

# UPPER-LEVEL COURSES

## INTEGRATING TAX AND ELDER LAW INTO ELDER LAW AND TAX COURSES

Edward D. Spurgeon\*  
Elizabeth J. Mustard\*\*

### I. INTRODUCTION

Now that upper-level elective courses in elder law have become well established in the curriculum at many law schools,<sup>1</sup> this Symposium explores if and how law schools should teach elder law and selected tax topics that affect the elderly across the curriculum. In the past, the same question has been asked about other emerging fields. For example, when law school faculties recognized the educational importance of international law in a rapidly globalizing world, they developed new upper-level specialized public and private international law courses, and some international law faculty advocated the addition of units on related international law topics in some required core law school courses.<sup>2</sup> As elder law becomes increasingly relevant, both because of the rapidly growing population of aging citizens with legal concerns and because of an expanding body of law that cuts across other areas of law, law faculty should similarly reassess and appropriately revise how these

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\* © Edward D. Spurgeon, 2001. All rights reserved. Professor of Law, University of Georgia School of Law. Executive Director, Borchard Foundation Center on Law and Aging.

\*\* © Elizabeth J. Mustard, 2001. All rights reserved. Fellow, Borchard Foundation Center on Law and Aging, 2000–2001. J.D. Order of the Coif, University of Georgia School of Law.

1. See generally David M. English, *Teaching Elder Law in the Twenty-First Century*, 12 NAELA Q. 25 (1999) (recognizing the lack of faculty in the elder law area); Alex L. Moschella, *Elder Law in the Law Schools*, 12 NAELA Q. 27 (1999) (describing the surveys of elder law courses and listing the law schools that offer elder law courses as of 1993).

2. See generally John A. Barrett, Jr., *International Legal Education in the United States: Being Educated for Domestic Practice while Living in a Global Society*, 12 Am. U. J. Intl. L. & Policy 975 (1997) (describing international legal education in the United States); Alberto Bernabe-Riefkohl, *Tomorrow's Law Schools: Globalization and Legal Education*, 32 S.D. L. Rev. 137 (1995) (describing the effects of economic globalization on legal education).

subjects are taught to address aspects of this dynamic field. In particular, the coverage of tax aspects affecting the elderly in elder law, estate planning, and the basic federal income tax and tax policy curriculum needs some revision.

Broadly speaking, elder law describes the array of legal issues concerning older persons — including economic security, estate planning and management, planning for incapacity, age discrimination, elder abuse, health and long-term care, and end-of-life issues.<sup>3</sup> Federal and state tax laws impact many of these nontax elder law areas, and an attorney must consider these areas when addressing the legal needs of an elderly client — or even a young client — whose planning or activities have elder law implications. For example, whether, and under what circumstances, the estate tax law recognizes gifts made under a durable power of attorney for an incapacitated person as irrevocable impacts both the nontax elder law areas of estate planning and planning for incapacity. Also, in the pure tax area, aspects of elder law are implicated because tax provisions apply expressly or as a result of either a chronological or biological age-based status. An example of one such provision is Section 22 of the Internal Revenue Code, which expressly permits an unused carryover credit of fifteen percent of income up to a specified maximum for qualifying individuals who are sixty-five or older or who are permanently and totally disabled.<sup>4</sup>

The specific questions addressed in this Article include how coverage of relevant tax laws can be improved in elder law materials and courses, and how coverage of nontax elder law topics and the specific tax provisions of particular relevance to the elderly can be improved in basic estate and gift tax and estate planning casebooks, in the basic individual income tax course, and in tax policy materials and teaching. To answer these questions, the Authors have reviewed current elder law, wealth transfer taxation, estate planning, individual income taxation, and tax policy casebooks. Admittedly, a casebook evaluation does not provide a complete picture of the formal education students receive because there may be a significant gap between a casebook and an instructor's classroom work product. Some instructors may already teach their courses in a way that incorporates the improvements suggested. However, when the professor follows the casebook closely, this Article will recommend improvements to both casebook authors and instructors, which will

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3. The Authors will refer to these areas generally as the nontax elder law topics.

4. I.R.C. § 22 (2000).

broaden student learning on nontax elder law and tax topics impacting the elderly.

Part II of this Article reviews and critiques the current coverage of tax topics in the two available elder law casebooks and the elder law nutshell. Part III examines the coverage of nontax elder law topics in wealth transfer taxation and estate planning casebooks and also suggests that the estate planning casebooks could productively include a separate section on special tax issues affecting the elderly. Next, Parts IV and V explore and recommend improvements for covering the tax aspects of elder law in both the individual income tax and tax policy casebooks, respectively. Finally, in Part VI, the reasons for improving both elder law and tax courses are emphasized, and potential criticisms of undertaking such improvements are addressed.

## *II. CURRENT COVERAGE OF TAX IN ELDER LAW MATERIALS*

### A. Discussion

As mentioned in the Introduction, law schools offer elder law courses as upper-level elective courses, seminars, and clinical components.<sup>5</sup> Although there is some variation in nontax elder law topics, elder law courses typically address most, if not all, of the following topics: the aging population and special ethical issues; economic security (social security, private pension plans, supplemental security income, and public and private housing); health and long-term care (medicare, medicaid, patients' rights, long-term care insurance, and viatical insurance settlements); planning for incapacity (guardianship, powers of attorney, revocable trusts, and joint tenancy ownership); health care decision-making (informed consent, proxy decision-making, right to die, physician-assisted suicide, and euthanasia); estate planning; elder abuse; neglect and crime; and age discrimination.<sup>6</sup> Some of these subjects have tax implications, but many do not. For example, income tax considerations are an important part of economic security, and the wealth

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5. Moschella, *supra* n. 1, at 27-28; *supra* pt. I.

6. English, *supra* n. 1, at 25.

transfer tax laws pervade estate planning for older individuals with estates in excess of the federal unified credit.<sup>7</sup>

On the other hand, the topics of health care decision-making, elder abuse, and age discrimination<sup>8</sup> have few, if any, tax implications. Long-term care costs and viatical insurance settlements within health and long-term care; and revocable trusts, durable powers of attorney, and joint tenancy ownership within planning for incapacity involve tax considerations. When elder law topics involve tax issues and implications of consequence, the casebooks, nutshell, practitioner-targeted treatises, and instructors in elder law courses should address these tax matters.

There are only two published elder law casebooks — a reflection of the field's relative infancy and recent introduction into the law school curriculum. The first casebook, Lawrence A. Frolik and Alison McChrystal Barnes's *Elderlaw: Cases and Materials* (the "Frolik casebook"), was originally published in 1992.<sup>9</sup> The book is now in its second edition, which was published in 1999.<sup>10</sup> The second casebook, *Elder Law: Readings, Cases and Materials*<sup>11</sup> (the "Gallanis casebook"), coauthored by Thomas P. Gallanis, A. Kimberley Dayton, and Molly M. Wood, was published in 2000. The coauthors were motivated to write this book, at least in part, because of the growth of the field and the demand for teaching materials in this area. In the preface, they comment that

[t]his area of the law is of rapidly increasing significance because of the demographic changes affecting the United States and, indeed, the rest of the world. The percentage of Americans aged 65 or older has more than tripled since the beginning of the twentieth century, and this percentage will rise even more

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7. The unified credit amount is \$675,000 for 2000 and 2001, \$700,000 for 2002 and 2003, \$850,000 for 2004, \$950,000 for 2005, and \$1,000,000 for 2006 and thereafter. I.R.C. §§ 2010(e), 2505 (2000).

8. Of course, one tax aspect of an age discrimination claim is that proceeds of an award are taxable. See I.R.C. § 104(a)(2) (2000) (excluding from gross income settlement and damage awards resulting from personal *physical* injury only).

9. Lawrence A. Frolik & Alison McChrystal Barnes, *Elderlaw: Cases and Materials* (Michie Co. 1992).

10. Lawrence A. Frolik & Alison McChrystal Barnes, *Elderlaw: Cases and Materials* (2d ed., LEXIS L. Publg. 1999). In the preface, the authors note how the idea of writing the book arose during lunch with other important participants in the evolution of the elder law field and also at the 1988 Wingspread Conference on Guardianship convened by the American Bar Association Commission on Legal Problems of the Elderly. *Id.* at viii-x.

11. Thomas P. Gallanis et al., *Elder Law: Readings, Cases, and Materials* (Anderson Publg. Co. 2000).

as the so-called "Baby Boomers" begin to join the ranks of the elderly.<sup>12</sup>

In addition to the two elder law casebooks, the field now offers a nutshell, coauthored by Lawrence A. Frolik and Richard L. Kaplan (the "Nutshell"),<sup>13</sup> and a growing number of treatises targeted at elder law practitioners.<sup>14</sup> The methodology of this Article includes a comparison of the approach to and coverage of tax topics between the two casebooks, the Nutshell, and the treatises.<sup>15</sup>

Both the Frolik casebook and the Gallanis casebook contain at least minimal descriptions of the federal income tax aspects of most, but not all, covered elder law topics.<sup>16</sup> Income tax coverage is more extensive in both the Nutshell and the practitioner-oriented treatises.<sup>17</sup> Although the Gallanis casebook provides the student with an overview of the federal estate, gift, and generation-skipping

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12. *Id.* at xix.

13. Lawrence A. Frolik & Richard L. Kaplan, *Elder Law in a Nutshell* (2d ed., West 1999).

14. *E.g.* Lawrence A. Frolik & Melissa C. Brown, *Advising the Elderly or Disabled Client: Legal, Health Care, Financial, and Estate Planning* (2d ed., Warren, Gorham & Lamont 2000) (covering a variety of issues in the elder law field); John J. Regan et al., *Tax, Estate & Financial Planning for the Elderly: Forms and Practice* vol. 1 (LEXIS L. Publg. 2000).

15. The Authors used a systematic methodology in reviewing the elder law casebooks. Step one was to identify the set of casebooks to be reviewed. The second step was to review each casebook's preface and table of contents for materials with tax implications. For step three, the textual materials identified in step two were reviewed to determine how the casebook addressed the tax implications applicable to elder law. Then, the available index of code provisions was reviewed for those tax provisions that expressly or frequently apply to the elderly. Also, a subsequent review of the textual materials corresponding to such references was undertaken. The fifth step was to review the index of the casebook for references to tax provisions of relevance to the elderly and undertake a subsequent review of the textual materials corresponding to such references. Any textual reviews included a review of the cases, the text, and any questions, notes, or problems following such materials.

16. Frolik & Barnes, *supra* n. 10; Gallanis et al., *supra* n. 11.

17. For example, in the Nutshell, where the discussion includes cites to and explanations of the relevant Internal Revenue Code provisions, there is good coverage of the tax aspects of "tax qualified" long-term care insurance policies, the sale or gift of a home, reverse mortgages, social security benefits, and qualified pension plan benefits. Frolik & Kaplan, *supra* n. 13, at 143-146, 183-199, 206-208, 306-310, 354-378. Not only are there brief explanations within various chapters of the income tax implications (e.g., the tax treatment of qualified plans and private pension plans) in the Frolik and Brown treatise, but Chapters 24 and 25, respectively, also cover federal income taxation and federal estate and gift taxation. Frolik & Brown, *supra* n. 14, at chs. 11, 24, 25. The *Tax, Estate and Financial Planning for the Elderly* treatise devotes Chapter 6 to relevant federal income tax law and Chapter 15 to estate planning—including an overview of federal estate, gift, and generation-skipping tax provisions. Regan et al., *supra* n. 14, at chs. 6, 15.

taxes in its estate planning chapter,<sup>18</sup> neither the Frolik casebook nor the Nutshell covers these wealth transfer taxes.

Generally speaking, the Frolik casebook contains only a brief descriptive summary of the relevant income tax law, often without reference to or explanation of the applicable Internal Revenue Code provisions. With one notable exception,<sup>19</sup> the Frolik casebook does not pose questions about the income tax material that are intended to foster and channel student thinking. Also, there is no mention of income tax consequences or planning options in the Frolik casebook's housing chapter<sup>20</sup> despite the fact that residence sales, reverse mortgages, and sales and leasebacks all involve significant income tax considerations. Finally, the discussion of joint tenancy ownership does not include any mention of the income tax basis or gift and estate tax issues.<sup>21</sup> Clearly, tax considerations are not of primary concern in the Frolik casebook, although they are summarily described in relation to several, but not all, topics in which there are important tax implications.

Throughout the Gallanis casebook, the authors do not write about the subjects that the casebook covers. Instead, each topic is described and explored by edited excerpts from articles written by others. Questions often follow these excerpts to help students fully understand the material. One example is the coverage in Chapter 4: Planning for Retirement, of the topics of income taxation of pension investments when made and the income taxation of pension distributions when made in annuity or lump sum form.<sup>22</sup> Each topic is presented by excerpts from collateral sources, including two law review articles, a source book on employee benefit programs, and Internal Revenue Service instructions for form 4972 tax on lump sum distributions.<sup>23</sup>

To provide an overview of the income taxation of contributions to qualified retirement plans, there is a one-paragraph excerpt from

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18. Gallanis et al., *supra* n. 11, at ch. 10.

19. Frolik & Barnes, *supra* n. 10, at 207. The Frolik casebook, following a brief comparison of qualified and nonqualified pension plans, poses questions that help the reader understand both the tax advantages of qualified plans ("Can you explain the federal income tax advantages of qualified pension plans? Why do employees prefer qualified pension plans to unqualified plans?") and the tax policy issues ("Is it consistent for the government to allow the employer to deduct future payments to the employee from current taxable income, but not tax the employee until receipt of the pension?"). *Id.*

20. *Id.* at 403-488.

21. *Id.* at 529.

22. Gallanis et al., *supra* n. 11, at ch. 4.

23. *Id.*

a law review article<sup>24</sup> that states — with citations to the relevant Internal Revenue Code provisions — that the contributing employee is allowed an income tax deduction when the contribution is made, that the employee participant does not include the contribution or earnings thereon in gross income while inside the plan, and that the plan itself is exempt from income tax.<sup>25</sup> Then, the casebook authors pose a question intended to help students understand the favorable tax treatment of qualified pension plans, “What are the tax advantages offered by pension plans? (Read, by way of example, Internal Revenue Code § 402(a) in the statutory supplement. What statutory language offers the tax advantage mentioned by Professor van Zante?).”<sup>26</sup> Note, particularly, the reference to the Gallanis casebook’s accompanying statutory supplement, which includes the relevant Internal Revenue Code provisions. Students are regularly asked to read this supplement in connection with the book’s questions regarding covered tax matters.

Although the Gallanis casebook, in contrast to the Frolik casebook, briefly covers the income, gift, and estate tax consequences of joint tenancy property ownership, it also mentions in its housing chapter that up to \$250,000 of a taxpayer’s gain on sale of his or her principal residence (\$500,000 in the case of a married couple filing a joint federal income tax return) will be excluded from gross income when the residence has been occupied as the principal residence for at least two of the five years preceding the sale.<sup>27</sup> However, the applicable code section (Internal Revenue Code Section 121) is not referenced, nor is there mention of the section’s prorated exclusion when the taxpayer has a change in circumstances — such as health — or the exception to the two-year use requirement when the taxpayer has been in a nursing home during the five-year period prior to sale. Furthermore, the tax implications of residence sales and leasebacks are not mentioned, and the coverage of reverse mortgages ignores the tax considerations — except to mention that interest accrued is not deductible until the end of the term when the mortgage debt is paid.<sup>28</sup>

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24. *Id.* at 194. The excerpted article is Peter M. van Zante, *Rollover of Retirement Plan Distributions: A Proposal to Eliminate the Dual Rollover Structure*, 86 Ky. L.J. 31, 42–43 (1997–1998).

25. van Zante, *supra* n. 24, at 42–43.

26. Gallanis et al., *supra* n. 11, at 194.

27. I.R.C. § 121 (2000); Gallanis et al., *supra* n. 11, at 401–403.

28. Gallanis et al., *supra* n. 11, at 194.

The Nutshell contains more detailed explanations of the relevant income tax provisions and consequences for the elder law topics with income tax implications than do either the Frolik or Gallanis casebooks. Compare, for example, the three books' coverage of Internal Revenue Code Section 86, the income taxation of social security benefits,<sup>29</sup> and their discussions of the income tax aspects of housing.<sup>30</sup> As previously noted, both casebooks ignore important income tax considerations and provide only cursory reference to others in connection with housing issues.<sup>31</sup> However, the Nutshell's discussion of the income tax aspects of an older person's sale or gift of their principal residence and of reverse mortgages and sales and leasebacks provides a reasonably complete explanation of the relevant law and its application, although there are no questions or assigned readings of statutes or other primary sources.<sup>32</sup>

Neither of the two elder law casebooks raises any tax policy questions, an unfortunate substantive and pedagogical omission, because an important goal of any course is to provoke a student to understand and think about different policy approaches and legal tools available to accomplish those policy objectives. For example, in addition to knowing that a portion of social security benefits is potentially subject to federal income tax and the mechanics of Internal Revenue Code Section 86, students should consider the history of the federal income taxation of social security benefits (where at first none, then up to fifty percent, and now up to eighty-five percent of benefits have been potentially taxable). Students should then be required to ask why benefits are taxed rather than more precisely means-tested when benefit entitlements are calculated.

On the subject of the income tax treatment of qualified pension plans, students should consider, and the class should discuss, what the broader economic and social policy objectives are for providing favorable tax treatment to both employers and employees, and whether the present system adequately meets those objectives. Also, students should question whether the trend away from the use of defined benefit plans and toward more defined contribution plans — where the investment performance risk falls on the plan participant

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29. Frolik & Barnes, *supra* n. 10, at 171–172; Frolik & Kaplan, *supra* n. 13, at 306–310; Gallanis et al., *supra* n. 11, at 161–163.

30. Frolik & Barnes, *supra* n. 10, at 447–448; Frolik & Kaplan, *supra* n. 13, at 183–199, 206–208, 210–215; Gallanis et al., *supra* n. 11, at 402, 412.

31. *Supra* nn. 20, 27–28 and accompanying text.

32. Frolik & Kaplan, *supra* n. 13, at 183–199, 206–208, 210–215.



and not the employer — is a good development. Furthermore, in addition to learning that long-term care insurance premiums are deductible medical expenses,<sup>33</sup> that the benefits paid up to a certain daily amount are not taxable, and that such policies can be offered as tax-free fringe benefits to employees (provided that the policy is a qualified long-term care insurance contract under Internal Revenue Code Section 7702B(b)), students should analyze if and how Congress — through its authority over the federal tax laws — should influence the content of long-term care insurance contracts, particularly because state law governs most aspects of insurance.<sup>34</sup>

As discussed previously, the Gallanis casebook provides students with a brief overview of the federal estate, gift, and generation-skipping tax, while neither the Frolik casebook nor the Nutshell provides any coverage of these transfer taxes.<sup>35</sup> The Gallanis casebook explains in its preface that, although Chapter 9 likely will be the final chapter covered during a typical semester, “[t]here is also a Chapter 10, which provides a summary of estate planning basics for students who have not yet taken courses in trusts and estates or in federal transfer taxation.”<sup>36</sup> That summary of transfer tax basics takes the form of two-page excerpts from three different law review articles that concisely and effectively summarize the federal estate, gift, and generation-skipping taxes; point out the purpose of the taxes; identify the primary exceptions and exclusions; and ask students to study certain Internal Revenue Code provisions found in the casebook’s statutory supplement.<sup>37</sup>

On the other hand, the Frolik casebook preface does not explain why the transfer taxes are not covered. However, a partial explanation may be gleaned from the introduction to the Nutshell where the authors state,

Finally, this book does not discuss estate planning in any real depth or Federal estate tax minimization at all. In part, this omission reflects the fact that the Federal estate tax affects less than 2% of older persons and rarely constitutes a major concern of the older client. But it also reflects the focus of elder law on maximizing the comfort of, and control by, the older person as he or she lives longer. The reader is referred to the separate

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33. I.R.C. § 213(d)(10)(A) (2000).

34. *McCarran-Ferguson Act*, 15 U.S.C. § 1012 (1994); *but see* 29 U.S.C. § 1144 (1994) (allowing ERISA preemption of certain employee benefit plans).

35. *Supra* n. 18 and accompanying text.

36. Gallanis et al., *supra* n. 11, at xix.

37. *Id.* at 553–558.

titles in this Nutshell series for "Estate Planning" and "Federal Estate and Gift Taxation" when information on those topics is desired.<sup>38</sup>

A final shortcoming of both the Gallanis and Frolik casebooks is the absence of problems. In general, problem-solving is a good pedagogical tool to introduce students to the intricacies of the principal textual material covered in the casebook. Adding problems to both casebooks would enhance student learning of the material and would allow explanation of some tax aspects of the elder law topics.

### B. Recommendations

The preceding comparative look at the coverage of the tax aspects of elder law in the existing casebooks and the Nutshell illuminates the need, and some possible ways, to improve tax coverage and pedagogy in student educational materials. The books should identify and at least briefly discuss the income tax consequences and planning options of all topics with tax implications. The discussion should reference applicable statutory provisions, adequately explain their coverage, and ask students to study the code sections and answer questions intended to further their understanding of the statutory provisions and their application. Also, through the inclusion of edited excerpts from secondary sources, textual discussion, and questions, tax and social policy implications and options should be explored. Furthermore, as the Gallanis casebook's concise summary of federal estate, gift, and generation-skipping tax laws illustrates, these topics should be overviewed in the primary elder law teaching materials. Finally, both casebooks would benefit from the addition of problems to stimulate analytical thinking about the principal textual materials.

## III. FEDERAL WEALTH TRANSFER TAXATION AND ESTATE PLANNING

### A. Federal Taxation of Gifts, Estates, and Trusts

Many law schools offer an upper-level course on federal taxation of gifts, estates, and trusts, which encompasses gift, estate, and

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38. Frolik & Kaplan, *supra* n. 13, at 7.

generation-skipping taxes (“wealth transfer taxes”) and an introduction to the income taxation of estates and trusts.<sup>39</sup> Other law schools have separate courses — one covering wealth transfer taxes and the other focusing on income taxation of estates and trusts.<sup>40</sup> The available published student-teaching materials include well-established and highly regarded casebooks — two of which cover income taxation of estates and trusts and wealth transfer taxes.<sup>41</sup>

Wealth transfer taxes and income taxation of estates and trusts are mostly age-neutral, applying without regard to the age of the donor, decedent, transferor, or beneficiary.<sup>42</sup> However, the primary impact of the wealth transfer taxes, and the planning to minimize them, falls naturally on the elderly. Nonetheless, these basic tax casebooks do not include any nontax elder law material<sup>43</sup> or incorporate either separate chapters or sections within chapters that discuss or illustrate special tax issues affecting the elderly. However, it is neither surprising nor inappropriate that nontax elder law and special tax issues affecting the elderly<sup>44</sup> are excluded from these basic tax casebooks, because these taxes are age-neutral, and the primary goal of a basic course covering the wealth transfer taxes or income taxation of estates and trusts is to provide students with a systematic and thorough grounding in these complex and substantive tax laws and to further knowledge about how a system based on a code, administrative regulations, and case law works. Even if such coverage were desirable, the ever-expanding scope of the wealth transfer taxes<sup>45</sup> and new developments in income

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39. Some law schools offer a basic wealth transfer tax course covering wealth transfer taxes, but not the income taxation of estates and trusts.

40. Typically, larger law schools and those that offer tax certificates or LL.M. programs in taxation offer separate courses on wealth transfer taxes and the income taxation of estates and trusts.

41. Boris I. Bittker et al., *Federal Estate and Gift Taxation* (7th ed., Little, Brown & Co. 1996); Regis W. Campfield et al., *Taxation of Estates, Gifts and Trusts* (21st ed., West 1999); Douglas A. Kahn et al., *Federal Taxation of Gifts, Trusts, and Estates* (3d ed., West 1997); Paul R. McDaniel et al., *Federal Wealth Transfer Taxation* (4th ed., Found. Press 1999). Both the Campfield and Kahn casebooks cover the income taxation of estates and trusts.

42. Of course, for both gift and estate tax valuation purposes, the value of life estates, remainders, and reversions depends on the age of the person involved. Otherwise, the laws are facially age-neutral.

43. *Supra* pt. I (identifying the so-called “nontax elder law” topics).

44. *Infra* nn. 75–86 and accompanying text (identifying and discussing the “special tax issues affecting the elderly” in the estate planning context).

45. In the past fifteen years, Congress enacted Chapters 13 (Sections 2601–2663) and 14 (Sections 2701–2704) of the Internal Revenue Code dealing, respectively, with the tax on generation-skipping transfers, and special valuation rules. I.R.C. §§ 2601–2633, 2701–2704 (2000). Internal Revenue Code Section 2057, providing an estate tax deduction not exceeding

taxation of estates and trusts<sup>46</sup> prevent professors from devoting sufficient time to these core subjects in a standard two- or three-credit hour law school course.

## B. Estate Planning

### 1. Introduction

For many years, law schools have offered upper-level estate planning courses and seminars that integrate the topics of wills, trusts, and future interests; document drafting; and federal taxation of gifts, estates, and trusts in a planning context. Traditionally, the emphasis has been on ways these laws, and particularly tax exemptions, exclusions, deductions, unified credits, valuation discounts, and freezes, can be used to minimize transfer and income taxes.<sup>47</sup>

Although today fewer individuals need wealth transfer tax planning as part of the estate planning process,<sup>48</sup> increasing life

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\$675,000 for qualified family-owned business interests, also has been added. I.R.C. § 2057 (2000). These and other amended code sections have prompted promulgation of new, complex, and often lengthy regulations, numerous public and private administrative rulings, and significant case law.

46. Although the laws on the income taxation of estates and trusts were simplified when the throwback rules were made inapplicable to most domestic trusts created on or after March 1, 1984, the election to treat qualified revocable trusts as part of the decedent's estate for income tax purposes contained in Section 645 and the extension of the separate share rule to apply to both estates and trusts under Section 663(c) have added further complexity.

47. The federal gift, estate, and generation-skipping tax laws are riddled with exemptions, exclusions, and credits. Important examples are the \$675,000 unified gift and estate tax credit that will increase to \$1,000,000 in 2006, the inflation-adjusted \$1,000,000 generation-skipping tax exemption, and the inflation-adjusted \$10,000 per donee annual gift tax exclusion. I.R.C. §§ 2010, 2505. Qualified family-owned businesses are allowed an estate tax valuation deduction of up to \$675,000. *Id.* § 2057(a)(2).

48. In recent years, the exemptions, exclusions, and unified credit amounts have been liberalized (as the new Internal Revenue Code Section 2057 qualified family-owned business estate tax valuation deductions and the phased-in increase in the unified gift and estate tax credit illustrate), and many states have repealed gift taxes and replaced their inheritance taxes with a tax equal to the federal estate tax state death tax credit. Consequently, only two percent of all estates are subject to wealth transfer taxes. Looking ahead, federal wealth transfer tax exclusions, exemptions, and the unified credit probably will be further liberalized, and perhaps an outright repeal of all federal wealth transfer taxes will occur. Congress passed a bill in 2000 repealing the transfer taxes over a ten-year period. President William Jefferson Clinton vetoed the bill, saying it was unfair and too costly. However, in April 2001 the House of Representatives again voted to repeal all federal wealth transfer taxes by 2011, and President George W. Bush will sign the repeal law if it is first approved by the Senate. Since there is widespread public support for either outright repeal or substantial further increases in exemptions, exclusions, and the unified credit, the Authors anticipate future enactment

expectancies and the prospective explosive increase in our elderly population require that more attention be given to planning for the disabilities of old age and the consequential financial, health care, and end-of-life issues. As one estate planning casebook author notes,

We have entered a new era of estate planning. . . . [E]state planning is no longer a process with which only the wealthy need be concerned. Instead, every person . . . needs [an] . . . estate plan to cover a wide array of concerns including asset management and disposition, disability planning for property management and health care, and planning for the physical aspects of death, as well as saving taxes.<sup>49</sup>

Although younger people cannot ignore issues associated with mental and physical incapacity, older people routinely need to address the risks of disability and living too long — regardless of whether they are rich or poor. Some of the issues that plague the elderly include the following: whether their income and financial assets are adequate for ongoing personal and dependent support needs — including housing — and for contingencies; whether, in the event of disability, there is a property management plan in place to avoid unwanted guardianship; whether their health care coverage is adequate (enough medicare, medigap insurance, medicaid, and long-term care insurance); and whether health care providers and family members will make medical and end-of-life decisions that are consistent with the disabled person's wishes.

As previously discussed, these nontax elder law topics are covered in the primary elder law casebooks and courses. However, not all law students who take estate planning (and perhaps not even the majority of them) enroll in the elder law course. Even when they do, it is important that they be exposed to financial and disability planning for the elderly as part of the estate planning process. Fortunately, each estate planning casebook surveyed includes at least some coverage of these nontax elder law subjects, and two casebooks provide extensive treatment.<sup>50</sup>

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of a law doing at least the latter.

49. Gerry W. Beyer, *Teaching Materials on Estate Planning* v (2d ed., West 2000).

50. *Id.*; Regis W. Campfield, *Estate Planning and Drafting* (2d ed., CCH, Inc. 1995); Kathryn G. Henkel, *Estate Planning and Wealth Preservation: Strategies and Solutions* (abr. ed., Warren, Gorham & Lamont 1998); Thomas L. Shaffer et al., *The Planning and Drafting of Wills and Trusts* (4th ed., Found. Press 2001).

## 2. Coverage of Nontax Elder Law Topics in Estate Planning Casebooks

*Teaching Materials on Estate Planning*,<sup>51</sup> written by Gerry W. Beyer (the “Beyer casebook”), and *The Planning and Drafting of Wills and Trusts*,<sup>52</sup> written by Thomas L. Shaffer, Carol Ann Mooney, and Amy Jo Boettcher (the “Shaffer casebook”), emphasize the nontax aspects of estate planning (e.g., wills, trusts, future interests, client counseling, and document drafting). In fact, the Shaffer casebook includes only one 7-page chapter on the topic of tax planning,<sup>53</sup> while the Beyer casebook devotes a 202-page chapter (in a 12 chapter casebook covering 842 pages) to an overview of the transfer taxes and tax planning techniques related to life insurance, business interests, employee benefits, and charitable gifts.<sup>54</sup>

On the other hand, the other two estate planning books surveyed, Regis W. Campfield’s *Estate Planning and Drafting*<sup>55</sup> and Kathryn G. Henkel’s *Estate Planning and Wealth Preservation: Strategies and Solutions*,<sup>56</sup> emphasize both the transfer and income tax aspects of estate planning. Because of their nontax focus, it is not surprising that both the Beyer and Shaffer casebooks cover the nontax aspects of elder law more extensively than either the Campfield or Henkel materials do. However, the latter two tax planning-oriented books do recognize the practical importance of planning for disability in today’s world. The Campfield casebook’s introduction informs the reader that “[t]he focus of Chapter 4 is on living too long, i.e., living beyond the time when we lose either our ability to manage or our interest in managing ourselves and our property.”<sup>57</sup> Henkel opines that “[t]he elderly . . . have their own set of special issues, which require sensitivity and expertise.”<sup>58</sup> Both authors then include brief discussions and comparisons of guardianships, durable powers of attorney, and living trusts, as well as short introductions to health care, powers of attorney, and living wills.<sup>59</sup> The Henkel treatise, but not the Campfield casebook, provides

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51. Beyer, *supra* n. 49.

52. Shaffer et al., *supra* n. 50.

53. *Id.* at ch. 11, 129–136. The chapter is titled “Death Taxes.” *Id.* at 129.

54. Beyer, *supra* n. 49, at 120. Chapter 4 is titled “Tax Planning.” *Id.* at ch. 4.

55. Campfield, *supra* n. 50.

56. Henkel, *supra* n. 50.

57. Campfield, *supra* n. 50, at 6.

58. Henkel, *supra* n. 50, at 42-1.

59. Campfield, *supra* n. 50; Henkel, *supra* n. 50.

summaries of medicare and medicaid coverage and disability insurance.

The current editions of the Shaffer and Beyer casebooks comprehensively and effectively cover nontax planning for elderly clients. Beyer devotes 3 of the book's 12 chapters (more than 200 pages) to the subjects of disability planning for property management, disability planning for health care, and physical aspects of death.<sup>60</sup> The Shaffer casebook includes an entire chapter on planning for disability and old age.<sup>61</sup> Pedagogically, the two take very different approaches, but both succeed in providing students with broad coverage of the relevant issues, planning options, and the comparative advantages and disadvantages of using different planning tools (for example, unconditional durable powers of attorney, springing durable powers of attorney, funded revocable living trusts, and standby revocable living trusts).

The Shaffer casebook effectively builds its planning for disability and old age discussions around meeting the needs of a hypothetical middle class husband and wife — ages seventy-two and seventy — with three adult children.<sup>62</sup> In addition to covering the basic topics of property management and health care decision-making in the event of incapacity, the chapter also covers medicaid planning and sources of income during retirement — including home equity loans, reverse mortgages, and life insurance viatical settlements — in addition to social security and private retirement plans.<sup>63</sup> The chapter includes three exercises, including a drafting exercise,<sup>64</sup> and contains a helpful bibliography.<sup>65</sup>

The Beyer estate planning casebook's coverage of nontax elder law topics is even more extensive than that found in the Shaffer casebook. In the chapter on disability planning property management, the author addresses the topics of self-designation of guardian of the estate, custodial trusts, disability income insurance, and durable powers of attorney.<sup>66</sup> Also, Chapter 7, entitled "Planning for

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60. Beyer, *supra* n. 49, at 323–528. For further discussion, see Chapter 5 entitled "Disability Planning — Property Management," Chapter 6 entitled "Disability Planning — Health Care," and Chapter 7 entitled "Planning for the Physical Aspects of Death."

61. Shaffer et al., *supra* n. 50, at ch. 11.

62. *Id.*

63. *Id.*

64. *Id.* at 282. See specifically Exercise 11.1, Paragraph 11.1.1. Students are asked to draft a clause covering what would cause a springing power of attorney to become effective. *Id.*

65. *Id.* at 312–314.

66. Beyer, *supra* n. 49, at ch. 5.

the Physical Aspects of Death,<sup>67</sup> includes the Oregon Death with Dignity Act,<sup>68</sup> two United States Supreme Court decisions on assisted suicide,<sup>69</sup> and coverage of the subjects of anatomical gifts and disposition of the body.<sup>70</sup>

Generally, the Beyer casebook covers each subject through introductory text, reprints of uniform laws that are relevant to a specific subject,<sup>71</sup> and excerpts from articles that the author or other scholars have written.<sup>72</sup> Following these materials, there are sections designated "Locate," "Notes and Questions," and "Draft." When the section has included a uniform act, students are asked to locate and carefully study their own state's statute on the same subject. When the section topic is insurance (e.g., long-term care insurance or disability income insurance), students must contact area insurance agents for information about available insurance products and then decide which policy they would recommend to clients.

The "Notes and Questions" section affords an opportunity for students to test their understanding of both specific and broader aspects of the law in their state and gain experience in carefully reading and comparing statutes. The notes and questions are usually numerous (e.g., thirty-four on anatomical donations and thirty-two on living wills). When the subject is some sort of advance directive and the law is based on a state statute, the questions typically probe the required capacity, the execution formalities, and the limitations and conditions of the directives.<sup>73</sup> In some instances,

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67. *Id.* at 490–528.

68. Or. Rev. Stat. §§ 127.800–127.897 (2000).

69. Beyer, *supra* n. 49, at 472, 479 (describing *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

70. *Id.* at 443.

71. The included uniform laws are the Durable Power of Attorney section of the 1993 Uniform Probate Code, the 1988 Uniform Statutory Form Power of Attorney Act, the 1987 Uniform Custodial Trust Act, the 1993 Uniform Health-Care Decisions Act, and the 1987 Uniform Anatomical Gifts Act. *Id.* at chs. 5, 7. The Oregon Death with Dignity Act is also reprinted. *Id.* at 462–469.

72. The excerpted articles include two written by the casebook author Gerry W. Beyer, and one each by Leone E. Irish, Ardath A. Hamann, David M. English, Clifton B. Kruse, Jr., Alan D. Lieberman, and Thane Josef Messinger. *Id.* at vii–xii.

73. *Id.* at 457–461. For an example of these types of questions, see questions three to eighteen. Question 3 asks, "What are the requirements for a valid living will?" *Id.* at 457. In question 6, the student is asked, "May a patient control the treatment decision in any non-written manner, either orally or by gestures such as blinking or thumbs down?" *Id.* at 458. Question 14 inquires, "What effect does executing a living will have on the declarant's ability to obtain life and health insurance?" *Id.* Question 18 asks, "May nutrition and hydration be withheld under a living will?" *Id.* at 459.



the notes and questions address practical planning issues or provide practice tips.<sup>74</sup> On a few occasions, broader policy issues are raised. In each “Draft” section that follows the “Notes and Questions,” students are instructed to draft, in the context of their own state law, the particular document discussed in that chapter (e.g., durable power of attorney, durable health care power, and guardian self-designation document).

### *3. Coverage of Special Tax Issues Affecting the Elderly in Estate Planning Casebooks*

With one exception,<sup>75</sup> the estate planning casebooks surveyed do not address, in either a separate chapter or in sections within chapters, the wealth transfer and income tax laws or issues that disproportionately impact older persons. Presumably, in the two casebooks with a tax emphasis (the Campfield and Henkel casebooks), the age-neutral character of most federal wealth transfer and income tax laws explains this subject matter organization. In the Beyer and Shaffer casebooks, the fact that the principal focus is on nontax matters explains why the casebooks do not address the wealth transfer and income tax laws and issues that disproportionately affect the elderly.

Nonetheless, there are special tax issues — most of them arising in the context of an older person’s mental incapacity — that could be productively discussed in estate planning casebooks with a tax emphasis. These issues could be covered in a separate section within a chapter dealing with planning for incapacity; at appropriate places in the discussion of the broader tax area that the particular issue relates to; or in notes, questions, and problems. Two of these important special tax issues — one dealing with nontaxable gifts and the other with general powers of appointment — are

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74. *Id.* at 458–459. Question 15 asks, “How does the declarant’s doctor learn that the declarant has a living will?” *Id.* at 458. Question 23 inquires, “Assume that your client wants to implement all life-prolonging procedures. What should you do? Is there an ‘anti-directive’ or ‘life-prolonging procedures directive?’” *Id.* at 459.

75. The one exception is found in Campfield’s casebook, which points out the Internal Revenue Code Section 2038 inclusion in the decedent donor’s gross estate of gifts that an agent made under a durable power of attorney on behalf of the incapacitated donor when the power does not encompass the right to make gifts. Campfield, *supra* n. 50, at 96; *see infra* n. 79 and accompanying text (discussing nontaxable gifts and state law problems concerning nontaxable gifts).

briefly discussed in the following two paragraphs, while others are mentioned later in this Section.<sup>76</sup>

Wealthy individuals often take full advantage of the annual gift tax exclusion and make nontaxable gifts that will be excluded later from their gross estate for federal estate tax purposes and from the generation-skipping tax. However, unless the donor has a revocable living trust, or has executed a durable power of attorney that empowers the trustee or agent to make gifts, or state law authorizes a guardian to make gifts, state law prohibits annual exclusion or other gifts on the donor's behalf during a period of mental incapacity.<sup>77</sup> Such unauthorized gifts are voidable and consequently will be brought back into the donor's gross estate at death.<sup>78</sup> The estate plans of all individuals — particularly those of the elderly at greater risk of age-related incapacity who want their trustee or financial agent authorized to make tax savings-motivated gifts in the event of their incapacity — should specifically provide in a living trust or durable power of attorney that the trustee or agent has the authority to make the gifts.<sup>79</sup> The topic seems of sufficient importance to be identified with particularity in the context of estate planning for older persons, as it already is in the Campfield casebook,<sup>80</sup> the two elder law casebooks,<sup>81</sup> and the Nutshell.<sup>82</sup>

Another frequent estate tax issue is whether a trust beneficiary given a general power of appointment is considered to hold the power at the date of the beneficiary's death if the beneficiary is then legally incapacitated and unable to exercise the power of appointment validly under state law. The issue arises both in the context of whether a surviving spouse beneficiary has a general power of appointment that suffices to qualify the assets of the trust for the federal estate tax marital deduction in the estate of the predeceased

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76. *Infra* n. 85 and accompanying text.

77. *Est. of Round v. Commr.*, 40 Tax 970, 979 (1963).

78. I.R.C. § 2038 (2000); *Est. of Casey v. Commr.*, 948 F.2d 895, 898 (4th Cir. 1991).

79. *Est. of Ridenour v. Commr.*, 36 F.3d 332, 335 (4th Cir. 1994). The trustee or agent's authority to make gifts depends on state law, including state statutes and the terms of the trustee's power of attorney. *Id.* The trustee or agent has authority to make gifts that the instruments expressly authorize. If the written document is silent, gifts will be allowed only where governing state law permits facts and circumstances evidence showing that the donor intended that the trustee or agent have the power to make the gifts. *Id.*

80. Campfield, *supra* n. 50, at 96.

81. Frolik & Barnes, *supra* n. 10, at 522–526; Gallanis et al., *supra* n. 11, at 217–222.

82. Frolik & Kaplan, *supra* n. 13, at 259–260.

spouse<sup>83</sup> and whether an incapacitated beneficiary possesses a general power of appointment taxable under Internal Revenue Code Section 2041 at death.<sup>84</sup> Given the importance of this issue and the fact that it most frequently arises in the case of elderly incapacitated trust beneficiaries, the Authors think it should be highlighted as a special tax issue for older people.

In addition to the two special tax issues discussed above that often affect the elderly, there are three other special tax issues relating to charitable remainder trusts, the measuring life for a terminally ill person, and the Internal Revenue Code Section 1014(e) prohibition on stepped-up income tax basis, which the Authors recommend be highlighted in an estate planning casebook's discussion of elder law.<sup>85</sup> Although not limited in their application

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83. Under Internal Revenue Code Section 2056(b)(5), there is an exception to the terminable interest rule, and the estate tax marital deduction is allowed where the "spouse is entitled for life to all the income" from the trust property and has a general power of appointment which is exercisable by will or during life by the spouse alone and in all events. I.R.C. § 2056(b)(5) (2000).

84. When a trust beneficiary has, at the time of death, a general power of appointment created after October 21, 1942, with respect to property, that property is includable in the decedent beneficiary's gross estate under Internal Revenue Code Section 2041. I.R.C. § 2041 (2000). The term "[g]eneral power of appointment" is defined in Section 2041(b). Both case law and administrative rulings support the view that, when a general power of appointment is exercisable under the governing instrument, the power is held by the beneficiary although the beneficiary has been adjudicated incompetent. *Est. of Alperstein v. Commr.*, 613 F.2d 1213, 1221-1222 (2d Cir. 1979); IRS Rev. Rul. 75-350, 1975-2 C.B. (IRS 1975) (available in 1975 WL 35593).

85. In a tax-qualified charitable remainder annuity trust or unitrust ("CRT"), the only permissible noncharitable beneficiaries are one or more individuals for life or a term of years. I.R.C. § 664(d)(1)(A), (2)(A) (2000). When the individual beneficiary is permanently incapacitated, the settlor might prefer to have required CRT distributions made to a separate trust for the benefit of the beneficiary. Would this disqualify the CRT, or can planners safely create separate beneficiary trusts for incapacitated, often elderly, individual beneficiaries? Generally, a charitable remainder trust that makes distributions to another trust for the life of an individual is not a tax-qualified charitable remainder trust. IRS Priv. Ltr. Rul. 9718030 (IRS May 2, 1997) (available in 1997 WL 217757). However, in that private letter ruling, the Internal Revenue Service left open the possibility of an exception if the transferee trust is for the benefit of an incompetent individual. In Technical Advice Memorandum 9831004, Federal Estate Gift Tax Report (CCH) Paragraphs 35 and 121, and Private Letter Ruling 9839018, the Internal Revenue Service ruled that a second trust could be the noncharitable beneficiary of a charitable remainder trust when the beneficiary of the second trust was incompetent. I.R.S. Technical Advice Memo. 9831004 (IRS July 31, 1998) (available in 1998 WL 430877); Fed. Est. Gift Tax Rep. ¶¶ 35,121; IRS Priv. Ltr. Rul. 9839018 (IRS June 25, 1998) (available in 1998 WL 656599).

Another frequently confronted issue is how to value the interest for gift and estate tax purposes when an elderly or terminally ill individual is the measuring life for an annuity payment, trust income, remainder, or reversionary interest. Under the Internal Revenue Code regulations, the standard actuarial valuation methods may not be used, and a special

to elderly people, these tax issues disproportionately affect the elderly because they arise when a person is either incapacitated, terminally ill, or actually dies within one year of a donative transfer.

### C. Recommendations

Because federal wealth transfer and income tax laws are mostly age-neutral and the basic law school courses on these topics already have a lot to cover and additional pedagogical objectives, the Authors do not recommend adding either nontax elder law topics or special tax issues of particular relevance to older people to the basic courses covering gift, estate, and generation-skipping taxes or the income taxation of estates and trusts. However, because the subject of estate planning involves a number of nontax elder law topics that provide the client and lawyer with both the need and the opportunity to promote the older client's personal autonomy, protect against the risks of poverty and incapacity, and help assure death with dignity and reasonable comfort, the Authors recommend that all estate planning casebooks and courses adequately cover the subjects of planning for financial security in retirement, property and health care management in the event of incapacity, and the physical aspects of death. Understandably, estate planning casebooks with a tax emphasis are unlikely to cover these topics as fully as those casebooks that focus primarily on the nontax aspects of estate planning. In any event, as the Beyer and Shaffer estate planning casebooks illustrate, building topic discussions around a hypothetical, requiring thorough reading and analysis of statutes by using notes and questions, and including document drafting assignments are effective pedagogical tools.

Although the federal wealth transfer taxes and income taxes on estates and trusts are age-neutral, they disproportionately affect older people — a rapidly growing age group. Also, as previously

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factor based on the Section 7520 interest rate and the beneficiary's actual life expectancy must be employed. I.R.C. Reg. 1.7520-3(b)(3) (2000). Often the mandated valuation method precludes tax planning that involves gifts or sales of remainder interests. For a discussion of sales of remainder interests or the joint purchase of actuarial interests, see Henkel, *supra* note 50, at Section 24.05.

Finally, when a person acquires appreciated property by gift from another (the donor) within a year of death and the property passes from the decedent back to the donor or the donor's spouse, Section 1014(e) prohibits the donor or spouse from receiving the stepped-up income tax basis that Section 1014(a) otherwise allows. I.R.C. § 1014(e) (2000). Estate planners need to be aware of Section 1014(e), because the elderly may be at risk of dying within a year of receipt of a gift from their spouse.

explained, there are several special tax issues that particularly impact the elderly.<sup>86</sup> Because most of these tax issues arise in the context of mental incapacity, estate planning casebooks should address these issues in a separate section within a chapter dealing with all facets of planning for incapacity or disability.

#### *IV. CURRENT COVERAGE OF ELDER LAW IN BASIC FEDERAL INCOME TAX EDUCATIONAL MATERIALS*

##### A. Discussion

Federal income tax — like elder law — is traditionally taught in law school as an upper-level core course. This course usually provides an introduction to the policy and practice of federal income taxation of individuals — including a determination of gross income, allowance of personal deductions, exemptions and credits, sales and dispositions of property, capital gains and losses, and problems of income attribution among taxpayers. The prefaces in most basic income tax casebooks emphasize the expanse of material that could be covered and the balancing process that the authors use in determining actual coverage. William D. Andrews, in his preface to *Basic Federal Income Taxation*,<sup>87</sup> describes his objectives in this decision-making process:

We are teaching students for a career at the bar, not just for a season, and one of the challenges is to sort out and focus on things that are likely to be of lasting importance. I try to think what students will most need to know and understand ten years from now. From this perspective the main objective is to teach students about persistent underlying problems, to which current legislation may be only an ephemeral response.<sup>88</sup>

This objective, when coupled with the burgeoning elder population and concomitant increased interest in elder law, calls for a basic income tax curriculum that addresses the tax provisions that have particular relevance to the elderly.

Although most income tax provisions are age-neutral, some income tax provisions are expressly age-based and therefore impact

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86. *Supra* nn. 75–86 and accompanying text.

87. William D. Andrews, *Basic Federal Income Taxation* (5th ed., Aspen L. & Bus. 1999).

88. *Id.* at xxvi.

the elderly.<sup>89</sup> Within the general framework of the basic income tax course as described above, the age-based status provisions include Internal Revenue Code Sections 22<sup>90</sup> and 63(f).<sup>91</sup> Some of the age-neutral tax provisions that apply to the elderly, based on such things as biological and physical aging, support, or dependency arrangements, are Internal Revenue Code Sections 21;<sup>92</sup> 86(a),<sup>93</sup> 101(g);<sup>94</sup> 121(c)(2); 121(d)(7);<sup>95</sup> 151(c), 152(a), and 152(c);<sup>96</sup> and 213.<sup>97</sup>

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89. For an overview of the tax provisions that impact the elderly, see John E. Donaldson, *Special Income Tax Provisions Affecting the Elderly*, C682 ALI-ABA 221 (May 30, 1991), and Gail Levin Richmond, *Taxes and the Elderly: An Introduction*, 19 Nova L. Rev. 587 (1995). Note that since the publication of the Donaldson and Richmond articles, some of the relevant tax provisions have been amended. Consistent with the purpose of this Article, the Authors have not provided extensive substantive detail on the workings of the income tax provisions that affect the elderly. Rather, the Authors have provided minimal substantive descriptions and emphasized how these provisions might be highlighted more effectively in the casebooks.

90. I.R.C. § 22. This section provides an unused carryover credit of fifteen percent of income up to a specified maximum for qualifying individuals who are sixty-five or older, or who are permanently and totally disabled. *Id.*

91. I.R.C. § 63(f) (2000). This section provides additional standard deductions for elderly and blind taxpayers. *Id.*

92. I.R.C. § 21 (2000). A nonrefundable personal credit is allowed for employment-related expenses that are incurred for household services or day care of a "qualifying individual" if incurred to permit the taxpayer to be gainfully employed. *Id.* This credit could apply in the case of an employed adult child who incurs household or day care expenses for a qualifying elderly parent.

93. I.R.C. § 86(a) (2000). This provision may require the inclusion of social security benefits in the gross income of a taxpayer. *Id.*

94. I.R.C. § 101(g) (2000). Section 101 provides for exclusion of amounts received under a life insurance contract if the death of the insured is the reason such amounts are paid. *Id.* § 101(a)(1). If the death of the insured is not the reason such amounts are received, they are included in gross income. *Id.* However, Section 101(g) treats amounts received under a life insurance contract on the life of an insured who is terminally or chronically ill to be "by reason of the death of an insured," thereby permitting exclusion. *Id.* § 101(g).

95. *Id.* § 121. Section 121 provides that gross income does not include gain from the sale of property if, during the five-year period ending on the date of the sale, "such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more." *Id.* § 121(a). If the taxpayer fails to satisfy this two-year ownership and use test, the sale proceeds are included in gross income. *Id.* Section 121(c)(2) permits prorating of the exclusion where the sale results from health and other circumstances. *Id.* § 121(c)(2). Under certain circumstances, Section 121(d)(7) permits tacking of any period of out-of-residence care in a facility where the taxpayer is physically or mentally incapable of self-care. *Id.* § 121(d)(7). Both of these provisions would provide relief to an elderly person whose biological aging has produced a life change requiring the early sale of a principal residence or facility care.

96. See *infra* note 102 for a description of Section 151(c) and Section 152(a). Section 152(c) provides for a special exception to the support requirement necessary for a dependent found in Section 152(a), where there are multiple contributors and no one person supplies over one-half the support of the claimed dependent. I.R.C. § 152(a), (c) (2000). Section 152(c) permits the supporters to agree that one of the group will be treated as satisfying the over one-half

To determine how elder law and elder-related tax provisions are currently incorporated into the federal income tax curriculum, thirteen casebooks<sup>98</sup> offered in the field of individual income taxation were surveyed.<sup>99</sup>

None of these casebooks include discussions of nontax elder law topics. For the basic income tax course that focuses on the fundamentals and mechanics of individual income taxation, there is no good reason to incorporate nontax elder law topics. Pure nontax elder law topics are inconsistent with the general scope of the basic income tax curriculum. Furthermore, instructors untrained in the nontax elder law topics and short on time would resist including such material in the course and, in many instances, might not assign such casebook material.

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support requirement. *Id.* § 152(c).

97. I.R.C. § 213 (2000). When there is no compensation by insurance or otherwise, this provision permits a deduction for extraordinary medical expenses for taxpayers who itemize their deductions. *Id.* § 213(a). This provision could permit an elderly or disabled person to deduct costs of home modifications, automobile equipment to accommodate wheelchair passengers, handicap controls, nursing home care, and many other expenses.

98. Andrews, *supra* n. 87; J. Martin Burke & Michael K. Friel, *Taxation of Individual Income* (5th ed., Matthew Bender 1998); Joseph M. Dodge et al., *Federal Income Tax: Doctrine, Structure, and Policy: Text, Cases, Problems* (2d ed., LEXIS L. Publg. 1999); James J. Freeland et al., *Fundamentals of Federal Income Taxation, Cases and Materials* (11th ed., Found. Press 2000); Michael J. Graetz & Deborah H. Schenk, *Federal Income Taxation: Principles and Policies* (3d ed., Found. Press 1995 & Supp. 1999); Sanford M. Guerin & Philip F. Postlewaite, *Problems and Materials in Federal Income Taxation* (4th ed., Little, Brown & Co. 1994); Alan Gunn & Larry D. Ward, *Cases, Text and Problems on Federal Income Taxation* (4th ed., West 1998); William A. Klein & Joseph Bankman, *Federal Income Taxation* (11th ed., Aspen L. & Bus. 1997); Laurie L. Malman et al., *Problems, Cases and Materials on Federal Income Taxation* (West 1994); Paul R. McDaniel et al., *Federal Income Taxation: Cases and Materials* (4th ed., Found. Press 1998); Joel S. Newman, *Federal Income Taxation: Cases, Problems and Materials* (West 1998); William D. Popkin, *Fundamentals of Federal Income Tax Law* (Matthew Bender 1994 & Supp. 2000); Philip H. Wile, *Federal Income Tax: A Casebook on the Basics* (West 1995). Another casebook, *Taxation of Income*, is in its nineteenth edition, but has not been published since 1994. The authors indicated that another edition is not anticipated. E-mail from Babette B. Barton, Prof., U. of Cal., Berkeley, Boalt Hall Sch. of L., to Elizabeth J. Mustard, Fellow, Borchard Found. Ctr. on L. & Aging, *Taxation of Income — Cases and Materials* (Oct. 23, 2000) (copy on file with Authors). *Taxation of Income* already contains many of this Article's suggestions. For example, it includes a detailed section on the credit for the elderly, which includes a policy discussion, properly titles the section covering Section 21 as "Credit for Dependent Care Expenses," and includes a reference to the aged in the topical index. Babette B. Barton et al., *Taxation of Income* 314, 534, 536, 1079 (19th ed., CCH, Inc. 1994).

99. The methodology used for the survey of the income tax casebooks was similar to that used in evaluating the elder law casebooks except that the relevant tax provisions were identified first and then discussions concerning such provisions were sought in the income tax casebooks. See *supra* n. 15 (describing the Authors' basic methodology).

Although most of the casebooks briefly mention at least one of the age-based provisions (Internal Revenue Code Sections 22 and 63(f)), many fail to address both provisions. Also, few casebooks provide any problems associated with either of these provisions. The fact that most casebooks mention this material is noteworthy, yet it is often buried in excerpted material, a footnote, or the last of many notes or questions following the principal textual material in a section or chapter.<sup>100</sup> The shortcoming of this approach is that the student may easily overlook the material or the instructor may undervalue or not assign it. If this material is principal textual material, even if the instructor assigns the material and skips classroom coverage, the student will be independently motivated to read the material, providing an uninstructed, yet essential, familiarity with this material. Furthermore, the casebooks that include both a description and discussion of the policy underlying these age-based provisions enhance student learning. For example, the McDaniel casebook explains Internal Revenue Code Section 22 and indicates that its purpose is to “provide a benefit roughly comparable to the exclusion from gross income of Social Security benefits.”<sup>101</sup>

Nearly all of the basic income tax casebooks contain some discussion of the age-neutral provisions that potentially apply to the elderly, yet fail to illustrate their application to the elderly. Further, some of the casebooks discuss the age-neutral provisions in ways that make them appear inapplicable to the elderly. Thus, where tax provisions apply to different categories of individuals, most of the casebooks emphasize the application of the provision to certain categories of people, such as children, but fail to emphasize the

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100. See e.g. Dodge et al., *supra* n. 98, at 273 (explaining Section 22 in the seventh and last note of a section); Malman et al., *supra* n. 98, at 51–52 (discussing Section 63(f) in the middle of an excerpt and in a footnote); Wile, *supra* n. 98, at 351 (explaining Section 22 in the last of five notes).

101. McDaniel et al., *supra* n. 98, at 728–729. The other casebooks that include a discussion of the policy behind the age-based provisions are Dodge et al., *supra* note 98, at 273; Freeland et al., *supra* note 98, at 939; Graetz & Schenk, *supra* note 98, at 432–433 (referring to Section 22); Guerin & Postlewaite, *supra* note 98, at 783 (referring to Section 63(f)), and Malman et al., *supra* note 98, at 51–52 (referring to Section 63(f)). Note that the Dodge casebook includes this explanation in the seventh and last note of a section entitled, “Theories Supporting a Progressive Rate Structure.” Dodge et al., *supra* n. 98, at 273. Similarly, the Malman casebook buries its meaningful policy discussion of Section 63(f) in an excerpt and comment on the accuracy of the excerpt in a footnote. Malman et al., *supra* n. 98, at 51–52. The approach of both the Dodge and Malman casebooks minimizes the effectiveness of including any policy behind the provision, because the approach is subject to the criticisms noted above.



application of the tax provisions to other categories, such as the elderly. This omission occurs repeatedly in the basic income tax casebooks for Internal Revenue Code Sections 21, 151(c), 152(a),<sup>102</sup> 152(c),<sup>103</sup> and 213.

To illustrate, Section 21 provides a nonrefundable personal credit for “expenses for household and dependent care services necessary for gainful employment” incurred for household services or day care for a “qualifying individual,” if incurred to permit the taxpayer to be gainfully employed.<sup>104</sup> A qualifying individual is a dependent of the taxpayer under the age of thirteen or a mentally or physically handicapped dependent or spouse of the taxpayer.<sup>105</sup> Arguably, this provision is not age-neutral, because it calls for a maximum age, and an obvious circumstance in which this part of Section 21 would apply is care for a dependent child under the age of thirteen. In fact, this application is so obvious that most of the casebooks treat Section 21 almost exclusively as a child care credit. Discussions of the provision are found in sections entitled “Child-care,”<sup>106</sup> “Child Care Credit,”<sup>107</sup> or “Child-Care Expenses.”<sup>108</sup> The not-so-obvious but accurate application of the age-neutral part of this section would potentially include expenses that an adult child paid for household services or day care for a physically handicapped elderly parent.

The failure to apply Section 21 and other age-neutral code provisions broadly impedes learning and the practice of law. First, it impairs the ability of the student to understand fully the breadth

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102. Section 151(c) allows the personal exemption for dependents, and Section 152(a) defines the exemption for dependents. I.R.C. § 151(c) (2000); *Id.* § 152(a). Within the casebooks, these sections are frequently treated almost exclusively as child-dependency exemption provisions. However, these provisions apply to the elderly when a taxpayer in one of the Section 152(a) relationships with the elderly person provides over half of the support of an elderly person, and the elderly person has gross income less than the exemption amount (defined in Section 151). Also, Sections 2(b)(1)(A)(ii), 151, and 152 would permit a single person living with an elderly dependent (qualifying under Section 152(a)) to take advantage of the more favorable head of household status for standard deduction and rate purposes. See *Id.* § 63(c)(2)(B) (defining “standard deduction”); I.R.C. § 2(b) (2000) (defining “Heads of Household”).

103. Of the casebooks that mention Section 152(c), many accurately explain this provision as “typically pertain[ing] to the support of aged parents by a group of children.” Dodge et al., *supra* n. 98, at 263; Freeland et al., *supra* n. 98, at 554; Graetz & Schenk, *supra* n. 98, at 431; Guerin & Postlewaite, *supra* n. 98, at 907, 910.

104. I.R.C. § 21(a).

105. *Id.* § 21(b); see *id.* § 152 (defining dependent).

106. Andrews, *supra* n. 87, at 513–514.

107. Guerin & Postlewaite, *supra* n. 98, at 947.

108. Klein & Bankman, *supra* n. 98, at 568–572; Newman, *supra* n. 98, at 385.

of the applicability of the provision. Second, even if a misnamed section discusses a provision's application to multiple groups, the student may overlook this application, because it is imbedded in a misnamed section. Third, the failure to illustrate the general breadth of coverage of a particular provision hinders the opportunity to discuss the similarities between categories of persons that would reinforce the policy behind the provision. For example, can it be said that dependent children and the other qualifying individuals, as defined in Section 21, are sufficiently similar to permit the same credit for each, and does Congress's policy of "mak[ing] provisions for the care of incapacitated dependents in the home rather than in institutions outside the home" apply equally to children and adults?<sup>109</sup> Fourth, if the student is not attuned to the relevance of a provision to different categories of persons, later that student as an attorney may fail to recognize the potential availability of this section to a client.<sup>110</sup> Casebook treatment of age-neutral provisions should not be limited to one category of individuals.

A related shortcoming of the casebook treatment of the age-neutral provisions is the problems used to illustrate these provisions. Although some of the casebooks include problems addressing the elderly,<sup>111</sup> most of the problems are geared towards other categories of individuals and fail to include problems or examples of how the provisions apply to the elderly.<sup>112</sup> Interestingly, while Congress illustrated the application of an age-neutral section to the elderly in the legislative history, some casebooks emphasize an altogether different application.<sup>113</sup>

Unfortunately, only a few of the basic income tax casebooks include any meaningful elder-related tax policy discussion. The authors of the *Fundamentals of Federal Income Taxation* incorporate tax policy particularly well when they question the appropriate-

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109. Sen. Rpt. 92-437, at § 1 (Nov. 9, 1971). Guerin & Postlewaite quote this Senate Report in their section entitled "Child Care Credit." Guerin & Postlewaite, *supra* n. 98, at 947-948.

110. A result of mischaracterizing the dependency care credit as a child care credit may be that "older taxpayers may be unaware that they qualify to use provisions commonly thought to cover younger taxpayers." Richmond, *supra* n. 89.

111. Freeland et al., *supra* n. 98, at 556 (requiring the application of Section 152(c)).

112. Gunn & Ward, *supra* n. 98, at 230-232.

113. Andrews, *supra* n. 87, at 422. The Andrews casebook asks a question concerning Section 152(c), placing it in the context of divorced parents. However, Congress, in adopting Section 152, specifically included examples of its application to three adult children supporting an elderly parent. Sen. Rpt. 83-1622, at § 1 (June 18, 1954); H.R. Rpt. 83-1337, at § 1 (Mar. 9, 1954); Gunn & Ward, *supra* n. 98, at 230 (explaining Section 152(c) only in the context of child support).

ness of the 1986 amendment to Internal Revenue Code Section 72. This section provides that, if an annuitant lives beyond her life expectancy and fully recovers her investment in the annuity contract, the full amount of any subsequent annuity payment is included in her gross income.<sup>114</sup> The authors ask, “Is it appropriate when the annuitant has reached an elderly age to begin then to tax the *full* amount of the annuity payment?”<sup>115</sup> This question specifically considers the needs of the elderly and assists the student in evaluating the appropriateness of an age-neutral tax provision as it is applied to the elderly.

Michael J. Graetz and Deborah H. Schenk’s casebook, *Federal Income Taxation: Principles and Policies*, provides an excellent explanation and policy discussion of Internal Revenue Code Section 22, followed by a directive to consider “various provisions of the Internal Revenue Code that primarily benefit elderly taxpayers.”<sup>116</sup> The authors then ask how these “substantial income tax benefits for elderly taxpayers” would be defended, and whether “a single special deduction or credit provisions would be an improvement.”<sup>117</sup> This section encourages students to consider the policies underlying the elder status-based tax provisions and requires a student to explore the differences between a deduction and a credit — and the appropriateness of either — to the elderly. An improvement to this section, which already should be noted as exceptional, would include consideration of some of the age-neutral tax provisions that apply to the elderly.

Another shortcoming of the basic income tax casebooks is that the subject indexes rarely contain a heading reference to the elder provisions.<sup>118</sup> Without such index references to locate coverage that

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114. Freeland et al., *supra* n. 98, at 162.

115. *Id.* Note also that the Freeland casebook takes every opportunity to illustrate the application of provisions to the elderly. In explaining Section 101, which provides for the exclusion of certain death benefits from gross income, the authors describe an exception to the inclusion of death benefits applicable to the chronically ill. *Id.* at 156. In a footnote, they indicate that this could include a person with Alzheimer’s or Parkinson’s disease. *Id.* at 155–159, 156 n. 6. Of course, to maximize the effectiveness of this illustration, it could have been mentioned in the principal text instead of a footnote.

116. Graetz & Schenk, *supra* n. 98, at 432–433.

117. *Id.* at 433. The preface states that the “composition of the book has been influenced by increasing use of tax law as an instrument of social and economic policy . . . [and] the book devotes substantial attention to principles and policies of federal taxation.” *Id.* at vi.

118. *But see* Barton et al., *supra* n. 98, at 1083; Klein & Bankman, *supra* n. 98, at 949 (referencing “Elderly, credit for”). The tenth edition of the Freeland casebook included a heading reference to “Elderly Persons” and a cross-reference to “Aged Persons,” both of which were removed from the eleventh edition. Now the eleventh edition references the elder

is relevant to the elderly, students must first know the specific tax provision to use the index to tax code provisions. An example of how this could be effectively included is found in the Barton casebook, which is no longer published.<sup>119</sup>

### B. Recommendations

The federal individual income tax course, remaining consistent with its basic objective, should not include nontax elder law materials. On the other hand, more comprehensively incorporating the age-based tax provisions and elder applications of the age-neutral income tax provisions within the casebooks and the curriculum would both broaden the fundamental tax education and more accurately reflect the application of the basic tax materials. The casebook revisions should integrate both provisions that specifically apply to the elderly where they would naturally fall in the existing text. For example, a section on tax credits should include Section 22, and a section on deductions should include Section 63(f).<sup>120</sup> Similarly, where the age-neutral tax provisions are discussed, the authors should include textual discussion and, more important, problems that illustrate applications to the elderly. Specifically, at least one of the many problems typically used to illustrate Internal Revenue Code Sections 21, 151(c), 152(a), 152(c), and 213 should be a problem applicable to the elderly. Further, by incorporating questions or direct statements of policy issues, the tax policy behind particular provisions could be included for consideration and critique.

In integrating the above suggestions into the current casebooks, the elder applications of and policies behind tax provisions should not be buried in excerpted materials or in the notes, but should be included as principal materials. In addition, the index should provide a reference to the elderly or aged, and the chapter or

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provisions under topic headings that are elder-neutral. Although this approach is helpful, the tenth edition approach would enable a person not familiar with the types of provisions impacting the elderly to locate such provisions easily. The publisher made the decision to modify the index from its tenth edition format. E-mail from Daniel J. Lathrope, Prof., U. of Cal., Hastings College of L., to Elizabeth J. Mustard, Fellow, Borchard Found. Ctr. on L. & Aging, *Fundamentals of Federal Income Taxation, 11th Edition* (Oct. 10, 2000) (copy on file with Authors).

119. Barton et al., *supra* n. 98, at 1079 (referencing "Aged Persons (over 65)").

120. See e.g. Freeland et al., *supra* n. 98, at 939 (including a reference to Section 22 in a section entitled "Credits against Tax"); but see Guerin & Postlewaite, *supra* n. 98, at 946-950 (not incorporating Section 22 in a discussion of credits).

sections should be appropriately titled (i.e., not “Child Care Credit” but “Dependent Care Credit”).

When an author chooses not to integrate these materials in the text, the professor should supplement the casebook with problems that illustrate the broader applications of the provisions affecting the elderly. These supplemental materials could be integrated into the course where the relevant provisions appear naturally in the casebook. Even if the professor has no specific desire to highlight the application of particular provisions to the elderly or believes that there is not enough time to do so, if the author of a casebook emphasizes a provision’s applicability to a narrow group, at a minimum, the professor should stress the provision’s broader application to address the materials more accurately.

Individual income tax course instructors should select a casebook that explains the tax provisions impacting the elderly — even if these provisions do not expressly provide problems relating to the elderly. Generally, these casebooks permit an easier integration of supplemental elder applications because of their comprehensive treatment of the tax material. Casebooks that address nearly all of the tax provisions, incorporate some policy explanations for the provisions, and provide some elder law examples are the Freeland, Graetz and Schenk, and Dodge casebooks.<sup>121</sup>

## V. CURRENT COVERAGE OF ELDER LAW IN TAX POLICY EDUCATIONAL MATERIALS

### A. Discussion

As is the case with elder law and basic federal income tax courses, tax policy is taught as part of the elective upper-level law school curriculum and generally offers a study of basic principles, theories, and tools of analysis that permits earnest discussion of federal income tax policy. The preface to the only recent textbook<sup>122</sup> on tax policy, entitled *Tax Policy: Readings and Materials* (“*Tax Policy*”), by Philip D. Oliver and Fred W. Peel, Jr., stresses the significance of tax policy as follows:

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121. On the other hand, the Newman, Wile, and Malman casebooks, for the most part, fail to refer to any elder tax provisions or provide for any elder applications.

122. The Oliver and Peel text is the only recent casebook on the subject of tax policy. *Infra* n. 123. Previously, Joseph M. Dodge authored *The Logic of Tax: Federal Income Tax Theory and Policy* published in 1989. Joseph M. Dodge, *The Logic of Tax: Federal Income Tax Theory and Policy* (West 1989). Because this text is not current, the Authors did not evaluate it.

[T]ax policy is the preeminent policy course in the curriculum of most schools . . . [because] tax law affects almost all aspects of life . . . [including] marital and family relationships. . . . No other branch of law even begins to have the broad economic *and* social impact of tax law.<sup>123</sup>

Oliver and Peel acknowledge the struggle inherent in “limiting the number of topics to keep the book of manageable size . . . [and] expect that many professors will supplement [the book] to cover one or more topics that [have been omitted].”<sup>124</sup> Whether Oliver and Peel revise their casebook or instructors supplement their teaching materials, both the age-based and age-neutral tax provisions discussed in connection with the individual income tax curriculum have associated tax policy questions that should be considered as part of a tax policy course.

To determine how tax policy — in particular elder tax policy materials — is currently being taught in law schools, the Oliver and Peel text was evaluated using a methodology similar to that used for the individual income tax casebooks.<sup>125</sup> The coverage of *Tax Policy* includes income tax and fiscal policy, when income should be taxed, imputed income, progressive tax rates, taxing of families, value-added taxes, consumption-type income tax, life insurance, property transferred at death or by gift, transfer and wealth taxes, tax expenditures, personal injury awards, federal tax treatment of state and local taxes, corporation and dividends, capital gains and losses, responding to price level changes and taxes, and the legislative process.<sup>126</sup> The material is presented primarily through excerpts from books and law review articles. Additionally, each chapter contains some introductory text, notes and questions that follow the excerpts, and a detailed bibliography. However, problems are not included in the casebook (unlike the basic income tax casebooks, which include multiple problems).

The Oliver and Peel casebook does not contain coverage of nontax elder law topics, and other coverage relating to the elderly is nominal. A chapter on tax expenditures raises two questions, both

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123. Philip D. Oliver & Fred W. Peel, Jr., *Tax Policy: Readings and Materials* v (Found. Press 1996).

124. *Id.* at vi.

125. See *supra* n. 99 and accompanying text (describing the methodology used in evaluating the tax casebooks).

126. Oliver & Peel, *supra* n. 123.

addressing the possible reasoning behind the 1986 change from a personal exemption to a standard deduction for the elderly and blind (Internal Revenue Code Section 63(f)).<sup>127</sup>

*Tax Policy* contains a chapter devoted to taxing families that covers sections on the history of the tax paying unit, the proper tax paying unit, and children and the income tax. The section on children and the income tax describes in detail the tax benefits parents derive from children, including the dependency exemption, earned income tax credit, and the child care credit (or more accurately the “Dependent Care Credit”).<sup>128</sup> However, there is no mention of the tax aspects of a family that includes an elderly person — a common situation in today’s society.

Another major criticism of the *Tax Policy* text is that it fails to include either a general index or an index to code provisions. Consequently, a reader would not be able to identify elder law tax policy (or other specifically sought materials) without painstakingly reading through all material.

## B. Recommendations

As with basic income tax, nontax elder law topics seem out of place in a tax policy casebook.<sup>129</sup> However, a tax policy casebook could meaningfully address the increasing upstream and downstream support found in multigenerational trends of the contemporary family. A chapter, such as Oliver and Peel’s “Taxing Families,” which focuses primarily on the traditional family unit of husband, wife, and child, could be supplemented with a section on the elderly or multigenerational family structures. Today’s family unit may consist of a grandparent and a grandchild, an adult child and an elderly parent, or exclusively elderly people. Considering how the

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127. *Id.* at 530. The questions posed are as follows: “What policy choices, or what views of the effects of age or blindness, justify one structure as compared to the other? What different decisions would be reflected by converting the tax advantage to a ‘refundable’ credit?” (Question 9). *Id.* “Why does Congress give a tax advantage to taxpayers who are elderly or blind, and not to taxpayers with other afflictions, such as paraplegia?” (Question 10). *Id.* The notes also distinguish between a tax expenditure and a refinement of the progressive tax rate schedule, “Professor [ ] Kahn has suggested informally that some personal deductions (such as the medical expense deduction and the additional standard deduction for the aged and blind) should be regarded not as tax expenditures, but as attempts to refine the very rough utility curve in the progressive tax rate structure to bring it closer to an ideal of equality of sacrifice.” *Id.* at 530 n. 11.

128. *Id.* at 188–202.

129. *See supra* pt. IV(B) (giving recommendations for coverage of elder law in basic income tax materials).

tax code should or does address these family structures is a more complete approach to addressing policy underlying taxation of the family.

“[M]ultigenerational families are increasingly common as sites for familial caretaking.”<sup>130</sup> There are “an increasing number of children cared for in homes in which the head is a grandparent, more of the very elderly cared for in the homes of elderly adult children, and more three and four generation families living under one roof.”<sup>131</sup> Even if the care is not extended within the home, adult children are providing support for elderly parents living in their own homes or in a facility of some sort. “An estimated 22.4 million U.S. households — nearly one in four — now are providing care to a relative or friend aged 50 or older or have provided care during the previous 12 months.”<sup>132</sup> Some surveys suggest that adult children will spend more years caring for a parent than for their own children.<sup>133</sup>

These multigenerational family and caretaking structures have become a part of the fabric of contemporary society and the tax policy implications potentially have a broad impact. Without a discussion incorporating this broader view of the family, the “Taxing Families” materials are incomplete and fail to address that these structures have emerged in the United States today.<sup>134</sup>

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130. Greer Litton Fox, *Children's Well-Being: Clues and Caveats from Social Research*, 39 Santa Clara L. Rev. 1075, 1085 (1999).

131. *Id.*

Rather than a source of pathology and dysfunction, multigenerational families are, and have always been, a resource for family members in time of need, and a source of economic and social support that is turned to more readily and more often than other sources of formal or informal support.

*Id.*

132. FTC, *Aging Parents and Adult Children Together* <<http://www.ftc.gov/bcp/conline/pubs/services/apact/>> (accessed Apr. 1, 2001) (citing a national survey undertaken by the National Alliance for Caregiving and the American Association for Retired Persons). Note that the caretaking discussed is not exclusively or even predominantly economic support of the kind that would qualify the arrangement for tax dependency status under Internal Revenue Code Section 152(a). However, some economic support exists in the caretaking arrangements previously discussed. In many cases, economic support may provide some tax benefits; however, even if it does not provide such benefits, a meaningful policy question exists as to whether it should. Natl. Alliance for Caregiving & AARP, *Family Caregiving in the U.S.: Findings from a National Survey 24* (June 1997) (available at <<http://www.caregiving.org/content/repssprods.asp>>).

133. FTC, *supra* n. 132.

134. As Robert H. Binstock pointed out:

A number of research efforts have estimated that about 80% to 85% of the long-term care provided to older persons outside of nursing homes is provided on an in-kind basis



Such a section should provide demographic materials on the elderly, including the projected increase in population of those sixty-five and older, income and its sources for the elderly, average retirement ages, statistics on families who support an elderly parent or relative, or grandparents who support their grandchildren. These background materials can form the basis for discussion on the policies behind the tax provisions that impact the elderly and multigenerational families relevant in our contemporary society.

In addition, since *Tax Policy* emphasizes the tax benefits accruing to children, discussions of the tax benefits that accrue exclusively to older people, a grandparent supporting a grandchild, or an adult child supporting elderly parents or relatives should likewise be included. For example, in the case of an elderly person, the Section 63(f) standard deduction potentially would apply. Congress initially adopted Section 63(f) in 1948 as a special exemption:

As a result of the rise in the cost of living the need for a special exemption for persons over 65 [was] even more pressing now than in the spring of 1947. There [was] a very heavy concentration of small incomes among persons in this age group reflecting the fact that the group as a whole [was] handicapped in an economic, if not in a physical sense.<sup>135</sup>

Does this remain true today or are the following views of the minority voters at that time and today more accurate:

All low-income taxpayers have suffered severely from high prices and it would be inequitable to grant additional income-tax relief to those over 65 years of age and to deny it to those under 65 years of age who are equally as hard-pressed. The high cost of living is a heavy burden on all low-income taxpayers, regardless of their age.<sup>136</sup>

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by family members, spouses, siblings, adult children, and broader kin networks. About 74% of dependent, community-based, older persons receive all of their care from family members or other unpaid sources. About 21% receive both formal and informal services, and only about 5% rely exclusively on formal services.

Robert H. Binstock, *Public Policies on Aging in the Twenty-First Century*, 9 *Stan. L. & Policy Rev.* 311, 319 (1998) (citation omitted).

135. H.R. Rpt. 80-1274, at § 1 (1948).

136. *Id.* at 1294 (giving the views of the minority).

These questions encourage discussion of the appropriateness of government involvement and the manner in which it should be undertaken. Other questions that could be asked are whether a grandparent who supports a grandchild can claim the grandchild as a dependent under Section 151(c), whether an adult child who supports an elderly parent or relative can deduct medical expenses expended for the elderly and whether the adult child can claim head of household status. Another valid question is whether the answers to these questions are good policy. These questions would further address the government role and, in particular, whether the government should encourage caretaking behavior within families.

Finally, a tax policy casebook should include a general index and an index to tax provisions that would permit a student to access easily information relevant to topics of interest. In particular, a general index should include a subtopic on the elderly or aged persons.

## VI. CONCLUSION

Casebook authors and professors have multiple incentives to implement the recommendations in this Article, and many of these incentives have been covered in the text of this Article. However, the importance of integrating these changes cannot be overstated. First, integrating these changes more accurately and completely responds to the societal changes reflected in the increased elderly population. Second, current interest in elder law and its related job opportunities can be addressed. Third, practicing lawyers, whether in elder law or otherwise, will be better able to identify issues impacting their clients, further providing for an avenue of knowledge to the elderly client or young client whose activities include an older person. Notwithstanding the possible criticisms discussed below, these incentives should compel adoption of this Article's recommendations.

As previously mentioned, the demographic changes in society and, in particular, the growing size of the older population, make elder law topics and their tax implications and the elder applications of tax law, relevant to a greater segment of society. A failure to address these tax implications and applications makes coverage in elder law, estate planning, basic individual income tax, and tax policy teaching materials incomplete and, in some cases, inaccurate. The law school curricula should adapt to a changing world and provide a complete and accurate education that addresses the rapidly expanding older segment of our society.

Additionally, current interest in the field of elder law and the accompanying possibilities of employment have been spurred by this growing size of the older population and have been cited as reasons for increasing the availability of pure elder law courses.<sup>137</sup> Revamping the current law school curricula as suggested can respond to and facilitate interest in the field and employment opportunities. Incorporating elder tax aspects into the evaluated courses will not, without more, adequately educate the student who hopes to pursue elder law as a profession. However, if a law school does not have faculty or resources available to teach or fund elder law courses, incorporating the suggestions of this Article becomes a necessary and important compromise to fuel the interests of students in legal applications impacting the elderly. Furthermore, sprinkling these applications throughout nonelder law courses may pique the interest of students who formerly either did not know about or lacked interest in elder law.

Finally, implementation of these suggestions will better educate the contemporary law school population by increasing awareness of elder law issues arising in various law contexts, including estate planning and tax. Even if the former student — now a practicing lawyer (either in elder law or another area) — does not come away from the training with a comprehensive notion of how to address the elder law issue, at a minimum he is more likely to know that an elder law issue is or may be implicated and do further research or planning with this issue in mind. Knowledge by the practicing attorney of an issue affecting the elderly is an avenue for the elderly client to become better informed of legal implications derived from his chronological or biological age.<sup>138</sup> Of course, when an attorney represents an elderly person, the fact that an elder law issue is implicated may be obvious. However, the other advantage in a less obvious situation is that an attorney may be better attuned to a younger client's tax implications affected by actions taken to assist an elderly person or to plan for aging.<sup>139</sup>

A potential criticism of incorporating the recommendations mentioned in this Article is that a professor would need to have special expertise in elder law or tax law. However, an elder law professor need not be an expert in tax, and a basic federal income tax and tax policy instructor need not be an expert in elder law, to

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137. English, *supra* n. 1, at 25.

138. Richmond, *supra* n. 89, at 589–590.

139. *Id.* at 589.

incorporate these suggestions.<sup>140</sup> The suggestions offered in this Article about the income tax and tax policy courses merely broaden the depth of tax material that is already being taught, rather than adding an element of law that is not related to tax or its policy. The instructors will be simply teaching the Internal Revenue Code more accurately and completely in the basic tax course. For example, noting how and why Internal Revenue Code Section 21 may apply to the elderly and incorporating problems applying Section 21 to the elderly is not elder law, but rather the application of tax law. Similarly, in elder law, the professor is required only to know tax aspects of elder law and not have a comprehensive tax background. Also, in the tax policy area, with the elderly becoming an increasingly larger segment of the population, more elder law issues will inevitably motivate family and legislative decision-making, which will in turn influence tax policy. Furthermore, the professor can learn many of these suggestions merely by keeping abreast of the advances in his or her substantive area of the law. None of this Article's recommendations requires a tax specialist to become an expert in elder law or an elder law specialist to become comprehensively knowledgeable about tax law.

Another potential criticism is that there is not enough time to incorporate these changes into courses. Casebook authors and professors already struggle with what they should include in the casebook or course. Even when a casebook includes certain materials, the instructor may choose to eliminate or supplement the coverage. This process naturally requires balancing and weighing the importance of various materials on one hand and the time available on the other. The end result is a value judgment on the part of the instructor. These factors have been considered, and these recommendations do not propose serious departures from the goal and structure of the evaluated courses. For example, in the basic federal individual income tax and tax policy arenas, the Authors have not suggested that nontax elder law material be incorporated into either the casebooks or the teaching. Rather the suggestions in this Article attempt to tailor the possibilities for inclusion to those

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140. A similar criticism was leveled against incorporating international and comparative law into basic law courses. This would probably be more justified if it would require "a core of teachers who had an understanding of . . . the law of contracts from both a European and an American perspective." Arthur T. Von Mehren, *Special Feature: The State of International Legal Education in the United States*, 29 Harv. Intl. L.J. 239, 296 (1988). The comprehensive understanding of another area of law as described by Von Mehren would not be needed to incorporate the Authors' suggestions.

that are most important by focusing on accuracy and completeness and emphasizing both the topics and methodologies that would be most useful to the student in expanding his or her formal education and preparation for practice. The incentives for incorporating the Authors suggestions emphasize why they are inherently important to the subjects addressed and should be adopted.

Law school faculty have the difficult task of responding to the current demands and the anticipated needs of the legal profession, which will be impacted dramatically well into the twenty-first century by the growth of the elderly population. The concomitant explosion of elder law and the recognition of its expanding importance create both the need and opportunity for further improvements in the law school curriculum, particularly in elder law, estate planning, basic individual income tax, and tax policy course teaching materials and pedagogy. This Article offers various suggestions that the Authors hope will result in better integration of tax and elder law into elder law and tax courses.

