

**GET YOUR GUNS UP!  
...OR AT LEAST GET THEM IN A GUN TRUST!**

“A free people ought not only to be armed and disciplined, but they should have sufficient arms and ammunition to maintain a status of independence from any who might attempt to abuse them, which would include their own government.”

-George Washington

**Comment**

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I. THE SECOND AMENDMENT: WHAT DOES THE RIGHT TO POSSESS A  
FIREARM REALLY MEAN?

The Second Amendment to the United States Constitution dictates, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>1</sup> The modern political climate has led to significant debate as to the meaning and scope of the Second Amendment. Presently, the citizens of the United States maintain the right to “keep and bear arms.”<sup>2</sup> In 2008, the Supreme Court delivered an

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1. U.S. CONST. amend. II.

2. *Id.*

important decision that solidified and detailed the rights associated with the Second Amendment.<sup>3</sup> The court ruled the following:

The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home and that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.<sup>4</sup>

Although this landmark decision is a victory for supporters of the Second Amendment, it leaves unanswered questions involving the ownership of firearms. The Supreme Court specifies that the Second Amendment forbids an outright ban on arms in common use.<sup>5</sup> It is plausible to assume that handguns meet the "in common use" standard, but that other firearms—such as a machine gun—may not.<sup>6</sup> Therefore, the court leaves open the idea that weapons not "in common use" could still be constitutionally subjected to an outright ban.<sup>7</sup> Issues involving the purchase, transfer, and ownership of firearms are inherent to the "individual right to possess a firearm."<sup>8</sup> The court defers to Congress to provide the guidelines and regulations of an "individual[']s right to possess a firearm."<sup>9</sup>

Many Americans are proud owners of firearms, and many young Americans hope to inherit or purchase firearms in the future.<sup>10</sup> In fact, a 2006 poll reported that 43% of Americans keep a gun in their home.<sup>11</sup> Another study, conducted by the Bureau of Justice Statistics, found that 240,000 machine guns are registered with the Bureau of Alcohol Tobacco, Firearms, and Explosives.<sup>12</sup> Through various legislation, federal and state governments have slowly, but surely, tightened the reigns on the purchase, transfer, and ownership of certain classifications of weapons.<sup>13</sup> Regulation of machine guns and other similar weapons have been subjected to the most scrutiny and

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3. See generally *District of Columbia v. Heller*, 128 S. Ct. 2783, 2794 (2008) (holding that the Second Amendment to the United States Constitution protects an individual's right to possess a firearm for private use).

4. *Heller*, 128 S. Ct. at 2786–87.

5. *Id.* at 2787.

6. See *id.*

7. See *id.*

8. See *id.*

9. See *Parker v. District of Columbia*, 478 F. 3d 370 (D.C. Cir. 2007) (explaining that the Supreme Court has not addressed any specific procedures to accompany the right to bear arms).

10. See *Americans By Slight Margin Say Gun in the Home Makes It Safer*, Gallup Poll, Oct. 20, 2006.

11. See *id.*

12. See MARIANNE ZAWITZ, BUREAU OF JUSTICE STATISTICS, GUNS USED IN CRIME (1995), <http://bjs.ojp.usdoj.gov/content/pub/pdf/GUIC.PDF>.

13. See National Firearms Act of 1934 73rd Cong. (1934), 26 U.S.C. § 5812 (2005); see also Gun Control Act of 1968 Pub. L. No. 90-618, 82 Stat. 1213 (1968), 18 U.S.C. § 923 (2005).

reform.<sup>14</sup> The public policy arguments made by gun violence activists are somewhat irrelevant to this discussion because of the miniscule number of crimes committed by legal owners of the firearms in question.<sup>15</sup> In fact, according to research, only two murders since 1934 have involved legally registered machine guns, and one of those was committed by a police officer.<sup>16</sup>

This comment aims to educate legal professionals, as well as National Firearms Act (NFA) classified weapons owners, on how to protect their ownership, transferor, and possessory rights while alive and at death or incapacitation. This comment also addresses how to protect family members and friends from illegally possessing or transferring NFA classified weapons during and after the owner's lifetime.

Part II of this comment provides a general overview of using a trust instrument as an estate planning technique. Part III summarizes the history of important legislation that affects the purchase, transfer, and ownership of NFA weapons. Part IV delves into the complexities and technicalities of a gun trust, as well as the important differences between gun trusts and traditional trusts. Part V explains why the use of a gun trust can be an innovative and important technique in the estate planning process. Ultimately, the purpose of this comment is to provide a comprehensive overview of how to handle and protect an estate that contains valuable and highly regulated firearms.

## II. THE TRUST RELATIONSHIP AND THE TRUST INSTRUMENT

### A. General Principles

A trust is a unique relationship created when the owner of property conveys his property in a special way.<sup>17</sup> The owner of the property is required to divide title to the property into a legal interest and an equitable interest.<sup>18</sup> Following the division of title, the owner of the property must then establish fiduciary duties that the legal interest holder must uphold when managing the property for the equitable interest owner.<sup>19</sup>

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14. *Id.*

15. GARY KLECK, *TARGETING GUNS: FIREARMS AND THEIR CONTROL* 108 (Walter de Gruyter, Inc., New York 1997) (explaining that the Director of BATF testified before Congress that he only knew of ten crimes that had been committed with legally owned machine guns and that these crimes were not violent in nature, but rather violations of administrative policies).

16. *See Searcy v. Dayton*, 38 F.3d 282, 283–84 (6th Cir. 1994) (explaining that, on September 15th, 1988, a thirteen-year veteran of the Dayton, Ohio police department, Patrolman Roger Waller, then 32, used his fully automatic MAC-11 .380 caliber submachine gun to kill a police informant, fifty-two-year-old Lawrence Hileman).

17. GERRY W. BEYER, *TEXAS TRUST LAW CASES AND MATERIALS* 1 (Author House 2007).

18. *Id.*

19. *Id.*

The trustee (holder of the legal title to trust property) must “use reasonable care when dealing with the trust property and maintain the utmost degree of loyalty.”<sup>20</sup> The beneficiary (holder of equitable title) is intended to benefit from the trust property in compliance with the terms established in the trust instrument.<sup>21</sup>

Motivations for establishing trust relationships vary greatly.<sup>22</sup> The most common reason for entering into this type of arrangement is to provide for and protect the beneficiaries.<sup>23</sup> Typically, beneficiaries are minors, people who lack management skills, people who are frivolous spenders, or people that are susceptible to the influence of others.<sup>24</sup> Beneficiaries tend to benefit greatly from this legal relationship.<sup>25</sup> Additionally, grantors can confidently convey their own hard-earned property to beneficiaries drowning in creditors without the fear of losing it all.<sup>26</sup> Whereas, if grantor simply simply gifted the property to a person, then the property would be vulnerable to the recipient’s creditors.<sup>27</sup>

### *B. The Functions of a Trust*

Trust instruments come in many forms with various functions. Generally, trusts are typically characterized as revocable, irrevocable, and inter vivos or testamentary.<sup>28</sup> It is always important to explicitly state the kind of trust you intend to create.<sup>29</sup> In Texas, a silent trust instrument will be considered revocable.<sup>30</sup> Simply stated, the “revocable trust is a legal entity established under state law” that can own real and personal property.<sup>31</sup> As far as income taxes are concerned, the trust is not required to file an income tax return.<sup>32</sup> This is a critical difference between using other legal entities, such as a corporation, to achieve similar goals.<sup>33</sup>

Attorneys in states with burdensome probate procedures favor trusts because, if drafted properly, the judiciary is not involved with the administration process.<sup>34</sup> The trustee is under no obligation to seek the court’s permission or authorization when making management decisions

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20. *Id.*

21. *Id.* at 2.

22. *Id.* at 3.

23. *Id.*

24. *Id.*

25. *Id.* at 3–4.

26. *Id.*

27. *Id.* at 78.

28. *Id.* at 25.

29. *See id.* at 11.

30. *Id.*

31. Bob J. Howell, Esq., *The Legal Side*, SMALL ARMS REVIEW, Mar. 2008, at 14.

32. *See id.*

33. *See id.*

34. BEYER, *supra* note 17, at 5.

regarding the trust property.<sup>35</sup> Although Texas does not have the judicial oversight in estate administration that other states do, the trust relationship is still a vital and important technique used in modern estate planning.<sup>36</sup>

Although the Gun Trust is fairly similar to the traditional trust in form and function, there are critical differences that create substantial benefits for NFA firearm owners.<sup>37</sup> Primarily, a properly drafted gun trust allows a trustee to possess and use the trust's firearms without violating the duties and fiduciary responsibilities as of a trustee.<sup>38</sup> A traditional trust arrangement only allows use and enjoyment of the trust property by the beneficiaries.<sup>39</sup> Other benefits of a gun trust include potential for multiple people to legally possess the firearms and the ability for the trust to continue until the beneficiary reaches majority age or the level of maturity required to own and possess firearms.<sup>40</sup> Therefore, placing firearms in a traditional trust may provide some benefits, but a gun trust allows for exceptional possibilities.

### C. Rule Against Perpetuities

The Rule Against Perpetuities (RAP) is a contentious issue in the legal community. States such as Pennsylvania have repealed RAP, whereas other states such as Texas still maintain its validity.<sup>41</sup> The common law version of the Rule states that:

A future interest not destructible by the owner of a prior interest cannot be valid unless it becomes vested at a date not more remote than twenty-one years after lives in being at the creation of such interest, plus the period of gestation. Any future interest so limited that it retains its indestructible and contingent character until a more remote time is invalid.<sup>42</sup>

Therefore, depending on a particular state's law regarding RAP, trust creation may require certain construction principles. An individual in a state that has abolished the Rule can, in effect, create a perpetual NFA gun trust to circumvent future statutory changes as to transfer policies.<sup>43</sup> States that still

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35. *Id.* at 105 (explaining that the trustee has a duty to carry out a settlor's instructions as stated in the trust instrument).

36. *See id.* at 3–6.

37. *See generally* David M. Goldman, *Why Do I Need an NFA Trust?*, Oct. 6, 2009, <http://www.guntrustlawyer.com/2009/10/why-do-i-need-an-nfa-firearms.html> (explaining the benefits of a gun trust over individual ownership).

38. *Id.*

39. BEYER, *supra* note 17, at 1 (explaining that a trustee has all of the responsibilities of property ownership but does not benefit from the property in any way).

40. *See* Goldman, *supra* note 37.

41. *See* Joshua G. Prince, *The New Trust on the Block—The “Gun Trust”*, Jan. 31, 2009, <http://blog.princelaw.com/2009/2/1/the-new-trust-on-the-block-the-gun-trust> (stating that Pennsylvania no longer follows RAP); *see also* TEX. CONST. art. I, § 26.

42. TEX. CONST. art. I, § 26.

43. *See* Goldman, *supra* note 37.

follow the Rule are more restricted and must be a bit more creative. One idea is to include young, legally allowable settlors and trustees at the time of trust creation as well as young beneficiaries. This way the trust, although not perpetual, would have some longevity. Regardless, short-term gun trusts, or gun trusts governed by RAP states, may be allowed a tax-free transfer upon the death of the settlor, to the beneficiary, as long as the beneficiary is of familial ties.<sup>44</sup>

### III. HISTORY AND EVOLUTION OF GUN LEGISLATION

#### A. Federal Law

The NFA largely governs the purchase, sale, transfer, use, and ownership of certain weapons.<sup>45</sup> Congress enacted the NFA in 1934 under Congress' Sixteenth Amendment power of taxation.<sup>46</sup> Although the NFA does impose taxes in various circumstances, the tax concerns were not the primary motivation behind the legislation.<sup>47</sup> The NFA sought to regulate specific firearms that communities believed were contributing to waves of violence.<sup>48</sup>

The Alcohol, Tobacco, and Firearms (ATF) division of the United States Department of Treasury provides resources on how to identify whether a weapon falls under NFA regulations.<sup>49</sup> NFA firearms include: machine guns, suppressors, short-barreled shotguns (sawed-off shotguns), and destructive devices (mortars, howitzers, grenade launchers).<sup>50</sup> The most popular NFA weapon is the machine gun.<sup>51</sup> The United States Code and case law provide detailed definitions and descriptions in order to make clear exactly what these terms mean.<sup>52</sup> This group of firearms is also commonly referred to as "Title II weapons."<sup>53</sup> Title II simply refers to the section of the NFA and Gun Control Act where these firearms are defined.<sup>54</sup> The legislative history of the NFA indicates that Congress believed these weapons to pose a

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44. *Id.*

45. ATF.gov, History of the National Firearms Act, <http://www.atf.gov/firearms/nfa/> (last visited Jan. 29, 2009).

46. *See id.*

47. *Id.*

48. *Id.*

49. BUREAU OF ALCOHOL TOBACCO FIREARMS AND EXPLOSIVES, ATF NATIONAL FIREARMS ACT HANDBOOK 5 (Rev. Apr. 2009), available at <http://www.atf.gov/publications/download/p/atf-p-5320-8/atf-p-5320-8.pdf>.

50. 27 C.F.R. 479 (2003).

51. *See Americans By Slight Margin Say Gun in the Home Makes It Safer*, *supra* note 10.

52. *See* 26 U.S.C.S. § 5845(b) (2005); *see also* *United States v. Carter*, 530 U.S. 255, 257–58 (defining machine gun as: "[A]ny weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.").

53. *See* Goldman, *supra* note 37.

54. *Id.*

grave and serious threat to the safety of citizens due to their use in recent violent crimes.<sup>55</sup>

An important portion of the act imposes a \$200 transfer tax on all NFA weapons.<sup>56</sup> In 1934 this was a burdensome and aggressive tax, but today it is regarded as a fairly reasonable administrative tax.<sup>57</sup> Interestingly, Congress did not index this tax for inflation, which may indicate that Congress did not anticipate this tax to have the longevity it has. At the inception of the Act, the tax was meant to discourage and prevent the transfer of these weapons.<sup>58</sup> Although the tax remains in effect today, it is no longer a vehicle of prevention.<sup>59</sup> Additionally, the Act imposes a Special Occupational Tax (SOT) on persons and entities engaged in the manufacturing, importing, and dealing of NFA firearms.<sup>60</sup>

The NFA has been amended and expanded as the political culture of our nation has evolved. Namely, Congress has enacted additional provisions to regulate firearms: the Gun Control Act of 1968, and most recently the Firearm Owners' Protection Act (FOPA).<sup>61</sup> The amendments and expansions found in the later legislation have drastically increased the regulations on the transfer, possession, and ownership of NFA weapons.<sup>62</sup> The FOPA, although intended to protect Second Amendment rights, changed the Gun Control Act so severely that it made the transfer and ownership of machine guns illegal.<sup>63</sup> The FOPA did lay out two exceptions to this blanket prohibition. First, an exception was made for the transfer and possession of machine guns by government agencies.<sup>64</sup> Second, an exception was made for machine guns that were lawfully possessed in compliance with the NFA at the time of the prohibition in 1986.<sup>65</sup> It follows that any legal transfer of machine guns lawfully possessed in 1986, whether through sale or inheritance, remain protected by the second exception.

Unlawful possession of NFA firearms, be it actual or constructive, comes with criminal penalties strictly enforced by a no tolerance policy.<sup>66</sup> The NFA authorizes a fine of up to \$250,000, up to ten years in prison, and the forfeiture of the weapon and any "vessel, vehicle, or aircraft" used to

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55. See ATF.gov, *supra* note 45.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. See *supra* note 11 and accompanying text.

62. See *supra* note 11 and accompanying text.

63. Firearm Owners' Protection Act, 18 U.S.C. § 921 (1986). The machine gun ban, pioneered by Representative Hughes, a democrat from New Jersey, placed a ban on civilian ownership of machine guns not registered or manufactured before May 19, 1986. House Amend. 777 to H.R. 4332.

64. *Id.*

65. *Id.*

66. See *supra* note 33.

conceal or convey the firearm.<sup>67</sup> Therefore, the seemingly tedious procedures and processes that accompany ownership of an NFA weapon are important and relevant under every circumstance.<sup>68</sup>

The trend in NFA gun legislation and regulation is obviously to restrict transfer and ownership in ways that ultimately weed out civilian ownership entirely.<sup>69</sup> What this goal and strict legislation ignores is the monetary and sentimental value that these firearms usually represent. Whether the firearm has familial significance or was just costly to acquire is irrelevant to gun control legislators.<sup>70</sup> In an effort to take preemptive action and to prevent criminal penalties or confiscation, estate-planning professionals have emerged with a solution: NFA Gun Trust.<sup>71</sup>

### B. State Law

Although the federal government has a comprehensive framework established to regulate the rights associated with certain firearms, state and local governments do not prohibit imposing additional restrictions.<sup>72</sup> The United States lacks uniform ownership laws between the states.<sup>73</sup> Regulation of NFA classified firearms typically coincides with the political climate of a particular location.<sup>74</sup> For example, whereas Texas and Arizona do not place additional restrictions on their residents, Connecticut imposes a total prohibition of assault weapons and select fire machine guns on top of the regulations sanctioned by the NFA, Gun Control Act (GCA), and FOIPA.<sup>75</sup> Some states, such as Illinois and Michigan, attempt to find a middle ground on the spectrum.<sup>76</sup> Ultimately, the state and local governments can legislate at will within the confines of general legal principles.<sup>77</sup>

Always consult state and local laws when determining your options regarding firearm ownership. In addition, remember that compliance with the National Firearms Act, Gun Control Act, and the Firearm Owners' Protection Act is not a defense to violating local laws of gun purchase, sale,

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67. 26 U.S.C.S. §§ 5861(d),(j) (Lexis 2010); 26 U.S.C.S. § 5872 (Lexis 2010); 49 U.S.C.S. §§ 781-788 (Lexis 2003).

68. *See supra* note 11.

69. *See supra* note 41.

70. *See supra* notes 11, 41.

71. *See generally supra* note 33.

72. *E.g.*, TEX. PENAL CODE ANN. § 46.05(c) (Vernon 2005).

73. *Compare* TEX. PENAL CODE ANN. § 46.05(c) (Vernon 2005) with N.Y. PENAL LAW § 265 (McKinney 2008) (includes a ban almost identical to the expired Federal Assault Weapons Ban).

74. *See, e.g.*, TEX. PENAL CODE ANN. § 46.05(c) (Vernon 2005); N.Y. PENAL LAW § 265 (McKinney 2008).

75. TEX. PENAL CODE ANN. § 46.05(c) (Vernon 2005); ARIZ. REV. STAT. ANN. §§ 13-3101 (West 2009); CONN. GEN. STAT. §§ 53-202 (2009).

76. *See* 430 ILL. COMP. STAT. 65 (2009); 720 ILL. COMP. STAT. 5124 (2010); Mich. Comp. Laws § 750.224.

77. *See generally id.* and *supra* note 69.

transfer, and possession.<sup>78</sup> Finally, pay close attention to the trust laws established in your state in order to determine the proper formation and terms of a Gun Trust.<sup>79</sup>

#### IV. THE GUN TRUST

##### A. *The Gun Trust Method and Purpose*

A recent phenomenon in the estate planning community is to create a distinct and separate trust arrangement for owners of NFA weapons. As briefly mentioned above, Title II designates certain firearms have as requiring more stringent procedures for sale, transfer, use, and possession.<sup>80</sup> There are obviously public policy arguments to be made in support of and against these strict processes.

Proponents of gun reform assert that weapons of this kind are especially dangerous and civilian access to them is totally unnecessary.<sup>81</sup> NFA weapon owners argue their Second Amendment right to bear arms.<sup>82</sup> Although that was a simplification of both perspectives, it is evident that gun laws are a volatile topic and will continue to be an ongoing debate.<sup>83</sup> For this reason, many NFA firearms owners are becoming increasingly fearful that Congress will place a blanket prohibition on all civilian ownership, possession, and transfer of these firearms.<sup>84</sup> The regulations found in the National Firearms Act are just stepping-stones to this final result.<sup>85</sup> Many gun owners and gun enthusiasts believe that the next step in gun regulation is to prevent transfer of these weapons.<sup>86</sup>

Transfer of a Title II NFA firearm to an individual is a long and tedious process.<sup>87</sup> Because improper transfer can result in major fines and jail time, the transfer of these weapons must be taken very seriously.<sup>88</sup> Chapter Nine of the NFA Handbook describes the necessary steps to transfer NFA firearms.<sup>89</sup> As with any element of the law, it is important to determine how certain items are identified and certain terms defined. The NFA defines transfer as “selling, assigning, pledging, leasing, loaning, giving away, or

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78. *Supra* note 45.

79. *See* discussion *supra* Part II.C.

80. *See supra* note 41.

81. *See supra* notes 10, 11 and accompanying text.

82. *See* NRA.org, Who We Are, And What We Do, <http://www.NRAILA.org/About/> (last visited Jan. 29, 2009).

83. *Compare* NRA.org with bradycampaign.org.

84. *See generally* Tom W. Smith, *Public Attitudes Towards the Regulation of Firearms*, Nat'l. Opinion Research Ctr., (University of Chicago, Mar. 2007).

85. *See id.*

86. *See id.*

87. *See supra* note 45, at 59–66.

88. *See supra* text accompanying note 57.

89. *See supra* note 45, at 59–66.

otherwise disposing of” an NFA firearm.<sup>90</sup> Although the definition of transfer is fairly general, it only lawfully applies to NFA weapons that are registered to the transferor in the National Firearm Register and Transfer Record.<sup>91</sup> Transferring, possessing, or receiving an NFA weapon that is not legally registered is a criminal act.<sup>92</sup> Unregistered NFA weapons are subject to seizure and forfeiture.<sup>93</sup> Once a weapon has been determined registered, the administrative steps of transfer are as follows: transferee must complete ATF Form 4;<sup>94</sup> payment of required taxes in the form of a check or money order;<sup>95</sup> obtain a signed law enforcement certification from the chief law enforcement officer of your jurisdiction.<sup>96</sup> Although in theory these administrative steps are just tedious and lengthy, practically they have become unmanageable.<sup>97</sup> Most notably, chief law enforcement officers have stopped signing the law enforcement certification without cause.<sup>98</sup> This obstacle is particularly egregious because there is no legal avenue or remedy to compel chief law enforcement officers to sign the certification.<sup>99</sup>

Individual ownership of an NFA weapon may put your family at risk due to the doctrine of constructive possession.<sup>100</sup> *United States v. Turnbough* is the landmark constructive possession case.<sup>101</sup> Although the case is not specific to an NFA firearm, the principles and issues are identical to those

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90. *Id.* at 59; *see also* 26 U.S.C. § 5845(j) (2005).

91. *See supra* note 45, at 59.

92. *Id.*

93. *Id.*

94. Form 4 can be downloaded from <http://www.atf.gov/forms/firearms/>. Applicants must submit duplicate forms with original signatures. An individual transferee, except if licensed as a manufacturer, importer, or dealer under the Gun Control Act, must (1) attach to Item 16, a 2 inch x 2 inch photograph of the frontal view of the transferee taken within 1 year prior to the date of the application and (2) attach two properly completed FBI Forms FD-258 (*Fingerprint Card with blue lines*) to the application. The fingerprints must be clear for accurate classification and taken by someone properly equipped to take them.

95. *See id.* at 1(h), 1(i) (stating that the tax for transferring any NFA firearm is \$200.00 unless the firearm is classified as “any other weapon” and that payment should be submitted with Form 4 as either a check or money order).

96. BUREAU OF ALCOHOL TOBACCO FIREARMS AND EXPLOSIVES, ATF NATIONAL FIREARMS HANDBOOK 64 (2009) (citing 27 C.F.R. § 479.85), *available at* [http://www.atf.gov/publications/firearms/nfa\\_handbook](http://www.atf.gov/publications/firearms/nfa_handbook) (“Acceptable certifying officials include chiefs of police, county sheriffs, heads of State police, State or local district attorneys, or ‘such other persons whose certificates may in a particular case be acceptable to the Director.’”).

97. *See generally* Joshua G. Prince, *Estate Planning 101 Under the National Firearms Act*, Nov. 11, 2007, <http://paelderestatedfiduciary.blogspot.com/2007/11/estate-planning-for-grandpops-gun-in.html> (explaining the basic procedures, requirements, and obstacles of purchasing, possessing, and transferring NFA firearms).

98. *See Lomont v. O’Neill*, 285 F.3d 9, 15 (D.C. Cir. 2002) (stating that a chief law enforcement officer is not required to sign a certification).

99. *Id.*

100. Joshua Prince, *NFA and Constructive Possession: Myth or Reality?*, July 8, 2009, <http://blog.princelaw.com/2009/7/8/nfa-and-constructive-possession-myth-or-reality/comments/365#comment-365> (July 8 2009).

101. *See United States v. Turnbough*, 114 F.3d 1192 (7th Cir. 1997).

confronted with NFA firearms.<sup>102</sup> Mr. Turnbough kept an illegal firearm in the home he shared with his girlfriend and his girlfriend's daughter.<sup>103</sup> The court in *Turnbough* ruled that "the government may establish constructive possession by demonstrating that the defendant exercised ownership, dominion, or control over the premises in which the contraband is concealed."<sup>104</sup> The court does not require that the defendant exercised ownership, dominion, or control over the actual contraband itself.<sup>105</sup> To be charged with and convicted of constructive possession or any violation of the National Firearms Act, the prosecution is not required to prove intent.<sup>106</sup> Something as simple as a spouse knowing the access code to the gun safe can lead to prosecution of both the spouse and the weapon owner.<sup>107</sup> With an NFA Trust, multiple people can legally possess, use, purchase, and know how to gain access to the firearms.<sup>108</sup> The NFA Trust substantially diminishes the risks associated with constructive possession.<sup>109</sup> This is an important benefit, especially in homes that are shared with spouses and children.<sup>110</sup>

Another dilemma, often faced by families, relates to the transfer of NFA weapons in a person's estate following death or incapacity.<sup>111</sup> The registration information compiled in the National Firearms Registry and Transfer record is tax information.<sup>112</sup> The executor of an estate is the only person this information may be disclosed to.<sup>113</sup> Obviously, any unregistered firearms are immediately confiscating and cannot be registered by the estate.<sup>114</sup> For registered firearms, the executor is responsible for completing the necessary steps to register the firearms to himself.<sup>115</sup> Although technically the executor unlawfully possesses the firearm until the registration is cleared, ATF allows the executor a reasonable amount of time to take the necessary step for transfer.<sup>116</sup> Generally, the process should be completed

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102. See *supra* note 97.

103. *Turnbough*, 114 F.3d at 1192 (1997).

104. *Id.* at \*2.

105. *Id.*

106. David M. Goldman, *Constructive Possession: NFA Trusts vs. Individual Ownership*, NFA GUN TRUST LAWYER BLOG, Aug. 5, 2009, <http://www.guntrustlawyer.com/2009/08/constructive-possession-nfa-tr.html>.

107. See PRINCE, *supra* note 97.

108. GOLDMAN, *supra* note 106.

109. See *id.*

110. *Id.*

111. *Transfers of National Firearms Act: Firearms in Decedents' Estates*, BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS 1 (2006), <http://www.atf.gov/press/releases/1999/09/090599-openletter-nfa-estate-transfers.html>.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

prior to the probate closing.<sup>117</sup> The executor is wholly responsible for the firearm (must remain in the executors custody and control) registered to the decedent.<sup>118</sup> Although the executor may seek advice and support from a federally licensed firearms owner or dealer, he may not transfer the firearm directly from the decedent to the licensee under any circumstances.<sup>119</sup> If the executor were to transfer the firearm to a licensee for consignment or safekeeping, the executor would be criminally liable because even consignment and safekeeping are transfers subject to the requirements of the National Firearms Act.<sup>120</sup> The licensee is not forbidden from assisting the executor by identifying potential purchasers and acting as a broker.<sup>121</sup> The benefit of a probate transfer of the firearm is that the transfer is exempt from the \$200 tax when the firearm is transferred to a lawful heir.<sup>122</sup> A lawful heir is determined by the decedent's will or through the intestacy laws outlined in the jurisdiction's probate code.<sup>123</sup> ATF Form 5 is used when applying for a tax-exempt transfer to a lawful heir.<sup>124</sup> When transferring the NFA firearm to a lawful heir, the heir must supply fingerprints to the FBI with the transfer application.<sup>125</sup> These procedures are categorically the same as a transfer to an individual.<sup>126</sup> If the firearm is transferred out of the estate, the transfer is no longer tax-exempt and is subject to the requirements of ATF Form 4.<sup>127</sup> If the firearm is unserviceable, the transfer is once again tax-exempt.<sup>128</sup>

The solution to most of the obstacles and time-delays associated with acquiring a Title II weapon as an individual is simple. When the term "person" is used in a legal context, the National Firearms Act has defined the word to include corporations, trusts, and other similar legal entities.<sup>129</sup> Because you can transfer a registered NFA firearm to an individual--barring any specific state legislation stating otherwise--it follows that you can transfer a registered NFA firearm to an estate.<sup>130</sup> If drafted properly, an NFA Gun Trust should give guidance to the grantor, trustee(s), and beneficiaries of the trust to help them avoid any NFA violations.

You may be wondering why not form a corporation or LLC? Generally, a trust is more efficient for the average firearms owner because there is no

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117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *See id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *See id.*

127. *Id.*

128. *Id.*

129. 27 C.F.R. § 479.11 (2003).

130. *See* 27 C.F.R. § 479.81 (2009).

annual state filing fees or tax preparation required with trusts.<sup>131</sup> Business entities such as corporations and LLCs are not private.<sup>132</sup> Typically, information about the persons involved in these business formations is public.<sup>133</sup> These entities are usually required to file tax returns with the IRS.<sup>134</sup> The Secretary of State must be notified to change anything regarding who can use, purchase, or possess the corporation's or LLC's firearms.<sup>135</sup> An NFA Gun Trust does not have any annual fees or documents that must be filed with the state; to amend an NFA Gun Trust you simply change the instrument to designate who can use, purchase, or possess the firearms.<sup>136</sup>

A Gun Trust expedites the purchase of firearms and also provides a comprehensive estate plan to maintain ownership and ease the transfer of firearms at death.<sup>137</sup> Additional benefits of the gun trust include, but are not limited to: no finger prints, photos, or law enforcement certification required; the ability of anyone acting as a trustee to lawfully possess the firearms held in trust; removes the assets from probate proceedings; continues to protect your assets if the transfer of NFA firearms is one day prohibited.<sup>138</sup> Although a traditional trust may satisfy the purchase requirements and even expedite the process, it will not provide for the complexities of the future, nor comprehensively protect against unlawful possession in case of death or incapacity.<sup>139</sup>

When creating a Gun Trust, it is important to think through the specifics of your situation. Ultimately, this process requires you to determine your present and future goals, and with whom these goals relate. Sometimes it can be difficult to truly determine how you would like something handled at death or incapacity, but it is important so that the trust can outline specific instructions and powers for the trustee in case of unplanned events.<sup>140</sup> Considering that NFA weapons cannot be transferred like traditional personal property in the event of death or incapacity, without proper trust creation, the risk of criminal penalties and confiscation is significant.<sup>141</sup>

Basic underlying principles of trust formation apply to the creation of a Gun Trust.<sup>142</sup> The people involved in the formation of a trust typically

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131. David M. Goldman, *NFA Trust and Purchase of Class 3 Items*, Jan. 5, 2008, [http://www.floridaestateplanninglawyerblog.com/2008/01/nfa\\_trust\\_and\\_purchase\\_of\\_class\\_3\\_items.html](http://www.floridaestateplanninglawyerblog.com/2008/01/nfa_trust_and_purchase_of_class_3_items.html).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *See* Goldman, *supra* note 37.

138. *Id.*

139. *See* discussion *infra* Part IV.B.

140. Beyer, *supra* note 15, at 5.

141. *See supra* note 11 and accompanying text.

142. E-mail correspondence with David M. Goldman in which he provided a Gun Trust Issues Outline.

include a grantor, trustee, successor trustee, and beneficiaries.<sup>143</sup> As previously mentioned, the grantor contributes the property to the trust.<sup>144</sup> The trustee (or co-trustees) is authorized to be in possession of and manage the property of the trust.<sup>145</sup> The successor trustee is designated to manage the property in the event the original trustee dies, is no longer capable of performing his role, or simply no longer wishes to act as trustee.<sup>146</sup> The ultimate receivers of trust property are the beneficiaries.<sup>147</sup> The goals discussed above will aid in designating people to these specific roles.<sup>148</sup>

When determining the actors to designate roles to, keep in mind that a grantor cannot name himself as the only beneficiary if he is also the sole grantor and sole trustee.<sup>149</sup> This type of trust formation will result in an invalid trust.<sup>150</sup> Therefore, if the trust purchases a firearm the grantor will be deemed an individual illegally possessing an NFA firearm because the trust never existed and the grantor did not comply with the procedures of an individual purchasing an NFA firearm.<sup>151</sup> Also, the grantor should be wary of including too many people in the trust because anyone named as a trustee may use the firearms.<sup>152</sup> This presents significant risks because each trustee is jointly and severally liable for all of the actions of co-trustees under the partnership issues documented in the National Firearms Act.<sup>153</sup>

Arguably, the most important parts of creating a Gun Trust are the determination of powers, duties, and other terms in the trust instrument.<sup>154</sup> Because these duties are drastically different from the popular “health, education, management, and support” it is ill advised to include other assets in an NFA Firearms Trust.<sup>155</sup> Additional assets would only create confusion and unnecessary risk.<sup>156</sup>

A generic Gun Trust is almost impossible to create because of the variety of scenarios, situations, and issues that present themselves in each individual’s life. But, there are a few key elements that a settlor should always address. An NFA Firearms Trust must include the following information in order to determine necessary actions to ensure proper transfer in the event of death or incapacity: whether it is permissible in the jurisdiction

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143. See discussion *supra* Part II.A.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Supra* note 140.

149. BEYER, *supra* note 15, at 5.

150. *Id.*

151. See *supra* note 129.

152. *Supra* note 140.

153. *Id.*

154. David M. Goldman, *What Is an NFA Trust?*, Oct. 8, 2009, <http://www.guntrustlawyer.com/2009/10/what-is-a-nfa-firearms-trust.html>.

155. See *supra* note 15, at 5.

156. *Id.*

to transfer the items; whether the items are legal in the state where they will be transferred to; whether the beneficiary is legally able to be in possession of or use the items; whether the successor trustee is given the ability to independently determine that the beneficiary is mature and responsible enough to have control of the firearms.<sup>157</sup> Settlers can include an additional provision, which is just now becoming popular in the Gun Trust, providing for education on proper firearm usage for beneficiaries when they reach adulthood.<sup>158</sup> Although education is a common element found in trusts, the provision seems advisable to define in more detail that the beneficiary is to receive aid in the form of trust funds to complete courses in firearm education specifically.<sup>159</sup> A California Gun and Trust Lawyer by the name of David Durringer explains:

Such training can provide your children with the comfort of skill at arms so they can protect themselves and their own children, and furthermore, passes on American values necessary to preserve political independence of families in our society. Other benefits of such training can include increased personal responsibility and lower juvenile delinquency rates. You may even want to go further with an incentive trust provision actually requiring this training, possibly with achievement standards.<sup>160</sup>

As Gun Trusts continue to grow in popularity, Gun Trust professionals will likely continue to collaborate in order to create the most efficient and effective Gun Trust possible.

#### *B. Proceed with Caution: Generic Trust Forms When Dealing with NFA*

Internet trusts and make your own trust software is a phenomenon that continues to grow in this country.<sup>161</sup> Although most people emerge unscathed with a valid trust, there have been situations where estate plans were ineffective because of errors made when forming the trust. As the Gun Trust becomes more popular, free gun trust forms and gun trust software is beginning to emerge.<sup>162</sup> Currently, there are only a few distributors (using this method, although gun trust specific, the generic trust is still a substantial risk and should be avoided) so people are attempting to use generic trust

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157. See David M. Goldman, *How Is a NFA Gun Trust Different than a Revocable Trust?* July 15, 2009, <http://www.guntrustlawyer.com/2009/07/how-is-a-nfa-gun-trust-differe.html>.

158. David M. Goldman, *Does the Definition of Education in Your Firearms and Estate Planning Trust Allow for Firearms Training?*, <http://www.guntrustlawyer.com/2009/12/does-the-definition-of-educati.html>.

159. See *id.*

160. *Id.*

161. See, e.g., LegalZoom.com, *Living Trust Overview*, <http://www.legalzoom.com/living-trusts/living-trusts-overview.html> (last visited Jan. 29, 2010).

162. GOLDMAN, *supra* note 37.

forms to cover their NFA firearms.<sup>163</sup> Time and time again this technique is proving to create serious problems.<sup>164</sup> A significant portion of these forms, when used for NFA weapons, create invalid trusts.<sup>165</sup> An invalid trust means that a trust was not created.<sup>166</sup> If the trust does not legally exist, regardless of whether the ATF approved the transfer to the trust, you will, as an individual, unlawfully possess the firearm and be subject to any and all penalties imposed by the National Firearms Act.<sup>167</sup> In the event that a valid trust was formed, but exists with the terms of a generic trust instrument, the transfer of the weapon is lawful but other problems will arise.<sup>168</sup> Traditional trusts do not address death or incapacity regarding firearms and will instruct trustees to transfer the property in ways “that create liability to the beneficiary put the assets at risk of seizure, and put both the trustee’s and beneficiary at risk of the penalties for violating the NFA.”<sup>169</sup>

Another short cut people are utilizing is a free NFA Gun Trust Form provided by their very own gun dealer.<sup>170</sup> Typically, gun dealers are not attorneys nor are they well versed in estate planning techniques, such as the trust. Therefore, not only are these forms inadequate in establishing even the most basic of trusts, they in no way form the kind of trust necessary for NFA firearms.<sup>171</sup>

Under the aforementioned circumstances, there are a plethora of issues that can arise when using generic forms for traditional trusts.<sup>172</sup> Most trust forms are set up to have one creator and one trustee.<sup>173</sup> If an individual were to form an NFA Gun Trust under those limitations the individual would completely defeat the trust’s ability to protect against constructive possession.<sup>174</sup> Another common issue with trust forms is that trust forms create traditional revocable trusts.<sup>175</sup> Considering the trust is the registered owner of the firearm, the revocation of the trust would lead to unlawful possession by anyone possessing the firearm owned by the revoked

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163. *Id.*

164. *Id.*

165. David M. Goldman, *BATFE Seeks to Seize NFA Firearms from an Invalid Quicken Trust*, NFA GUN TRUST LAWYER BLOG, May 22, 2009, <http://www.guntrustlawyer.com/2009/05/batfe-seeks-to-seize-nfa-firea.html> (discussing that a person that used the popular trust software created by Quicken to establish a trust for NFA purposes created an invalid trust and is now facing criminal penalties and seizure of his weapons).

166. GOLDMAN, *supra* note 37.

167. GOLDMAN, *supra* note 165.

168. GOLDMAN, *supra* note 154.

169. GOLDMAN, *supra* note 37.

170. GOLDMAN, *supra* note 37 (“Lately we have seen many dealers and manufactures providing trusts to customers or helping them to fill out the trusts in order to purchase firearms.”).

171. GOLDMAN, *supra* note 37.

172. GOLDMAN, *supra* note 37.

173. *See* GOLDMAN, *supra* notes 15–18 and accompanying text.

174. GOLDMAN, *supra* note 106.

175. *See* GOLDMAN *supra* note 37.

trust.<sup>176</sup> Traditional revocable trusts are also at risk of revocation by someone acting under the authority of Power of Attorney.<sup>177</sup> Sub trusts created by this form for children should not be used in NFA Gun Trusts because of their restrictive nature and the possibility that a minor could illegally own the firearms.<sup>178</sup> The language used in trust forms regarding trust property usually conveys an idea that the trustee can buy, sell, lease, or alter the property.<sup>179</sup> NFA weapon transfers must follow specific procedures to avoid criminal liability.<sup>180</sup> If a trustee were to act according to the trust and without following protocol, then the trustee would be subject to criminal penalties.<sup>181</sup> Although there is not an extensive and complete list of potential issues involving generic trust forms, it should be clear that the risks associated with making a mistake or improperly forming the trust agreement are serious.<sup>182</sup> As previously mentioned, ATF approval of a purchase by a trust does not shield purchasers if a problem with the trust is later discovered.<sup>183</sup> Basically, ATF assumes the validity of the trust, but in no way guarantees the validity of the trust.<sup>184</sup> When creating a trust for NFA Firearms, it is always better to proceed with caution and hire an attorney with specialized knowledge of the NFA and NFA Gun Trusts.<sup>185</sup>

#### V. A CALL TO ARMS: PUT YOUR TITLE II WEAPONS IN A TRUST

The Gun Trust has become a powerful tool in estate planning when an estate contains Title II National Firearms Weapons. As legislation continues to become more restrictive, many Americans fear losing NFA weapons to government seizure and confiscation.<sup>186</sup> Considering the least expensive legally registered machine gun sells for an average of \$4,000, people have strong personal and economic interests in preserving their ownership and transfer rights.<sup>187</sup>

As explained in detail above, a number of special interest groups are campaigning and lobbying Congress to prevent future transfers of Title II

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176. See GOLDMAN, *supra* note 37.

177. See GOLDMAN, *supra* note 37.

178. See GOLDMAN, *supra* note 37.

179. See GOLDMAN, *supra* note 166.

180. See GOLDMAN, *supra* note 166.

181. See GOLDMAN, *supra* note 166.

182. See *supra* text accompanying note 57.

183. GOLDMAN, *supra* note 37.

184. GOLDMAN, *supra* note 37.

185. See Joshua G. Prince, *The New Trust on the Block . . . The Gun Trust*, Jan. 31, 2009, <http://blog.princelaw.com/2009/2/1/the-new-trust-on-the-block-the-gun-trust> (“[A] *gun trust* should not be drafted without sufficient knowledge of the NFA and BATFE’s rapidly changing, sometimes daily, decisions regarding trust applications.”) (emphasis added).

186. See GOLDMAN, *supra* note 37.

187. Joshua G. Prince, *Grandpop’s Machine Gun in the Chest, Part I*, Sept. 12, 2007, <http://paelderestatefiduciary.blogspot.com/2007/09/i-bequeath-my-machine-gun-to.html>.

weapons.<sup>188</sup> If this occurs, which it most likely will, then any weapons remaining a part of the probate estate are forfeited at death. Any economic or personal value becomes in essence worthless. For those of us who own, or have family members that own, Title II weapons, we know the devastating impact that would have on the gun community. The beauty of an NFA Firearms Trust is that an adult child, family member, or friend can easily be designated as co-owner of the trust.<sup>189</sup> Since the NFA Gun Trust is the registered owner, the actual ownership of the trust can easily be changed and as long as the Trust remains the registered owner, then no transfer within the meaning of the NFA has occurred.<sup>190</sup> Therefore, transfer legislation and restrictions would be inapplicable.

As a gun enthusiast myself, I loathe the thought of losing my Father's Title II weapons to the government with one sweep of legislation. But, the reality of the changing legislation and resulting consequences is becoming increasingly pervasive. Regardless of research and statistics that show legally owned and registered NFA firearms are almost never involved in violent crimes, the sentiment of many powerful people in our nation is that the elimination of private ownership of firearms will lead to a decrease in violence.<sup>191</sup> Therefore, it is imperative that anyone owning Title II weapons that would like their family or friends to have the opportunity to maintain the right to transfer or possess those firearms after they die, should contact a Gun Trust lawyer sooner rather than later.

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188. See text accompanying TEX. PENAL CODE ANN. § 46.05(c) (Vernon 2005); ATF NATIONAL FIREARMS ACTS HANDBOOK, *supra* text accompanying note 45, at 5; see also discussion *supra* Part II.C; ATF.gov, *supra* note 41.

189. See GOLDMAN, *supra* note 37.

190. *Id.*

191. See KLECK, *supra* note 15 and accompanying text.