

# GUN TRUSTS— WHAT'S ALL THE FUSS?

By Michael A. Sneeringer

**D**istributing a firearm at death can be complicated. Is a gun trust the most viable solution? Gun trusts in the United States carry a stigma. The Internet perpetuates this stigma as a typical on-line search of the words “gun trust” turns up multiple misleading hits. See, e.g., Firearm Concierge, *The Truth About Gun Trusts—and How Attorneys Lie to Get Your Money*, Jan. 26, 2014, [www.thetruthaboutguns.com/2014/01/firearmconciierge/truth-gun-trusts-attorneys-lie-get-money](http://www.thetruthaboutguns.com/2014/01/firearmconciierge/truth-gun-trusts-attorneys-lie-get-money) (last visited Dec. 1, 2016). What is fact and what is fiction? What can an attorney do to properly dispose of a client’s firearm?

## Background

The Uniform Trust Code does not specifically address firearms. See Uniform Law Commission, Uniform Trust Code, [www.uniformlaws.org/shared/docs/trust\\_code/utc\\_final\\_rev2010.pdf](http://www.uniformlaws.org/shared/docs/trust_code/utc_final_rev2010.pdf). In addition, state trust laws are silent on the ownership of

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firearms. But state laws are not silent on the overall possession and ownership of firearms. See, e.g., Fla. Stat. Ch. 790. Each state has such statutes on its books governing the regulation, possession, and laws applicable to firearms and other weapons.

Two major federal laws regulate firearms. Under the National Firearms Act (NFA), Pub. L. No. 73-474, 48 Stat. 1236 (codified at IRC Ch. 53) (June 26, 1934), Congress sought to impose a tax on the making and transfer of specifically enumerated firearms. See ATF, National Firearms Act, June 23, 2016, available at [www.atf.gov/rules-and-regulations/national-firearms-act](http://www.atf.gov/rules-and-regulations/national-firearms-act) (last visited Dec. 1, 2016). Under the NFA, a firearm means

(1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as

defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device.

26 U.S.C. § 5845(a). A firearm is not an antique or “any device (other than a machine gun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector’s item and is not likely to be used as a weapon.” *Id.*

The NFA includes a catchall category of “any other weapon” that pertains to

any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire.



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Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

26 U.S.C. § 5845(e).

The NFA requires registration of all firearms with the Secretary of Treasury: "Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor." 26 U.S.C. § 5841(b). The NFA mandates that each person possessing a registered firearm must retain proof of registration, available to the Secretary of Treasury on request. See 26 U.S.C. § 5841(e).

In addition to the NFA, the second major federal law, the Gun Control Act of 1968 (the "Act"), Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-931 (2012)), regulates the interstate transportation of firearms. See 18 U.S.C. § 926A. A firearm means

(A) any weapon (including a starter gun) which will or is

designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C. § 921(a)(3).

A "destructive device" is defined at 18 U.S.C. § 921(a)(4) and includes an exhaustive list of things including bombs, grenades, rockets, missiles, mines, and other types of weapons either designed or intended for use in converting such device into a destructive device. See 18 U.S.C. § 921(a)(4) (A)-(C). Additional terms, such as "shotgun," "rifle," "short-barreled rifle," and "antique firearm" are also defined. See 18 U.S.C. § 921(a). The Act regulates unlawful acts, licensing, penalties, remedies, concealed firearms, possession, and prohibits certain individuals from owning firearms. See 18 U.S.C. Ch. 44 et seq. The Act gives the U.S. Attorney General the right to "prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter. . . ." 18 U.S.C. § 926(a). Section 922 of the Act is key because it declares unlawful various actions pertaining to the sale of firearms within interstate commerce. See 18 U.S.C. § 922.

The NFA is referred to as Title II, and the Act is referred to as Title I. See ATF, *infra*. Although the \$200 tax imposed by the NFA on the making and transfer of firearms has not changed, the substance of the NFA is "virtually unenforceable." *Id.* The 1968 case of *Haynes v. United States*, 390 U.S. 85 (1968), held that the Fifth Amendment privilege against self-incrimination was a full defense to prosecutions "either for failure to register under § 5841 or for possession of an unregistered firearm under § 5851." *Id.* at 95-100. In response, the Act was passed to fix the problematic system set out in the NFA. See ATF, *infra*. Today, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) "issues firearms licenses and conducts firearms

licensee qualification and compliance inspections," including "compliance inspections of existing licensees focus[ed] on assisting law enforcement to identify and apprehend criminals who illegally purchase firearms," ATF, *Firearms*, [www.atf.gov/firearms](http://www.atf.gov/firearms) (last visited Dec. 1, 2016), while the Act (incorporating the Firearms Owners' Protection Act of 1986, the Brady Handgun Violence Prevention Act of 1993, and the NICS Improvement Act of 2008) regulates "interstate and foreign commerce in firearms, including importation, 'prohibited persons', and licensing provisions." ATF, *Gun Control Act of 1968*, [www.atf.gov/rules-and-regulations/gun-control-act](http://www.atf.gov/rules-and-regulations/gun-control-act) (last visited Dec. 1, 2016) [ATF].

Effective July 13, 2016, the Department of Justice published revisions under 27 C.F.R. Part 479 applicable to machine guns, destructive devices, and certain other firearms. See 27 C.F.R. Part 479 (Jan. 15, 2016), available at [www.gpo.gov/fdsys/pkg/FR-2016-01-15/pdf/2016-00192.pdf](http://www.gpo.gov/fdsys/pkg/FR-2016-01-15/pdf/2016-00192.pdf). Referred to as Rule 41F, the revisions discuss background checks for "Responsible Persons." See, e.g., ATF, *FINAL Rule 41F—Background Checks for Responsible Persons—Effective July 13 2016*, Sept. 22, 2016, [www.atf.gov/rules-and-regulations/final-rule-41f-background-checks-responsible-persons-effective-july-13#Who%20is%20a%20Responsible%20Person](http://www.atf.gov/rules-and-regulations/final-rule-41f-background-checks-responsible-persons-effective-july-13#Who%20is%20a%20Responsible%20Person) (last visited Dec. 1, 2016); ATF, *supra*, at 41. Rule 41F is important because it closed what effectively amounted to a loophole that allowed individuals, under the shield of a trust, to purchase a firearm without the identification and background check requirements. *Id.*

There are two key definitions: a "person" and a "responsible person." A person is any "partnership, company, association, trust, corporation, including each responsible person associated with such an entity; an estate; or an individual." 27 C.F.R. § 479.11. A responsible person is:

In the case of an unlicensed entity, including any trust, partnership, association, company

(including any Limited Liability Company (LLC)), or corporation, any individual who possesses, directly or indirectly, the power or authority to direct the management and policies of the trust or entity to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust or legal entity.

Id.

Rule 41F requires responsible persons, of trusts or legal entities, to (1) complete ATF Form 5320.23 (the National Firearms Act Responsible Person Questionnaire) and (2) submit photographs and fingerprints when the trust or legal entity (a) files an application to make an NFA firearm or (b) is listed as the transferee on an application to transfer an NFA firearm. See ATF, *supra*, at 41. All applications to make or transfer a firearm are required to be copied and "forwarded to the chief law enforcement officer (CLEO) of the locality in which the applicant/transferee or responsible person resides." Id.

In addition, a new section, 27 C.F.R. § 479.90a, was created to guide executors through the disposition of firearms process from a decedent's estate:

The executor . . . may possess a firearm registered to a decedent during the term of probate without such possession being treated as a "transfer" as defined in § 479.11. No later than the close of probate, the executor must submit an application to transfer the firearm to beneficiaries or other transferees in accordance with this section. If the transfer is to a beneficiary, the executor shall file an ATF Form 5 (5320.5), Application for Tax Exempt Transfer and Registration of Firearm, to register a firearm to any beneficiary of an estate in accordance with § 479.90. The executor will identify the estate as the transferor, and will sign the form on behalf of the decedent, showing the

executor's title (e.g., executor, administrator, personal representative, etc.) and the date of filing. The executor must also provide the documentation prescribed in paragraph (c) of this section.

27 C.F.R. § 479.90a(a).

The Act, including newly enacted Rule 41F, is a crucial study for attorneys creating trusts for their clients, as well as for attorneys whose clients express a desire to leave guns to certain persons at death. Under the Act, it is unlawful for a person to knowingly, or having reasonable cause to have known, sell a firearm or ammunition to certain persons, including but not limited to persons convicted of specific crimes such as stalking or domestic violence, fugitives, persons renouncing their U.S. citizenship, persons committed or adjudicated mentally incompetent, illegal aliens, drug addicts, or persons who are "under indictment for, or ha[ve] been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" (that is, a felon). 18 U.S.C. § 922(d). On the other hand, it is unlawful for certain persons "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," including but not limited to persons convicted of specific crimes such as stalking or domestic violence, fugitives, persons renouncing their U.S. citizenship, persons committed or adjudicated mentally incompetent, illegal aliens, drug addicts, or persons who are "under indictment for, or have been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" (that is, a felon). 18 U.S.C. § 922(g). In addition, it is "unlawful for a person to purchase, own, or possess body armor, if that person has been convicted of a felony. . . ." 18 U.S.C. § 931(a).

The statutes make it difficult to leave assets in trust to just any person. Clients often hardly know their

friends and loved ones, that is, the potential heirs and beneficiaries of such client's estate or trust. How does a client know if the best friend he hunts with annually has been convicted of any of the aforementioned crimes unless the client actively sought out this information or was told by the friend? (The client may not have ever known.)

