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GRANNY HAD A GUN
Firearms in Estate Planning and Administration

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. TERMINOLOGY..... 1

 A. National Firearms Act. 1

 B. NFA Firearms..... 1

 C. Gun Control Act of 1968..... 1

 D. Title I Firearms..... 1

 E. Title II Firearms..... 1

 F. Class 3 Dealers. 1

 G. ATF. 1

 H. Prohibited Person. 1

 I. Regulations. 2

 J. Person. 2

III. SUMMARY OF LEGAL PRINCIPLES..... 2

 A. Possession of NFA Firearms. 2

 B. Application and Transfer Tax..... 2

 C. Tax Paid and Tax Exempt Transfers. 2

 D. Possession By and Transfer to Prohibited Persons..... 3

 E. Machine Guns Registered Before May 19, 1986. 3

IV. ESTATE ADMINISTRATION 3

 A. Possession by an Executor..... 3

 B. Safekeeping by Third Party is Not Allowed..... 3

 C. Constructive Possession. 4

 D. Pieces and Parts. 4

 E. Unregistered or Questionable NFA Firearms..... 4

 F. Other Unlawful Acts. 5

 G. Penalties..... 5

 H. Forfeiture..... 5

 I. Strict Liability..... 6

 J. Transporting Firearms. 6

V. ADDITIONAL DEFINITIONS 6

 A. Firearms - NFA. 6

 B. Firearms - GCA. 7

 C. Machine Guns..... 7

 D. Suppressors and Silencers. 7

 E. