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INSIDE

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USDA Disaster Payments "Means Test"

USDA disaster payment programs since 1988 have included a so-called "means test" under which farmers with annual revenues in excess of $2 million are made ineligible for program benefits. This is the only means test currently being applied to the USDA farm programs.

Implementing this means test has presented some difficult issues for USDA and farmers. Several legal challenges have been raised against USDA determinations on the question of what revenues to attribute to farmers for purposes of applying the test, with mixed results for the farmers bringing the suits. The most recent court decision, the *Doane* decision issued in June and described in the July issue of *The Agricultural Law Update*, found for the farmer, but three earlier federal court decisions found in favor of USDA administrative rulings that excluded farmers from the program.

Proposals likely will be made during the debate on the 1995 farm bill to extend the means test to other USDA farm program benefits, such as deficiency payments and price support loans. If the coverage of the means test widens, more court challenges to USDA's administration of the means test can be expected. With that in mind, this article reviews the means test law suits and the legal issues addressed in those cases.

Statutory background

The disaster payments means test was first imposed for the omnibus disaster payment program enacted by the Disaster Assistance Act of 1988, Pub. L. No. 100-387, § 231, Aug. 11, 1988, 7 U.S.C. § 1421 note. Congress has extended the means test each time it has reauthorized the disaster payment programs, first in the Disaster Assistance Act of 1989 (Pub. L. No. 101-82, § 151, Aug. 14, 1989, 7 U.S.C. § 1421 note), then by the Food, Agriculture, Conservation, and Trade Act of 1990 (the "1990 farm law")(Pub. L. No. 101-624, § 2266, Nov. 28, 1990, 7 U.S.C. § 1421 note.)

A new disaster payment program will be established for the 1995 and succeeding crops under recently passed crop insurance reform legislation — H.R. 4217, 103d Cong., which was passed by the House of Representatives on October 3, 1994 (*see* 140 Cong. Reg. H10499 *et seq.*) and by the Senate on October 4, 1994 (*see* 140 Cong. Rec.

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Privacy Act Review of ASCS Determination Denied

The Seventh Circuit has joined other circuits in declining to permit the Privacy Act to be used to review the substance of agency decisions. *Douglas v. Agricultural Stabilization and Conservation Service*, No. 93-3262, 1994 WL 460596 (7th Cir. Aug. 24, 1994). The dispute in *Douglas* involved the eligibility of certain acreage for enrollment in the Conservation Reserve Program (CRP). On the tract at issue, Ms. Douglas enrolled six acres in the CRP based on Soil Conservation Service (SCS) data. Three years later, the SCS reduced the eligible acreage to between 3.8 and 4.2 acres. Ms. Douglas refused to sign a revised CRP contract for 4.2 acres. She then administratively appealed the determination to reduce the eligible acres and lost, apparently admitting in the appeal that the field was not in compliance with the CRP requirements.

Expressly disclaiming her right to review under the Administrative Procedure Act, Ms. Douglas brought an action under the Privacy Act, 5 U.S.C. section 552a, seeking an order directing the ASCS to correct its records to show that six acres were eligible and an award of damages. The Seventh Circuit affirmed the district court's dismissal of Ms. Douglas's action and "join[ed] many other circuits in holding that the Privacy Act does not authorize relitigation of the substance of agency decisions." 1994 WL 460596 at *1 (citations omitted). The court held that Ms. Douglas's only relief under the Privacy Act was the right "to place in the administrative file 'a concise statement setting forth [her] reasons for . . . disagreement with the refusal of the agency' to delete or correct its record." *Id.* at *2 (quoting 5 U.S.C. § 552a(d)(3)).

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S143083 *et seq.*). Section 112 of this legislation extends the means test to the new program.

The means test provisions of the 1988, 1989, and 1990 acts use identical language establishing the rule that any person with gross revenues in excess of $2 million annually will not be eligible to receive any disaster payments. All three also contain a majority-of-income test that provides that if a majority of the person's income is from farming, USDA can only count gross revenues from farming for the purposes of the means test.

The *Doane* case: a recent win for the farmer

In the case of *Doane v. Espy*, 26 F.3d 783 (7th Cir. 1994), the Seventh Circuit Court of Appeals struck down a USDA action governing the way marketing receipts are counted under the means test.

Doane grew kidney beans and corn. He also was a sixty percent owner of a warehouse that stored and handled kidney beans, wherein he acted as marketing agent for other producers in selling their kidney beans. The full facts of the case are set out in detail in the July, 1994, *Agricultural Law Update*, at page 1. Briefly, Doane suffered losses on his own crops in 1988 that qualified for disaster payments, but USDA rejected his application on the grounds that the gross revenues attributable to him from both his farming and the warehouse operations exceeded the $2 million limit.

The court noted that USDA based its decision against Doane on the fact that CVBC never placed the funds it received on behalf of other farmers in a trust fund or escrow account — rather it put all receipts into its general bank account. The court rejected this rationale as ignoring the real legal ownership of the funds regardless of how they were commingled.

Instead the court said, CVBC never assumed ownership of others' production; it was merely a bailor of the beans. The court held that the arrangement between CVBC and the other producers was much like that between an agent and principal, and in such a relationship, there is no question that the money belongs to the principal. Thus, there was no reasonable basis to assign the proceeds of the sale to CVBC.

This case is significant as the first U.S. Court of Appeals ruling on the issue of how to treat marketing revenues, since a considerable number of farmers market other farmers' production along with their own.

Decisions for USDA in the *Vculek* and *Haubein Farms* cases on a "net income" argument

In contrast to the *Doane* case, USDA prevailed in two earlier means test lawsuits where a different issue was presented, *Vculek v. Yeutter*, 754 F. Supp. 154 (D.N.D. 1990), *aff'd sub nom., Vculek v. Madigan*, 950 F.2d 727 (ith Cir. 1991) and *Haubein Farms, Inc. v. Department of Agriculture*, 824 F. Supp. 239 (D.D.C. 1993).

As with *Doane*, in each of these cases the farmer had substantial revenues from sources other than farming, and the case question was whether to count the outside revenues in applying the $2 million means test. In both cases, however, the outside business generating the additional revenues was *not* a business of handling and selling others' production as a marketing agent. In *Vculek*, the oustide business was the operation of a grain elevator; in *Haubein Farms*, it was an implement dealership. Also the arguments made by the farmers were different. They argued that the term "annual income" contained in the disaster payments law does not include *gross receipts* to the non-farm operation, just *net income*.

The means test statutes have used a different term than "gross revenues" in their majority-of-income test; they use the term "annual income." Specifically, the test states that "if a majority of the person's *annual income* is derived fror farming, ranching, and forestry operations, [USDA can only count] *gross revenues* from farming, ranching, and forestry operations" to determine if the $2 million trigger is reached (cmphasis added). The USDA poisition in essence has been that, for purposes of the majority-of-income, gross revenues and annual income are the same thing.

Interestingly, the USDA regulations on this matter, 7 C.F.R. section 1477.3, changed the statutory term "annual income" to "gross income." Basing the calculation on *gross income* certainly would preclude any consideration of treating one's annual income as being the *net benefits* after expenses are deducted. Even more interesting, recently passed H.R. 4217, once signed into law by the President, will give a statutory basis for USDA's position, because it drops the reference to "annual income" in the majority-of-income test and substitutes the phrase "gross revenue."

The *Vculek* case involved a North Dakota farmer who owned a grain elevator that had annual revenues of $15 million in 1987. However, Vculek suffered a new loss of $500,000 on the elevator operation. He argued that since Congress used bot' the phrase "annual income" and th— phrase "gross revenue" in the majority-of-income test, annual income must mean something different than gross revenue. The district court did not agree with the argument stating that there was nothing in the legislative history on the issue and that the USDA position was not unreasonable, arbitrary, or capricious.

In the *Haubein Farms* case, the farmers had gross income from farming of approximately $700,000 in 1988, while an implement dealership they owned had revenues in excess of $1.3 million. However, their net profit from the dealership was small enough that if the "majority-of-income test were applied using net income instead of gross revenues, a majority of their income would come from farming. They argued that, by using the term "annual income," Congress meant net profit and that USDA's use of the term "gross income" in the regulations runs counter to Congressional intent.

However, the district court ruled that USDA's determination that "gross revenue" was synonymous with "gross income" cannot be considered arbitrary and capricious, because of the absence of evidence of Congressional intent indicating whether "gross revenue" was to be sy nonymous with "net profit," and the fact—

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The Property Rights of Farm Wives: Who Owns the Family Farm?

By Susan A. Schneider

[This is an excerpt of an article that will appear in the upcoming Northern Illinois University Law Review symposium issue on agricultural law.]

Since the *Married Women's Property Acts*, the law has been clear that spouses have the right to own separate property and each spouse is unquestionably a separate legal entity. With regard to family farm operations, the lines are frequently blurred. For example, profits from the farming operation as well as separate earnings of husbands and wives are often commingled in joint bank accounts, often the property is acquired during the marriage is with these commingled funds, and assets may be encumbered to finance the farming operation. When a legal crisis such as financial distress, divorce, or the death of one spouse occurs, the courts may be asked to unravel the complex relationship and determine who owns what and where liability lies.

Ownership of property

Whether the farm wife has an ownership interest in the assets of the farming operation may be very important in a number of respects. Assuming an ongoing farming operation, it may determine whether she has control over that asset, whether her interest in it has been encumbered by her husband's actions, and whether she is entitled to certain exemption and lien avoidance rights in bankruptcy. In the event of a death, it may determine whether the assets are part of the decedent's estate. In the event of divorce, it may determine the appropriate division of assets.

There are several ways in which a farm wife can be found to own farm property. Under the current law in all of the states, a wife is a separate legal person, and she is entitled to retain ownership and control of her individual pre-marital property separate from her husband. The most conclusive evidence of ownership is legal title, and for untitled property, ownership is generally determined according to possession, control, and the intentions of the parties.

Community property

The ownership of assets acquired during the marriage is determined in part by whether either the matrimonial domicile *(See, e.g., Poe v. Seaborn*, 282 U.S. 101, 110 (1930)) or the property itself is located in a community property jurisdiction. *(See, e.g., Black v. Commissioner of Internal Revenue*, 114 F.2d 355, 357 (1940)). If so the property may be "community property" subject to state laws that govern property acquired by married persons.

Non-community property

In a non-community property state, property acquired during a marriage can be either separately or jointly owned. *See, e.g. Ballard v. U.S.*, 645 F.Supp. 788, 791 (D. Mont. 1986). In these jurisdictions, the ownership of titled property will generally be determined according to record title, particularly if the rights of a third party such as a mortgagee are at issue. There are, of course exceptions to this rule. In the Wisconsin case of *Wall v. Dep't of Revenue*, 458 N.W.2d 814 (Wis. App. 1990), *rehearing denied* 458 N.W.2d 534 (1990), the court held that "[o]wnership means substantially more in the way of enjoyment or the possession of other indicia of ownership than bare or paper title. Beneficial ownership, therefore, not mere technical title is determinative. *Id.*, at 817 (citations omitted). At issue was investment property that a married couple had purchased jointly. Through the seller's mistake, however, title to the property had been placed in the wife's name alone. Both husband and wife's names appeared on the mortgage note, and but for the actual deed, all pertinent documents related to the sale listed both names. The Wisconsin Department of Revenue objected to the husband's claim of a loss for tax purposes on the property, arguing that he was not the owner of the property. The court rejected this argument and held that the property was in joint ownership. *Id. See also, In re Brollier*, 165 B.R. 286, 291 (wife found to have ownership interest for purposes of 11 U.S.C. section 363(i) despite title in husband's name alone).

A determination of ownership is more complicated with regard to untitled property, particularly for property that is in the possession of both the husband and wife. This determination may be particularly difficult in unincorporated family farm situations where significant untitled business assets are present on farm homestead property. In analyzing this situation, there are several possible outcomes. Clearly, either husbands or wives are entitled to own property separately, or they can own it together as joint owners. Alternatively, with regard to business transactions and assets, it is sometimes found that the husband and wife are partners. If so, the property at issue may belong to the partnership, with each partner having an interest therein.

•Joint Ownership

A number of cases have addressed the issue of husband and wife joint ownership of family farm assets. Many of the cases discussing the role of the wife in the family farm setting arise in dissolution actions. As principles of equitable distribution frequently cause the court in these actions to make property awards inconsistent with legal ownership, these cases often do not address the fundamental question of joint ownership. For example, the bankruptcy court in *In re Wolsky*, 53 B.R. 751 (Bankr. D.N.D. 1985) rejected the farm wife's reliance on dissolution precedent for determining her interest in the farm property. The court stated that the cited case dealt "with the equitable distribution of property in a divorce proceeding and not the issue of legal ownership of property." *Id.* at 755, note 1. The court found the precedent "neither persuasive nor controlling." *Id.*

Several courts addressing farm financial issues have held that under the specific facts presented, the husband and wife operating the family farm were co-owners of their untitled farm assets. The case of *Matter of Slagle*, 78 B.R. 570 (Bankr. Neb. 1987) provides an example of this holding. Experiencing financi difficulties with the operation, the farm couple filed for relief under Chapter 13 of the Bankruptcy Code. The first issue addressed by the court in this case was whether the wife, Mrs. Slagle owned a one half interest in certain untitled personal property i.e., crops, livestock, and farm machinery. *Id.* at 571-72.

The court considered her involvement in the farming operation, the parties' intentions, and evidence of joint tenancy with regard to other farm assets. Although Mrs. Slagle held an off-farm job, the court found that she took an active part in the farming operations in the evenings, on weekends, and during the summer. Both Mr. and Mrs. Slagle testified that it was their intention that all property acquired after their marriage be held in joint tenancy. Indeed, the property that was titled or registered was listed in joint tenancy. Mr. Slagle, however, handled all of the financing arrangements for the operation with the Bank, and he alone signed the loan documents. Under these facts, the court held that Mrs. Slagle had a one half interest in the personal property at issue. *Id.* at 572.

The same result was reached in the case of *Farmers Security State Bank of Zumbrota v. Voegele*. 386 N.W.2d 76 (Minn. Ct. App. 1986). Certain farm personal property had been sold to satisfy the husband's debts, and the wife sought her share of the proceeds. In this context, the

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urt of appeals upheld the trial court finding that the husband and wife were co-owners as tenants in common of the farm personal property. This finding was supported by the wife's testimony that she considered the farm to be a "family enterprise" as well as evidence that both spouses contributed labor to the farming operation. *Id.* at 762. The bank argued against Mrs. Voegele's claim of a one-half interest in the property and alternatively alleged that Mrs. Voegele was estopped from challenging its right to the property on the basis that Mr. Voegele acted as his wife's agent in encumbering the assets. The court also rejected this allegation. *Id.*

Similar conclusions have been drawn in a number farm bankruptcy cases in which the farm wife sought to claim a "tools of the trade" exemption in items of farm equipment. Implicit in the exemption claim is that the wife has an ownership interest in the claimed property. The majority of courts have allowed the wife to claim the exemption. *See, e.g. In re Kobs*, 163 B.R. 368, 372-74 (Bankr. D. Kan. 1994); *In re Meckfessel*, 67 B.R. 277, 278 (Bankr. D. Kan. 1986); *In re Schroeder*, 62 B.R. 604, 606 (Bankr. D. Kan. 1986); *In re Oetinger*, 49 B.R. 41, 43 (Bankr. D. Kan. 1985); *But see, In re Indvik*, 118 B.R. 93 (Bankr. 993 (Bankr. N.D. Iowa 1990) (brothers' farming operation found to be a partnership; individual partners not allowed to claim partnership property as exempt under Iowa law).

Other cases have rejected the family farm wife's claim of joint ownership of farm assets, however, including cases involving similar facts. For example, in the case of *Farmers and Merchants National Bank v. Schulz*, 63 B.R. 168 (Bankr. Neb. 1986), a bankruptcy court addressed the issue of a farm wife's ownership of untitled personal property associated with the operation of the family farm and concluded that the wife had no ownership interest. Rejecting Mrs. Schulz's claim, the court found that the property at issue belonged solely to Mr. Schulz. The court stated that under Nebraska law, there must be an express agreement between the husband and wife in order for the wife to acquire an ownership interest in the husband's property in return for her services. *Id.* at 171, citing *In re* Estate of Carman, 213 Neb. 98, 327 N.W.2d 611 (1982). The court also stated that an ownership interest in farm property "must be established by a preponderance of the evidence, the quality of which is clear, satisfactory and convincing in nature." *Id.*, citing *In re* Whiteside's Estate, 159 Neb. 362 at 368, 67 N.W.2d 141 (1954).

In another Nebraska case, a determination of whether all of the farm assets were included in the decedent-husband's estate, the same result was reached, and the same rationale applied. *In re Estate of Carman*, 327 N.W.2d 611 (1982). In this case, the surviving wife claimed an ownership interest in one half of the farm personalty and argued that her interest should be excepted from her deceased husband's augmented estate. The court characterized the wife's argument as "that she did more than merely perform as a farmwife; that in fact she functioned as a partner in the farming operation, or in any event did at least as much as would a hired hand; and, thus, one-half of the items of farm production and other items of personalty were to be treated as being owned by her outright." The court rejected the wife's claim, characterizing the issue as whether the wife's labor "constitutes a contribution 'in money's worth' such that one-half the value of the farm production and jointly acquired personalty should be excluded from the augmented estate and set over to appellee as her own property." *Id.* The court, however, acknowledged a number of tax court cases that have supported the wife's position. *Craig v. United States*, 451 F.Supp. 378 (D.S.D.1978); *In re Estate of Kersten*, 71 Wis.2d 757, 239 N.W.2d 86 (1976); *Est. of Everett Otte*, 41 T.C.M. 72,076 (P-H 1972). Espousing "the traditional view," the court held that "in the absence of an express contract to compensate a spouse for extra and unusual services, no obligation to do so will be implied." *Carman*, 327 N.W.2d at 614, citing *Peterson v. Massey*, 155 Neb. 829, 53 N.W.2d 912 (1952); *Brodsky v. Brodsky*, 132 Neb. 659, 272 N.W. 919 (1937).

In many ways, these two holdings beg the question of husband/wife ownership. The courts base the holdings on the theory a wife's claim is for a share of her husband's property and that her entitlement is based on her right to compensation for the services she performs. This analysis skirts the joint ownership issue by presuming that husband's initial ownership. Both courts fail to discuss the fundamental issue of whether family farm assets that are acquired as the result of the labors of both spouses are joint properties. The court in *In re Brollier*, 165 B.R. 286 (Bankr. W.D. Okla. 1994) raised the distinction between a wife alleging an interest in her husband's property, e.g. in a dissolution action, and a wife claiming an independent interest as co-owner of property. *Id.* at 291. The court discussed the Kansas state law regarding dissolution actions, then noted, "That issue is different from the issue at hand. Linda Brollier [the wife] does not claim an interest in her husband's separate property. She claims her interest arises as a co-owner." *Id.* In determining whether the claim of co-ownership was valid, the court looked beyond the legal title to evidence of the "intent and conduct of co-ownership." *Id.* The wife testified that the property was purchased with marital funds, encumbered by a mortgage in the name of both husband and wife, both spouses paid rents and profits together, and both reserved a remainder interest in the property upon conveyance. Based on this evidence, the court held that the wife was a co-owner entitled to exercise her right of first refusal to purchase the bankruptcy estate's property. *Id.* at 292 interpreting 11 U.S.C. § 363(i)).

• *Partnership*

Alternatively, some courts have addressed the ownership of family farm assets by undertaking an analysis of partnership law. For example, in *In re Oetinger*, 49 B.R. 41 (Bankr. Kan. 1985). a bankruptcy case in which the court was asked to determine the ownership interests of farm equipment, the court applied partnership law. Although she also had off-farm employment, she worked off the farm only twenty hours per week, leaving, as the court observed, "many hours before and after work and on weekends for her labor on the farm." *Id.* at 43. The court found that this evidence constituted a prima facie showing that Mrs. Oetinger's principal occupation was farming. *Id.*

The court then considered the ownership issue. Curiously, the court did not consider joint ownership, but rather stated:

> Mrs. Oetinger claims to be co-owner of all of the farm equipment. She does not set out the theory under which she deems herself entitled to ownership status, but the Court is of the opinion that the only way she can be co-owner of the equipment is by virtue of a partnership between her and her husband.
> *Oetinger*, 49 B.R. at 43.

Defending this turn to partnership law, the court noted that "a spouse does not acquire a joint interest in all the property belonging to the other simply by virtue of the marriage." *Id.* The court cited Kansas law as specifically providing that "a married person may carry on a trade or business on his or her separate account and the earnings therefrom 'shall be his or her sole and separate property' to be disposed of and invested in his or her own name." *Id.*, citing K.S.A. § 23-204. The court further noted that if "Mr. Oetinger were the only farmer in the family, Mrs. Oetinger would not automatically acquire an ownership interest in the farm earn-

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ings or property purchased with the earnings simply by virtue of being married, because Kansas is not a community property jurisdiction." *Id.*

The court then turned to partnership law, stating that "[a]ll property acquired by a partnership is partnership property, in which each partner has an interest." *Id.*, citing K.S.A. §§ 56-308(a) and K.S.A. s 56-325(a). The court relied on the standard definition of a partnership as "an association of two or more persons to carry on as co-owners a business for profit" and held that the Oetingers' farming operation met this definition. *Oetinger*, 49 B.R. at 43, citing K.S.A. s 56-306(a). The Court thus held that Mr. and Mrs. Oetinger were partners, that the farm machinery was partnership property, and that accordingly, Mrs. Oetinger held an interest in the machinery as a partner. *Id.*

A number of other cases also have also addressed the role of husbands and wives under partnership law. *In re Lapp*, 66 B.R. 67, 69 (Bankr. D. Colo. 1986) (in order to prove joint ownership without joint title, farming partnership must be shown); *In re Schroeder*, 62 B.R. 604, 606 (Bankr. D. Kan. 1986) (stating that "the only viable theory which would give [the wife] a co-ownership status in the farm earnings or property purchased with farm earnings is that she is a farming partner"); *In re Wolsky*, 53 B.R. 751, 755 (Bankr. D.N.D. 1985) (absent substantial individual "outside" contribution to the purchase of the farm assets, any legal interest that the wife asserts must be grounded in partnership law). Absent joint title, these cases appear to state that joint ownership absent a farm partnership is not possible. Of these cases, the courts are split as to whether a partnership is created. *Schroeder*, 62 B.R. at 606 (holding that a husband and wife partnership exists); *Lapp*, 66 B.R. at 70) (same); *Wolsky*, 53 B.R. at 755 (wife is not a partner in farming operation). Unfortunately, there does not appear to be a clear pattern guiding the court's analysis and the standards which evidence a partnership remain ambiguous.

Subsequent courts applying Kansas law have held that partnership theory is not the only way for the court to find that the farm wife has an interest in family farm assets. In *In re Griffin*, 141 B.R. 207 (Bankr. D. Kan. 1992)(the court explicitly held that the farm husband and wife did not operate the farm as a partnership but rather the husband and wife owned the farm assets as co-owners). *See also, In re Brollier*, 165 B.R. 286, 291 (co-ownership of assets by husband and wife is allowed).

At least two courts have analyzed a family farm operation and ruled that an informal husband and wife partnership was created without discussing joint ownership as an alternative. *Georgens v. Federal Deposit Ins. Corp.*, 406 N.W.2d 95, 97 (Minn. App. 1987); *Craig v. United States*, 451 F.Supp. 378 (D.S.D. 1978).

Finally, still other courts have discussed partnership law, but held that joint ownership is an alternative way for a family farm wife to establish an ownership interest. For example, the court in *In re* Griffin declined to find a partnership under facts similar to those in *Oetinger. Griffin,* 141 B.R. at 211-12. The court stated that "the mere fact that the wife participates in the conduct of a business with her husband" does not "necessarily establish a partnership between them, unless there exist some other indicia of partnership and the intent to form a partnership is clearly proven." *Id.* citing 59 Am. Jur. 2d *Partnership* §§ 240-42. One of the factors that the court found would indicate a partnership was "proof of a right to a division of profits, instead of a deposit of all profits into a joint account with the joint use of income." *Id.* The court held that despite the fact that the Griffins worked as a "team," because there was no evidence of a specific method of profit sharing, no specific evidence of an intent to create a partnership, and no evidence that they held themselves out to be partners, no partnership would be found. *Griffin*, 141 B.R. at 212. The court also held that it is the party asserting the partnership status that carries the burden of proof. In this case, it was the bank that alleged that the husband and wife were partners. The bank sought to use this status to overcome the failure to obtain the wife's signature on the security documents. *Id.* As an alternative route to establishing the wife's ownership interest, however, the court found her to be a joint owner of the farm assets. *Id.* at 210.

Thus, the application of partnership law to the family farm setting has produced divergent results. More clear guidance from the courts would be of great assistance to both farm lenders as well as farm couples.

Control over property

The ownership of property generally carries with it the basic rights of possession and control. The next issue to be addressed with regard to the rights of farm wives is, assuming that they do own farm property, what rights and responsibilities to they have with regard to that property?

Under the general law established by the Married Women's Property Acts and associated legislation, a married woman is free to exercise all incidents of ownership over her property. That is, she is free to contract with regard to, to sell or otherwise convey, to encumber, or to use in any way, her own separate property. With regard to jointly held or husband and wife partnership property, however, the issues become more difficult. Each spouse has an interest in this property. Must decisions with regard to this property b made together, or is one spouse autho rized to control the interest of the other? However, when dealing with decisions that affect the rights of third parties, legal controversy as to the respective rights and authority of the spouses may arise.

This potential controversy is best illustrated by reference to farm finance and credit issues. As farming is recognized as a capital intensive business, real estate and operating loans are essential to most farms. With regard to untitled farm personal property, many lenders appear to make the assumption referenced in the *Schultz* case that "the male operator of the farm [is] the actual owner of all the assets." *Schulz*, 63 B.R. at 170. Their first consideration that the wife may have an interest comes as a challenge to their rights as secured lender to proceed against the collateral. The facts typically are that the wife claims an interest in the farm property, and the bank did not obtain her signature on the loan documents or the security agreement. The issue becomes whether the security interest attached or is perfected with respect to her interest in the property.

There are a number of published deci sions addressing this fact pattern. Th majority of courts appear hesitant to grant the wife an interest in the untitled property on the grounds that she is a participant in the farming operation, while allowing her to avoid the security agreement associated with the financing of that operation. Nevertheless, once it is established that the wife is a part owner, in order for her interest to be encumbered, there must be a legal theory upon which to find that her signature is not necessary to the attachment or perfection of the security interest. The legal theories generally advanced are the related rules of either agency or partnership law. Examples of their application to this fact pattern are set forth below.

Agency

In some instances, a spouse is found to have acted as agent of the other. The law of agency has been applied to the husband's actions with regard to property that is separately owned by the wife, although if it can be shown that he acted without authority, she will generally not be bound. Marriage alone does not create the presumption of an agency relationship between the spouses, and unless statute provides otherwise, the burden of estal lishing agency is on the asserting party Nevertheless, with regard to jointly owned property, the courts have frequently found a principal-agent relationship between

farm spouses. For example, in the previously discussed *Slagle* case, *Slagle*, 78 B.R. at 572, at issue was not only whether Mrs. Slagle owned a one-half interest in the untitled farm property, but if so, did the creditor's security interest extend to her ownership interest. Although Mrs. Slagle was actively involved in the farming operation, only Mr. Slagle signed the notes, security agreements and financing statements. Mrs. Slagle testified that sometimes she did not know of her husband's borrowing until after the fact.

After finding that Mrs. Slagle was a joint owner of the farm property at issue, the court held that Mrs. Slagle had authorized Mr. Slagle to act as her agent in encumbering their jointly held property. *Id.* The court found that Mrs. Slagle was aware of all decisions with regard to the farm and was aware that her husband was borrowing money to finance the operations, even though she may have opposed some of the borrowing. The court held that her "acquiescence to her husband's actions amounted to a ratification of them" and held that her husband had acted as her agent. *Id.*

Partnership

On other cases, courts have found that the partnership relationship of the spouses authorized one spouse to act on behalf of the partnership and the other spouse. Under the Uniform Partnership Code, every partner is an agent of the partnership.

The decision in the *Oetinger* case provides an example of the authority that can be exerted by a partner over partnership property. *Oetinger*, 49 B.R. at 43. In *Oetinger*, the court found that Mr. and Mrs. Oetinger operated their farm business as a partnership and that all farm assets were partnership assets. As a second issue, the Oetingers alleged that the bank had an unperfected security interest in the farm equipment because it had failed to obtain Mrs. Oetinger's signature on the financing statement. The court held that Mr. Oetinger's signature on the financing statement bound the partnership. As further support for its holding, the court also found that Mrs. Oetinger in effect ratified her husband's actions. Because Mrs. Oetinger was aware of her husband's actions and accepted the benefits of the loan, she could not later claim that he acted without her authority. The court therefore found that the creditor had a perfected security interest in Mrs. Oetinger's share of the farm equipment.

In conclusion, husbands and wives who operate their farming operation together as well as their lenders are well advised to give careful consideration to their legal status and its potential interpretation by the courts in their jurisdiction.

USDA Disaster Payments "Means Test"/continued from page 2

that USDA had broad discretion to implement programs authorized by Congress.

Hanson case: same courts as in _Doane_, different ruling when different argument used

In *Hanson v. Espy*, 8 F.3d 469 (7th Cir. 1993), a means test dispute was litigated before the same district court judge and the same court of appeals that heard the *Doane* appeal about a year later. However, the two courts' rulings in *Hanson* were the exact opposite of their decisions in *Doane*.

The *Hanson* case involved two brothers, Christian and Evan Hanson, who farmed as a partnership in Wisconsin. Each suffered production losses in 1988 sufficient to qualify for disaster payments. However, USDA held that both were ineligible under the $2 million means test even though their farm income in itself did not hit the $2 million trigger. Christian owned an unrelated nonfarm corporation with gross sales of more than $9 million in 1987; and Evan owned a separate nonfarm corporation with 1987 gross sales of just over $2 million. Christian's corporation suffered a net loss for its 1987 operations, and Evan's corporation netted only about $25,000 that year.

The brothers argued that the term "person" in the means test statute did not mean both an individual and any business entity it owned. They noted that the 1988 disaster law instructed USDA to use the pre-existing payment limitaiton rules on defining the term "person" for *disaster payment limit* purposes, but was silent regarding the use of the term in the *means test* provision, which was located in a separate section of the act. USDA, however, had chosen to apply the same definition rules to the term "person" as used in both places in the 1988 act. One of those definitional rules provides that the terms includes both an individual and any business entity with respect to which the individual controls more than fifty percent of the stock.

The Hansons argued that, by not specifically providing that the pre-existing payment "person" rules are also to be used for purposes of the means test provisions of the act, Congress meant to exclude the use of those rules in the means test. They maintained further that the term "person," as used in the means test provision, was meant to cover only the producer himself — not controlled entities as well. In this case, therefore the term would mean only the two brothers and their personal farm activities.

While the district court found for the brothers in this case, the court of appeals reversed, using the two standards in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) for determining whether an administrative agency's interpretation of the law is permissible. In applying the first standard (whether Congress addressed the matter at issue), the court determined that Congress, in drafting the statute, did not directly speak to the question at hand. Then, moving to the second *Chevron* standard (whether the agency determination was a permissible construction), the court found the USDA interpretation permissible, noting that the court cannot substitute its own construction for the Secretary's if the Secretary's construction is reasonable.

The Hansons also made a "net income" argument similar to those made in the *Vculek* and *Haubein Farms* cases since, for both brothers, their corporations in 1987 did not net anywhere close to $2 million. The court summarily dismissed this argument, however, noting that an agency's construction of its own regulatiosn is entitled to substantial deference.

Conclusion

It is clear from these cases that USDA wants to broadly count revenues in determining under the means test who is eligible for disaster payments, and prefers to resolve doubts by including cash flow rather than excluding it. The courts to a large extent have deferred to USDA in this regard, but have not written the agency a blank check. At least in one important area, covering farmers who also have marketing businesses on the side, the *Doane* court drew the line beyond which USDA may not go to attribute revenues to the farmer. The *Doane* court would not let USDA count revenues that were merely handled by the farmer but did not ultimately end up in (or even go through) the farmer's pocket.

—Phil Fraas, McLeod, Watkinson & Miller, Washington, D.C.

Federal Register *in brief*

My apologies for the absence of this column in this issue. The Community College library where I do this research was unable to locate the issues that I needed to review. I will attempt to catch up in next month's *Update*.

—Linda Grim McCormick, Alvin, TX

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AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

Report on the 1994 AALA Annual Conference

More than 190 practitioners, educators, government officials, industry representatives, and international guests met in Memphis, Tennessee, October 21-22, 1994 at the American Agricultural Law Association's Fifteenth Annual Meeting and Educational Conference.

Over forty-six speakers addressed a variety of topics including the annual review of agricultural law, issues in agricultural sales contracts, international agricultural law, issues in agricultural productivity contracts, biotechnology and the agricultural market structure, estate and business planning, ethical considerations and the agricultural lawyer, rural enterprise and empowerment, rural land transactions and environmental law, UCC Article 7 - warehouse and warehouse receipts issues, farmers' health and security.

Professor Norman W. Thorson, University of Nebraska School of Law, gave the president's address on the future of agriculture.

Paul Wright was awarded this year's "Distinguished Service Award."

Drew Kershen is the Association's President-Elect. J. Patrick Wheeler, Canton, MO, assumed his duties as President. Joining the Board of Directors are newly elected members Alan Malasky, Washington, D.C., and Gordon Tanner, Seattle, WA.

Retiring Board Members are Pat Rynn and John Becker. We sincerely thank them for their dedicated service to the American Agricultural Law Association.

Drew Kershen announced the winners of the revised writing competition. This year there were two awards, one for Excellence in Scholarship, and one for Excellence in Student Scholarship. The Annual Award for Excellence in Scholarship was awarded to Brenda W. Jahns of Sacramento, CA. The Annual Award for Excellence in Student Scholarship was awarded to Terri A. Jones of Marriottsville, MD.

Next year's Annual Meeting will be held November 3-4, 1995 at the Ritz-Carlton in Kansas City, MO.