STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
ADMINISTRATIVE HEARINGS FOR THE
DEPARTMENT OF HEALTH AND HUMAN SERVICES

IN THE MATTER OF:

[redacted]

Reg. No.:	14-010967-RECON
	14-010967
Issue No.:	2001
Case No.:	[redacted]
Hearing Date:	December 3, 2014
County:	Delta

DECISION AND ORDER OF RECONSIDERATION

This matter is before the undersigned Supervising Administrative Law Judge pursuant to the Department of Health and Human Services Request for Rehearing/ Reconsideration of the Hearing Decision generated by the assigned Administrative Law Judge (ALJ) at the conclusion of the hearing conducted on December 3, 2014, and mailed on January 6, 2015, in the above-captioned matter.

The Rehearing and Reconsideration process is governed by the Michigan Administrative Code, Rule 792.11015 and applicable policy provisions articulated in the Bridges Administrative Manual (BAM), specifically BAM 600, which provide that a rehearing or reconsideration must be filed in a timely manner consistent with the statutory requirements of the particular program or programs that is the basis for the Appellant's benefits application, and **may** be granted so long as the reasons for which the request is made comply with the policy and statutory requirements.

This matter having been reviewed, an Order Granting Reconsideration was mailed on March 26, 2015.

ISSUE

Did the ALJ err in reversing the Department's denial of Appellant's application for Medical Assistance (MA) benefits due to excess assets?

FINDINGS OF FACT

The Supervising Administrative Law Judge, based upon the competent, material, and substantial evidence on the whole record, finds as material fact:

1. Appellant and her spouse (Spouse) were married during the relevant time period.

2. On June 2, 2014, Spouse executed the "[redacted]" (SBO Trust) naming himself as primary beneficiary. (Exhibit 6, p. 40).

3. Under Section 2.2 of the SBO Trust, "During each fiscal year of the Trust, Trustee shall during the last calendar month of each fiscal year pay or distribute to [redacted] or for his or her sole benefit, during the lifetime of [redacted] such part or all of the net income and principal ("Recourses") of the Trust as Trustee determines is necessary in order to distribute the resources in an actuarially sound basis. . . " (Exhibit 6, p. 41).

4. On or about August 13, 2014, Appellant applied for MA.

5. On August 13, 2014, the Department issued an Initial Asset Assessment Notice (DHS-4588) and determined, among other things, the following: (1) protected spousal amount (PSA), i.e., the amount of assets that may be kept by patient's spouse is $[redacted] ($[redacted] may be kept while on Medicaid); (2) the initial asset assessment amount is $[redacted] and (3) the patient's countable assets consisted of real property in the amount of $[redacted] (Exhibit 5, pp. 19-21).

6. In connection with processing the application, the Department sent the SBO Trust to its Office of Legal Services/Trust and Annuities Unit for evaluation.

7. On August 19, 2014, the Office of Legal Services/Trust and Annuities Unit issued a memo finding that because there is a condition under which payments can be made to or on behalf of Appellant from the trust, the SBO Trust was not a divestment but was a countable asset, with a value equal to the principal in the Trust. The Department concluded that, due to the SBO Trust being a countable asset, Appellant's total assets in the application month of August exceeded the applicable asset limit for MA eligibility. (Exhibit 3, pp. 9-11).

8. On August 26, 2014, the Department mailed Appellant a Health Care Coverage Determination Notice (DHS-1606) denying Appellant's MA application on the basis that the value of the countable assets was higher than allowed. (Exhibit 4, pp. 15-16).

9. On September 8, 2014, Appellant's counsel requested a hearing to dispute the Department's decision.

10. On December 3, 2014, a hearing was held resulting in a Hearing Decision mailed on January 6, 2015.

11. On February 4, 2015, the Michigan Administrative Hearing System (MAHS) received the Department's Request for Rehearing/Reconsideration.

