

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

**IN THE MATTER OF:**

[REDACTED]

Reg. No.: 14-018534  
Issue No.: 2001  
Case No.: [REDACTED]  
Hearing Date: February 4, 2015  
County: Livingston

**ADMINISTRATIVE LAW JUDGE:** Vicki Armstrong

**HEARING DECISION**

Following Claimant'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, an in-person hearing was held on February 4, 2015, from Howell, Michigan. Claimant's Authorized Hearing Representative, [REDACTED], appeared on Claimant's behalf and provided testimony. Participants on behalf of the Department of Human Services (Department) included Assistant Attorney General [REDACTED] and Eligibility Specialists' [REDACTED] and [REDACTED].

**ISSUE**

Did the Department properly deny Claimant's 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/her spouse (Spouse) were married during the relevant time period.
2. In July 23, 2014, Claimant required long-term skilled nursing care and entered a long-term care (LTC) facility.
3. On July 30, 2014, Spouse executed the "Solely for the Benefit of Spouse Irrevocable Trust" (SBO Trust) naming himself as beneficiary.
4. On September 28, 2014, \$ [REDACTED] was transferred into the SBO Trust (Dept Exhibit 37).
5. Under Section 2.2 of the SBO Trust, the trustee was required to make annual distributions of income and principal from the Trust to Spouse on an actuarially-sound basis:

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 whatever part of the net income and principal (the "Resources") of the Trust that Trustee determines is necessary to distribute the resources on an actuarially sound basis. However, during the first year of the Trust, distribution shall be made to me after February 1, 2015 of that year, but before June 30, 2015. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table attached to this Agreement as Exhibit A, to determine the appropriate minimum portion of the Resources to be distributed in any fiscal year. During my lifetime, no Resources of Trust may be used for anyone other than me, except for Trustee fees. Notwithstanding anything in this Agreement 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. The Resources of the Trust shall be valued on the first day of January of each fiscal year of the Trust, except that in the first fiscal year the Resources of the Trust shall be valued as of the date of their contribution to the trust.

6. In an initial asset assessment, the Department determined that the protected spousal amount (PSA) was \$ [REDACTED]
7. On September 30, 2014, Claimant applied for MA.
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 August 29, 2014, the Office of Legal Services/Trust and Annuities Unit issued a memo finding that the SBO Trust was not a divestment but was a countable asset, with a value equal to the principal in the Trust.
10. The Department concluded that, due to the SBO Trust being a countable asset, Claimant's total assets in the application month of September 1 – September 30, 2014, exceeded the applicable asset limit for MA eligibility.
11. On October 24, 2014, the Department sent Claimant's counsel a corrected Health Care Coverage Determination Notice denying Claimant's MA application on the basis that her countable assets exceeded the MA asset limit.
12. On December 8, 2014, Claimant's counsel 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.

The Department denied the September 30, 2014, MA application submitted by Claimant, a resident of a LTC facility as of July 23, 2014, due to excess assets. The Department contends that the SBO Trust Spouse executed on July 30, 2014, was a countable asset in determining Claimant's asset-eligibility for MA and, because the value of the SBO Trust exceeded the applicable asset limit for MA eligibility, Claimant was ineligible for MA.

### **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. 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 (July 2013), p. 1.

In Michigan, individuals who are over age 65, 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 individuals age 65 or older, blind or disabled in a LTC facility who meet the financial and nonfinancial eligibility criteria. BEM 164 (*April 2014*), pp. 1-2. For an individual in a LTC facility with a community spouse, 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 (*February 1, 2014*), p. 7. When the institutionalized spouse is married, the Department excludes the protected spousal amount (PSA), a portion of the couple's assets protected for use by the community spouse, 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 \$ [REDACTED] and a maximum of \$ [REDACTED].

When the institutionalized spouse applies for MA, the amount of his or her countable assets for initial asset eligibility 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 applicable \$2000 asset limit for MA eligibility, the institutionalized spouse is ineligible for MA. BEM 402, p. 4. Applicants eligible for the processing month are automatically asset eligible for up to 12 calendar months (the presumed asset eligible period). BEM 402, pp. 4-5.

In this case, the Department concluded that the applicable PSA for Spouse was \$ [REDACTED]. Claimant does not dispute this calculation. The Department contends that the SBO Trust was a countable asset and, because the sum of Claimant's assets, less the \$ [REDACTED] PSA, exceeded \$ [REDACTED] the Department concluded that Claimant 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. Claimant's counsel has raised concerns 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. However, 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 in denying Claimant's MA application were in accordance with Department policy. BAM 600 (July 2013), p. 35; Delegation of Hearing Authority executed by Maura Corrigan, Department Director, July 13, 2011 (expressly providing that officers "have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulations, or overrule or make exceptions to Department policy.")

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.
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.  
BEM 401 (October 2013), pp. 5-6.

In this case, Spouse's SBO Trust contains funds and other assets 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.

Whether a Medicaid trust is 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 7, p. 22). 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,<sup>1</sup> 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 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.

In this case, the terms of Spouse's SBO Trust provide under § 2.2 as follows:

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 whatever part of the net income and principal (the "Resources") of the Trust that Trustee determines is necessary to distribute the resources on an actuarially sound basis. However, during the first year of the Trust, distribution shall be made to me after February 1, 2015 of that year, but before June 30, 2015. In determining an actuarially sound basis for distribution, Trustee shall use the life expectancy table attached to this Agreement as Exhibit A, to determine the appropriate minimum portion of

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<sup>1</sup> 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.

the Resources to be distributed in any fiscal year. During my lifetime, no Resources of Trust may be used for anyone other than me, except for Trustee fees. Notwithstanding anything in this Agreement 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. The Resources of the Trust shall be valued on the first day of January of each fiscal year of the Trust, except that in the first fiscal year the Resources of the Trust shall be valued as of the date of their contribution to the trust.

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]).

**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).

**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 “[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 \$50,000 in a trust is a resource with a value of \$50,000 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 100<sup>th</sup> 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, “at a rate that is calculated to use up all of the Resources during [Spouse’s] lifetime.” Thus, SBO Trust anticipates that the entire net income and principal of the Trust is to be paid to Spouse over his 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 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, 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.



Claimant's argument that, because the spouse could not receive payments from the Trust until February, 2015, 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 § 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, 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.

To the extent that Claimant contends that the trust assets are not available because the SBO Trust is for the benefit of Spouse and payments are made to Spouse, not Claimant, 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<sup>2</sup> for MA, the institutionalized spouse and the community spouse are considered a single asset group. 42 USC § 1936p(h)(1) 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. **BEM 401, p. 4 defines resources consistent with this definition.** Therefore, **Spouse's** SBO Trust is Claimant'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

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<sup>2</sup> 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.

(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 Claimant's MA application, was also an asset to Claimant at the time of the initial eligibility determination. As such, the Department properly considered the trust as a countable asset for determining Claimant's MA eligibility.<sup>3</sup>

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, Spouse's SBO Trust is, as discussed above, a countable asset valued at the full amount of the value of the trust corpus at the time of application, which was \$ [REDACTED] BEM 401, p. 9, BEM 400 (December 2013), p. 14. The parties did not dispute the Department's calculation of the \$117,240 PSA. Because the difference between the

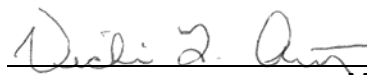
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<sup>3</sup> An institutionalized spouse's asset eligibility at application is to be distinguished from the determination of his or her ongoing MA eligibility. Once an institutionalized spouse is eligible for MA, he or she is automatically asset-eligible 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.

asset value of \$ [REDACTED] and the \$ [REDACTED] PSA exceeds the \$2000 MA asset limit applicable to Claimant's case, Claimant was not asset eligible for MA. Therefore, the Department acted in accordance with Department policy when it denied Claimant's MA application

### **DECISION AND ORDER**

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



**Vicki Armstrong**  
Administrative Law Judge  
for Nick Lyon, Interim Director  
Department of Human Services

Date Signed: **2/23/2015**

Date Mailed: **2/23/2015**

VLA/las

**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 party may request a rehearing or reconsideration of this Hearing Decision from the Michigan Administrative Hearing System (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:

