

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

IN THE MATTER OF:

██████████
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██████████

Reg. No.: 14-012876
Issue No.: 2001
Case No.: ██████████
Hearing Date: February 09, 2015
County: Macomb-District 12

ADMINISTRATIVE LAW JUDGE: Alice C. Elkin

HEARING DECISION

Following Claimant's husband's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 45 CFR 99.1 to 99.33; and 45 CFR 205.10. After due notice, a telephone hearing was held on February 9, 2015, from Detroit, Michigan. Attorney ██████████ represented Claimant. Assistant Attorney General ██████████ represented the Department of Human Services (Department). Participants on behalf of the Department included ██████████, Departmental Specialist with the ██████████, and ██████████, Hearing Facilitator.

ISSUE

Did the Department properly deny Claimant's July 31, 2014 application for Medical Assistance (MA) benefits based upon its determination that Claimant had excess assets?

FINDINGS OF FACT

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

1. Claimant and her spouse (Spouse) were married during the relevant time period.
2. On March 3, 2014, Claimant entered a long-term care (LTC) facility, where she remained for more than 30 days.
3. On July 25, 2014, Spouse executed the "Trust Solely for the Benefit of [Spouse]" (SBO Trust) naming himself as beneficiary (Exhibit E).

4. The SBO Trust was funded with assets of Claimant and Spouse.
5. Sections 2.1 and 2.2 of the SBO Trust describe the distributions from the Trust to Spouse:

Section 2.1 Distribution of Income and Principal

During [Spouse's] life and using the attached life expectancy table (attached as Exhibit A), Trustee shall annually distribute such portion of the trust property solely to (or otherwise for the benefit of) [Spouse] so as to result in the use and exhaustion of the entire principal of the trust property during [Spouse's] expected lifetime. To the extent possible, these mandatory distributions should be made in such a manner so as to provide [Spouse] with those benefits and services (and only those benefits and services) that in Trustee's judgment are not otherwise available to [Spouse] from other sources, such as governmental, charitable or other programs. Trustee may make distributions at such time and in such amounts during each year as Trustee, in its sole and absolute discretion, deems best. Trustee shall use its best efforts to administer this trust so as not to disqualify [Spouse] from any current or future benefits to which [Spouse] may be entitled.

(a) Initial Distribution

No distribution may be made to (or for the benefit of) [Spouse] prior to one year following the signing of the trust.

(b) Valuation During First Fiscal Year

For purposes of determining the mandatory distribution amount for the first fiscal year, the property transferred to the trust will be valued as of the date of transfer.

(c) Valuation During Subsequent Fiscal Years

For purposes of computing the mandatory distribution amount for the trust's second and subsequent fiscal years, the trust shall be valued on the last day of that fiscal year.

Section 2.2 Additional Discretionary Distributions

Subject to the above distribution parameters during the first fiscal year, Trustee, in its sole and absolute discretion, may distribute to (or otherwise for the benefit of) [Spouse] all (or such lesser portion) of the

remaining net income (if any) and all (or such lesser portion) [of] the remaining principal (if any) of the trust as Trustee determines to be in [Spouse's] best interest.

(Exhibit E, p. 2.)

6. In an initial asset assessment, the Department determined that the protected spousal amount (PSA) applicable to Claimant's MA asset-eligibility was \$34,259 (Exhibit F).
7. On July 31, 2014, an application for MA for Claimant was submitted to the Department.
8. In connection with processing the application, the Department sent the SBO Trust to its Office of Legal Services/Trust and Annuities Unit for evaluation.
9. On September 9, 2014, the Office of Legal Services/Trust and Annuities Unit issued a memo to the Department worker processing the case that concluded that the transfer of assets to the SBO Trust was not a divestment but that the SBO Trust was a countable asset to Spouse, with a value equal to all the countable net income and the countable assets in the principal of the Trust (Exhibit C, pp. 9-11.)
10. The Department concluded that, due to the SBO Trust being a countable asset, Claimant's total countable assets in the application month of July 2014 exceeded the applicable asset limit for MA eligibility.
11. On September 16, 2014, the Department sent Claimant a Health Care Coverage Determination Notice denying her MA application on the basis that her countable assets exceeded the MA asset limit.
12. On September 25, 2014, Spouse timely filed a request for hearing disputing the Department's decision.

CONCLUSIONS OF LAW

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

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 1396-1396w-5. 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 Servs*, 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 (January 2014), p. 1.

In Michigan, individuals age 65 or older (aged), blind, disabled, entitled to Medicare, or formerly blind or disabled are eligible for MA under SSI-related categories. BEM 105, p. 1. Extended care is an SSI-related MA category that provides MA benefits to aged, blind or disabled individuals in a LTC facility who meet the financial and nonfinancial eligibility criteria. BEM 164 (April 2014), pp. 1-2. For any individual in a LTC facility, eligibility for MA is subject to a \$2000 asset limit applicable to an asset group of one. BEM 211 (January 2014), pp. 6-7; BEM 402 (April 2014), p. 4; BEM 400 (July 2014 2014), p. 7. However, when the individual in the LTC facility is married, the Department excludes the protected spousal amount (PSA), a portion of the individual's and his/her spouse's assets protected for use by the community spouse,¹ from the calculation of the institutionalized spouse's asset-eligibility for MA. BEM 402, pp. 4, 9.

The Department determines the PSA by performing an initial asset assessment to calculate the couple's total countable assets as of the first day of the institutionalized spouse's first continuous period of care. BEM 402, pp. 1, 7. In general, in the absence of a court order or hearing to the contrary, the PSA is equal to one-half of the couple's total countable assets as calculated at the initial asset assessment, subject at the time of Claimant's MA application in 2014 to a minimum of \$23,448 and a maximum of \$117,240. BEM 402, p. 9.

When the institutionalized spouse applies for MA, the amount of his or her countable assets for initial asset eligibility² is equal to (i) the value of the couple's (his, her, their)

¹ The "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.

² The initial asset 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

countable assets for the month being tested **minus** (ii) the PSA. BEM 402, p. 4. If the result of this calculation is greater than the institutionalized spouse's applicable \$2000 asset limit for MA eligibility, the institutionalized spouse is ineligible for MA. BEM 402, p. 4.³

DISCUSSION

In this case, an application for MA extended care benefits was submitted for Claimant, a resident of a LTC facility, on July 31, 2014. The Department concluded that the applicable PSA for Spouse was \$34,259. The Department contends that the SBO Trust Spouse executed on July 25, 2014 was a countable asset in determining Claimant's asset-eligibility for MA and, because the sum of Claimant's assets including the SBO Trust, less the PSA, exceeded \$2000, Claimant was not asset-eligible for MA.

Claimant's counsel argues that the Department's conclusion that the SBO Trust is a countable asset is contrary to its long-standing policy that irrevocable "solely for the benefit" trusts for a community spouse are not countable. At the hearing, the departmental specialist for the Department's ██████████ acknowledged that, prior to August 20, 2014, the Department had found irrevocable "solely for the benefit" of a community spouse trusts not countable when determining the institutionalized spouse's asset eligibility for MA but that effective August 20, 2014 it concluded that such trusts were in fact countable and applied this standard to applications being processed during that period. The parties agree that there was no change in existing policy or law but there was a change in the Department's *application* of existing law and policy.

Where Department policy is not contrary to existing law, the authority of an administrative law judge is limited to determining whether the Department's actions were in accordance with Department policy. BAM 600 (July 2014), p. 37. Furthermore, administrative law judges presiding over Department hearings "have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulations, or overrule or make exceptions to Department policy." Delegation of Hearing Authority executed by Maura Corrigan, Department Director, July 13, 2011. Therefore, the undersigned's authority is limited to determining whether the denial of

day of the institutionalized spouse's first continuous period of care and is used to calculate the PSA. BEM 401, p. 7.

³ If an applicant is determined eligible for MA, the Department reviews any transfer of assets made by the individual prior to application. Assets transferred for less than fair market value during the "look-back period" are deemed divestments, resulting in a penalty period during which time MA will not pay the institutionalized client's LTC expenses. BEM 405 (July 2014), pp. 1-9, 12-16. Transfers made by a client "solely for the benefit of" a spouse are **not** divestments. BEM 405, pp. 9, 11-12. In this case, the Department acknowledges that Claimant's transfer of assets to the SBO Trust did not result in a divestment. The fact that the SBO Trust did not involve a divestment, however, 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").

Claimant's July 31, 2014 MA application was in accordance with Department policy unless the Department's conclusion that Spouse's SBO Trust is a countable asset for Claimant is contrary to existing law.

Accordingly, the matter presented in this case 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 Claimant's MA asset eligibility purposes.

Under Department policy, the determination of whether a trust is a countable asset requires that the trust be evaluated to determine if it is a Medicaid trust, and, if so, whether it is a revocable or irrevocable trust. BEM 401 (July 2014), pp. 3-4, 10-12. 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 (see definition).
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 in this item.

BEM 401, pp. 5-6.

In this case, Spouse's SBO Trust contains funds transferred by Claimant 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.

Determining whether assets in a Medicaid trust are countable depends on whether the Medicaid trust is revocable or irrevocable. In this case, the SBO Trust is identified as irrevocable, and the Department has not disputed that conclusion. (Exhibit E, p. 1, § 1.3; Department's prehearing brief, p. 6). 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 based on, and 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.

In determining the value of the SBO Trust, both BEM 401 and § 1396p(d)(3)(B) provide that if there is **any** condition or circumstance under which the principal in an irrevocable trust could be paid to or on behalf of the person, the portion of the corpus from which payment to the individual can be made is a resource. The State Medicaid Manual, which provides guidance to states in administering their Medicaid programs, explains when there are circumstances under which payments can or cannot be made for purposes of determining the value of an irrevocable trust. State Medicaid Manual, Health Care Financing Administration⁴ Publication No. 45-3, Transmittal 64 (November 1994) *available at* <http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html?DLPage=1&DLSort=0&DLSortDir=ascending>. Although the State Medicaid Manual does not have the force and effect of law, its provisions are relevant and entitled to consideration. *Hughes v McCarthy*, 734 F3d 473, 478 (CA 6, 2013) (finding that statutory interpretations in Health and Human Services' agency manuals are not afforded deference but are entitled to respect "only to the extent that those interpretations have the 'power to persuade'"); *Morris v Okla Dep't of Human*

⁴ The Health Care Financing Administration is now known as the Centers for Medicare and Medicaid Services (CMS).

Servs, 685 F3d 925, 931 (CA 10, 2012) (finding that the provisions in the State Medicaid Manual is entitled to deference “to the extent that they are consistent with the purposes of the federal statute and provide reasonable interpretation thereof”).

In determining whether payments can be made from an irrevocable trust, rendering the trust countable, § 3259.6(E) of the State Medicaid Manual provides as follows:

For example, if an irrevocable trust provides that the trustee can disburse only \$1,000 to or for the individual out of a \$20,000 trust, only the \$1,000 is treated as a payment that could be made under the rules in subsection B [concerning payments from an irrevocable trust]. The remaining \$19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual. On the other hand, if a trust contains \$50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this full amount is considered as payment that could be made under some circumstances, even though the likelihood of payment is remote. Similarly, if a payment cannot be made until some point in the distant future, it is still payment that can be made under some circumstances. (Emphasis in original.)

In this case, the terms of Spouse’s SBO Trust provide as follows:

Section 2.1 Distribution of Income and Principal

During [Spouse’s] life and using the attached life expectancy table (attached as Exhibit A), Trustee shall annually distribute such portion of the trust property solely to (or otherwise for the benefit of) [Spouse] so as to result in the use and exhaustion of the entire principal of the trust property during [Spouse’s] expected lifetime. To the extent possible, these mandatory distributions should be made in such a manner so as to provide [Spouse] with those benefits and services (and only those benefits and services) that in Trustee’s judgment are not otherwise available to [Spouse] from other sources, such as governmental, charitable or other programs. Trustee may make distributions at such time and in such amounts during each year as Trustee, in its sole and absolute discretion, deems best. Trustee shall use its best efforts to administer this trust so as not to disqualify [Spouse] from any current or future benefits to which [Spouse] may be entitled.

(a) Initial Distribution

No distribution may be made to (or for the benefit of) [Spouse] prior to one year following the signing of the trust.

(b) Valuation During First Fiscal Year

For purposes of determining the mandatory distribution amount for the first fiscal year, the property transferred to the trust will be valued as of the date of transfer.

(c) Valuation During Subsequent Fiscal Years

For purposes of computing the mandatory distribution amount for the trust's second and subsequent fiscal years, the trust shall be valued on the last day of that fiscal year.

Section 2.2 Additional Discretionary Distributions

Subject to the above distribution parameters during the first fiscal year, Trustee, in its sole and absolute discretion, may distribute to (or otherwise for the benefit of) [Spouse] all (or such lesser portion) of the remaining net income (if any) and all (or such lesser portion) the remaining principal (if any) of the trust as Trustee determines to be in [Spouse's] best interest.

Under its terms, Spouse's SBO Trust requires the annual distribution of funds from the Trust to Spouse with the expectation that the entire principal of the trust property would be distributed to Spouse over his expected lifetime based on life expectancy tables. It also provides that additional funds may be distributed by the trustee to Spouse if the trustee determines, in its sole and absolute discretion, that such distribution is in Spouse's best interest. The conditions for distributions of all income and principal from the SBO Trust to Spouse are more likely to be satisfied than the conditions leading to disbursement in the State Medicaid Manual example above where funds are disbursed to the beneficiary only in the event the beneficiary needs a heart transplant. Because there is a condition or circumstance for payment of the SBO Trust principal to Spouse, the SBO Trust is a countable asset under the State Medical Manual, with a value equal to the full value of the countable assets in the SBO Trust.

The Social Security Administration's (SSA's) Program Operations Manual System (POMS) SI 01120.201D.2. concerning irrevocable trusts further support this conclusion that the value of the SBO Trust is the value of all the countable assets within the trust corpus. While the POMS, which contains 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, they are entitled to some consideration 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); *Landy v Velez*, 958 F Supp 2d 545, 553 (D NJ, 2013); 70A Am Jur 2d, Social Security and Medicare § 16.

The second example in SI 01120.201D.2.c., similar to the example in the State Medicaid Manual § 3259.6(E), explains that where an irrevocable trust containing \$50,000 provides that the trustee can pay funds from the trust 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. Like the example in the State Medicaid Manual, the conditions for distributions of all income and principal from the SBO 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. Therefore, the POMS provides further support for the conclusion that the SBO Trust is a countable asset with a value equal to the full amount of the value of the assets in the principal of the Trust.

Although Michigan courts have not addressed the application of § 1396p(d)(3)(B) to irrevocable trusts “solely for the benefit of” a community spouse and the determination of whether such trusts are countable assets under federal law, 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 Servs*, 228 P3d 1199 (Okla App, 2009).

In *Johnson III*, at issue was whether certain private trusts (referred in the decision as “community spouse annuity trusts”) established for the sole benefit of the community spouses and 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 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 an employee of the federal Department of Health and Human Services,⁵ 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

⁵ 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.

marital assets (assets belonging to both spouses), and (iii) designed so that the corpus and the income on the corpus would 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 irrevocable trust in that case was a resource available to the institutionalized spouse 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 spouse’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 installments 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 for the duration of his or her life. The SBO Trust in this case requires that assets of the trust be distributed annually to Spouse “so as to result in the use and exhaustion of the entire principal of the trust property during [Spouse’s] expected lifetime.” This provision has the effect, like the trust in *Johnson III*, of allocating payment of the Trust resources to Spouse over his lifetime. The courts’ decisions in *Johnson III* and *Daily* support the conclusion that Spouse’s SBO Trust is a countable asset to Claimant.

The fact that the trustee controls distribution of the Trust assets does not affect the assessment of whether the Trust is a countable asset. 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 State Medicaid Manual and POMS. Furthermore, under § 1396p(d)(2)(C), the determination of a countable asset under § 1396p(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 App, 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). Claimant's argument that the assets in the SBO Trust are unavailable is further undermined by BEM 400 (December 2013), 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.

Further, even though payments from the SBO Trust are to Spouse, not Claimant, the SBO Trust is a countable asset for determining Claimant's asset eligibility at application. BEM 211 (July 2013), pp. 6-7, provides that, for purposes of determining a couple's countable assets for an initial asset assessment or the institutionalized spouse's initial eligibility for MA, the institutionalized spouse and the community spouse are considered a single asset group. 42 USC § 1936p(h)(1), which defines the terms in § 1396p, broadly 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. Therefore, the SBO Trust is countable as Claimant's asset for the initial eligibility calculation.

42 USC § 1396r-5(c)(2) 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 Servs*, 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 Claimant's

MA application, was a countable asset to Claimant at the time of the initial eligibility determination. As such, the Department properly considered the SBO Trust a countable asset for determining Claimant's MA eligibility at application.⁶

Therefore, Spouse's SBO Trust is, in accordance with Department policy and consistent with federal law, a countable asset valued at the full amount of the value of the assets in the trust corpus at the time of application. Claimant's counsel does not dispute that, when the value of Claimant's assets includes Spouse's SBO Trust, the difference between the value of those assets and the applicable PSA exceeds the \$2000 MA asset limit applicable to Claimant's MA asset eligibility. Therefore, the Department acted in accordance with Department policy and federal law when it denied Claimant's MA application on the basis that the value of her countable assets exceeded the limit for MA eligibility.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, AFFIRMS the Department's September 16, 2014 determination denying Claimant's MA application.



Alice C. Elkin
Administrative Law Judge
for Nick Lyon, Interim Director
Department of Human Services

Date Signed: **3/5/2015**

Date Mailed: **3/5/2015**

ACE / tlf

NOTICE OF APPEAL: A party may appeal this Hearing Decision in the circuit court in the county in which he/she resides, or the circuit court in Ingham County, within 30 days of the receipt date.

⁶ 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.

