_____ BILL NO. _____

INTRODUCED BY _____

BY REQUEST OF THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

A BILL FOR AN ACT ENTITLED: “AN ACT GENERALLY REVISING LIEN AND ESTATE RECOVERY LAWS RELATED TO THE RECOVERY OF MEDICAID FUNDS; REVISING NOTIFICATION REQUIREMENTS FOR WHEN A MEDICAID RECIPIENT FILES A CLAIM AGAINST A THIRD PARTY FOR DAMAGES FOR WHICH MEDICAID PAID MEDICAL ASSISTANCE; REVISING TIME FOR THE DEPARTMENT TO FILE A CLAIM AGAINST A DECEASED MEDICAID RECIPIENT'S ESTATE TO RECOVER MEDICAID PAYMENTS; CLARIFYING EXCEPTIONS FOR THE DEPARTMENT TO SEEK RECOVERY OR PLACE A LIEN ON REAL PROPERTY OF A DECEASED MEDICAID RECIPIENT FOR REPAYMENT OF MEDICAID PAYMENTS; REVISING NOTIFICATION REQUIREMENTS; DEFINING "LONG-TERM CARE FACILITY" AND UPDATING TERMINOLOGY; AND AMENDING SECTIONS 53-2-612, 53-6-165, 53-6-167, 53-6-168, AND 53-6-171, MCA.”

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

Section 1. Section 53-2-612, MCA, is amended to read:

"**53-2-612. Lien of department upon third-party recoveries.** (1) Upon notice by the department or the recipient to a third party or the third party's insurer as provided in subsection (5)(b), the department has a lien upon money paid by a third party or the third party's insurer in satisfaction of a judgment or settlement arising from a recipient's claim for damages or compensation for personal injury, disease, illness, or disability to the extent that the department has paid medical assistance on behalf of the recipient for the same personal injury, disease, illness, or disability and to the extent that the money represents payment for medical expenses.

(2) The department may, in the name of the recipient on whose behalf medical assistance has been paid by the department, commence and prosecute to final conclusion any action that may be necessary to recover from a third party or the third party's insurer compensation or damages for medical assistance paid by the department on behalf of the recipient. This section does not affect the right of the recipient to initiate and

prosecute to final conclusion an action for damages or compensation in the recipient's own name in accordance with the provisions of this section.

(3) (a) The lien is subordinate to the lien of an attorney under 37-61-420.

(b) Unless specifically provided by law, the recipient's right to recover damages or compensation from a third party or a third party's insurer may not be reduced or denied on the ground that the recipient's costs of medical treatment and medical-related services have been paid by the department under any public assistance program.

(c) From the amount collected by the department or recipient from legal proceedings or as a result of settlement, reasonable attorney fees and costs must be first deducted and paid. Unless the department and the recipient agree to a different settlement, the amount previously paid as medical assistance by the department, less a pro rata share of attorney fees and costs, must be deducted next and paid to the department, but only to the extent that the amount paid as medical assistance does not exceed the portion of the amount collected that represents payment of medical expenses. The remainder, if any, must be paid to the recipient.

(d) In all cases of payment to the department out of an amount collected from a third party or insurer on a recipient's claim, the amount of the lien must be reduced by a pro rata share of attorney fees and costs as provided in subsection (3)(c), but the department may not be required to participate in payment of attorney fees and costs unless the recipient's claim results in recovery out of which the department receives full or partial payment of its lien.

(e) (i) Except as provided in subsections (3)(e)(ii) and (3)(e)(iii), the department may not impose a lien under this section upon a self-sufficiency trust established pursuant to Title 53, chapter 18, part 1, or upon the assets of a self-sufficiency trust established pursuant to Title 53, chapter 18, part 1.

(ii) The department may impose a lien under this section upon a self-sufficiency trust or upon the assets of a self-sufficiency trust established pursuant to Title 53, chapter 18, part 1, if the department is required by federal law to recover or collect from the trust or its assets as a condition of receiving federal financial participation for the medicaid program.

(iii) To the extent otherwise permitted by this section, the department is not precluded from asserting a claim or imposing a lien upon real or personal property prior to transfer of the property to the trust. If

the department imposes a lien upon property prior to transfer to a self-sufficiency trust, any transfer of the property to the trust is subject to the lien.

(4) (a) A recipient of medical assistance or the recipient's legal representative shall ~~notify the department~~ provide written notification to the office of inspector general by certified letter within 30 days if the recipient or the recipient's legal representative asserts a claim against a third party or a third party's insurer for damages or compensation for a personal injury, disease, illness, or disability for which the department paid medical assistance in whole or in part or for which the recipient has applied for medical assistance. ~~The notice must be mailed to the director of the department.~~ At the same time, a copy must be sent by certified mail to the third party or the third party's insurer.

(b) The notice must contain the following information:

(i) the name and address of the recipient and the recipient's legal representative, if any;

(ii) the name and address of the third party alleged to be liable to the recipient;

(iii) the name and address of any known insurer of the third party; ~~and~~

(iv) the judicial district and docket number of any action filed; and

(v) an authorization for release of protected health information signed by the recipient or the recipient's parent or legal guardian if the recipient is a minor.

(c) A recipient or the recipient's legal representative who has received ~~actual~~ notice that the department has paid medical assistance is liable to the department for the amount it is entitled to receive under this section if:

(i) the recipient or the recipient's legal representative fails to ~~timely notify~~ provide timely written notification to the department or fails to mail a copy of the notice to the third party or the third party's insurer; and

(ii) a third party or the third party's insurer that did not receive notice from the department as provided for in subsection (5)(b) pays the recipient or the recipient's legal representative without satisfying any lien of the department.

(5) (a) If a third party or the third party's insurer that has received notice of the department's lien as provided for in subsection (5)(b) makes payment in whole or in part of the recipient's claim without first satisfying the lien of the department, the third party or the third party's insurer is liable to the department for the

amount the department is entitled to receive under this section.

(b) For the purposes of subsection (5)(a), a third party or the third party's insurer has been given notice if:

(i) the department ~~mails, by certified mail,~~ provides written notification to the third party or the third party's insurer:

(A) a statement of the medical assistance, including but not limited to claims directly related to the personal injury, disease, illness, or disability that have been submitted to medicaid prior to the date of settlement and that have been paid or that may be paid by the department on behalf of the recipient; and

(B) a claim for reimbursement;

(ii) the recipient or the recipient's legal representative mails, by certified ~~mail~~ letter, to the third party or the third party's insurer:

(A) a copy of the notice required by subsection (4)(a); or

(B) a statement stating that the recipient has applied for or has received medical assistance from the department in connection with the same claim; or

(iii) the recipient or the recipient's legal representative has commenced an action against the third party or the third party's insurer for damages or compensation for personal injury, disease, illness, or disability for which the department has paid or may pay medical assistance, in whole or in part, and the department files in the court in which the action is pending a notice of lien stating that a lien is claimed for medical assistance on any money paid in satisfaction of any judgment in or settlement of the action and that:

(A) medical assistance in a stated amount has been paid by the department on behalf of the recipient; or

(B) medical assistance may be paid on behalf of the recipient.

(6) As used in this section, the following definitions apply:

(a) "Legal representative" means an attorney having or exercising authority on behalf of a recipient with respect to a claim or action to recover damages or compensation from a third party or a third party's insurer.

(b) "Recipient" means a person on whose behalf the department has paid or may pay medical assistance for the cost of medical treatment and medical-related services for personal injury, disease, illness, or

disability. If the context allows, the term includes a recipient's legal representative.

(c) "Third party" means an individual, institution, corporation, or public or private agency that is or may be liable to pay all or part of the cost of medical treatment and medical-related services for personal injury, disease, illness, or disability of a recipient of medical assistance from the department and includes but is not limited to insurers, health service organizations, and parties liable or who may be liable in tort."

Section 2. Section 53-6-165, MCA, is amended to read:

"**53-6-165. Definitions.** As used in this part, unless expressly provided otherwise, the following definitions apply:

(1) "Department" means the department of public health and human services provided for in 2-15-2201.

(2) "Financial institution" means any organization in the business of moving, investing, or lending money, dealing in financial instruments, or providing financial services, including but not limited to federally chartered and state-chartered banks, savings and loan associations, and credit unions.

(3) "Long-term care facility" means a facility or part of a facility that provides skilled nursing care, residential care, intermediate nursing care, or intermediate developmental disability care to a total of two or more individuals or that provides personal care. The term includes community homes for persons with developmental disabilities licensed under 53-20-305 and community homes for persons with severe disabilities licensed under 52-4-203.

~~(3)~~ (4) "Recipient" means an individual who has been determined by a medicaid agency to be eligible for medicaid benefits, whether or not the individual has actually received a benefit, or an individual who has received benefits, whether or not that person has been determined to be eligible.

~~(4)~~ (5) (a) "Recoverable medical assistance" means a payment pursuant to this part, including but not limited to a payment made for items or services provided to and insurance premiums, deductibles, and coinsurance paid on behalf of a recipient who:

(i) during the recipient's lifetime, was an inpatient in a ~~nursing facility, intermediate care facility for the developmentally disabled, or institution for mental disease~~ long-term care facility and, with respect to that institutionalization, the department determined under 53-6-171 that the person was not reasonably expected to

be discharged and return home; or

(ii) was at least 55 years of age, or younger if allowed by 42 U.S.C. 1396p, as may be amended, when the item or service was provided or when the insurance premium, deductible, or coinsurance was paid.

(b) The term does not include medical assistance for medicare cost sharing or for benefits described in 42 U.S.C. 1396a(a)(10)(E).

~~(5)~~ (6) "Recovery" means legal action brought for the payment or repayment of recoverable medical assistance or amounts of money paid for other purposes."

Section 3. Section 53-6-167, MCA, is amended to read:

"**53-6-167. Recovery of medicaid benefits after recipient's death.** (1) Except as provided in subsection (7) or (9)(b), after the death of a recipient, the department shall execute and present a claim against the recipient's estate, within 1 year of the recipient's death or the time specified in the published notice to creditors in the estate proceeding, whichever is latest, for the total amount of recoverable medical assistance paid to or on behalf of the recipient. The department is not required to initiate probate proceedings in order to present a claim in a case in which no proceeding has been commenced to probate the estate of the deceased recipient.

(2) Except as prohibited by subsection (9)(b), after the death of a recipient, the department may execute and present a claim 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. The amount recoverable from a person with respect to property of the recipient must be reduced by the value of any property transferred to the person for less than full market value for which a period of ineligibility was imposed under 53-6-166 against the recipient during the recipient's life. The department may bring an action in district court to collect upon a claim under this subsection (2).

(3) A department claim under subsection (1) or (2) must include notice of the right to seek an undue hardship exception under rules adopted by the department in accordance with subsection (8).

(4) (a) Notwithstanding any statute of limitations or other claim presentation deadline provided by law, a department claim against an estate is not barred for lack of timely presentation if it is presented in the

probate proceeding within 1 year of the recipient's death or the time specified in the published notice to creditors, whichever is latest.

(b) An action to collect a claim under subsection (2) must be commenced within 3 years of the later of the recipient's death or the closing of the recipient's estate.

(5) (a) For the 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~~ at 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. For the purposes of this section, property is not received by distribution or survival to the extent that the person received the property or property interest for consideration equal to the fair market value of the property or property interest received.

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

(i) property from a deceased recipient's estate distributed to a person through a probated estate or a small estate administration procedure; and

(ii) property from a deceased recipient's estate 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.

(c) Assets of a deceased recipient's estate and property of a deceased recipient received by distribution or survival are not exempt from recovery under this section because the assets or property were or may have been considered by the department as exempt income or resources for the purpose of determining eligibility for medical assistance during the recipient's lifetime.

(6) (a) The department may seek recovery under subsection (1) or (2), or both, with respect to a 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 to other affected persons.

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

(7) The department may waive recovery under this section if it determines that recovery would not

be cost-effective. In determining whether recovery would be cost-effective for the purposes of this subsection (7), the department may consider but is not limited to consideration of the following factors:

(a) the estimated cost of recovery;

(b) the amount reasonably likely to be recovered;

(c) the likelihood that recovery by the department will cause a person to become eligible for public assistance; and

(d) the importance of the case or the issues in the case and the need for judicial interpretation of issues that may recur with respect to the administration or implementation of this section.

(8) (a) Upon presentation or assertion of a claim by the department under this section, the personal representative of the estate or another affected person may apply to the department, in accordance with procedures established by department rule, for a waiver of recovery based on undue hardship. The department shall waive its recovery under this section in whole or in part if it determines that recovery would result in undue hardship as defined by department rule.

(b) The department shall adopt rules that are consistent with 42 U.S.C. 1396p, as may be amended, and that implement federal regulations and policies, establishing procedures and criteria for undue hardship exceptions. The rules adopted under this section must include but are not limited to rules addressing the following:

(i) a description of the circumstances considered to constitute an undue hardship;

(ii) the procedures by which an individual may seek an undue hardship exception;

(iii) the persons entitled to an undue hardship exception; and

(iv) whether an exception is partial or temporary and the circumstances under which partial or temporary exceptions may be granted.

(c) If a person is aggrieved by a department determination on an application for an undue hardship exception, the person may assert a claim of entitlement to an undue hardship exception in any court proceeding on a department petition for allowance of an estate claim or for recovery of an amount due under this section. When a person claims entitlement to an undue hardship exception in the proceeding, the court shall make a determination on the claim for an exception based upon the department rules adopted in accordance with this section. Department denial of all or any part of the relief requested in an exception application under this

section may be reviewed by a district court only as provided in this subsection (8)(c). Denial does not grant a right to a contested case hearing or a right to judicial review under the Montana Administrative Procedure Act or the department's rules.

(9) (a) Except as provided in subsection (9)(b), if the requirements of this section are met, the department may collect upon its claim.

(b) The department may not recover under this section while there is a surviving spouse of the recipient or while there is a surviving child of the recipient who is under 21 years of age, determined to be blind, or permanently and totally disabled by the United States social security administration under Title XVI of the Social Security Act and defined by 20 CFR, part 416, subpart I. This subsection (9)(b) does not preclude the department from recovering from the recipient's estate after the death of the surviving spouse or child.

(10) All money recovered under this section from any source must be distributed to the state general fund and to the United States as required by applicable state and federal laws and regulations.

(11) The personal representative of a deceased recipient's estate or the attorney for the estate shall notify the department of the appointment of a personal representative within 30 days after the appointment."

Section 4. Section 53-6-168, MCA, is amended to read:

"**53-6-168. Payment of certain funds of deceased recipient to department.** (1) (a) A ~~nursing~~ long-term care facility, a financial institution, or a person holding personal funds of a deceased ~~nursing~~ long-term care facility resident who received medicaid benefits at any time shall, within 30 days following the resident's death, pay those funds to the department.

(b) A ~~nursing~~ long-term care 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~~ long-term care 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 53-6-167 does not apply to recovery of the funds by the department.

(2) For the purposes of this section, a ~~nursing~~ long-term care 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 and shall pay any remaining amount to a person entitled by law to the funds."

Section 5. Section 53-6-171, MCA, is amended to read:

"**53-6-171. Department lien upon real property of certain medicaid recipients -- conditions.** (1) Following notice and opportunity for hearing as provided in 53-6-172, the department shall impose a lien upon the real property, including the home, of an institutionalized recipient of recoverable medical assistance to secure the assets of the recipient for recovery of medical assistance paid on behalf of the recipient prior to, on, or after the imposition of the lien if:

(a) the recipient has been admitted to a long-term care facility, including but not limited to a nursing facility, an intermediate care facility for the developmentally disabled, or an institution for mental disease;

(b) the property upon which a lien is being imposed is the recipient's home and the home is not lawfully resided in by:

(i) the recipient's spouse;

(ii) the recipient's child who is under 21 years of age, determined to be blind, or permanently and totally disabled by the United States social security administration under Title XVI of the Social Security Act and as defined in 20 CFR, part 416, subpart I; or

(iii) ~~the recipient's sibling who was residing in the recipient's home for a period of at least 18 months immediately prior to the recipient's institutionalization~~ a sibling of the recipient who has an equity interest in the home and who was residing in the recipient's home for a period of at least 1 year immediately before the date of the recipient's admission to the long-term care facility and is lawfully residing in the home; and

(c) the recipient has been determined by the department, pursuant to subsection (2), to be permanently institutionalized.

(2) A recipient is permanently institutionalized for the 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 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.

(3) For the purposes of this section, real property of a recipient includes any interest in real property that may be subject to a judgment lien."

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