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

IN THE MATTER OF:

Reg. No.:	14-019121
Issue No.:	2001
Case No.:	
Hearing Date:	May 14, 2015
County:	Wayne-District 82

ADMINISTRATIVE LAW JUDGE: Alice C. Elkin

HEARING DECISION

Following Claimant's counsel'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; and Mich Admin Code, R 792.11002. After due notice, a telephone hearing was held on May 14, 2015, from Detroit, Michigan. Attorneys and represented Claimant. Assistant Attorney General represented the Department of Health and Human Services (Department). Witnesses on behalf of the Department included , Assistance Payment Supervisor; Assistance Payment Worker; and , Departmental Specialist with the Department's Office of Legal Affairs, who participated via telephone conference.

ISSUE

Did the Department properly deny Claimant's May 30, 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 his spouse (Spouse) were married during the relevant time period.

2. On February 10, 2014, Claimant entered a long-term care (LTC) facility where he remained for a continuous period of at least 30 days (Exhibit E).

3. On May 17, 2014, Spouse executed the "Trust Agreement Irrevocable Trust No. 1" which provided that the trust was an irrevocable trust intended as a "solely for the benefit of" trust for the benefit of Spouse (SBO Trust) (Exhibit 1, §§ 1.4, 1.5).

4. The SBO Trust was funded with assets of Claimant and Spouse.

5. Section 2 of the SBO Trust describes the distributions from the Trust to Spouse during Spouse's lifetime:

> 2.2 **Distribution of Resources.** During each fiscal year of the Trust, Trustee shall, from time to time during the fiscal year, pay or distribute to me, or for my sole benefit, during my lifetime such part or all of the net income and principal ("Resources") of the Trust as Trustee determines is necessary in order to at least distribute the resources in an actuarially sound basis if not sooner, provided however, during the first fiscal year of the Trust no distribution shall be made until after approval of Medicaid benefits by the Department of Human Services. Classification of distributions as income or return of principal is solely within the discretion of my Trustee.
>
> 2.3 In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table from Michigan Program Eligibility Manual 405, male or female, depending on the sex of the beneficiary, to determine the appropriate portion of Resources to be distributed in any fiscal year. During my lifetime, no Resources of the Trust can be used for anyone other than me, except for Trustee fees and reasonable and necessary administration expenses. Notwithstanding anything contained herein to the contrary, Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the Resources during my lifetime.
>
> 2.4 The Resources of the Trust shall be valued on the 1st day of February of each fiscal year of the Trust, except in the first fiscal year the Resources of the Trust shall be valued as of the date of their contribution to the Trust.
>
> (Exhibit 1, pp. 4-5.)

6. On May 30, 2014, an application for MA for Claimant was submitted to the Department (Exhibit A).

7. In an initial asset assessment, the Department determined that the protected spousal amount (PSA) applicable to Claimant's MA asset-eligibility was [redacted] (Exhibit E).

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 June 17, 2014, the Office of Legal Services/Trust and Annuities Unit issued a memo to the Department worker processing Claimant's application finding that the SBO Trust was not a countable asset and the transfer of assets to the SBO Trust was not a divestment (Exhibit D).

10. In August 2014, the Department determined that trusts solely for the benefit of a community spouse were countable assets for determining the institutionalized spouse's MA asset eligibility (Exhibit 3). All trusts solely for the benefit of a community spouse in applications that had not been certified as of August 20, 2014, were sent back to the Office of Legal Services/Trust and Annuities Unit for reevaluation.

11. Because the Department had not completed processing Claimant's application on August 20, 2014, the SBO Trust was sent back for reevaluation.

12. On September 9, 2014, the Office of Legal Services/Trust and Annuities Unit issued a second memo to the Department worker processing Claimant's application that replaced the June 17, 2014 evaluation. The updated memo confirmed that the transfer of assets to the SBO Trust was not a divestment but concluded that the SBO Trust was a countable asset, with a value equal to all the countable net income and the countable assets in the principal of the Trust (Exhibit C).

13. The Department concluded that, due to the SBO Trust being a countable asset, Claimant's total countable assets exceeded the applicable asset limit for MA eligibility.

14. On September 24, 2014, the Department sent Claimant a Health Care Coverage Determination Notice denying his MA application on the basis that his countable assets exceeded the MA asset limit (Exhibit 2).

15. On December 19, 2015**,** Claimant's attorney filed an unsigned request for hearing disputing the Department's decision; a signed copy was submitted to the Michigan Administrative Hearing System (MAHS) on January 20, 2015.

CONCLUSIONS OF LAW

Department policies are contained in the Department of Health and Human Services Bridges Administrative Manual (BAM), Department of Health and 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 Department of Human Services) 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 who are aged (age 65 or older), blind, disabled, entitled to Medicare, or formerly blind or disabled are eligible for MA under SSI-related categories. BEM 105, p. 1. Assistance with long-term care costs is available under MA SSI-related categories for individuals who meet the financial and nonfinancial eligibility criteria. BEM 163 (July 2013), pp. 1-2; BEM 164 (April 2014), pp. 1-2; BEM 166 (July 2013), 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), p. 4; BEM 402 (April 2014), p. 3; BEM 400 (February 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 applicant'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 value of the couple's total countable assets as calculated at the initial asset assessment, subject to minimum and maximum amounts set annually in accordance with federal law. BEM 402, p. 9.

[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.

When the institutionalized spouse applies for MA, the amount of his or her countable assets for initial asset eligibility[2] is equal to (i) the value of the couple's (his, her, their) 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 based on excess assets. BEM 402, p. 4.

If an applicant **is** determined asset-eligible for MA, the Department then reviews any transfer of assets made by the individual prior to application. Assets transferred for less than fair market value during the prescribed "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 (October 2013), 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 does not, however, preclude the assessment of whether the SBO Trust 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").

DISCUSSION

As a preliminary matter, the issue of the validity of the hearing request was discussed at the hearing. Claimant's attorney submitted an unsigned request for hearing with the Department on December 19, 2014, disputing the Department's finding that Claimant was ineligible for MA. Hearing requests must be signed; MAHS denies hearing requests without signatures. BAM 600 (March 2014), p. 2.

In a letter dated January 16, 2015, MAHS advised Claimant that because the hearing request was not signed, a hearing could not be scheduled. The January 16, 2015, letter further advised Claimant that "[i]f the document bearing your signature is received by MAHS your hearing request can then be reviewed and if a valid reason exists a hearing will be scheduled." Counsel explained at the hearing, and in a supplemental brief filed after the hearing, that he had a signed copy of the hearing request on December 19, 2014, but because of an administrative error in his office, an unsigned copy was forwarded to the Department. Upon being advised by MAHS that the submitted hearing request was unsigned, Claimant's attorney submitted the signed hearing request to MAHS on January 20, 2015. MAHS subsequently scheduled Claimant's hearing. In

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[2] The initial asset eligibility is the institutionalized spouse's asset eligibility for MA during the application month, any retroactive month (up to three months prior to the application month), and the processing month. BEM 402, 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 and is used to calculate the PSA. BEM 402, p. 7.

essence, the January 16, 2015, letter from MAHS had the effect of tolling counsel's hearing request to the date it was submitted on December 19, 2014, until the signed hearing request was received. Because a signed hearing request was submitted and the hearing request filed on December 19, 2014, was timely submitted within 90 days of the Department's September 24, 2014, Health Care Coverage Determination Notice denying Claimant's MA application, Claimant's hearing request is deemed timely filed and the merits of Claimant's issue are addressed.

In this case, an application for MA extended care benefits was submitted for Claimant, a resident of a LTC facility, on May 30, 2014. The Department calculated the PSA for Spouse as [redacted] (Exhibit E). The Department contends that the SBO Trust 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 Office of Legal Services 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 (Exhibit 3). In fact, in Claimant's case, the Department had initially concluded in a June 17, 2014, internal memo that the SBO Trust was not a countable asset (Exhibit D). However, because the application had not been certified as of August 20, 2014, the SBO Trust was resubmitted to the Office of Legal Services for reevaluation resulting in a new internal memo dated September 9, 2014, concluding that the SBO Trust **was** a countable asset (Exhibit C). The parties agree that there was no change in existing policy or law but there was a change in the Department's interpretation and application of existing policy and law.

Claimant's counsel argues that the Department's undue delay in processing the May 30, 2014, application beyond the applicable 45-day standard of promptness for processing MA applications under BAM 115 (July 2013), p. 15, resulted in the SBO Trust being a countable asset and, consequently, Claimant's MA application being denied for excess assets. Counsel argues that the Department should have applied Department policy as it interpreted such policy at the time the application was submitted in May 2014. In support of its argument, counsel cites *In re D'Amico Estate*, 435 Mich 551; 460 NW2d 198 (1990).

In *D'Amico*, the decedent had won a state lottery prize entitling her to $1,000,000 payable in twenty annual installments of $50,000. At the time of her death in 1981, fourteen installments remained unpaid. Consistent with the Department of Treasury's interpretation of the Lottery Act at the time of decedent's 1981 death, the lottery

proceeds were not included in the calculation of the inheritance tax. In 1983, the Department of Treasury reversed its position and announced it would no longer adhere to prior interpretations of the Lottery Act that excluded lottery proceeds from the inheritance tax. In 1986, the Department of the Treasury imposed an inheritance tax on lottery proceeds paid to the decedent's heirs. The Michigan Supreme Court concluded that the inheritance tax did not apply to the heirs' lottery proceeds, reasoning that the Department of the Treasury should be bound by the first, contemporaneous construction of the Lottery Act, at least with regard to the estate of persons who purchased lottery tickets before September 1983 when the Department advised inheritance tax field examiners of its new interpretation of the lottery law. *Id.* at 564. In making its decision, the Court relied on the general principle that "an administrative agency having interpretive authority may reverse its interpretation of a statute, but that its new interpretation applies only prospectively." *Id.* at 562 (citing 2A Sands, Sutherland Statutory Construction (4th ed), § 49.05, p. 356).

Claimant's counsel argues that the principle cited in *D'Amico* disallowing an administrative agency's retrospective application of a new policy interpretation applies in the instant case. However, the facts in *D'Amico* and the instant case are distinguishable. Unlike the situation in *D'Amico* where the circumstances leading to the inheritance tax, namely the decedent's 1981 death, occurred prior to the Department of Treasury's 1983 reinterpretation of the application of inheritance taxes to lottery winnings, in this case, Claimant was not yet approved for, and therefore not a recipient of, MA benefits at the time the Department revised its interpretation concerning the countability of "solely for the benefit of" trusts. Because Claimant was an MA applicant, not a recipient, the Department did not retroactively apply its reinterpreted policy concerning "solely for the benefit of" trusts when it applied the policy in processing Claimant's application.

To the extent Claimant's counsel argues that Claimant relied on the Department's prior interpretation of policy or that the Department failed to properly notify Claimant of its change in the interpretation and application of the policy, counsel is presenting an equitable argument. In the absence of an express legislative conferral of authority, an administrative agency generally lacks the powers of a court of equity. *Delke v Scheuren*, 185 Mich App 326, 332; 460 NW2d 324 (1990). Because the Legislature has not conferred equitable authority to MAHS with respect to hearings relating to Department actions, the undersigned is precluded from addressing Claimant's equitable arguments of reliance, undue delay, or lack of notice.

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 (March 2014), p. 39. 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.

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 law and Department policy existing at the time of Claimant's application 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 (October 2013), 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 (Exhibit 1, § 1.4), and the Department has not disputed that conclusion. If a Medicaid trust is an irrevocable trust, BEM 401, p. 11, provides the person's countable assets include the value of the countable assets in the trust principal and the value of

the trust's countable income if there is any condition under which the principal from the trust could be paid to or on behalf of the person. 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.

Pointing to the language in BEM 401 referencing "the person" and in § 1396p(d)(3)(B)(i) referencing "the individual," Claimant's counsel argues that the person and the individual referenced in each provision is the institutionalized spouse. Counsel contends that, consequently, BEM 401 and § 1396p(d)(3)(B) require only that trusts to, or for the benefit of, the *institutionalized spouse* be considered in calculating countable assets, and because the SBO Trust is to the sole benefit of the *community spouse*, it is not counted in determining Claimant's MA asset eligibility. Counsel concludes that, because payments from the SBO Trust are made solely to the community spouse and no payment from the SBO Trust could be made to the institutionalized spouse, the SBO Trust should be evaluated under § 1396p(d)(3)(B)(ii), which applies when "no payment could under any circumstances be made to the individual" and would require the transfer of assets to the SBO Trust to be assessed **only** for divestments.