## Creation of Gun Trust

### Basic Contents

The contents of a gun trust are no different from any other revocable trust, except for references and terms related to firearms and the Act. Although a gun trust can be irrevocable, a revocable trust may be preferred; the contents of the trust may change frequently during the grantor's lifetime. The grantor (that is, the gun owner) creates a trust during his lifetime for his benefit, naming himself as a trustee. The trust should make specific references to an intent to comply with the Gun Control Act and National Firearms Act. It is also important to note in the trust's statement of intent that the trust is created specifically to comply with local, state, and federal laws on firearms in its administration and interpretation. The trust should be created with the formalities of a revocable trust under the laws of the grantor's domicile (that is, no one state has stronger gun protection laws). The gun trust



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should be a stand-alone trust, as opposed to being incorporated into an existing revocable trust.

### Trustees

To properly accomplish its purposes, a gun trust should have successor trustees listed who are eligible (in accordance with the Act) to own firearms themselves. The trust should contain automatic removal language under which a successor trustee, if at the time he is to become trustee is an ineligible trustee in accordance with the provisions of the Act, is deemed to have predeceased the grantor. It is recommended that at least two qualifying successor trustees be named. Instead of naming successor trustees, a trust protector could be used in the trust document to select eligible successor trustees.

### Additional Considerations

During the grantor's lifetime, the gun trust's benefit is that the grantor has a vehicle to own title to his firearms in case of incapacity. In addition, it is recommended that the grantor prepare a list of his firearms to accompany the creation of the gun trust. This is analogous to completing a Schedule A on creation of a revocable trust or simultaneously executing a statement of tangible personal property when creating a will. This list can be used going forward by the grantor to keep track of his collection. During his lifetime, the grantor will leave himself the power to amend the trust and add or remove additional property from the trust.

### Trustee Powers

The gun trust should provide the successor trustees with broad language to deal with the firearms. This may include filling out the requisite transfer forms to transfer the firearms, reimbursement for shipping costs, and reimbursement for travel costs to transport such firearms. The trustee should be given discretion to transfer firearms to beneficiaries in accordance with local, state, and federal law. If the grantor is going to name specific beneficiaries during his lifetime, he should ascertain whether

such beneficiaries are able to own a firearm. The trust will give the trustee authority to ascertain, at the time a firearm is to be distributed, whether a beneficiary can receive the firearm. The trust should make an alternate disposition of the firearm in case a certain beneficiary is unable to own a firearm. The trust should nominate a charitable remainder beneficiary as the taker of last resort, ideally, an organization that can properly dispose of the firearm, such as the National Rifle Association. The gun trust can leave the firearms in further trust for the ultimate beneficiaries or provide an outright distribution of the firearms. If the firearms are of historical value, however, it is recommended that the gun trust be used in a dynastic-trust-type manner, thereby continuing the trust to maintain the firearms within the family for generations to come.

### Checklist

A checklist of things to consider when drafting a gun trust might look like the following:

- Revocable or irrevocable?
- Initial trustee?
- Does the trust contain a statement that it complies with the Gun Control Act?
- Does the trust contain a statement that it complies with the National Firearms Act?
- Does the trust have a statement that it intends to comply with all local, state, and federal laws on firearms in its administration and interpretation?
- Names, contact information, dates of birth, and Social Security numbers of each successor trustee.
- Has a search of on-line state and local criminal records been completed for each successor trustee?
- Names, contact information, dates of birth, and Social Security numbers of each beneficiary.
- Has a search of on-line state and local criminal records been completed for each beneficiary?
- Dynastic provisions and

outright distribution to beneficiary?

- Has a contingent 501(c)(3) beneficiary been named?
- Will a trust protector be named?
- Has the client provided a complete list of all firearms to be transferred?

### Ancillary Gun Ownership Issues

When a gun trust owner is considering expatriation, additional issues arise. Transfers of firearms to a gun trust should be made before the grantor becomes a "prohibited person," that is, an expatriate. The gun trust should be drafted to ensure that, if the grantor becomes a prohibited person under 18 U.S.C. § 922(g), the grantor will immediately cease to be a trustee or a beneficiary of the trust. The trust should also contain language prohibiting distributions of firearms to any prohibited person under any circumstances. Beneficiaries of such a gun trust who were not prohibited persons can still use the firearms held in the trust.

In the recent case of *Henderson v. United States*, 135 S. Ct. 1780 (2015), the petitioner, as a felon, was prohibited under 18 U.S.C. § 922(g) from possessing firearms. The Court held that 18 U.S.C. § 922(g) would not prevent the petitioner from disposing of his firearms in ways that guaranteed he would never use them again (that is, placing those guns in a secure trust for distribution to his children after his death). *Henderson* can be applied to expatriates in the sense that such a grantor can rely on its holding for the premise that he can place his firearm in the trust before expatriating and avoid further scrutiny.

### Conclusion

The body of complicated law on firearms illustrates the importance a gun trust can have in a gun owner's estate plan. The extra expense to the grantor is surely less onerous than any problems that can arise when firearms are left in an estate to an unsuspecting personal representative or trustee. Both proper care by the grantor and the expertise of the drafting attorney are necessary. ■