

P A T H

Department of Prevention, Assistance, Transition, and Health Access

BULLETIN NO. 02-21F

FROM Eileen I. Elliott, Commissioner
for the Secretary

DATE June 28, 2002

SUBJECT Changes to SSI-Related Medicaid Rules Used to
Determine Eligibility for Long-Term Care Coverage

CHANGES ADOPTED EFFECTIVE July 1, 2002

INSTRUCTIONS

Maintain Manual - See instructions below.

**Proposed Regulation - Retain bulletin
and attachments until you receive
Manual Maintenance Bulletin: _____**

**Information or Instructions - Retain
until _____**

CURRENT MANUAL REFERENCES

M200 TOC M400 TOC
M201 M417

Act 142 (enacted June 21, 2002) requires the department to change the SSI-related Medicaid resource rules used to determine eligibility for all SSI-related Medicaid applicants. This includes Medicaid applicants seeking long-term care coverage, including waiver and hospice services. Using the expedited rule-making process authorized by Act 142 §152, the department limited its current SSI-related Medicaid rules concerning real estate, burial funds, and annuities and its transfer rules concerning the treatment of income and resources. These rule changes are specified in Act 142 §148(m) and are summarized below.

Exceptions to New Rules

The department will only apply these new rules from July 1, 2002 forward. The new rules concerning jointly held real estate, life estates, irrevocable burial trusts, and annuities provide an explicit exception that actions taken by individuals prior to July 1, 2002 with respect to these kinds of resources shall be evaluated based on the old rules.

In addition, current Medicaid recipients and those who have received Medicaid recently, will be given one year to come into compliance with two of the new rules. Specifically, individuals who have received Medicaid between July 1, 2001 and June 30, 2002 shall not be subject to the rules concerning real property for sale (M201.22) and real estate producing significant income (M201.25) until July 1, 2003.

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Limitations on Real Estate Exclusions

The department will consider homes, other than an individual's principal place of residence, as countable resources. The department will treat jointly held property as countable resources only with respect to joint interests created within 36 months before applying for Medicaid. The 'refusal to sell' rule will continue to apply to joint interests created more than 36 months before application.

The department will count an applicant's life estate as a resource if the applicant retains the power to sell, unless the life estate is held in the applicant's principal place of residence.

The department will require individuals to meet explicit criteria in order to exclude real property for sale and real estate producing significant income from the resource determination of financial eligibility.

Cap on Burial Fund Exclusions

The department will cap burial expense exclusions at \$10,000 per person, regardless of the instrument used to provide for burial expenses.

Treatment of Annuities

The department will exempt annuities as a resource if created more than 36 months before application. For individuals seeking long-term care, including waiver and hospice services, the department will also exempt annuities from transfer penalties only if they are paid to the applicant or community spouse through a regular stream of income in equal payments over the applicant or spouse's life expectancy. The payout period must expire at the death and not provide for any beneficiary in the event that the applicant or spouse dies before the payout period ends.

Limitation on Transfers of Income or Resources

For impermissible transfers made by individuals seeking long-term care coverage, including waiver and hospice services, the department will use the average daily rate of nursing facility care and aggregate transfers to make a single penalty period. This will limit excludable transfers to approximately \$157, compared with the current limit of approximately \$4,725.

Expedited Rulemaking Process

On June 6, 2002, the Vermont Legislature authorized the department to adopt these rules through an expeditious rulemaking process (Act 142, §152). The process required the department to publish in three daily Vermont newspapers of highest average circulation a notice that listed all rules to be adopted by this process. Notice of rulemaking was published on June 6, 2002 in *The*

Burlington Free Press, *The Rutland Herald*, and *The Barre-Montpelier Times Argus*. It allowed for a seven-day public comment period that ended June 13 at 4:30 pm. It required the department to file the final proposed rule with the legislative committee on administrative rules no later than June 14, 2002.

After circulating the draft rules for public comment and before filing the final proposed rule, the department made changes indicated below as occurring, “*Following public comment*”.

