

**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.: 14-017327
Issue No.: 2001
Case No.: ██████████
Hearing Date: February 04, 2015
County: Macomb-District 12

ADMINISTRATIVE LAW JUDGE: Alice 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, an in-person hearing was held on February 4, 2015, from Mt. Clemens, Michigan. Attorney ██████████ represented Claimant. ██████████ ██████████ ██████████ represented the Department of Human Services (Department). Participants on behalf of the Department included ██████████ ██████████, Departmental Specialist with the Office of Legal Services; ██████████, Eligibility Specialist; and ██████████, Hearing Facilitator.

ISSUE

Did the Department properly deny Claimant's April 29, 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. In August 15, 2013, Claimant was hospitalized and subsequently was released to a long-term care (LTC) facility.
3. On April 17, 2014, Spouse executed the "Solely for the Benefit of a Spouse Trust" (SBO Trust) naming himself as beneficiary (Exhibit F).
4. The SBO Trust was funded with assets of Claimant and Spouse.

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 fiscal year of the Trust, the distribution shall be made to me after **January 1, 2015**, but before **March 10, 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 the 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 April 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.

(Exhibit F, 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 \$117,240 (Exhibit C).
7. On April 29, 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 June 19, 2014, the Office of Legal Services/Trust and Annuities Unit issued a memo to the Department worker processing the case finding that the SBO Trust was not a countable asset and the transfer of assets to the SBO Trust was not a divestment.
10. On August 29, 2014, the Office of Legal Services/Trust and Annuities Unit issued a second memo to the Department worker processing the case that replaced the evaluation dated June 19, 2014 and 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.

11. The Department concluded that, due to the SBO Trust being a countable asset, Claimant's total countable assets in the application month of April 2014 exceeded the applicable asset limit for MA eligibility.
12. On September 11, 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.
13. On November 26, 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 (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 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) 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. Applicants who are asset eligible for the month of application are automatically asset eligible for up to twelve subsequent calendar months (the presumed asset eligible period). BEM 402, pp. 4-5.

DISCUSSION

In this case, an application for MA extended care benefits was submitted for Claimant, a resident of a LTC facility, on April 29, 2014. The Department concluded that the applicable PSA for Spouse was \$117,240. Claimant does not dispute this calculation. The Department contends that the SBO Trust Spouse executed on April 17, 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 \$117,240 PSA, exceeded \$2000, Claimant was not asset-eligible for MA.

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, noting that in the June

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

19, 2014 memo, the Department's Office of Legal Affairs concluded that the SBO Trust was not countable but that in the August 29, 2014 memo replacing the June 19, 2014 memo, it changed its position and concluded that the SBO Trust was a countable asset. 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 (March 2014), p. 39; 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.") Therefore, the undersigned's authority is limited to determining whether the denial of Claimant's April 29, 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.

Claimant's counsel's also challenges the Department's actions based on equitable principals, including equitable estoppel, undue delay in processing the application, and reliance. However, 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 the Michigan Administrative Hearing System with respect to hearings relating to Department actions, the undersigned lacks the authority to address Claimant's arguments based on equitable principles.

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.³

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

³ The Department acknowledges that the transfer of assets from Claimant to the sole benefit of Spouse pursuant to the SBO Trust is not a divestment (Exhibit A, p. 3). Therefore, no divestment penalties apply. BEM 405 (October 2013), pp. 1, 9. However, the fact that the SBO Trust did not involve a divestment under BEM 405 is independent of the assessment of whether SBO Trust is a countable asset under BEM 401. 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").

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 F, p. 1, § 1.5; Department's prehearing brief, p. 7). 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.

Claimant's counsel contends that 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, accordingly, BEM 401 and § 1396p(d)(3)(B) do not require that the SBO Trust, which is to the benefit of the *community spouse*, be counted in determining Claimant's MA asset eligibility. In support of this argument, counsel argues that BEM 401, which requires consideration of payment made to or on behalf of "the person," and § 1396p(d)(3)(B), which requires consideration of payment from the trust to or for the benefit of "the individual," are intended to apply **only** to the institutionalized spouse and if the community spouse was intended to be included, the policy would expressly include "and spouse." Counsel distinguishes the language in § 1396p(d)(3)(B) to that in 42 USC 1382b of Subchapter XVI of the Social Security Act, which pertains to an individual's asset eligibility for Supplemental Security Income (SSI). In counting the value of trust assets in determining an individual's asset eligibility for SSI, §1382b(e)(3)(B) expressly provides that the individual's resources from an irrevocable trust include the portion of the corpus from which payment "to or for the benefit of the individual (or the individual's spouse)" could be made (emphasis added). Counsel argues that the absence of "or the individual's spouse" in BEM 401 and § 1396p(d)(3)(B) is intended to exclude the trust solely for the benefit of a community spouse from the calculation of the institutionalized spouse's MA asset eligibility.

