

DISPATCHES FROM THE TRENCHES OF AMERICA'S GREAT GUN TRUST WARS

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INTRODUCTION

Without question, the national dialogue pertaining to the right to bear arms and the possible expansion of gun control regulations is shaping up to be one of the more heated political topics of the twenty-first century. At the moment, the collective focus of fervent participants on both sides of this ongoing debate have focused a spotlight on an estate planning instrument commonly referred to as a “gun trust.”¹ Typically, estate planning products rarely cause the kind of nationally impassioned discussion as seen with gun trusts. So why have trusts, a commonly used estate planning tool, become entangled in this lively, and often vitriolic, national discussion concerning the purchase and possession of firearms? Moreover, is recent attention paid to these trusts beneficial to, or distracting from, the broader national discourse concerning federal firearms policy? Unfortunately, America’s gun trust wars have been waged by both sides in an atmosphere of frenzied controversy littered with misinformation. This Essay will examine the legitimate, worrisome, and inaccurate concerns surrounding the uses of gun trusts.

In February 2013, the manhunt of Christopher Dorner, an honorably discharged Navy Reservist and former Los Angeles police officer, unnerved the nation. Before committing suicide during a standoff with police at a cabin in the San Bernardino Mountains, Dorner killed four people, wounded three others, and thrust Southern California into a state of panic. In Dorner’s manifesto, he stated that he had used a gun trust to buy silencers and a short-barreled rifle in Nevada.² Following the release of Dorner’s manifesto, the *New York Times* headline read “Trusts Offer a

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¹ A gun trust is created for the ownership, transfer, or possession of federally restricted (but legal-to-own) firearms, also known as “NFA Trusts” or “Title II Trusts.”

² For a copy of the entire manifesto, see *Christopher Dorner’s Manifesto: Los Angeles Cop Killing Suspect Leaves Disturbing Writings on Facebook*, HUFFPOST CRIME (Feb. 7, 2013, 2:16 PM), http://www.huffingtonpost.com/2013/02/07/christopher-dorner-manifesto-ramblings_n_2639141.html.

Legal Loophole for Buying Restricted Guns.”³ Although Dorner could have passed a background check and bought these firearms individually, subsequent press coverage propelled gun trusts from obscurity into the national consciousness as a wedge issue in the gun control debate.⁴

What exactly is a gun trust? It is simply a trust created to receive (or purchase) and manage certain federally restricted, but legal-to-own, firearms. From a trust law perspective, a gun trust is conceptually no different from other trusts. The trustee of a gun trust holds the trust property as a fiduciary for one or more beneficiaries, the trustee takes legal title of the trust property, and beneficiaries enjoy the equitable title to the trust property.⁵ Trusts are frequently used to manage a single type of asset for a specialized purpose (such as an insurance policy or a personal residence). With gun trusts, the trust property typically consists of restricted firearms regulated under federal law (so-called Title II firearms). The gun trust is the legal entity to which any firearm is registered. The trustees and beneficiaries may use the firearms owned by the trust under conditions both specifically dictated in the trust instrument and prescribed by all federal, state, and local firearms laws.

Gun trusts are not illegal and their use for estate planning purposes does not exploit a loophole in the applicable federal firearms laws. In fact, the purchase or ownership of restricted firearms by trusts is specifically contemplated by, and permitted under, federal firearms laws. And, contrary to the general impression implied by the media, trusts provide neither a means to purchase illegal firearms nor an avenue to circumvent laws that prohibit specified individuals from owning, possessing, or using firearms. In addition, no party associated with a gun trust—settlor, trustees, or beneficiaries—is insulated from any criminal liability for violating firearms laws. Finally, gun trusts cannot bypass any of the applicable waiting or “cooling-off” periods mandated before the purchase of a firearm is completed. Therefore, nothing in and of itself is legally wrong with gun trusts purchasing firearms.

Understandably, a major goal of gun control reform is the reduction in the incidences of violent crime, but there is no positive correlation between

³ Erica Goode, *Trusts Offer a Legal Loophole for Buying Restricted Guns*, N.Y. TIMES (Feb. 25, 2013), <http://www.nytimes.com/2013/02/26/us/in-gun-trusts-a-legal-loophole-for-restricted-firearms.html>.

⁴ See, e.g., Associated Press, *Machine Gun Loophole Sees Legal Sales Soar*, USA TODAY (Mar. 12, 2013), <http://www.usatoday.com/videos/news/nation/2013/03/12/1982057>; Lucy Madison, *Poll: Americans Split over Who to Trust on Gun Control*, CBS NEWS (Mar. 12, 2013, 6:45 PM), http://www.cbsnews.com/8301-250_162-57573784/poll-americans-split-over-who-to-trust-on-gun-control; Jamie Smith, *Legal Machine Guns Without Background Checks*, ACTIONNEWSJAX.COM (Feb. 28, 2013, 11:04 PM), <http://www.actionnewsjax.com/content/topstories/story/Legal-machine-guns-without-background-checks/vxhxxLFq5EG9oCaUeqwB9A.aspx>.

⁵ See Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2598–2601 (2011) (discussing the special nature of trusts).

the use of gun trusts and the commission of such crimes. Therefore, a legitimate question arises of whether a problem actually exists with trust ownership of Title II firearms. The Dorner shootings were an exception to the fact that it is extremely rare for Title II firearms to be used in violent crimes or suicides—whether owned individually or by a trust. Moreover, Title II firearms represent a small percentage of the total number of privately owned firearms in the United States.⁶ Thus, the gun trust wars concern merely a sliver of the overall firearms owned in America—and statistically the safest group among them. Yet, despite the seemingly unassuming nature of gun trusts, there seems to be a lot of hype concerning their use.

Gun control advocates are concerned about the differences between the federal transfer requirements for Title II firearms that are applicable to individual applicants versus trust applicants. For *an individual* to obtain Title II firearms, the signature of a local Chief Law Enforcement Officer (CLEO) and the individual's picture and fingerprints must be submitted along with the completed transfer application form. In contrast, the transfer application process for *a trust or other entity* requires none of these. Instead, the trustee simply signs the application form and provides proof of the entity's existence. This distinction is only relevant for the transfer application process of Title II firearms, but it has become the center of the storm in the gun trust wars.

Gun rights proponents tout a gun trust's unique ability to provide comprehensive estate planning for owners of firearms. Probating a firearm has serious risks, including steep fines and jail time, as compared to probating other items of personal property, such as heirlooms or jewelry. Gun trusts provide relevant legal information and procedural safeguards to protect fiduciaries and beneficiaries from accidentally running afoul of firearms laws. And, as controversial as the fingerprints and photographs exception for trusts is for gun control advocates, the CLEO's signature requirement is just as controversial for gun rights proponents, who allege that CLEOs indiscriminately and arbitrarily refuse to sign application forms for no reason, or reasons based upon political motives or personal prejudices. Adding fuel to this concern is the fact that CLEOs are not required to justify their denials, to which there is no legal remedy.

Regardless of where the front line is in the debate concerning gun rights and gun control, millions of Americans own firearms.⁷ These firearm owners will need sound estate planning advice, which includes the potential use of gun trusts. Therefore, this Essay will examine gun trusts through the lens of American trust jurisprudence. In order to accomplish this goal, Part I

⁶ See GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 106–08 (1997).

⁷ There are approximately 230 million privately owned firearms in America—roughly equal to the entire adult population in this country. Some other estimates calculate the number to be closer to 300 million. NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT 7 (2012).

provides an overview of the pertinent, but disparate, laws involved in this debate—federal firearms laws and trust laws. Part II introduces gun trusts descriptively while looking at the possible exploitation of the differences in how transfers of restricted firearms to individuals are treated under federal firearms laws as compared to transfers to trusts. Next, Part III clears up basic misconceptions about gun trusts. Then, Part IV describes and critiques new proposed federal regulations on transfers of Title II firearms to gun trusts. Finally, this Essay concludes that while there might be a need for some tailored tightening of the federal firearms laws concerning the transfers of restricted firearms to gun trusts, they remain a legitimate and important estate planning technique.

I. THE BASICS

A cogent analysis and critique of gun trusts must begin with a discussion of (1) the elementary aspects of federal firearms laws and (2) some basic tenets of trust law.

A. *Applicable Federal Gun Laws and Regulations*

A substantive analysis of gun trusts must begin with a rudimentary overview of federal firearms laws and regulations.⁸ Although firearms are primarily regulated by the states, several important federal firearms laws are more pertinent to the discussion of the rapid growth of interest in gun trusts. The most relevant federal laws for gun trusts are the National Firearms Act of 1934 (NFA),⁹ the Gun Control Act of 1968 (GCA),¹⁰ and the regulations enacted and enforced by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE).¹¹

In the early 1930s, then-U.S. Attorney General Homer Cummings began garnering support for a new plan to tax certain firearms out of circulation. In 1934, Congress enacted the NFA, the first federal gun control legislation in American history. The NFA was designed to make it difficult to obtain certain types of especially lethal guns, particularly

⁸ It should be noted that some states ban weapons that would be legal to possess under federal law. See HARRY HENDERSON, GUN CONTROL 37–39 (rev. ed. 2005). Transfers between different states must comply with not only federal statutes, but also the laws of the individual states. For a discussion concerning the various federal and state gun laws and regulations in the probate process, see Nathan G. Rawling, Note, *A Testamentary Gift of Felony: Avoiding Criminal Penalties from Estate Firearms*, 23 QUINNIPIAC PROB. L.J. 286, 287–90 (2010).

⁹ Pub. L. No. 73-474, 48 Stat. 1236 (codified as amended at I.R.C. §§ 5801–22, 5841–54, 5861, 5871–72 (2006)).

¹⁰ Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–931 (2012)).

¹¹ For a detailed summary of federal and state firearms laws and regulations and pertinent judicial decisions, see STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK (2013).

machine guns and sawed-off shotguns.¹² The NFA tried to accomplish this goal by imposing a statutory excise tax on the manufacture and transfer of these specified firearms and then mandating a registration process on the production and distribution system of these specified firearms from the manufacturing phase to the eventual buyer. The Act called for a \$200 tax to be paid during the sale or transfer of these specified firearms¹³—a tax, at the time, often more costly than the gun itself.¹⁴

The NFA became a landmark act concerning gun control in general. More importantly, the NFA's application process for the transfer of certain regulated firearms is at the heart of the dispute between the two camps carrying on the gun trust wars.

In the decades following the passage of the NFA and the end of Prohibition, crime rates decreased and so did public pressure for gun control measures.¹⁵ In the mid-1960s, however, public sentiment demanded additional congressional protection from firearms after the infamous string of assassinations of President John F. Kennedy, Martin Luther King, Jr., and Robert Kennedy.¹⁶ In addition, the United States Supreme Court's 1968 decision in *Haynes v. United States*,¹⁷ a case interpreting the Fifth Amendment's implications regarding weapons registration procedures under the NFA, greatly weakened the effectiveness of the NFA.

It was during this tumultuous time that Congress ratified the GCA, which remains the major federal statute on gun control today. The GCA is more expansive in scope than former federal firearms laws and contains stricter and more detailed firearm controls. The GCA has two major titles. Title I addresses federal regulations of handguns and long guns, which encompasses the vast majority of firearms in America. Title II incorporates and revises the provisions of the original NFA and remains focused on a

¹² These firearms were commonly used in the gang-related crimes of the time. See *National Firearms Act of 1934*, THEFREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/National+Firearms+Act+of+1934> (last visited Nov. 25, 2013).

¹³ I.R.C. § 5821.

¹⁴ In 1934, a \$200 tax was quite heavy—the equivalent of \$3495 today. See *CPI Inflation Calculator*, BUREAU OF LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited Nov. 25, 2013). Congress, however, did not index this tax for inflation, and the \$200 tax remains in effect today.

¹⁵ See MARK THORNTON, *THE ECONOMICS OF PROHIBITION* 123–25 (1991). The NFA was expanded several times during this time period and faced a constitutional challenge that carved its legacy into current firearms laws. See *United States v. Miller*, 307 U.S. 174 (1939).

¹⁶ See *Gun Control*, THEFREEDICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/gun+control> (last visited Nov. 25, 2013). For a brief history of federal gun control laws, see BRIAN DOHERTY, *GUN CONTROL ON TRIAL* 43–45 (2008) and JAMES B. JACOBS, *CAN GUN CONTROL WORK?* 19–32 (2002).

¹⁷ 390 U.S. 85, 95 (1968) (holding that the registration requirements, outside of statutorily approved means, infringed upon Fifth Amendment privileges against self-incrimination).

narrow variety of firearms.¹⁸ (For purposes of this Essay, references to the NFA now will refer to Title II of the GCA.) In the context of gun trusts, Title II is of greater importance. Although the number of Title II firearms in circulation is low when compared to the number of Title I firearms, gun trusts typically are created to purchase or possess Title II firearms.¹⁹

Despite the NFA's limited applicability to only a small variety of firearms, the newly revised NFA resurrected registration requirements for Title II firearms and expanded the scope of the law to include "destructive device[s]" like hand grenades and other explosive ordnance.²⁰ Central to this legislation were bans on interstate firearms trafficking; bans on firearms ownership by minors, convicted felons, and those deemed mentally incompetent; and a ban on importation of surplus military weapons and other firearms unless deemed "suitable for sporting purposes."²¹

Today, the federal government classifies weapons by their construction, measurements, and abilities²² to determine the requisite level of classification for federal monitoring and regulation. The BATFE provides resources on the identification and proper categorization of weapons for regulation purposes. There are two main classifications—Title I firearms and Title II firearms.

1. *Title I Firearms.*—Title I firearms primarily include, but are not limited to, rifles, shotguns, and handguns²³—the vast majority of firearms owned in America. These weapons can be single shot, bolt action, and even semiautomatic. Title I firearms are not generally regulated by the federal government²⁴ and so they do not require the NFA transfer tax or application process.

2. *Title II Firearms.*—Title II firearms include, but are not limited to, machine guns, short-barreled rifles (i.e., sawed-off shotguns), silencers, explosive ordnance (such as bombs, grenades, mines, and types of rockets and missiles with explosive or incendiary charges over a prescribed amount), and "any other weapon."²⁵ Congress believes that the nature of Title II firearms poses a greater threat to the safety of Americans as

¹⁸ See Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (reenacting the National Firearms Act of 1934, Pub. L. No. 73-474, 48 Stat. 1236). In doing so, Title II replaced and made void the NFA, but it is still referred to as the NFA. In reference to firearms, the terms *Title I* and *Title II* come from the corresponding sections of the GCA.

¹⁹ Rachel Emma Silverman, *Armed for the Future: Gun Trusts Help Owners Legally Pass Down Firearms*, WALL ST. J. (June 9, 2013, 4:21 PM), <http://online.wsj.com/news/articles/SB10001424127887323550604578408281316445350>.

²⁰ 18 U.S.C. § 921(a)(4) (2012).

²¹ *Id.* §§ 921–922.

²² See I.R.C. § 5845 (2006).

²³ *Id.* (defining *rifle*, *shotgun*, and *any other weapon*).

²⁴ See 18 U.S.C. §§ 921–931.

²⁵ *Id.* § 921. For a definition of *any other weapon*, see 27 C.F.R. § 479.11 (2013).

compared to Title I firearms. As a result, Title II firearms are subject to strict registration, transfer, and tax requirements. The BATFE's NFA enforcement branch regulates transfer of ownership of Title II firearms through the National Firearms Registration and Transfer Record.

Because of these heightened regulations and penalties, Title II firearms are generally the corpus of gun trusts. It is important to note, however, that transfers regulated by Title II are relatively uncommon compared to the vast number of firearm transactions that fall under Title I.²⁶ More importantly, legally owned Title II weapons are rarely used in violent crimes, whether owned individually or by a trust or other entity.²⁷ For example, there have been only two murders since 1934 that involved legally registered Title II machine guns and one of them was committed by a police officer.²⁸

3. *Transfers of Title II Firearms.*—The controversy surrounding gun trusts goes to the differences in the application requirements concerning the transfer of Title II firearms for individual transferees and entity transferees. Title II firearms are subject to an extensive regulatory process. Transferring a Title II firearm without complying with the NFA transfer rules is illegal and can result in serious fines, jail time, or both.²⁹ The NFA defines *transfer* as “selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of” a registered Title II firearm.³⁰

In order to transfer a Title II firearm, the weapon must be registered with the National Firearm Register and Transfer Record.³¹ An individual transferee must register by application with the state in which the individual resides. In addition, the individual transferee must complete a transfer form (ATF Form 4).³² Form 4 requires an individual to attach a photograph and two sets of fingerprints for an extensive background check, purchase the \$200 tax stamp, and get the signature of a CLEO on the application.³³

Title II firearms may also be transferred to trusts and other legal entities. An entity also must complete a Form 4, pay the \$200 transfer tax, and provide proof of the existence of the entity.³⁴ However, Form 4 does not require entities to include fingerprints or a picture along with an

²⁶ See JOHNSON, *supra* note 7, at 368. For statistics on the number of the various types of firearms produced and the frequency in the use of each type of firearm in a crime, see *id.* at 7–16.

²⁷ See Jessica B. Jackson, Comment, *Get Your Guns Up! . . . Or at Least Get Them in a Gun Trust!*, 3 EST. PLAN. & COMMUNITY PROP. L.J. CODICIL 1 (2011) (discussing the low number of crimes committed by legal owners of the firearm in question).

²⁸ See *id.* at 3.

²⁹ See I.R.C. §§ 5861(e), 5871 (2006).

³⁰ See *id.* § 5845(j).

³¹ 27 C.F.R. § 479.101 (2013). Transferring or possessing a Title II firearm that is not properly registered is a criminal act covered by I.R.C. § 5861(e).

³² 27 C.F.R. § 479.84; see also I.R.C. § 5812.

³³ 27 C.F.R. § 479.85; see also I.R.C. § 5812.

³⁴ 27 C.F.R. § 479.84.

application. In addition, an entity is not required to obtain a CLEO's signature. Instead, the federal government investigates the trust application to verify the existence of the entity but does not perform background checks in a fashion similar to how it does with an individual's application.

4. *Possession of Title II Firearms.*—The NFA also defines who can own or possess a Title II firearm. In general, a Title II firearm may have only one owner. But a *person* is defined by the NFA as a “partnership, company, association, trust, estate, or corporation, as well as a natural person.”³⁵

Federal law makes it unlawful for certain categories of persons to ship, transport, receive, or possess firearms.³⁶ These categories include convicted felons, wanted fugitives, illegal users of controlled substances, those adjudicated as mentally defective or those committed to any mental institution, illegal aliens, those dishonorably discharged from the military, and those who have renounced American citizenship.³⁷ Unlawful possession of Title II firearms may result in a fine of up to \$10,000, up to ten years in prison, and forfeiture of the weapon (and any vessel or vehicle used to convey the firearm).³⁸

Only the owner or their representative may be in possession of an NFA firearm.³⁹ Moreover, “possession” of a firearm may be either actual or constructive. Circuit courts have ruled that constructive possession exists “when a person knowingly has the power and the intention at a given time of exercising dominion and control over an object or over the area in which the object is located.”⁴⁰ Just knowing that there is a gun in the residence and how to access it may be reason enough for criminal prosecution. Intent does not have to be proven.⁴¹

Accordingly, suppose an individual legally owns a weapon and stores that weapon in his or her house where others live. Should the firearm owner become incapacitated or die and leave the gun safe's combination to a surviving spouse, family member, or companion, those surviving individuals may be subject to prosecution. If those individuals know that there is a firearm and can access it, those surviving individuals can face criminal prosecution for “constructive possession” of the firearm.⁴² In

³⁵ 27 C.F.R. § 479.11.

³⁶ 18 U.S.C. § 922(d), (g) (2012).

³⁷ *Id.* § 922(g)(1)–(9).

³⁸ I.R.C. §§ 5871–5872; 49 U.S.C. §§ 80302–80306 (2006).

³⁹ Lending a Title II firearm could also result in prison, fines, and seizure of the firearm.

⁴⁰ *United States v. Booth*, 111 F.3d 1, 2 (1st Cir. 1997) (emphasis omitted); *see also United States v. Turnbough*, 114 F.3d 1192 (7th Cir. 1997) (unpublished disposition).

