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Commission I

Statut juridique des conjoints et de leurs enfants dans l'entreprise agricole – **Legal status of cohabitantes and their children in the agricultural enterprise** – Rechtliche Stellung der Partner und deren Kinder im landwirtschaftlichen Unternehmen

National report for the United States of America

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Summary

The questions focus on the role of women and children in the “agriculture enterprise.” This term is not commonly used in the United States (U.S). Moreover, no uniform definition or description of the food production process exists. Farmer or farming are probably the most common terms used in the U.S. but other terms such as producer, operator, conventional farming, family farm, factory farm, corporate farm, industrial or large scale farm, urban farming, organic or sustainable farming are used as well. The farming operations are quite different in size and method of food production. Most farms are operated by owner-operator and his/her family but some use hired labor consisting of about 24% women and about 50% unauthorized immigrants. The 2007 farm census showed nearly one third of all farm operators are women. This was a 19% increase from 2002 figures.

A significant change in farm typology occurred in 2013 when United States Department of Agriculture (USDA) Economic Research Service changed how farms are sized. The size of farms is now measured by gross cash farm income (GCFI) (the total revenue received by a farm business in a given year). Using this criteria farms are divided into three categories: 1) Small farm [GCFI of less than \$350,000]; 2) Midsize farm [GCFI of \$350,000 to \$999,999]; and 3) Large-scale farm [GCFI \$1 million or more]. Based on 2010 data, 91% of farms were classified as small producing 29% of the value of U.S. food production and less than 2% of farms were classified as large-scale farms but they produced 34% of food production.

As for legal issues involving women and children, some issues are governed by Federal law and some by state law. Article VI, Section 2, of the U.S. Constitution is known as the Supremacy Clause because it provides that the "Constitution, and the Laws of the United States ... shall be the supreme Law of the Land." It means that no state or local government can enact a law which prohibits something expressly authorized in the U.S. Constitution or by Federal law, or authorize something expressly prohibited by the U.S. Constitution or Federal law. The Fifth and the Fourteenth Amendments to the U.S. Constitution prohibit the Federal government as well as state governments from discriminating against women and governments cannot arbitrarily treat women differently than men. Currently, the test being applied to gender discrimination by the U.S. Supreme Court is the so-called intermediate scrutiny test or intermediate standard of review test. Under this test “Classifications by gender must serve important governmental objectives and must be substantially related to achieving of those objectives.” The Federal government, states and municipalities have laws that prohibit non-governmental entities from discriminating on the basis of gender in a number of settings such as education, employment, credit opportunity, equal pay and federal services.

Farm workers are essential for labor intensive operations producing such things as fruits and vegetables. It is estimated that about three million migrant workers and seasonal farmworkers are employed and at least half of the agricultural workforce is estimated to be unauthorized immigrants; about 24% are estimated to be female. Many believe that the legal and regulatory system is not adequately protecting these workers particularly women and children. As for children, both hired and family kids, a different standard exists for certain farming activities. For example, a recent Federal government proposal requiring special licenses to operate certain farm equipment was dropped because in many farm states kids living on the farm or working on it are able to operate certain off-road and road farm equipment when they are as young as 13.

The development of an effective transition or succession plan for an agriculture enterprise is a major issue for rural America. Initially, it must be determined what the assets (farmland, equipment etc.) are and how they are owned. If no planning is done at all, the owner will die intestate and the property will be distributed according to the relevant state statute. Typically, if decedent is survived by a spouse and children, the spouse will get half and the children will share half. If only children survive, the property passes to them in undivided equal shares.

In general, women or men who are owners of assets of farming operations, can transfer their property interest to whomever they choose. In all states women and men have the right to transfer their property by will. However, in non-community property states a surviving spouse cannot be completely disinherited by the will or provided for only minimally. By state statute, the surviving spouse may elect to take a statutory or so-called forced share as opposed to taking under the will. The elective share or forced share ranges from one-third to one-half of the so-called "probate estate" or "augmented estate". In community property states (10 states) the surviving spouse is generally not given an elective share option because property acquired during the marriage is owned by both spouses. In many non-community property states, spouses are given interests in real estate and/or the homestead owned during a marriage. Thus, in all states when a married person makes a transfer of property to another person or to an entity such as a trust or limited liability company, both spouses need to consent to the transfer. Children have no right to inherit.

Transition and estate planning often raise difficult family decisions. For example, Mom and Pop often want to continue the family farm operation but want to treat their children equally. This is a problem when multiple children exist and only one is interested in farming. And, if Mom and Pop want to retire and have the family farm continue operating, the issue of how Mom and Pop generate retirement income arises. One possibility is to have the operator purchase the farm. Interestingly, some have argued that female children have not been encouraged to be farmers. Another sticky situation is

where the assets of the agricultural enterprise are owned by a limited liability company or some sort of corporation with family members having units or shares in the entity. If a minority shareholder wants to liquidate, problems can arise concerning such things as how to value the assets of the entity and how to generate the cash needed for the purchase of the minority owner's interest.

Social Security is a Federal government system designed primarily to provide supplemental income to individuals in retirement. Self-employed individuals and workers pay a Social Security tax during their working years and then draw a monthly payment after retirement until death. To fund Social Security benefits for the self-employed, the Internal Revenue Code taxes self-employment income. Normally, someone is self-employed if she/he operates a trade or business for a livelihood or in good faith to make a profit. Most farming operations qualify. Questions have arisen about spouses when a farming operation is operated by them jointly. Both qualify if the farm is operated as a partnership. Also, a spouse may be employed by the operation and qualify.

Self-employment tax is a Social Security Tax and Medicare tax and is running about 15% annually. The monthly benefits, received after retirement, are based on the earnings of the individual prior to retirement without regard to gender. However, a non-earning spouse can elect to receive a limited benefit based on the contributed earnings record of the working or self-employed spouse. An example of this is when husband (H) and wife (W) both qualify to receive Social Security upon reaching the appropriate age. Based on their individual qualified earnings, H is entitled to receive \$2500 a month and W is entitled to receive \$900 a month. Currently, W is entitled to receive a spousal benefit slightly less than half of what H is receiving. Thus, here W, instead of taking her \$900 a month, can elect to take the spousal share of about \$1200 a month. Combined the monthly total for H and W is about \$3700 (H's \$2500 + W's \$1200).

In conclusion, women play an active part in farming, their role is expanding and gender discrimination is inappropriate and generally illegal if done by a governmental entity.

Introduction

This report responds to, and discusses, from an American perspective, several questions concerning women and children in U.S. agriculture enterprise. These questions focus on whether women and children are treated differently. They range from broad treatment questions to specific issues such as land law and tenancy, law of succession, family law, social security law, tax law, corporate law, and the transfer of a business and if there has been any change in treatment. Some ask about trends and the impact of international events and new programs. Initially, the paper considers what an agriculture enterprise is, what constitutes farming and women's involvement. Then the rules dealing with gender discrimination are discussed. Finally, the specific questions concerning succession and social security are considered.

Agriculture Enterprise—What is Farming?

The questions in general raise issues about the legal status of women and children in the “agricultural enterprise.” The term “agriculture enterprise” is not commonly used in the United States (U.S.). Moreover, no uniform definition or description of the food production process exists. Farmer or farming are probably the most common terms used in the U.S. but other terms such as producer, operator, conventional farming, family farm, factory farm, corporate farm, industrial or large scale farm, urban farming, organic or sustainable farming are used as well. The internet and print media are replete with positions and agendas concerning how food should be produced, how the increasing world population can be fed and the role and shape of the Federal government's agriculture policy. In footnote #1, I have included links to videos that focus on some of divergent views of agriculture in the U.S.¹ As to the conflict of small and/or organic or so-called sustainable producers versus big producers of food, it was reported that Senators Saxby Chambliss (Republican(R) -Georgia, Ranking Minority member of the Senate Agriculture

1. Factory farm or corporate farm is a term that is normally used a derogatory term or as an insult. Some refer to it as a large, industrial operation that raises large numbers of animals for food or large grain producers. But see Emily Meredith, *My Week on a “Fact”ory Farm: Part I*

<http://www.meatingplace.com/Industry/Blogs/Details/40081> Cf. Peggy Lowe, *Who are you calling a corporate farmer?* <http://www.netnebraska.org/article/news/who-are-you-calling-corporate-farmer>

A factory farm animation video that clearly has an agenda dealing with so-called factory farms see <http://www.thematrix.com/>

For other videos dealing with broad farming issues see: <http://www.youtube.com/watch?v=GdR5TOhHJGM> (2013 Super Bowl commercial for a Chrysler truck entitled “So God Made a Farmer”); <http://www.youtube.com/watch?v=LX153eYcVrY> (Kansas family farmer description video); and <http://www.takepart.com/foodinc/film> (critique of food production).

Committee), John McCain (R-Arizona) and Pat Roberts (R-Kansas) sent a letter to Secretary of Agriculture Tom Vilsack challenging the USDA's "Know Your Farmer, Know Your Food" program.² The letter provides in part:

[w]hile the concept of educating consumers about production agriculture is a worthwhile endeavor, we have serious misgivings about the direction of the Know Your Farmers program." The Senators complain that the program does not direct funding to "conventional farmers" but instead is "aimed at small, hobbyist and organic producers whose customers generally consist of affluent patrons at urban farmers markets."³

Clearly, the production of food involves very different operations. For example, a farm can be an operation that produces grains such as wheat, corn, soybeans, and rape seed. Farming also includes income from the operation of a stock, dairy, poultry, fish, bee, fruit, or truck farm (e.g. vegetables), plantation, ranch, nursery, orchard, or oyster bed. Fish farms and animal breeding farms are also considered farms.

These farming operations are quite different in size and method of food production.⁴ For example grain farming is not labor intensive whereas the production of fruits and vegetables is. Farm labor issues dealing with so-called migrant workers⁵ exist in those productions that are labor intensive.

About two-thirds of farm workers consist of self-employed farm operators and their families.⁶ The other third consists of hired farmworkers (field crop

2. http://www.usda.gov/wps/portal/usda/usdahome?navid=KYF_MISSION

This program is designed to strengthening local and regional food systems including so-called farmers markets.

3. <http://aglaw.blogspot.com/2010/04/senators-challenge-know-your-farmer.html>

4. Many farms are cultivated by owner-operators but others use hired labor. See USDA Economic Research Service (2012) Background, Farm Labor, Farm Economy, Topics, USDA Economic Research Service, available at <http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx#Numbers>

5. "Because migrants are often excluded from the census, their full contribution to agriculture and working conditions often remains invisible to policy makers." Who Are Women in Agriculture?, Women's Agricultural Community, available at <http://www.safs.msu.edu/womenag/aboutus/us.htm>

The role of women operators may be underrepresented because the Census only allows for one self-defined operator to be named. Id. and *USDA Economic Research Service, Structural and Financial Characteristics of U.S. Farms: 2001 Family Farm Report* pg. 38, available at <http://webarchives.cdlib.org/sw1s17tt5t/http://ers.usda.gov/Publications/AIB768/>

6. See *supra* note 4 and notes 27 and 32 and accompanying text.

workers, nursery workers, livestock workers, farmworker supervisors and hired farm managers).⁷ About 50% of the agriculture work force is estimated to be unauthorized immigrants.⁸ For the period 2007-09, of the estimated 1.8 million farm⁹ workers, 22-24% were women.¹⁰ In 2012, the United States Department of Agriculture (USDA) Economic Research Service indicated that 82% of all hired farmworkers were male, 82% of farm laborers and supervisors were male, and 81% of farm managers were male. Interestingly, of all U.S. wage and salary workers, 53% were male.¹¹

The issue of who is a farmer and what activities are considered farming or agriculture arises in a variety of contexts today. The definitions often vary according to the Federal or state statute dealing with a particular problem. Examples are tax codes, the Uniform Commercial Code (UCC), Federal government price and income support programs, and environmental statutes and regulations.¹²

7. See *supra* note 4. Also, note that it has been argued that migrants are excluded from the census which means that their true contribution to agriculture is unclear. See *Who Are Women in Agriculture?*, Women's Agricultural Community, available at <http://www.safs.msu.edu/womenag/aboutus/us.htm>

8. See e.g., Diana Damschroder, *Female Migrant Farmworkers are Often Targets of Sexual Violence and Harassment*, The Human Rights Brief (Feb. 12, 2013), available at <http://hrbrief.org/2013/02/female-migrant-farmworkers-are-often-targets-of-sexual-violence-and-harassment-2/>. For other information and issues concerning migrant workers see *Injustice on Our Plates: Immigrant Women in the U.S. Food Industry*, Publications, Southern Poverty Law Center (Nov. 2010), available at <http://www.splcenter.org/get-informed/publications/injustice-on-our-plates#.UYqWULUp-Hc>

9. "Hired farmworkers make up less than 1 percent of all U.S. wage and salary workers, but they play an essential role in U.S. agriculture." See *supra* note 4.

10. See Demographics, Farmworker Health Fact Sheet, National Center for Farmworker Health (Sept. 2012), available at <http://www.ncfh.org/docs/fs-Migrant%20Demographics.pdf> (Information based on the National Agricultural Workers Survey (NAWS) from 2007-2009); See Diana Damschroder, *supra* note 5.

11. See *supra* note 4.

12. Examples of statutory definitions are UCC § 9-102 (a) (34-35) (define farm products and farm operation) & cmt. 4(a); 7 U.S.C.A. § 1631(c)(5)(farm products and farming operation); 7 CFR § 1400.401(2013)(actively engaged in farming—payment eligibility requirement for certain Federal government farm payments)(<http://www.fsa.usda.gov/FSA/webapp?area=home&subject=pmel&topic=af>); 11 U.S.C.A § 101(18, 20 and 21)(Federal Bankruptcy Act defines farming, farmer and family farmer); IRS Publication 225, <http://www.irs.gov/publications/p225/ar01.html> (Farming defined for Federal income tax purposes); I.R.C. §1231(b)(3) (2012) and Treas. Reg. Sec. 1.1231-2(a)(3)(livestock does not include poultry); 49 C.F.R. 390.5(2013)(The Federal Motor Carrier Safety Administration regulations define a farm vehicle driver and farmer); 7 U.S.C.A. §§ 291(2012) (anti-trust exemption for certain farmers to act in concert to affect product price); 505 Ill. Comp. Stat. Ann. § 5/3.06

Every five years, USDA National Agricultural Statistics Service (NASS) conducts a survey or census of agriculture in the U.S. For purposes of this census, a “farm” is defined as “. . . any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year.” Other relevant definitions include:

Migrant farm worker: a farm worker whose employment required travel that prevented the worker from returning to his/her permanent place of residence the same day.

Operator: a person who operates a farm, either doing the work or making day-to-day decisions about such things as planting, harvesting, feeding, and marketing. The operator may be the owner, a member of the owner’s household, a hired manager, a tenant, a renter, or a sharecropper. If a person rents land to others or has land worked on shares by others, he/she is considered the operator only of the land which is retained for his/her own operation. The census collected information on the total number of operators, the total number of women operators, and demographic information for up to three operators per farm.

Principal operator: the person primarily responsible for the on-site, day-to-day operation of the farm or ranch business. This person may be a hired manager or business manager.¹³

(West 2012)(defines active farmer);Kan. Stat. Ann. § 17-5903(h)(2012)(Defines farming not to include production of timber, forest products, nursery products or sod, and farming does not include a contract to provide spraying, harvesting or other farm services);(Kan. Stat. Ann. § 17-5904(b)(2012)(A prohibited corporation who enters into a production contact with a Kansas farmer is not considered to be a ownership, acquisition, obtainment or lease, either directly or indirectly, of any agricultural land);K.S.A. Const. Art. 11, § 1(Article 11. Finance and Taxation)§ 1;

“Local food.” There is no generally accepted definition of “local” food. See <http://links.mkt1447.com/servlet/MailView?ms=NDE2Mzk0MTMS1&r=NjMwMDU3NjIwOQS2&j=MTg5OTIyMzgZS0&mt=1&rt=0> and <http://grist.org/food/local-food-put-a-sticker-on-it/> and <http://agriculture.ks.gov/divisions-programs/agricultural-marketing-advocacy-and-outreach-team/from-the-land-of-kansas>

13. Entire report available in PDF form at http://www.agcensus.usda.gov/Publications/2007/Full_Report/usv1.pdf Also, Detailed census of agriculture information is available online at www.agcensus.usda.gov.

The census produces detailed information about such things as “land use and ownership, operator characteristics, production practices, income and expenditures, exports of farm production and many other areas.”¹⁴ The most recent data available is from 2007.¹⁵

The 2007 Census indicates an increasing presence of women in agriculture. Currently, nearly one third of all farm operators in the United States are women. This represents a 19% increase from 2002 figures, while farm operators overall increased only by 7%. Women Principal Operators also increased by 30% in the same period.¹⁶ Women operators tend to have smaller farms but are more likely to own the farmland they operate.¹⁷ Women operators are more likely than men to have diverse farming operations and are less likely to grow beef cattle or grain and oil seed.¹⁸ The presence of Women Principal Operators is more pronounced in western states and least pronounced in the Midwest.¹⁹

Census information is available for the U.S., all 50 states and outlying U.S. territories. The farm census information has in the past been published by the U.S. Bureau, Statistical Abstract of the United States. See <http://www.census.gov/compendia/statab/cats/agriculture.html> and <http://www.census.gov/prod/2011pubs/11statab/agricult.pdf>

14. <http://www.agcensus.usda.gov/>

In general, U.S. farm structure and organization is the focus of certain divisions of the USDA. The USDA states: “[Economic Research Service],ERS, is a primary source of economic research and analysis from the U.S. Department of Agriculture, providing timely information on economic and policy issues related to agriculture, food, the environment, and rural America.” See www.ers.usda.gov Also see *infra* notes 27 and 32 and accompanying text.

For examples of specific areas of interest see Family Farm Reports (see the latest in the series, Structure and Finances of U.S. Farms: Family Farm Report, 2010 Edition, or see all in the Family Farm Report series). Also see National Agricultural Statistics Service (NASS) www.nass.usda.gov/

15. The 2012 Census of Agriculture information is not yet available. Forms were mailed in late Dec. 2012 and farmers and ranchers are asked to respond by mail or online by Feb. 4, 2013.

16. USDA, 2007 Census of Agriculture, Women Farmers p. 1, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Demo_graphics/women.pdf

17. USDA, 2007 Census of Agriculture, Women Farmers p. 2, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Demo_graphics/women.pdf

18. USDA, 2007 Census of Agriculture, Women Farmers p. 3, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Demo_graphics/women.pdf

19. USDA, 2007 Census of Agriculture, Women Farmers p. 4, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Demo_graphics/women.pdf

Because it seems that women operations are more likely to sell raw commodities to the public, a 2013 North Carolina statute may encourage this growth. Under the North Carolina statute “[a] commodity producer shall be entitled to a rebuttable presumption that the commodity producer was not negligent when death or injury is proximately caused by the consumption of the producer's raw agricultural commodity” if the producer can meet certain qualifying criteria.²⁰

In 2007, Women Principal Operators controlled 306,209 farms, which accounted for 64,264,566 acres of farm land.²¹ Of the acreage controlled, women owned 50,101,842 acres and rented the remaining 14,162,724.²² Of these farms, 279,996 were operated by 1 woman, 22,783 were operated by 2 women, 2,761 were operated by 3 women, 431 were operated by 4 women, and 238 were operated by 5 women or more.²³ The 2007 data also shows that 942,035 farms, totaling 298,009,940 acres, with 985,192 Women Operators in the United States.²⁴ Farming was the principal occupation of 341,538 of these women, while non-farming activities were the primary occupation of 643,654.²⁵ Of these operators: 16,632 were under 25 years old; 62,182 were between 25 and 34; 157,193 were between 35 and 44; 283,098 were between 45 and 54; 251,231 were between 55 and 64; 137,246 were between 65 and 74; and 77,610 were 75 and over.²⁶

An excellent report published in April 2013 by the Economic Research Service discusses in great detail the role of women in agriculture as shown in

20. 2013 N.C. Sess. Laws Ch. SL 2013-265.

21. USDA, Census of Agriculture 2007 Table 50, available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/st99_1_050_050.pdf

USDA, Census of Agriculture 2007 Table 48, available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_048_048.pdf Table 48 contains specific data about women ownership in each of the 50 states.

22. See *supra* note 21 in Table 50.

23. *Id.*

24. USDA, Census of Agriculture 2007 Table 48, available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_048_048.pdf

Also see USDA, Census of Agriculture 2007 Table 51, available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/st99_1_051_051.pdf

25. USDA, Census of Agriculture 2007 Table 51, available at http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/st99_1_051_051.pdf

26. *Id.*

http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1,_Chapter_1_US/st99_1_051_051.pdf

the 2007 Census.²⁷ This report, in addition to discussing the growing share of women-operated farms, considers the characteristics (age, education & off farm income reliance) of principal women-operated farms, profits generated, farms and sales by specialization, government payments received by women operators, women as secondary operators and joint operations by women and men.²⁸

Another article interpreting the 2007 Census on Agriculture data is the 2012 piece by Maurice J. Hladik, *Women Farmers – Breaking Through the “Grass Ceiling,” Demystifying Food from Farm to Fork*.²⁹ The author concludes that women were responsible for 4% of food production alone and an additional 7% from joint female/male operations. The author estimates that women are responsible for an estimated 10% of food production in the United States. While this figure is not staggering, it is worth noting that corporate farms only account for 15% of food.

Many states have collected their own data on farm women. A 2001 study of farm women from one state, Wisconsin, found that most farm women were responsible for bookkeeping and bill paying, farm errands and vegetable gardening were common tasks, and women were more likely to work with livestock than do field work. The study also found that 63% of women interviewed contributed 40 or more hours of on-farm work per week.³⁰ Two years later, a 2003 Wisconsin study found that farm women were involved in all of the major decisions on farming operation, a majority of women are responsible for household decisions, women were likely to work with financial decisions rather than crop management, and more than one half (57%) said they were “very involved” in farm decisions.³¹

27. Robert A. Hoppe & Penni Korb, *Characteristics of Women Farm Operators and Their Farms*, EIB-111, U.S. Department of Agriculture, Economic Research Service (April 2013) <http://www.ers.usda.gov/media/1093194/eib111.pdf>

28. A relevant article about property rights is Susan A. Schneider, *Who Owns the Family Farm: The Struggle to Determine the Property Rights of Farm Wives*, 14 N. ILL. U. L. REV. 689 (1994).

29. <http://foodfarmfork.authorsxpress.com/2012/09/09/women-farmers-breaking-through-the-grass-ceiling/>

30. The Roles of Women on Wisconsin Dairy Farms at the Turn of the 21st Century. PATS Research Report No. 10. Nov, 2001, cited in Jenny Vanderlin & Joy Kirkpatrick, Center for Dairy Profitability (CDP), University of Wisconsin – Madison, Women in Agriculture: Heart of the Farm: Program Statistics/Trends (slide 8) (nd.), available at <http://www.uwex.edu/ces/heartofthefarm/resources/documents/HOFPresentation.pdf>

31. Heart of the Farm Women in Agriculture, PATS Research Report No. 20. September, 2003, cited in Jenny Vanderlin & Joy Kirkpatrick, Center for Dairy Profitability (CDP), University of Wisconsin – Madison, Women in Agriculture: Heart of the Farm: Program Statistics/Trends (slide 9) (nd.), available at <http://www.uwex.edu/ces/heartofthefarm/resources/documents/HOFPresentation.pdf>.

Another set of relevant federal data is collected by the United States Department of Agriculture (USDA)'s Economic Research Service (ERS).³² It collects and publishes data from Agricultural Resource Management Survey (ARMS) concerning various classifications of farms including typologies.³³ In 1998, the ERS developed its farm typology for reporting and research purposes. It sorted farms into seven groups utilizing gross farm sales, the primary occupation of their operators and whether the farms were family farms. In 2005, ERS changed the way it defined "family farms." Prior to 2005, ERS had used ARMS data to classify family farms as either sole proprietorships, partnerships, or family corporations. ARMS changed its survey questions so that a family farm was one that a majority of the farm operation was owned by the operator and relatives of the operator. Also, limited-resource farms were dropped as a separate category in 2005 in large part because this definition was inconsistent with the definitions of the other categories of farms that focused on amount of sales and the operator's occupation.³⁴ Moreover, in general, farm operator households cannot be characterized as low-income when both farm and off-farm income are considered. Nevertheless, limited-resource farms still exist and account for 3 to 12 percent of family farms, depending on how "limited-resource" is defined.³⁵ And they are still being tracked.

Most U.S. farms—98 percent in 2007—are family operations, and even the largest farms are predominantly family run. Large-scale family farms and nonfamily farms account for 12 percent of U.S farms but 84 percent of the value

Also see Carmen Albright, *Who's Running the Farm?: Changes and Characteristics of Arkansas Women in Agriculture*, Amer. J. Agr. Econ. 88 (Number 5, 2006) 1315-1322.

32. The USDA states: "[Economic Research Service]ERS is a primary source of economic research and analysis from the U.S. Department of Agriculture, providing timely information on economic and policy issues related to agriculture, food, the environment, and rural America." See www.ers.usda.gov

33. Robert A. Hoppe and James M. MacDonald, *Updating the ERS Farm Typology*, EIB-110, U.S. Department of Agriculture, Economic Research Service, April 2013. See <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib110.aspx> and www.ers.usda.gov

34. Robert Hoppe and David E. Banker, *Structure and Finances of U.S. Farms: Family Farm Report, 2010 Edition*, Economic Information Bulletin No. (EIB-66) 72 pp. 40-45 & 48 (July 2010) and Robert A. Hoppe and James M. MacDonald, *Updating the ERS Farm Typology*, EIB-110, U.S. Department of Agriculture, Economic Research Service, p. 4 (April 2013) and <http://www.ers.usda.gov/publications/eib-economic-information-bulletin/eib110.aspx>

and www.ers.usda.gov Also see http://www.ers.usda.gov/media/139267/eib66_reportsummary_1.pdf

Also see <http://www.ers.usda.gov/topics/farm-economy/beginning-disadvantaged-farmers/socially-disadvantaged-farmers-race-hispanic-origin-gender.aspx>

35. Robert Hoppe and David E. Banker, *Structure and Finances of U.S. Farms: Family Farm Report, 2010 Edition*, Economic Information Bulletin No. (EIB-66) 72 July 2010.

of production. In contrast, small family farms make up most of the U.S. farm count but produce only a modest share of farm output. Small farms are less profitable than large-scale farms, on average, and their operator households tend to rely on off-farm income for their livelihood.

In April 2013, ERS announced a significant change in farm typology. The changes were made to reflect significant commodity price increases, the movement to larger farms and the growth of the use of production contracts among livestock and poultry producers. The size of farms is now measured by gross cash farm income (GCFI) (the total revenue received by a farm business in a given year). Using this criteria farms are divided into three categories: 1) Small farm [GCFI of less than \$350,000]; 2) Midsize farm [GCFI of \$350,000 to \$999,999]; and 3) Large-scale farm [GCFI \$1 million or more]. According to the ERS:

Using the updated typology, 91 percent of U.S. farms were classified as small in 2010, and accounted for about 29 percent of the value of U.S. farm production. Large-scale family farms under the new typology—less than 2 percent of all farms—accounted for a disproportionately large 34-percent share of the value of production.³⁶

Legal Status of Women in the U.S.

With this background, it is now appropriate to consider the general question concerning whether women and children involved in farming are uniquely treated. The U.S. Constitution grants certain powers to both the U.S. government and the state governments. For example, Article I, Section 8 of the U.S. Constitution grants the U.S. Congress powers such as coining money, regulating interstate trade and commerce, declaring war, raising an army and navy and to establish laws of immigration. Article 1, Section 9 of the U.S. constitution lists those things states cannot do. For example, states cannot coin money, enter into treaties, charge duties on imports or exports. The 10th Amendment states ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’ Powers not specifically listed in the Constitution, like requiring driver’s licenses or collection of property taxes are examples of the many powers reserved to the states. Article VI, Section 2, of the U.S. Constitution is known as the Supremacy Clause because it provides that the "Constitution, and the Laws of the United States ... shall be the supreme Law of the Land.” It means that no state or local government can

36. See table 9 in the ERS report, Updating the ERS Farm Typology, EIB-110, April 2013 and a chart found at <http://www.ers.usda.gov/data-products/chart-gallery/detail.aspx?chartId=37005&ref=collection#.UXqXwZXA6ZM>

enact a law which prohibits something expressly authorized in the U.S. Constitution or Federal law or authorize something expressly prohibited by the U.S. Constitution or Federal law.

As for women and children, some issues are governed by Federal law and some by state law. Congress created the USDA in 1862, and thus areas within the scope of the grant of power to the USDA are federal issues governed by Federal statutes, regulations and the Federal courts.

The Fifth Amendment and the Fourteenth Amendment to U.S. Constitution *prohibit the Federal government as well as state governments* from discriminating against women and governments cannot arbitrarily treat women differently than men. Specifically, the Fifth Amendment provides in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." The Fourteenth Amendment provides in part that "No State shall . . . deny to any person . . . the equal protection of the laws." The Equal Protection Clause of the Fourteenth Amendment, by its own terms, applies only to state and local governments. No Equal Protection Clause exists that governs the federal government. However, a "discriminatory" act by the federal government would be prohibited by the Due Process Clause of the Fifth Amendment. In 1954,³⁷ the US Supreme Court held that "discrimination may be so unjustifiable as to be violative of due process." Since 1954, therefore, the constitutional concept of equal protection of the laws applies to all governments in the United States: Federal, state and local.

Certainly any governmental action that expressly imposes legal disabilities on women, or men for that matter, would be challenged under equal protection. Women farmers filed a discrimination lawsuit on October 19, 2001 against the U.S. Department of Agriculture for gender discrimination in the administration of its farm loan programs.³⁸ This case was settled. It did bring attention to the treatment of women trying to get started in agriculture and USDA's farm loan programs for socially disadvantaged applicants, who include women. As part of the social disadvantaged farmers' settlement, women are required to be represented appropriately on county committees that are a central part of the USDA's determination of who is eligible for federal support payments among other things.³⁹

37. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

38. *Love v. Vilsack*, Case No. 1:00CV02502 (U.S. District Court for the District of Columbia). see www.womenfarmers.com and <http://www.fsa.usda.gov/FSA/webapp?area=home&subject=fmlp&topic=sdl>

39. See Selection and Functions of Farm Service Agency State and County Committees, 78 Fed. Reg. 13,771 (March 1, 2013) to be codified at 7 C.F.R. Part 7.

The U.S. Supreme Court has considered a number of gender discrimination cases.⁴⁰ In the context of sex-based classifications, the current test being applied by the U.S. Supreme Court is the so-called intermediate scrutiny test or intermediate standard of review test.⁴¹ Under this test “Classifications by gender must serve important governmental objectives and must be substantially related to achieving of those objectives.”⁴² The intermediate scrutiny is the second level of deciding equal protection issues using judicial review. The other levels are typically referred to as rational basis review (least rigorous) and strict scrutiny (most rigorous).

The Federal government, states and municipalities have laws that prohibit discrimination based on gender in a number of settings. Congress has enacted federal laws prohibiting discrimination based on sex in a number of settings including education, employment, credit opportunity, equal pay and federal services.⁴³ These laws are important because it must be stressed that the Constitutional equal protection rule, normally, applies only to *governmental* actions not acts of private entities or individuals.

Special state sponsored programs exist for ranch and farm women. For example, Annie’s Project is designed to develop risk management skills and is offered in at least 27 states.⁴⁴ Another special program is the USDA’s farm loan programs for socially disadvantaged applicants, who include women.⁴⁵ These so-called affirmative action programs refer to governmental policies and programs that give preferential treatment to members of certain minorities in education, in employment, and in awarding of government contracts to

40. See e.g. J.E.B. v. Alabama, 511 U.S. 127 (1994)(Gender based peremptory challenges based on gender invalid); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)(women only admission policy at state school invalid); Reed v. Reed, 404 U.S. 71 (1971)(law giving men a preference over women as administrators of estates invalidated).

41. See Craig v. Boren, 429 U.S. 190 (1976) and its progeny.

42. Id.

43. See Civil Rights Act of 1964: Title VII (Equal Employment Opportunities) 42 U.S.C.A. ch. 21 (2012). See also e.g. Equal Credit Opportunity Act, 15 U.S.C. § 1691, Equal Pay Act Equal Pay Act of 1963 29 U.S.C. § 206(d) (2012).<http://www.womenfarmers.com>

44. See e.g. <http://www.extension.iastate.edu/annie/http://aesop.rutgers.edu/~farmmgmt/anniesproject.html>

45. See *supra* notes 36 and 37.

<http://www.fsa.usda.gov/FSA/webapp?area=home&subject=fmlp&topic=sdl>

Cf. www.mda.state.mn.us/~media/Files/about/affirmactionplan.ashx

The Minnesota Department of Agriculture as an active program that promotes hiring affirmative action, minorities and women.

businesses as a way of remedying past discrimination or providing diversity. The programs are controversial and the subject of much litigation.⁴⁶

Migrant farmworkers

While issues concerning women's challenges in farmland ownership and operation are important, the status and treatment of migrant farmworker women and children also present significant issues. A 2008 USDA ERS report indicates/notes?? that farmworkers make up a third of the total agricultural labor force.⁴⁷ As indicated earlier, these farmworkers are essential for labor intensive operations producing fruits and vegetables. A large number of these workers are relatively disadvantaged and are unauthorized workers.⁴⁸ It is estimated that about three million migrant workers and seasonal farmworkers are employed in the U.S. At least half of the agricultural workforce is estimated to be unauthorized immigrants, 24% are estimated to be female.⁴⁹ The 2008 government report states, "Hired farmworkers face a challenging work environment that may include hazardous work conditions, low pay, and substandard housing conditions."⁵⁰ A blistering attack on the treatment of farmworker women is found in *Injustice on Our Plates: Immigrant Women in the U.S. Food Industry*,⁵¹. Others have argued that female farmworkers are not adequately protected by the laws and the regulatory system.⁵²

Because of special exemptions for agriculture, children as young as 10 may work in the fields, and it appears that many states still exempt farmworker

46. See e.g. Fisher v. University of Texas at Austin, Fisher v. University of Texas at Austin

--- S.Ct. ----, 2013 WL 3155220, ___ U.S. ___ (June 24, 2013); Grutter v. Bollinger, 539 U.S. 306, pet. rehearing denied 539 U.S. 982 (2003); Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court' Suspect Classification Jurisprudence*, 50 Washburn L.J. 33 (2010).

47. William Kandel, *Profile of Hired Farmworkers, A 2008 Update*, Economic Research Report No. (ERR-60) (July 2008) <http://www.ers.usda.gov/publications/err-economic-research-report/err60.aspx> Also, see note 4.

48. Id.

49. Id. at 12.

50. Id. at 1.

51. Publications, Southern Poverty Law Center (Nov. 2010) <http://www.splcenter.org/get-informed/publications/injustice-on-our-plates#.UYqWULUp-Hc>

52. See *supra* note 46 and Diana Damschroder, Female Migrant Farmworkers are Often Targets of Sexual Violence and Harassment, The Human Rights Brief (Feb. 12, 2013), available at <http://hrbrief.org/2013/02/female-migrant-farmworkers-are-often-targets-of-sexual-violence-and-harassment-2/>

children from compulsory education laws.⁵³ Agricultural employee and farm laborers are excluded from coverage by the majority of state workers' compensation statutes. This exclusion has been held constitutional.⁵⁴

In an attempt, in part, to protect farm children, The Federal Motor Carrier Safety Administration (FMCSA), part of the Department of Transportation (DOT), proposed new standards that would require all farmers and everyone on the farm to obtain a CDL (Commercial Driver's License) in order to operate any farming equipment. This created an instant controversy and very strong opposition from farm groups and politicians from farm states. The proposal was dropped. First, it was asserted that the CDL would place unacceptable regulatory pressure on small farms and family farms. And, most agriculture states, examples being Nebraska and Kansas, have special driving rules for "farm kids." Nebraska has a rule that grants "farm kids" as young as 13 a farm husbandry permit that authorizes the holder to operate "off road vehicles designed for agricultural, horticultural or livestock-raising operations or for lifting or carry an implement of husbandry."⁵⁵ In Kansas, a 14 year old

who resides upon a farm in this state or is employed for compensation upon a farm in this state may apply to the division of vehicles for a farm permit authorizing such person, while possessing the permit, to operate any motor vehicle in class C. . . (A) While going to or from or in connection with any farm job, employment or other farm-related work; (B) on days while school is in session, over the most direct and accessible route between the licensee's residence and school of enrollment for the purpose of school attendance . . .⁵⁶

Succession laws

The next matter to be considered is that part of Question 2 focusing on the law of succession and the agriculture enterprise. The development of an effective transition or succession plan for an agriculture enterprise is a major issue for rural America. Many farmers are planning on, or thinking about, retiring in the next five years. In one state, Iowa, at least 40% of farmland is

53. Id. For a general discussion of children working on farmers operated by families or owner see: http://www.huffingtonpost.com/2012/04/27/white-house-child-labor-agriculture_n_1458701.html and <http://www.dairyherd.com/dairy-news/Does-passing-down-the-farm-include-blood-sweat-and-tears-213119091.html>

54. See *Eastway v. Eisenga*, 362 N.W.2d 684 (Mich. 1984).

55. Neb.Rev.St. § 60-4,126

56. Kan. Stat. Ann. § 8-296 (2011).

owned by someone over the age of 75,⁵⁷ and more than 25% is owned by widows over the age of 65.⁵⁸

In general, owners of agriculture enterprises must decide what they want to happen upon their passing. If no planning is done at all, the owner will die intestate and the property will be distributed according to the relevant state statute. Typically, if decedent is survived by a spouse and children, the spouse will get half and the children will get half. If only children survive, the property passes to them in undivided equal shares.

Transition and estate planning often raise difficult family decisions. For example, should planning decisions assure their successors—heirs will have the opportunity to continue the family legacy, i.e. the family farm unit should be retained rather than sold or sub-divided. This issue is presented in a number of scenarios. For example, assume the farm is the major asset of the operators, Mom and Pop, who have two children, a male and a female. Only one is interested in the farm being retained as an operating farm after the death of Mom and Pop.⁵⁹ Should the children be treated equally? Does the interested one have the ability to run the operation? How will Mom and Pop generate income for retirement? Will Mom and Pop give up control before they die? Another sticky situation is where the assets of the agricultural enterprise are owned by a limited liability company or some sort of corporation with family members having units or shares in the entity. If a minority shareholder wants to liquidate, problems can arise concerning such things as how to value the assets of the entity and how to generate the cash needed for the purchase of the minority owner's interest. Does part of the agriculture enterprise have to be sold? Finally, as of 2012, most agricultural enterprises do not have to worry

57. http://www.ucs.iastate.edu/mnet/_repository/2013/.../pdf/duffyjensen.pdf?http://www.ucs.iastate.edu/mnet/_repository/2013/soilmanagement/pdf/duffyjensen.pdf

58. <http://harvestpublicmedia.org/article/435/redefining-farm-woman/5>

59. An article asserting that farm daughters have traditionally not been given the same opportunity to inherit farms as sons and proposes a method to change is Hannah Alsgaard, *Rural Inheritance: Gender Disparities in Farm Transmission*, 88 N.D.L.Rev. 347 (2012); http://web.law.und.edu/LawReview/issues/web_assets/pdf/88/88-2/88ndlr347.pdf

An interesting discussion of a farmer's daughter inheritance is found in http://www.agweb.com/legacyproject/legacy_project_case_studies.aspx?smartid=CZZBZDG1111ZZ11AZZZZZZZZZ&spMailingID=41508803&spUserID=NjMwMDU3NjIwOQS2&spJobID=188194489&spReportId=MTg4MTk0NDg5S0

An excellent discussion of the planning issues connected with farmland disposition (***tax consequences are not up to date because of major changes made by Congress in 2012***) see Jerry Mahan, *What Should I Do With the Farm?*, Fact Sheet Agriculture and Natural Resources The Ohio State University Extension AEDE-13-09 (2009) http://ohioline.osu.edu/ae-fact/pdf/AEDE_13_09.pdf Also see <http://www.choicesmagazine.org/choices-magazine/theme-articles/transitions-in-agriculture>

about Federal Estate Tax (death taxes) upon the death of the owner(s) of the farm. In 2013, an individual has no federal estate tax liability for estates less than \$5.25 million (couples \$10.5 million).⁶⁰ It is estimated that 99% of all estates will be exempt. However, it must be noted that some farm operations located near urban areas or that have large land holdings may face estate tax liability. For example, in some mid-western states like Iowa, high quality land, with no development potential, was selling in 2012 for more than \$10,000 an acre.⁶¹

When discussing succession or distribution of property upon death, it must be noted that an agriculture enterprise may consist of different types of property or assets including real estate, personal property or movable property such as animals, equipment and crops, bank accounts, stocks, and water rights. Some farming operations will be small and some large. But, the crucial question in all cases is who owns the property and in what legal form.⁶² The type of legal interest affects transfers and succession plans. The legal forms include individual fee simple total ownership, a life estate, joint tenancy with the right of survivorship, tenants in common, some sort of trust, or an ownership interest in a legal entity like a limited liability company or corporation. A recent Iowa survey showed farm property was roughly 20% owned by a single male, 16% by a single female, 40% by a couple, and 24% by multiple owners. Let us examine the succession rules applicable to individual owners and the spouse's right to inherit.

Most states originally adopted the English common law system that treated a husband and wife as one. Long ago these common law states by statute recognized a married woman's right to contract, own real estate and dispose of property by will.⁶³

The European community property system was adopted by a few states. Community property law provides that "marital property" of both the husband and wife is equally owned by both. Under the original system, the husband had

60. For excellent discussions of the general issues connected with the effect of the federal estate tax has on transition and estate planning see e.g. <http://www.choicesmagazine.org/choices-magazine/theme-articles/tax-theme/the-effects-of-the-federal-estate-tax-on-farm-households>

<http://www.choicesmagazine.org/choices-magazine/theme-articles/tax-theme/farm-transition-tough-tasks-at-hand-and-why-transfer-tax-isnt-so-tough>

61. <http://www.extension.iastate.edu/agdm/wholefarm/html/c2-70.html>

<http://www.extension.iastate.edu/agdm/wholefarm/html/c2-75.html>

62. Iowa State University Extension and Outreach published 2012 preliminary results of a 2012 ownership survey on May 22, 2013. See <http://www.ucs.iastate.edu/mnet/repository/2013/soilmanagement/pdf/duffyjensen.pdf>.

63. The statutes were referred to in a variety of ways such as "Married Women's Property Acts", Married Women's Emancipation Acts". See e.g. Conn. Gen. Stat. § 46b-36 (2013)

the right to control community “marital property” including that owned or acquired by the wife. Presently, it appears all states that have community property schemes, except maybe Louisiana, have changed their community property laws to give wives equal rights to control marital property. Today nine states, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin, are community property states. Alaska has an optional law, i.e. married persons may choose to classify some or all of their property as community property.

In general, women or men who are owners of assets of farming operations, can transfer their property interest to whomever they choose. In all states women and men have the right to transfer their property by will. However, in *non-community property states* a surviving spouse cannot be completely disinherited by the will or provided for only minimally. By state statute, the surviving spouse *may elect* to take a statutory or so-called forced share as opposed to take under the will. The elective share or forced share ranges from one-third to one-half of the so-called “probate estate.” Historically, the probate estate did not cover many things that the decedent might own. Examples of assets not included are pension or life insurance proceeds distributed according to a beneficiary designation on file with the employer or insurance company, assets held in a revocable trust or assets (like a bank account) held by the decedent and another person in joint tenancy with the right of survivorship. Currently, many states have changed their elective share statutes by changing the definition of the probate estate to the “augmented estate” as defined in the Uniform Probate Code.⁶⁴ The augmented estate covers a broader range of assets including many passing outside of probate. Thus, a surviving spouse is given more protection. The elective share has also been expanded in many jurisdictions. For example, in Kansas the surviving spouse

has a right to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule: . . .⁶⁵

A final point about the elective share is that it is not automatically available. The surviving spouse must normally challenge the validity of the will.⁶⁶ If the surviving spouse does not challenge the will, the will be probated as written.

Another protection given to a surviving spouse is the so-called homestead right which consists typically of 160 acres for farmland or some portion of an

64. UPC §§ 2-201, 2-203(a), 2-205. For one state’s current approach see Kan. Stat. Ann. §§ 59-6a201-6a217 (2012).

65. Kan. Stat. Ann. § 59-6a202 (2012).

66. See e.g. Kan. Stat. Ann. § 59-6a212 (2012).

acre in an incorporated city.⁶⁷ A typical statute providing for this is the Kansas statute which states

A surviving spouse is entitled to the homestead, or in lieu thereof the surviving spouse may elect to receive a homestead allowance of \$50,000. The homestead or homestead allowance is exempt from and has priority over all demands against the estate. The homestead or homestead allowance is in addition to any share passing to the surviving spouse by way of elective share.⁶⁸

Normally, an ex-spouse is not entitled to take under a will executed prior to a divorce. From a planning perspective, any will drafted before a divorce should be revoked and a new one executed.⁶⁹

In community property states the surviving spouse is generally not given an elective share option. The reason given is that property acquired during the marriage is owned by both spouses.

The surviving spouse's rights in marital property must be considered when a person who is married transfers property to another or to an entity such as a revocable trust. In general, both spouses have to transfer any and all interests they might have in the asset being transferred. In some states this concern may focus on just real estate but in others it may be broader. The Kansas statute provides in part:

the surviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized or possessed and to the disposition whereof the survivor shall not have consented in writing, or by a will, or by an election as provided by law to take under a will. . . .⁷⁰

Another possible succession or distribution rule deals with intestate succession. A person who dies without a will is considered to have died intestate. As noted earlier, the distribution of the decedent's property is made according to the state statute prescribing how the property is to be distributed. The laws of intestate distribution can also apply to a person who dies with a will that does not cover all of the decedent's property. While normally state law

67. See e.g. Kan. Stat. Ann. § 59-401. See also id. §§ 402-04.

68. Kan. Stat. Ann. § 59-6a215 (2012).

69. See . John S. Slowiaczek & David A. Domina, *The Equitable Distribution of Farms*, 18 J. Am. Acad. Matrim. Law. 357 (2003) for a discussion property settlements in divorce.

70. Kan. Stat. Ann. § 59-505 (2012).

controls intestate succession, federal law must be consulted when a native American or American Indian dies.⁷¹

Children's right to inherit

What about a child's right to a parent's property upon the death of the parent? In general children have no right to inherit anything from their parents. Most states have laws that protect children that were accidentally disinherited. Remember if farm owner dies intestate, the children will inherit as prescribed by the relevant state statute. Typically, it is in undivided equal shares.

Social Security

Social security is a system designed primarily to provide supplemental income to individuals in retirement.⁷² Self-employed individuals and workers pay a social security tax during their working years and then draw a monthly payment after retirement until death. The monthly benefits received after retirement are based on the earnings of the individual prior to retirement. However, a non-earning spouse can elect to receive a limited benefit based on the contributed earnings record of the working or self-employed spouse. An example of this is when husband (H) and wife (W) both qualify to receive social security upon reaching the appropriate age. Based on their *individual* qualified earnings, H is entitled to receive \$2500 a month and W is entitled to receive \$900 a month. Currently, W is entitled to receive slightly less than half of what H is receiving as his spouse. Thus, here W, instead of taking her \$900 a month, can elect to take the spousal share of about \$1200 a month.

To fund Social Security benefits for the self-employed, the Internal Revenue Code taxes self-employment income. Normally, someone is self-employed if she/he operates a trade or business for a livelihood or in good faith to make a profit. Farming for purposes of self-employment tax (SE) is broadly defined.⁷³ People who are self-employed under 26 U.S.C.A § 1402,⁷⁴ must pay (SE) as well as income tax. SE tax is a Social Security Tax and Medicare tax running about 15% annually.

The definition of a self-employed farmer also includes a person who produces crops or livestock on land owned by another and a contract farmer who has a contract for a fixed amount for crops or with a processor to produce finished animals or eggs. The farmer can operate as a sole proprietor or independent contractor or as a member of a partnership that operates a trade or business or otherwise is in business for oneself. The possibilities for farmers

71. See e.g. 25 U.S.C.A §§ 2206(2) and other sections found in Chapter 25.

72. In addition to retirement benefits, benefits include the disability benefits, survivor benefits, and hospital insurance (Medicare) benefits.

73. See *supra* note 2 and text following. See I.R.S. publication 225 and http://www.irs.gov/publications/p225/ch12.html#en_US_2012_publink1000218739

74. See also 26 C.F.R. §

are an owner/operator, partner in a partnership farming (including a member of a multi-member limited liability company (LLC)), renter or share farmer.⁷⁵

As for spouses, I.R.S. publication 225 states

If you and your spouse jointly own and operate a farm as an unincorporated business and share in the profits and losses, you are partners in a partnership whether or not you have a formal partnership agreement. You must file Form 1065, instead of Schedule F, unless you make a joint election to be treated as a qualified joint venture. Making this election will allow you to avoid the complexity of Form 1065 but still give each spouse credit for social security earnings on which retirement benefits are based.

Qualified joint venture. If you and your spouse each materially participate as the only members of a jointly owned and operated farm, and you file a joint tax return for the tax year, you can make a joint election to be treated as a qualified joint venture instead of a partnership for the tax year.⁷⁶

The publication also mentions that a spouse can be an employee, not a partner. The employer spouse must pay social security and Medicare taxes for the employed spouse.⁷⁷

Being prepared financially for retirement is extremely important for anyone and particularly the self-employed. Adequate financial planning is a must for farmers and it is not simple.

75. For general information about farmers and self-employment issues see federal government's Internal Revenue Service publication 22 5 which may be found at http://www.irs.gov/publications/p225/ch12.html#en_US_2012_publink1000218739

Also see, <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Husband-and-Wife-Business> and <http://www.irs.gov/taxtopics/tc554.html>

76. http://www.irs.gov/publications/p225/ch12.html#en_US_2012_publink1000218739

77. <http://www.irs.gov/publications/p225/ch12.html>