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 and the value of the trust under § 1396p(d)(3)(B) 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 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 (January 2014), 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 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]⁴ (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. As such, the Department properly considered the SBO Trust a countable asset in determining Claimant's MA eligibility.

Further support for this conclusion is found in the State Medicaid Manual, which provides guidance to states in administering their Medicaid programs. State Medicaid Manual, Health Care Financing Administration⁵ 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>

⁴ For purposes herein, the "community spouse resource allowance" is the PSA.

⁵ The Health Care Financing Administration is now known as the Centers for Medicare and Medicaid Services (CMS).

=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 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").

Section 3258.11 of the State Medicaid Manual explains that, while transfer of assets between spouses, or to a third party for the sole benefit of a spouse, are not subject to transfer penalties for divestments, this unlimited transfer exception for spouses generally has little effect on the eligibility determination of the institutionalized spouse "primarily because resources belonging to both spouses are combined in determining eligibility for the institutionalized spouse." It further provides that the exception from divestment penalties for transfers to a third party for the sole benefit of the spouse "may have greater impact on eligibility because resources may potentially be placed *beyond the reach of either spouse* and thus not be counted for eligibility purposes." (Emphasis added.) Read together, the statements in § 3258.11 indicate that a transfer "for the benefit of" a community spouse is a countable asset for the institutionalized spouse *unless* the resource is beyond the reach of *either* spouse. Therefore, the State Medicaid Manual supports the conclusion that Spouse's SBO Trust is a countable asset in determining Claimant's MA eligibility if it is reachable to Spouse, which, as discussed below, it is.

Although Michigan courts have not addressed whether an irrevocable trust "solely for the benefit of" a community spouse is a countable asset to the institutionalized spouse for Medicaid eligibility purposes, other jurisdictions have addressed this issue and concluded that such a trust **is** a countable asset. 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 (referred in the decision as "community spouse annuity trusts") that were established for the sole benefit of a community spouse 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,⁶ and

⁶ 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

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 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.

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 fiscal year of the Trust, the distribution shall be made to me after **January 1, 2015**, but before **March 10, 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 the 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 April of

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.

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.

(Exhibit F, p. 2.)

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 payment of all of the trust's assets and income 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, 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 all 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.

The decision in *James v Richman*, 465 F Supp 2d 395 (MD Pa 2006),), aff'd 547 F3d 214 (CA 3, 2008), referenced by Claimant is distinguishable from the present case because it concerns a *commercial* annuity purchased for the benefit of the community spouse, not a trust. In that case, the institutionalized spouse's and community spouse's funds were used to purchase the annuity from a commercial insurance company licensed to sell such products in the state of Pennsylvania. The district court concluded that the funds used to purchase the annuity were not a countable resource to the institutionalized spouse because neither spouse had an ownership interest in those funds any longer. The use of resources to purchase an annuity is distinguishable from the placement of a resource in a Medicaid trust. In fact, BEM 401, p. 10, provides that an asset is not considered unavailable because it is owned by the Medicaid trust rather than the person. It is further noted that annuities have separate statutory provisions governing their treatment in determining an institutionalized spouse's MA eligibility. See § 1396p(c)(1)(G) and (e).

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. Section 3259.6(E) of the State Medicaid Manual provides the following example to explain when there are circumstances under which payments can or cannot be made for purposes of determining the value of the 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 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, 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, the 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 Spouse, the beneficiary. 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 example above where funds are disbursed to the beneficiary only in the event the beneficiary needs a heart transplant. Therefore, the SBO Trust is a countable asset under the State Medical Manual, with a value equal to the full value of the countable asset 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 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, 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 principal in the Trust.

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 does not dispute that, when the value of her 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 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 11, 2014 determination denying Claimant's MA application.



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

Date Signed: **2/19/2015**

Date Mailed: **2/19/2015**

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 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:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]