After filing the final proposed rule on June 14, 2002, and before the hearing of the Joint Legislative Committee on Administrative Rules on June 26, 2002, the department worked with commenters to discuss ongoing concerns. Several changes to the rule were made in response to concerns raised by these commenters. The department also made several changes on its own initiative since the filing of the final proposed rule. All changes that have been made since the filing of the final proposed rule are indicated below as occurring “*Since the last filing and with the approval of the Joint Legislative Committee on Administrative Rules*”.

Specific Changes

New Sections Description of change

Types of Resources

M201.1 – Defines the types of resources affected by these rule changes: real property; life estate;
M201.14 burial funds and burial spaces; and annuities.

Following public comment, the department added an exception to the applicability of the resource rules set forth in sections M201 through M201.31. Also, the term irrevocable in the definition of burial fund was replaced to allow individuals to verify burial expenses through title to the fund or by sworn statement. More description was added to explain that the department will consider life insurance policies as burial funds as long as a funeral provider is the beneficiary of the policy and it is used as payment of a burial contract. The department also made some revisions to clarify its definition of annuity.

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, the department replaced definition of annuity with one developed in consultation with a Senior Analyst for Life Insurance and Annuities at the Vermont Department of Banking, Insurance, Securities and Health Care Administration. The new subsection (b) clarifies how, for Medicaid purposes, the department considers whether annuities are available. Since annuities are trust-like instruments, the department uses terminology similar to trusts (e.g., revocable and irrevocable), when it describes the availability of cash from annuities. The new subsection (c) retains the standard for measuring life expectancy included in the final proposed rule and expressed in Act 142, §148(m)(8)(C).

Excluded Resources

- M201.2 Describes the resource exclusions.
- M201.21
A Home and Contiguous Land Clarifies rules at M234(1) by permitting applicants for SSI-related Medicaid to exclude only one principal place of residence.
Following public comment, the department replaced the word “any” in the second sentence to clarify its intent that only one home be excludable. The department further clarified when the home exemption applies.

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, the department inserted the word “nonresidential” in two places in the first paragraph to clarify that contiguous land may include additional buildings that are not residences.
- M201.22
Real Property for Sale Clarifies rules at M234(2) by establishing criteria defining reasonable efforts to sell.
Following public comment, the department added a definition of fair market value to ensure the property for sale is not listed at an inflated value.
- M201.23
Jointly Owned Real Property Amends rules at M233 and M234(1) by considering other residences as countable resources unless the property is the applicant’s primary residence or the joint ownership was created more than 36 months ago.

Following public comment, the department excluded other residences or property as a resource if the joint ownership interest was created before July 1, 2002.

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, clarified that the resource exclusion applies only as long as the status quo is maintained; changes in owners or joint owners' refusal to sell trigger evaluation under the new resource rules at M201.33.
- M201.24
Life Estates Limits current rules specified in a policy memorandum at M233 (1/12/94) by excluding an applicant’s life estate only if the applicant has no power to sell or it is the applicant’s principal place of residence

Following public comment, the department excluded life estate interests created before July 1, 2002.

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, the department clarified that the life estate’s value includes the remainder interest.

**M201.25
Real Property
Producing
Significant
Income** Adds specific criteria to rules at M234(5) by excluding real property producing income only if the real property generates at least 6 percent of its fair market value in net annual income after allowable expenses related to producing the income are deducted.

**M201.26
Burial Funds
and Burial
Spaces** Amends rules at M234 (11)-(13), M234 (18), M237.1, and M237.2 as well as policy memoranda at M234 (12/21/93) and M234 (4/17/91) by capping burial expense exclusions at \$10,000 per person, regardless of the instrument used to provide for burial expenses.

Following public comment, the department moved explanatory text to subsection M201.13 and replaced the term irrevocable with an alternate means to designate funds for the purpose of burial through title to the fund or a sworn statement provided to the department.

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, the department excluded as resources irrevocable burial trusts established before July 1, 2002.

**M201.27
Annuities** Amends policy memoranda M230 (11/12/93) and M416 (12/15/94) by exempting annuities only if they are irrevocable, based on the life expectancy of the community spouse, and paid to the community spouse. In addition, the payout period must expire at the death of the spouse and may not provide for a residual beneficiary in the event that the community spouse dies before the payout period ends.

Following public comment, the department specified that the exclusion applies to applicants as well as to their spouses. It added the criteria previously listed only in the definition of annuity to the section describing the criteria for exclusion.

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, the department revised exclusion for additional clarity.

Value of Resources Counted Toward the Medicaid Resource Limit

**M201.3-
M201.33** Specifies how the department treats annuities, life estates, and jointly owned real estate when valuing them as resources.

**M201.31
Annuities**

Following public comment, the department revised the description of how it counts revocable annuities.

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, the department revised its description of how it counts annuities to be consistent with terms used in the revised definition in subsection M201.14. It also revised the cash value description after consultation with a Senior Analyst for Life Insurance and Annuities at the Vermont Department of Banking, Insurance, Securities and Health Care Administration. Cash value equals the amount of money used to establish the fund with some adjustments.

**M201.33
Jointly Owned
Real Property**

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, the department eliminated limitation to long-term care because states must apply resource rules equally to all SSI-related Medicaid applicants pursuant to 42 U.S.C. §1396a(a)(10)(B); SSA §1902(a)(10)(B). It also corrected the provision so it only applies prospectively; clarified that in order for the presumption to be successfully rebutted individuals must demonstrate that shares were purchased by joint owners at fair market value; and specified that its presumption on counting joint property applies regardless of any co-owner's refusal to sell is based on Vermont laws related to partition.

Transfer Rules

**M417
Changes to
Transfer Rules
Effective July 1,
2002**

States that rules in sections M417-M417.22 apply to all eligibility determinations made on or after July 1, 2002 and supercede provisions at M416-M416.3, existing PP&Ds, and declaratory rulings, if conflicting.

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, the department allowed transactions completed by July 1, 2002 to be considered under the old rules. Clarified that jointly owned property and life estates considered excludable under M201.23 and M201.24 may not be transferred without penalty. The resource exclusion applies only as long as the status quo of the resource is maintained; changes in life estate interest or in owners or joint owners' refusal to sell trigger evaluation under the new resource rules at M201.33.

**M417.1
Transfers
Involving
Annuities**

Amends policy memoranda at M416 (12/15/94) by exempting lifetime annuities from transfer penalties only if they are irrevocable, based on the life expectancy of the community spouse, and paid to the community spouse. In addition, the payout period must expire at the death of the spouse and may not provide for a residual beneficiary in the event that the community spouse dies before the payout period ends.

Following public comment, the department more precisely specified that it would consider annuities permissible transfers of income or resources when they were purchased more than 36 months ago or meet the criteria in M201.27 for an excluded resource.

Since filing the final proposed rules and with the approval of the Joint Legislative Committee on Administrative Rules, the department changed title of section to reflect new content; streamlined description of permissible transfers involving annuities by incorporating by reference the resource exclusion criteria in M201.27; and added new subsection (b) to specify that annuities will be considered a transfer of resources subject to penalty when they contain residual or contingent beneficiaries and when any action is taken to relinquish or transfer ownership of an annuity.

**M417.2-
M417.22
Determination of
the Penalty
Period for
Transfers**

Amends rules at M416 and a policy memorandum at M416.2 (7/8/94) by using the average daily rate of nursing facility care and aggregate transfers to make a single penalty period. The department will exclude transfers of less than a full day's nursing facility cost.

Following public comment, the department revised the penalty date to run from the date of the transfer, rather than the first day of the month in which the transfer occurred.

Summary of Written Comments and Department's Responses

PATH distributed the draft bulletin containing the proposed draft rules to all who responded to the public notice as well as to all members and alternates of the Medicaid Advisory Board. The department also sent the proposed rules to the Office of Healthcare Ombudsman, the Disability Law Project, Vermont Legal Aid, and the Community of Vermont Elders. Written comments were received from three attorneys whose practice includes Medicaid Estate Planning and two advocacy groups: the Community of Vermont Elders and the Vermont Health Care Association. The comments are summarized below along with the department's responses.

Specific Comments and Responses by Regulation Sections

M201 Changes to Resource Rules Effective July 1, 2002
M417

Comment: Four commenters requested that the department continue to apply the resource and transfer rules in effect at the time of the transaction for all individuals regardless of when an individual applies for Medicaid.

Response: The department has revised the rule. Until July 1, 2003, determinations and redeterminations of eligibility for individuals who have received SSI-related or ANFC-related Medicaid at any time between July 1, 2001 and June 30, 2002, shall be evaluated based on the rules in effect on June 30, 2002. On July 1, 2003, all SSI-related Medicaid eligibility determinations and redeterminations shall be subject to the resource rules set forth in sections M201 through M201.31.

The department requires additional time to determine whether to further extend the grandfather provision.

M201.13 Burial Funds and Burial Spaces
M201.26

Comment: Two commenters were concerned that individuals cannot designate a burial account as irrevocable without putting funds in an irrevocable trust.

Response: The department has revised the definition of burial funds and the description of the exclusion to make it easier for individuals to make these arrangements.

M201.14 Annuities
M201.27

Comment: One commenter requested the annuities not be a countable resource for federal employees, teachers and others who receive annuities for retirement.

Response: The department has corrected the error and revised the rule to be consistent with the statute. Annuities purchased more than 36 months ago are an exempt resource.

Comment: One commenter asked the department to allow the remainder of a community spouse's annuity to be paid to the institutionalized spouse, if still living.

Response: The department is still considering whether this modification is permitted by 42 U.S.C. §1396r-5(b).

M201.22 Real Property for Sale

Comment: One commenter expressed concern that people could list property at an inflated value to avoid having to sell the excluded property and asked that a certified appraisal be required.

Response: The department has inserted the term fair market value and defined it to prevent property from being listed too high. The rule was revised to permit a certified appraisal to be one way of establishing fair market value.

Comment: One commenter requested that the criteria in this section distinguish between private sales and broker sales.

Response: The department's proposed rule already makes this distinction.

Comment: Two commenters asked the department to change its requirement that individuals accept an offer of two-thirds the price of the property to an offer within 90% of the appraised value or MLS price.

Response: The Legislature directed the department to adopt rules that are comparable to the Supplemental Security regulations which provide for sale of property when offered at least two-thirds the price of the property. 20 C.F.R. §416.1245(b)(3)(iii).

M201.23 Jointly Owned Real Property

Comment: Several commenters asked that the new rule apply prospectively only.

Response: The rule has been revised to grandfather transactions completed prior to July 1, 2002.

M201.24 Life Estates

Comment: One commenter asked that the rule clarify that the department will not count life estate with the power to sell as a resource when it is the applicant's principal place of residence.

Response: The department added a reference to the home exclusion to clarify this exclusion.

Comment: Several commenters asked that the new rule apply prospectively only.

Response: The rule has been revised to grandfather transactions completed prior to July 1, 2002.

M201.33 Jointly Owned Real Property

Comment: One commenter requested the department provide a hardship exemption for people who jointly own property and co-owners refuse to sell.

Response: The Legislature directed the department to count joint interests created within the 36-month lookback period. It is without authority in the expedited rule to provide for a hardship exemption.

Comment: Several commenters asked that the new rule apply prospectively only.

Response: The rule has been revised to grandfather transactions completed prior to July 1, 2002.

General comments

Comment: One commenter requested that the department engage in regular rulemaking rather than expedited rulemaking to make these changes.

Response: The Legislature has provided for expedited rulemaking so that the department can apply eligibility changes to produce savings as soon as possible.

Additional comments were received that were not directly relevant to the proposed rules. The department will respond to these questions separately.

Vertical lines in the left margin indicate significant changes. Three dots at the bottom of a page after the last line of text and three dots at the top of the following page before the first line of text indicate that text has been moved.

Manual Holders: Please maintain manuals assigned to you as follows.

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PP&D	M233	(01/12/94)		Nothing	
PP&D	M234	(12/21/93)		Nothing	
PP&D	M234	(04/17/91)		Nothing	
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PP&D	M416	(12/15/94)		Nothing	
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Nothing				M417-M417.2 (2 Pages)	(02-21)
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M201

M201 Changes to Resource Rules Effective July 1, 2002

The rules in sections M201-M201.3 apply to all eligibility determinations made on or after July 1, 2002. To the extent any other existing PP&Ds or declaratory rulings are inconsistent with the new regulations, the new regulations are intended to supercede them and be the controlling authority.

Until July 1, 2003, determinations and redeterminations of eligibility for individuals who have received SSI-related or ANFC-related Medicaid at any time between July 1, 2001 and June 30, 2002, shall be evaluated based on the rules in effect on June 30, 2002. On July 1, 2003, all SSI-related Medicaid eligibility determinations and redeterminations shall be subject to the resource rules set forth in sections M201 through M201.31.

M201.1 Types of Resources

This section defines the meaning of terms used in sections M201.2 and M201.3.

M201.11 Real Property

Real property means land and generally whatever is erected, growing on, or affixed to land.

M201.12 Life Estate

Life estate means a legal arrangement entitling the owners to possess, rent, and otherwise profit from real or personal property during their lifetime. The owner of a life estate sometimes may have the right to sell the life estate but does not normally have future rights to the property. Ownership of a life estate may be conditioned upon other circumstances, such as the owner's remarriage. The document granting the life estate includes the conditions for the life estate and the right of the owner to sell or bequeath it, if these property rights were retained.

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M201.13

M201.13 Burial Funds and Burial Spaces

A burial fund is any separately identifiable fund clearly designated as for burial expenses through the title to the fund or by a sworn statement provided to the department. Burial funds include contracts, trusts, or other agreements, accounts, or instruments with a cash value. Some burial funds include accumulated interest, and the value of some burial funds may change through time (e.g., when the fund consists of bonds). Burial expenses include burial spaces, items related to burial spaces, and services related to burial spaces.

Certain life insurance policies are also treated as excluded burial funds for the purposes of determining Medicaid eligibility. A burial fund for the purposes of determining Medicaid eligibility includes an insurance policy owned by an individual whose income and resources are considered in determining Medicaid eligibility as long as a funeral provider is the beneficiary of the policy and it is used as payment of a burial contract.

For the purposes of determining Medicaid eligibility, burial spaces include burial plots, gravesites, crypts, mausoleums, caskets, urns, and other repositories customarily and traditionally used for the deceased bodily remains. Items related to burial spaces include, but are not limited to, vaults, headstones, markers, plaques, and burial containers for caskets. Services related to burial include, but are not limited to, embalming, opening and closing of the gravesite, and care and maintenance of the gravesite, sometimes called an endowment or perpetual care.

M201.14 Annuities

For Medicaid purposes, an annuity is a contract reflecting payment to an insurance company, bank, charitable organization, or other registered or licensed entity.

(a) Parties to an annuity

There are always two parties to an annuity: the writer of the annuity, usually an insurance carrier or charitable organization, and the purchaser who owns the annuity.

In addition to the formal parties to an annuity, annuities also name a beneficiary: the person who will be paid a regular stream of income from the annuity in equal payments. Anyone can be a beneficiary, including but not limited to, the owner of the annuity, a spouse, dependent, trust, estate, commercial entity, proprietorship, or charitable organization.

Beneficiaries may be revocable or irrevocable. A revocable beneficiary can be changed by the owner of the annuity at any time. An irrevocable beneficiary can be changed only by the written permission of that beneficiary.

In addition to the primary beneficiary, annuities can provide for a contingent beneficiary or residual beneficiary. A contingent or residual beneficiary will receive annuity payments upon the occurrence of a specified condition.

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M201.14 P.2

M201.14 Annuities (Continued)

(b) Types of annuities

There are many types of annuities. For Medicaid purposes, the department considers whether annuities of any type are available as a liquid resource. Since annuities are trust-like instruments, the department uses terminology similar to trusts, when it describes the availability of cash from annuities.

Annuities that name revocable beneficiaries are available because they can be surrendered, cashed in, assigned, transferred, or allow the beneficiary to be changed. The department presumes revocability when an annuity contract is silent regarding revocability.

Annuities are unavailable when the owner of an annuity is not the Medicaid applicant or applicant's spouse or the applicant or spouse has abandoned all rights of ownership.

(c) Standard annuity contract provisions

There are two phases to an annuity: an accumulation phase and a payout phase. Annuities vary in how they accumulate and payout money. Annuities may accumulate money by payment of a single lump sum or by payments on a schedule, which accumulate interest over time. Once an annuity has matured, money is paid to the beneficiary according to the terms of the annuity contract.

Annuity contracts provide for payments over a certain period. For the purposes of Medicaid eligibility, the payout period of an annuity must equal the life expectancy of the person on whose life the annuity is based or else it will be counted as a resource or considered a transfer of assets at less than fair market value. The department determines life expectancy based on the tables in §3158.9 of the State Medicaid Manual published by the federal Centers for Medicare and Medicaid Services, and referenced in the department's Medicaid procedures manual.

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M201.2

M201.2 Excluded Resources

This section specifies the resources whose value the department excludes in determining SSI-related Medicaid eligibility. The department may consider these resources, however, when determining if long-term care applicants should be penalized for transfer of resources.

M201.21 A Home and Contiguous Land

The department excludes a person's home as a resource, regardless of its value. Home means the property in which an individual resides and has an ownership interest and which serves as the individual's principal place of residence. This property includes the shelter in which an individual resides, the land on which the shelter is located, related nonresidential outbuildings, and surrounding property not separated from the home by intervening property owned by others. Public rights of way, such as roads that run through the surrounding property and separate it from the home, will not affect the exemption of the property. The home includes contiguous land and any other nonresidential buildings located on the land.

The home exclusion applies even if the owner is making an effort to sell the home. The home exclusion also applies if the owner is absent from the home due to institutionalization, provided that the owner has not placed the home in a revocable trust and:

- intends to return to the home even if the likelihood of return is apparently nil;
- has a spouse or dependent child residing in the home; or
- has a medical condition that prevented the owner from living there prior to institutionalization.

Unless one of the exceptions listed above applies, the home becomes a countable resource when the owner moves out of the home without the intent to return, because it is no longer the owner's principal place of residence. Temporary absences, such as for hospitalization or convalescence with a relative, do not affect the determination of an individual's principal place of residence.

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M201.22

M201.22 Real Property for Sale

The department excludes real property from countable resources as long as owners verify that they are making reasonable efforts to sell it. Reasonable efforts to sell property means taking all necessary steps to sell it for fair market value in the geographic area covered by the media serving the area in which property is located, unless owners are prevented by circumstances beyond their control from taking these steps.

The steps considered necessary to sell the property depend on the method of sale. Owners may choose to list the real property with a real estate agent or undertake to sell it themselves. If owners choose to list it with a real estate agency, they must take the necessary step of listing it and cooperating with the real estate agent's efforts to sell it. If owners choose to sell it without an agent, they must take all of the following necessary steps:

- advertise it in at least one of the appropriate local media continuously;
- place a "For Sale" sign on the property continuously, unless prohibited by zoning regulations;
- conduct open houses or otherwise show the property to prospective buyers; and
- attempt any other appropriate methods of sale.

If any prospective buyer makes a reasonable offer for the property, owners must accept it or demonstrate why it was not a reasonable offer. Any offer at least two-thirds of the most recent estimate of the property's fair market value is considered a reasonable offer.

Fair market value means a certified appraisal or an amount equal to the price of the property on the open market in the locality at the time of the transfer or contract for sale, if earlier.

M201.23 Jointly Owned Real Property

The department will exclude jointly owned real property from countable resources as long as the joint owner refuses to sell, if the joint ownership was created:

- (a) before July 1, 2002; or
- (b) more than 36 months prior to the date of application.

The department considers that the addition of new joint owners creates a new joint interest and will be evaluated as a countable resource under M201.33.

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M201.24

M201.24 Life Estates

The department excludes life estates in real property when the owner does not retain the power to sell the real property.

When owners retain the power to sell the entire real property, including any remainder interest, the department excludes the value of the life estate in the real property only if the life estate is an interest in the individual's home (M201.21) or was created in other property before July 1, 2002. For this purpose, the value of the life estate will include the value of the remainder interest.

M201.25 Real Property Producing Significant Income

Real property producing significant income is exempt from consideration as a resource. Real property is considered to produce "significant income" if it generates at least 6 percent of its fair market value in net annual income after allowable expenses related to producing the income are deducted.

M201.26 Burial Funds and Burial Spaces

For any individual whose income and resources are considered in determining Medicaid eligibility, the department excludes up to \$10,000 of burial funds, as long as the member shows that the funds are designated for burial expenses through the title to the fund or by a sworn statement provided to the department. They must be separately identifiable and not commingled with other funds.

A burial fund may be excluded as of the first day of the month in which the individual whose income and resources are considered in determining Medicaid eligibility established it.

The value of certain burial spaces may also be excluded under the allowable limit of \$10,000 for each individual whose income and resources are considered in determining Medicaid eligibility. Such spaces must be held for the burial of a member of the applicant's immediate family. For this purpose, the immediate family includes the member's spouse, children, brothers, sisters, and parents.

Irrevocable burial trusts established prior to July 1, 2002 and funded in excess of \$10,000 shall be excluded up to the value of the trust as of June 30, 2002.

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M201.27

M201.27 Annuities

The department excludes annuities if they were purchased more than 36 months ago, or if they:

- (a) have no beneficiary other than an individual requesting long-term care Medicaid or, if married, his or her spouse; and
- (b) provide for payments to applicants or their spouses in equal intervals and equal amounts; and
- (c) are based on the actuarial life expectancy of the applicants or their spouses, as determined by the department; and
- (d) return to the beneficiary at least the amount used to establish the annuity and any additional payments plus any earnings, as specified in the annuity contract; and
- (e) do not pay anyone other than the applicant or the applicant's spouse, even if the applicant or spouse dies before the payout period ends.

Once eligibility has been determined, if someone other than the long-term care recipient or spouse becomes a beneficiary of the annuity, the recipient shall be precluded from allocating income to the community spouse up to the amount of the previously available annuity payment.

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M201.3

M201.3 Value of Resources Counted Toward the Medicaid Resource Limit

The following sections describe how the department values certain resources.

M201.31 Annuities

Unless otherwise excluded, the department counts the cash value of annuities that are considered available, as defined in section M201.14. In addition, the department counts the cash value of annuities that do not equal the life expectancy of the individuals on whose life the annuities are based.

The cash value is equal to the amount of money used to establish the annuity and any additional payments used to fund the annuity, plus any earnings and minus any early withdrawals and surrender fees, unless the individual can furnish evidence from a reliable source showing that the annuity is worth a lesser amount. Reliable sources include banks, other financial institutions, insurance companies, and brokers, as well as any other the department considers, in its discretion, to be reliable.

M201.32 Nonexcluded Life Estates

Unless the life estate is excluded, the department establishes the value of life estates by multiplying the fair market value of the property by the number in the life expectancy table that corresponds with the individual's age at the time of the transfer creating the life estate. The life expectancy table is found in the Medicaid procedures manual. Individuals may submit evidence supporting another method of establishing the fair market value of such a life estate. The department shall make a decision about which method to use. If the department decides not to use the alternate method advocated by an individual, the department shall provide that individual with a written notice stating the basis for its decision.