This argument fails to consider § 1396p(d)(3)(B) within the context of the remaining provisions of § 1396p(d). Section 1396p(d)(1) provides that in determining an individual's eligibility for MA benefits, the rules in subparagraph (3) apply to a trust "established by such individual." Under § 1396p(d)(2), an individual is considered to have "established" a trust if (i) assets of the individual were used to form all or part of the corpus of the trust and (ii) either the individual or the individual's spouse established such trust other than by will. In this case, Claimant's and Spouse's assets were used to fund the SBO Trust, and the SBO Trust was established by Spouse. Therefore, the SBO Trust is a trust established by Claimant under § 1396p(d)(3)(B) and the value of the trust must be considered in determining Claimant's MA asset eligibility.

Moreover, 42 USC 1936p(h)(1), which defines the terms used 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 the individual or such individual's spouse." BEM 401, p. 4 defines resources consistent with this definition. Therefore, Spouse's SBO Trust is a resource to Spouse, the value of which must be considered in assessing Claimant's initial MA asset eligibility calculation.

This conclusion is consistent with the underlying policy for the initial asset eligibility evaluation requiring that assets of **both** the institutionalized spouse and the community spouse be counted in determining the institutionalized spouse's initial MA asset eligibility. BEM 211, pp. 6-7 provides that, for purposes of determining the institutionalized spouse's initial asset eligibility for MA at application, the institutionalized spouse and the community spouse are considered a single asset group. 42 USC § 1396r-5(c)(2) concerning the calculation of resources at the time of an institutionalized spouse's initial asset eligibility at application provides, in relevant part, as follows:

> 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][3] (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 SBO Trust, which was an asset to Spouse at the time of Claimant's MA application, is considered in calculating Claimant's initial asset eligibility at application.

The State Medicaid Manual, which provides guidance to states in administering their Medicaid programs, supports this conclusion. State Medicaid Manual, Health Care Financing Administration[4] Publication No. 45-3, Transmittal 64 (November 1994)

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[3] The community spouse resource allowance, as defined in (f)(2)(A), is the PSA.

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

available at http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-ManualsItems/CMS021927.html?DLPage=1&DLSort=0&DLSortDir=asending. 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 Servs*, 685 F3d 925, 931 (CA 10, 2012) (finding that the provisions in the State Medicaid Manual are entitled to deference "to the extent that they are consistent with the purposes of the federal statute and provide reasonable interpretation thereof").

Section 3259.3 of the State Medicaid Manual provides that the trust provisions of § 3259 apply to any individual who establishes a trust and who is an applicant for Medicaid. An individual is considered to have established a trust if his or her assets (regardless of how little) were used to form part or all of the corpus of the trust and if the grantor of the trust was the individual or the individual's spouse. Because Claimant's assets were used to fund the SBO Trust and Spouse is the Trust grantor, Claimant is considered to have established the SBO Trust. Because Claimant established the SBO Trust and is an MA applicant, the trust provisions of § 3259 apply. Under § 3259.5, a trust that meets the basic definition of a trust can be counted in determining eligibility for Medicaid. Therefore, the SBO Trust is countable.

Section 3258.11 of the State Medicaid Manual acknowledges that, while an institutionalized spouse can transfer unlimited assets to the community spouse or to a third party for the sole benefit of a community spouse without incurring a divestment penalty, resources transferred to the community spouse are still considered available to the institutionalized spouse for asset eligibility purposes as are assets transferred to a third party for the sole benefit of the spouse unless the assets are beyond the reach of either spouse. Unlike a commercially purchased annuity, which several courts have concluded is not an asset because neither spouse maintains an ownership interest in the funds used to purchase the annuity (see *Morris*, 685 F3d at 933 and cases cited therein), the "solely for the benefit" of a spouse trust, which is established by, and funded with assets of, the institutionalized spouse and community spouse and whose corpus is intended to be distributed to the community spouse, is within the reach of the community spouse. Therefore, the State Medicaid Manual supports the conclusion that Spouse's SBO Trust is a countable asset to Spouse and, as such, to Claimant, in determining Claimant's MA eligibility.

