

INTRODUCTION

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Some years back, I was on a panel discussing the topic of teaching elder law in a law school curriculum. On that panel with me was my friend Howard Eglit, Professor at Chicago-Kent College of Law. Howard and I were talking about our presentation, and he offered me the following thoughts. Howard took the position that having elder law as a separate course made it ageism. If elder law issues were truly important, they would be integrated into a curriculum. Having a separate course would fall into that “ism” trap and actually work in a discriminatory fashion against the elderly.

Of course, at that time, I did not agree with Howard. We have a lot of speciality courses that are designed to allow a student to learn an area of law in depth. Are we stereotyping elderly people if we offer a stand-alone course in elder law? But from time to time over the years, I would think about Howard’s comments. If elder law was really that important, why could we not integrate it into the law school curriculum? Thus, the genesis of this issue of the *Stetson Law*

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Review came from my discussion with Howard those many years ago. The only question I cannot answer is why it took me so long to think of this.

In this issue of the *Law Review*, we offer a number of articles on incorporating elder law into the law school curriculum. Each author is a recognized expert and experienced professor. All of the authors were asked to write articles about incorporating elder law into traditional law school courses. Could it be done? Should it be done?

Professor Larry L. Teply, in *The Elderly and Civil Procedure: Service and Default, Capacity Issues, Preserving and Giving Testimony, and Compulsory Physical or Mental Examinations*,¹ shows how easily it can be done in a traditional civil procedure course. He identifies a few key areas of civil procedure in which hypotheticals involving an elderly party could be incorporated into the course. He even provides the hypotheticals, including one based on the famous discovery case *Schlagenhauf v. Holder*.² Professor Teply concludes that using elder law issues in a basic civil procedure course not only illustrates the particular issues, but also sensitizes students to issues and provides insight into strategic considerations, as well as broader policy concerns.³

Professor Patrick Emery Longan, a former colleague and now the William Augustus Bootle Professor of Ethics and Professionalism in the Practice of Law at Mercer University Walter F. George School of Law, writes about the ways to incorporate elder law hypotheticals into professional responsibility in *Elder Law across the Curriculum: Professional Responsibility*.⁴ Professor Longan recognizes that real world examples in elder law situations have an advantage over the more standard approach of using hypotheticals based in civil or criminal litigation.

Few students have personal experiences with civil or criminal litigation. Almost all of the students have families and will be familiar with the legal issues and personal dynamics present in the practice of elder law.⁵

1. Larry L. Teply, *The Elderly and Civil Procedure: Service and Default, Capacity Issues, Preserving and Giving Testimony, and Compulsory Physical or Mental Examinations*, 30 Stetson L. Rev. 1273 (2001).

2. 379 U.S. 104 (1964).

3. Teply, *supra* n. 1, at 1292.

4. Patrick Emery Longan, *Elder Law across the Curriculum: Professional Responsibility*, 30 Stetson L. Rev. 1413 (2001).

5. *Id.* at 1414.

Professor Longan uses real world elder law hypotheticals to provide examples for teaching students in a professional responsibility course, and these hypotheticals can be integrated easily into any professional responsibility course.

Professor Edward D. Spurgeon, along with Elizabeth J. Mustard, Fellow of the Borchard Foundation Center on Law and Aging, reviewed an extensive number of books — casebooks, as well as treatises, and other materials for elder law, wealth transfer taxation, and estate planning — for their article, *Integrating Tax and Elder Law into Elder Law and Tax Courses*.⁶ In their introduction, they note that the question of teaching elder law across the curriculum is a question that has been asked about other emerging fields.⁷ They take the position that elder law will become more relevant not only because of the growing population, but also because of an increasing likelihood of its integration throughout other areas of law.⁸ Their review of elder law books revealed minimal coverage of tax issues and a lack of tax policy questions. They provide a detailed review of those provisions covered and those not and recommend ways to improve tax coverage in elder law books. Most of the wealth transfer and tax laws are age-neutral, and due to the volume of material covered in these courses, the authors recommend against adding non-tax elder law topics or special tax issues to the basic courses on gift, estate, and generation-skipping taxes or the estate and trusts tax courses.⁹ The authors do recommend that all estate planning casebooks and courses cover topics, such as physical aspects of death, planning for financial security for retirement and health care, and property management on incapacity.¹⁰

For the basic tax courses, the authors believe that age-based tax provisions, as well as elder applications of other provisions, could be more significantly included in the books and the curriculum.¹¹ Not only would this broaden the education of the students, it also would be a more accurate reflection of the materials' application. The authors give examples of how sections should be included and integrated. For tax policy, they recommend adding multi-genera-

6. Edward D. Spurgeon & Elizabeth J. Mustard, *Integrating Tax and Elder Law into Elder Law and Tax Courses*, 30 *Stetson L. Rev.* 1375 (2001).

7. *Id.*

8. *Id.*

9. *Id.* at 1394.

10. *Id.*

11. *Id.* at 1402.

tional family and family caregiver situations to the discussion of taxing families, to provide a more accurate picture.¹² The authors conclude that these changes are important and should be adopted. The authors are sensitive to professors' concerns about a lack of expertise in another field, but conclude that the elder law professor does not need to be a tax law expert nor does the tax law professor need to be an elder law expert to integrate the authors' suggestions.¹³ Instead, these suggestions simply add to the depth of material already offered. Recognizing that all professors face a time crunch when trying to include everything they want to in a course, the authors suggest ways to focus on increased depth and topics, as well as methodologies they feel would be most helpful to a student in the law school educational experience.¹⁴

Professor William E. Adams, Jr. in his article, *The Intersection of Elder Law and Criminal Law: More Traffic Than One Might Assume*,¹⁵ also recognizes the time constraints faced by law professors in covering course materials. To refute that concern, he offers a number of reasons why including elder law issues into a criminal law course would improve it. In addition to demographic arguments, he argues that there is still widespread ageism in our society and that law students need to be sensitized to elderly stereotypes.¹⁶ Criminal law offers various perspectives to approach elder law. Cases can include elders as victims as well as offenders.¹⁷ The penal system faces particular challenges responding to the physical and mental issues faced by a geriatric population.¹⁸ The role of age in sentencing can present a particular challenge to the judicial system. The costs and social policies of incarcerating elderly criminals give the professor many opportunities for discussion.¹⁹

While most lawyers think of real property courses in terms of "dirt law," in reality the course is much more all-encompassing and cutting edge. In *Elder Law Issues in the Basic Real Property Course*,²⁰ Professor Darryl C. Wilson proves that elder law issues

12. *Id.* at 1405.

13. *Id.* at 1409–1410.

14. *Id.* at 1410–1411.

15. William E. Adams, Jr., *The Intersection of Elder Law and Criminal Law: More Traffic Than One Might Assume*, 30 Stetson L. Rev. 1331 (2001).

16. *Id.* at 1333–1334.

17. *Id.* at 1332–1333.

18. *Id.* at 1347–1348.

19. *Id.* at 1348–1351.

20. Darryl C. Wilson, *Elder Law Issues in the Basic Real Property Course*, 30 Stetson L. Rev. 1353 (2001).

extend far beyond the issues of descent and distribution. Although many of the concepts in property law are age-neutral, some can be taught emphasizing the elder's perspective. Professor Wilson starts with gifts and adverse possession.²¹ Age is relevant because of the importance of the party's mental state.²² Shared interests, consecutive interests, joint accounts, trusts, and even the fertile octogenarian rule can be used to illustrate the elder perspective.²³

Particular housing topics also can illustrate elder issues, such as landlord-tenant issues in rental subsidy programs, assisted living facilities, and reverse mortgages.²⁴ Age-restricted housing is one example of use restrictions that are age-specific, which is a great example of an issue from an elder law perspective.²⁵ Professor Wilson concludes that the opportunities to insert elder law issues into a basic property course are plentiful.

Professor Kenney F. Hegland was positioned uniquely to write an article for this volume of the *Law Review*. He not only teaches contracts law, he also teaches elder law. But he did not cover elder law topics in his contracts course. In his essay, *Teaching Elder Law in Contracts*,²⁶ he asks *why* — why raise elder law issues in contracts?²⁷ Like many law professors, he views his contracts course as a successful one and was reluctant to tinker with it without knowing why he should. After an internal debate, he simply decided to do it — he would teach elder law issues in his contracts course through exercises he would develop and assign to his students.

Professor Hegland describes the two exercises he developed and the results of using them. The first was an exercise on third-party beneficiaries.²⁸ He developed a fact pattern in which Dad was drafting a will, leaving Son nothing, and after Dad's death, Son sues the Lawyer as a third-party beneficiary.²⁹ The hypothetical allowed for a discussion of third-party beneficiary liability with a focus on the attorney's role.³⁰ It also allowed for a discussion about individualism and community.³¹

21. *Id.* at 1355–1358.

22. *Id.* at 1356.

23. *Id.* at 1358–1361.

24. *Id.* at 1363–1366.

25. *Id.* at 1371–1372.

26. Kenney F. Hegland, *Teaching Elder Law in Contracts*, 30 *Stetson L. Rev.* 1319 (2001).

27. *Id.*

28. *Id.* at 1321–1323.

29. *Id.*

30. *Id.*

31. *Id.*

The second exercise was a living will role-play. Professor Hegland divided his students into three groups – attorneys, clients, and observers.³² Outside of class, over a week's time, the attorneys were to meet their clients and discuss whether the client should have a living will; if so, then they discussed the terms of the living will.³³ If the client wanted, the end result could be an actual living will. Professor Hegland gave the attorneys and observers a form living will (attached to his article as Appendix A) and met with the attorneys and observers for a discussion of the law, the implications of not having an advance directive, and the elements of a good counseling session.³⁴ He then met with the clients, and at the end of the exercise, he had the students write about what they learned from the exercise for their on-line discussion group.³⁵

In his conclusion, Professor Hegland answers his *why* question this way — “elder law makes it real.”³⁶ Law students have parents and everyone dies.³⁷ The living will exercise not only brought in real world lawyering, but the opportunity to discuss the issues of enforcement and inaction.³⁸ Professor Hegland concluded that both exercises were “keepers” and closed his essay with this observation — “Elder law rocks!”³⁹

Elder law issues already exist in some of the cases included in constitutional law courses, and, at our school, we are fortunate to have on our faculty the authors of the preeminent Florida constitutional law casebook. One of them, my colleague Professor Thomas C. Marks, Jr., looks at using elder law issues in both federal and state constitutional law courses in his article, *Elder Law in Federal and Florida Constitutional Law Courses*.⁴⁰ Professor Marks notes that the instances of elder issues in federal constitutional law include age-based governmental classifications, government-imposed limits on removal of life-sustaining measures, the parallels between abortion and physician-assisted suicide, and legislating grandparent visitation.⁴¹ The section on Florida constitutional law

32. *Id.* at 1324–1327.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1327.

37. *Id.*

38. *Id.*

39. *Id.*

40. Thomas C. Marks, Jr., *Elder Law in Federal and Florida Constitutional Law Courses*, 30 Stetson L. Rev. 1293 (2001).

41. *Id.*

includes the second, third, and fourth issues, as well as the state constitutional prohibition against discrimination based on physical disability under Articles 2 and 23 of the Florida Constitution.⁴² He uses cases on these topics to show how a discussion of these issues could flow in constitutional law courses. Professor Marks already includes in class discussions most of these cases and many of these topics. In his article, he provides a significant analysis of these cases and how they can be used to illustrate elder law issues. He notes that coverage of this material prepares law students to represent a quickly growing segment of society that continues to need representation.⁴³

The final article is authored by Professor Seymour Moskowitz. Professor Moskowitz has written previously on elder law topics, significantly in the area of elder abuse. For this essay, however, he chose the topic of family law, authoring *On Golden Pond: Integrating Legal Issues of the Elderly into Family Law*.⁴⁴ Professor Moskowitz notes that there is little content in family law casebooks on elder issues; instead, the focus is on families as defined as parents with minor children.⁴⁵ Elder law issues can include marriage — for example, drafting prenuptial and antenuptial agreements or enforcing them; multi-generational families (for example, grandparents raising grandchildren and grandparents seeking custody against parents (the O.J. Simpson case));⁴⁶ the best interest of the child standard;⁴⁷ and visitation issues.⁴⁸ Dispute resolution, such as mandatory mediation in custody and visitation disputes, can follow a discussion of multi-generational family issues.⁴⁹ Professor Moskowitz notes the hostilities between the mother and grandparents about visitation in *Troxel v. Granville*.⁵⁰ Support issues, including a discussion of filial responsibility, can include elder law issues.⁵¹ Elder abuse and neglect also work in a family law course. Professor Moskowitz hypothesizes that the absence of materials on these issues in the family law casebooks

42. *Id.* at 1294.

43. *Id.* at 1317.

44. Seymour Moskowitz, *On Golden Pond: Integrating Legal Issues of the Elderly into Family Law*, 30 Stetson L. Rev. 1427 (2001).

45. *Id.* at 1429.

46. *Id.* at 1435–1436.

47. *Id.* at 1433–1439.

48. *Id.* at 1439–1447.

49. *Id.* at 1447–1450.

50. 530 U.S. 57 (2000) (plurality).

51. *Id.* at 1452–1458.

might be because the issue is viewed as equivalent to domestic violence.⁵² Professor Moskowitz argues that this equivalence would be false and demonstrates the difference in analysis of the two issues.⁵³ He includes a discussion of the ethical issues with an elder law focus that may be raised in a family law course.⁵⁴ He concludes that incorporating elder issues gives students both the skills and the information they need to represent clients competently and professionally.⁵⁵

The authors tackled their subject with enthusiasm and creativity. Their methods can be emulated easily or may serve as the spark for other ideas on how to incorporate elder law issues into courses across the law school curriculum. The first-year courses are presented in alphabetical order by course title — civil procedure, constitutional law, contracts, criminal law, and property. The upper-level courses — tax, professional responsibility, and family law — follow. The articles are fascinating, and I am deeply indebted to Professor Eglit for the idea and the authors for making the idea a reality. Professor Hegland said it best, “Elder law rocks!”

52. *Id.* at 1463.

53. *Id.*

54. *Id.* at 1464–1467.

55. *Id.* at 1468.