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

IN THE MATTER OF:

Reg. No.:	14-009181-RECON REHD/RECON
Issue No.:	2001
Case No.:	
Hearing Date:	October 21, 2014
County:	Macomb (12)

SUPERVISING ADMINISTRATIVE LAW JUDGE: C. Adam Purnell

DECISION AND ORDER OF RECONSIDERATION

This matter is before the undersigned Supervising Administrative Law Judge (SALJ) pursuant to the Department of Health and Human Services (Department's) timely Request for Rehearing/Reconsideration of the Hearing Decision generated by the assigned Administrative Law Judge (ALJ) at the conclusion of the hearing conducted on October 21, 2014, and mailed on October 29, 2014, in the above-captioned matter.

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

This matter having been reviewed, an Order Denying Request for Rehearing/Reconsideration was mailed on December 11, 2014. An Order Vacating Order Denying Request for Rehearing/Reconsideration and Order Granting Request for Reconsideration was mailed on January 5, 2015.

ISSUE

Did the ALJ erred in reversing the Department's denial of Claimant's application for Medical Assistance (MA) based on its determination that Claimant had excess assets?

FINDINGS OF FACT

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

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

2. At some point, Claimant required long-term skilled nursing care and entered a long-term care (LTC) facility.

3. On January 10, 2014, Claimant's spouse executed the "[Spouse] Sole Benefit Trust (SBO Trust) naming himself as beneficiary. (Exhibit 1, pp 5-12)

4. The SBO Trust, under Section 2.2, requires the trustee to make annual distributions of income and principal from the trust to Spouse on an actuarially-sound basis:

   "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 whatever part of the net income and principal (the Resources) of the Trust that Trustee determines is necessary to distribute the resources in an actuarially sound basis. However, during the first fiscal year of the Trust, the distribution shall be made to me after January 10, 2014, but before December 31, 2014." (See Exhibit 1, p 6)

5. On or about May 30, 2014, Claimant, by her attorney, applied for MA Long Term Care (LTC) benefits and also requested retroactive MA benefits for March and April.

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

7. On April 2, 2014, the Department's Office of Legal Services/Trust and Annuities Unit issued a memorandum to the Department caseworker responsible for processing the case which determined that the transfer of assets into the SBO Trust is not a divestment but was a countable asset with a value equal to all the countable net income and countable assets in the principal of the trust. (Exhibit 1, pp 3-4)

8. After the Department mailed Claimant a Notice of Case Action which denied the MA application due to excess assets, Claimant's spouse requested a hearing on July 30, 2014.

9. On October 21, 2014, a hearing was held before an ALJ.

10. On October 29, 2014, the ALJ issued a Hearing Decision which reversed the Department.

11. The Department's Request for Rehearing/Reconsideration was granted.

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 (July 2013), 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 (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 (July 2013), pp. 6-7; BEM 402 (July 2013), p. 4; BEM 400 (December 2013), p. 7. However, when the individual 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. BEM 402, p. 9.

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)

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[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).

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 March 7, 2014. BEM 402, p 4 provides that the assets of both spouses are calculated when determining if there are excess assets. The record shows that, per BEM 400, p 7, both spouse are permitted to have $2,000.00 for the applicant spouse plus the amount calculated as the Spousal Protected Amount which was $103,577.18. This means that both Claimant and her spouse were allowed $105,577.18 in countable assets to qualify for MA. The SBO Trust contained $52,629.20 plus the Protected Spousal Allowance was calculated to be $157,086.29, which was excess of the amount allowed for MA LTC eligibility.

Claimant does not dispute this calculation. 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, exceeded $2,000.00, Claimant was not asset-eligible for MA.

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 MA asset eligibility purposes. 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. Therefore, the undersigned's authority is limited to determining whether the denial of Claimant's March 7, 2014 MA application was in accordance with Department policy based on the Department's conclusion that Spouse's SBO Trust is a countable asset for Claimant is contrary to existing law.

Under Department policy, the determination of whether a trust is a countable asset requires that the trust be evaluated to determine if it is a Medicaid trust, and, if so, whether it is a revocable or irrevocable trust. BEM 401 (July 2013), pp. 3, 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

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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.

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, p. 6.)

In this case, Spouse's SBO Trust meets the definition of a Medicaid trust under BEM 401, pp 5-6 because: (1) it contains funds transferred by Claimant and Spouse; (2) the Trust was established by Spouse after August 11, 1993; (3) the Trust was not established by will; and (4) it is not a Special Needs Trust or Pooled Trust.

To determining whether assets in a Medicaid trust are countable depends on whether the Medicaid trust is revocable or irrevocable. Here, the SBO Trust is identified as irrevocable. If a Medicaid trust is an irrevocable trust, then 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 the 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 provides, in relevant part, that in the case of an irrevocable trust

(i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which . . . payment to the individual could be made shall be considered resources available to the individual . . . .

(ii) any portion of the trust from which . . . no payment could under any circumstances be made to the

> individual shall be considered, as of the date of the establishment of the trust (or, if later, the date on which payment to the individual was foreclosed) to be assets disposed by the individual for purposes of subsection (c) of this section, and the value of the trust shall be determined for purposes of such subsection by including the amount of any payments made from such portion of the trust after such date.

In determining the value of the SBO Trust, both BEM 401 and § 1396p(d)(3)(B) provide that if there is **any** condition or circumstance under which the principal in an irrevocable trust could be paid to or on behalf of the person, the portion of the corpus from which payment to the individual can be made is a resource. The State Medicaid Manual, which provides guidance to states in administering their Medicaid programs, explains when there are circumstances under which payments can or cannot be made for purposes of determining the value of an irrevocable trust.[3] Although the State Medicaid Manual does not have the force and effect of law, its provisions are relevant and worthy of 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").

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

> For example, if an irrevocable trust provides that the trustee can disburse only $1,000 to or for the individual out of a $20,000 trust, only the $1,000 is treated as a payment that could be made under the rules in subsection B [concerning payments from an irrevocable trust]. The remaining $19,000 is treated as an amount which cannot, under any circumstances, be paid to or for the benefit of the individual. On the other hand, if a trust contains $50,000 that the trustee can pay to the grantor only in the event that the grantor needs, for example, a heart transplant, this full amount is considered as payment that could be made under <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.)

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[3] State Medicaid Manual, Health Care Financing Administration[3] Publication No. 45-3, Transmittal 64 (November 1994) *available at* http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html?DLPage=1&DLSort=0&DLSortDir=asending.

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 10, 2014, but before December 31, 2014. 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 year the Resources of the Trust shall be valued as of the date of their contribution to the Trust.
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> (Exhibit 1, p 6)

The terms of Spouse's SBO Trust require the annual distribution of funds from the Trust to Spouse on an actuarially-sound basis, based on Spouse's life expectancy. Thus, the SBO Trust anticipates that the entire net income and principal of the Trust is to be paid to Spouse over her lifetime. Therefore, the SBO Trust has conditions under which the assets from the Trust can, and in fact must, be distributed to 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 in the State Medicaid Manual 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 assets in the SBO Trust.

The Social Security Administration's (SSA's) Program Operations Manual System (POMS) SI 01120.201D.2. concerning irrevocable trusts further support this conclusion that the value of the SBO Trust is the value of all the countable assets within the trust corpus. While the POMS, which contains the instructions used by SSA employees and agents to carry out the law, regulations, and rulings in evaluating Social Security claims, are not binding authority, they are entitled to some consideration in evaluating Medicaid claims. http://www.socialsecurity.gov/regulations/#a0=3; *Bubnis v Apfel*, 150 F3d 177,

181 (CA 2, 1998); *Davis v Sec'y of Health and Human Servs*, 867 F2d 336, 340 (CA 6, 1989); *Landy v Velez*, 958 F Supp 2d 545, 553 (D NJ, 2013); 70A Am Jur 2d, Social Security and Medicare § 16.

The second example in SI 01120.201D.2.c., similar to the example in the State Medicaid Manual § 3259.6(E), explains that where an irrevocable trust containing $50,000 provides that the trustee can pay funds from the trust to the beneficiary only in the event that he or she needs a heart transplant or on his or her 100th birthday, the entire $50,000 is considered to be a payment which could be made to the individual under some circumstance and is a resource. Like the example in the State Medicaid Manual, the conditions for distributions of all income and principal from the SBO Trust to Spouse are more likely to be satisfied than the conditions leading to disbursement in the second example in SI 01120.201D.2.c. Therefore, the POMS provides further support for the conclusion that the SBO Trust is a countable asset with a value equal to the full amount of the value of the assets in the principal of the Trust.

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

In *Johnson III*, at issue was whether certain private trusts (referred in the decision as "community spouse annuity trusts") established for the sole benefit of the community 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,[4] 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 would provide the community spouse a stream of payment, which could be

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[4] 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.

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

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

The SBO Trust at issue in this case is similar to the trusts considered by the courts in *Johnson III* and *Daily*. Each case involves irrevocable trusts funded by assets of the community spouse or institutionalized spouse for the benefit of the community spouse. The trusts in both *Johnson III* and *Daily* involved payments from the trust to the community spouse over the course of several years; in *Johnson III*, the trusts were private trusts designed to provide a stream of annuity payments to the community spouse for the duration of his or her life. The SBO Trust in this case, 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 to Claimant.

To the extent Claimant argues that, because the trustee controls distribution of the Trust assets, those assets are unavailable and non-countable is not persuasive. As discussed above, the Department's conclusion that the SBO Trust is a countable asset, despite the fact that the trustee controls the distribution of assets, is supported by federal law, Department policy, and the State Medicaid Manual and POMS. Furthermore, under § 1396p(d)(2)(C), the determination of a countable asset under § 1396p(d)(3)(B) is not dependent on whether the trustee has or exercises any discretion to make payments. In fact, in *In re Rosckes*, 783 NW2d 220, 225 (Minn App, 2010), the court held that, where the trust allowed the trustee to pay the beneficiary income and principal at such times and in such portions as he deemed advisable, all of the trust income and principal could have been paid to the beneficiary in some capacity and was, thus, available to the beneficiary under § 1396p(d). Claimant's argument that the assets in the SBO Trust are unavailable is further undermined by BEM 400 (December 2013), p. 9, which states that the determination of whether the asset is available for

purposes of determining whether it is countable does **not** apply when the asset is a trust, and BEM 401, p. 10, which states that an asset is not considered unavailable because it is owned by the Medicaid trust rather than the person.

Further, even though payments from the SBO Trust are to Spouse, not Claimant, the SBO Trust is a countable asset for determining Claimant's asset eligibility at application. BEM 211 (July 2013), pp. 6-7, provides that, for purposes of determining a couple's countable assets for an initial asset assessment or the institutionalized spouse's initial eligibility[5] for MA, the institutionalized spouse and the community spouse are considered a single asset group. 42 USC § 1936p(h)(1), which defines the terms in § 1396p, broadly defines "assets" to include all resources of the individual and of the individual's spouse, including any resources which the individual is entitled to but does not receive because of action by such individual's spouse. Therefore, the SBO Trust is countable as Claimant's asset for the initial eligibility calculation.

42 USC § 1396r-5(c)(2) provides further support for this conclusion, providing, in relevant part:

> In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property –
>
> (A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and
>
> (B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under section (f)(2)(A) of this section [the community spouse resource allowance][6] (as of the date of application for benefits).

See also *Palomba-Bourke v Comm'r of Social Servs*, 312 Conn 196; 92 A3d 932, 941, 943-944 (Conn 2014) (concluding that the assets of a trust available to the community spouse at the time of the institutionalized spouse's MA application are also available to the institutionalized spouse). Therefore, under both federal law and Department policy,

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[5] 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.

[6] The "community spouse resource allowance," as defined in (f)(2)(A), is the PSA as defined in BEM 402, p. 9.

the principal in the SBO Trust, which was an asset to Spouse at the time of Claimant's MA application, was a countable asset to Claimant at the time of the initial asset eligibility determination at application. As such, the Department properly considered the SBO Trust a countable asset for determining Claimant's MA eligibility.[7]

Claimant may contend that a finding that the SBO Trust is a countable asset would render BEM 405, which defines and permits "solely for the benefit of" transfers, superfluous. It should be noted that the Department does not challenge the notion that Spouse's SBO Trust is a "solely for the benefit" instrument as defined in BEM 405. However, the Department submits that the purpose of BEM 405 is to exclude a transfer made solely for the benefit of the community spouse from the divestment penalties; rather than 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 (October 2013), p. 1 is entitled "MA Divestment." It defines a divestment as a transfer of a resource for less than fair market value that results in a penalty period, not ineligibility, during which time MA will not pay the institutionalized client's expenses for LTC services. BEM 405, pp. 1-9, 12-16. BEM 405 also defines a "solely for the benefit of" transfer and expressly excludes transfer of resources from the client to the client's spouse or to another solely for the benefit of the client's spouse from the definition of a divestment. BEM 405, pp. 9, 11-12; see also 42 USC 1396p(c)(2)(B)(i); *Hughes v McCarthy*, 734 F3d 473 (CA 6, 2013). However, it does not preclude a "solely for the benefit" transfer from consideration for purposes of determining a client's MA eligibility, including asset eligibility. Thus, 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").

Claimant may argue that, even if the SBO Trust is a countable asset, because the Trust provides that the resources are to be distributed to Spouse on an actuarially-sound basis, the Trust's value is limited to the amount that could be distributed to Spouse in a single year based on Spouse's life expectancy. In other words, because, based on the value of the SBO Trust and Spouse's life expectancy, only a portion would be distributed to Spouse from the SBO Trust in the first year, the value of the SBO Trust for asset valuation purposes should be limited to this amount and the remaining portion of the Trust principal is not countable.

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[7] 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.

Although the SBO Trust in this case mandates distributions to the Spouse on an actuarially sound basis, because the SBO Trust provides that the entire corpus of the trust, both income and principal, is available and payable to Spouse over the course of her lifetime, the Department properly concluded that all of the Trust principal was countable, even though only a portion would paid annually. This conclusion is consistent with the decisions in *Johnson III* and *Daily* and in accordance with § 1396p(d)(3)(B), as interpreted by the State Medicaid Manual. See also *Gayan v Ill Dep't of Human Services*, 796 NE2d 657, 661 (Ill App, 2003) (finding that where there were five conditions that would result in payment of trust funds to the beneficiary, then the entire corpus of the trust was available and countable).

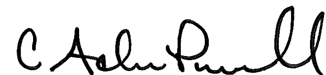
Therefore, under federal law and Department policy, Spouse's SBO Trust is, as discussed above, a countable asset valued at the full amount of the value of the trust corpus at the time of application. BEM 401, p. 9; BEM 400 (December 2013), p. 14. Claimant did not dispute the Department's calculation of the PSA or the Department's finding that, with the value of the Trust included as a countable asset, Claimant's countable assets at the time of the application exceeded the PSA by more than the $2,000 MA asset limit applicable to her case. Because Claimant's countable assets exceeded $2,000, Claimant was not asset eligible for MA. Therefore, the Department acted in accordance with Department policy when it denied Claimant's MA application. As such, the assigned ALJ erred when he reversed the Department's decision to deny Claimant's MA application based on excess assets.

DECISION AND ORDER

Based on the above findings of fact and conclusions of law, it is determined that the Supervising Administrative Law Judge finds that the Department's denial of Claimant's May 30, 2014 MA application due to excess assets was proper.

The Supervising Administrative Law Judge, based on the above findings of fact and conclusions of law, VACATES the ALJ's October 29, 2014 Hearing Decision and AFFIRMS the Department's denial of Claimant's MA application based on excess assets.

IT IS SO ORDERED.



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

Date Signed: May 22, 2015

Date Mailed: May 22, 2015

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

CAP/sw

cc: