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Supreme Court Rules in Progress Pig Case

J. David Aiken¹

Article 8 §12 of the Nebraska constitution (Initiative 300) establishes several requirements for corporations to legally qualify as family farm or ranch corporations. Under one provision, a majority of the family farm or ranch corporation's shareholders must be family members, "at least one of whom is a person residing on or actively engaged in the day-to-day labor and management of the farm or ranch." In *Hall v Progress Pig Inc.*, 259 Neb 407 (May 12, 2000) (*Progress Pig II*) the Nebraska Supreme Court ruled that where no family member resides on the farm or ranch, a family member must perform daily physical labor on the farm or ranch for the corporation to legally qualify as a family farm or ranch corporation.

Progress Pig Inc. is an Otoe county farrow-to-finish swine operation, with David Zahn the sole shareholder. Zahn, who lives on a farm three miles from the Progress Pig site, handles the operation's finance, management and marketing and works with production consultants. The Progress Pig production manager and other employees care for the swine. Zahn was physically onsite one to three days per week.

Zahn contended that the I300 daily labor requirement included production activities in addition to physical labor, such as bookkeeping, marketing, etc. The district court judge concluded that Zahn did provide labor and management for the farming operation, but ruled that Zahn's labor was insufficient to qualify as the *daily* labor and management required by I300. The Supreme Court, in contrast, ruled that Zahn's activities were primarily management, and that he provided only minimal physical labor (less than one hour per month). The Court ruled that Zahn did not provide the daily labor required for non-resident corporate owners by I300.

Under I300, Zahn will have to begin providing daily physical labor at the swine facility, sell the corporation within two years, or restructure the operation as a sole proprietorship or general partnership. If Zahn could prove that he had *previously* met the daily labor and management requirement and therefore qualified for family farm corporation status, Zahn might now qualify for the 50-year requalification provision under I300 so long as his family retained a majority interest in the corporation.

The district court judge noted that daily labor requirements would vary depending on whether the farm was a crop operation or a livestock operation. Livestock would require daily care, while crop operations might require physical labor only seasonally (e.g. at planting or harvesting). This issue was not addressed by the Supreme Court. However, future litigation seems inevitable regarding whether a non-resident corporate owner has provided sufficient daily physical labor to qualify for family farm corporation status, particularly where an older farmer is phasing out his or her physical labor contribution to the operation.

Progress Pig II was an important victory for family farm proponents. The lawsuit was originally filed in 1993, and plaintiffs (who include leaders of the Farmers Union and the Women Involved in Farm Economics) won an important procedural victory when the Nebraska Supreme Court ruled in *Hall v Progress Pig Inc.*, 254 Neb 150, 575 NW2d 369 (1998) (*Progress Pig I*) that the farmer-plaintiffs could enforce I300 under its citizen suit provision even after the county attorney had declined to bring suit. Nebraska Attorney General Stenberg earlier disqualified his office in the case as he had prepared incorporation documents for Progress Pig Inc. while in private practice law prior to his election.

Progress Pig II has important implications particularly for swine production in Nebraska, where family farm corporate owners providing management and non-family employees providing the physical labor is common. The owners of these operations face the same choices as Mr. Zahn.

Family farm estate planning implications. Often families may incorporate the farm or ranch when the parents finally consult an attorney to establish their estate plan. In many cases this may not occur until the parents are getting older. One estate planning recommendation stemming from *Progress Pig II* is that if the family wishes to establish a family farm corporation, it should do so while the parents (i.e. the current operators) can still meet the I300 family farm requirements by either residing on the farm or else by providing daily labor and management. If, for example the parents move off the farm, then they (or other family members) must meet the daily labor and management requirement (or else move onto the farm) in order to qualify for family farm corporation status under I300. And, the older the parents become, the less likely it is that they will be providing daily labor and management. So the bottom line is that families should establish a family farm or ranch corporation while the parents either reside on the farm or actively participate in daily labor and management. Once a family farm corporation has been legally established, the family will then have a 50-year grace period to requalify if they fall out of compliance with I300 (e.g. when the parents move into town). However, if the family cannot initially qualify under I300 when the family farm corporation is first established, they may have difficulty doing so (if they can at all) later on.

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