [section 7] while there is a surviving spouse; if any; and~~

~~{ii}~~ ~~if there is no~~ of the recipient or while there is a surviving child of the recipient who is under age 21, blind, or permanently and totally disabled. This subsection does not preclude the department from imposing a lien under [section 7].

(b) (i) Following the death of the recipient's surviving spouse, the department shall recover for the total amount of recoverable medical assistance, as defined in 53-2-611, under [section 7] or under 53-2-611. Recovery must be by claim against the recipient's estate prior to distribution or by claim against the estate of the

recipient's surviving spouse for the lesser of the total amount of recoverable medical assistance or the value of any of decedent's estate received by the surviving spouse by distribution.

(ii) Any statute of limitations or claim presentation deadline that purports to preclude recovery does not apply to a department claim under this subsection (b).

(c) (i) Following the recipient's death, the department shall impose a lien upon the real property of the surviving spouse to the extent of the interest received by the spouse from the recipient's estate or property. The lien:

(A) must be imposed according to the procedures specified in [section 7];

(B) is due and payable upon the death of the spouse or upon the sale, transfer, or exchange of the real property; and

(C) may be collected according to the provisions of [section 7].

(ii) The lien may be imposed under this subsection (c) without regard to the conditions specified in [section 7] but is subject to the limitations specified in subsections (4) and (5) of this section.

(d) The existence of any person described in subsection (4)(a) that prevents recovery by the department applies only to the share of the recipient's estate or property that

1 passes to the person or persons described in subsection
 2 (4)(a).

3 (5) The department may not recover under [section 7]
 4 upon a lien imposed on the deceased recipient's home while a
 5 person lawfully resides in the home and that person:

6 (a) has resided lawfully and continuously in the home
 7 since the time of the deceased recipient's
 8 institutionalization; and

9 (b) is either:

10 (i) a sibling of the deceased recipient who resided in
 11 the recipient's home for a period of at least 1 year
 12 immediately before the recipient's institutionalization; or

13 (ii) a child of the deceased recipient who resided in
 14 the recipient's home for a period of at least 2 years
 15 immediately before the recipient's institutionalization and
 16 who demonstrates to the satisfaction of the department,
 17 according to procedures and criteria established by
 18 department rule, that the child provided care to the
 19 recipient during the period that permitted the recipient to
 20 reside at home rather than in an institution.

21 (6) The department shall waive its recovery under
 22 53-2-611 or [section 7] in whole or in part if it determines
 23 that recovery would result in undue hardship as defined by
 24 department rule. The department shall adopt rules
 25 establishing procedures and criteria for obtaining undue

1 hardship waivers.

2 (4)--Recoveries---must---be---prorated---to---the---federal
 3 government-and-the-state-in-the--proportion--to--which--each
 4 contributed--to-the-medical-assistance;-Recovery-for-medical
 5 assistance-paid-prior-to-July-17-1974;-shall-be-prorated--to
 6 reimburse--the-county-share-of-participation;-The-provisions
 7 of-this-section-are--hereby--extended--to--provide--for--the
 8 recovery--of-all-medical-assistance-paid-under-this-part-and
 9 likewise-to-all-medical-aid-to-the-aged-assistance--paid--by
 10 the--department-of-social-and-rehabilitation-services-during
 11 the-period-of-time-July-17-1965;-through-June-30-1967;-"

12 NEW SECTION. Section 5. Payment of certain of deceased
 13 recipient's funds to department. (1) A nursing facility or a
 14 person, other than a financial institution, holding personal
 15 funds of a deceased nursing facility resident who received
 16 medicaid benefits at any time shall, within 30 days
 17 following the resident's death, pay those funds to the
 18 department unless within that time the nursing facility or
 19 person has actual notice that a probate proceeding has been
 20 commenced under Title 72, chapter 3, part 2 or 3, or a
 21 similar law in another state. If the nursing facility or
 22 person has actual notice that a proceeding has been
 23 commenced within that time, the funds are payable to the
 24 duly appointed personal representative of the deceased
 25 resident's estate. Commencement of a probate proceeding

after 30 days following the resident's death does not excuse a nursing facility or person from the requirement of delivering the funds to the department, and the department is not required to pay to the estate any funds received under this section. Funds paid to the department under this section are not considered to be property of the deceased resident's estate, and the limitations in 53-6-143 do not apply to recovery of the funds by the department.

(2) The department shall apply any funds received under this section proportionately to the federal and state shares of recoverable medical assistance, as defined in 53-2-611, and shall pay any remaining amount to any person entitled by law to the funds.

NEW SECTION. Section 6. Payment of excess burial funds or assets to department. (1) After the death of a person who at any time received medicaid benefits, a mortician, funeral director, or other person, including but not limited to the decedent's spouse, heirs, devisees, or personal representative, who holds unused funds or other property that had been specifically designated and set aside for paying for the disposition of the human remains and related expenses shall pay those funds to the department within 30 days following the burial, cremation, or other final disposition of the decedent's remains. The funds must be paid to the department regardless of any provision in a

written contract, trust, or other agreement entered into on or after January 1, 1994, directing a different disposition of the funds. Funds paid to the department under this section are not considered to be property of the deceased resident's estate, and the limitations in 53-6-143 do not apply to recovery of the funds by the department.

(2) The department shall apply any funds received under this section proportionately to the federal and state shares of recoverable medical assistance, as defined in 53-2-611, and shall pay any remaining amount to any person entitled by law to the funds.

NEW SECTION. Section 7. Department lien upon real property of certain medicaid recipients. (1) The department shall impose a lien upon the real property, including the home, of an institutionalized recipient of medical assistance under this part to secure the assets of the recipient for recovery of medical assistance benefits paid on behalf of the recipient prior to, on, and after the imposition of the lien if all of the following conditions are met:

(a) The recipient has been admitted to a nursing facility, intermediate care facility for the mentally retarded, or an institution for mental disease.

(b) A lien may not be imposed upon the recipient's home if any of the following individuals are lawfully residing in

1 the recipient's home:

2 (i) the recipient's spouse;

3 (ii) the recipient's child who is under 21 years of age,
4 blind, or permanently and totally disabled; or

5 (iii) the recipient's sibling who has an ownership
6 interest and equity in the recipient's home and who was
7 residing in the recipient's home for a period of at least 1
8 year immediately before the recipient's
9 institutionalization.

10 (c) The department has determined that the recipient
11 cannot reasonably be expected to be discharged from the
12 facility and to return home. There is a rebuttable
13 presumption that the recipient cannot reasonably be expected
14 to be discharged from the facility and return home if the
15 recipient or a representative of the recipient declares that
16 there is no intent to return home or if the recipient has
17 been institutionalized for 6 months or longer with no
18 discharge plan. A recipient or recipient's representative
19 who alleges that there is a reasonable expectation of
20 discharge from the facility and a return home has the burden
21 of demonstrating the reasonable expectation. The reasonable
22 expectation must be established based upon medical evidence
23 and medical opinion. A declaration by the recipient or a
24 recipient's representative that the recipient intends to be
25 discharged from the facility and to return home is not alone

1 sufficient to establish that there is a reasonable
2 expectation of discharge from the facility and a return
3 home.

4 (d) The department has provided the recipient 30 days'
5 written notice of its determination under subsection (1)(c)
6 and its intent to impose a lien, and the recipient has an
7 opportunity for a hearing pursuant to the department's
8 hearing procedures.

9 (2) For purposes of subsection (1), real property of a
10 recipient includes any interest in real property that may be
11 subject to a judgment lien.

12 (3) The lien must contain the name and address of the
13 recipient who owns an interest in the property, a legal
14 description of the property, and an address and telephone
15 number of the department, office, or representative who can
16 provide more information about the lien. The lien applies
17 only to the property described in the lien.

18 (a) The lien need not be executed by or on behalf of
19 the medicaid recipient, but it must be executed by a duly
20 authorized agent or employee of the department. The
21 execution must be acknowledged as provided in 70-21-203.

22 (b) The lien need not state the specific amount of
23 medical assistance repayment owed. The lien is sufficient to
24 secure repayment of past, current, and future recoverable
25 medical assistance, as defined in 53-2-611, if the lien

1 states that:

2 (i) the lien is imposed under 53-6-143 or this section
3 to secure the described property for recovery of medical
4 assistance benefits paid on behalf of the recipient prior
5 to, on, and after the date of the lien; and

6 (ii) the recoverable medical assistance paid, as defined
7 in 53-2-611, is due and payable upon sale, transfer, or
8 exchange of any right, title, or interest of the recipient
9 in the property or upon the recipient's death, with interest
10 at the rate specified in 31-1-106 accruing from the date of
11 the sale, transfer, or exchange or from the date of the
12 recipient's death.

13 (c) Technical errors in the recipient's name or in the
14 legal description of the property do not affect the validity
15 of the lien if the information provided is sufficient to
16 identify the person and property described. Regardless of
17 any defect in the form or recording of the lien, the lien is
18 valid as between the department and:

19 (i) the recipient and the recipient's estate; and

20 (ii) persons who have actual notice of the existence of
21 the lien, the recipient's identity, and the identity of the
22 property intended to be subject to the lien.

23 (4) The lien must be recorded in the office of the
24 clerk and recorder in the county in which the real property
25 is located. The department may not be required to pay any

1 fee for recording the lien, regardless of the provisions of
2 7-4-2631.

3 (a) Recording of the lien operates as due and legal
4 notice to all persons, including subsequent purchasers,
5 encumbrancers, mortgagees, or other lienholders. Upon
6 recording, the lien is prior to any earlier unrecorded
7 interest or claim, is prior to any subsequent interest or
8 claim, whether or not recorded, and is subject to any unpaid
9 property taxes. For purposes of execution under this
10 section, a sale, transfer, or exchange of the property by
11 the recipient is considered a waiver and relinquishment of
12 any homestead exemption of the recipient in the property
13 subject to the lien.

14 (b) When recorded, the lien has the force and effect of
15 a judgment lien, except as provided in this section. For
16 purposes of provisions of this chapter relating to judgment
17 liens, the department is considered the judgment creditor
18 and the recipient is considered the judgment debtor.

19 (c) After recording, the lien remains effective without
20 any further department action until satisfied, released, or
21 dissolved. If and when the recipient is discharged from the
22 facility and returns home, the lien dissolves.

23 (5) Upon the recipient's death or the sale, transfer,
24 or exchange of any right, title, or interest of the
25 recipient in the property, the department may file with the

1 clerk of the district court in the county in which the real
2 property is located an application for issuance of a writ of
3 execution for levy on the real property described in the
4 lien for the amount of recoverable medical assistance, as
5 defined in 53-2-611, paid on behalf of the recipient prior
6 to, on, and after the date of the lien, including amounts
7 paid up to the date of sale of the property, plus interest
8 and costs.

9 (a) The application must be sworn and must state the
10 following:

11 (i) the name of the recipient, a legal description of
12 the real property, and a description of the recipient's
13 interest in the property;

14 (ii) a statement that the department has imposed a lien
15 upon the property under this section;

16 (iii) a statement that the lien complies with the
17 requirements of this section;

18 (iv) the date upon which the lien was recorded and the
19 office in which it was recorded;

20 (v) a description of the sale, transfer, or exchange
21 that entitles the department to recover or a statement that
22 the recipient has died, with the date of the recipient's
23 death;

24 (vi) a statement that the lien has not dissolved under
25 the provisions of subsection (4)(c);

1 (vii) the amount of recoverable medical assistance, as
2 defined in 53-2-611, paid, the amount of interest on the
3 recoverable medical assistance as of the date of the
4 application, and, if applicable, a statement that additional
5 amounts may be paid and additional interest may accrue up to
6 the time that the property is sold in satisfaction of the
7 lien;

8 (viii) a statement that the total amount due has not
9 been paid as of the date of the application;

10 (ix) a statement that recovery is not prohibited by
11 53-6-143;

12 (x) the names and addresses of all persons who have a
13 recorded interest in the property, including a recipient or
14 recipient's estate, co-owner, purchaser, grantee,
15 encumbrancer, mortgagee, and lienholder, and a statement
16 that all of these persons have been notified as required by
17 subsection (5)(b); and

18 (xi) a request that a writ of execution be issued for
19 sale of the described property if an action is not filed as
20 provided in subsection (5)(d) within 60 days of filing of
21 the application.

22 (b) The department shall mail a notice to all persons
23 having a recorded interest in the property. The notice must
24 state that the department has a lien under this section upon
25 the described property, that the department has filed an

1 application for a writ of execution seeking sale of the
 2 property, and that a writ will be issued unless an action
 3 has been filed, in accordance with subsection (5)(d), within
 4 60 days of the date of filing the application challenging
 5 issuance of the writ. The department shall include with the
 6 notice a copy of the filed application. Mailing is
 7 considered sufficient if the notice is mailed, postage
 8 prepaid and return receipt requested, under the name and to
 9 the address stated in the recorded instrument creating each
 10 person's interest.

11 (c) The submission of an application under this
 12 subsection (5) is not the filing of a legal action, and the
 13 rules and requirements applicable to legal actions do not
 14 apply.

15 (d) A person with a recorded interest in the real
 16 property described in an application filed under this
 17 subsection (5), including the recipient or a co-owner,
 18 purchaser, grantee, encumbrancer, mortgagee, or lienholder,
 19 may, within 60 days of filing of the application under this
 20 subsection (5), file an action in the district court
 21 challenging the requested issuance of a writ of execution.
 22 The court shall determine the validity or invalidity of the
 23 department's lien and order appropriate relief, including
 24 issuance of the writ or denial of the application for
 25 issuance of the writ.

1 (e) If an action has not been filed under subsection
 2 (5)(d) within 60 days of filing of an application containing
 3 the statements required by subsection (5)(a), the clerk
 4 shall issue a writ of execution specifying the property to
 5 be levied upon, the amount due as of the date of filing of
 6 the application, and a statement that additional amounts may
 7 be due up to and through the date of sale.

8 (6) Upon sale of the property under a writ of execution
 9 issued under this section, the purchaser acquires the right,
 10 title, interest, and claim of the recipient, subject only to
 11 any right, title, interest, or claim arising from an
 12 instrument recorded prior to the department's lien under
 13 this section and to any unpaid property taxes. The sale is
 14 absolute and is not subject to any period of redemption
 15 under Title 25, chapter 13, part 8, or other related law.

16 (7) If a lien under this section is invalid for any
 17 reason, the invalidity does not preclude the department from
 18 recovering under 53-2-611.

19 (8) For purposes of 70-19-302, the state's right or
 20 title to property described in a lien created under this
 21 section is considered to accrue on the latest of:

- 22 (a) a sale, transfer, or exchange of any right, title,
 23 or interest of the recipient in the property;
- 24 (b) the death of the recipient; or
- 25 (c) the death of the recipient's spouse.

(9) (a) The department may waive recovery under this section if it determines that the cost of recovery equals or exceeds the amount likely to be recovered. If the total amount due the department under this section is paid, the department may not file an application under subsection (5), shall withdraw its application if the application has already been filed, or shall instruct the sheriff to cancel sale proceedings.

(b) In lieu of applying for a writ of execution, the department may agree with the heirs or devisees of the recipient to accept periodic payments toward repayment of recoverable medical assistance or may agree with the recipient's surviving spouse to accept substitute security and partial payment, when appropriate, if the terms of agreement, including security for repayment, are acceptable to the department and if the agreement does not reduce the amount due or the likelihood of recovering the amount due. The department may delay filing an application for issuance of a writ of execution for purposes of concluding negotiations toward an agreement in lieu of execution.

(10) The department shall apply any funds received under this section proportionately to the federal and state shares of the recipient's recoverable medical assistance, as defined in 53-2-611. Any excess funds after application of proceeds to recoverable medical assistance must be paid to

the recipient or to the recipient's representative or successor in interest.

NEW SECTION. Section 8. Repealer. Sections 53-2-601 and 53-5-401, MCA, are repealed.

NEW SECTION. Section 9. Rulemaking authority. The department may adopt rules to implement [this act].

NEW SECTION. Section 10. Codification instruction. [Sections 1, 2, 5 through 7, and 9] are intended to be codified as an integral part of Title 53, chapter 6, part 1, and the provisions of Title 53, chapter 6, part 1, apply to [sections 1, 2, 5 through 7, and 9].

NEW SECTION. Section 11. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 12. Applicability. (1) [Sections 3, 5, and 6] and those portions of [section 4] relating to recovery under 53-2-611 apply to medical assistance recipients who die on or after January 1, 1994.

(2) [Section 7] and those portions of [section 4] relating to recovery under [section 7] apply as a condition of medical assistance eligibility or continuation of medical assistance eligibility on or after January 1, 1994.

NEW SECTION. **Section 13.** Retroactive applicability.

[Sections 1 and 2] apply retroactively, within the meaning of 1-2-109, to assets disposed of or trusts established after August 10, 1993, for purposes of determining eligibility for medical assistance on or after January 1, 1994.

NEW SECTION. **Section 14.** Effective dates. (1)

[Sections 1, 2, 9 through 11, and 13 and this section] are effective on passage and approval.

(2) [Sections 3 through 8 and 12] are effective January 1, 1994.

-End-

STATE OF MONTANA - FISCAL NOTE

Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for SB0039, as introduced.DESCRIPTION OF PROPOSED LEGISLATION: Revises eligibility standards for assets of applicants for Medicaid benefits.ASSUMPTIONS:

1. Two FTE will be hired to implement the Medicaid lien law within the Department of Social and Rehabilitation Services (SRS). One FTE will be assigned to the estate recovery program and one FTE will work as an eligibility technician and do public outreach. Both FTE will start 1/1/94.
2. Operating expenses and equipment for these FTE include computers, desks, telephones, telephone line hookups, and computer network hookups.
3. A contractor will be hired to design, implement and operate a recipient asset management system, including public outreach at a cost of \$100,000 per year.
4. The contractor will receive a 15% contingency for collections, which will cost \$90,000 per year.
5. Gross collections of \$600,000/year are anticipated, made up of: \$100,000 from liens and \$500,000 from estates. Of these collections, 28.98% (FY94) and 29.13% (FY95) goes to general fund, with the remainder going to the federal government. The collections will not begin before 7/1/94, due to the time frame for selecting a contractor.
6. There will be two people denied eligibility per month based on the new eligibility requirements.

FISCAL IMPACT:

<u>Expenditures</u>	<u>FY '94</u>			<u>FY '95</u>		
	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
FTE	0.00	1.00	1.00	0.00	2.00	2.00
Personal Services	0	28,219	28,219	0	56,439	56,439
Operating Exp/Equip	0	8,200	8,200	0	4,400	4,400
Contingency Contract	0	0	0	0	190,000	190,000
Total Expenditures	0	36,419	36,419	0	250,839	250,839
<u>Funding:</u>						
General Fund	0	14,320	14,320	0	119,141	119,141
Federal Funds	0	22,099	22,099	0	131,698	131,698
Total Funding	0	36,419	36,419	0	250,839	250,839

(Continued on p. 2)

Dave Lewis 12-8
 DAVE LEWIS, BUDGET DIRECTOR DATE
 Office of Budget and Program Planning

Mignon Waterman 12/10/93
 MIGNON WATERMAN, PRIMARY SPONSOR DATE
 Fiscal Note for SB0039, as introduced

SB 39

Fiscal Note Request, SB0039 as introduced
Form BD-15 page 2
(continued)

	FY '94			FY '95		
	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>	<u>Current Law</u>	<u>Proposed Law</u>	<u>Difference</u>
<u>Revenues:</u>						
Gross Collections	0	0	0	0	600,000	600,000
Cost Avoidance	<u>0</u>	<u>78,930</u>	<u>78,930</u>	<u>0</u>	<u>315,720</u>	<u>315,720</u>
Total Revenues	0	78,930	78,930	0	915,720	915,720
<u>Revenue Distribution:</u>						
General Fund	0	22,874	22,874	0	266,749	266,749
Federal Funds	<u>0</u>	<u>56,056</u>	<u>56,056</u>	<u>0</u>	<u>648,971</u>	<u>648,971</u>
Total Distribution	0	78,930	78,930	0	915,720	915,720
<u>Net Impact:</u>						
General Fund Savings	0	(8,554)	(8,554)	0	(147,608)	(147,608)
Federal Revenue Savings	<u>0</u>	<u>(33,957)</u>	<u>(33,957)</u>	<u>0</u>	<u>(517,273)</u>	<u>(517,273)</u>
Total Reduction	0	(42,511)	(42,511)	0	(664,881)	(664,881)

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION: Significant savings are expected in the future as changes in this law become known and alternative funding methods for nursing home care become available and more widely utilized (i.e. long-term care insurance).

APPROVED BY COMM. ON
FINANCE AND CLAIMS

1 SENATE BILL NO. 39
2 INTRODUCED BY WATERMAN, COBB
3 BY REQUEST OF THE DEPARTMENT OF SOCIAL AND
4 REHABILITATION SERVICES AND THE OFFICE OF BUDGET
5 AND PROGRAM PLANNING
6
7 A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE
8 DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES TO ADOPT
9 RULES THAT PROVIDE FOR INELIGIBILITY FOR PUBLIC ASSISTANCE
10 WHEN ASSETS ARE DISPOSED OF FOR LESS THAN FAIR MARKET VALUE
11 AND THAT PROVIDE FOR AN UNDUE HARDSHIP EXCEPTION; REQUIRING
12 THE DEPARTMENT TO ADOPT RULES THAT PROVIDE FOR CERTAIN
13 TREATMENT OF TRUSTS ESTABLISHED WITH AN APPLICANT'S OR
14 RECIPIENT'S ASSETS AND THAT PROVIDE FOR AN UNDUE HARDSHIP
15 EXCEPTION; EXPANDING THE AUTHORITY AND RESPONSIBILITY OF THE
16 DEPARTMENT TO RECOVER MEDICAID EXPENDITURES FROM ESTATES OF
17 DECEASED MEDICAID RECIPIENTS; PROVIDING THAT AFTER THE DEATH
18 OF A SURVIVING SPOUSE THE DEPARTMENT MAY RECOVER MEDICAL
19 ASSISTANCE PAID; SPECIFYING THE TIME WITHIN WHICH CLAIMS
20 MUST BE PRESENTED; AUTHORIZING AND DIRECTING THE DEPARTMENT
21 TO CLAIM AND RECOVER MEDICAID EXPENDITURES FROM THE
22 RECIPIENTS OF PROPERTY OWNED BY DECEASED MEDICAID RECIPIENTS
23 IMMEDIATELY PRIOR TO DEATH AND RECEIVED BY DISTRIBUTION OR
24 SURVIVORSHIP; PROVIDING FOR INTEREST ON THE DEPARTMENT'S
25 CLAIMS; SPECIFYING CERTAIN LIMITATIONS UPON DEPARTMENT

1 RECOVERY AGAINST ESTATES, SUCCESSORS IN INTEREST, AND
2 PROPERTY SUBJECT TO LIEN; REQUIRING PARTIES HOLDING PERSONAL
3 FUNDS OF DECEASED NURSING FACILITY RESIDENTS TO PAY THOSE
4 FUNDS TO THE DEPARTMENT; REQUIRING PARTIES HOLDING EXCESS
5 BURIAL FUNDS OR ASSETS TO PAY THOSE FUNDS TO THE DEPARTMENT;
6 PROVIDING FOR DEPARTMENT IMPOSITION OF A LIEN FOR RECOVERY
7 OF MEDICAID EXPENDITURES AGAINST THE REAL PROPERTY OF
8 MEDICAID RECIPIENTS; SPECIFYING THE PERSONS WHO MAY BE
9 SUBJECT TO A LIEN AND CIRCUMSTANCES THAT PRECLUDE CREATION
10 OF THE LIEN; SPECIFYING THE PROCEDURES AND REQUIREMENTS FOR
11 CREATION OF THE LIEN; SPECIFYING THE EVENTS THAT TRIGGER
12 REPAYMENT UNDER THE LIEN; PROVIDING PROCEDURES FOR
13 COLLECTION AND FORECLOSURE OF THE LIEN; PROVIDING FOR
14 DISSOLUTION OF THE LIEN WHEN THE RECIPIENT IS DISCHARGED
15 FROM AN INSTITUTION AND RETURNS HOME; PROVIDING FOR THE
16 DISPOSITION OF THE PROCEEDS OF RECOVERIES; AMENDING SECTIONS
17 53-2-611 AND 53-6-143, MCA; REPEALING SECTIONS 53-2-601 AND
18 53-5-401, MCA; AND PROVIDING EFFECTIVE DATES AND A
19 RETROACTIVE APPLICABILITY DATE."

21 WHEREAS, the cost of funding the Montana Medicaid
22 program has escalated rapidly in recent years and threatens
23 to continue escalating beyond the capacity of Montanans to
24 fund the program;

25 WHEREAS, while the Medicaid program pays for the cost of

1 the individual's medical care, prior laws and regulations
2 have permitted individuals to retain or dispose of valuable
3 assets through the use of various transfers, trusts, and
4 other arrangements, and have precluded recovery of Medicaid
5 benefits even after the individual's death in certain cases;

6 WHEREAS, under prior laws and regulations, valuable
7 assets often have been transferred, disposed of or
8 dissipated prior to the individual's death, making the
9 assets unavailable for recovery by the Medicaid program even
10 when not needed by a surviving spouse, dependent children,
11 or other dependent family members;

12 WHEREAS, unused funds belonging to Medicaid-eligible
13 nursing facility residents set aside for burial often become
14 unavailable for recovery by the Medicaid program; and

15 WHEREAS, the United States Congress has recently enacted
16 amendments to the federal Social Security Act that require
17 the states to deny eligibility if assets have been disposed
18 of for less than fair market value; to treat trusts as
19 available resources, income, or transferred assets for
20 eligibility purposes; to pursue estate recoveries in a
21 broader range of cases; to expand the definition of estates
22 beyond the probate estate to allow the states to recover
23 more Medicaid benefits and to reflect a federal policy
24 intended to prevent uncompensated transfers of assets; to
25 prevent sheltering of income and assets through the use of

1 trusts and similar arrangements; and to prevent dissipation
2 of assets that could be used to repay Medicaid benefits and
3 to ensure that Medicaid benefits are available only to the
4 truly needy.

6 STATEMENT OF INTENT

7 A statement of intent is required for this bill because
8 [sections 1, 2, 4, and 9] grant the department of social and
9 rehabilitation services rulemaking authority to implement
10 the provisions of [this act].

11 (1) The legislature intends that in adopting rules
12 under [this act], the department of social and
13 rehabilitation services establish criteria for undue
14 hardship waivers and exception procedures that are narrowly
15 drawn so as to minimize eligibility for medical assistance
16 and maximize recovery of medicaid benefits to the greatest
17 extent allowed by federal requirements.

18 (2) The legislature intends that the department adopt
19 rules that specify the criteria and procedures for obtaining
20 a recovery exception under 53-6-143(5)(b)(ii) and an
21 exception from application of the transfer of assets rules
22 (with respect to a transfer to an applicant's or recipient's
23 child who provided care that permitted the applicant or
24 recipient to reside at home rather than in an institution)
25 so as to ensure that exceptions are drawn as narrowly as

1 permitted under federal requirements.

2 (3) The legislature intends that the department adopt
3 rules that, to the greatest extent allowed by federal
4 requirements, provide for ineligibility for medical
5 assistance as a result of transfers of assets without regard
6 to the purpose of the transfer, except as specifically
7 relevant under federal requirements.

8 (4) (a) The legislature intends that the department
9 adopt rules that, to the greatest extent possible under
10 federal requirements, provide for treatment of trusts and
11 similar devices as available income, available resources, or
12 transferred assets and prevent sheltering of assets through
13 those devices.

14 (b) The legislature intends that exceptions to
15 treatment of trusts and similar devices be limited to those
16 exceptions that are mandatory under federal requirements and
17 that any exceptions be limited, to the extent possible under
18 federal requirements, to cases in which the state of Montana
19 will receive the funds remaining in the trusts, to the
20 extent of medical assistance paid on behalf of the
21 individual upon the individual's death.

22 (c) The legislature intends that, if the department
23 establishes a maximum income limitation of 300% of the
24 federal supplemental security income (SSI) benefit for
25 persons who reside in institutions or who require an

1 institutional level of care, the department adopt rules
2 providing:

3 (i) that income trusts described in 42 U.S.C.A.
4 1396p(d)(4)(B) are exempt from treatment as available
5 resources or income for nursing facility residents only if
6 all of the individual's monthly income is paid to the trust
7 and the trust distributes monthly to the individual an
8 amount no less than the maximum income allowable for
9 purposes of medicaid eligibility;

10 (ii) that the income distributed to a nursing facility
11 resident as provided in subsection (4)(c)(i), less the
12 individual's monthly personal needs allowance, less any
13 amount that may be diverted to a community spouse under the
14 department's spousal impoverishment rules, and less any
15 other amount specified by department rule, must be applied
16 to the individual's cost of nursing facility care;

17 (iii) that the exemption of these trusts applies only to
18 the extent that the individual requires services to which
19 the income limit described in subsection (4)(c) applies;

20 (iv) that the exemption of these trusts must be limited
21 to individuals whose income, immediately prior to
22 establishment of the trust, is in excess of the income limit
23 described in subsection (4)(c) and below the private cost of
24 nursing facility care;

25 (v) that the exemption of these trusts applies only if

~~the--trust--is--established--and--actually--maintained--for--the
sole--benefit--of--the--recipient--and
(vi)--procedures--and--criteria--under--which--a--transfer--to--a
trust--described--in--subsection--(4)(c)(i)--is--a--disposal--of
assets--for--purposes--of--(section--i)--~~

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1.** Rules providing for period of
ineligibility for medical assistance when assets disposed of
for less than fair market value -- undue hardship exception.
(1) Subject to subsection (2) and to the extent allowed by
federal law, the department shall adopt rules that provide
for a period of ineligibility for medical assistance under
this part when the applicant or recipient or the applicant's
or recipient's spouse directly or indirectly disposes of any
assets for less than fair market value.

(2) An applicant or recipient is not ineligible for
medical assistance under this part by reason of a
disposition of assets under subsection (1) to the extent
that the department determines that the denial of
eligibility would cause an undue hardship, as defined by
department rule. The department shall adopt rules
establishing procedures and criteria for determining whether
a denial of eligibility would work an undue hardship.

(3) This section does not prohibit the department from

adopting rules that provide for a period of ineligibility
for public assistance programs other than medical assistance
when an applicant or recipient directly or indirectly
disposes of assets for less than fair market value.

NEW SECTION. **Section 2.** Rules requiring certain
treatment of trusts established with applicant's or
recipients assets -- undue hardship exception. (1) Subject
to subsection (2), and to the extent allowed by federal law,
the department shall, for the purposes of eligibility for
medical assistance under this part, adopt rules to require
that the corpus, income, accumulated income, and
distributions from or of a trust or similar legal instrument
or device, established in whole or in part with the
applicant's or recipient's assets or with assets to which
the applicant or recipient is entitled, be considered as
available income, available resources, or assets disposed of
for less than fair market value.

(2) The rules must include a procedure and criteria for
a waiver of application of the rules provided for in
subsection (1) if the applicant or recipient demonstrates
that application of the rules would cause an undue hardship
on the applicant or recipient.

Section 3. Section 53-2-611, MCA, is amended to read:

***53-2-611. Recovery of medicaid benefits following from
recipient's estate death.** (1) Upon Following the death of

1 any recipient of medical assistance under Title 53, chapter
2 6, part 1, the department shall execute and present a claim:

3 (a) against the recipient's estate of--such-person,
4 within the time specified in the published notice to
5 creditors in the estate matter proceeding, for the total
6 amount of recoverable medical assistance paid under this
7 title, separately stating the amount of all assistance paid
8 on--or-after-July-17-1953--The department's claim is subject
9 to the limitations specified in 53-6-143(3): to or on behalf
10 of the recipient; and

11 (b) against a person who has received property of the
12 recipient by distribution or survival for an amount equal to
13 the recoverable medical assistance paid on behalf of the
14 recipient or the value of the property received by the
15 person from the recipient by distribution or survival,
16 whichever is less.

17 (2) Notwithstanding any statute of limitations or claim
18 presentation deadline, a department claim against an estate
19 may not be barred for lack of timely presentation if
20 presented to creditors in the probate proceeding within the
21 time specified in the published notice.

22 (3) A department claim under subsection (1) bears
23 interest from the date of the recipient's death at the rate
24 specified in 31-1-106.

25 (4) For purposes of this section, "recoverable medical

1 assistance" includes any payment under Title 53, chapter 6,
2 part 1, including but not limited to payments made for items
3 and services provided to and insurance premiums,
4 deductibles, and coinsurance paid on behalf of a recipient
5 who:

6 (a) during the recipient's lifetime, was an inpatient
7 in a nursing facility, intermediate care facility for the
8 mentally retarded, or institution for mental disease and,
9 with respect to that institutionalization, the department
10 determined under the provisions of [section 7(1)(c)] that
11 the person was not reasonably expected to be discharged and
12 return home; or

13 (b) was at least age 55 or a lesser age allowed by
14 federal law when the item or service was provided or when
15 the insurance premium, deductible, or coinsurance was paid.

16 (5) (a) For purposes of this section, property of a
17 deceased recipient received by distribution or survival is
18 any real or personal property or other assets in which the
19 recipient had any right, title, or interest immediately
20 prior to the time of death, including but not limited to
21 assets passing to one or more survivors, heirs, assignees,
22 or beneficiaries of the deceased recipient through joint
23 tenancy, tenancy in common, right of survivorship,
24 conveyance subject to life estate, living trust, or other
25 arrangement.

(b) Property received by distribution includes but is not limited to:

(i) property distributed to a person through a probated estate or a small estate administration procedure; or

(ii) property otherwise distributed to or in the possession of a person through any other procedure or when a legal procedure for distribution has not been followed.

(6) (a) The department may seek recovery under both subsections (1)(a) and (1)(b) with respect to the estate of the same deceased recipient until its claim is satisfied in full. Upon full satisfaction of its claim, the department may not seek further recovery and shall provide appropriate releases to the deceased recipient's estate and other affected parties.

(b) An estate or other party is not entitled to a reduction or waiver of the department's claim on the grounds that there is or may be another party from whom recovery may be made under this section.

(7) The department's claim is subject to the limitations and requirements specified in 53-6-143.

(8) The department may waive recovery under this section if it determines that the cost of recovery equals or exceeds the amount likely to be recovered.

(9) All money recovered under this section from any source must be distributed to the county and to the state

general fund of the state of Montana according to the county's or state's interests. If the federal law requires, the federal government is entitled to a share of any amounts collected under this section in proportion to the amounts that it has contributed to the grants recovered. The amount due the United States must be promptly paid by the department and to the United States government as required by applicable state and federal laws and regulations."

Section 4. Section 53-6-143, MCA, is amended to read:

"53-6-143. Limitations on liens and recoveries. (1) Except as provided in this section, the department may not impose a lien upon the property of an applicant for or recipient of medical assistance may not be required to execute an agreement creating a lien on his real property.

(2) A lien for recovery of medical assistance paid or to be paid under this chapter may be imposed against the real or personal property of an individual a medicaid applicant or recipient prior to his the applicant's or recipient's death for recovery of medical assistance paid or to be paid on his behalf under this chapter only:

(a) pursuant to a judgment of a court for recovery of medical assistance incorrectly paid on behalf of the recipient; or

(b) on a third-party recovery as provided in 53-2-612; or

(c) as provided in [section 7].

(3) ~~(a)~~ The department may recover medical assistance correctly paid on behalf of a recipient only:

~~(i)~~ as provided in 53-2-611, ~~except--that--it--may--not recover-for-any-assistance-paid-on-behalf-of-a-recipient-for services-provided-before-he-reached-age-65;-or~~

~~(ii)~~ ~~as--provided-in~~ 53-2-612, [section 5], [section 6], or [section 7] or as provided in a written agreement between the department and the recipient or the recipient's representative.

~~(b)~~(4) (a) The department may not recover under 53-2-611 only:

~~(i)~~ ~~--after-the-death-of-the-recipient's~~ or [section 7] while there is a surviving spouse; ~~if-any;-and~~

~~(ii)~~ ~~if-there-is-no~~ of the recipient or while there is a surviving child of the recipient who is under age 21, blind, or permanently and totally disabled. This subsection does not preclude the department from imposing a lien under [section 7].

(b) (i) Following the death of the recipient's surviving spouse, the department shall recover for the total amount of recoverable medical assistance, as defined in 53-2-611, under [section 7] or under 53-2-611. Recovery must be by claim against the recipient's estate prior to distribution or by claim against the estate of the

recipient's surviving spouse for the lesser of the total amount of recoverable medical assistance or the value of any of decedent's estate received by the surviving spouse by distribution.

(ii) Any statute of limitations or claim presentation deadline that purports to preclude recovery does not apply to a department claim under this subsection (b).

(c) (i) Following the recipient's death, the department shall impose a lien upon the real property of the surviving spouse to the extent of the interest received by the spouse from the recipient's estate or property. The lien:

(A) must be imposed according to the procedures specified in [section 7];

(B) is due and payable upon the death of the spouse or upon the sale, transfer, or exchange of the real property; and

(C) may be collected according to the provisions of [section 7].

(ii) The lien may be imposed under this subsection (c) without regard to the conditions specified in [section 7] but is subject to the limitations specified in subsections (4) and (5) of this section.

(d) The existence of any person described in subsection (4)(a) that prevents recovery by the department applies only to the share of the recipient's estate or property that

1 passes to the person or persons described in subsection
 2 (4)(a).

3 (5) The department may not recover under [section 7]
 4 upon a lien imposed on the deceased recipient's home while a
 5 person lawfully resides in the home and that person:

6 (a) has resided lawfully and continuously in the home
 7 since the time of the deceased recipient's
 8 institutionalization; and

9 (b) is either:

10 (i) a sibling of the deceased recipient who resided in
 11 the recipient's home for a period of at least 1 year
 12 immediately before the recipient's institutionalization; or

13 (ii) a child of the deceased recipient who resided in
 14 the recipient's home for a period of at least 2 years
 15 immediately before the recipient's institutionalization and
 16 who demonstrates to the satisfaction of the department,
 17 according to procedures and criteria established by
 18 department rule, that the child provided care to the
 19 recipient during the period that permitted the recipient to
 20 reside at home rather than in an institution.

21 (6) The department shall waive its recovery under
 22 53-2-611 or [section 7] in whole or in part if it determines
 23 that recovery would result in undue hardship as defined by
 24 department rule. The department shall adopt rules
 25 establishing procedures and criteria for obtaining undue

1 hardship waivers.

2 ~~(4) Recoveries must be prorated to the federal~~
 3 ~~government and the state in the proportion to which each~~
 4 ~~contributed to the medical assistance. Recovery for medical~~
 5 ~~assistance paid prior to July 17, 1974, shall be prorated to~~
 6 ~~reimburse the county share of participation. The provisions~~
 7 ~~of this section are hereby extended to provide for the~~
 8 ~~recovery of all medical assistance paid under this part and~~
 9 ~~likewise to all medical aid to the aged assistance paid by~~
 10 ~~the department of social and rehabilitation services during~~
 11 ~~the period of time July 17, 1965, through June 30, 1967."~~

12 NEW SECTION. Section 5. Payment of certain of deceased
 13 recipient's funds to department. (1) A nursing facility or a
 14 person, other than a financial institution, holding personal
 15 funds of a deceased nursing facility resident who received
 16 medicaid benefits at any time shall, within 30 days
 17 following the resident's death, pay those funds to the
 18 department unless within that time the nursing facility or
 19 person has actual notice that a probate proceeding has been
 20 commenced under Title 72, chapter 3, part 2 or 3, or a
 21 similar law in another state. If the nursing facility or
 22 person has actual notice that a proceeding has been
 23 commenced within that time, the funds are payable to the
 24 duly appointed personal representative of the deceased
 25 resident's estate. Commencement of a probate proceeding

1 after 30 days following the resident's death does not excuse
 2 a nursing facility or person from the requirement of
 3 delivering the funds to the department, and the department
 4 is not required to pay to the estate any funds received
 5 under this section. Funds paid to the department under this
 6 section are not considered to be property of the deceased
 7 resident's estate, and the limitations in 53-6-143 do not
 8 apply to recovery of the funds by the department.

9 (2) The department shall apply any funds received under
 10 this section proportionately to the federal and state shares
 11 of recoverable medical assistance, as defined in 53-2-611,
 12 and shall pay any remaining amount to any person entitled by
 13 law to the funds.

14 NEW SECTION. Section 6. Payment of excess burial funds
 15 or assets to department. (1) After the death of a person who
 16 at any time received medicaid benefits, a mortician, funeral
 17 director, or other person, including but not limited to the
 18 decedent's spouse, heirs, devisees, or personal
 19 representative, who holds unused funds or other property
 20 that had been specifically designated and set aside for
 21 paying for the disposition of the human remains and related
 22 expenses shall, AFTER PAYING FOR THE DISPOSITION AND RELATED
 23 EXPENSES, pay those ALL REMAINING funds to the department
 24 within 30 days following the burial, cremation, or other
 25 final disposition of the decedent's remains. The funds must

1 be paid to the department regardless of any provision in a
 2 written contract, trust, or other agreement entered into on
 3 or after January 1, 1994, directing a different disposition
 4 of the funds. Funds paid to the department under this
 5 section are not considered to be property of the deceased
 6 resident's estate, and the limitations in 53-6-143 do not
 7 apply to recovery of the funds by the department.

8 (2) The department shall apply any funds received under
 9 this section proportionately to the federal and state shares
 10 of recoverable medical assistance, as defined in 53-2-611,
 11 and shall pay any remaining amount to any person entitled by
 12 law to the funds.

13 NEW SECTION. Section 7. Department lien upon real
 14 property of certain medicaid recipients. (1) The department
 15 shall impose a lien upon the real property, including the
 16 home, of an institutionalized recipient of medical
 17 assistance under this part to secure the assets of the
 18 recipient for recovery of medical assistance benefits paid
 19 on behalf of the recipient prior to, on, and after the
 20 imposition of the lien if all of the following conditions
 21 are met:

22 (a) The recipient has been admitted to a nursing
 23 facility, intermediate care facility for the mentally
 24 retarded, or an institution for mental disease.

25 (b) A lien may not be imposed upon the recipient's home

1 if any of the following individuals are lawfully residing in
2 the recipient's home:

3 (i) the recipient's spouse;

4 (ii) the recipient's child who is under 21 years of age,
5 blind, or permanently and totally disabled; or

6 (iii) the recipient's sibling who has an ownership
7 interest and equity in the recipient's home and who was
8 residing in the recipient's home for a period of at least 1
9 year immediately before the recipient's
10 institutionalization.

11 (c) The department has determined that the recipient
12 cannot reasonably be expected to be discharged from the
13 facility and to return home. There is a rebuttable
14 presumption that the recipient cannot reasonably be expected
15 to be discharged from the facility and return home if the
16 recipient or a representative of the recipient declares that
17 there is no intent to return home or if the recipient has
18 been institutionalized for 6 months or longer with no
19 discharge plan. A recipient or recipient's representative
20 who alleges that there is a reasonable expectation of
21 discharge from the facility and a return home has the burden
22 of demonstrating the reasonable expectation. The reasonable
23 expectation must be established based upon medical evidence
24 and medical opinion. A declaration by the recipient or a
25 recipient's representative that the recipient intends to be

1 discharged from the facility and to return home is not alone
2 sufficient to establish that there is a reasonable
3 expectation of discharge from the facility and a return
4 home.

5 (d) The department has provided the recipient 30 days'
6 written notice of its determination under subsection (1)(c)
7 and its intent to impose a lien, and the recipient has an
8 opportunity for a hearing pursuant to the department's
9 hearing procedures.

10 (2) For purposes of subsection (1), real property of a
11 recipient includes any interest in real property that may be
12 subject to a judgment lien.

13 (3) The lien must contain the name and address of the
14 recipient who owns an interest in the property, a legal
15 description of the property, and an address and telephone
16 number of the department, office, or representative who can
17 provide more information about the lien. The lien applies
18 only to the property described in the lien.

19 (a) The lien need not be executed by or on behalf of
20 the medicaid recipient, but it must be executed by a duly
21 authorized agent or employee of the department. The
22 execution must be acknowledged as provided in 70-21-203.

23 (b) The lien need not state the specific amount of
24 medical assistance repayment owed. The lien is sufficient to
25 secure repayment of past, current, and future recoverable

1 medical assistance, as defined in 53-2-611, if the lien
2 states that:

3 (i) the lien is imposed under 53-6-143 or this section
4 to secure the described property for recovery of medical
5 assistance benefits paid on behalf of the recipient prior
6 to, on, and after the date of the lien; and

7 (ii) the recoverable medical assistance paid, as defined
8 in 53-2-611, is due and payable upon sale, transfer, or
9 exchange of any right, title, or interest of the recipient
10 in the property or upon the recipient's death, with interest
11 at the rate specified in 31-1-106 accruing from the date of
12 the sale, transfer, or exchange or from the date of the
13 recipient's death.

14 (c) Technical errors in the recipient's name or in the
15 legal description of the property do not affect the validity
16 of the lien if the information provided is sufficient to
17 identify the person and property described. Regardless of
18 any defect in the form or recording of the lien, the lien is
19 valid as between the department and:

20 (i) the recipient and the recipient's estate; and

21 (ii) persons who have actual notice of the existence of
22 the lien, the recipient's identity, and the identity of the
23 property intended to be subject to the lien.

24 (4) The lien must be recorded in the office of the
25 clerk and recorder in the county in which the real property

1 is located. The department may not be required to pay any
2 fee for recording the lien, regardless of the provisions of
3 7-4-2631.

4 (a) Recording of the lien operates as due and legal
5 notice to all persons, including subsequent purchasers,
6 encumbrancers, mortgagees, or other lienholders. Upon
7 recording, the lien is prior to any earlier unrecorded
8 interest or claim, is prior to any subsequent interest or
9 claim, whether or not recorded, and is subject to any unpaid
10 property taxes. For purposes of execution under this
11 section, a sale, transfer, or exchange of the property by
12 the recipient is considered a waiver and relinquishment of
13 any homestead exemption of the recipient in the property
14 subject to the lien.

15 (b) When recorded, the lien has the force and effect of
16 a judgment lien, except as provided in this section. For
17 purposes of provisions of this chapter relating to judgment
18 liens, the department is considered the judgment creditor
19 and the recipient is considered the judgment debtor.

20 (c) After recording, the lien remains effective without
21 any further department action until satisfied, released, or
22 dissolved. If and when the recipient is discharged from the
23 facility and returns home, the lien dissolves.

24 (5) Upon the recipient's death or the sale, transfer,
25 or exchange of any right, title, or interest of the

1 recipient in the property, the department may file with the
 2 clerk of the district court in the county in which the real
 3 property is located an application for issuance of a writ of
 4 execution for levy on the real property described in the
 5 lien for the amount of recoverable medical assistance, as
 6 defined in 53-2-611, paid on behalf of the recipient prior
 7 to, on, and after the date of the lien, including amounts
 8 paid up to the date of sale of the property, plus interest
 9 and costs.

10 (a) The application must be sworn and must state the
 11 following:

12 (i) the name of the recipient, a legal description of
 13 the real property, and a description of the recipient's
 14 interest in the property;

15 (ii) a statement that the department has imposed a lien
 16 upon the property under this section;

17 (iii) a statement that the lien complies with the
 18 requirements of this section;

19 (iv) the date upon which the lien was recorded and the
 20 office in which it was recorded;

21 (v) a description of the sale, transfer, or exchange
 22 that entitles the department to recover or a statement that
 23 the recipient has died, with the date of the recipient's
 24 death;

25 (vi) a statement that the lien has not dissolved under

1 the provisions of subsection (4)(c);

2 (vii) the amount of recoverable medical assistance, as
 3 defined in 53-2-611, paid, the amount of interest on the
 4 recoverable medical assistance as of the date of the
 5 application, and, if applicable, a statement that additional
 6 amounts may be paid and additional interest may accrue up to
 7 the time that the property is sold in satisfaction of the
 8 lien;

9 (viii) a statement that the total amount due has not
 10 been paid as of the date of the application;

11 (ix) a statement that recovery is not prohibited by
 12 53-6-143;

13 (x) the names and addresses of all persons who have a
 14 recorded interest in the property, including a recipient or
 15 recipient's estate, co-owner, purchaser, grantee,
 16 encumbrancer, mortgagee, and lienholder, and a statement
 17 that all of these persons have been notified as required by
 18 subsection (5)(b); and

19 (xi) a request that a writ of execution be issued for
 20 sale of the described property if an action is not filed as
 21 provided in subsection (5)(d) within 60 days of filing of
 22 the application.

23 (b) The department shall mail a notice to all persons
 24 having a recorded interest in the property. The notice must
 25 state that the department has a lien under this section upon

1 the described property, that the department has filed an
 2 application for a writ of execution seeking sale of the
 3 property, and that a writ will be issued unless an action
 4 has been filed, in accordance with subsection (5)(d), within
 5 60 days of the date of filing the application challenging
 6 issuance of the writ. The department shall include with the
 7 notice a copy of the filed application. Mailing is
 8 considered sufficient if the notice is mailed, postage
 9 prepaid and return receipt requested, under the name and to
 10 the address stated in the recorded instrument creating each
 11 person's interest.

12 (c) The submission of an application under this
 13 subsection (5) is not the filing of a legal action, and the
 14 rules and requirements applicable to legal actions do not
 15 apply.

16 (d) A person with a recorded interest in the real
 17 property described in an application filed under this
 18 subsection (5), including the recipient or a co-owner,
 19 purchaser, grantee, encumbrancer, mortgagee, or lienholder,
 20 may, within 60 days of filing of the application under this
 21 subsection (5), file an action in the district court
 22 challenging the requested issuance of a writ of execution.
 23 The court shall determine the validity or invalidity of the
 24 department's lien and order appropriate relief, including
 25 issuance of the writ or denial of the application for

1 issuance of the writ.

2 (e) If an action has not been filed under subsection
 3 (5)(d) within 60 days of filing of an application containing
 4 the statements required by subsection (5)(a), the clerk
 5 shall issue a writ of execution specifying the property to
 6 be levied upon, the amount due as of the date of filing of
 7 the application, and a statement that additional amounts may
 8 be due up to and through the date of sale.

9 (6) Upon sale of the property under a writ of execution
 10 issued under this section, the purchaser acquires the right,
 11 title, interest, and claim of the recipient, subject only to
 12 any right, title, interest, or claim arising from an
 13 instrument recorded prior to the department's lien under
 14 this section and to any unpaid property taxes. The sale is
 15 absolute and is not subject to any period of redemption
 16 under Title 25, chapter 13, part 8, or other related law.

17 (7) If a lien under this section is invalid for any
 18 reason, the invalidity does not preclude the department from
 19 recovering under 53-2-611.

20 (8) For purposes of 70-19-302, the state's right or
 21 title to property described in a lien created under this
 22 section is considered to accrue on the latest of:

23 (a) a sale, transfer, or exchange of any right, title,
 24 or interest of the recipient in the property;

25 (b) the death of the recipient; or

(c) the death of the recipient's spouse.

(9) (a) The department may waive recovery under this section if it determines that the cost of recovery equals or exceeds the amount likely to be recovered. If the total amount due the department under this section is paid, the department may not file an application under subsection (5), shall withdraw its application if the application has already been filed, or shall instruct the sheriff to cancel sale proceedings.

(b) In lieu of applying for a writ of execution, the department may agree with the heirs or devisees of the recipient to accept periodic payments toward repayment of recoverable medical assistance or may agree with the recipient's surviving spouse to accept substitute security and partial payment, when appropriate, if the terms of agreement, including security for repayment, are acceptable to the department and if the agreement does not reduce the amount due or the likelihood of recovering the amount due. The department may delay filing an application for issuance of a writ of execution for purposes of concluding negotiations toward an agreement in lieu of execution.

(10) The department shall apply any funds received under this section proportionately to the federal and state shares of the recipient's recoverable medical assistance, as defined in 53-2-611. Any excess funds after application of

proceeds to recoverable medical assistance must be paid to the recipient or to the recipient's representative or successor in interest.

NEW SECTION. Section 8. Repealer. Sections 53-2-601 and 53-5-401, MCA, are repealed.

NEW SECTION. Section 9. Rulemaking authority. The department may adopt rules to implement [this act].

NEW SECTION. Section 10. Codification instruction. [Sections 1, 2, 5 through 7, and 9] are intended to be codified as an integral part of Title 53, chapter 6, part 1, and the provisions of Title 53, chapter 6, part 1, apply to [sections 1, 2, 5 through 7, and 9].

NEW SECTION. Section 11. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 12. Applicability. (1) [Sections 3, 5, and 6] and those portions of [section 4] relating to recovery under 53-2-611 apply to medical assistance recipients who die on or after January 1, 1994.

(2) [Section 7] and those portions of [section 4] relating to recovery under [section 7] apply as a condition of medical assistance eligibility or continuation of medical

1 assistance eligibility on or after January 1, 1994.

2 NEW SECTION. **Section 13.** Retroactive applicability.

3 [Sections 1 and 2] apply retroactively, within the meaning
4 of 1-2-109, to assets disposed of or trusts established
5 after August 10, 1993, for purposes of determining
6 eligibility for medical assistance on or after January 1,
7 1994.

8 NEW SECTION. **Section 14.** Effective dates. (1)

9 [Sections 1, 2, 9 through 11, and 13 and this section] are
10 effective on passage and approval.

11 (2) [Sections 3 through 8 and 12] are effective January
12 1, 1994.

-End-

RE-REFERRED AND
APPROVED BY COMMITTEE
ON JUDICIARY

SENATE BILL NO. 39

INTRODUCED BY WATERMAN, COBB

BY REQUEST OF THE DEPARTMENT OF SOCIAL AND
REHABILITATION SERVICES AND THE OFFICE OF BUDGET
AND PROGRAM PLANNING

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE
DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES TO ADOPT
RULES THAT PROVIDE FOR INELIGIBILITY FOR PUBLIC ASSISTANCE
WHEN ASSETS ARE DISPOSED OF FOR LESS THAN FAIR MARKET VALUE
AND THAT PROVIDE FOR AN UNDUE HARDSHIP EXCEPTION; REQUIRING
THE DEPARTMENT TO ADOPT RULES THAT PROVIDE FOR CERTAIN
TREATMENT OF TRUSTS ESTABLISHED WITH AN APPLICANT'S OR
RECIPIENT'S ASSETS AND THAT PROVIDE FOR AN UNDUE HARDSHIP
EXCEPTION; EXPANDING THE AUTHORITY AND RESPONSIBILITY OF THE
DEPARTMENT TO RECOVER MEDICAID EXPENDITURES FROM ESTATES OF
DECEASED MEDICAID RECIPIENTS; PROVIDING THAT AFTER THE DEATH
OF A SURVIVING SPOUSE THE DEPARTMENT MAY RECOVER MEDICAL
ASSISTANCE PAID; SPECIFYING THE TIME WITHIN WHICH CLAIMS
MUST BE PRESENTED; AUTHORIZING AND DIRECTING THE DEPARTMENT
TO CLAIM AND RECOVER MEDICAID EXPENDITURES FROM THE
RECIPIENTS OF PROPERTY OWNED BY DECEASED MEDICAID RECIPIENTS
IMMEDIATELY PRIOR TO DEATH AND RECEIVED BY DISTRIBUTION OR
SURVIVORSHIP; PROVIDING FOR INTEREST ON THE DEPARTMENT'S
CLAIMS; SPECIFYING CERTAIN LIMITATIONS UPON DEPARTMENT

RECOVERY AGAINST ESTATES, SUCCESSORS IN INTEREST, AND
PROPERTY SUBJECT TO LIEN; REQUIRING PARTIES HOLDING PERSONAL
FUNDS OF DECEASED NURSING FACILITY RESIDENTS TO PAY THOSE
FUNDS TO THE DEPARTMENT; REQUIRING PARTIES HOLDING EXCESS
BURIAL FUNDS OR ASSETS TO PAY THOSE FUNDS TO THE DEPARTMENT;
PROVIDING FOR DEPARTMENT IMPOSITION OF A LIEN FOR RECOVERY
OF MEDICAID EXPENDITURES AGAINST THE REAL PROPERTY OF
MEDICAID RECIPIENTS; SPECIFYING THE PERSONS WHO MAY BE
SUBJECT TO A LIEN AND CIRCUMSTANCES THAT PRECLUDE CREATION
OF THE LIEN; SPECIFYING THE PROCEDURES AND REQUIREMENTS FOR
CREATION OF THE LIEN; SPECIFYING THE EVENTS THAT TRIGGER
REPAYMENT UNDER THE LIEN; PROVIDING PROCEDURES FOR
COLLECTION AND FORECLOSURE OF THE LIEN; SPECIFYING PRIORITY
OF CLAIMS; PROVIDING FOR DISSOLUTION OF THE LIEN WHEN THE
RECIPIENT IS DISCHARGED FROM AN INSTITUTION AND RETURNS
HOME; PROVIDING FOR THE DISPOSITION OF THE PROCEEDS OF
RECOVERIES; AMENDING SECTIONS 53-2-611 AND 53-6-143, MCA;
REPEALING SECTIONS 53-2-601 AND 53-5-401, MCA; AND PROVIDING
EFFECTIVE DATES AND A RETROACTIVE APPLICABILITY DATE."

WHEREAS, the cost of funding the Montana Medicaid
program has escalated rapidly in recent years and threatens
to continue escalating beyond the capacity of Montanans to
fund the program;

WHEREAS, while the Medicaid program pays for the cost of

1 the individual's medical care, prior laws and regulations
 2 have permitted individuals to retain or dispose of valuable
 3 assets through the use of various transfers, trusts, and
 4 other arrangements, and have precluded recovery of Medicaid
 5 benefits even after the individual's death in certain cases;

6 WHEREAS, under prior laws and regulations, valuable
 7 assets often have been transferred, disposed of or
 8 dissipated prior to the individual's death, making the
 9 assets unavailable for recovery by the Medicaid program even
 10 when not needed by a surviving spouse, dependent children,
 11 or other dependent family members;

12 WHEREAS, unused funds belonging to Medicaid-eligible
 13 nursing facility residents OR set aside for burial often
 14 become unavailable for recovery by the Medicaid program; and

15 WHEREAS, the United States Congress has recently enacted
 16 amendments to the federal Social Security Act that require
 17 the states to deny eligibility if assets have been disposed
 18 of for less than fair market value; to treat trusts as
 19 available resources, income, or transferred assets for
 20 eligibility purposes; to pursue estate recoveries in a
 21 broader range of cases; to expand the definition of estates
 22 beyond the probate estate to allow the states to recover
 23 more Medicaid benefits and to reflect a federal policy
 24 intended to prevent uncompensated transfers of assets; to
 25 prevent sheltering of income and assets through the use of

1 trusts and similar arrangements; and to prevent dissipation
 2 of assets that could be used to repay Medicaid benefits and
 3 to ensure that Medicaid benefits are available only to the
 4 truly needy.

6 STATEMENT OF INTENT

7 A statement of intent is required for this bill because
 8 [sections 1, 2, 4, and 9] grant the department of social and
 9 rehabilitation services rulemaking authority to implement
 10 the provisions of [this act].

11 (1) The legislature intends that in adopting rules
 12 under [this act], the department of social and
 13 rehabilitation services establish criteria for undue
 14 hardship waivers and exception procedures that are narrowly
 15 drawn so as to minimize eligibility for medical assistance
 16 and maximize recovery of medicaid benefits to the greatest
 17 extent allowed by federal requirements.

18 (2) The legislature intends that the department adopt
 19 rules that specify the criteria and procedures for obtaining
 20 a recovery exception under 53-6-143(5)(b)(ii) and an
 21 exception from application of the transfer of assets rules
 22 (with respect to a transfer to an applicant's or recipient's
 23 child who provided care that permitted the applicant or
 24 recipient to reside at home rather than in an institution)
 25 so as to ensure that exceptions are drawn as narrowly as

permitted under federal requirements.

(3) The legislature intends that the department adopt rules that, to the greatest extent allowed by federal requirements, provide for ineligibility for medical assistance as a result of transfers of assets without regard to the purpose of the transfer, except as specifically relevant under federal requirements.

(4) (a) The legislature intends that the department adopt rules that, to the greatest extent possible under federal requirements, provide for treatment of trusts and similar devices as available income, available resources, or transferred assets and prevent sheltering of assets through those devices.

(b) The legislature intends that exceptions to treatment of trusts and similar devices be limited to those exceptions that are mandatory under federal requirements and that any exceptions be limited, to the extent possible under federal requirements, to cases in which the state of Montana will receive the funds remaining in the trusts, to the extent of medical assistance paid on behalf of the individual upon the individual's death.

(c) The legislature intends that, if the department establishes a maximum income limitation of 300% of the federal supplemental security income (SSI) benefit for persons who reside in institutions or who require an

institutional level of care, the department adopt rules providing:

(i) that income trusts described in 42 USC 1396p(d)(4)(B) are exempt from treatment as available resources or income for nursing facility residents only if all of the individual's monthly income is paid to the trust and the trust distributes monthly to the individual an amount no less than the maximum income allowable for purposes of medicaid eligibility;

(ii) that the income distributed to a nursing facility resident as provided in subsection (4)(c)(i), less the individual's monthly personal needs allowance, less any amount that may be diverted to a community spouse under the department's spousal impoverishment rules, and less any other amount specified by department rule, must be applied to the individual's cost of nursing facility care;

(iii) that the exemption of these trusts applies only to the extent that the individual requires services to which the income limit described in subsection (4)(c) applies;

(iv) that the exemption of these trusts must be limited to individuals whose income, immediately prior to establishment of the trust, is in excess of the income limit described in subsection (4)(c) and below the private cost of nursing facility care;

(v) that the exemption of these trusts applies only if

~~the--trust--is--established--and-actually-maintained-for-the
sole-benefit-of-the-recipient;-and
(vi)-procedures-and-criteria-under-which-a-transfer-to-a
trust-described-in-subsection-(4)(c)(i)--is--a--disposal--of
assets-for-purposes-of-(section-1);~~

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Rules providing for period of ineligibility for medical assistance when assets disposed of for less than fair market value -- undue hardship exception. (1) Subject to subsection (2) and to the extent allowed by federal law, the department shall adopt rules that provide for a period of ineligibility for medical assistance under this part when the applicant or recipient or the applicant's or recipient's spouse directly or indirectly disposes of any assets for less than fair market value.

(2) An applicant or recipient is not ineligible for medical assistance under this part by reason of a disposition of assets under subsection (1) to the extent that the department determines that the denial of eligibility would cause an undue hardship, as defined by department rule. The department shall adopt rules establishing procedures and criteria for determining whether a denial of eligibility would work an undue hardship.

(3) This section does not prohibit the department from

adopting rules that provide for a period of ineligibility for public assistance programs other than medical assistance when an applicant or recipient directly or indirectly disposes of assets for less than fair market value.

NEW SECTION. Section 2. Rules requiring certain treatment of trusts established with applicant's or recipients assets -- undue hardship exception. (1) Subject to subsection (2), and to the extent allowed by federal law, the department shall, for the purposes of eligibility for medical assistance under this part, adopt rules to require that the corpus, income, accumulated income, and distributions from or of a trust or similar legal instrument or device, established in whole or in part with the applicant's or recipient's assets or with assets to which the applicant or recipient is entitled, be considered as available income, available resources, or assets disposed of for less than fair market value.

(2) The rules must include a procedure and criteria for a waiver of application of the rules provided for in subsection (1) if the applicant or recipient demonstrates that application of the rules would cause an undue hardship on the applicant or recipient.

Section 3. Section 53-2-611, MCA, is amended to read:

"53-2-611. Recovery of medicaid benefits following from recipient's estate death. (1) Upon Following the death of

any recipient of medical assistance under Title 53, chapter 6, part 1, the department shall execute and present a claim:

(a) against the recipient's estate of--such-person, within the time specified in the published notice to creditors in the estate matter proceeding, for the total amount of recoverable medical assistance paid under this title, separately stating the amount of all assistance--paid on--or-after-July-17-1953--The department's claim is subject to the limitations specified in 53-6-143(3)-- to or on behalf of the recipient; and

(b) against a person who has received property of the recipient by distribution or survival for an amount equal to the recoverable medical assistance paid on behalf of the recipient or the value of the property received by the person from the recipient by distribution or survival, whichever is less.

(2) Notwithstanding any statute of limitations or claim presentation deadline, a department claim against an estate may not be barred for lack of timely presentation if presented to creditors in the probate proceeding within the time specified in the published notice TO CREDITORS.

(3) A department claim under subsection (1) bears interest from the date of the recipient's death at the rate specified in 31-1-106 FROM THE DATE OF PRESENTATION OF THE CLAIM IN THE PROBATE PROCEEDING OR FROM THE DATE OF DEMAND

FOR PAYMENT TO A PERSON WHO HAS RECEIVED PROPERTY OF THE RECIPIENT BY DISTRIBUTION OR SURVIVAL.

(4) For purposes of this section, "recoverable medical assistance" includes any payment under Title 53, chapter 6, part 1, including but not limited to payments made for items and services provided to and insurance premiums, deductibles, and coinsurance paid on behalf of a recipient who:

(a) during the recipient's lifetime, was an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease and, with respect to that institutionalization, the department determined under the provisions of [section 7(1)(c)(3)] that the person was not reasonably expected to be discharged and return home; or

(b) was at least age 55 or a lesser age allowed by federal law when the item or service was provided or when the insurance premium, deductible, or coinsurance was paid.

(5) (a) For purposes of this section, property of a deceased recipient received by distribution or survival is any real or personal property or other assets in which the recipient had any right, title, or interest immediately prior to the time of death, including but not limited to assets passing to one or more survivors, heirs, assignees, or beneficiaries of the deceased recipient through joint

tenancy, tenancy in common, right of survivorship, conveyance BY THE RECIPIENT subject to life estate, living trust, or other arrangement.

(b) Property received by distribution includes but is not limited to:

(i) property distributed to a person through a probated estate or a small estate administration procedure; or

(ii) property otherwise distributed to or in the possession of a person through any other procedure or when a legal procedure for distribution has not been followed.

(6) (a) The department may seek recovery under both subsections (1)(a) and (1)(b) with respect to the estate of the same deceased recipient until its claim is satisfied in full. Upon full satisfaction of its claim, the department may not seek further recovery and shall provide appropriate releases to the deceased recipient's estate and other affected parties.

(b) An estate or other party is not entitled to a reduction or waiver of the department's claim on the grounds that there is or may be another party from whom recovery may be made under this section.

(7) The department's claim is subject to the limitations and requirements specified in 53-6-143.

(8) The department may waive recovery under this section if it determines that the cost of recovery equals or

exceeds the amount likely to be recovered.

(2)(9) All money recovered under this section from any source must be distributed to the county and to the state general fund of the state of Montana according to the county's or state's interests. If the federal law requires, the federal government is entitled to a share of any amounts collected under this section in proportion to the amounts that it has contributed to the grants recovered. The amount due the United States must be promptly paid by the department and to the United States government as required by applicable state and federal laws and regulations."

Section 4. Section 53-6-143, MCA, is amended to read:

"53-6-143. Limitations on liens and recoveries. (1) An Except as provided in this section, the department may not impose a lien upon the property of an applicant for or recipient of medical assistance may not be required to execute an agreement creating a lien on his real property.

(2) A lien for recovery of medical assistance paid or to be paid under this chapter may be imposed against the real or personal property of an individual a medicaid applicant or recipient prior to his the applicant's or recipient's death for recovery of medical assistance paid or to be paid on his behalf under this chapter only:

(a) pursuant to a judgment of a court for recovery of medical assistance incorrectly paid on behalf of the

recipient; or

(b) on a third-party recovery as provided in 53-2-612;
or

(c) as provided in [section 7].

(3) ~~(a)~~ The department may recover medical assistance correctly paid on behalf of a recipient only:

~~(i) as provided in 53-2-611, except--that--it--may--not recover for any assistance paid on behalf of a recipient for services provided before he reached age 65; or~~

~~(ii) as--provided in 53-2-612, [section 5], [section 6], or [section 7] or as provided in a written agreement between the department and the recipient or the recipient's representative.~~

~~(b)(4) (a) The department may not recover under 53-2-611 only:~~

~~(i)--after the death of the recipient's or, EXCEPT AS PROVIDED IN SUBSECTION (4)(C), UNDER [section 7] while there is a surviving spouse, if any, and~~

~~(ii) if there is no of the recipient or while there is a surviving child of the recipient who is under age 21, blind, or permanently and totally disabled. This subsection does not preclude the department from imposing a lien under [section 7].~~

(b) (i) Following the death of the recipient's surviving spouse, the department shall recover for the total

amount of recoverable medical assistance, as defined in 53-2-611, under [section 7] or under 53-2-611. Recovery must be by claim against the recipient's estate prior to distribution or by claim against the estate of the recipient's surviving spouse for the lesser of the total amount of recoverable medical assistance or the value of any of decedent's estate received by the surviving spouse by distribution.

~~(ii) Any--statute--of--limitations or claim presentation deadline that purports to preclude recovery does not apply to a department claim under this subsection (b).~~

(II) FOR PURPOSES OF ANY APPLICABLE STATUTE OF LIMITATION, A DEPARTMENT CLAIM UNDER SUBSECTION (4)(B) ACCRUES UPON THE DEATH OF THE RECIPIENT'S SURVIVING SPOUSE.

(c) (i) Following the recipient's death, the department shall impose a lien upon the real property of the surviving spouse to the extent of the interest received by the spouse from the recipient's estate or property. The lien:

(A) must be imposed according to the procedures specified in [section 7];

(B) is due and payable upon the death of the spouse or upon the sale, transfer, or exchange of the real property; and

(C) may be collected according to the provisions of [section 7].

(ii) The lien may be imposed under this subsection (c) without regard to the conditions specified in [section 7(1) AND (2)] but is subject to the limitations specified in subsections (4) and (5) of this section.

(D) FOLLOWING THE RECIPIENT'S DEATH AND WHEN THERE IS NO LONGER A RECIPIENT'S CHILD WHO IS UNDER 21 YEARS OF AGE, BLIND, OR PERMANENTLY AND TOTALLY DISABLED, THE DEPARTMENT MAY RECOVER FROM THE RECIPIENT'S CHILD OR THE ESTATE OF THE RECIPIENT'S CHILD THE LESSER OF THE TOTAL AMOUNT OF RECOVERABLE MEDICAL ASSISTANCE, AS DEFINED IN 53-2-611, OR THE VALUE OF ANY OF THE RECIPIENT'S PROPERTY RECEIVED BY THE CHILD BY SURVIVAL OR DISTRIBUTION.

(d)(E) The existence of any person described in subsection (4)(a) that prevents recovery by the department applies only to the share of the recipient's estate or property that passes to the person or persons described in subsection (4)(a).

(5) The department may not recover under [section 7] upon a lien imposed on the deceased recipient's home while a person lawfully resides in the home and that person:

(a) has resided lawfully and continuously in the home since the time of the deceased recipient's institutionalization; and

(b) is either:

(i) a sibling of the deceased recipient who resided in

the recipient's home for a period of at least 1 year immediately before the recipient's institutionalization; or

(ii) a child of the deceased recipient who resided in the recipient's home for a period of at least 2 years immediately before the recipient's institutionalization and who demonstrates to the satisfaction of the department, according to procedures and criteria established by department rule, that the child provided care to the recipient during the period that permitted the recipient to reside at home rather than in an institution.

(6) The department shall waive its recovery under 53-2-611 or [section 7] in whole or in part if it determines that recovery would result in undue hardship as defined by department rule. The department shall adopt rules establishing procedures and criteria for obtaining undue hardship waivers.

(4)--Recoveries--must--be--prorated---to---the---federal government--and--the--state--in-the-proportion-to-which-each contributed-to-the-medical-assistance--Recovery-for--medical assistance--paid-prior-to-July-17-1974--shall-be-prorated-to reimburse-the-county-share-of-participation--The--provisions of--this--section--are--hereby--extended--to-provide-for-the recovery-of-all-medical-assistance-paid-under-this-part--and likewise--to--all-medical-aid-to-the-aged-assistance-paid-by the-department-of-social-and-rehabilitation-services--during

the-period-of-time-July-1, 1965, through-June-30, 1967."

NEW SECTION. Section 5. Payment of certain FUNDS of deceased recipient's funds RECIPIENT to department. (1) (A) A nursing facility or a person, other than a financial institution, holding personal funds of a deceased nursing facility resident who received medicaid benefits at any time shall, within 30 days following the resident's death, pay those funds to the department unless within that time the nursing facility or person has actual notice that a probate proceeding has been commenced under Title 72, chapter 37, part 2 or 37 or a similar law in another state. If the nursing facility or person has actual notice that a proceeding has been commenced within that time, the funds are payable to the duly appointed personal representative of the deceased resident's estate. Commencement of a probate proceeding after 30 days following the resident's death does not excuse a nursing facility or person from the requirement of delivering the funds to the department, and the department is not required to pay to the estate any funds received under this section.

(B) A NURSING FACILITY MAY SATISFY A DEBT OWED BY THE DECEASED RESIDENT TO THE FACILITY FROM THE DECEASED RESIDENT'S PERSONAL FUNDS THAT ARE HELD BY THE NURSING FACILITY AND THAT WOULD HAVE BEEN PAYABLE TO THE FACILITY FROM THE RESIDENT'S FUNDS. THE FACILITY SHALL PAY THE

REMAINING FUNDS TO THE DEPARTMENT AS REQUIRED BY THIS SECTION.

(C) Funds paid to the department under this section are not considered to be property of the deceased resident's estate, and the limitations in 53-6-143 do not apply to recovery of the funds by the department.

(2) FOR PURPOSES OF THIS SECTION, A NURSING FACILITY IS HOLDING PERSONAL FUNDS OF A RESIDENT IF THE FACILITY:

(A) MAINTAINS POSSESSION OF THE FUNDS IN THE FACILITY;

OR

(B) AS THE RECIPIENT'S TRUSTEE OR REPRESENTATIVE, HAS DEPOSITED THE RESIDENT'S FUNDS IN AN INDIVIDUAL OR SHARED ACCOUNT IN A FINANCIAL INSTITUTION.

(3) The department shall apply any funds received under this section proportionately to the federal and state shares of recoverable medical assistance, as defined in 53-2-611, and shall pay any remaining amount to any person entitled by law to the funds.

NEW SECTION. Section 6. Payment of excess burial funds or assets to department. (1) After the death of a person who at any time received medicaid benefits, a mortician, funeral director, or other person, including but not limited to the decedent's spouse, heirs, devisees, or personal representative, who holds unused funds or other property that had been specifically designated and set aside for

1 paying for the disposition of the human remains and related
 2 expenses shall, AFTER PAYING FOR THE DISPOSITION AND RELATED
 3 EXPENSES, pay those ALL REMAINING funds to the department
 4 within 30 days following the burial, cremation, or other
 5 final disposition of the decedent's remains. The funds must
 6 be paid to the department regardless of any provision in a
 7 written contract, trust, or other agreement entered into on
 8 or after January 1, 1994, directing a different disposition
 9 of the funds. Funds paid to the department under this
 10 section are not considered to be property of the deceased
 11 resident's estate, and the limitations in 53-6-143 do not
 12 apply to recovery of the funds by the department.

13 (2) The department shall apply any funds received under
 14 this section proportionately to the federal and state shares
 15 of recoverable medical assistance, as defined in 53-2-611,
 16 and shall pay any remaining amount to any person entitled by
 17 law to the funds.

18 NEW SECTION. Section 7. Department lien upon real
 19 property of certain medicaid recipients -- PRIORITY OF
 20 CLAIMS. (1) The SUBJECT TO 53-6-143(4)(C)(II) AND FOLLOWING
 21 NOTICE AND OPPORTUNITY TO BE HEARD AS PROVIDED UNDER
 22 SUBSECTION (2) OF THIS SECTION, THE department shall impose
 23 a lien upon the real property, including the home, of an
 24 institutionalized recipient of medical assistance under this
 25 part to secure the assets of the recipient for recovery of

1 medical assistance benefits paid on behalf of the recipient
 2 prior to, on, and after the imposition of the lien if ~~all of~~
 3 ~~the following conditions are met:~~

4 (a) ~~The~~ THE recipient has been admitted to a nursing
 5 facility, intermediate care facility for the mentally
 6 retarded, or an institution for mental disease;

7 (b) ~~A lien may not be imposed upon the recipient's home~~
 8 ~~if any of the following individuals are lawfully residing in~~
 9 the recipient's home, IF THE PROPERTY UPON WHICH A LIEN IS
 10 BEING IMPOSED IS A HOME, IS NOT LAWFULLY RESIDED IN BY:

11 (i) the recipient's spouse;

12 (ii) the recipient's child who is under 21 years of age,
 13 blind, or permanently and totally disabled; or

14 (iii) the recipient's sibling who has an ownership
 15 interest and equity in the recipient's home and who was
 16 residing in the recipient's home for a period of at least 1
 17 year immediately before the recipient's
 18 institutionalization; AND

19 (C) THE RECIPIENT HAS BEEN DETERMINED BY THE
 20 DEPARTMENT, PURSUANT TO SUBSECTION (3), TO BE PERMANENTLY
 21 INSTITUTIONALIZED.

22 (2) PRIOR TO IMPOSING A LIEN UNDER SUBSECTION (1), THE
 23 DEPARTMENT SHALL PROVIDE THE RECIPIENT:

24 (A) 30 DAYS' WRITTEN NOTICE OF ITS DETERMINATION UNDER
 25 SUBSECTION (1)(C) AND OF ITS INTENT TO IMPOSE A LIEN; AND

(B) AN OPPORTUNITY FOR A HEARING PURSUANT TO THE
DEPARTMENT'S HEARING PROCEDURES.

~~{c}~~(3) ~~The department has determined~~ A RECIPIENT IS PERMANENTLY INSTITUTIONALIZED FOR PURPOSES OF SUBSECTION (1)(C) IF THE DEPARTMENT DETERMINES that the recipient cannot reasonably be expected to be discharged from the facility and to return home. There is a rebuttable presumption that the recipient cannot reasonably be expected to be discharged from the facility and return home if the recipient or a representative of the recipient declares that there is no intent to return home or if the recipient has been institutionalized for 6 months or longer ~~with no~~ WITHOUT A discharge plan. THE RECIPIENT'S INSTITUTIONALIZATION FOR A PERIOD OF 6 MONTHS OR LONGER WITHOUT A DISCHARGE PLAN DOES NOT GIVE RISE TO THE PRESUMPTION IF THE FACILITY WAS REQUIRED BY LAW TO ADOPT A DISCHARGE PLAN BUT FAILED TO DO SO. A recipient or a recipient's representative who alleges that there is a reasonable expectation of discharge from the facility and a return home has the burden of demonstrating the reasonable expectation. The reasonable expectation must be established based upon medical evidence and medical opinion. A declaration by the recipient or a recipient's representative that the recipient intends to be discharged from the facility and to return home is not alone sufficient to

establish that there is a reasonable expectation of discharge from the facility and a return home.

~~{d}~~--The department has provided the recipient 30 days+ written notice of its determination under subsection--~~{i}~~~~{c}~~ and--its--intent--to impose a lien, and the recipient has an opportunity for--a--hearing--pursuant--to--the--department's hearing procedures.

~~{2}~~(4) For purposes of subsection (1), real property of a recipient includes any interest in real property that may be subject to a judgment lien.

~~{3}~~(5) The lien must contain the name and address of the recipient who owns an interest in the property, a legal description of the property, and an address and telephone number of the department, office, or representative who can provide more information about the lien. The lien applies only to the property described in the lien.

(a) The lien need not be executed by or on behalf of the medicaid recipient, but it must be executed by a duly authorized agent or employee of the department. The execution must be acknowledged as provided in 70-21-203.

(b) The lien need not state the specific amount of medical assistance repayment owed. The lien is sufficient to secure repayment of past, current, and future recoverable medical assistance, as defined in 53-2-611, if the lien states that:

(i) the lien is imposed under 53-6-143 or this section to secure the described property for recovery of medical assistance benefits paid on behalf of the recipient prior to, on, and after the date of the lien; and

(ii) the recoverable medical assistance paid, as defined in 53-2-611, is due and payable upon sale, transfer, or exchange of any right, title, or interest of the recipient in the property or upon the recipient's death, with interest at the rate specified in 31-1-106 accruing from the date of the sale, transfer, or exchange or from the date of the recipient's death.

(c) Technical errors in the recipient's name or in the legal description of the property do not affect the validity of the lien if the information provided is sufficient to identify the person and property described. Regardless of any defect in the form or recording FILING of the lien, the lien is valid as between the department and:

(i) the recipient and the recipient's estate; and

(ii) persons who have actual notice KNOWLEDGE of the existence of the lien, the recipient's identity, and the identity of the property intended to be subject to the lien.

~~(4)(6)~~ The lien must be recorded FILED in the office of the clerk and recorder in the county in which the real property is located. ~~The department may not be required to pay any fee for recording the lien, regardless of the~~

~~provisions of 7-4-2631.~~

(a) Recording FILING of the lien operates as due and legal notice to all persons, including subsequent purchasers, encumbrancers, mortgagees, or other lienholders. Upon recording FILING, the lien is prior to any earlier unrecorded interest or claim, is prior to any subsequent interest or claim, whether or not recorded, and is subject to any unpaid property taxes. For purposes of execution under this section, a sale, transfer, or exchange of the property by the recipient is considered a waiver and relinquishment of any homestead exemption of the recipient in the property subject to the lien.

(b) When recorded FILED, the lien has the force and effect of a judgment lien, except as provided in this section. For purposes of provisions of this chapter relating to judgment liens, the department is considered the judgment creditor and the recipient is considered the judgment debtor.

(c) After recording FILING, the lien remains effective without any further department action FOR A PERIOD OF UP TO 6 YEARS until satisfied, released, or dissolved. THE DEPARTMENT MAY RENEW A LIEN FOR ADDITIONAL 6-YEAR PERIODS. If and when the recipient is discharged from the facility and returns home, the lien dissolves. WHEN THE LIEN DISSOLVES, THE DEPARTMENT SHALL FILE A RELEASE OF LIEN IN

1 THE CLERK AND RECORDER'S OFFICE.

2 (5)(7) Upon FOLLOWING the recipient's death or the
3 sale, transfer, or exchange of any right, title, or interest
4 of the recipient in the property, the department may file
5 with the clerk of the district court in the county in which
6 the real property is located an application for issuance of
7 a writ of execution for levy on the real property described
8 in the lien for the amount of recoverable medical
9 assistance, as defined in 53-2-611, paid on behalf of the
10 recipient prior to, on, and after the date of the lien,
11 including amounts paid up to the date of sale of the
12 property, plus interest and costs.

13 (a) The application must be sworn and must state the
14 following:

15 (i) the name of the recipient, a legal description of
16 the real property, and a description of the recipient's
17 interest in the property;

18 (ii) a statement that the department has imposed a lien
19 upon the property under this section;

20 (iii) a statement that the lien complies with the
21 requirements of this section;

22 (iv) the date upon which the lien was recorded FILED and
23 the office in which it was recorded FILED;

24 (v) a description of the sale, transfer, or exchange
25 that entitles the department to recover or a statement that

1 the recipient has--died--with OR, IF APPLICABLE, THE
2 RECIPIENT'S SPOUSE HAS DIED AND the date of the recipient's
3 death;

4 (vi) a statement that the lien has not dissolved under
5 the provisions of subsection (4)(c) (6)(C);

6 (vii) the amount of recoverable medical assistance, as
7 defined in 53-2-611, paid; the amount of interest on the
8 recoverable medical assistance as of the date of the
9 application; THE AMOUNT OF ANY UNREIMBURSED TAXES,
10 INSURANCE COSTS, MAINTENANCE COSTS, OR OTHER COSTS PAID
11 UNDER SUBSECTION (11); and, if applicable, a statement that
12 additional amounts may be paid and additional interest may
13 accrue up to the time that the property is sold in
14 satisfaction of the lien;

15 (viii) a statement that the total amount due has not
16 been paid as of the date of the application;

17 (ix) a statement that recovery is not prohibited by
18 53-6-143 OR THIS SECTION;

19 (x) the names and addresses of all persons who have a
20 recorded interest in the property, including a recipient or
21 recipient's estate, co-owner, purchaser, grantee,
22 encumbrancer, mortgagee, and lienholder;--and a statement
23 ~~that all of these persons have been notified as required by~~
24 ~~subsection (5)(b);~~ and

25 (xi) a request that a writ of execution be issued for

1 sale of the described property if an action is not filed ~~as~~
 2 WITHIN THE TIME provided FOR in subsection ~~(5)(d)~~ (7)(E)
 3 ~~within-60-days-of-filing-of-the-application.~~

4 (b) The department shall ~~mail-a-notice~~ PROVIDE NOTICE
 5 AS REQUIRED BY THIS SUBSECTION (B) to all persons having a
 6 recorded interest in the property. The notice must CONTAIN A
 7 DESCRIPTION OF THE PROPERTY AND MUST state that the
 8 department has a lien under this section upon the described
 9 property, that the department has filed an application for a
 10 writ of execution seeking sale of the property, and that a
 11 writ will be issued unless an action CHALLENGING ISSUANCE OF
 12 THE WRIT has been filed, in accordance with subsection
 13 ~~(5)(d)~~ (7)(E), within 60 days of the date of ~~filing--the~~
 14 ~~application--challenging--issuance--of--the--writ~~ MAILING OR
 15 SERVICE OF NOTICE OR FIRST PUBLICATION OF NOTICE. The
 16 department shall include with the notice a copy of the ~~filed~~
 17 application. ~~Mailing-is-considered-sufficient-if-the-notice~~
 18 ~~is-mailed~~ THE DEPARTMENT MAY MAIL NOTICE, postage prepaid
 19 and return receipt requested, under the name and to the
 20 address stated in the recorded instrument creating each
 21 person's interest. MAILING AS PROVIDED IN THIS SUBSECTION
 22 (B) IS SUFFICIENT NOTICE TO A PERSON IF THE RETURN RECEIPT
 23 IS RETURNED TO THE DEPARTMENT AND INDICATES THAT THE NOTICE
 24 WAS RECEIVED BY OR ON BEHALF OF THE PERSON. IF THE RETURN
 25 RECEIPT IS NOT RETURNED TO THE DEPARTMENT INDICATING THAT

1 THE NOTICE WAS RECEIVED BY OR ON BEHALF OF THE PERSON, THE
 2 DEPARTMENT SHALL ATTEMPT WITH REASONABLE DILIGENCE TO LOCATE
 3 THE PERSON AND TO PERSONALLY SERVE OR MAIL NOTICE TO THE
 4 PERSON. IF AFTER THE EXERCISE OF REASONABLE DILIGENCE THE
 5 DEPARTMENT IS UNABLE TO LOCATE THE PERSON, THE DEPARTMENT
 6 SHALL PUBLISH A NOTICE TO THE PERSON THREE TIMES, ONCE EACH
 7 WEEK FOR 3 SUCCESSIVE WEEKS, IN A NEWSPAPER PUBLISHED IN THE
 8 COUNTY IN WHICH THE PROPERTY IS LOCATED, IF A NEWSPAPER IS
 9 PUBLISHED IN THE COUNTY. IF A NEWSPAPER IS NOT PUBLISHED IN
 10 THE COUNTY, THEN PUBLICATION MUST BE IN A NEWSPAPER HAVING A
 11 GENERAL CIRCULATION IN THE COUNTY. IN THE ALTERNATIVE, THE
 12 NOTICE AND APPLICATION MAY BE PERSONALLY SERVED UPON THE
 13 PERSON.

14 (C) FOLLOWING PROVISION OF NOTICE AS REQUIRED UNDER
 15 SUBSECTION (7)(B), THE DEPARTMENT SHALL FILE WITH THE CLERK
 16 OF COURT AN AFFIDAVIT DESCRIBING THE MANNER IN WHICH NOTICE
 17 HAS BEEN PROVIDED TO EACH PERSON ENTITLED TO NOTICE; THE
 18 DATE OF MAILING, PERSONAL SERVICE, OR FIRST PUBLICATION OF
 19 THE NOTICE; AND THE DATE BY WHICH EACH PERSON MUST FILE AN
 20 ACTION TO CHALLENGE ISSUANCE OF THE WRIT OF EXECUTION. THE
 21 DEPARTMENT SHALL ATTACH TO THE AFFIDAVIT THE RETURN RECEIPT,
 22 THE AFFIDAVIT OF PERSONAL SERVICE, OR THE AFFIDAVIT OF
 23 PUBLICATION. IF AN ACTION HAS NOT BEEN FILED WITHIN THE TIME
 24 REQUIRED BY SUBSECTION (7)(E), THE AFFIDAVIT MUST STATE THAT
 25 AN ACTION HAS NOT BEEN FILED WITHIN THE TIME REQUIRED TO

1 CHALLENGE ISSUANCE OF THE WRIT AND MAY REQUEST IMMEDIATE
 2 ISSUANCE OF THE WRIT.

3 ~~(c)~~(D) The submission of an application under this
 4 subsection ~~(5)~~ (7) is not the filing of a legal action, and
 5 the rules and requirements applicable to legal actions do
 6 not apply.

7 ~~(d)~~(E) A person with a recorded interest in the real
 8 property described in an application filed under this
 9 subsection ~~(5)~~ (7), including the recipient or a co-owner,
 10 purchaser, grantee, encumbrancer, mortgagee, or lienholder,
 11 may, within 60 days of ~~filing-of-the-application-under-this~~
 12 ~~subsection--(5)~~ MAILING OR SERVICE OF NOTICE OR FIRST
 13 PUBLICATION OF NOTICE AS PROVIDED IN SUBSECTION (7)(B), file
 14 an action in the district court challenging the requested
 15 issuance of a writ of execution. The court shall determine
 16 the validity or invalidity of the department's lien and
 17 order appropriate relief, including issuance of the writ or
 18 denial of the application for issuance of the writ.

19 ~~(e)~~(F) If an action has not been filed under subsection
 20 ~~(5)~~(d) ~~(7)~~(E) within 60 days of ~~filing-of--an~~ MAILING OR
 21 SERVICE OF NOTICE OR FIRST PUBLICATION OF NOTICE, AS
 22 PROVIDED IN SUBSECTION (7)(B), THAT THE DEPARTMENT HAS FILED
 23 AN AFFIDAVIT MEETING THE REQUIREMENTS OF SUBSECTION (7)(C)
 24 AND THAT THE DEPARTMENT HAS FILED A SWORN application
 25 containing the statements required by subsection ~~(5)~~(a)

1 (7)(A), the clerk shall issue a writ of execution specifying
 2 the property to be levied upon, the amount due as of the
 3 date of filing of the application, and a statement that
 4 additional amounts may be due up to and through the date of
 5 sale.

6 ~~(6)~~(8) Upon sale of the property under a writ of
 7 execution issued under this section, the purchaser acquires
 8 the right, title, interest, and claim of the recipient,
 9 subject only to any right, title, interest, or claim arising
 10 from an instrument recorded prior to the department's lien
 11 under this section and to any unpaid property taxes. The
 12 sale is absolute and is not subject to any period of
 13 redemption under Title 25, chapter 13, part 8, or other
 14 related law.

15 ~~(7)~~(9) If a lien under this section is invalid for any
 16 reason OR IS UNENFORCEABLE UNDER THE PROVISIONS OF
 17 SUBSECTION (10), the invalidity OR UNENFORCEABILITY OF THE
 18 LIEN does not preclude the department from recovering under
 19 53-2-611.

20 ~~(8)~~(10) ~~For purposes of 70-19-302, the state's right--or~~
 21 ~~title--to--property--described--in--a--lien--created--under--this~~
 22 ~~section--is--considered--to--accrue--on~~ THE DEPARTMENT MAY NOT
 23 FILE AN APPLICATION FOR ISSUANCE OF A WRIT OF EXECUTION TO
 24 RECOVER UPON A LIEN IMPOSED UNDER 53-6-143 OR THIS SECTION
 25 MORE THAN 3 YEARS AFTER the latest of:

1 (a) a sale, transfer, or exchange of any right, title,
2 or interest of the recipient in the property;

3 (b) the death of the recipient; or

4 (c) the death of the recipient's spouse.

5 (11) (A) AFTER THE INSTITUTIONALIZATION OR DEATH OF THE
6 RECIPIENT AND AFTER THE INSTITUTIONALIZATION OF THE
7 RECIPIENT'S SURVIVING SPOUSE, IF ANY, A PERSON WHO PAID REAL
8 PROPERTY TAXES, HOMEOWNERS' INSURANCE PREMIUMS, OR
9 REASONABLE COSTS OF NECESSARY MAINTENANCE OR REPAIRS ON
10 BEHALF OF THE RECIPIENT OR RECIPIENT'S SPOUSE, WITH RESPECT
11 TO PROPERTY SUBJECT TO A LIEN UNDER 53-6-143 OR THIS
12 SECTION, HAS A CLAIM AGAINST THE PROCEEDS OF THE SALE OF THE
13 PROPERTY FOR RECOVERY OF PAYMENTS. THE CLAIM MUST BE
14 SUPPORTED BY WRITTEN DOCUMENTATION THAT CLEARLY DEMONSTRATES
15 THE AMOUNT OF EACH PAYMENT, THE PURPOSE OF EACH PAYMENT, AND
16 THE SERVICES AND ITEMS PURCHASED WITH EACH PAYMENT. A CLAIM
17 UNDER THIS SUBSECTION (A) IS PRIOR TO THE DEPARTMENT'S LIEN
18 IMPOSED UNDER 53-6-143 OR THIS SECTION.

19 (B) THE AMOUNT OF A CLAIM UNDER SUBSECTION (11)(A) MUST
20 BE REDUCED BY:

21 (I) THE AMOUNT OF ANY RENTS AND PROFITS FROM THE
22 PROPERTY DURING THE PERIOD AFTER THE INSTITUTIONALIZATION OR
23 DEATH OF THE RECIPIENT AND THE INSTITUTIONALIZATION OF THE
24 RECIPIENT'S SURVIVING SPOUSE, IF ANY;

25 (II) THE VALUE OF ANY PROPERTY THAT THE PERSON WITH A

1 CLAIM UNDER SUBSECTION (11)(A) WILL RECEIVE BY DISTRIBUTION
2 OR SURVIVAL FROM A DECEASED RECIPIENT IF THE RECIPIENT DID
3 NOT LEAVE A SURVIVING SPOUSE; AND

4 (III) THE VALUE OF ANY PROPERTY THAT THE PERSON WILL
5 RECEIVE BY DISTRIBUTION OR SURVIVAL FROM THE RECIPIENT'S
6 DECEASED SPOUSE, IF THE SPOUSE SURVIVED THE RECIPIENT.

7 (C) THE DEPARTMENT MAY, IN ITS DISCRETION, TAKE ANY
8 ACTION IT CONSIDERS NECESSARY TO PREVENT WASTE OR LOSS OR TO
9 PRESERVE THE VALUE OF PROPERTY SUBJECT TO A LIEN UNDER
10 53-6-143 OR THIS SECTION, INCLUDING BUT NOT LIMITED TO THE
11 FOLLOWING:

12 (I) THE PAYMENT OF ANY UNPAID TAXES ON THE PROPERTY;

13 (II) THE PURCHASE OR RENEWAL OF INSURANCE POLICIES ON
14 THE PROPERTY AND THE PAYMENT OF THOSE INSURANCE PREMIUMS;

15 (III) THE ORDERING OF AND PAYMENT FOR NECESSARY REPAIRS
16 AND MAINTENANCE ON THE PROPERTY; AND

17 (IV) IF THE PROPERTY IS UNOCCUPIED, THE RENTAL OR LEASE
18 OF THE PROPERTY AND THE APPLICATION OF:

19 (A) FIRST, ANY RECEIPTS TO UNPAID PROPERTY TAXES,
20 INSURANCE, AND MAINTENANCE AND REPAIR; AND

21 (B) SECOND, ANY REMAINING AMOUNT TOWARD REPAYMENT OF
22 RECOVERABLE MEDICAL ASSISTANCE.

23 (D) THE DEPARTMENT'S REASONABLE COSTS AND EXPENSES TO
24 PREVENT WASTE OR LOSS OR TO PRESERVE THE VALUE OF THE
25 PROPERTY ARE SECURED BY THE LIEN UNDER 53-6-143 OR THIS

SECTION AND MAY BE RECOVERED IN ADDITION TO ALL OTHER
AMOUNTS SECURED BY THE LIEN.

~~(9)~~(12) (a) The department may waive recovery under this section if it determines that the cost of recovery equals or exceeds the amount likely to be recovered. If the total amount due the department under this section is paid, the department may not file an application under subsection ~~(5)~~ (7), shall withdraw its application if the application has already been filed, or shall instruct the sheriff to cancel sale proceedings.

(b) In lieu of applying for a writ of execution, the department may agree with the heirs or devisees of the recipient to accept periodic payments toward repayment of recoverable medical assistance or may agree with the recipient's surviving spouse to accept substitute security and partial payment, when appropriate, if the terms of agreement, including security for repayment, are acceptable to the department and if the agreement does not reduce the amount due or the likelihood of recovering the amount due. The department may delay filing an application for issuance of a writ of execution for purposes of concluding negotiations toward an agreement in lieu of execution.

~~(10)~~(13) The department shall apply any funds received under this section proportionately to the federal and state shares of the recipient's recoverable medical assistance, as

defined in 53-2-611. Any excess funds after application of proceeds to recoverable medical assistance must be paid to the recipient or to the recipient's representative or successor in interest.

NEW SECTION. Section 8. Repealer. Sections 53-2-601 and 53-5-401, MCA, are repealed.

NEW SECTION. Section 9. Rulemaking authority. The department may adopt rules to implement [this act].

NEW SECTION. Section 10. Codification instruction. (1) [Sections 1, 2, 5 through 7, and 9] are intended to be codified as an integral part of Title 53, chapter 6, part 1, and the provisions of Title 53, chapter 6, part 1, apply to [sections 1, 2, 5 through 7, and 9].

(2) SECTION 53-2-611 IS INTENDED TO BE RENUMBERED AND CODIFIED AS A NEW SECTION IN TITLE 53, CHAPTER 6, PART 1, AND THE CODE COMMISSIONER IS INSTRUCTED TO CHANGE ANY REFERENCES IN EXISTING CODE AND ANY REFERENCES IN LEGISLATION ENACTED BY THE NOVEMBER 1993 SPECIAL SESSION OF THE 53RD LEGISLATURE TO REFLECT THE RENUMBERING AND RECODIFICATION OF 53-2-611.

NEW SECTION. Section 11. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are

1 severable from the invalid applications.

2 NEW SECTION. **Section 12. Applicability.** (1) [Sections
3 3, 5, and 6] and those portions of [section 4] relating to
4 recovery under 53-2-611 apply to medical assistance
5 recipients who die on or after January 1, 1994.

6 (2) [Section 7] and those portions of [section 4]
7 relating to recovery under [section 7] apply as a condition
8 of medical assistance eligibility or continuation of medical
9 assistance eligibility on or after January 1, 1994.

10 NEW SECTION. **Section 13. Retroactive applicability.**
11 [Sections 1 and 2] apply retroactively, within the meaning
12 of 1-2-109, to assets disposed of or trusts established
13 after August 10, 1993, for purposes of determining
14 eligibility for medical assistance on or after January 1,
15 1994.

16 NEW SECTION. **Section 14. Effective dates.** (1)
17 [Sections 1, 2, 9 through 11, and 13 and this section] are
18 effective on passage and approval.

19 (2) [Sections 3 through 8 and 12] are effective January
20 1, 1994.

-End-

SENATE BILL NO. 39

INTRODUCED BY WATERMAN, COBB

BY REQUEST OF THE DEPARTMENT OF SOCIAL AND
REHABILITATION SERVICES AND THE OFFICE OF BUDGET
AND PROGRAM PLANNING

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE
DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES TO ADOPT
RULES THAT PROVIDE FOR INELIGIBILITY FOR PUBLIC ASSISTANCE
WHEN ASSETS ARE DISPOSED OF FOR LESS THAN FAIR MARKET VALUE
AND THAT PROVIDE FOR AN UNDUE HARDSHIP EXCEPTION; REQUIRING
THE DEPARTMENT TO ADOPT RULES THAT PROVIDE FOR CERTAIN
TREATMENT OF TRUSTS ESTABLISHED WITH AN APPLICANT'S OR
RECIPIENT'S ASSETS AND THAT PROVIDE FOR AN UNDUE HARDSHIP
EXCEPTION; EXPANDING THE AUTHORITY AND RESPONSIBILITY OF THE
DEPARTMENT TO RECOVER MEDICAID EXPENDITURES FROM ESTATES OF
DECEASED MEDICAID RECIPIENTS; PROVIDING THAT AFTER THE DEATH
OF A SURVIVING SPOUSE THE DEPARTMENT MAY RECOVER MEDICAL
ASSISTANCE PAID; SPECIFYING THE TIME WITHIN WHICH CLAIMS
MUST BE PRESENTED; AUTHORIZING AND DIRECTING THE DEPARTMENT
TO CLAIM AND RECOVER MEDICAID EXPENDITURES FROM THE
RECIPIENTS OF PROPERTY OWNED BY DECEASED MEDICAID RECIPIENTS
IMMEDIATELY PRIOR TO DEATH AND RECEIVED BY DISTRIBUTION OR
SURVIVORSHIP; PROVIDING FOR INTEREST ON THE DEPARTMENT'S
CLAIMS; SPECIFYING CERTAIN LIMITATIONS UPON DEPARTMENT

THERE ARE NO CHANGES IN THIS BILL
AND WILL NOT BE REPRINTED. PLEASE
REFER TO YELLOW COPY FOR COMPLETE TEXT.