12. On March 26, 2015, the MAHS issued an Order Granting Reconsideration.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Department of Human Services Bridges Eligibility Manual (BEM), Department of Health and Human Services Reference Tables Manual (RFT), and Department of Health and Human Services Emergency Relief Manual (ERM).

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act, 42 USC 1396-1396w-5; 42 USC 1315; the Affordable Care Act of 2010, the collective term for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152; and 42 CFR 430.10-.25. The Department (formerly known as the Family Independence Agency) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

The Department denied Appellant's MA application due to excess assets. The Department contends that the SBO Trust was a countable asset in determining Appellant's asset-eligibility for MA and, because the value of the SBO Trust exceeded the applicable asset limit for MA eligibility, Appellant was ineligible for MA. Appellant, on the other hand, contends that neither BEM 401, page 11 nor 42 USC 1396p(d)(3)(B) apply to the Appellant for purposes of determining eligibility for Medicaid. Accordingly, the Appellant argues, the funds transferred to the trustee of the SBO Trust in question were divested and that under BEM 405, page 9, there is no divestment penalty to resources transferred from Appellant or Spouse to another solely for the benefit of Spouse.

BACKGROUND

Medicaid is a federal-state cooperative program established by Title XIX of the Social Security Act of 1965 to assist needy individuals with medical expenses. 42 USC 1396-1396v. Congress enacted the Medicare Catastrophic Coverage Act (MCCA) of 1988, 42 USC 1396r-5, and the Omnibus Budget Reconciliation Act (OBRA), 42 USC 1396p, to prevent the medical expenses of the spouse in a hospital or LTC facility (the institutionalized spouse) from causing the impoverishment of the spouse remaining in the community (the community spouse)[1] and to prevent financially secure couples from sheltering assets for the purpose of qualifying for Medicaid. *Johnson v Guhl,* 166 F Supp 2d 42, 46-47 (D NJ 2001) *(Johnson II)*, aff'd 357 F3d 403 (CA 3, 2004) *(Johnson III)*; *Hughes v McCarthy*, 734 F3d 473, 475 (CA 6, 2013). When an institutionalized spouse who has transferred assets to a trust applies for Medicaid benefits, the applicant's eligibility is subject to the trust and transfer rules set forth in §§ 1396p and 1396r-5 respectively. *Johnson v Guhl,* 91 F Supp 2d 754, 762 (D NJ, 2000) *(Johnson I)*.

[1] "Community spouse" is the spouse of an individual in a hospital and/or LTC facility who has not himself or herself been, or expected to be, in a hospital and/or LTC facility for 30 or more consecutive days. BEM 402, p. 2.

States are not required to participate in the Medicaid program, but states that do must comply with federal law and regulations in administering the program. *Mackey v Dep't of Human Services*, 289 Mich App 688, 486; 808 NW2d 484 (2010), citing, in part, *Atkins v Rivera*, 477 US 154, 156-157; 106 S Ct 2456; 91 L Ed 2d 131 (1986). Michigan participates in the Medicaid program, and the Department administers the program, generally referred to as the Medical Assistance (MA) program, under MCL 400.105-.112k and Department policies contained in the Bridges Eligibility Manual (BEM). BEM 105 (1-1-2014), p. 1.

Unless the Special Exception Policy in BEM 402 applies, an initial asset assessment is needed to determine how much of a couple's assets are protected for the community spouse. BEM 402 (4-1-2014), page 1. The Department will do an initial asset assessment when one is requested by either spouse, even when an MA application is **not** made. BEM 402, p. 1.

Policy requires the Department use SSI-related fiscal group policy in BEM 400 to determine countable assets. For SSI-related MA, the formula is the value of the couple's countable assets for the month being tested minus the protected spousal amount equals the client's countable assets. (BEM 402 (4-1-2014), p. 4). **Exception:** The client is asset eligible when the countable assets exceed the asset limit, if denying MA would cause undue hardship; see UNDUE HARDSHIP in this item. Assume that denying MA will **not** cause undue hardship unless there is evidence to the contrary. BEM 402, p. 4. For all other SSI-related MA categories, the asset limit is $2,000.00 for a group of one. BEM 400 (10-1-2014), p. 7.

In this case, the Department concluded that the total assets were $[redacted] according to the IAA and the applicable PSA for Spouse was $[redacted] (plus $[redacted] for Appellant). The calculations are not in dispute. The Department contends that the SBO Trust was a countable asset because the value of the Trust, less the PSA, exceeded $[redacted] Accordingly, the Department concluded that Appellant was not asset-eligible for MA.

DISCUSSION

The matter presented is limited to the legal issue of (i) whether Spouse's SBO Trust is a countable asset under existing law and policy; and, (ii) if so, the value of the SBO Trust for MA asset eligibility purposes.

Appellant argues that the term "individual" or "person" refers to a patient under 42 USC 1396p. A review of 1396p, does not support Appellant's position. The plain language of the statute does not expressly limit the "individual" or "person" as only the patient. However, Appellant is incorrect in the interpretation that this means that the assets of both spouse are not counted.

Under BEM 401 (7-1-2014), pp. 5-6, a trust must be evaluated to determine whether it is a Medicaid Trust. If so, the provisions of BEM 401, pp. 10-12, must be considered to determine whether the trust is a countable asset.

A Medicaid trust is a trust that meets the following criteria:

1. The person whose resources were transferred to the trust is someone whose assets or income must be counted to determine MA eligibility, an MA post-eligibility patient-pay amount, a divestment penalty or an initial assessment amount. A person's resources include his spouse's resources.
2. The Trust was established by
    - The person.
    - The person's spouse.
    - Someone else (including a court or administrative body) with legal authority to act in place of or on behalf of the person or the person's spouse, or an attorney, or adult child.
    - Someone else (including a court or administrative body) acting at the direction or upon the request of the person or the person's spouse or an attorney ordered by the court.
3. The trust was established on or after August 11, 1993.
4. The trust was not established by a will.
5. The trust is not described in Exception A, Special Needs Trust, or Exception B, Pooled Trust, as defined in BEM 401.

See BEM 401, pp. 5-6.

In this case, the assigned ALJ did not properly analyze the SBO Trust at issue according to BEM 401. First, it must be determined whether the SBO Trust in question is a Medicaid trust pursuant to the above five criteria. Here, the SBO Trust meets the above five criteria. Spouse's SBO Trust contains funds transferred by Appellant and Spouse, the Trust was established by Spouse after August 11, 1993, the Trust was not established by will, and it is not a Special Needs Trust or Pooled Trust. Therefore, the SBO Trust is a Medicaid trust.

Next, according to BEM 401, pp 2 &3, assets in Medicaid trusts must be evaluated both for divestment and for countable assets. There was no dispute in this case that the assets in this trust were not divestments as the trusts were SBO Trusts. Accordingly, the assets must be distributed to the beneficiary during his lifetime. This means that under BEM 401, p. 11, there must be a "condition under which the principal could be paid to or on behalf of the person."

If a Medicaid trust is an irrevocable trust, BEM 401, p. 11, provides, in relevant part, that a person's countable assets include the value of the countable assets in the trust principal "if there is any condition under which the principal could be paid to or on behalf of the person from an irrevocable trust." If a trust allows use of one portion of the

principal but not another portion, only the usable portion is a countable asset. BEM 401, p. 11.

The provisions in BEM 401 **are consistent with** those in 42 USC § 1396p(d)(3)(B), which provide, in relevant part, that in the case of an irrevocable trust

> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which . . . payment to the individual could be made shall be considered resources available to the individual . . . .
> (ii) any portion of the trust from which . . . no payment could under any circumstances be made to the individual shall be considered, as of the date of the establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

Although Michigan courts have not addressed the application of § 1396p(d)(3)(B) to irrevocable trusts "solely for the benefit of" a community spouse, other jurisdictions have addressed the issue and concluded that such a trust is a countable asset to the institutionalized spouse for Medicaid eligibility purposes. Particularly notable in this respect are the courts' decisions in *Johnson v Guhl*, 357 F3d 403 (CA 3, 2004) *(Johnson III)* and *Daily v Oklahoma Dep't of Human Services*, 228 P3d 1199 (Okla App, 2009).

In *Johnson III*, at issue was whether certain private trusts established for the sole benefit of the community spouses (referred to as "community spouse annuity trusts"), which were designed to provide a stream of annuity payments to the community spouse for the duration of his or her life, were countable assets to the institutionalized spouse for Medicaid eligibility purposes in the State of New Jersey. New Jersey initially had held that such trusts were not countable assets as long as, to the extent that the State paid benefits on behalf of the institutionalized spouse, the State was the first beneficiary of the trust upon the community spouse's death. However, the State reversed its position in 1999, largely in response to an interpretive letter from a federal employee of the Department of Health and Human Services,[2] and concluded that the trusts were countable. In response to a challenge by parties who were denied Medicaid by New Jersey because the value of their trusts made them asset-ineligible, the Third Circuit noted that the trusts at issue were (i) irrevocable, (ii) funded with marital assets (assets

[2] In an April 16, 1998 interpretive letter in response to an inquiry by a West Virginia attorney, a federal Health and Human Services employee concluded that a trust established by either member of a couple using at least some of the Medicaid applicant's assets falls under the jurisdiction of § 1396p(d) and if the trust is an irrevocable trust and the corpus can be paid at some point in time to the community spouse, the corpus is an available resource to the beneficiary and must be included as a countable resource in determining the institutionalized spouse's Medicaid eligibility. *Johnson III* at 409, fn. 9.

belonging to both spouses), and (iii) designed so that the corpus and the income on the corpus will provide the community spouse a stream of payment, which could be shared by the community spouse with the institutionalized spouse. The Third Circuit held that the trusts at issue fell squarely within the purview of § 1396p(d)(3)(B)(i) as "'circumstances [exist] under which payment from the trust could be made to or for the benefit of' the institutionalized spouse" and, as such, were countable assets. 357 F3d at 409.

Similarly, in *Daily*, 228 P3d at 1203-1204, the Oklahoma Court of Civil Appeals, relying on the language in § 1396p(d)(3)(B)(i), held that the trust in that case was a resource available to the institutionalized husband because the entire corpus of the trust was payable to the community spouse over the course of four years. The trust in that case was funded by the institutionalized husband's funds, identified the community spouse as "the sole beneficiary of the trust," and provided for payment of all the net income and principal of the trust to the community spouse in 48 monthly installment with the remaining trust property paid as provided in the community spouse's will or to her living descendants per stirpes in the event she died before the term of the trust expired. 228 P3d at 1201. The court reasoned that "[i]n the case of assets transferred to a trust, the assets remain available to the transferring individual to the extent they may be paid to the spouse, because payments to the spouse benefit the transferring individual." *Id*. At 1203.

The SBO Trust at issue in this case is similar to the trusts considered by the courts in *Johnson III* and *Daily*. Each case involves irrevocable trusts funded by assets of the community spouse or institutionalized spouse for the benefit of the community spouse. The trusts in both *Johnson III* and *Daily* involved payments from the trust to the community spouse over the course of several years; in *Johnson III*, the trusts were private trusts designed to provide a stream of annuity payments to the community spouse of the duration of his or her life. The SBO Trust in this case, which requires payment to Spouse of the principal and income of the Trust on an actuarially-sound basis based on Spouse's life expectancy has the effect, like the trust in *Johnson III*, of allocating payment of the Trust resources to Spouse over her lifetime. The courts' decisions in *Johnson III* and *Daily* support the conclusion that Spouse's SBO Trust is a countable asset.

The Department also references the Social Security Administration's (SSA's) Program Operations Manual System (POMS) SI 01120.201D.2 concerning irrevocable trusts in support of this conclusion. The POMS, which contain the instructions used by SSA employees and agents to carry out the law, regulations, and rulings in evaluating Social Security claims, are not binding authority, but they are persuasive, even in evaluating Medicaid claims. http://www.socialsecurity.gov/regulations/#a0=3; *Bubnis v Apfel*, 150 F3d 177, 181 (CA 2, 1998); *Davis v Sec'y of Health and Human Servs*, 867 F2d 336, 340 (CA 6, 1989); *Stroup v Barnhart*, 327 F3d 1258, 1262 (CA 11, 2003).

SI 01120.201D.2. provides, in relevant part, as follows:

> **a. General rule for irrevocable trusts**
> In determining whether an irrevocable trust established with the assets of an individual is a resource, we must consider how payments from the trust can be made. If payments from the trust could be made to or for the benefit of the individual or individual's spouse (SI 01120.201F.1. of this section [regarding solely for the benefit trusts]), the portion of the trust from which payment could be made that is attributable to the individual is a resource. However, certain exceptions may apply (see SI 011203.203 [regarding pooled trusts and special needs trusts]).
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> b. **Circumstance under which payment can or cannot be made**
> In determining whether payments can or cannot be made from a trust to or for the benefit of an individual (SI 01120.201F.1.), take into consideration any restrictions on payments. Restrictions may include use restrictions, exculpatory clauses, or limits on the trustee's discretion included in the trust. However, if a payment can be made to or for the benefit of the individual under **any** circumstance, no matter how unlikely or distant in the future, the general rule in SI 01120.201D.2.a. in this section applies (i.e., the portion of the trust that is attributable to the individual is a resource, provided no exception from SI 01120.203 [regarding special needs and pooled trusts] applies).
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> c. **Examples**
> •An irrevocable trust provides that the trustee can disburse $2,000 to, or for the benefit of, the individual out of a $20,000 trust. Only $2,000 is considered to be a resource under SI 01120.201D.2.a. in this section. The other $18,000 is considered to be an amount which cannot, under any circumstances, be paid to the individual and may be subject to the transfer of resources rule in SI 01120.201E in this section and SI 01150.100.
>
> •If a trust contains $50,000 that the trustee can pay to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday, the entire $50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource.

In this case, the language in SI 01120.201D.2.a., which provides that it "[i]f payments from the trust could be made to or for the benefit of the individual or individual's spouse . . ., the portion of the trust from which payment could be made that is attributable to the individual is a resource," is similar to the language in § 1396p(d)(3)(B)(i), which provides that "[i]f there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which . . . payment to the individual could be made shall be considered resources available to the individual." Because SI 01120.201D.2.a and § 1396p(d)(3)(B)(i) define the countability of an irrevocable trust with respect to the circumstances in which payments could be made, it

follows that the examples in SI 01120.201D.2.c. could be relevant in analyzing when a trust is a countable asset for MA purposes.

The second example in SI 01120.201D.2.c. concludes that the entire $[redacted] in a trust is a resource with a value of $[redacted] even though the funds in the trust are payable to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday. In this case, Spouse's SBO Trust requires the annual distribution of funds from the Trust to Spouse on an actuarially-sound basis, based on Spouse's life expectancy. Thus, SBO Trust anticipates that the entire net income and principal of the Trust is to be paid to Spouse over her lifetime. Therefore, the SBO Trust has conditions under which the assets from the Trust can and in fact must be distributed to the beneficiary. Because the conditions for distributions of all income and principal from the SBOT trust to Spouse are more likely to be satisfied than the conditions leading to disbursement in the second example in SI 01120.201D.2.c, it follows that the SBO Trust is countable under D.2.a, with a value equal to the full amount in the SBO Trust. Therefore, the POMS provides further support for the conclusion that the SBO Trust is a countable asset.

To the extent Appellant argues that, because the trustee controls distribution of the Trust assets, those assets are unavailable and non-countable is without merit. As discussed above, the Department's conclusion that the SBO Trust is a countable asset, despite the fact that the trustee controls the distribution of assets, is supported by federal law, Department policy, and the POMS. Furthermore, under § 1396p(d)(2)(C), the determination of a countable asset under § 1396(d)(3)(B) is not dependent on whether the trustee has or exercises any discretion to make payments. In fact, in *In re Rosckes*, 783 NW2d 220, 225 (Minn, 2010), the court held that where the trust allowed the trustee to pay the beneficiary income and principal at such times and in such portions as he deemed advisable, all of the trust income and principal could have been paid to the beneficiary in some capacity and was thus available to the beneficiary under § 1396p(d). The contention that the assets in the SBO Trust are unavailable is further undermined by BEM 400, p. 9, which states that the determination of whether the asset is available for purposes of determining whether it is countable does **not** apply when the asset is a trust, and BEM 401, p. 10, which states that an asset is not considered unavailable because it is owned by the Medicaid trust rather than the person.

Appellant's argument that the trust assets are not available because the SBO Trust is for the benefit of Spouse and payments are made to Spouse, not Appellant, this argument is contrary to BEM 211 (July 2013), pp. 6-7, which provides that for purposes of determining a couple's countable assets for an initial asset assessment or the institutionalized spouse's initial eligibility[3] for MA, the institutionalized spouse and the community spouse are considered a single asset group. 42 USC § 1936p(h)(1) broadly

[3] The initial eligibility is the institutionalized spouse's asset eligibility for MA during the application month and any retroactive month (up to three months prior to the application month). BEM 401, pp. 3-4. In contrast, the initial asset assessment is the calculation of the couple's total countable assets on the first day of the institutionalized spouse's first continuous period of care for purposes of determining the PSA. BEM 401, p. 7.

defines "assets" to include all resources of the individual and of the individual's spouse, including any resources which the individual is entitled to but does not receive because of action by such individual's spouse. BEM 401, p. 4 defines resources consistent with this definition. Therefore, Spouse's SBO Trust is Appellant's asset for the initial eligibility calculation.

42 USC § 1396r-5(c)(2) concerning the calculation of resources at the time of an institutionalized spouse's initial eligibility determination provides further support for this conclusion, providing, in relevant part:

> In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property –
>
> (A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and
>
> (B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under section (f)(2)(A) of this section [the community spouse resource allowance] (as of the date of application for benefits).

See also *Palomba-Bourke v Comm'r of Social Services*, 312 Conn 196; 92 A3d 932, 941, 943-944 (Conn 2014) (concluding that the assets of a trust available to the community spouse at the time of the institutionalized spouse's MA application are also available to the institutionalized spouse). Therefore, under both federal law and Department policy, the principal in the SBO Trust which was an asset to Spouse at the time of Appellant's MA application was also an asset to Appellant at the time of the initial eligibility determination. As such, the Department properly considered the trust as a countable asset for determining Appellant's MA eligibility.[4]

Appellant submits that, even if the SBO Trust is a countable asset, because the Trust provides that the resources are to be distributed to Spouse on an actuarially-sound basis, the Trust's value is limited to the amount that could be distributed to Spouse in a single year based on Spouse's life expectancy. In other words, because, based on the value of the SBO Trust and Spouse's life expectancy, only a portion of the assets would be distributed to Spouse from the SBO Trust in the first year, the value of the SBO Trust for asset valuation purposes should be limited to this amount. However, because the SBO Trust here provides that the entire corpus of the trust, both income and principal, is

[4] An institutionalized spouse's asset eligibility at application is to be distinguished from the determination of his or her ongoing MA eligibility. Once an institutionalized spouse is eligible for MA, he or she is automatically asset-eligible for up to 12 months, which is referred to as the presumed asset eligible period. After the presumed asset eligible period ends, only the client's assets, not the community spouse's assets, are counted to determine continued MA asset-eligibility. BEM 402, pp. 4-5.

available to Spouse, the Department properly concluded that all of the trust assets were countable, even though only a portion would paid annually. This conclusion is consistent with the decisions in *Johnson III* and *Daily* and in accordance with § 1396p(d)(3)(B). See also *Gayan v Ill Dep't of Human Services*, 796 NE2d 657, 661 (Ill App 2003) (finding that where there were five conditions that would result in payment of trust funds to the beneficiary, then the entire corpus of the trust was available and countable).

Finally, Appellant argues that a finding that the SBO Trust is a countable asset would render BEM 405, which defines and permits "solely for the benefit of" transfers, irrelevant. BEM 405 (October 2013), pp. 11-12, provides that a transfer is "solely for the benefit" of a person if (i) the arrangement is in writing and legally binding on the parties, (ii) the arrangement ensures that none of the resources can be used for someone else during the person's lifetime except trustee fees, and (iii) the arrangement requires that the resources be spent for the person on an actuarially sound basis, meaning that spending must be at a rate that will use up all the resources during the person's lifetime.

The Department concedes that the SBO Trust is a "solely for the benefit" instrument as defined in BEM 405. However, the Department argues that the purpose of BEM 405 is to exclude a transfer made solely for the benefit of the community spouse from the divestment penalties, not to render the asset at issue not countable. The Department points out that excluding a "solely for the benefit" trust as a countable asset would allow a client to shelter assets in excess of the PSA and render the calculation of the PSA meaningless.

BEM 405 is the policy concerning divestment. A divestment occurs when a resource of the institutionalized spouse or community spouse is transferred for less than fair market value in the sixty-month period before the institutionalized spouse was eligible for MA, and it results in a penalty period during which time MA will not pay the institutionalized client's expenses for LTC services. BEM 405, pp. 1-9, 12-16. BEM 405, p. 9, expressly states that a transfer of resources from the client to the client's spouse or to another solely for the benefit of the client's spouse is **not** a divestment. Therefore, the policy supports the Department's position that transfers "solely for the benefit of" a community spouse are not subject to the divestment penalties. See also 42 USC 1396p(c)(2)(B)(i); *Hughes v McCarthy*, 734 F3d 473 (CA 6, 2013) The fact that the SBO Trust did not involve a divestment is not relevant to the assessment of whether it is a countable asset. See *Brewer v Schalansky*, 278 Kan 734, 739-740; 102 P3d 1145, (Kan, 2004) (concluding that "[t]he concepts of transfer and availability of assets are not mutually exclusive" and "there is no reason to automatically deem a transferred asset unavailable").

Therefore, although the transfer of assets to the SBO Trust was not a divestment, as discussed above, Spouse's SBO Trust is a countable asset valued at the full amount of the value of the trust corpus at the time of application. The parties did not dispute the Department's calculation of the PSA. Because the difference between the asset value and the PSA exceeded the $[redacted] MA asset limit applicable to Appellant's case,

Appellant was not asset eligible for MA. Therefore, the Department acted in accordance with Department policy when it denied Appellant's MA application.

DECISION AND ORDER

The Supervising Administrative Law Judge, based on the above findings of fact and conclusions of law, VACATES the ALJ's Hearing Decision under Registration Number 14-010967 and **AFFIRMS** the Department's MA determination.

IT IS SO ORDERED.

C. Adam Purnell
Supervising Administrative Law Judge
for Nick Lyon, Director
Department of Health and Human Services

Date Signed: September 15, 2015

Date Mailed: September 15, 2015

NOTICE: The law provides that within 30 days of receipt of this Decision, the Appellant may appeal it to the circuit court for the county in which he/she lives or the circuit court in Ingham County.

CAP/las

cc: [redacted]