M201.33 Jointly Owned Real Property

Regardless of any co-owner's refusal to sell, the department presumes that individuals who own real property jointly with others own the entire equity value of the real property if the joint ownership was created less than 36 months prior to the date of application or the transaction was completed on or after July 1, 2002. Individuals may rebut this presumption by showing through reliable sources that others have purchased shares of the property at fair market value. Reliable sources include cancelled checks or property transfer tax returns. When individuals establish that one or more co-owners purchased shares of the property, the department counts the proportional interest owned by the individual requesting long-term care.

Under Vermont law, a co-owner may demand partition, the dividing of lands held by more than one person. For this reason, the department counts the individual's proportionate share of the lands as an available resource, unless excluded as a home (M201.21) or property up for sale (M201.22).

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M417

M417 Changes to Transfer Rules Effective July 1, 2002

The rules in sections M417-M417.22 apply to all eligibility determinations for long-term care, including waiver and hospice services, made on or after July 1, 2002. To the extent that the transfer provisions at M416-M416.3 or any other existing PP&Ds or declaratory rulings are inconsistent with the rules in sections M417-M417.22, the new rules are intended to supercede them and be the controlling authority. Transfers completed prior to July 1, 2002 shall be evaluated based on the provisions at M416-M416.3. The rule permitting transfer of excluded resources (M416) shall not apply to jointly held property or life estates transferred after July 1, 2002.

M417.1 Transfers Involving Annuities

(a) Permissible Transfers

The department does not impose a penalty when income or resources were used to purchase an annuity more than 36 months ago or meet the criteria in M201.27.

(b) Impermissible Transfers

When the beneficiary is married, an annuity will not be considered a permissible transfer if some one other than individual requesting long-term care Medicaid or his or her spouse, is a named beneficiary, even when both spouses die before the payout period ends.

Action by applicants or their spouses to abandon or transfer ownership of an annuity shall be treated as a transfer of resources.

When annuities are considered an impermissible transfer, the total value of the transfer is the cash value. The cash value equals the amount of money used to establish the annuity and any additional amounts used to fund the annuity, plus any earnings and minus any early withdrawals and surrender fees, unless the individual can furnish evidence from a reliable source showing that the annuity is worth a lesser amount. Reliable sources include banks, other financial institutions, insurance companies, and brokers, as well as any other the department considers, in its discretion, to be reliable.

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M417.2

M417.2 Determination of the Penalty Period for Disallowed Transfers

If a transfer is disallowed, the department imposes a penalty period of restricted Medicaid coverage to an otherwise eligible individual. During this period, no Medicaid payments are made for long-term care services, including waiver and hospice services. Medicaid payments are made for all other covered services provided to the recipient during the period of restricted coverage.

M417.21 Penalty Date

The penalty date is the beginning date of each penalty period imposed for a disallowed transfer. The period of restricted coverage begins the date the asset was transferred if that does not occur in any other period of restricted coverage.

Penalty periods for transfers occurring in different months run consecutively rather than concurrently, in the order in which the transfers occurred. If, after establishing a penalty period for disallowed transfers, the department determines that additional disallowed transfers were made in a subsequent month but before the end of the first penalty period, the department shall designate the first day following the end of the first penalty period as the penalty date for the subsequent penalty period.

M417.22 Penalty Period

The number of days in a penalty period shall be equal to the total value of all disallowed transfers made during a given calendar month divided by the average daily cost to a private patient of nursing facility services in the state as of the date of application or the date of discovery, if the department discovered additional disallowed transfers after the initial determination of eligibility for long-term care coverage.

Penalty periods for transfers in different calendar months shall be consecutive and established in the order in which the disallowed transfers occurred.

A penalty period runs continuously from the first date of the penalty period, even if the individual stops receiving long-term care services, including waiver and hospice services.