It is noted that, 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 trusts are countable assets to the institutionalized spouse for Medicaid eligibility purposes, reasoning that payments from the trust to the community spouse would benefit the institutionalized

spouse. See *Johnson v Guhl*, 357 F3d 403, 409 (CA 3, 2004) *(Johnson III)* and *Daily v Okla Dep't of Human Servs*, 228 P3d 1199, 1203 (Okla App, 2009)

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 explains through examples in § 3259.6(E) when there are circumstances under which payments can or cannot be made for purposes of determining the value of an irrevocable trust:

> 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 <u>some</u> 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 in §§ 2.2 to 2.4 as follows:

> 2.2 **Distribution of Resources.** During each fiscal year of the Trust, Trustee shall, from time to time during the fiscal year, pay or distribute to me, or for my sole benefit, during my lifetime such part or all of the net income and principal ("Resources") of the Trust as Trustee determines is necessary in order to at least distribute the resources in an actuarially sound basis if not sooner, provided however, during the first fiscal year of the Trust no distribution shall be made until after approval of Medicaid benefits by the Department of Human Services. Classification of distributions as income or return of principal is solely within the discretion of my Trustee.
>
> 2.3 In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table from Michigan Program Eligibility Manual 405, male or female, depending on the sex of the beneficiary, to determine the appropriate portion of Resources to be distributed in any fiscal year. During my lifetime, no Resources of the Trust can be used for anyone other than me, except for Trustee fees and reasonable and necessary administration expenses. Notwithstanding anything contained herein to the contrary, Trustee shall distribute the Resources of the Trust at a rate that is calculated to use up all of the Resources during my lifetime.

> 2.4 The Resources of the Trust shall be valued on the 1st day of February of each fiscal year of the Trust, except in the first fiscal year the Resources of the Trust shall be valued as of the date of their contribution to the Trust.
>
> (Exhibit 1, pp. 4-5.)

Under its terms, Spouse's SBO Trust requires the distribution of funds from the Trust to Spouse on an actuarially-sound basis with the expectation that the entire principal of the Trust property would be distributed to Spouse over her expected lifetime based on life expectancy tables. 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 entire 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 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. 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. Any argument 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.

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. 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 May 30, 2014 MA application on the basis that the value of his 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 24, 2014, Health Care Coverage Determination Notice denying Claimant's May 30, 2014, MA application.

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

Date Signed: **6/5/2015**

Date Mailed: **6/5/2015**

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. A copy of the claim or application for appeal must be filed with the Michigan Administrative Hearing System (MAHS).

A party may request a rehearing or reconsideration of this Hearing Decision from MAHS within 30 days of the mailing date of this Hearing Decision, or MAHS **MAY** order a rehearing or reconsideration on its own motion. MAHS **MAY** grant a party's Request for Rehearing or Reconsideration when one of the following exists:

- Newly discovered evidence that existed at the time of the original hearing that could affect the outcome of the original hearing decision;
- Misapplication of manual policy or law in the hearing decision which led to a wrong conclusion;
- Typographical, mathematical or other obvious error in the hearing decision that affects the rights of the client;
- Failure of the ALJ to address in the hearing decision relevant issues raised in the hearing request.

The party requesting a rehearing or reconsideration must specify all reasons for the request. MAHS will not review any response to a request for rehearing/reconsideration. A request must be *received* in MAHS within 30 days of the date this Hearing Decision is mailed.

A written request may be faxed or mailed to MAHS. If submitted by fax, the written request must be faxed to (517) 335-6088 and be labeled as follows:

Attention: MAHS Rehearing/Reconsideration Request

If submitted by mail, the written request must be addressed as follows:

Michigan Administrative Hearings
Reconsideration/Rehearing Request
P.O. Box 30639
Lansing, Michigan 48909-8139

cc: