

# ELDER LAW ISSUES IN THE BASIC REAL PROPERTY COURSE

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Property law is a dynamic and fluid substantive legal area. As society evolves, new issues continuously arise regarding the categorization of subject matter and whether the “res” can properly be delineated as property.<sup>1</sup> However, as the well-known cliché states, “The more things change, the more they are the same.”<sup>2</sup> Thus, most people still think of property as plain old dirt law, despite cases regarding the ownership of items in outerspace,<sup>3</sup> squatters’ rights in cyberspace,<sup>4</sup> property rights to body parts,<sup>5</sup> postmarital claims to frozen human embryos,<sup>6</sup> and other similarly diverse disputes.<sup>7</sup>

In fact, most lawyers, and certainly law students, approach property law as if it were akin to dirt in the eye, or worse yet, in the mouth. Mention property and many physically wince and spit vituperations about their introduction to the subject’s ancient underpin-

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The Author wishes to thank his colleague, Professor Rebecca C. Morgan, former president of the National Association of Elder Law Attorneys, Connie Evans, the director of the Faculty Support Services, and particularly Legal Assistant Sharon Gisclair, who did an excellent job typing and formatting this Article. He also would like to thank his beautiful, understanding family and, of course, The One.

1. In legalese, the term “res” is used to describe any number of items. Res (rēz) is Latin for “thing” and denotes a legal action premised on establishing “rights in relation to an object, as opposed to a person” asserting his or her individual rights. Steven H. Gifis, *Barron’s Law Dictionary* 413 (3d ed., Barron’s 1991).

2. *The Oxford Dictionary of Quotations* 385 (Angela Partington ed., 4th ed., Oxford U. Press 1992) (quoting Alphonse Karr in *Les Guêpes*).

3. See Dan L. Burk, *Protection of Trade Secrets in Outer Space Activity: A Study in Federal Preemption*, 23 Seton Hall L. Rev. 560, 561–566 (1993) (discussing space law and commercial activity in space); Glenn H. Reynolds, *The Patents in Space Act*, 3 Harv. J.L. & Tech. 13, 13–14 (1990) (explaining the Patents in Space Act and its impact on jurisdiction and federal space-related cases).

4. 15 U.S.C. § 1129 (Supp. 1999).

5. *Moore v. Regents of U. of Cal.*, 793 P.2d 479, 488–489 (Cal. 1990).

6. *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992).

7. E.g. E-mail from Jay D. Adkisson, Esq., to <3DT@mail.abanet.org> *3DTListArchives on the Web* (June 15, 2000) (copy on file with Author) (wherein “3DT” stands for “Deals, Dirt, Death and Taxes”).

nings.<sup>8</sup> Yet fellow dirt lawyers know that property is the foundation upon which all other concerns are built, and thus they happily ply their trade knowing that even the most mundane property issues impact society from life's beginning to end, and even beyond.<sup>9</sup>

This Article focuses on the aspects of property that intersect with the substantive area known as elder law. Elder law is a diverse field that has grown geometrically in relation to the graying of America.<sup>10</sup> Thus, elder law issues extend beyond mere concerns of descent and distribution. Though any of us could pass away at any given moment, the elderly understandably think about death more often than others and are therefore more concerned about their property passing to the parties they choose. However, those interested in elder law also need to garner an awareness of matters that need special attention when seniors wish to engage in transactions involving their property while they are alive.

Basic real property is normally a required course of either four or six credit hours during a student's first year of law school.<sup>11</sup> The typical course begins by addressing property as a concept, then reviews how individual rights accrue in property, and subsequently moves on to the resolution of disputes between individuals asserting claims to property. This survey includes exposure to estates in land and future interests, basic aspects of the real estate sales transaction, and an introduction to land use regulations.<sup>12</sup>

These topics equally are important to any property owner regardless of age; however, some of the topics can and should be

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8. Because this is a scholarly publication, we will avoid what students say about their property law professors, especially me.

9. Of course, it does not go too far beyond, because they would not want to offend law students' favorite property rule, the rule against perpetuities. For a detailed discussion of the rule, see Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 178 (2d ed., Found. Press 1984).

10. The percentage of Americans under age sixty-five reportedly tripled during the twentieth century and will continue to grow rapidly. Thomas P. Gallanis et al., *Elder Law Readings, Cases, and Materials* 2 (Anderson Publg. Co. 2000). Thus, as the population ages, it increasingly will be important for attorneys to be familiar with matters germane to law and aging.

11. My course is worth six credits, stretching over two semesters. My students will be glad to know that I participated in the Curriculum Committee discussion about raising the credit hours to seven so the other property professors could cover more material, and I voted that proposal down.

12. *E.g.* Roger Bernhardt, *Property: Cases and Statutes* chs. I, II, VI, VII (West 1999); Edward H. Rabin, *Fundamentals of Modern Real Property Law* chs. I, III, IV, V (2d ed., Found. Press 1982); Joseph William Singer, *Property Law: Rules, Policies, and Practices* chs. 1-5, 8 (2d ed., Aspen L. & Bus. 1997) (all of which are introductory property law casebooks).

emphasized from the perspective of the elderly. For example, this Symposium attests to the breadth of concerns the elderly face and emphasizes the need for specialized study in the area. First-year courses usually are unable to delve deeply into these aspects of law, as they are formulated to introduce new students to foundational aspects of the law. Thus, many first-year courses that whet a student's appetite can be followed by a number of elective courses that build on that foundation. In property law, the interested student might decide to take additional classes such as personal property, trusts and estates, land use planning, real estate finance, or any other course that examines the intricacies of property law.

As elder law evolves, the legal work related to property law will occur in more specialized areas as opposed to traditional ones. Therefore, some of the concepts mentioned as possibly controversial in elder law require one to leap beyond the basics of first-year property and use that core course either as a springboard into these new areas or as a question mark in terms of whether the law would be better served if some of these fundamental principles were challenged.

### ACQUISITION

Most basic property courses begin with a discussion of the theory of private property rights as they relate to an individual's acquisition of property. Property can be acquired in a number of ways, such as by sale,<sup>13</sup> gift,<sup>14</sup> or devise.<sup>15</sup> These methods of transfer

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13. Often people will offer to assist seniors in exchange for an interest in their property after they die; however, to protect seniors, courts have been reluctant to enforce such agreements unless they have been expressly and clearly documented. *E.g. Burns v. McCormick*, 135 N.E. 273, 274–275 (N.Y. 1922) (striking down plaintiffs' claim for interests in an old, widower's property).

14. A gift generally is defined as "a voluntary transfer of . . . property [from] one to another without any consideration." Ray Andrews Brown, *The Law of Personal Property* § 7.1, 76 (Walter B. Raushenbush ed., 3d ed., Callaghan & Co. 1975). Gifts can be characterized as inter vivos, which means between the living, or as causa mortis, which means in contemplation of the transferor's death. *Id.* at 77. All gifts require the necessary intent to make the transfer. *Id.* at § 7.12, 114. This donative intent is an area that particularly is ripe for challenge when dealing with seniors. Additionally, gifts causa mortis often are associated with the elderly, because those individuals may find themselves "in extremis," facing the end of their lives, and may want to give away much of their property. *E.g. Newman v. Bost*, 29 S.E. 848, 848 (N.C. 1898); Brown, *supra* n. 14, at § 7.15, 130–131 (both discussing the historical background of gifts causa mortis).

15. Devise indicates a transfer by will. Gerry W. Beyer, *Wills, Trusts, and Estates: Examples and Explanations* § 1.2.2, 5 (Aspen L. & Bus. 1999). If an individual dies without a will, his property automatically is transferred in accordance with state statutes. *Id.* at §

generally are not age sensitive. Individual assertion of superior property rights stems from a confidence in the government's establishment of a sensible system of property laws.<sup>16</sup> Governments acquired land for citizens and created a legal system to acknowledge superior rights in one individual or another, depending on the factual circumstances.<sup>17</sup> Systems generally comport with basic individual expectations by recognizing the following simple principles: 1) first in time, first in right;<sup>18</sup> and 2) that without some tangible indication of ownership, such as a deed or paper title, one will have a superior claim over any individual other than a prior peaceable possessor or a true owner.<sup>19</sup> Basic property courses address disputes among individuals whose acquisition of the res arose as a result of lost property, property that comes from unknown or disputed sources, and property that is transferred over the objections of verified sources.<sup>20</sup>

Though age is not normally an issue in analyzing and understanding the principles needed to resolve the above disputes, two areas in which it may have some impact are gifts and adverse possession. Age may become relevant because both of those areas deal with the party's mental state.

To determine that a valid gift transaction has occurred one must show intent,<sup>21</sup> delivery,<sup>22</sup> and acceptance between the donor and donee.<sup>23</sup> Putting aside potentially unfounded stereotypes, I have noticed a higher degree of mental instability in myself as I have aged and thus find it possible to raise a credible argument regarding my necessary donative intent relative to the viability of a gift.<sup>24</sup> To

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1.2.1, 2-3. The descent of property to certain designated parties, known as heirs, is known as the process of intestate succession. *Id.*; Jesse Dukeminier & James E. Krier, *Property* 202-203 (4th ed., Aspen L. & Bus. 1998).

16. See Dukeminier & Krier, *supra* n. 15, at 205-207 (discussing the evolution of public and private property rights recognition).

17. *Johnson v. McIntosh*, 21 U.S. 543, 595-596 (1823).

18. Dukeminier & Krier, *supra* n. 15, at 3.

19. See Rabin, *supra* n. 12, at 823 (explaining the requirements of written instruments).

20. Bernhardt, *supra* n. 12, at 13.

21. Brown, *supra* n. 14, at § 7.1, 78.

22. *Id.* at 77.

23. *Id.*

24. *Id.* at § 7.12, 114 (noting that a "court will consider the circumstances of the donor, the relationship between the parties, and the size of the gift and its relation to the total amount of the donor's property" when assessing whether the donor "really intended" a gift of the type claimed). Furthermore, a donor's mental capacity must be evaluated to determine whether he appreciated the nature of his acts and to protect him from fraud, duress, or undue influence. *Id.*

the extent that the characteristic holds true for other individuals reaching their senior years, one may properly look at this as a viable elder law issue. Courts seemingly have shown some sensitivity to this argument in dealing with the closely related issue of whether a deed has been delivered for a donative transfer of property after a property owner's death.<sup>25</sup> A valid deed requires intent,<sup>26</sup> delivery,<sup>27</sup> and acceptance,<sup>28</sup> and seniors often deliver deeds to individuals in further proof of their promise to have the grantee/donee take the property after the seniors' deaths.<sup>29</sup> Although this type of delivery often is contested as creating an invalid will, many courts nonetheless have upheld these transfers, apparently swayed by the status of the individual transferor as a senior citizen.<sup>30</sup>

State of mind disputes also arise in adverse possession actions. Adverse possession often is described as second in time, first in right.<sup>31</sup> It is one of the situations in which an individual loses his property, because he was inattentive for a protracted period of time.<sup>32</sup> In determining whether the adverse possessor ultimately is successful, the general consensus is that the individual's state of mind is irrelevant.<sup>33</sup> The attempt to objectify the transfer rests on whether certain physical elements are present.<sup>34</sup> The party losing

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25. *E.g. Ferrell v. Stinson*, 11 N.W.2d 701, 702-705 (Iowa 1943) (finding that a bedridden elderly woman, who directed a servant to put a deed in a box in her bedroom until after her death, had, in fact, made a valid transfer of the property in the deed to her cousins although the cousins did not know of the transaction until after the grantor died).

26. *Id.* at 704.

27. *Id.*

28. *Id.* at 704-705; Ralph E. Boyer et al., *The Law of Property: An Introductory Survey* § 16.4, 556-557 (4th ed., West 1991).

29. *See e.g. Ferrell*, 11 N.W.2d at 706 (discussing an ill elderly woman's attempt to transfer her deed to her closest friend and nearest living relatives just before her death); Boyer et al., *supra* n. 28, at § 16.4, 556-557 (explaining delivery, escrow, and acceptance).

30. *Ferrell*, 11 N.W.2d at 703-704, 706.

31. *See Dukeminier & Krier*, *supra* n. 15, at 117 (explaining that adverse possession allows a second possessor to gain interests in land "without the consent of the [first] owner").

32. The specific time period involved is set by statute in each jurisdiction and typically varies between seven and twenty-one years. *See Roger A. Cunningham et al., The Law of Property* 808 (2d ed., West 1993) (explaining that there are different statutory periods of limitation for adverse possession). An adverse claimant must show that he possessed the subject property continuously without significant interruption for the requisite time. *Id.* Sometimes a claimant may use the time period of a predecessor in interest by "tacking" that party's time to his own to satisfy the statute. *Id.* at 814.

33. *Id.* at 812 (citing the state of mind issue as "the most difficult, thoroughly maddening, question in all adverse possession").

34. *Id.* at 808-809, 815 (noting that most scholars prefer simply to evaluate whether the claimant was, in fact, within their own property boundary lines or within the boundaries of another, based on a land survey of the parcels in dispute).

the property generally has no viable argument that his age or status kept him from ejecting the adverse possessor from his land.<sup>35</sup> Likewise, the adverse possessor successfully can claim the property despite the fact that he may not originally have intended to take ownership when he first settled upon it.<sup>36</sup> In adverse possession, the failure to recognize a mental state argument is not always detrimental to a senior citizen, because he could benefit from this principle if the statute of limitations is not too lengthy.<sup>37</sup> It may be worth exploring the question of whether age should be viewed as a potential additional defense for a losing party.

### SHARED INTERESTS

Much of the basic property class is spent deprogramming students from their views of property as purely tangible things and forcing them to understand property as a concept. Title, ownership claims, and possession all involve some res, but they are not things in and of themselves.<sup>38</sup> You cannot buy a title without a thing, but you can acquire things without having title to them. Understanding this conceptual severance between tangible property and the legal rights encompassing tangible property is key to mastering property law successfully. Finding this key proves most elusive to students when they initially face the topics of consecutive and concurrent interests. These topics also are the areas most often associated with senior citizenry. We all must die and the hope is that this will occur later as opposed to sooner, so people often think that consecutive interest issues dealing with property transfers and ownership after death are the crux of elder law. Shared interests in property is a closely related topic. Because many seniors find themselves concurrently holding an interest in property with others while alive, shared interests may impact the distribution of property at their death.

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35. *Id.*

36. *Id.* at 812.

37. Boyer et al., *supra* n. 28, at 50–51. In essence, a senior who is inattentive to his property because of his mental state may easily fall prey to an adverse claimant, but it is just as likely that a senior not mindful of his boundary lines, due to his mental state, may extend his occupancy beyond his proper point and ultimately, though unintendedly, become a successful adverse possessor in his own right. There are several other elements that have to be satisfied to claim the property by adverse possession successfully. *Id.* at 50. These elements generally are referred to as actual, notorious, exclusive, continuous, hostile, and open, or as I tell my students, “A.N. E.C.H.O.” *Id.*

38. Cunningham et al., *supra* n. 32, at 1.

One always can split ownership of property into a variety of legal parts.<sup>39</sup> These parts always must add up to the whole title to the property.<sup>40</sup> For instance, I may transfer to you an interest in the house I currently own.<sup>41</sup> I may convey the interest for your present or future enjoyment.<sup>42</sup> It may be an interest in all of the property's ownable interest or in just a portion of it.<sup>43</sup> Thus, when I convey to you an interest legally recognized as a life estate or a term of years, I have released less than my total ownership interest in the property.<sup>44</sup> After you have enjoyed the property during your lifetime, or for a shorter period designated by a term of years, the property may then be enjoyed by others or the ownership may revert in total back to me.<sup>45</sup>

The designation of various consecutive interest holders in property, while not age dependent, often implies a degree of sensitivity to seniority status. This type of conveyance typically identifies several generations of one or more families.<sup>46</sup> For example, a conveyance might involve a grantor, her children, and grandchildren, or a combination of friends and relatives.<sup>47</sup> Special rules determine the validity of these transactions, but most apply uniformly to individuals of all ages.<sup>48</sup>

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39. Dukeminier & Krier, *supra* n. 15, at 199–202.

40. *Id.*

41. A typical conveyance of the whole interest in property law is represented by an example, such as O to A and his heirs. *Id.* at 201.

42. Future interests in property involve a delay in the grantee's enjoyment of the property until some later point in time. *Id.* at 257–258. Thus, a representative transfer may read, O to A after the death of B. *Id.* “[E]states followed by future interests are the foundation blocks of wills and estate planning.” *Id.* at 257.

43. *Id.* at 210 (explaining that a typical conveyance for less than all of the ownership interest is one transferring a life estate and is identified as follows: O to A for life).

44. *Id.* at 210, 419–420. A term of years is one type of leasehold estate in which the grantor holds the status of landlord and the grantee is known commonly as a tenant. *Id.* at 419.

45. *Id.* at 258–259 (discussing reversions). When a grantor gives away less interest in property than he has, and the initial grantee has used the property for the designated period, the interest shifts back to the grantor, his successor, or a third party. *Id.*

46. *Id.* at 257 (providing examples of life estates and future interests partially conveyed to a son and his heirs and partially to a daughter and her heirs).

47. *Id.* at 257–258. One example is as follows: O to her child A for life, then to A's children, and if any of A's children are not alive, then to A's children's issue then living. *Id.* at 258–259.

48. See generally Lewis M. Simes, *Handbook of the Law of Future Interests* 67–105, 237–321 (2d ed., West 1966) (discussing the characteristics of future interests and the rule against perpetuities).

These rules are troubling, particularly to students, because the language seems directly related to old age. The typical transaction, addressed in the beginning of this material, offers a conveyance or devise from an owner, O, to a grantee, A, and that grantee's heirs.<sup>49</sup> Students consistently associate the concept of heirs with senior status. Heirs actually consist of anyone to whom property is left, either by the official acts of a decedent or as parties designated by the government.<sup>50</sup>

There is one particular concept, known as the fertile octogenarian rule, that obviously emphasizes senior status.<sup>51</sup> The fertile octogenarian rule declares that every person is capable of having children as long as they live.<sup>52</sup> Thus, in property disputes that depend on a grantee being able to have children, despite the fact that the grantee may be well past childbearing years, a court will presume that such an occurrence can take place for purposes of resolving the case.<sup>53</sup> This principle has been applied to eighty-year-old women, hence the label of fertile octogenarian.<sup>54</sup>

Although consecutive interests are important, shared interests in property is a more prevalent issue. As previously stated, seniors focus on living more than on dying, but an inevitable part of aging is that it becomes more difficult to remain independent. In an effort to acquire assistance, many seniors decide to share their real and personal property with others. For example, one might add a joint tenant to his deed and, in exchange for present care, pass his property to the caregiver upon his death as a type of delayed consideration.<sup>55</sup> Additionally, an elderly person might place a caregiver's name on a bank account in exchange for assistance with

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49. Dukeminier & Krier, *supra* n. 15, at 201.

50. *Id.* at 202-203.

51. John P. Dwyer & Peter S. Menell, *Property Law and Policy: A Comparative Institutional Perspective* 183 (Found. Press 1998); see Simes, *supra* n. 48, at 287-288 (explaining the rationale behind the fertile octogenarian concept).

52. Simes, *supra* n. 48, at 287-288. Thus, if A devises property to B's grandchildren who reach the age of twenty-one, and B is an eighty-year-old person, then the gift to B's grandchildren is invalid, because the law presumes that B will be able to have more children after A's death. *Id.* at 287 n. 26.

53. *Id.* at 287.

54. *Id.*

55. Lawrence A. Frolik & Richard L. Kaplan, *Elder Law in a Nutshell* § 10.2, 250-254 (2d ed., West 1999).



his financial affairs.<sup>56</sup> These accounts often are referred to as joint tenancy accounts.<sup>57</sup>

A shared interest in joint tenancy means that the surviving joint tenant is entitled to the remaining portion after the concurrent interest holder dies.<sup>58</sup> In dealing with real property, the common law generally presumes that a party is not a joint tenant unless the words "joint tenancy with a right of survivorship" are used specifically in the transfer instrument.<sup>59</sup> However, the law is more unsettled regarding personal property and joint bank accounts. These types of joint tenancies usually hinge on proof of the decedent's intent.<sup>60</sup> Thus, some joint accounts have been later characterized as convenience accounts or payable-on-death accounts, as opposed to true joint tenancy accounts.<sup>61</sup>

Convenience accounts are those deemed to have been arranged to permit another party to help pay the depositor's bills, but not arranged to afford the party any money at the depositor's death.<sup>62</sup> Payable-on-death accounts are organized to allow any remaining sums to be transferred to the joint account holder upon the death of the primary depositor.<sup>63</sup> The major difference between this account and a joint tenancy is that the former only contemplates the depositor having a right to personal use of the funds during his lifetime.<sup>64</sup> A true joint tenancy permits shared use of the account by the named parties while alive.<sup>65</sup> This also is true of real property held in joint tenancy.<sup>66</sup> As a result, one common difficulty that arises when seniors place children or other caretakers on property deeds while alive is that the property becomes potentially vulnerable to third-party creditors.<sup>67</sup>

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56. *Id.* at 251.

57. *Id.*; see Boyer et al., *supra* n. 28, at § 3.7, 30–31 (detailing some of the characteristics of joint bank accounts).

58. Boyer et al., *supra* n. 28, at § 3.7, 30.

59. *Id.* at § 6.5, 120.

60. *Id.* at § 3.7, 30–31; Dukeminier & Krier, *supra* n. 15, at 338.

61. Dukeminier & Krier, *supra* n. 15, at 338–339.

62. *Id.* Florida is one of the few states to expressly recognize an arrangement by the name "convenience account." Fla. Stat. § 655.80 (2001).

63. Dukeminier & Krier, *supra* n. 15, at 338.

64. *Id.*

65. *Id.*

66. *Id.* at 322.

67. Gallanis et al., *supra* n. 10, at 231.

## WILLS AND TRUSTS

One of the primary reasons seniors set up joint accounts with children or other loved ones is to avoid probate.<sup>68</sup> If there is a survivorship right in a personal or real property asset, ownership will shift automatically to the shared interest holder upon the death of the senior citizen.<sup>69</sup> Another way seniors and their families try to avoid probate is by creating some type of trust.<sup>70</sup> In those situations, the person who holds legal title to the property and desires the trust, transfers the res to a trustee who administers the trust on behalf of certain designated parties.<sup>71</sup> The person transferring the property is the settlor, and the party for whom the trust is established is known as the beneficiary.<sup>72</sup> The settlor and beneficiary may be the same party, and the settlor and trustee may be the same party.<sup>73</sup>

Trusts have long been aligned with the status of wealth more than age. Nonetheless, the subject often arises when dealing with elder law issues, because revocable trusts are viewed as popular will substitutes.<sup>74</sup> Although there are a wide variety of trusts, the first-year property class only introduces the concept, leaving a more

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68. *Id.* at 229. Probate is the process where a designated individual oversees the collection of a decedent's assets, payment of creditors and taxes, and distribution of the remaining assets to those designated by the decedent or by statute. Peter J. Strauss & Nancy M. Lederman, *The Elder Law Handbook: A Legal and Financial Survival Guide for Caregivers and Seniors* 175–176 (Facts on File, Inc. 1996). When an individual dies with a will, the person designated to handle the affairs is known as the executor or executrix. *Id.* at 175. When there is no will, a party petitions the court to be recognized as the administrator of the decedent's affairs. *Id.* at 175–185. The only way to avoid probate is to have the property distributed automatically upon the death of the asset holder. *Id.* at 175, 181, 188. Automatic distribution can be accomplished by holding the property jointly with survivorship rights or by putting the property in a particular type of trust. *Id.* at 181, 188.

69. *Id.* at 229.

70. Strauss & Lederman, *supra* n. 68, at 151–152, 187–188.

71. *Id.* at 151–152.

72. Gallanis et al., *supra* n. 10, at 236–237.

73. *Id.*

74. Strauss & Lederman, *supra* n. 68, at 188. Other popular will substitutes include guardianships, gifts, deed transfers retaining a life interest, insurance arrangements, holdings in joint tenancy, and the use of durable powers of attorney. See generally Robert Friedman, *Welcome to Estate Planning/Elderlaw Legal Survival* <[http://www.friran.com/elder\\_law.html](http://www.friran.com/elder_law.html)> (accessed Apr. 1, 2001) (providing an overview of various estate planning tools).

detailed discussion to courses such as wills and trusts or trusts and estates.<sup>75</sup>

Introductory property classes vary in the depth of coverage given to wills, trusts, and estates. Most look at the typical will requirements that usually require a maker be a certain age of majority and have the traditional "sound mind."<sup>76</sup> Furthermore, the will must be written and duly witnessed.<sup>77</sup> Certain trusts also must be written and witnessed.<sup>78</sup> Because there are a variety of types of trusts,<sup>79</sup> wills,<sup>80</sup> and conflicts between individuals claiming rights in decedents' estates, it is important for one contemplating an elder law career to study these areas.

### LANDLORD-TENANT ISSUES

Most first-year courses address the landlord-tenant system, also known as the nonfreehold estates system.<sup>81</sup> In elder law, there have been a number of statutory developments aimed at assuring affordable rental housing options to seniors. The introductory property course usually avoids these particulars and instead deals with the general duties and responsibilities of landlords and tenants. These non-age-specific issues primarily focus on recognizing the traits of different major tenancy types, including the term of

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75. The wills and trusts and the trusts and estates classes build on the introductory sections of the trust topics introduced in the basic property class. These classes typically are elective courses in most curricula, but they are popular because this subject is addressed commonly on bar examinations. The cases and concepts discussed in these classes often revolve around senior citizens.

76. William M. McGovern, Jr. et al., *Wills, Trusts and Estates: Including Taxation and Future Interests* 274 (West 1988) (citing Uniform Probate Code Section 2-501).

77. *Id.* at 163.

78. *Id.* at 298.

79. Strauss & Lederman, *supra* n. 68, at 152-153, 187-188. One of the most popular trusts for seniors is the revocable living trust. *Id.* at 188. Actually, any trust created by an individual while he is alive (*inter vivos*) is a living trust as opposed to those that are created by will after the settlor dies. McGovern et al., *supra* n. 76, at 297. The revocable trust gives the settlor the ability to decide while he is living whether to continue to use the assets of the trust for the sake of the beneficiary or to terminate the trust arrangement. *Id.* at 223-226. This power to revise the trust must be established at the trust inception. *Id.* at 224-225.

80. See Frolik & Kaplan, *supra* n. 55, at § 3.4, 29-41 (explaining that a popular device among seniors is the living will). However, the living will is titled deceptively, because it is not really a will in the traditional sense. It is actually a device used to instruct health care institutions on the type of treatment individuals should receive if they become too ill or disoriented to speak on their own behalf. *Id.* at 29. Because living wills do not include the distribution of property, the statutory requirements for them are less stringent. *Id.* at 29-30.

81. See *supra* n. 12 (listing some casebooks used to teach a first-year property law course).

years,<sup>82</sup> the periodic tenancy,<sup>83</sup> the tenancy at will,<sup>84</sup> and the tenancy at sufferance.<sup>85</sup>

Seniors who rent will find themselves involved in any one of these arrangements. This is true whether they rent under normal circumstances or based on a specialized senior program. For instance, the federal government finances a rental subsidy program commonly known as Section 8.<sup>86</sup> Individuals who qualify are handicapped, disabled, or over sixty-two years old.<sup>87</sup> A Section 8 tenant normally will sign a standardized lease and become a tenant for a term of years.<sup>88</sup> Tenancies characterized as a term of years have different requirements for termination than other types, such as periodic tenancies.<sup>89</sup> A periodic tenancy is established for a limited, recurring period of time and requires that a notice to terminate be given in a time frame equivalent to that period.<sup>90</sup> For example, if one has a month-to-month periodic tenancy, termination requires a one-month notice.<sup>91</sup> A term of years tenancy generally requires no notice, because it terminates on its own accord at the end of the time period mentioned in the lease.<sup>92</sup>

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82. Dukeminier & Krier, *supra* n. 15, at 419–420.

83. *Id.* at 420.

84. *Id.* at 421.

85. *Id.* at 425. It is important to characterize the type of tenancy, because this determines the legal requirements necessary to terminate the leasehold arrangement. *Id.* at 419–421, 425.

86. See U.S. Dept. Hous. & Urb. Dev., *Housing Choice (Section 8) Voucher Program Fact Sheet* <<http://198.200.153.9/section8.cfm>> (accessed Apr. 1, 2001) (providing an overview of rental vouchers under Section 8). The Section 8 program also is known as the housing choice program. The Department of Housing and Urban Development oversees the program, and various housing authorities around the country administer it. *Id.*

87. City of Arvada, *Section 8 Housing Program* <<http://www.ci.arvada.co.us/housing.html>> (accessed Apr. 1, 2001).

88. Columbia Leg. Servs. & N.W.J. Project, *Section 8 Existing Housing: Evictions* <<http://www.nwjustice.org/docs/6110.html>> (accessed Apr. 1, 2001) (stating that “recent changes enacted by Congress [indicate that] the Housing Authority will no longer require landlords to use a Section 8 lease”). However, this does not mean that those leases will no longer be used, because most landlords of Section 8 property are not attorneys and will use the lease that the agency suggests. The standardized lease specifies particular dates, notice requirements, and automatic renewal clauses. N.Y. St. Div. Hous. & Community Renewal, Off. of Rent Administration, *Fact Sheet #4 — Lease Renewal in Rent Stabilized Apartments* <<http://www.housingnyc.com/resources/dhcr/dhcr4.html>> (accessed Apr. 1, 2001) [hereinafter Off. of Rent Administration].

89. Dukeminier & Krier, *supra* n. 15, at 419–420.

90. *Id.* at 420.

91. *Id.*

92. *Id.*

Seniors who secure their housing through a type of subsidy program, such as Section 8, potentially will have more protection than tenants who do not.<sup>93</sup> Statutory programs, like Section 8, generally provide more safeguards for tenants, making it more difficult for the landlord to evict them, because the underlying policies of the program recognize the difficulty these individuals will face in trying to secure substitute housing.<sup>94</sup> This is especially true of seniors facing severely limited income and lacking the physical ability to move between residential settings quickly.

Another area of housing that commonly is associated with the elderly is the assisted living facility (ALF).<sup>95</sup> While there usually is no reason to bring up the ALF when discussing the basic landlord-tenant framework, an elder law-conscious professor might raise the subject. Students often believe that landlord-tenant law governs any normal living space that an individual pays to use. This is not true as shown by some dormitory disputes.<sup>96</sup> If the academic setting brings to mind dormitories for the young, the ALF may be juxtaposed as a dormitory for the old. It is interesting to compare residents' rights in normal leasehold settings with those of dormitory residents. Certain states, such as Florida, have granted ALF residents very specific rights, some of which correspond to common

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93. N.Y. St. Div. Hous. & Community Renewal, *supra* n. 88. For example, a standard Section 8 lease allows termination only for "[a] serious or repeated violation of [the] lease; [v]iolation of federal, state, or local laws . . . ; or [o]ther good cause [during the initial term]," and for other restricted reasons during the renewal terms. Columbia Leg. Servs. & N.W.J. Project, *supra* n. 88. Furthermore, specific notice requirements must be followed. *Id.* On the other hand, if a senior has leased in a nonsubsidized setting, the lease may not be written, or it may be one terminable at the will of the landlord without cause.

94. Columbia Leg. Servs. & N.W.J. Project, *supra* n. 88.

95. *Older Floridians Handbook: Laws and Programs Affecting Older Floridians* 44 (4th ed., Fla. J. Inst., Inc. 1998) [hereinafter *Older Floridians Handbook*]. "An ALF is a popular long-term care housing alternative" in the State of Florida. *Id.* It can be a building with multiple units and residents, or it can be a private home with only one or two residents. *Id.* The contours of an ALF are defined by statute, because the facilities are licensed by the state; however, ALF's are not considered nursing homes. *Id.*

96. *E.g. Virgili v. Wesley College, Inc.*, 1981 WL 88268 (Del. Ch. 1981) (determining that exclusion from a dormitory for improper conduct did not constitute "suspension" and therefore did not violate the contractual arrangement between the students and the college); *Nw. U. v. City of Evanston*, 582 N.E.2d 1251, 1257 (Ill. App. 1st Dist. 1991) (holding that charging a hotel-motel tax to Northwestern University for operation of a dormitory was unconstitutional under Illinois law); *cf. Fischer v. Taub*, 491 N.Y.S.2d 538, 541 (App. Div. 1984) (finding that seniors living in an adult home care facility were not tenants); *Older Floridians Handbook*, *supra* n. 95, at 44 (describing the ALF as a version of a board and care facility).

law tenant expectations and others which extend beyond those beliefs.<sup>97</sup>

### HOME OWNERSHIP

Landlord-tenant law is related closely to issues involving residential home ownership. After looking at the particulars involved in renting property, the course often turns to a comparison of rental laws with those involved in a sales transaction. Home ownership issues in the basic property course are not viewed as age sensitive; however, as in leaseholds, there have been statutory programs established to make it easier for seniors to obtain and/or maintain a private home.<sup>98</sup> These programs assist seniors in securing low interest loans, paying a portion of their monthly mortgage, helping with utility bills, or raising funds for home repairs.<sup>99</sup>

The home still remains the largest, most important investment for most citizens, and survey data indicates that eighty-six percent of older adults want to stay in their homes for the rest of their lives.<sup>100</sup> A large number of senior homeowners often find themselves with a very valuable asset as they grow older, because their houses usually are free from mortgages or other liens. Because this rather large asset can be pledged easily as security, it is targeted often by the unscrupulous and often lost by the careless, especially when it comes to the elderly.

When reviewing realty sales transactions, it is important to convey to students the vast number of safeguards involved in assuring that the transfer works as smoothly as possible. Although general safeguards apply to any prospective participant in a residential real estate transaction, many protections are especially

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97. *Older Floridians Handbook*, *supra* n. 95, at 45. Residents' rights that logically are expected include "the right to . . . [l]ive in a safe and decent living environment free from abuse and neglect" and "the right to . . . [a]ccess to adequate and appropriate health care." *Id.* Other, more atypical rights include the right to a minimum of thirty days' written notice of relocation or termination and "the right to . . . [p]resent grievances and recommend changes" either directly, through the use of a Long-Term Care Ombudsman Council, or via an appropriate advocacy group. *Id.*

98. U.S. Dept. Hous. & Urb. Dev., *Senior Citizens* <<http://198.200.153.9/groups/seniors.cfm>> (last updated Feb. 12, 2001).

99. Administration on Aging, *Elder Action: Action Ideas for Older Persons and Their Families* <<http://www.aoa.dhhs.gov/aoa/eldractn/homemodf.html>> (last modified Mar. 20, 2000); Am. Assn. of Homes & Servs. for the Aging, *Senior Housing* <<http://www.aahsa.org/public/backgrd2.htm>> (accessed Apr. 1, 2001).

100. Strauss & Lederman, *supra* n. 68, at 254.

urgent when dealing with seniors. Issues surrounding contract interpretations, deed drafting and recordation, title insurance, and financing incorporate a lot of technical legal jargon, and the law is generally not more sensitive to a particular individual just because he has reached his senior years.<sup>101</sup>

Reverse mortgaging is a recent development in financing that is geared specifically toward seniors.<sup>102</sup> Reverse mortgaging programs allow seniors to use the equity in their homes as a source of additional income during those more trying financial times that most face as wages decrease and expenses accumulate.<sup>103</sup> These reverse mortgages are really not much different than the home equity loans available to any property owner with a positive debt-to-equity ratio.<sup>104</sup> The reverse characterization is based on the financial institution paying the homeowner each month instead of the normal loan situation in which the borrower makes the monthly payments.<sup>105</sup> The payments frequently are guaranteed by the government, and the homeowner receives the money as long as he lives on the premises.<sup>106</sup> The money normally does not have to be repaid until the house is sold.<sup>107</sup>

To qualify, homeowners must be at least sixty-two years old and owe little or nothing on the subject property.<sup>108</sup> The property used for the equity determination can be a home or a condominium.<sup>109</sup> Unlike normal mortgages, the applicant's income and credit history

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101. U.S. Dept. Hous. & Urb. Dev., *supra* n. 98, at *protect yourself* (providing links to assist seniors in dealing with "[f]raud information," "[h]ousing discrimination," and "[r]everse mortgage scams").

102. Strauss & Lederman, *supra* n. 68, at 259.

103. *Id.*

104. *Id.* Home equity loans provide a lump sum of money to a homeowner based on the equity in the property. *Id.* Thus, a property owner who has a home with a current market value of \$100,000 and an outstanding mortgage of \$25,000 will have approximately \$75,000 worth of equity and might use that to secure a home equity loan of \$50,000. The lender will feel that this is a good risk when comparing the loan amount to the property value less outstanding liens. Traditional home equity loans give the homeowner a lump sum that is repaid in monthly installments over time. With a reverse mortgage, instead of getting a lump sum, the homeowner gets monthly installments paid to him from the lender, and the lender's lien on the property grows with the payments. *Id.* at 260.

105. *Id.*

106. *Id.* (noting that some reverse mortgages are backed by the Federal Housing Authority, while others are backed by either private insurance or no insurance at all).

107. *Id.*

108. *Id.*

109. *Id.* However, "[c]ondominiums must be FHA-approved to be eligible." *Id.* Additionally, some properties will not qualify for the reverse mortgage program, such as mobile homes, cooperatives, and multiple unit dwellings. *Id.*

are of minimal importance.<sup>110</sup> The money can be received in a number of ways, but the most popular payment is equal monthly installments.<sup>111</sup> Regardless of the amount or the manner in which the money is received, it is tax-free income.<sup>112</sup> The amount of money available is related directly to the property used.<sup>113</sup> For example, rural farmland in Kansas in immaculate condition, totally free of any liens, undoubtedly will be of less value than a rundown, one bedroom condominium on Manhattan's lower east side. Of course, the financial needs of the applicants also will be colored by the location and circumstances surrounding the property at issue.<sup>114</sup>

While the reverse mortgage program is a great benefit on its face, like many matters in property law, the devil is in the details. Seniors commonly complain that the financial lenders of these programs offer very little money for the equity they feel they have accumulated in their homes.

I recently reviewed documents sent to prospective reverse mortgagors in which the lending institution determined that it would be able to send the individuals just over three hundred dollars a month. The property involved was a detached, single-family home with a fair market value of approximately \$150,000. The male prospective reverse mortgagor was approximately seventy-two years old, and the female was in her late sixties.<sup>115</sup> These individuals felt that the lender was not respecting them or their property, and they were worried that the lender would take their property. I was able to alleviate their fears of losing the property through some financial scam, because the program was typical in that the homeowners were not required to transfer title to their

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110. *Id.*

111. *Id.* at 261.

112. *Id.* at 262.

113. *Id.* at 261.

114. *Id.*

115. Lenders participating in the reverse mortgage program must comply with state and federal lending regulations; however, there are still many differences between programs. Some programs are simply lines of credit where the borrower draws funds as desired relative to the equity amount settled on at the programs initiation. Frolik & Kaplan, *supra* n. 55, at 201. Other programs provide payments as long as the owner remains in the residence and are known as "life tenure" arrangements. *Id.* at 203. These loans by nature are tied to the life of the owner as opposed to fixed term reverse mortgages. *Id.* Life tenure payments generally are lower than fixed term payments. *Id.* Regardless of the program, the older the borrower, the higher the monthly payment because of the likely shorter term of the loan. *Id.* at 202-203.



property.<sup>116</sup> However, they were not convinced that the program was worthwhile, because they believed they were entitled to bigger payments despite the effect this increase would have on the value of their overall estate. While a reverse mortgagor's heirs rarely face a strong likelihood of total forfeiture of their interest, the value of their interest certainly is affected.<sup>117</sup>

Although most programs require seniors to attend a free consumer education seminar on reverse mortgages, many seniors still have questions. It must be made clear to them that a reverse mortgage program is a money-lending program that utilizes their property as security, and thus, an undesired forced sale of the property for loan repayment purposes may result.

The chance is very slight because the mortgagee's first response to a problem would be to stop making payments to the seniors. Because the payments are based on the equity in the home, the amount of the lien is always going to be less than the total value of the property. Therefore, despite potential problems, the creditor is reasonably assured of receiving payment at some time in the future.

Seniors may run into other unfavorable consequences regarding their property. For example, because the senior maintains the title to the property, he may pledge it as security for another traditional mortgage or home equity loan, which might lead to foreclosure. Also, there may be a preexisting debt that is called on the property.<sup>118</sup>

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116. The underpinnings of the reverse mortgage program revolve around allowing seniors who are "house rich but cash poor" to satisfy their desires to stay in their homes as long as possible. *Id.* at 200. The program offered to the aforementioned individuals was a standard "life tenure" arrangement; thus, they never had to fear being forced out of their home or owing, either personally or through their successors, more than their home was worth when the loan originated. *Id.* at 204.

117. Strauss & Lederman, *supra* n. 68, at 262 (warning that circumstances may arise that cause an individual to lose his home or deplete its value as an asset to his heirs).

118. When a senior attempts to use joint ownership as a method of avoiding probate, it is likely that the remaining equity in his property will be pledged as security for some other loan or possibly attached to satisfy a lien. While joint ownership with survivorship rights allows for immediate transfer of ownership interest upon the death of a joint tenant holder, all joint tenants have equal control over the property during their lifetime. For a discussion of joint tenancies, consult *supra* notes 58 to 61 and accompanying text. Thus, a senior who holds title with a particularly irresponsible individual may suffer not only the unexpected reduction or termination of monthly payments, but may be at risk for total loss of the property for behavior that they were not aware of and did not support. See Frolik & Kaplan, *supra* n. 55, at 202-203 (explaining the duration of reverse mortgages including mortgages on jointly owned homes).

Finally, a senior may need to move to an ALF or other facility that uses the house as security for the services it renders.<sup>119</sup>

### USE RESTRICTIONS

The basic property course covers use restrictions from a variety of perspectives. I previously mentioned the discussion of duties and responsibilities involved in the leasehold housing arrangement.<sup>120</sup> All property holders who own rather than lease also face a number of restrictions on the use of their property. While a titleholder clearly has more rights than a leaseholder, he must avoid being duped into believing that these rights are limitless.<sup>121</sup> Restrictions arise from a number of private and public places. Typical private restrictions are characterized as easements,<sup>122</sup> real covenants,<sup>123</sup> and equitable servitudes.<sup>124</sup> Public restrictions usually are identified as zoning laws.<sup>125</sup> Additionally, one may face a private or public nuisance action based on objections to the way the property is used.<sup>126</sup>

Property law students must learn to distinguish between the various types of use restrictions even though they are non-age specific. However, in becoming familiar with the framework for use restrictions, issues of discrimination, which can be addressed from an elder law perspective, often arise.

For instance, when addressing the improper use of deed restrictions to limit the scope of alienation one can review past and

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119. Nursing homes are generally thought of as places for seniors who can no longer care for themselves. However, "[t]here are several types of nursing homes, each type being staffed and equipped to deliver a different level of care." *Older Floridians Handbook*, *supra* n. 95, at 31. For example, skilled nursing facilities provide seniors with comprehensive medical attention twenty-four hours per day. *Id.* Intermediate care facilities provide seniors limited supervision with certain daily activities, but not full-time personal care by registered nurses or other professional medical personnel. *Id.*

120. *Supra* pt. *Landlord-Tenant Issues* (discussing landlord-tenant issues related to elder law).

121. I tell my students that an easy way to think of the bundle of rights (often referred to as sticks) that a property owner has, is to remember the acronym D.U.P.E.D., identifying the rights to dispose, use, possess, exclude, and secure damages. I also note that thinking these rights are absolute simply because one owns property is to be duped in the literal sense of the word.

122. Boyer et al., *supra* n. 28, at § 10.1, 308–319.

123. *Id.* at § 10.2, 320–322.

124. *Id.* at § 10.3, 322–403.

125. *Id.* at § 12.1, 430–434.

126. *See generally id.* at § 11.1, 404–408 (discussing liability in private and public nuisance actions).

present laws prohibiting discrimination.<sup>127</sup> Newer laws, such as the Federal Fair Housing Act, do not expressly classify the elderly as a suspect category, but they do prevent disfavorable treatment against the handicapped.<sup>128</sup> A number of cases have used this aspect of the statute to include seniors, because handicapped and disabled categories encompass individuals with mobility impairments and those suffering from a serious reduction in the use of their major sensory organs.<sup>129</sup> In general, most seniors can qualify under one or both of these prongs.

Interestingly, discrimination “in favor of” the elderly has been upheld where challenges have been raised against entities limiting occupancy to the elderly.<sup>130</sup> For example, many communities feature condominium and townhouse complexes where the residents are generally fifty-five years old or older. However, federal housing laws prohibit discrimination against families with children.<sup>131</sup> Therefore, conflicts arise when families with children seek to move into the

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127. Many individuals think of the Age Discrimination in Employment Act of 1967 (ADEA) when considering discrimination against the elderly; however, that act only deals with employment-related situations. “The federal Fair Housing Act prohibits discrimination in housing,” including both rental and sales arrangements. *Older Floridians Handbook, supra* n. 95, at 59. For a recent United States Supreme Court application of ADEA principles, see *O'Connor v. Consolidated Coin Caterers Corporation*, 517 U.S. 308, 309–312 (1996).

128. Strauss & Lederman, *supra* n. 68, at 266.

129. *E.g. Casa Marie, Inc. v. Super. Ct. of P.R.*, 988 F.2d 252, 266–270 (1st Cir. 1993) (Elderly individuals may be afforded protection under Title VIII if they are, or are perceived to be, persons with a handicap.); *U.S. v. Forest Dale, Inc.*, 818 F. Supp. 954, 969–970 (N.D. Tex. 1993) (A public housing complex for senior citizens was not permitted to exclude an applicant who was elderly, because the applicant also fell within another protected category.); *“K” Care, Inc. v. Town of Lac Du Flambeau*, 510 N.W.2d 697, 700 (Wis. App. 1993) (Elderly residents were “handicapped” persons under the Fair Housing Act, because residents were frail and required assistance in daily living.). Seniors also may qualify for protection under the Americans with Disabilities Act of 1990. Strauss & Lederman, *supra* n. 68, at 206. This act, like the ADEA, is directed at eliminating discrimination in the workplace. *Id.* State discrimination laws also may be consulted for both housing and employment issues. *Id.* at 215.

130. *E.g. Senior Civ. Liberties Assn. v. Kemp*, 761 F. Supp. 1528, 1540–1543 (M.D. Fla. 1991) (The Fair Housing Amendments Act of 1988 did not violate the rights of elderly Florida owners whose dwelling units had restrictive covenants excluding children.); *Assisted Living Assocs. v. Moorestown Township*, 996 F. Supp. 409, 437 (D.N.J. 1998) (Unreasonable efforts to obtain housing were not required of plaintiffs in a handicap discrimination case under the Fair Housing Act.); *Sunrise Dev., Inc. v. Town of Huntington*, 62 F. Supp. 2d 762, 773–774 (E.D.N.Y. 1999) (A city’s denial of a zoning variance, which required more restrictive permit requirements to build an elderly living facility, was likely to violate the Fair Housing Act.); *but cf. Chiara v. Dizoglio*, 59 F. Supp. 2d 193, 198 (D. Mass. 1999) (denying a preliminary injunction and explaining that granting a permit to build senior citizen housing would be against public interest prior to a trial about the construction).

131. Strauss & Lederman, *supra* n. 68, at 266–267.

complexes primarily reserved for senior citizens. The senior citizen communities often are granted an exemption from the prohibition against families with children discrimination.<sup>132</sup>

Furthermore, a number of cases have generated favorable outcomes for those engaged in developing housing alternatives for seniors despite the objections of otherwise neighborly residents.<sup>133</sup> Although few openly object to the construction of housing alternatives for seniors, as with many other types of nontraditional housing arrangements, everyone wants this type of housing constructed elsewhere. This "not in my backyard" attitude has led to litigation in the area of zoning laws, and the cases involving the elderly provide some of the most compelling facts.<sup>134</sup> Thus, students may find that the area of use restrictions especially highlights the interaction of seniors' concerns with basic real property concepts.

Many basic property courses also will address the concept of eminent domain. Some professors will discuss it as the ultimate use restriction, while others will deal with it as a totally independent subject. Eminent domain, otherwise known as takings law, is an area that is generally age neutral. Introductory property law students review eminent domain by discussing the reach of the Fifth Amendment in federal law and similar provisions in state constitutions. More specifically, one studies whether the government is taking private property only for public purposes and whether the property owners are duly compensated.<sup>135</sup> The government, moti-

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132. *Id.* at 267. Peter J. Strauss & Nancy M. Lederman explain that senior housing is exempt from the anti-familial discrimination provision of the Federal Fair Housing Act if the HUD Secretary determines that [the property] is specifically designed for and occupied by elderly persons under [some] government program or [i]t is occupied solely by persons who are 62 or older or [i]t houses at least one person who is 55 or older in at least 80 percent of the occupied units; it has significant services and facilities for older persons; it adheres to a published policy statement that demonstrates an intent to house persons 55 or older.

*Id.*

133. *E.g. Senior Civ. Liberties Assn.*, 761 F. Supp. at 1540-1543 (The Fair Housing Amendments Act of 1988 did not violate rights of elderly Florida owners whose dwelling units had restrictive covenants excluding children.); *Assisted Living Assocs.*, 996 F. Supp. at 437 (Unreasonable efforts to obtain housing were not required of plaintiffs in a handicap discrimination case under the Fair Housing Act.); *Sunrise Dev., Inc.*, 62 F. Supp. 2d at 773-774 (A city's denial of a zoning variance, which required more restrictive permit requirements to build an elderly living facility, was likely to violate the Fair Housing Act.).

134. Donald F. Berschback II, *The Many Faces of Nimby*, 23 Barrister 11, 11 (Spring 1996) (describing the protectionist sentiment associated with the "Not In My Backyard" homeowners concerned with unwelcome land uses that come to their neighborhoods).

135. The Fifth Amendment to the United States Constitution states that private property shall not "be taken for public use, without just compensation."

vated by its perceived need for a particular parcel and its ultimate power in the property law hierarchy, is not more likely to take a senior's property than another citizen's property. Although the government may feel more comfortable fighting over property issues with a senior citizen, the government does not make decisions on that basis. As the ultimate progenitor of property rights, the government does not have to target particular types of property owners. Therefore, this area is not one that can be relied on as providing a basis for examining the nexus between elder law and property law.

### *CONCLUSION*

This Article illustrates that a professor who wishes to sensitize an introductory property class to elder law issues will have ample opportunities to do so. These opportunities can be seized throughout the course and need not be limited to those sections covering the transfer of property at death. While those topics naturally involve seniors, those principles actually apply to individuals of any age. Seniors, like others, are concerned with living the best possible life for the time they are here, and they want attorneys who are adept at helping them maneuver through all areas of property law. Making students cognizant of the present expanse of opportunities as well as challenging them to question the status quo will help assure that seniors are represented well in the future.

