PRESERVING, PROMOTING, AND PROTECTING: THE POWER OF A FAMILY LIMITED PARTNERSHIP FOR RENEWABLE ENERGY LEASES

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ABSTRACT

Over the last forty years, the growth of large-scale commercial renewable energy projects in Texas has outpaced the development of regulations, leaving owners needing assistance from attorneys to navigate their wind and solar rights. As leases executed in the 1980s and 1990s approach their end, families are faced with challenges regarding succession planning due to a lack of precedent. Succession planning issues arise as heirs receive an interest in a current renewable energy lease without a concurrent interest in "Blackacre" where the renewable energy project sits. When the renewable energy lease ends, so does the interest because the lease is appurtenant to the real property. Therefore, the heirs have no way to ensure future interests in any renewable energy leases. Further, no court in Texas has determined the admissibility of severing the wind or solar rights from the surface rights nor the admissibility of conveyance of a divided interest in the wind or solar lease profits.

This Comment explores these problems and proposes utilizing a family limited partnership. This Comment is the first to suggest that practitioners and renewable lease owners should use a family limited partnership. Further, this Comment also proposes leaving the renewable leases interest undivided as opposed to severing the rights or conveying divided interests. This Comment also explains that a family limited partnership offers stability as a proven estate planning tool that allows lease owners to preserve their family legacy, continue to promote clean energy, and protect them from possible liability.

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I. INTRODUCTION

The Caller family lives on a 1,500-acre ranch in West Texas; they are proud third-generation cattle ranchers who have three children that enjoy helping on the ranch.[1] They have been contacted by a wind-energy company about a fifty-year wind lease that would be built on their ranch.[2] Because the ranching business is volatile due to rainfall's large impact on their cattle ranch's profits, the Callers are excited about this opportunity.[3] They plan to use the wind farm profits to put their three kids through college and build a sanctuary for people to retire their ranch horses when the horses get too old to work cattle.[4]

During year ten of the lease, the Callers worked with an attorney to build an estate plan.[5] The attorney asked the family if they had thought about whether they planned on re-signing a new lease with the wind company after the original fifty-year lease was over or whether they would sign a solar lease on the 1,500 acres.[6] Their attorney explained that the wind lease was attached to the surface estate because the developers leased the real property to develop the wind farm.[7] Explaining that if the 1,500 acres divests to the Caller's three children in three separate parcels, only the child with the parcel containing the wind turbines would become the new lease owner, with the sole right to the renewable energy lease profits and the sole authority to decide whether to renew the current lease when it ends.[8] Further, if the three parcels all have wind turbines under one lease, a legal question arises—not yet decided by the courts—concerning who becomes the new lease owner, making it more likely that when the current lease ends, the renewable energy company will likely not renew the lease.[9]

The Caller's attorney recommended setting up a family limited partnership (FLP) that would hold the wind rights as an undivided.[10] The Callers ultimately agreed that an FLP was the best choice.[11] First, the Callers valued the idea of maintaining a sense of unity and shared responsibility for their children.[12] By keeping the wind rights undivided within the FLP, they ensured all three kids would collectively be involved in making decisions related to the renewable energy lease after their death.[13] Second, the undivided interest within the FLP facilitated a smoother proactive succession

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1. Author's original hypothetical.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Christianson Hartman, *Is the Wind Mine to Give Away? Guidance for Testators Wishing to Transfer a Wind Interest*, 1 TEX. TECH EST. PLAN. COM. PROP. L.J. 399, 403 (2009).
7. *Id.*
8. *Id.*
9. *Id.*
10. *See* James J. Ferraro, *Keeping Property in the Family with LLC and Partnerships*, KIPLINGER PERS. FIN., https://www.kiplinger.com/retirement/estate-planning/604612/keeping-property-in-the-family-with-llcs-and-partnerships (last updated Nov. 02, 2022) [http://perma.cc/4URK-AUJZ].
11. *Id.*
12. *Id.*
13. *See* Church v. United States, No.SA-97-CA-0074-OG, 2000 U.S. Dist. LEXIS 714, at *805 (W.D. Tex. Jan. 18, 2000).

plan due to the likelihood that laws regarding renewable energy will change during or after the fifty-year lease ends.[14] Third, the Callers wanted to create a legacy that would not just benefit the current generation but also future generations.[15] The Callers recognized the FLP's flexibility to continue to provide for future generations and help keep the generational ranch in the family by allowing their children to resign or add future renewable leases.[16] Lastly, the key reason the Callers chose an FLP was to ensure equal division of income of the renewable energy lease to their three children in a way that courts would uphold.[17]

Renewable energy largely goes unregulated and lacks precedent in most areas of the law.[18] Large scale commercial renewable energy projects are new, with the first commercial energy wind and solar farms being built in the 1980s.[19] Important areas that lack precedent, in Texas, are absence of court decisions regarding the admissibility of severance and conveyances of the lease interest.[20]

As a result of this lack of precedent, it is difficult to plan for an estate because the renewable lease is attached to the real property.[21] This causes divestment concerns when, like the Caller family, issues arise due to the intricate nature of separating the ownership interests of these assets where lease owners have multiple children.[22] Traditional methods of estate planning may lead to disputes and unequal distribution of assets.[23] Some attorneys have recommended severance as a way to plan for an estate with renewable energy, but absent court decision on admissibility, this may lead to disputes and potential legal ambiguities.[24]

With these leases lasting between thirty-five to fifty years, the need to create an estate plan with a renewable energy lease in mind is becoming increasingly more important.[25] When considering the changing legal

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14. *See* Rachel Givens, Comment, *Pecos Bill's Turbines in the Tumbleweeds: Extending the Texas Property Code to Permit Severance of Wind Rights Through Testate and Intestate Succession*, 14 TEX. TECH. EST. PLAN. COM. PROP. L.J. 579, 581 (2022).

15. Ferraro, *supra* note 10.

16. *Id.*

17. *Id.*

18. *History of U.S. Wind Energy*, DEP'T. OF ENERGY, https://www.energy.gov/eere/wind/history-us-wind-energy (last visited Nov. 22, 2024) [http://perma.cc/2K6Y-2YF7].

19. *Id.*

20. Givens, *supra* note 14, at 581.

21. Jordan Veurink, *Benefits Blown Away: Farmers and Ranchers, Wind Energy Leases, and The Estates Tax*, 1 TEX. A & M J. PROP. L. 171, 173 (2012).

22. *Id.*

23. *See Assigning Property Right Through Wind and Solar Easements*, TEX. PUB. POL'Y FOUND. (Feb. 7, 2019), https://www.texaspolicy.com/press/assigning-property-rights-through-wind-and-solar-easements [https://perma.cc/M2WM-58KK].

24. Lisa Chavarria, *The Severance of Wind Rights in Texas*, STAHL, BERNAL, & DAVIES, LLP 1, 5, https://sbaustinlaw.com/library-papers/Chavarria-Severance_of_Wind_Rights%20%28Final%29.pdf (last visited Nov. 17, 2024) [https://perma.cc/G2SW-ASP4].

25. *Id.*; *See* Ernest E. Smith, Jacob R. Lederle, & W. Jared Berg, *Everything Under the Sun: A Guide to Siting Solar in the Lone Star State*, 12 TEX. J. OIL GAS & ENERGY L. 41, 51 (2017) (explaining the

landscape of renewable energy rights, renewable energy lease owners need a plan that allows them to preserve their ranches' legacy, continue to promote clean energy, and protect them from future liability.[26]

This Comment proposes that practitioners should encourage the use of FLPs for undivided interests in renewable energy leases.[27] An FLP is an effective tool that will facilitate proper divestment and ensure equitable distribution, ultimately contributing to long-term sustainability of clean energy.[28] Further, this Comment is the first to argue that renewable lease owners should use an FLP for a renewable lease, opposed to the traditional method of severing the rights or conveying a divided interest in a lease.[29]

This Comment establishes a clear framework on how to handle renewable leases upon the client's death through the use of an FLP.[30] Part I provides an overview of the common concerns lease owners face when planning for their estates with a renewable energy lease.[31] Part II provides background of renewable energy to demonstrate the relevance of this Comment by outlining the growth of renewable energy through incentives, explaining the lease as it relates to the issues that arise with succession planning, and the current legal landscape conveying interests in wind and solar leases.[32] Part III outlines the structure and abilities of an FLP.[33]

Further, Part IV proposes an FLP for succession planning of renewable energy leases as opposed to severance or conveyance of undivided interests in the wind or solar rights.[34] Section IV.A explains the need for the use of an FLP to offer owners stability and a tool for planning their estates.[35] Section IV.B discusses how the structure of an FLP allows lease owners to create and preserve a lasting legacy by ensuring proper divestment of renewable lease income for current and future leases.[36] Section IV.C proposes that an FLP protects lease owners from liability from changes in the admissibility of severance or conveyance of a divided interest, limiting disputes between beneficiaries and neighbors, and limiting possible conflicts with mineral developers.[37] Section IV.D explains how keeping the surface property undivided promotes the renewable energy rights in a FLP by ensuring the

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incentives Texas offers for renewable energy projects).

26. Author's original thought.
27. *See* discussion *infra* Parts II–IV.
28. *See* discussion *infra* Part IV.
29. *See* discussion *infra* Part IV.
30. *See* discussion *infra* Parts II–IV.
31. *See* discussion *supra* Part I.
32. *See* discussion *infra* Sections II.A–D.
33. *See* discussion *infra* Part III.
34. *See* discussion *infra* Part IV.
35. *See* discussion *infra* Section IV.A.
36. *See* discussion *infra* Section IV.B.
37. *See* discussion *infra* Section IV.C.

family can re-sign or add a lease with ease.[38] Lastly, Section IV.E outlines additional benefits of an FLP related income tax exemption and estate taxes.[39]

II. THE RENEWABLE ENERGY FARM

Renewable energy has become a viable energy source.[40] Renewable energy sources include wind, solar, geothermal, biomass, hydro, and lithium battery energy.[41] Texas is one of the leading states in renewable development due to the amount of land available and the lack of regulations governing these projects.[42] The United States has seen a rapid growth of renewable energy development with wind and solar farms being the most prevalent.[43] In 1990, wind energy generated only .02% of the United States's energy generating capacity, by 2020 this amount grew exponentially to 11%.[44]

A. Growth of the Renewable Energy Farm

A turbine, commonly known as a windmill, has been used for centuries to move grain mills or pump water out of the ground.[45] In 1980, New Hampshire built the first wind farm that generated electricity.[46] A wind farm, sometimes called a wind park, is an area of several hundred acres consisting of groups of individual turbines that harness the kinetic energy of the wind to generate electricity.[47] In Texas, the average size of a wind farm is thirty thousand acres.[48] Each commercial-scale wind and solar facility can produce

38. *See* discussion *infra* Section IV.D.

39. *See* discussion *infra* Section IV.E.

40. *Solar and wind lead growth of U.S. power generation for the next two years*, U.S. ENERGY INFO. ADMIN. (Jan. 16, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61242 [https://perma.cc/VU8M-NH3G].

41. Cameron K. Rivers, *Change in the Wind: Severance of the Wind Estate in Texas*, 14 TEX. J. OIL GAS & ENERGY L. 91, 92 (2019).

42. *Id.*

43. Rodrick E. Wetsel & Becky H. Diffen, 1 WIND & SOLAR L. § 1.01 (2024).

44. *See Solar and wind lead growth of U.S. power generation for the next two years*, *supra* note 40; Clayton T. Baumann & Christopher T. Rigo, *Wind Farm Valuation Update: A Deeper Dive into Income Approach for Ad Valorem Taxation*, THE MTS J. 39, 40 (Jan. 12, 2022), https://evcvaluation.com/wp-content/uploads/2022/01/Wind-Farm-Valuation-Update_MTS-Journal.pdf [https://perma.cc/K43E-S449].

45. *Wind Facts*, TEX. LANDOWNERS COAL., https://www.txlc.org/wind-facts (last visited Oct. 24, 2023) [https://perma.cc/8M8N-N7TK].

46. *History of U.S. Wind Energy*, *supra* note 18.

47. *See Everything about wind farms, How do we harness wind energy?*, REPSOL GLOB., https://www.repsol.com/en/energy-and-the-future/future-of-the-world/wind-farms/index.cshtml (last visited Sept. 15, 2023) [https://perma.cc/3LMP-LGTE].

48. *Wind Facts*, *supra* note 45; Jamie Smith, *What is a solar farm? Costs, Pros and Cons*, SOLAR REV., https://www.solarreviews.com/blog/what-is-a-solar-farm-do-i-need-one (last visited Sept. 27, 2024) [https://perma.cc/GCQ7-VFQ6].

enough energy to power between roughly two hundred and three hundred homes.[49]

Following the first wind farm, the first solar farm was built in California in 1983.[50] While most people are familiar with residential solar panels, a solar farm is a large quantity of solar panels on the ground or in the water that harness the sun's energy to produce electricity.[51] The average solar farm in Texas is forty acres in size but could cover up to thirteen thousand acres.[52]

In the United States, Texas is the number one producer and fastest growing state for renewable energy.[53] Texas farmers and ranchers are hailing renewable energy as the "new cash crop[s]" because renewable energy offers far superior return than traditional farming such as corn or soybeans.[54] For example, in Texas, a six to eight acre solar farm will yield about $40,000 a year compared to eight acres of corn which only yields about $5,700 per year.[55]

Renewable energy has also grown in the eyes of the public, as many have turned to renewable energy as a clean source of energy.[56] President Biden has also influenced this proposition with the announcement of his goal of reducing carbon electricity by one hundred percent by 2035.[57] This goal would require an increase of wind and solar energy by 60% and an increase of other renewable sources by 18%.[58] Further, powerful lobbying by environmental groups at the federal and state levels has led to legislation that greatly incentivizes companies to invest in renewable energy.[59]

On the federal level, the Inflation Reduction Act (IRA), proposed and signed by President Biden, kick-started the growth of wind and solar energy through a tax incentive for large-scale commercial wind and solar projects.[60] The IRA provides a production tax credit of three dollars for every megawatt

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49. *Id.*

50. *Oldest Solar Farm in the U.S.*, LANDGATE (Aug. 29), https://www.landgate.com/news/the-oldest-solar-farm-in-the-us [https://perma.cc/CKP8-NXMB].

51. *See* Jacob Marsh, *Solar Farms: What are they and how much do they cost?*, ENERGY SAGE, https://www.energysage.com/community-solar/solar-farms-start-one/ (last updated Apr. 10, 2023) [https://perma.cc/SGN3-A88V].

52. Smith, *supra* note 48.

53. Rivers, *supra* note 41, at 92.

54. Kevin Brehm, *Wind & Solar: The New Cash Crops*, CLEAN TECHINCA (Oct. 29, 2020), https://cleantechnical.com/2020/10/29/wind-solar-the-new-cash-crops/ [https://perma.cc/79UK-7UXM].

55. Marsh, *supra* note 51; *2023 State Agricultural Overview, Texas*, U.S. DEP'T OF AGRIC., https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=Texas (last visited Nov. 4, 2023) [https://perma.cc/V7R7-2M4W].

56. Veurink, *supra* note 21, at 173.

57. *How Much Land Would it Require to Get Most of Our Electricity from Wind and Solar?*, CLEAN TECHNICA (Feb. 24, 2023), https://cleantechnica.com/2023/02/24/how-much-land-would-it-require-to-get-most-of-our-electricity-from-wind-solar/ [https://perma.cc/DR8N-B2B6].

58. *Id.*

59. *Id.*

60. Eduardo Garcia, *U.S. tax credits set to spur bigger wind farms, new siting strategies*, REUTERS (Oct. 20, 2022, 8:32 AM), https://www.reuters.com/business/energy/us-tax-credits-set-spur-bigger-wind-farms-new-siting-strategies-2022-10-20/ [https://perma.cc/6U4M-BQNX].

produced and an investment credit of six percent, which has improved competition for wind and solar projects.[61] Therefore, more development companies are moving into Texas.[62] Considering the average cost to develop a commercial wind farm falls between three and four million dollars, this incentive tax credit is extremely beneficial to developers.[63]

Even at a state level, the Texas legislature and local governments have created incentives to spur development of renewable energy farms.[64] Many local counties allow tax abatement agreements with renewable energy developers, meaning farms in these counties do not have to pay property taxes on the renewable farms' real property value increase.[65] This spurs development because local property taxes are one of the largest annual expenses for wind and solar farms.[66] Texas also provides incentive programs to build renewable energy projects.[67] Texas has a renewable portfolio standard (RPS) that features a renewable energy credit system.[68]

These incentives have made renewable energy an important source of energy and a viable income for landowners in Texas.[69] Therefore, the legal landscape surrounding renewable energy growth should be just as important.[70]

B. A Renewable Energy Lease

To lower the cost of these multimillion dollar energy projects, developers lease land from landowners instead of buying the land to build these farms.[71] The developer becomes the lessee and the landowner becomes the lessor of the real property where the renewable project is built.[72] As a result, a wind or solar lease is appurtenant to the landowner's real property, meaning that the landowner's interest in the renewable energy lease is not independent from the real property.[73]

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61. *Id.*
62. *Id.*
63. Rivers, *supra* note 41, at 101.
64. Rodrick E. Wetsel & Becky H. Diffen, 1 WIND & SOLAR L. § 6.05(1) (2024).
65. *Id.*
66. *Id.*
67. Smith et al., *supra* note 25, at 51.
68. TEX. TAX CODE ANN. § 11.27(a).
69. Brehm, *supra* note 54.
70. *See* discussion *infra* Part IV.
71. *5 Reasons a Landowner Should Lease Land to a Solar Farm*, PIVOT ENERGY (Sept. 16, 2019), https://www.pivotenergy.net/blog/lease-land-for-solar-farm [https://perma.cc/42M6-XHHL].
72. Matthew Wilde, *Farm With the Wind: Wind Energy - Farm With the Wind*, DTN – FARMER CROPS ED. (Mar. 3, 2021), https://www.dtnpf.com/agriculture/web/ag/news/article/2021/04/01/wind-energy-farm-wind [https://perma.cc/4P2H-5K9S].
73. *Id.*

1. The Wind Lease

Wind leases have two terms: the option or assessment period, which usually lasts about two to seven years, and the production period, which normally lasts between thirty-five and fifty years.[74] During the option period, the developer determines the feasibility of building a wind farm on the lessor's land.[75] If building the wind farm is feasible, the developer is required to pay a lump sum or an annual minimum payment to the landowner prior to starting the development of the farm.[76]

Once the developer builds the wind farm, the production period begins when the farm starts to produce electricity.[77] During the production period, the developer pays the landowner a percentage of the revenue from the sale of electricity produced—typically called a royalty.[78] The amount in royalty payments paid to the landowner of a wind farm varies and depends on the amount of wind turbines, the capacity of the wind, the land, and the price of electricity.[79] Generally, a landowner of a wind farm can expect to receive $2,000 to $6,000 per turbine every year.[80]

During the lease term, the developer holds a wind easement, and the landowner has a contractual interest in the royalty or profits of the farm.[81] Typically, the developer's rights under the lease include the right to construct roads, the right to access roads, and the right to reasonable use of the premises for production.[82] However, prior to executing the lease, many additional terms may be added to the lease when negotiating.[83] The landowner's rights to payments from the wind or solar farm are specific to that lease and are connected to the surface estate as a surface right.[84] No court in Texas has categorized wind or solar rights as anything independent from the surface estate.[85]

This contractual relationship terminates at the end of the lease term by voluntary termination on the part of the developer or involuntary termination

74. Judon Fambrough, *Wind Rights and Wrongs*, TIERRA GRANDE TEX. A&M REAL EST. CRT. J. 1, 1 (Apr. 2008), https://trerc.tamu.edu/wp-content/uploads/files/PDFs/Articles/1856.pdf [https://perma.cc/A4TK-3555].

75. *The Law of Wind: A Guide to Business and Legal Issues*, STOEL RIVES LLP, https://www.stoel.com/legal-insights/special-reports/the-law-of-wind/sections/wind-energy-lease-agreements (last visited Nov. 20, 2023) [https://perma.cc/A4TK-3555].

76. Smith et al., *supra* note 25, at 51.

77. *Id.*

78. *The Law of Wind: A Guide to Business and Legal Issues*, *supra* note 75.

79. Veurink, *supra* note 21, at 176.

80. *Id.*

81. *See* Robert Nardi, *Wind Easements and Lease Agreements*, WINDUSTRY, https://rvs.umn.edu/Uploads/EducationalMaterials/b602d53b-67d2-4b90-80f7-5c4acd777715.pdf (last visited Jan. 31, 2024) [https://perma.cc/55MD-FE7X].

82. *Id.*

83. *Id.*

84. *See* Rivers, *supra* note 41, at 92.

85. *Id.*

resulting in the developer's default.[86] Therefore, the lease will continue, even if the landowner dies, until one of the above conditions are met.[87] If a landowner dies prior to the lease's termination, the landowner could have assigned their right to the lease to their beneficiaries, or if they died intestate, it is likely that the interest in the lease would be divided equally amongst their heirs.[88] However, at the termination of the lease, the heir's rights to any profits or decisions regarding the lease, terminate as well, unless they own the real property where the renewable energy project sits.[89]

2. The Solar Lease

Solar leases are divided into three terms: the option term, the construction term, and the operations term.[90] The option term usually lasts between two to five years; during this time, the developer determines the suitability of the property of a solar facility through conducting studies.[91] After the developer determines that the project is feasible, the developer will begin to construct the solar farm; construction of the farm typically takes one to two years.[92] During the construction term, the developer normally pays higher rent than during the operations term.[93]

Once the developer finishes construction of the solar farm, the operations term begins.[94] The operations term is when the solar farm starts producing electricity; the majority of solar leases operations terms state the developer will produce electricity between thirty to forty years.[95] Once the operations term begins, the developer pays the landowner a set minimum amount per acre per year, provided in the lease, unlike wind lease payments which are based on royalties.[96] In Texas, a solar farm landowner typically gets paid $800 an acre per year, which escalates at a rate of two to three percent compounded each year.[97]

However, similar to a wind lease, a solar lease is attached to the real property in which the developer holds a lease because they pay "rent" to use the land.[98] The developer holds a solar easement, but the landowner has a

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86. Nardi, *supra* note 81.
87. *Id.*
88. Hartman, *supra* note 6, at 403.
89. *Id.*
90. Smith et al., *supra* note 25, at 51.
91. Rodrick E. Wetsel & Becky H. Diffen, 1 WIND & SOLAR L. § 3.03(1) (2023).
92. *Id.* § 3.03(2).
93. *Id.*
94. *Id.*
95. *Id.*
96. Smith et al., *supra* note 25, at 52; Rodrick E. Wetsel & Becky H. Diffen, 1 WIND & SOLAR L. § 3.04(2) (2023).
97. Rodrick E. Wetsel & Becky H. Diffen, 1 WIND & SOLAR LAW § 3.04(2) (2023).
98. *Id.*

contractual interest in the "rental" of land payments.[99] Additionally, the contractual relationship between the developer and the landowner terminates at the end of the lease term or by voluntary termination on the part of the developer, similar to a wind lease.[100] Therefore, the lease will continue, even if the landowner dies, until a condition is met.[101]

C. Current State of Succession Precedent

As renewable energy leases become more popular, issues arise due to the renewable lease being appurtenant to the surface estate and the lack of a court decision on the classification of these rights.[102] Estate planning involves preparation for how and where personal assets and wealth will be distributed after one passes away.[103] Succession planning involves preparation for the transition of a business to the next generation.[104]

Imagine two siblings each inherit a parcel of land.[105] A beautiful historic hotel sits on each of the two parcels, with about 75% of the hotel sitting on one of the parcels and the remaining 25% of the hotel on the other.[106] If a prior lease existed for the hotel when the siblings inherited it they would become separate landowners but joint landlords.[107] Every year the hotel brings in $50,000 in rent, but the siblings have to split the profits; therefore, each sibling profits $25,000 every year. [108] When the hotel lease ends, each sibling has a different idea about what to do with the hotel, one wants to sell his parcel of the land, and the other wants to re-lease the hotel to continue receiving profits.[109] To no surprise, this causes a dispute between the two siblings.[110] If the siblings cannot come to an equitable solution, they will have to petition the court for a judgement.[111] Similar to the hotel lease, renewable energy leases may cause this same type of issue when multiple siblings or heirs inherit them.[112]

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99. Nardi, *supra* note 81.
100. *Id.*
101. *Id.*
102. *See* discussion *infra* Section II.C.
103. *Succession and Estate Planning: Differences and Commonalities*, PROVIDENT CPAS PLC (Sept. 15, 2021), https://providentcpas.com/succession-planning-vs-estate-planning/ [https://perma.cc/PQ8X-BJPE].
104. *Id.*
105. *See* Paul Goeringer, *Help, I Just Inherited the Family Farm With My Siblings. Now What?*, DEP'T OF AGRIC. & RES. ECON. (July 2, 2020), https://www.agrisk.umd.edu/post/help-i-just-inherited-the-family-farm-with-my-siblings-now-what [https://perma.cc/U68U-BF3F].
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. Hartman, *supra* note 6, at 403.

The growth of renewable energy in Texas, as a result of state and federal incentives, has created legal concerns for property divisions with renewable energy farm leases.[113] Many farmers and ranchers do not realize that executing the lease may cause these divestment implications.[114] Renewable energy leases are leases in a surface estate—similar to the hotel.[115] Therefore, the landowner has full autonomy to the profits of any current and future renewable lease.[116] Currently, Texas has no regulations regarding the divestment ability of interests in future leases; therefore, many farm owners are seeking assistance from attorneys to help aid in these issues.[117]

1. Division of Lease Interests

A concern arises when dividing interests in Blackacre that have renewable energy leases because no court in Texas has ruled on the type of right a person has in wind or solar energy.[118] Renewable energy leases are unique because they last between thirty-five and fifty years, but unlike water or mineral rights, wind and solar energy is always renewable.[119] Therefore, these leases could keep renewing for generations, and additional leases could be added to the land.[120] Many renewable farms have the ability to be "repowered," meaning once a lease ends, the developer could offer the lessor the ability to re-sign another renewable lease that lasts another thirty-five to fifty years.[121] This increases the likelihood of a lessor (landowner) dying during the production term of a wind lease or the operations terms of a solar lease.[122]

When the owner of a renewable energy lease dies and the land is divided among multiple children or heirs, the specifics of how the lease is handled can depend on the terms of the lease agreement.[123] Whoever inherits the land tied to the renewable energy lease will become the new owner of that lease.[124] If the land is divided into separate parcels, the person who inherits that specific parcel would likely become the lease owner, but in the current

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113. Veurink, *supra* note 21, at 173.

114. *Id.*

115. *See* Goeringer, *supra* note 105.

116. Hartman, *supra* note 6, at 403.

117. Clayton T. Baumann & Christopher T. Rigo, *Wind Farm Valuation Update: A Deeper Dive into the Income Approach for Ad Valorem Taxation*, THE MTS J. 39, 39 (Jan. 12, 2022), https://evcvaluation.com/valuation-of-wind-farms-update/ [https://perma.cc/J2U2-SNYW].

118. Hartman, *supra* note 6, at 404 (showing that Blackacre refers to a fictional piece of land).

119. *Id.*

120. Rivers, *supra* note 41, at 93.

121. *Wind Repowering Helps Set the Stage for Energy Transition, Wind Energy Technologies Office*, U.S. DEP'T OF ENERGY (June 2, 2021), https://www.energy.gov/eere/wind/articles/wind-repowering-helps-set-stage-energy-transition [https://perma.cc/H296-GHND].

122. *Id.*

123. Hartman, *supra* note 6, at 403.

124. *Id.*

renewable lease, the original owner may have included a stipulation that divided the renewable energy lease shares between all heirs or beneficiaries of the estate.[125]

When there are multiple heirs, whoever owns the land has full autonomy regarding renewable energy projects, including the sole right to re-sign a lease and keep all profits from the wind or solar farms without consulting with the other interest holders.[126] Therefore, if the new landowner executes a wind or solar lease after the original lease ends or adds another lease to Blackacre after divestment, no other heir or interest holder in the current lease has any right to the income from future leases.[127] Here, the original lease would not govern the share divisions because there is a new lease.[128]

When a testator is trying to make an equitable division of renewable energy projects, it is likely difficult.[129] Many times, testators transfer a parcel of land to their beneficiary with wind turbines or with the potential to have wind or solar energy.[130] However, when a testator attempts to make an equitable division to beneficiaries, it is likely that the parcels of equal size are not of equal value because the parcels with more wind turbines or solar panels are more valuable than the parcels without them.[131] This may cause disputes among beneficiaries because when the original lease ends, any future leases would not be of equal value due to the unequal number of wind turbines or solar panels.[132]

To ensure equal division of profits of current and future wind or solar leases, attorneys should recommend the use of an FLP.[133] Attorneys in Texas currently encourage owners to either use an entity for the surface estate or sever the wind and solar rights from the surface.[134] However, no court in Texas has ruled on the admissibility of severance of renewable rights or a lease interest conveyance.[135]

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125. *Id.*
126. *See* Veurink, *supra* note 21, at 173.
127. *See* Hartman, *supra* note 6, at 403.
128. *Id.*
129. *Id.*; Givens, *supra* note 14, at 581 (explaining that testator refers to someone who dies leaving a valid will).
130. Hartman, *supra* note 6, at 403.
131. *Id.*
132. *Id.*
133. *See* discussion *infra* Parts III–IV.
134. *History of U.S. Wind Energy*, *supra* note 18; Hartman, *supra* note 6, at 404.
135. Glenn Hegar, *Solar and Wind-Powered Energy Device Exemption and Appraisal Guidelines*, TEX. COMPTROLLER OF PUB. ACCTS. 1, 2 (May 2022), https://www.scribd.com/document/663250854/96-1569 [https://perma.cc/NZ6Z-98Z4].

2. Severance of Renewable Energy Rights

Severance has become a common strategy recommended by practitioners to deal with conveyance or these divestment issues.[136] Severance occurs when a property owner separates some or all of the rights or income stream from ownership of the underlying land.[137] With regard to renewable energy, severance refers to conveying a specific right to use and profit off of the surface from wind or solar energy.[138] This separates the wind or solar from the surface estate, consisting of the real property, making the wind or solar an individual right.[139] Practitioners and courts have a long history of severing mineral and water rights.[140]

These rights include the reservation of rights, royalty payments, development payments, development options, rent, and signing bonuses.[141] However, while both severance and leases grant certain property rights, severance is a permanent right and a lease is merely a temporary transfer of that property right.[142] By severing the wind or solar estate, the owner can sell or transfer the surface estate while retaining the right to develop a wind or solar farm later without worrying about the lease ending.[143]

However, Texas courts have not determined whether severance of wind or solar rights will be upheld.[144] California is the only state that has allowed severance of wind rights in some instances.[145] In *Contra Costa Water District v. Vaquero Farms*, the water district sought to sever the wind rights from the surface and condemn only the land but not the wind lease.[146] The landowner, who had 260 wind turbines installed with a thirty year wind lease, argued that wind rights could not be severed and demanded the water district pay for the entire value of the land.[147] The court held that wind rights can be severed "[w]hen a public entity acquires property through eminent domain . . . ."[148]

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136. *Id.*

137. Paul Dvorak, *Welcome to the Law of the Wind: A Guide to Business and Legal Issues*, WINDPOWER ENG'G & DEV. (Feb. 13, 2018), https://www.windpowerengineering.com/welcome-law-wind-guide-business-legal-issues/ [https://perma.cc/E3H5-C842].

138. *Id.*

139. Rivers, *supra* note 41, at 92.

140. *See* Griffin v. Reilly, 275 S.W. 242, 244 (Tex. App.—Amarillo 1925, no writ.).

141. Givens, *supra* note 14, at 581.

142. *See Reilly*, 275 S.W. at 244.

143. *Id.*

144. *See* Rivers, *supra* note 41, at 92; *see also* Jeffrey A. Chester & Craig Duewall, *The Severability of Wind Rights from a Surface Estate*, GT ALERT (July 11, 2023), https://www.gtlaw.com/en/insights/2023/7/the-severability-of-wind-rights-from-a-surface-estate (discussing a case out of Hale County, Texas, Ridge Renewables v. Southwestern Public Service Company, that is current on appeal regarding the admissibility of severance) [https://perma.cc/JBT5-5BFA].

145. Contra Costa Water Dist. v. Vaquero Farms, Inc., 58 Cal. App. 4th 883, 885 (1997).

146. *Id.*

147. *Id.* at 886.

148. *Id.* at 890.

This was an extremely narrow application in California condemnation cases involving "substantial rights."[149]

Many other states—including: South Dakota, Kansas, Nebraska, Montana, Wyoming, and New Mexico—have banned severance of wind and solar rights from the surface estate.[150] These states have held that wind and solar energy are regarded as interests in real property and appurtenant to the surface estate.[151] States have primarily banned severance of wind and solar rights to avoid litigation between parties with a greater presence of wind developers, surface owners, or wind estate holders as interested parties, or to avoid conflicts between the mineral and renewable estate.[152] Another common concern of the severance of wind and solar rights is the wealth distribution disparities among owners of the land and those who own the rights.[153]

Absent a clear court ruling on the validity of severance, a legal gray area is created.[154] Further, when landowners sever the wind or solar estate, potential litigation can burden the courts when trying to resolve the collateral issues.[155] Kansas, for example, explains that the restriction of renewable right severance aims to "protect the health, safety, economic viability, and property rights of rural Kansans."[156]

3. Entity Approach to Renewable Energy Leases

This legal divulgence can be avoided by using an entity approach to estate planning for renewable energy leases.[157] A business entity is an organization created by one or more individuals that carries out the functions of a business.[158] There are many forms of business entities, including: FLPs, limited liability companies (LLCs), trusts, and sole entrepreneurs.[159] The goal

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149. *Id.*

150. NEB. REV. STAT. § 76-3004 (2012); MONT. CODE ANN. § 70-17-404 (2017); COL. REV. STAT. ANN. § 38-30.7-103 (2015); KAN. STAT. ANN. § 58-2272 (2011); S.D. CODIFIED L. § 43- 1319 (2017); OKLA. STAT. tit. 60, § 820.1 (2012); WYO. STAT. ANN. § 34-27-103 (2011); MONT. CODE ANN. § 70-17-404 (2017).

151. WYO. STAT. ANN. § 34-27-103(a) (2011).

152. Michaell J. Stephan, Note, *Wind Severance*, 40 TEX. ENV'T L.J. 73, 81 (2009).

153. *See* Givens, *supra* note 14, at 591.

154. Stephan, *supra* note 152, at 88.

155. *See* Ferraro, *supra* note 10.

156. Mike Thompson, *Senator Says the Wind Industry is Running Amok in Kansas. He Believes His Bill Will Protect Rural Residents*, TOPEKA CAP. J. (Apr. 2, 2021), https://www.cjonline.com/story/opinion/2021/04/02/author-bill-restrict-wind-energy-kansas-defends-legislation/4851901001/ [https://perma.cc/2QL6-9SCV].

157. *See* Sean M. Moran & Lauren A. Chase, *Renewable Structures: Choices and Challenges*, WILSON SONSINI GOODRISH & ROSATI PRO. CORP. 1, 2, https://www.wsgr.com/a/web/305/choices-and-challenges-0415.pdf (last visited Dec. 7, 2023) [https://perma.cc/H5ER-WJGT].

158. *Entity*, CFI, https://corporatefinanceinstitute.com/resources/management/entity/ (last visited Nov. 26, 2023) [https://perma.cc/3BZ2-D6B9].

159. *Business succession planning Cultivating enduring value*, DELOITTE 1,14, https://www2.deloitt

of succession planning is to understand the value of a business, to preserve its value and future growth potential, and to pass it forward intact.[160] Using an entity for renewable energy leases treats the renewable farm as a business instead of a right; this provides liability protection and allows owners managerial control of the business during their lifetime and after.[161]

Attorneys should recommend the use of an FLP in lieu of severance when creating a renewable energy business.[162] An FLP is a holding or parent company for family assets, such as real property, oil and gas interests, or lease interests.[163] A holding company is a company that owns the majority shares of a private or public business.[164] As a holding company, one unique feature is that an FLP may hold other entities as well as assets, which allows for greater protection, control, and flexibility than other forms of entities.[165]

Upon formation of an FLP, family members transfer property or a business in exchange for an ownership interest in the capital and profits of an FLP.[166] An FLP has no operational control over the business but has the authority to change the managerial roles.[167] Another unique ability of an FLP is that its structure allows partners to add assets at any time after formation, which are specifically beneficial to a renewable energy lease.[168] For example, a partner could add a solar lease to a parcel of land in the FLP that already contains a wind lease, enhancing that parcel of land's value and increasing profits.[169]

In addition to an FLP, there are alternative forms of entities within which a renewable energy business may operate.[170] Each form of entity has characteristics that may be either advantageous or disadvantageous to a

e.com/content/dam/Deloitte/us/Documents/deloitte-private/us-dges-business-succession-planning-collection.pdf (last visited Nov. 26, 2023) [https://perma.cc/TED6-7Y7W].

160. *Id.*

161. *Id.*

162. Austin Jarvis, *Family Limited Partnerships*, SCHWAB CTR. FOR FIN. RSCH., https://www.schwab.com/resource/family-limited-partnerships (last visited Oct. 9, 2024) [https://perma.cc/A782-SRUG].

163. *Id.*

164. Amy Fontinelle, *Holding Company: What it is, Advantages and Disadvantages*, INVESTOPEDIA (July 29, 2024), https://www.investopedia.com/terms/h/holdingcompany.asp [https://perma.cc/HV5L-5FZU].

165. *Id.*

166. Andrew Davis, *What Is A Family Limited Partnership And How Does It Work?,* FIRST CLASS COUNS. (Sept. 27, 2021), https://firstclasscounsel.com/blog/What-Is-A-Family-Limited-Partnership-And-How-Does-It-Work [https://perma.cc/KXF4-N242].

167. *Id.*

168. *Id.*

169. See Tanya E. Feinleib, *Estate Planning for Ranch Owners*, 15 TEX. TECH EST. PLAN. COM. PROP. L.J. 1,16 (2023).

170. Will Kenton, *Family Limited Partnership (FLP): Definition, Pros & Cons*, INVESTOPEDIA, https://www.investopedia.com/terms/f/familylimitedpartnership.asp (last updated May 17, 2024) [https://perma.cc/VDH5-37MJ].

client.[171] When choosing an entity, each characteristic must be analyzed to determine which form of entity best suits the needs of the client.[172]

For example, while an FLP might mirror some characteristics of a trust or LLC, there are important differences.[173] Most importantly, a trust is a vehicle set up to hold property for the benefit of the trust's beneficiaries, whereas an FLP is a business in which family members profit according to their proportion of their partnership shares.[174] Although an FLP and LLC both constitute as businesses, an LLC does not provide the same estate planning potential as an FLP.[175] One main estate planning benefit that an FLP has that an LLC does not, is an FLP takes advantage of the Internal Revenue Service (IRS) annual gift tax exclusion.[176] Using this exclusion, a parent can place assets into an FLP and then gradually transfer the FLP interest to immediate family members over the years without running into the problem of gift taxes.[177]

III. THE FAMILY LIMITED PARTNERSHIP AS AN EFFECTIVE ESTATE PLANNING TOOL

Renewable energy lease owners should use an FLP because it will facilitate proper divestment, and it ensure equitable distribution ultimately contributing to long-term sustainability of clean energy without severance of the renewable rights.[178] FLPs have become an extremely popular estate planning tool for families with large assets or businesses.[179]

Attorneys are encouraging FLPs because of their ability to make transfers of limited partnership interests to an owner's descendants and minimize taxes for shareholders.[180] Further, FLPs have proven to be a flexible tool for farmers and ranchers in recent years that are looking to give their heirs greater control over operating decisions and afford uninvolved heirs the opportunity to participate in revenues generated.[181]

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171. *Id.*
172. *Id.*
173. Davis, *supra* note 166.
174. *Id.*
175. *Id.*
176. *Id.* (noting that an FLP is not an income tax paying entity, owners can transfer ownership into the FLP without annual tax liability).
177. *Id.*
178. *See* discussion *infra* Part IV.
179. Kenneth L. Wenzel, Stephanie M. Bourland & P. Michelle Eaton, *Family Limited Partnerships*, ALI-ABA COURSE OF STUD. MATERIALS (July 2003).
180. *Id.*
181. Shannon L. Ferrel et al., *AALA Symposium Presenters: The Future of Agricultural Law: A Generational Shift*, 18 DRAKE J. ARGIC. L. 107, 132 (2013); *see* Feinleib, *supra* note 169, at 11.

A. The Structure of an FLP

The structure of an FLP allows flexible succession planning for income-producing capital assets.[182] An FLP consists of family members, usually grandparents, children, or grandchildren, who can hold a current or future interest in the partnership.[183] Current interests consist of divided interests in the partnership that a family member gets immediately; future interests consist of partnership interests that someone will receive at the time of the owner's death.[184]

Ownership of an FLP is divided into two groups: general partners and limited partners.[185] General partners, usually the original owner of the asset, own the largest share of the FLP and are typically responsible for the management of the assets.[186] As a holding company, an FLP's general partner may also be an entity, either a corporation or LLC, owned by the parent.[187] Some FLPs use an entity as a general partner because it shields the owner from liability.[188] The limited partners, usually the children or grandchildren, are those with an economic interest in the FLP and have limited involvement in its management.[189]

The FLP is established through a written partnership or operations agreement—depending on the jurisdiction—that outlines the rights, responsibilities, and obligations of both the general and limited partners.[190] The partnership agreement specifically outlines the purpose of the partnership, allocations of profits, management structure, and any restrictions on transfers of partnership interests.[191] This structure is extremely beneficial for estate planning as the owner of the asset may govern how to manage it, which ensures proper division while keeping the business in the family.[192] For example, the agreement can limit interest to family members only by including a provision that restricts the transfer of an FLP interest, unless other

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182. *See* Feinleib, *supra* note 169, at 15.

183. Kenton, *supra* note 170 (describing that a future interest is the right to possess something in the future).

184. *Id.*

185. *Id.*

186. Travis L. Brown & Rick D. Bailey, *Limited Partnerships: Use in Tax, Estate, and Business Planning*, 32 IDAHO L. REV. 305, 309 (1996).

187. Lisa Featherngill & Melissa Linn, *The pros and cons of creating a Family Limited Partnership or Family Liability Company*, COMERICA (Nov. 6, 2023), https://www.comerica.com/insights/personal-finance/Pros_and_Cons_Family_Limited_Partnership_or_Family_Limited_Liability_Company.html [https://perma.cc/69LW-RTUS].

188. *Id.*

189. Brown & Bailey, *supra* note 186, at 309.

190. *Id.* at 312–13.

191. Will Kenton, *Family Limited Partnership: Definition, Pros & Cons*, INVESTOPEDIA (May 7, 2024), https://www.investopedia.com/terms/f/familylimitedpartnership.asp [https://perma.cc/63JC-KXRQ].

192. Davis, *supra* note 166.

partners are given the right to purchase the interest.[193] The agreement may be tailored to meet the family's needs and goals.[194]

Further, for an FLP to serve its purpose of protecting and benefiting the owner of a renewable energy lease, practitioners must ensure they follow all regulations necessary, which increases the cost of setting up an FLP.[195] Forming an FLP is a complex undertaking due to its multifaceted nature and the diverse considerations involved.[196] First, the legal formation of an FLP requires meticulous drafting of documents like a partnership agreement and a certificate of limited partnership.[197] One must consider the gift and estate tax implications, valuation discounts, and the decision regarding transferring limited partnership interests and potential conflicts.[198] Additionally, each state regulations differ, so tailoring an FLP to each family's needs and state requirements is necessary to ensure compliance and effectiveness.[199]

Although the cost of setting up an FLP typically ranges from $8,000 to $15,000, it may be higher depending on the complexity of the partnership.[200] The benefits of an FLP far exceed the time and cost necessary to set it up.[201] Considering the average cost of an FLP is $11,500 and the average solar farm earns $40,000 a year, this one-time set-up fee is miniscule.[202]

B. Divestment of FLP Shares

An FLP allows an owner to leave a lasting legacy for generations; as a separate entity, an FLP remains intact, continuing to operate when the owner dies.[203] An FLP continues to operate because, when the owner dies, the owner's percentage interest share in the FLP divests.[204] Following the owner's death, heirs will receive a divided interest in the FLP without dividing the interest in the underlying asset.[205] The inheritance of FLP shares can be influenced by both the partnership agreement and the owner's will.[206]

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193. *Id.*

194. *Id.*

195. Kenton, *supra* note 170.

196. *Family Limited Partnerships 101*, WOLTERS KLUWER (Nov. 28, 2020), https://www.wolterskluwer.com/en/expert-insights/family-limited-partnerships-101 [https://perma.cc/U6H3-XR4M].

197. *Id.*

198. *Id.*

199. *Benefits and Drawbacks of Family Limited Partnerships*, TEX. TR. L. (Jan. 3, 2023, 8:40 AM), https://www.texastrustlaw.com/benefits-and-drawbacks-of-family-limited-partnerships/ [https://perma.cc/9YKQ-BHQ7].

200. *Id.*

201. *See* Dillon Clayton, *How Much Money Does a Wind Turbine Make?*, ENERGY FOLLOWER, https://energyfollower.com/how-much-money-does-a-wind-turbine-make/ (last updated July 21, 2021) [https://perma.cc/DK9Z-UYVN].

202. *Id.*

203. Ferraro, *supra* note 10.

204. *Id.*

205. *Id.*

206. *See Family Limited Partnerships & Legal Implications for Estate Planning*, JUSTIA (Oct. 2023),

An FLP allows owners to evenly distribute the estate among all children.[207] If the owner of the FLP shares dies testate, meaning with a valid will, it is likely that the percent share in the FLP will be separated into smaller shares and given to their beneficiaries.[208] If the owner of the FLP shares dies intestate, meaning without a valid will, the shares become part of the deceased's estate and are distributed according to the relevant Texas estate law.[209] Typically in Texas, if the deceased leaves living children, the shares will be divided equally amongst the living children.[210] However, if the owner leaves a living spouse, then all the FLP share interests will likely go to the living spouse.[211]

When shares of an FLP divests to the owner's children or heirs, the underlying asset interests is not divided allowing equitable division.[212] In scenarios where the primary asset of the business is real estate, "it can be given to the children in fractional shares rather than as undivided interests or individual parcels."[213] By using an FLP, "there is no need to divide the assets to make" an equal gift.[214] The parent only needs to gift a percentage of an FLP.[215] Therefore, even if children or heirs do not want to participate in the family business, an FLP will continue to operate, allowing those heirs or beneficiaries to still derive economic benefit from the income distributions.[216] This also becomes helpful when real estate with a renewable lease on it "is an asset of a business which is located in a state other than the state the parents reside".[217] Because the real estate will be owned by the partnership, following multiple states' estate codes will be avoided upon the death of the parents.[218]

C. Illustrating the Use of an FLP to Preserve, Protect, and Promote

An FLP for renewable energy leases will likely be upheld in a Texas court because they have a legitimate business purpose.[219] Courts have found that an FLP for interests in mineral rights, interests in a family ranch or farm,

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https://www.justia.com/estate-planning/asset-protection/family-limited-partnerships/ [https://perma.cc/93SD-KKWX].

207. *See id.*
208. *See* Ferraro, *supra* note 10.
209. TEX. EST. CODE ANN. § 201.001(a)–(b).
210. *Id.*
211. *See* Ferraro, *supra* note 10.
212. *See id.*
213. Troy Renkemeyer, *The Family Limited Partnership: An Effective Estate Planning Tool*, 64 UMKC L. REV. 587, 612 (1996).
214. *Id.*
215. *Id.*
216. Ferraro, *supra* note 10.
217. Renkemeyer, *supra* note 213.
218. *Id.*
219. Author's original thought.

and for purposes of generational wealth transfer are a valid and beneficial use of an FLP.[220]

Courts have upheld an FLP that contained working interests in oil and gas profits for the purpose of ensuring centralized management and protection from liability of the profits.[221] The Fifth Circuit Court of Appeals, in *Kimbell v. United States*, held that oil and gas production constitutes a valid business reason for forming an FLP, confirming that FLPs are a useful and valuable estate planning strategy.[222] There, the plaintiff created an FLP as a succession tool for a working oil and gas interest.[223] Specifically, in the partnership agreement it expressly stated that the purposes of the FLP were to

> [I]ncrease Family wealth; establish a method by which annual gifts can be made without fractionalizing Family Assets; continue the ownership and collective operation of Family Assets and restrict the right of non-Family members to acquire interests in Family Assets; provide protection to Family Assets from claims of future creditors against Family members; prevent transfer of a Family member's interest in the Partnership as a result of a failed marriage; provide flexibility and continuity in business planning for the Family not available through trusts, corporations or other business entities; facilitate the administration and reduce the cost associated with the disability or probate of the estate of Family members; promote the Family's knowledge of and communication about Family Assets; provide resolution of any disputes which may arise among the Family in order to preserve Family harmony and avoid the expense and problems of litigation; and consolidate fractional interests in Family Assets.[224]

The Fifth Circuit concluded that the interest in the oil and gas FLP operated as a business.[225] Therefore, transferring management of their business to their children was valid because the FLP ensured centralized management and protection from personal liability of the asset.[226] It reasoned that the division of an oil and gas interest can become complicated, and transferring undivided interests of mineral rights through an interest in an FLP created an easier means of accomplishing the plaintiff's goals.[227]

Further, courts in Texas have held that creating an FLP to "preserve the family ranching enterprise for [the landowners] and their descendants" is a

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220. *See* Kimbell v. United States, 371 F.3d 257, 260 (5th Cir. 2004); Keller v. United States, 697 F.3d 238, 248 (5th Cir. 2012).
221. *Kimbell*, 371 F.3d at 260.
222. *Id.*
223. *Id.*
224. Kimbell v. United States, 371 F.3d 257, 260 (5th Cir. 2004)
225. *Id.*
226. *Id.* at 267.
227. *Id.*

valid motivating reason to form a partnership.[228] In *Church v. United States*, a mother formed a Texas FLP for her and her children to consolidate their undivided interest in their family's ranch.[229] Prior to the formation of the partnership, each family member "owned undivided interests in the [r]anch, with each interest carrying the right to use and enjoy the property, or force a partition or possible sale."[230] The mother chose to consolidate the undivided interest in their family ranch to centralize the management to ensure its preservation, avoid forced partition or sale of the ranch, and benefit future generations' ability to engage in cattle ranching.[231] The court held that this was a genuine business purpose that constituted a valid FLP.[232]

IV. Practitioners Should Encourage Renewable Energy Farms to Create a Family Limited Partnership

Practitioners should encourage renewable energy owners to create an FLP in lieu of severance.[233] An FLP offers stability as a proven family business model and estate planning tool.[234] It allows lease owners to preserve their family legacy, continue to promote clean energy, and protect themselves from possible liability.[235] It provides lease owners and their families a clear and stable tool for current and future leases.[236] Further, an FLP is not limited to solar and wind lease owners but may also be used for other types of renewable energy, such as lithium battery farms or crypto mining farms.[237]

A. Need for the Use of an FLP for Renewable Energy Leases

Large-scale commercial renewable energy projects are fairly new.[238] As a result, renewable energy largely goes unregulated and lacks precedent in most areas of the law.[239] Gaps in the law include court decisions regarding admissibility of severance of rights or conveyance of interests in royalty or income payments, whether a landowner's real property value will increase due to the possibility of receiving future payments, whether a renewable

228. Church v. United States, No. SA-97-CA-0774-OG, 2000 U.S. Dist. LEXIS 714, at *9 (W.D. Tex. Jan. 18, 2000).
229. *Id.* at *2.
230. *Id.* at *11.
231. *Id.* at *2–9.
232. *Id.* at *9.
233. Author's original proposal.
234. *See* discussion *supra* Section II.C.
235. *See* discussion *supra* Section II.C.
236. *See* discussion *supra* Section II.C.
237. Author's original thought; *see Renewable Energy*, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, https://www.energy.gov/eere/renewable-energy (last visited Jan. 27, 2024) [https://perma.cc/VNA2-MFNJ].
238. *History of U.S. Wind Energy*, *supra* note 18.
239. *See id.*

owner can receive special valuation, and guidance for the evaluation of the value of commercial renewable energy leases.[240]

With this lack of court guidance, concerns related to renewable leases and divestment of these leases become an issue.[241] When land divests in separate parcels to heirs or beneficiaries, the person who inherits that specific parcel will become the landowner and become entitled to the income payments from the lease, unless the lease states otherwise.[242] Therefore, with the renewable lease appurtenant to the surface, when the original lease ends it no longer governs the share divisions, and the owner of Blackacre has full autonomy to re-sign or add a lease.[243]

Many of the original renewable energy leases are approaching their end, so it is important to find a forward thinking solution to prepare for these divestment concerns.[244] In addition to original leases ending, new opportunities have arisen to re-sign a lease or add a different type of renewable energy lease to one's land, further complicating succession planning.[245] These opportunities and incentives spurring the development of renewable energy farms, mixed with the lack of precedent and regulations in Texas, leave opportunities for change and expose renewable lease owners to liability.[246]

Absent a regulatory change, practitioners should encourage renewable energy lease owners to set up an FLP.[247] The FLP can hold the wind or solar lease as a business in its undivided form.[248] The practitioner should also encourage that the FLP hold the real property.[249]

The structure of an FLP allows lease owners to create and preserve a lasting legacy by ensuring proper divestment of renewable lease income for current and future leases.[250] An FLP protects lease owners from liability by shielding them from any change in the admissibility of severance or conveyance of a divided interest, limiting disputes between beneficiaries and neighbors, and limiting possible conflicts with mineral developers.[251] Further, keeping the surface property in its undivided form with the renewable energy rights in an FLP will promote renewable energy.[252] This is

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240. Givens, *supra* note 14, at 581; Chavarria, *supra* note 24, at 5; Hegar, *supra* note 135, at 2.
241. Hartman, *supra* note 6, at 403.
242. *Id.*
243. *Id.*
244. *See generally History of U.S. Wind Energy*, *supra* note 18 (discussing the history of wind energy in the United States).
245. Givens, *supra* note 14, at 581.
246. *Id.*; Chavarria, *supra* note 24, at 5; Hegar, *supra* note 135, at 2.
247. Author's original thought.
248. *See* Renkemeyer, *supra* note 213, at 611.
249. *See* discussion *supra* Part III.
250. *See* discussion *infra* Section IV.B.
251. *See* discussion *infra* Section IV.C.
252. *See* discussion *infra* Section IV.D.

accomplished when the family can easily re-sign a current renewable lease or add a lease.[253]

B. An FLP Preserves a Family Legacy

Setting up an FLP for a renewable energy lease ensures proper divestment of shares while allowing owners to build a lasting legacy.[254] Farmers and ranchers are well positioned to play a major role in commercial solar and wind expansion because they have two key components: renewable energy and enough land that can be leased to harvest the energy.[255]

Family-owned ranches and farms make up 97% of the farms and ranches in Texas, with 57% of those being owned for three generations or more.[256] With many of these families anticipating long-term ownership through multiple generations, proper divestment, preservation, and conflict resolution mechanisms should be given high priority when designing an estate plan.[257]

As real estate prices and renewable energy profits begin to rise across Texas, tensions rise between those family members who see the ranch as a source of a family legacy and those who desire the monetary value of the land.[258] An FLP offers these families the ability to continue to preserve their family legacy and also allows those members who see the land for its monetary value to still profit from the land through renewable energy.[259] This is accomplished through provisions in the partnership agreement that dictate which members have managerial control and which only benefit monetarily from the FLP.[260] This gives a renewable energy farm owner flexibility when planning for the next generation, which will protect the assets from mismanagement.[261]

1. Building a Family Legacy

A renewable energy FLP gives owners the ability to build a family legacy by creating a central profit distribution center and preserving it for

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253. *See* discussion *infra* Section IV.D.

254. *See* discussion *infra* Sections IV.B–C.

255. Robert Veldman, *Wind and Solar Offer Diversified Revenue for U.S. Farmers and Ranchers*, PINION ED. (Mar. 9, 2022), https://www.pinionglobal.com/wind-and-solar-offer-diversified-revenue-for-u-s-farmers-and-ranchers/ [https://perma.cc/QJA6-CPR3].

256. Lisa Minton & Astrid Alvarado, *Agricultural Industry Grows Texas*, TEX. COMPTROLLER OF PUB. ACCTS. (Oct. 2022), https://comptroller.texas.gov/economy/fiscal-notes/archives/2022/oct/agriculture.php [https://perma.cc/3LLQ-N3A6].

257. Feinleib, *supra* note 169, at 14.

258. *Id.*

259. *See* Renkemeyer, *supra* note 213, at 611.

260. Anthony Venette, *Family Limited Partnerships: Not Just for the Ultrawealthy*, WEALTH MGMT. (Aug. 9, 2023), https://www.wealthmanagement.com/philanthropy/family-limited-partnerships-not-just-ultrawealthy [https://perma.cc/9PDC-MRRU].

261. *Id.*

generations by acting as a vehicle for wealth distribution.[262] The FLP will distribute the profits from a renewable energy farm to each family member.[263] Even if children or heirs do not want to participate in the family business, the FLP continues to operate by building a legacy and economic benefit.[264]

A renewable energy farm offers owners the opportunity to preserve a generational farm or ranch.[265] In Texas, the most valuable land for renewable energy also tends to be agricultural land.[266] Many families who own enough land, or already have a renewable lease in place, are typically land rich because the land has been farmed or ranched in their family for generations.[267] However, because the family business of farming or ranching is extremely volatile, creating a renewable energy farm becomes more favorable.[268] Like the mother in *Church*, who used an FLP to preserve the generational ranch for her children, an FLP allows renewable lease owners to have the same opportunity while keeping the renewable rights as a surface right.[269]

An FLP will continue to provide farmers and ranchers with supplemental income and spur local economic growth.[270] Wind or solar lease payments provide a cushion against the harsh economics that farmers and ranchers face due to erratic weather, trade wars, and low commodity prices.[271] Bankruptcy of family farms reached a high in 2019, causing the income of farmers and ranchers to reach a low.[272]

Utilizing an FLP for a renewable energy lease, instead of severing the rights, allows farmers and ranchers to keep producing food for the public.[273] Renewable energy lease payments enable farmers and ranchers to pay off farm equipment and other loans that are burdening the farm.[274] Just twenty-

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262. Church v. United States, 268 F.3d 1063, 1064 (5th Cir. 2001); *see also* Veldman*, supra* note 255.

263. *Church*, 268 F.3d at 1064.

264. *See generally* Ferraro, *supra* note 10 (discussing how an FLP will continue even without all heirs participating).

265. *Church*, 268 F.3d at 1064.

266. Elizabeth Weise, *Wind Energy Gives American Farmers a New Crop to Sell in Tough Times*, USA TODAY, https://www.usatoday.com/story/news/nation/2020/02/16/wind-energy-can-help-american-farmers-earn-money-avoid-bankruptcy/4695670002/ (last updated Feb. 20, 2020, 12:08 PM) [https://perma.cc/XGX6-WCYU].

267. *Id.*

268. *Id.*

269. *Id.*

270. Brian Eckhouset, *Here's How One Family Office Bought a Wind Farm. Now You Can Too*, BLOOMBERG NEF. (July 23, 2018), https://about.bnef.com/blog/heres-one-family-office-bought-wind-farm-now-can/ [https://perma.cc/9W48-FEB5].

271. Paul Davidson, *Low Prices, Floods and Trade Wars Plague American Farmers, Putting Their Survival at Risk*, USA TODAY, https://www.usatoday.com/story/money/2019/06/06/farmers-struggle-trade-wars-floods-and-low-prices/1346442001/ (last updated June 6, 2019, 3:05 PM) [https://perma.cc/V6KP-NZQE].

272. *Id.*

273. *Id.*

274. Weise, *supra* note 266.

five turbines could bring in between $75,000 to $175,000 a year, which would allow an owner to buy a new tractor or equipment.[275] This supplemental income not only helps farmers pay off loans but also supplements the income that has been lost due to low demand and increasing supply prices of fertilizer, seed, and other materials over the last decade.[276]

Aside from a profit increase for the renewable farmer, keeping the renewable energy rights as a real property interest substantially increases the property and market value of the land.[277] This provides owners and their heirs with an asset that will continue to increase in value, further building a family legacy for generations to come.[278] Compare this to severance, which is typically utilized for its ability to exclusively retain the income from an existing wind farm or the ability to develop a wind farm in the future without owning the real property.[279]

By retaining the renewable energy rights as a real property interest, both the property and market value of the land will experience a substantial boost.[280] Land with severed wind rights has been found to have substantial diminished market value.[281] For example, in Taylor County a 1,700 acre ranch with three wind turbines on the property sold for 40% less per acre when compared to similar properties without turbines insight, because the seller had severed the wind rights.[282]

Profit retention of a renewable energy lease through an FLP incentivizes younger generations to carry on the farming tradition and give new life to a struggling industry.[283] Although, concerns may arise about the increase in property values and taxes burdening the lease owner and their heirs.[284] With the renewable energy lease as an appurtenant surface right, it requires heirs or beneficiaries to keep up with the real property and the lease, while also paying higher value property taxes.[285] However, an FLP will help lower this tax burden while also providing for the ability to continue the family tradition and build a legacy.[286]

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275. *Id.*
276. *Id.*
277. Ferraro, *supra* note 10; *see* Veurink, *supra* note 21, at 173.
278. *See generally* Ferraro, *supra* note 10 (explaining how an FLP helps with family planning when deciding to create a renewable energy farm); Deery T. Gardner, *Impact of Wind Turbines on Market Value of Texas Rural Land*, GARDNER APPRAISAL GRP. INC. 1, 23, http://docs.wind-watch.org/gardner_wind-property-values_2_13_09.pdf (last visited Oct. 12, 2023) [https://perma.cc/DX5M-73KY].
279. *See generally* Givens, *supra* note 14, at 581 (discussing the definition of severance).
280. Gardner, *supra* note 278.
281. *Id.*
282. *Id.*
283. Davidson, *supra* note 271.
284. *Id.*
285. *See generally* Veurink, *supra* note 21, at 174 (discussing the tax implications for beneficiaries).
286. *Id.*; Ferraro, *supra* note 10.

2. Ensuring Proper Succession

Renewable lease owners should use an FLP to help ensure proper divestment and transferability of renewable lease income interests.[287] Landowners must consider the implications of signing a wind lease to themselves and to their heirs, especially in cases of partible inheritance.[288] Concerns arise when attempting to divide interest in Blackacre with a renewable energy lease because the absence of precedent for separating these rights from the surface poses a challenge.[289]

Interest in a renewable energy lease divest to the next generation when placed in an FLP without the need to be severed from the surface estate.[290] The Texas Property and Estates Code covers divestment of one's interest in personal and real property, meaning it covers an FLP interest as it is considered personal property.[291] These codes have also been extended to govern mineral estate interests.[292] But these codes have not been extended to cover wind or solar right divestment through testate or intestate succession.[293]

An FLP provides a regulated framework for division of a renewable energy interest, ensuring a fair and equitable distribution of benefits from a renewable energy lease.[294] The landowner should have the option to decide with whom the wind development continues once they pass away.[295] Partnership interest is considered personal property; when a partner dies, the interest may be divided based on the deceased's will or through intestate succession.[296]

If the owner dies testate, with a valid will, they may convey the interest in the FLP to their beneficiaries.[297] An individual beneficiary may hold a contingent or vested remainder in the interest in the FLP; this allows for future split of economic benefits to beneficiaries without partitioning the real property.[298] For example, this can be accomplished through a will by adding a provision that states: "To (name of client), the remainder of (percent of interest in the FLP) to (beneficiary)."[299] At the time of the owners death, FLP

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287. Author's original thought.
288. Givens, *supra* note 14, at 605.
289. Hartman, *supra* note 6, at 403.
290. TEX. EST. CODE ANN. §§ 201.001, 251.002.
291. Givens, *supra* note 14, at 605.
292. *Id.*
293. *Id.*
294. Kimbell v. United States, 371 F.3d 257, 260 (5th Cir. 2004).
295. Givens, *supra* note 14, at 605.
296. *See generally* Chavarria, *supra* note 24, at 2–3 (explaining that there is a "possibility that a surface owner may place greater value on not converting wind into electricity and may elect to forego developing a wind project on his property.").
297. *Remainder (property law)*, CORNELL L. SCH., https://www.law.cornell.edu/xex/reminder_%28 property_%29 (last visited Oct. 12, 2023) [https://perma.cc/3LDP-4NVP].
298. *Kimbell*, 371 F.3d at 260; Ferraro, *supra* note 10.
299. *Remainder (property law)*, *supra* note 297.

interests will be divided between their beneficiaries based on the will's provisions, and the new owners will be managed through provisions in the partnership agreement.[300]

Even if an owner of an interest held in a renewable FLP dies intestate, without a valid will, the FLP will not automatically be dissolved, but rather the decedent's partnership interest will still pass to their heirs.[301] The interest will be divided between the heirs according to the correct property scheme.[302] The heirs will then hold the partnership interest as limited partners with the same economic rights as the decedent but without the decedent's management rights.[303] This will still ensure the FLP's assets remain undivided.[304]

An FLP offers similar benefits as severance, but unlike severance, an FLP ensures proper and long-term divestment.[305] Many Texas practitioners are currently using severance to get around divestment issues that arise.[306] However, without the court's determination of the admissibility of these rights, severance may not be a permanent solution.[307] As owners of a severed estate die, there is no precedent to determine proper divestment.[308]

Further, an FLP also ensures that when an interest divests or is transferred, it remains evenly divided among heirs or divided exactly to the wishes of the decedent.[309] Severance has become a common strategy recommended by practitioners.[310] However, a renewable lease mimics a severed estate in many aspects, with the difference being an owner of a severed estate may only assign payments in a lease.[311] Once the lease expires so does the person's rights to the lease payments; however, when using the FLP, the right to the renewable profits do not end with that lease.[312]

An FLP firmly lays out who has the majority say in the operations and maintains stability of ownership of a current or future renewable farm.[313]

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300. Katie Alsop, *Don't Write Your Will Without Your Partnership Agreement to Hand*, WRIGHT HASSALL (May 19, 2017), https://www.wrighthassall.co.uk/knowledge-base/don-t-write-your-will-without-your-partnership-agreement-to-hand [https://perma.cc/K4BE-WGX9].

301. *See* W&S Harkness Fam. V. KWT Custom Homes, No. 12CV1183, 2012 Tex. Dist. LEXIS 9617, at *2 (56th JD, Galveston County, Aug. 9, 2012).

302. *See* TEX. EST. CODE ANN. Ch. 31.

303. *See W&S Harkness Fam.*, 2012 Tex. Dist. LEXIS 9617, at *2.

304. *Id.*

305. Rivers, *supra* note 41, at 103; Renkemeyer, *supra* note 213, at 612.

306. Interview with Rodd Wetsel, Professor, at Tex. Tech Sch. of L., in Lubbock, Tex. (Oct. 16, 2023).

307. Author's original thought.

308. *See generally* Chester & Duewall, *supra* note 144 (discussing how the court case out of Hale County and how it created more questions than it answered).

309. *Family Limited Partnerships & Legal Implication for Estate Planning*, *supra* note 206.

310. Givens, *supra* note 14, at 581.

311. *See generally Assigning Property Right Through Wind and Solar Easements*, *supra* note 23 (discussing the tension between the renewable energy industry and landowners).

312. Rivers, *supra* note 41, at 103.

313. *See* Venette, *supra* note 260.

Shares in the FLP stay in the family for generations preventing any title issues or rights to lease profits.[314] For example, rights in a mineral estate have become extremely difficult because there are two types of interests: a right to a decision and no right to a decision of executing a lease.[315] This can become difficult because, as the interests divest, the percentages of lease profits become smaller, while the number of people with interest in the decisions of executing the lease increases.[316] This situation is unlike the central management of an FLP that allows only divestment of the entities interest, leaving the interest in the renewable energy farm whole.[317] Therefore, even if renewable rights are severed, an FLP prevents divestment issues.[318]

3. Allowing for Proper Management and Transfer of Interests in a Partnership Agreement

Under Texas law, an FLP partner may freely transfer their partnership interest.[319] A common goal of clients when creating an estate plan is to ensure that their wishes are met and their management decisions are followed when an interest in an asset divests or is gifted.[320] Transfer of partnership interests does not have to be made at any specific time, meaning the owner may choose to give family members interest in an FLP while alive, avoiding the probate system entirely.[321]

The client can ensure their goals are met by choosing which beneficiary receives what percentage of the FLP in the partnership agreement.[322] Additionally, because an FLP continues to operate after the owner's death, it would not be disrupted after the transfer of ownership.[323] This ensures that the percent interest in the undivided renewable lease is divested permanently, that interest is not revoked, and that the clients goals are met.[324]

Even when owners choose to give the interest to the next generation prior to their death, they may still maintain control and make decisions through the general partner interest.[325] The general partner only needs to own

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314. *See generally* Hartman, *supra* note 6, at 403 (explaining how beneficiaries rights to parcels of land with wind turbines are affected during transfer).

315. *Severed Mineral Rights — Common Real Estate Title Issues in Renewable Projects, Part 1*, FOLEY BLOGS (Mar. 26, 2013), https://www.foley.com/insights/publications/2013/03/severed-mineral-rights-common-real-estate-title-i/ [https://perma.cc/G7NA-RGWZ].

316. *Id.*

317. *Business Succession Planning: Family Limited Partnership (FLP)*, *supra* note 191.

318. *See generally*, Kimbell v. United States, 371 F.3d 257, 260 (5th Cir. 2004) (discussing the terms of the partnership agreement and how it was meant to operate).

319. TEX. BUS. CODE ANN. § 152.401.

320. *Business Succession Planning: Family Limited Partnership (FLP)*, *supra* note 191.

321. TEX. BUS. CODE ANN. § 152.402.

322. Ferraro, *supra* note 10.

323. *Business Succession Planning: Family Limited Partnership (FLP)*, *supra* note 191.

324. *Id.*

325. Venette, *supra* note 260.

one percent interest in the FLP to maintain control.[326] Through this process, the owner can protect the asset from mismanagement while preparing the next generation to manage the assets in the FLP.[327]

Provisions may be set out in the partnership or operating agreement that dictate how the income of renewable energy is split as well as when or how a lease can be renewed.[328] This further safeguards the owner's intent and goals when the FLP interest divests to the next generation.[329] The income distribution provision should therefore state: "Income generated from the wind and solar leases shall be distributed on a pro-rata basis to limited partners based on their ownership interest in the FLP."[330] This provision could be further limited by a specific timing requirement: "Income distributions shall be made on a quarterly basis, with the first distribution occurring on the date that a limited partner turns twenty-one."[331]

The partnership or operations agreement ensures long-term success of the renewable energy interest.[332] The most important provision in a renewable energy FLP is a renewable provision in the partnership or operations agreement to protect one's interest in the income and decisions of future leases.[333] A main reason for the continuance of severance use is its ability to ensure interest in future renewable energy leases.[334] However, an FLP offers this same ability through a renewal provision in the partnership or operations agreement.[335] This provision should state: "All limited and general partners shall share in any renewal or new lease of property for the use of renewable energy projects in the future."[336] Additionally, this provision could be narrowly tailored by stating:

> Limited partners shall have the exclusive right to initiate and negotiate the renewal of any wind and solar lease owned by the FLP upon their expiration. Such renewals shall be in accordance with the terms and conditions of the original lease, or as otherwise negotiated in the best interest of the FLP.[337]

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326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.*
330. Author's original thought.
331. Interview with Rodd Wetsel, Professor, Tex. Tech Sch. of L., in Lubbock Tex. (Oct. 16, 2023).
332. *Business Succession Planning: Family Limited Partnership (FLP)*, *supra* note 190.
333. *See generally Family Limited Partnership Termination*, L. MADE EASY PRESS, LLC, https://laweasy.com/questions/family-limited-partnership-termination/ (last visited Sept. 30, 2024) (explaining when an FLP should be terminated and how) [https://perma.cc/59DN-RC46].
334. Givens, *supra* note 14, at 581.
335. *See* Venette, *supra* note 260.
336. Author's original thought; *Family Limited Partnership Termination*, *supra* note 333.
337. *Family Limited Partnership Termination*, *supra* note 333.

Additionally, the FLP protects voluntary or involuntary transfers or assignment of asset interest by a family member with FLP interest, which allows the family control over its transfer.[338] In the partnership agreement, a provision may be included that restricts transfer of FLP interests without consent from the general partner or only allowing transfer to another family member.[339] This provision may read, "An owner of an interest in the FLP may not assign or transfer all or any portion of their interest, nor pledge, mortgage, grant a security interest in, or otherwise encumber all or any portion of their interest, except with the consent of the general partner."[340]

Although FLPs can be complex to set up, their benefits far outweigh this complexity because the FLP has a governing document that helps ensure that divestment is proper and decisions are made accordingly.[341] Some argue that severance should be used over an FLP because it is easier.[342] However, severance does not provide future divestment safeguards or management control.[343]

C. An FLP Protects Owners from Liability

Limiting liability is important for anyone who derives income from a business or asset.[344] By placing the asset that subjects one to liability in an entity, it essentially acts as a shield.[345] Specifically, an FLP shields owners from the types of liability that states opposing severance are concerned with, such as avoiding (1) potential liability if Texas bans severance; (2) liability between heirs or beneficiaries; (3) liability from the dominant estate doctrine; (4) liability from issues with lease interest conveyance; and (5) liability from creditors.[346]

1. Severance Liability

An FLP serves as a shield against potential legal ambiguities in the realm of renewable energy rights because Texas courts have not ruled on the admissibility of severance.[347] Without a court decision, lease owners open

338. *See generally* Renkemeyer, *supra* note 213, at 611 (discussing how an FLP can protect against creditors).

339. *Id.*

340. Nikki Nelson, *What is an LLC Operating Agreement and Why Do You Need One?*, WOLTERS KLUWER (Dec. 18, 2020), https://www.wolterskluwer.com/en/expert-insights/what-is-an-llc-operating-agreement-and-why-do-you-need-one [https://perma/cc/480D-4KCM].

341. *Benefits and Drawbacks of Family Limited Partnerships*, *supra* note 199.

342. Rivers, *supra* note 41, at 103.

343. *See generally* Feinleib, *supra* note 169, at 9 (discussing the limitations of severance).

344. *Id.*

345. *Id.*

346. *See* discussion *infra* Section IV.C.1–5.

347. *Business Succession Planning: Family Limited Partnership (FLP)*, *supra* note 191; Givens, *supra* note 14, at 581.

themselves up to liability when choosing to sever the wind or solar rights from the surface.[348] Renewable owners should use an FLP to protect themselves from liability if Texas courts ever ban severance because it does not require severance of the wind or solar rights.[349]

Many other states have banned severance of wind and solar rights from the surface rights.[350] Only one state allows severance of wind rights and only in very narrow instances.[351] This legal divergence among states demonstrates the importance of tailoring strategies to the unique legal environment where the renewable energy lease is located.[352] Further, absent a clear court ruling on the validity of severance, it creates a legal gray area that demands careful consideration.[353] Therefore, states that oppose severance for overwhelming courts with renewable interest issues have a valid concern.[354]

Given the legal uncertainties surrounding severance in Texas, lease owners should adopt a cautionary approach.[355] An FLP offers similar estate planning benefits as severance, ensuring continuity in economic benefits and a seamless transition of ownership without compromising the wind or solar rights association with the real property.[356] This provides families with a secure and adaptable structure for managing their renewable energy lease.[357] Without the use of an entity approach, heirs or beneficiaries could only inherit the surface rights without the full economic benefits of the wind or solar lease.[358]

A main reason for severance is the ability to exclusively retain the income from an existing wind farm or to develop one in the future without owning the real property.[359] Many people have already severed the wind rights from the surface rights using a deed.[360] Texas has not yet seen the severance of solar rights, but that may change in the near future as hybrid farms— where solar panels are attached to the side of wind turbines or are placed on poles about eight feet off the ground beside the turbines—become increasingly popular.[361]

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348. Rivers, *supra* note 41, at 92.

349. *Id.*

350. *See, e.g.*, NEB. REV. STAT. § 76-3004 (2012); MONT. CODE ANN. § 70-17-404 (2017); COLO. REV. STAT. ANN. § 38-30.7-103 (2015); KAN. STAT. ANN. § 58-2272 (2011); S.D. CODIFIED L. § 43-13-19 (2017); *see also* N.D. CENT. CODE § 17-04-04 (2017); OKLA. STAT. ANN. tit. 60, § 820.1 (2011); WYO. STAT. ANN. § 34-27-103 (2011).

351. Contra Costa Water Dist. v. Vaquero Farms, Inc., 58 Cal. App. 4th 883, 890 (1997).

352. *See generally* Givens, *supra* note 14, at 582 (explaining the different approaches states have taken regarding renewable energy leases).

353. *Id.*

354. *Id.*

355. Author's original thought.

356. *Business Succession Planning: Family Limited Partnership (FLP)*, *supra* note 191.

357. *Id.*

358. Hartman, *supra* note 6, at 403.

359. Givens, *supra* note 14, at 581.

360. *Id.*

361. *See generally* Fred Guterl, *The Rise of the Hybrids: This Plant Combines Wind and Solar Power*

2. Limiting Beneficiary Disputes

Using an FLP to estate plan for a renewable energy lease prevents unnecessary disputes among heirs.[362] Without severance of renewable energy rights, and without court or statutory determination classifying renewable energy rights in Texas, each renewable energy lease is appurtenant to the real property.[363] When that lease ends, it terminates both the landowner's right to profit from the renewable energy project and the developer's right to harvest the wind or solar energy.[364] This may potentially create disputes among descendants regarding who is entitled to the lease profits and management decisions.[365]

An FLP allows the client to take preventive measures to avoid family disputes that are likely to arise when children take over a business.[366] As in *Kimbell v. United States*, in which an FLP was formed for a mineral interest, one purpose was to "provide resolution of any disputes which may arise among the [f]amily in order to preserve [f]amily harmony and avoid the expense and problems of litigation."[367] Because an FLP is extremely flexible, this can be accomplished by putting clauses in the partnership agreement designating how the company should be managed.[368] For example, in a renewable energy FLP, the partnership agreement could say that when the current leases end, all partners must unanimously agree on whether to renew the lease and a method of dispute resolution if the decision cannot be unanimous.[369]

By keeping the lease as an undivided interest in an FLP, the interest, if of the same percentage, will be of equitable value.[370] Without the use of an FLP, even if a testator attempts to make an equitable division, it is likely that the parcels of equal size are not of equal value.[371] For example, two beneficiaries each inherit two hundred and fifty acres of the family ranch, but

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to Keep Renewable Electricity Flowing, GE (June 24, 2018), https://www.ge.com/news/taxonomy/term/8279 ("Dan Juhl was building a wind farm in Woodstock, Minnesota, back in 1998, and he'd hit a snag. He needed to supply electricity to a small office building for the farm's engineers and operators, but he couldn't afford the local utility's fees for hooking the building up to the grid. He could tap the wind turbines, but then how would he keep the lights on through the summer doldrums, when the wind dies down for days or weeks at a time? The solution seemed obvious: use solar panels to complement the wind.") [https://perma.cc/JS9B-6JJG].

362. *See* discussion *supra* Section II.C.2.

363. *Id.*

364. Givens, *supra* note 14, at 581.

365. *Id.*

366. Renkemeyer, *supra* note 213, at 611.

367. Kimbell v. United States, 371 F.3d 257, 260 (5th Cir. 2004).

368. *See generally* 6 UNIF. LTD. P'SHIP ACT § 1 (1985) (discussing the changes to South Carolina's partnership law).

369. *Id.*

370. Linda B. Trugman, *The Valuation of FLPs*, THE TAX ADVISER (Dec. 31, 2009), https://www.thetaxadviser.com/issues/2010/jan/thevaluationofflps/ [https://perma.cc/UHG5-TX4U].

371. Hartman, *supra* note 6, at 403.

one parcel has twenty wind turbines and the other only has three.[372] This would cause not only a large discrepancy in the value of the two parcels but also an issue determining which heir or beneficiary has the right to execute a lease or re-sign the original wind lease.[373]

Further, an FLP acts as a system of family dispute resolution by allowing them the ability to include provisions of how disputes will be handled in the future.[374] The parents can take preventative measures to determine the method of solving disputes between their children that may ultimately arise when the children are managing a business.[375] This may be accomplished by designating the method of dispute resolution—such as arbitration or mediation—in the partnership agreement.[376]

3. Limiting Disputes Between Owners of Mineral, Renewable, & Surface Rights

Texas courts have held that the mineral estate is dominant to the surface estate, which may cause disputes between the mineral and renewable energy estates if rights are severed.[377] An FLP limits possible disputes with the mineral estate.[378] The dominant estate doctrine protects the rights of the subsurface estate holder by giving the subsurface estate holder an implied right to use as much of the surface estate that is reasonably necessary to extract the underlying minerals.[379]

An FLP protects lease owners from disputes with the mineral estate owner because no Texas court has discussed how, or if, this relationship changes when a renewable energy project is located on the same property.[380] Under this doctrine, the mineral estate owner not only has an implied right to the use of the surface but may do so without the estate owner's permission.[381] The mineral estate has no duty to compensate the surface owner for any possible damages, which may cause problems if the mineral estate causes damages, and the surface estate seeks money from the wind or solar

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372. *Id.*

373. *Id.*

374. Renkemeyer, *supra* note 213, at 612.

375. *Id.*

376. *Id.*

377. Judon Fambrough, *Accommodation of the Estates Doctrine*, TEX. A&M REAL EST. CTR. 1, 3 (Feb. 13, 2015), https://trerc.tamu.edu/wp-content/uploads/files/PDFs/Articles/2090.pdf [https://perma.cc/5Y9C-G599].

378. Meredith A. Wegener, *Balancing Rights in a New Energy Era: Will the Mineral Estate's Dominance Continue?*, 57 HOUS. L. REV. J. 1037, 1079 (2020); *see generally* Feinleib, *supra* note 169, at 15 (explaining how an FLP mitigates potential disputes between general and non-equity general partners).

379. Wegener, *supra* note 378, at 1040.

380. *See generally* Feinleib, *supra* note 169, at 15 (explaining how liability can arise from land ownership, but not as easily through mineral estate ownership).

381. Fambrough, *supra* note 377, at 20.

developer for those damages.[382] Other disputes may arise during the development portion of renewable energy projects because they use an extensive portion of the surface during farm construction.[383] This may cause interference with the mineral estate.[384]

An FLP would limit the number of uninvited individuals on the surface estate, thus limiting liability.[385] The dominant estate doctrine would likely apply to the renewable energy estate because they sit on the surface—unlike minerals.[386] This would further diminish the surface rights of the landowner, increasing the number of uninvited individuals on the property if rights are severed.[387]

An FLP will preserve the balance between the mineral and surface estate because the accommodation doctrine would apply to the surface use.[388] The accommodation doctrine limits the reach of the dominant estate doctrine by requiring the mineral estate owner to reasonably accommodate the surface estate's use when there is a pre-existing use of the surface.[389] However, no court has ruled on whether the accommodation doctrine would apply to severed renewable energy rights.[390] Keeping the renewable energy lease as a surface lease would ensure the accommodation doctrine applies to the renewable farm.[391]

Further, when an FLP keeps the lease appurtenant with the surface lease, the owner and their heirs or beneficiaries benefit from the lease, opposed to only being burdened by it.[392] Renewable energy farms burden the existing land: taking up space, potentially causing damage, and inviting unwanted guests on to the property.[393] As a surface right, an FLP keeps the harmony between heirs, as well as surface owners, by ensuring that everyone is aware and consents to this burden.[394]

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382. *Id.*
383. Wegener, *supra* note 378, at 1081.
384. Rodrick E. Wetsel & Becky H. Diffen, WIND & SOLAR L. § 2.24 (LexisNexis ed., 2024 ed.).
385. *Id.*
386. Wegener, *supra* note 378, at 1079.
387. *Id.*
388. Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971); *see generally* Fambrough, *supra* note 377 (explaining that the rule balances the rights of the surface owner and the mineral lessee's use of the surface).
389. *Jones*, 470 S.W.2d at 621.
390. *Id.*
391. Chavarria, *supra* note 24, at 10.
392. Jeff Phelps, *Pitfalls of Severing Wind Rights*, LAND NETWORK (Sept. 22, 2015), https://network.land.com/selling/wind-rights-2/ [https://perma.cc/P2PR-JVMF].
393. *Id.*
394. *Id.*

4. Avoiding Conveyance of Lease Interests

An FLP keeps the renewable lease in an undivided interest, while providing the same benefits as a conveyance of a lease interest and allowing for divestment of profits from a renewable lease.[395] Conveyance of one's lease interest has been one method used in renewable energy leases.[396] Conveyance allows one to hold a divided right to enjoy a percentage of the income from a lease without severing the mineral rights from the surface rights.[397] However, conveyance does not allow for the right to execute a lease nor the right to manage.[398]

When a divided interest is conveyed, the right to profits ends when the lease ends; or, when the beneficiary passes away, it does not divest.[399] In an FLP, the lease interest does not end when the lease does.[400] Transferring real estate and leases into an entity and then gifting interests in the entity is preferable to directly gifting a divided interest in that asset because it allows donors to retain greater management control and for more flexible long-term succession planning.[401]

Renewable energy farm owners should use an FLP because no Texas court has upheld the carving out of interest payments in renewable energy leases.[402] In contrast, an FLP allows for greater management control of the leases, thus giving the shareholders power to execute a renewable energy lease in the future, divestment of renewable profits, and the rights to an FLP, even after their lease ends.[403]

5. Protecting Assets from Creditors

Another common goal and reason to choose an FLP is to protect family assets.[404] The FLP protects the renewable energy farm and the real property (if a family chooses to keep the lease appurtenant to the land) from personal creditors of the partnership.[405] These assets are only owned by the entity; partners do not have direct ownership—they have an ownership interest in

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395. Chavarria, *supra* note 24, at 10.
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. Feinleib, *supra* note 169, at 32.
401. *Id.*
402. *Id.*
403. Kiara Ashanti, *What Is a Family Limited Partnership (FLP) – Pros & Cons*, MONEY CRASHERS (Sept. 14, 2021), https://www.moneycrashers.com/family-limited-partnership-flp/ [https://perma.cc/65ND-KECN].
404. Milton Childs, *Using Family Limited Partnerships for Estate Planning*, 5 MARQ. BENEFITS & SOC. WELFARE L.R. 193, 195 (2004).
405. *Id.*

the partnership itself.[406] Creditors pursuing an individual family member typically cannot access assets or force the liquidation of a debtor's partnership interest held within the FLP, making it a form of asset protection.[407] Additionally, any creditors of a partner may only attach the distribution to the percentage that the partner has the right to receive, thus protecting other members from liability.[408]

The FLP's partnership agreement can provide additional protection by acting as a spendthrift vehicle.[409] A spendthrift vehicle is a legal arrangement designed to protect the assets within the entity from a beneficiary's creditors.[410] An FLP may act as a spendthrift vehicle by placing restrictions on the partnership interests, such as disallowing them from being transferred; the beneficiary's gifted interests are being protected from waste and from being used to secure bad investments.[411] Such restrictions also inevitably protect against involuntary transfers to ex-spouses in potential divorce settings.[412]

The structure of an FLP, paired with the flexibility of the partnership agreement, protects the family assets while also protecting the individual partners from liability of others.[413] Further, this asset protection stops creditors from seizing the partnership, terminating the partnership, or demanding a partnership distribution.[414]

D. An FLP Promotes Renewable Energy

A lease owner should use an FLP in lieu of severance because it promotes the development of renewable energy.[415] Setting up an FLP promotes renewable energy by ensuring a renewable developer's interest in leasing and keeping the ability to re-sign a lease or add a lease.[416]

1. Developers Seek Landowners Without Severed Rights

Developers are more incentivized to renew a renewable energy lease on an owner's land when the renewable energy lease is a surface right in an FLP because it ensures the developer has secured the rights to use the real

406. Renkemeyer, *supra* note 213, at 611.
407. Childs, *supra* note 404, at 195.
408. Renkemeyer, *supra* note 213, at 612.
409. *Id.*
410. Roberta Pescow, *Spendthrift Trust: What Is It and How Does It Work?*, NERD WALLET, https://www.nerdwallet.com/article/investing/estate-planning/spendthrift-trust (last updated June 19, 2024, 11:54 AM) [https://perma.cc/W9CA-XVGP].
411. Renkemeyer, *supra* note 213, at 611.
412. *Id.*
413. Childs, *supra* note 404, at 196.
414. *Id.*
415. *See* discussion *infra* Section IV.D.
416. *See* discussion *infra* Section IV.D.

property.[417] This encourages developers to allow the owner to re-sign a lease or add a lease to the existing one because the management of the lease and the real property will not change.[418] In contrast, severing wind or solar rights discourages renewable energy development because most renewable energy companies and their lenders generally prefer that landowners do not separate the wind or solar rights from the surface.[419]

Prior to loaning any funds for the renewable energy project, a lender must do their due diligence to ensure the wind or solar company has secured the real property.[420] Severance removes the surface owner from the negotiation; thus, the surface owner does not have a financial incentive to promote operations.[421] Further, lenders and developers fear severance because the party that conveys their wind or solar rights might later challenge the conveyance and seek profits from those rights.[422]

Severance does not encourage development of renewable energy projects because developers prefer that the rights are not severed from the surface.[423] Opponents may argue that severing the wind or solar rights makes it a freely marketable and transferable commodity, which would encourage the development of renewable energy by providing another means to transfer wind or solar rights to those who value them.[424] They argue that this encourages development because it provides another means to transfer wind rights to those who value them and have the resources to develop the rights.[425] However, this argument fails because renewable energy developers seek out landowners when they want to develop a renewable energy farm.[426]

In contrast to severance, an FLP would encourage developers to build a renewable energy farm because it would ensure the lease would cover enough land for the developer.[427] Developers want landowners with a large amount of property to develop a renewable energy farm because of the high expense of development.[428] Most of the land that commercial renewable energy farms are located on have been in families for generations; because many are farms or ranches, these landowners should use an FLP.[429]

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417. Martin Lockman, *Fencing the Wind: Property Rights in Renewable Energy*, 125 W. VA. L. REV. 27, 57 (2022).
418. *Id.*
419. Chavarria, *supra* note 24, at 5.
420. *Id.*
421. Lockman, *supra* note 417, at 57.
422. Chavarria, *supra* note 24, at 5.
423. *Id.* at 15.
424. Alan J. Alexander, Note, *The Texas Wind Estate: Wind as a Natural Resource and Severable Property Interest*, 44 U. MICH. J.L. REFORM 429, 441 (2011).
425. *Id.*
426. Chavarria, *supra* note 24, at 5.
427. Lockman, *supra* note 417, at 57.
428. *Id.*
429. *See generally* Feinleib, *supra* note 169, at 17 (discussing what to do when beneficiaries to a generational farm no longer wish to run the farm).

2. Encouraging Owners to Re-sign or Add a Renewable Lease

As many of the original renewable energy leases are approaching their end, it is important to preserve the ability to renew or add additional renewable leases.[430] One unique ability of an FLP is that the structure as a holding company allows partners to add assets at any time after formation; specifically, this is beneficial to a renewable energy lease because partners may add assets to the FLP after its creation.[431] Such projects appeal to the next generation because they love technology and renewable energy.[432]

An FLP provides certainty to lease owners, ensuring the opportunity to sign a lease renewal or add additional leases in the future.[433] This flexibility is crucial when adapting to changing market conditions, technological advancements, and evolving renewable energy opportunities.[434] Therefore, an FLP will protect a family's income and divestment of a wind or solar farm, while keeping the Blackacre in the family.[435]

Further, when using an FLP, it incentivizes developers to renew the renewable energy lease.[436] When determining whether to renew a lease, the developer wants to minimize the chance of disputes arising because these leases may last through the next generation.[437] Developers may do this simply by ensuring that they have secured the right to use the real property.[438] In addition, an FLP's central management decreases the likelihood of disputes as it passes to the next generation, incentivizing developers further.[439]

E. An FLP Reduces Tax Liability

A renewable energy lease increases the property value and the income of the landowner; this in turn increases the landowner's income tax liability as well as landowner's heirs or beneficiaries estate tax liability.[440] An entity approach for these renewable energy leases provides landowners with income tax and estate tax liability benefits.[441] Without the use of an FLP, renewable lease owners who rely on agricultural exemptions will likely have

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430. *See* discussion *supra* Part I.
431. *See* discussion *supra* Part I.
432. Veldman, *supra* note 255.
433. *See generally* Feinleib, *supra* note 169, at 20 (explaining how an FLP can handle future generations taking over the property).
434. Givens, *supra* note 14, at 581.
435. *See generally* Ferraro, *supra* note 10 (explaining how an FLP can keep the family farm in the family).
436. *See generally* Chavarria, *supra* note 24, at 5 (discussing how wind companies typically approach projects).
437. Lockman, *supra* note 417, at 57.
438. Chavarria, *supra* note 24, at 2.
439. Author's original thought.
440. Hegar, *supra* note 135, at 3.
441. *See* discussion *supra* Section IV.D.1.

a higher tax burden because of the potential loss of agricultural associated tax benefits from the renewable energy farm.[442]

Under the Internal Revenue Code, farmers and ranchers can lower their tax liability through their agricultural enterprise.[443] This tax discount is only available if half of the estate's real property is used for a "qualified use," meaning that it produces an agricultural product.[444] However, if the real property has a commercial use, and that commercial use makes up more than half of the farm or ranch's income, then the landowner may not qualify for this tax deduction.[445] Without court guidance, wind or solar farms may be considered a commercial use instead of being considered a "qualified use," which will take away the tax deductions that these farmers and ranchers rely on.[446]

Additionally, when executing a renewable lease, it could bring forth federal estate tax liability because the value of the real property increases due to the right to receive future lease payments.[447] This may become an issue for farmers or ranchers who rely on these estate tax deductions for the purpose of keeping the farm or ranch in the family for generations.[448] For example, a decedent executed a thirty-year wind lease ten years prior to his death, and twenty wind turbines were placed on his land; each paid $4,000 per year in fixed royalties.[449] The estate should discount the value of the real property for the encumbrance, and assuming a 25% discount is appropriate, the value of the real property is $3,000,000 on the estate tax return; however, the heirs or beneficiaries have to consider the right to receive $1,600,000 in future payments under the lease on the real property, which is where the problem occurs.[450] If the IRS requires the valuation of the real property to include both the discount and the value of the leased fee interest, it also requires the inclusion of the remaining value of existing mineral leases; therefore, an additional $600,000 will be added to the decedent's gross estate and will be subject to estate tax.[451]

Most farmers and ranchers do not realize they will likely lose their qualified-use status prior to executing a renewable lease.[452] In the event that the court determines that a commercial renewable farm does not allow farmers and ranchers to receive their qualified-use status, an FLP will still

442. Veurink, *supra* note 21, at 173.
443. *Id.*
444. *Id.* at 186.
445. *Id.* at 176.
446. *Id.* at 181.
447. *Id.*
448. *Id.*
449. *See generally* Sheperd v. Comm'r, 283 F.3d 1258, 1260–63 (11th Cir. 2002) (discussing how the addition of a timber lease changed the valuation of the land).
450. *Id.*
451. *Id.*
452. Veurink, *supra* note 21, at 173.

allow these owners to receive income and estate tax discounts.[453] Therefore, the use of an FLP is a forward-thinking protective measure these farmers and ranchers may use to plan for their estate.[454]

1. Reducing Income Tax Liability

Due to the potential loss of a renewable energy farm owner's qualified-use status, one of the most important aspects of an FLP for renewable energy lease owners is the lack of income tax liability.[455] An FLP will reduce income tax liability because it is not a tax-paying entity.[456] The FLP only has to file an annual information tax return without paying taxes on that income.[457] Instead, each owner of interest in the FLP pays taxes on their portion of income.[458]

The income or loss of an FLP is allocated to the partners by the partnership agreement or operating agreement.[459] It may be written to state that all proceeds to children or grandchildren will not be distributed but used to pay their income tax or put aside as savings to be distributed at a later date, which lowers the parents' tax liability.[460] By spreading income between the parents and children, it allows for tax savings because they will typically be in different tax brackets.[461]

2. Reducing Estate Tax Liability

There are multiple ways an FLP can reduce the federal estate tax, which is the tax owed when assets divest to heirs or beneficiaries.[462] One of the largest FLP estate tax advantages is the market value discount.[463] The value of the wind or solar farm at the time of setting up the FLP will be used to evaluate estate tax liability at the time of divestment, regardless of whether the estate increases in value or not.[464] This discount typically ranges between

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453. *See* discussion *infra* Sections IV.E.1–2.

454. *See generally Sheperd*, 283 F.3d at 1261 (explaining consequences of the incorrect reporting to the IRS).

455. I.R.C. § 2032(B)(1); Veurink, *supra* note 21, at 197.

456. I.R.C. § 2032(B)(1); Veurink, *supra* note 21, at 197.

457. *See generally* Feinleib, *supra* note 169, at 14 (discussing the tax implications of LLCs).

458. *Id.*

459. Childs, *supra* note 404, at 195.

460. *Id.*

461. *Id.*

462. *Id.*

463. *Id.*

464. *Pros and cons of creating a Family Limited Partnership*, LEGAL ZOOM, https://www.legalzoom.com/articles/pros-and-cons-of-creating-a-family-limited-partnership (last updated Feb. 2, 2023) (also known as an "estate tax discount," which reduces the estimate value of an asset making one's tax liability less than the value of the overall asset) [https://perma.cc/9658-GTCN].

15%–20%, which is significant because renewable energy farms could be worth hundreds of thousand or even millions of dollars.[465]

This is extremely beneficial for renewable energy leases because no court has rendered a decision regarding whether a landowner's real property value will increase due to the possibility of receiving future payments from a wind or solar farm, causing further tax implications.[466] When a lease owner transfers a lease with or without real property into an FLP, any increase in income may be deducted from the basis value at time of transfer.[467] For example, a farmer puts their real property with ten turbines into an FLP, valued at $1.5 million at the time of transfer; when their heirs or beneficiaries inherit the FLP and decide to add ten more turbines, which increases the value, the FLP only has to pay taxes on the value in excess of the basis amount of $1.5 million.[468] Therefore, executors of a wind or solar estate can receive a valuation discount which will reduce income tax liability.[469]

V. CONCLUSION

Over 20% of Texas's energy capacity comes from renewable energy, which increases each year.[470] The popularity of commercial renewable energy farms will continue to grow in the United States, supported by the public and enacted legislation.[471] With this popularity also comes many issues that have risen due to a lack of court guidance or regulations for renewable energy leases, some of which relate to succession concerns with divestment issues.[472] As such, practitioners should be aware of these issues.[473]

When land divests in separate parcels to heirs or beneficiaries, the person who inherits that specific parcel would typically become the landowner and is entitled to the income payments from the lease, unless the lease stipulates otherwise.[474] The renewable energy lease is appurtenant to the surface lease; when the original lease ends, it no longer governs the share divisions, and the owner of Blackacre has full autonomy to re-sign or add a lease.[475] This creates a need for a flexible solution.[476]

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465. *Id.*
466. Veurink, *supra* note 21, at 173.
467. Ashanti, *supra* note 403.
468. Micheal A. Rosenhouse, *Treatment of Family Limited Partnership for Federal Estate and Gift Tax Purposes*, 27 A.L.R. FED. 2d 559 1,11 (last visited Oct. 7, 2023).
469. *Id.*
470. Rivers, *supra* note 41, at 113.
471. *Id.* at 114.
472. *Id.*
473. *See* discussion *supra* Section II.A.
474. Hartman, *supra* note 6, 403.
475. *Id.*
476. *See discussion supra* Part IV; *see generally* Renkemeyer, *supra* note 213, at 612 (discussing division of ownership in leases).

Practitioners should encourage the use of an FLP because it provides a vehicle to ensure proper divestments, limits disputes between family members through competent management and profit distribution, and protects from areas in the law that have not been deemed admissible.[477] Aside from the lack of precedent concerning renewable energy leases, an FLP offers both public and private benefits through providing stability for farming and ranching, allowing owners to create a legacy for their family, incentivizing the production of clean energy, and protecting family harmony.[478] In conclusion, as an estate planning tool, an FLP's unique structure gives landowners flexibility when estate planning for renewable leases because the partnership agreement may be tailored to meet these owners' needs.[479]

477. *See discussion supra* Section IV.B–C.
478. *See* discussion *supra* Section IV.B–D.
479. *See* discussion *supra* Section IV.B.