⁴¹ Gerry W. Beyer & Jessica B. Jackson, *What Estate Planners Need to Know About Firearms*, EST. PLAN. DEV. FOR TEX. PROFS., Apr. 2010.

⁴² *Id.*

addition, the firearm would then be in violation of the NFA and could be confiscated.

It is essential to understand that the possession rules (actual and constructive) apply to individuals regardless of whether the firearm is owned outright or in trust. Accordingly, the rules apply to settlors, trustees, and beneficiaries of a gun trust. Moreover, they apply to executors or personal representatives of estates.

B. *An Elementary Understanding of Trusts*

In addition to a basic knowledge of the pertinent federal firearms laws, a substantive analysis of gun trusts requires an elementary overview of the principles of the laws of trusts. An appreciation of these principles is necessary to understand the role gun trusts can play in proper estate planning for gun owners.

Trusts provide a means for individuals to make gifts. Although most gifts involve a donor simply giving a gift outright to the donee, a gift through trusts conceptually splits the gift between a trustee and beneficiary. In essence, trusts create two distinct elements of asset ownership: (1) legal title and (2) beneficial ownership.⁴³ In a gift to a trust, the trustee acquires legal title to the trust property, while equitable title rests with the beneficiaries. For purposes of this Essay, two types of trusts need explanation: private express trusts and purpose trusts.⁴⁴

In creating a private express trust, the original property owner (the settlor)⁴⁵ intentionally gives property to a trustee to hold for the benefit of a beneficiary upon terms and conditions the settlor has imposed. Trust law historically has aimed to effectuate the settlor's intent.⁴⁶ In this regard, the settlor faces few restraints when formulating the details of the trust instrument.⁴⁷

Purpose trusts exist for a specific purpose rather than for the benefit of individual beneficiaries.⁴⁸ The Uniform Trust Code specifically validates purpose trusts "for a noncharitable purpose without a definite or definitely

⁴³ See RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. d (2003).

⁴⁴ For an elucidation of dozens of other specialized trusts that have evolved over the years in a variety of contexts, see Wendy S. Goffe, *Oddball Trusts and the Lawyers Who Love Them or Trusts for Politicians and Other Animals*, 46 REAL PROP. TR. & EST. L.J. 543 (2012).

⁴⁵ The settlor may also be referred to as the "grantor."

⁴⁶ Effectuating the settlor's intent has been characterized as "[t]he dominant substantive principle of the law of gratuitous transfers." John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1109 (2004); see also Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 288–90 (2010) (discussing the importance of intent effectuating default rules in trusts and estates law).

⁴⁷ A settlor's intent will be ignored only in those rare cases where it violates public policy by encouraging illegal activity, immoral behavior, or the destruction of property, to name a few.

⁴⁸ See Adam J. Hirsch, *Delaware Unifies the Law of Charitable and Noncharitable Purpose Trusts*, EST. PLAN., Nov. 2009, at 13, 14.

ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee.”⁴⁹ Familiar examples of purpose trusts are pet trusts (to cover the care of a pet after the pet owner’s death), funeral trusts (to prepay an individual’s funeral expenses prior to death), and cemetery trusts (to provide for the upkeep of a cemetery plot after one’s death).

A fiduciary relationship arises because the trustee (the legal owner) shepherds the trust property for the benefit and enjoyment of the beneficiary or in accordance with the purpose of the trust. In administering the trust, the trustee is held to a robust and rich concept of fiduciary duties. In fact, the concept of fiduciary duties may be one of the defining aspects of trusts.⁵⁰ These duties function both as legal rules and moral norms.⁵¹

Within the estate planning context, trusts are used to achieve many objectives, usually emotionally charged and entrenched with idiosyncratic and personal preconceptions about death, property rights, personal legacies, paternalism, altruism, or other affective interests. Goals include protecting assets from creditors, minimizing taxes, providing familial support and maintenance, caring for minors or incompetents, preserving future postmortem control, permitting flexibility, teaching wealth management, promoting values, and influencing behavior.⁵² Many of these goals may overlap in a firearm owner’s decision to create a gun trust.

Trusts have various forms and structures. A trust can be used broadly as a will substitute, substantially holding all of a decedent’s property as its corpus. Trusts have been used narrowly to hold specific items of property, such as real estate, insurance, or guns. Trusts can be created during a settlor’s life (*inter vivos* trusts) or upon their death in their will (testamentary trusts), and are able to be short-term, long-term, and even perpetual in duration in some states. Moreover, *inter vivos* trusts may be revocable or irrevocable.

Trusts are entities in themselves, separate and distinct from the parties surrounding their creation (i.e., settlor, trustee, and beneficiary). Regulations from the U.S. Department of the Treasury describe trusts as independent entities, whose purpose is to protect and conserve property for the benefit of the beneficiaries “who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.”⁵³ Because trusts are perceived as separate

⁴⁹ UNIF. TRUST CODE § 409(1) (amended 2010).

⁵⁰ See Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67 (2005) (discussing the importance of the social and moral norms underlying fiduciary duties).

⁵¹ *Id.* at 70.

⁵² See Tritt, *supra* note 5, at 2598–2601 (discussing the general purposes for creating trusts).

⁵³ Treas. Reg. § 301.7701-4(a) (2013).

entities, they have unique partitioning and protection features.⁵⁴ Trust law splits the trustee into two distinct legal persons—an individual acting on its own behalf and a trustee acting on behalf of the trust,⁵⁵ thereby insulating the trustee from creditors of the trust and protecting trust assets from creditors of the trustee. In addition, by creating a spendthrift trust or a discretionary trust, the trust property is insulated from the beneficiaries' creditors. Finally, the settlor's creditors generally cannot reach the trust assets (as long as the settlor is not also a beneficiary). The creditor-protection aspects of trusts are very important in modern estate planning.

Gun owners create gun trusts for the same reasons settlors create any kind of trust. There is nothing novel about using trusts to manage specialized assets, insulate property from future changes in the law, manage property for minors, educate minor beneficiaries, protect property from creditors, avoid probate, and provide privacy. But the concept of the trust being a separate and distinct entity from the trustee or beneficiary does create a unique benefit when trusts are used to purchase Title II firearms. This unique aspect of trust law is the defining feature of gun trusts and is promoted and marketed as such.

II. THE GOOD, THE BAD, AND THE UGLY ABOUT GUN TRUSTS

Understanding the rapid escalation of the use of gun trusts as an estate planning tool requires both a dispositive examination of gun trusts and an exploration of the various underlying reasons for creating them. In addition, this Part will explore the potential for exploiting the differences in how federal firearms laws treat transfers of restricted firearms to individuals as compared with transfers to trusts.

A. Gun Trusts in General

Gun trusts are a legitimate means to obtain legal weapons. A gun trust is a trust specifically designed to own, possess, manage, and dispose of firearms. Typically, a gun trust is drafted to hold only Title II firearms. As discussed earlier, the NFA specifically defines a *person* to include trusts.⁵⁶ Therefore, a trust may legally own registered Title II firearms, *barring any specific state law to the contrary*.⁵⁷ Individuals may purchase Title II firearms through, or transfer Title II firearms into, a gun trust.

Gun trusts come in multiple varieties and are somewhat flexible. Though not exclusively, they tend to be revocable so that the settlor may

⁵⁴ Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998) (noting that the property law aspect of shielding a trustee's assets from creditors is one of the most important contributions of trust law).

⁵⁵ See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 416 (2000).

⁵⁶ 27 C.F.R. § 479.11 (2013).

⁵⁷ Depending on state law, gun trusts may not be transferrable to different states.

make changes to the trust provisions, add or subtract individuals as trustees or beneficiaries, and add to or subtract firearms from the trust corpus. Some are drafted as private trusts, while others are drafted as special purpose trusts. In addition, the durations of gun trusts vary depending on the settlor's desire and the jurisdiction's applicable rule against perpetuities, if any.

Gun trusts must address certain common elements. For example, although the settlor can be a life beneficiary, the settlor cannot be named the sole trustee and the sole beneficiary; otherwise the interests will merge and no trust will have been created.⁵⁸ In addition, to ensure proper transfers during incapacity or death, a gun trust should specifically address (1) the federal gun laws concerning proper possession and transfers of the firearms; (2) the state and regional gun laws where the firearms are located; (3) the state and regional gun laws where the firearms are going; (4) the legality in each location; (5) the proper method for completing any transfer; and (6) the eligibility of the fiduciary, successor fiduciary, and beneficiaries to possess the firearm.

In general, there are three major reasons for creating a gun trust. First, they provide comprehensive estate planning for firearm owners in the event of incapacity or at death. Second, a gun trust allows multiple trustees to lawfully own (in their fiduciary capacity), possess, or even use the firearms held in trust. In contrast, individuals, in their sole capacity, cannot jointly own a single Title II firearm. Finally, purchasing a Title II firearm through a gun trust eases the NFA transfer process because no photos, fingerprints, or CLEO signatures are required.

B. Estate Planning Benefits

Many Americans own firearms. These firearm owners need sound estate planning to deal with the complexities of having federally restricted firearms in their estates. Proponents of gun trusts tout a trust's unique ability to provide comprehensive estate planning for owners of firearms.

Among other benefits, gun trusts can provide relevant information and procedural safeguards to protect fiduciaries and beneficiaries from accidentally running afoul of firearms laws. Considering that Title II firearms cannot be transferred like other tangible personal property, the risk of criminal penalties looms. As discussed earlier, federal law regulates possession and transfer of various firearms. A fiduciary may inadvertently violate the NFA by allowing an individual to use, hold, or possess the weapon (actually or constructively) without following the proper transfer rules under the NFA. For example, a firearm owner may not know if a

⁵⁸ In other words, the individual will be deemed to possess the firearm individually, not as a trustee, because the trust is invalid under the merger doctrine. Therefore, if the individual tried to purchase the Title II firearm through the invalid gun trust, the individual would illegally individually possess the firearm.

potential fiduciary or beneficiary has renounced his or her U.S. citizenship, is under a restraining order, is mentally incompetent, has been convicted of a felony or misdemeanor involving domestic violence, has been dishonorably discharged, or uses narcotics. But the improper administration of Title II firearms can result in the criminal conviction of both the fiduciary and the beneficiary. Not only is a prohibited person not allowed to possess a Title II firearm, but an individual may not legally transfer a Title II firearm to a prohibited person. A well-drafted gun trust will ease compliance with the law by prohibiting NFA violations and giving guidance to the trustee and beneficiaries to help avoid any NFA pitfalls. Moreover, prohibited persons will be precluded from being trustees or beneficiaries.

These same warnings and safeguards could just as easily be added to the language of a will. However, creating and funding the gun trust during life provides additional protection to families and friends against accidental unlawful possession of Title II firearms upon the death or incapacity of the firearm owner.

The other estate planning benefits of gun trusts are common to trusts in general. Gun trusts provide privacy and allow firearms to avoid the probate process. Gun trusts can be tailored to manage a specialized asset. They also may insulate firearms against any changes in the laws affecting future transfers of firearms. (Providing protection, or a hedge, against changes in the law has long been considered a major utility of trusts in general, especially during times of uncertainty in federal transfer tax laws.) In addition, putting assets in trusts allows minors time to mature and creates a means of educating beneficiaries before they receive the benefits of the property. Finally, gun trusts provide continuity of possession: subject to a state's rule against perpetuities, gun trusts may last several generations without the necessity of transferring title of the firearms upon the death of a trustee or future beneficiary.

C. Non-Estate Planning Benefits

Outside the realm of estate planning, gun trusts offer other benefits. There is nothing novel about using trusts for the many purposes discussed above. But the concept of the trust being a separate and distinct entity from the trustee or beneficiary creates a unique benefit when trusts are used to purchase Title II firearms. It is this aspect of trusts generally that is being exploited and marketed in the promotion and use of gun trusts.

1. Pseudo-Joint Possession of Title II Firearms.—The BATFE requires that there be a single owner for every Title II firearm. When an individual owns a Title II firearm, that individual is the sole individual who may possess that firearm. Likewise, trusts and other entities may not own Title II firearms jointly; only one trust or one entity may own Title II firearms. Remember, the trust is a separate entity from the trustees and

beneficiaries, and it is the trust that serves as the registered owner on the Form 4 transfer application. Although a gun trust, as a single entity, is applying for the Form 4, a gun trust allows any named trustees (not otherwise prohibited) to lawfully engage in the activities of possession of the firearms held in trust because the trustees hold legal title and are granted such use under the gun trust agreement. Accordingly, a gun trust can name numerous trustees, each of whom may lawfully possess the weapon without triggering the NFA transfer laws. Trustees must be at least eighteen years of age, as federal law prohibits anyone under eighteen from possessing Title II weapons (and anyone under twenty-one from purchasing Title II weapons). Trustees must not otherwise be prohibited from possessing firearms. Although this pseudo-joint ownership is promulgated by gun trust enthusiasts as one of the benefits of creating gun trusts, this aspect of ownership and possession does not yet seem to be controversial with gun control advocates.

2. *Fingerprints and Photographs.*—The fingerprint and photograph requirements of Form 4 that are applicable to individuals are not applicable to gun trusts. Instead of submitting fingerprints and pictures, the trust document is often submitted to the BATFE and the trustee signs the Form 4. The federal government then investigates and verifies the trust application.⁵⁹

Trust entities cannot be fingerprinted or photographed. But this type of information might be excluded from trust applications for other reasons that lie in the special nature of trusts. As discussed earlier, a trust is a distinct and separate entity from not only the settlor who created it, but also the trustee who manages the trust property and the beneficiary who enjoys the trust property. The firearm is part of the corpus of the trust, and accordingly the trust is listed as the owner of the firearm on the federal transfer application. Therefore, under trust law, any firearm held by the trust is not the personal firearm of the trustee or beneficiary. From a trust law perspective, it may be understandable why historically the transfer application lacked the requirement of fingerprints and photographs of any trustee or beneficiary.

For gun control proponents, however, the lack of fingerprint and photograph requirements presents a serious problem because background checks are not being run on individuals who may have access to Title II firearms. Although a trust is a separate legal entity distinct from the trustees and beneficiaries, the trustees are deemed to possess the legal title of trust property under American trust jurisprudence (although the firearm is part of the corpus of the trust entity). Accordingly, an argument could be made that the trustee should submit his or her fingerprints and photographs (as should co-trustees, successor trustees, and other individuals who would be in

⁵⁹ See 18 U.S.C. § 923 (2012); 28 C.F.R. § 25.1 (2013).

control of the firearm) on any transfer application. This suggested tightening of the discrepancy in the Form 4 requirements would have an equalizing appeal and facial merit in terms of background checks, while preserving all of the estate planning benefits of a gun trust.

Remember, though, that the use or possession of a Title II firearm by a trustee or beneficiary is subject to criminal possession laws regardless of the transfer application process. Gun trusts do not insulate any party to the trust from criminal liability. The firearms are registered. The trustee's name is registered. The trustee, like any individual, would be criminally liable for possessing a Title II firearm illegally or allowing a prohibited person to possess one.

3. *CLEO Approval.*—The NFA's requirement that individuals obtain a CLEO's signature on the Form 4 is a major motivation of the gun trust marketing campaign by lawyers and a significant reason behind the increased use of gun trusts to purchase Title II firearms by gun owners. The CLEOs' unlimited discretion in refusing to sign a Form 4 enables abuse of discretion. To make matters worse, CLEOs are not required to justify their denial, and there is no appeals process.⁶⁰ It is the widely held belief that CLEOs arbitrarily and prejudicially decline to sign Form 4s. Gun trusts eliminate this potential abuse of discretion because they allow a Title II firearm to be purchased without a CLEO signature.⁶¹

Gun control advocates want individuals to avail themselves of the transfer application process. But if approval is effectively unobtainable because of arbitrary or prejudicial denials by CLEOs, then gun owners are faced with a type of Hobson's choice, where the rules provide no incentive to avail themselves of the transfer application process and the only option is not to participate in the process at all. If the only difference between qualifying for the transfer application and not qualifying is the CLEO's own whims, political motives, or personal prejudices, then the CLEO signature requirement could raise equal protection questions.

A review of legal websites advertising gun trusts and blogs for gun owners shows that each significantly discusses the CLEO signature requirements, the difficult and arbitrary nature of obtaining one, and the alternative solution gun trusts provide. Concern over the CLEO approval requirement breaks down into two hotly contested claims. First, that for political reasons, some CLEOs refuse to sign all Form 4s. Second, that some CLEOs indiscriminately refuse to sign an applicant's Form 4 based on their race, gender, sexual orientation, or socioeconomic status.

⁶⁰ See Jackson, *supra* note 27, at 10.

⁶¹ A number of states have excluded all discretionary aspects from the process of issuing state firearm licenses so that most adults that are not prohibited persons may obtain a license. CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC* 141 (1999).

a. Blanket refusals for political reasons.—Refusals by CLEOs to sign a Form 4 have motivated individuals to create gun trusts to lawfully purchase firearms. Although a seemingly simple process, obtaining the CLEO signature for any Form 4 application may be problematic because of an individual CLEO's general reluctance to sign any Form 4.⁶² Moreover, CLEOs do not have to specify a reason for not signing the form.⁶³ Regardless of the reason, the CLEO signatures on these forms are seemingly much harder for the applicants to obtain. In some jurisdictions, CLEOs refuse to sign any and all Form 4s.⁶⁴ The potentially arbitrary denial of process for Form 4 applications has increasingly motivated the creation of gun trusts.

b. Selective refusals based upon economic, racial, gender, and sexual orientation prejudices.—Gun trusts provide individuals who have been denied CLEOs' signatures based upon the CLEOs' personal prejudices with a mechanism to purchase firearms legally. Prejudicial enforcement of facially neutral firearms regulations has a long history in America and may be the cause behind some arbitrary denials of Form 4s based on the lack of CLEOs' signatures. In fact, selective profiling based upon economic, racial, gender, and sexual orientation biases may play a large part in some CLEOs' refusal to sign Form 4s. Accordingly, gun trusts might play a small role in promoting equal access to firearms for qualified citizens of generally suspect classification.

Minorities are denied access to firearms in a discriminatory fashion. This denial of equal access to firearms has historical foundations in the evolution of America's firearms laws. Discretionary aspects of facially neutral firearms laws have long been used for the sole purpose of preventing minorities from obtaining firearms.⁶⁵ For instance, discriminatory aspects of firearms policy have applied to blacks, other racial minorities, women, homosexuals, ethnic groups, Native Americans, and immigrants, among others.⁶⁶

The denial of a legitimate process for minorities to legally obtain firearms is evidenced in American history. For example, historically, black

⁶² See Beyer & Jackson, *supra* note 41 (“Most notably, chief law enforcement officers have stopped signing the law enforcement certification without cause.”).

⁶³ *Id.*; see also Jackson, *supra* note 27, at 10.

⁶⁴ For an example, see Michael P. Buffer, *Sheriff Refuses to Sign Machine Gun Forms*, CITIZENS' VOICE (Apr. 29, 2013), <http://citizensvoice.com/news/sheriff-refuses-to-sign-machine-gun-forms-1.1480856>.

⁶⁵ See T. Markus Funk, *Gun Control in America: A History of Discrimination Against the Poor and Minorities*, in GUNS IN AMERICA 390, 391 (Jan E. Dizard et al. eds., 1999).

⁶⁶ See EARL R. KRUSCHKE, GUN CONTROL 24–34 (1995). “Today, comparatively few gun permits are issued to blacks, persons of low income, and to minorities in general.” *Id.* at 27. For a fascinating and insightful series of discussions on various views about firearms policy broken down along racial, gender, age, disability, and sexual orientation lines, see JOHNSON, *supra* note 7, at 725–81.

Americans across the country were denied equal access to firearms.⁶⁷ There is clear evidence of a distinction between black and white Americans in “the mythology of American gun ownership: a distinction between puerile foolishness by blacks, and the mature and responsible gun ownership by law-abiding (white) citizens.”⁶⁸ For instance, early constitutions in states like Tennessee and Arkansas specifically restricted firearms ownership to white men beginning in the 1830s.⁶⁹ Courts also supported the efforts of state legislatures to keep black Americans disarmed. The *Dred Scott* decision was partially animated by a desire to deprive minorities of guns.⁷⁰ After the Civil War, discrimination became a matter of understood practice rather than black letter law. Southern states passed firearms restrictions that facially applied to everyone, but then enforced them exclusively against black Americans.⁷¹

It is also important to note that the discretionary, but discriminatory, applications of firearms laws have not been limited to the Deep South or limited to black Americans. Discretionary restrictions have been applied to whites, immigrants, the poor, women, homosexuals, and other minorities. For instance, in 1911 New York passed the Sullivan Act,⁷² an act partially intended to take firearms from the state’s Italian immigrant population.⁷³

Discrimination in access to firearms is evidenced in modern America as well. For example, New York City requires a firearm permit that gives police absolute discretion to grant or deny. When working-class black and Hispanic families publicly marched through their Bronx neighborhoods in 1969 calling for permits for firearms to protect their families from an outbreak of violent crime by drug addicts, police told them that “[i]t’s the policy of this department not to give out permits for people who want to

⁶⁷ See generally Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R. L.J. 67 (1991).

⁶⁸ Maxine Burkett, *Much Ado About . . . Something Else: D.C. v. Heller, the Racialized Mythology of the Second Amendment, and Gun Policy Reform*, 12 J. GENDER RACE & JUST. 57, 98 (2008) (footnote omitted).

⁶⁹ ARK. CONST. of 1836, art. II, § 21, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 101, 103 (Ben: Perley Poore ed., Washington, Gov’t Printing Office 2d ed. 1878); TENN. CONST. of 1834, art. I, § 26, *reprinted in* 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES, *supra*, at 1677, 1679.

⁷⁰ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1856).

⁷¹ See, e.g., *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (en banc) (Buford, J., concurring) (“The statute was never intended to be applied to the white population and in practice has never been so applied.”).

⁷² Ch. 195, 1911 N.Y. Laws 442.

⁷³ See LEE KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA* 183 (1975). For additional discussion, see Tahmassebi, *supra* note 67, at 82 (“New York’s infamous Sullivan law[was] originally enacted to disarm Southern and Eastern European immigrants . . .”).

protect themselves.”⁷⁴ By contrast, wealthy and well-connected residents of the city like Howard Stern and Donald Trump have been given special access to firearms permits for the purpose of protecting themselves in their already well-protected Manhattan penthouses.⁷⁵

It all comes down to preferential police treatment. Because the police have no incentive to sign off on any of these firearms permits, they are typically reserved for privileged applicants. At best, the process promotes corrosive favoritism.⁷⁶ At worst, this discretion builds a legal basis for discrimination.

Many would argue that public safety demands a vigorous exercise of legislative action and police discretion in order to keep dangerous weapons off of America’s streets.⁷⁷ But while modern intentions may be noble, it is hard to imagine that America has really left behind centuries of deceptive legislation and discriminatory police practices.

Requiring a CLEO signature on a Form 4 gives CLEOs complete discretion over access to specially regulated firearms. Gun trusts are a partial solution to this potential problem. They remove that element of police discretion that denies firearms permits to working families in high-crime neighborhoods but allows for permits to be granted to well-secured media moguls and business magnates living in penthouse suites. By removing the discretion of CLEOs from the equation, laws that have historically prevented certain suspect classes of citizens from having equal access to firearms lose much of their effectiveness.

Equal access to firearms is only one consideration in a broader discussion about gun trusts. But it is important to remember that equal access to firearms is not merely a matter of historic interest—it remains a real issue for Americans today.

⁷⁴ *40 in Bronx Seek Gun Permits for Protection Against Addicts*, N.Y. TIMES, Sept. 26, 1969, at 31.

⁷⁵ See Rocco Parascandola & Alison Gendar, *Lifestyles of the Rich and Packin’*: *High-Profile Celebrities Seeking Gun Permits on the Rise*, N.Y. DAILY NEWS (Sept. 27, 2010, 4:00 AM), <http://www.nydailynews.com/new-york/lifestyles-rich-packin-high-profile-celebrities-seeking-gun-permits-rise-article-1.441377>.

⁷⁶ For example, Aerosmith’s Steven Tyler and Joe Perry were given firearms permits in exchange for concert tickets and backstage passes. See Jon Wiederhorn, *Janie’s Got a Gun Permit? Aerosmith Flap Lands Cop in Hot Water*, MTV NEWS (Dec. 19, 2002, 2:00 PM), <http://www.mtv.com/news/articles/1459226/janies-got-gun-permit.jhtml>.

⁷⁷ See Michael B. de Leeuw et. al., *Ready, Aim, Fire?* *District of Columbia v. Heller and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 163 (2009). This article provides an important response to many of the equal protection concerns raised by this discussion. “Unlike early firearms restrictions, which were adopted during a time of widespread African American disenfranchisement, most contemporary firearms laws were adopted in the context of greater minority participation in the electoral process.” *Id.* at 168.

III. GUN TRUST MYTHOLOGY

Misinformation abounds concerning gun trusts, and so briefly debunking some of the myths about them is necessary to properly evaluate these trusts.

A. *Gun Trusts Do Not Bypass Applicable Waiting Periods*

Gun trusts do not bypass any waiting or “cooling-off” period that is mandated before the purchase of a firearm. In fact, the transfer application process of a Form 4 takes months, whether it is an individual application or a trust application.⁷⁸ Regardless, the use of gun trusts to purchase firearms does not bypass or shorten any applicable waiting periods.

B. *Gun Trusts Do Not Make the Purchase of Illegal Guns Easier*

Despite allusions to the contrary, gun trusts do not allow a prohibited person to own, use, or possess a firearm in any way. In addition, gun trusts do not permit the purchase of an illegal firearm or weapon. Gun trusts may only hold legal firearms that individuals may purchase under federal firearms laws.

C. *Gun Trusts Do Not Exculpate Anybody from Criminal Liability*

No party associated with a gun trust (i.e., a settlor, trustee, or beneficiary) is exculpated from any criminal liability that they might otherwise face under federal gun laws. People prohibited from buying or owning firearms cannot serve as trustees. The trust may not transfer a firearm to a person who cannot otherwise lawfully buy or own firearms.

In addition, the trustee is responsible for determining the capacity of the beneficiary and the laws that apply to the beneficiary before distributing a Title II firearm. Unlike traditional revocable trusts, which can be revoked at any time by the settlor, the BATFE must approve termination of the gun trust and distribution of its assets to its beneficiaries as it would any other transfer.

1. *Willful Blindness.*—Trustees of gun trusts can also incur liability under the doctrine of “willful blindness.” Willful blindness occurs when an individual has uncertainties and suspicions but deliberately overlooks those concerns in order to remain ignorant.⁷⁹ “If there is knowledge that [an individual] could have had, should have had but chose not to have, [that individual is] still responsible.”⁸⁰ For example, a trustee could willfully

⁷⁸ See *National Firearms Act (NFA)—Processing Times*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <http://www.atf.gov/firearms/faq/national-firearms-act-processing-times.html> (last visited Nov. 25, 2013).

⁷⁹ See *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992).

⁸⁰ Margaret Heffernan, *Willful Blindness: When a Leader Turns a Blind Eye*, IVEY BUS. J., May–June 2012 (internal quotation marks omitted), available at <http://iveybusinessjournal.com/topics/>

overlook the fact that one of the beneficiaries abuses narcotics, but the trustee would be criminally liable under the doctrine of willful blindness.

2. *Straw Purchase*.—Another potential liability for trustees is the “straw purchase” doctrine. A straw purchase occurs when a person uses a third party, a “straw person,” to purchase a gun on behalf of someone else.⁸¹ Usually the actual buyer is someone who is prohibited from owning a gun and needs to hide his or her identity. The GCA prohibits both the intermediary and the actual buyer from engaging in a straw purchase. However, it is often difficult to prove if the intermediary actually knew that the person he sold the gun to was someone who could not pass a background check. Only licensed gun dealers are required to do background checks on firearms buyers. The maximum penalty for participating in a straw purchase is ten years.⁸² Although straw purchases are difficult to control, they account for over one-third of all gun trafficking investigations.⁸³ The use of a gun trust would not shield a trustee from criminal liability under the straw purchase doctrine.

IV. PROPOSED FEDERAL REGULATIONS ON GUN TRUSTS

On September 9, 2013, the Department of Justice issued a Notice of Proposed Rulemaking (ATF 41P) amending, in part, regulations concerning the transfer of firearms to gun trusts.⁸⁴ Its new rules were proposed as part of a continuing initiative from the White House to take executive action on gun violence in the wake of several high-profile shootings and Congress’s inability to pass any gun reform measures.⁸⁵ This proposal is currently in the public comment period, which lasts ninety days. After the conclusion of the comment period, the ATF may publish a final rule that will become effective thirty days afterwards.

ATF 41P has reignited the gun trust wars and set the Internet ablaze with calls for resistance. Correspondingly, firearms sales and the use of gun

leadership/willful-blindness-when-a-leader-turns-a-blind-eye (discussing the nuances of willful blindness).

⁸¹ For a general discussion of the straw purchase doctrine, see JOHNSON, *supra* note 7, at 475–78.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See Machine Guns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm, 78 Fed. Reg. 55,014 (proposed Sept. 9, 2013) [hereinafter Proposed Regulations] (to be codified at 27 C.F.R. pt. 479), available at <https://www.federalregister.gov/articles/2013/09/09/2013-21661/machine-guns-destructive-devices-and-certain-other-firearms-background-checks-for-responsible>.

⁸⁵ See Office of the Press Sec’y, *Fact Sheet: New Executive Actions to Reduce Gun Violence*, WHITE HOUSE (Aug. 29, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/29/fact-sheet-new-executive-actions-reduce-gun-violence>. The BATFE “received more than 39,000 requests for transfers of these restricted firearms to trusts or corporations” in 2012. *Id.*

trusts in general have increased dramatically before ATF 41P goes into effect.

A. *Exception for Executors*

Under current federal law, if an individual dies with Title II firearms in his or her estate, the executor could face prosecution for constructive possession of an illegal firearm. Under ATF 41P, executors “may lawfully possess the decedent’s NFA firearm during the term of probate without such possession being treated as a transfer from the decedent.”⁸⁶ This is a change that estate planners should support.

B. *Responsible Persons*

ATF 41P adds the term “responsible person[s]” and requires them to submit photographs, fingerprints, and proof of citizenship along with the applicable transfer application. The proposed rule amends 27 C.F.R. § 479.11 to define *responsible person* as “any grantor, trustee, [or] beneficiary . . . who possesses, directly or indirectly, the power or authority under any trust instrument . . . to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm *for, or on behalf of, the entity.*”⁸⁷ Whether trustees are deemed responsible persons would depend on their particular powers and duties as defined under the trust agreement. Settlers may or may not be deemed responsible persons depending on the amount of control they retain over the transferred firearms (e.g., revocable transfers versus irrevocable transfers). Finally, beneficiaries typically do not have authority to control the trust corpus “for, or on behalf of,” the trust. Some beneficiaries may not have vested interests and others may be precluded from using the firearms due to terms in the trust agreement. Therefore, it is not clear whether all beneficiaries will be deemed responsible persons. Adding another level of complexity and administrative costs, ATF 41P proposes a requirement that new responsible persons (as they may change over time) submit a Form 5320.23 within thirty days of the change in status.

C. *CLEO Approval*

The biggest surprise under ATF 41P concerns the CLEO signature requirement. Over the past five years, the ATF has considered eliminating the CLEO signature requirement altogether—for individuals and entities alike.⁸⁸ ATF 41P, however, “proposes extending the CLEO certificate

⁸⁶ Proposed Regulations, *supra* note 84, at 55,020.

⁸⁷ *Id.* at 55,017–18 (emphasis added).

⁸⁸ See *Background Checks for Principal Officers of Corporations, Trusts, and Other Legal Entities with Respect to the Making or Transferring of a National Firearms Act Firearm*, OFF. INFO. & REG. AFF. (July 2013), <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201210&RIN=1140-AA43>.

requirement to responsible persons of a legal entity.”⁸⁹ To address CLEOs’ concern about liability issues, the ATF has proposed amending the language of the CLEO certificate to omit the requirement that the CLEO “state that he has no information that the applicant or transferee will use the firearm for other than lawful purposes.”⁹⁰ The proposed regulation, unfortunately, still leaves the final discretionary decision to the CLEO and undermines a major benefit behind gun trusts. This requirement might serve as a *de facto* ban on all Title II firearms in certain CLEOs’ jurisdictions.

CONCLUSION

Regardless of the tenor of the debate concerning gun rights and gun control, the fact remains that millions of Americans own firearms and they have legitimate estate planning concerns. As detailed in this Essay, firearms in an estate can be problematic and may expose an executor or beneficiary to severe criminal penalties. Gun trusts typically deal only with Title II firearms, which are few in number and very rarely used in violent crimes or suicides. The debate itself focuses on the narrow topic of the transfer application process. More importantly, though, gun trusts do not insulate any individual from firearm possession and use laws. The new national spotlight on this not-so-new estate planning tool is sounding a false alarm, fueling the rapid growth of a burgeoning gun trust practice, and contributing to the increase of laymen trying to create gun trusts without counsel—which might create problems in their estate plans while exposing them to inadvertent criminal liability.

The gun trust wars are distracting America from more serious gun reform issues. Although there might be some need for tailored tightening of the laws concerning the transfers to trusts, gun trusts are a legitimate and important estate planning technique with the ability to alleviate the troublingly prejudicial access to guns inherent in current laws. Both sides would do well to declare a ceasefire on this front of the ongoing firearms debate.

⁸⁹ Proposed Regulations, *supra* note 84, at 55,017.

⁹⁰ *Id.*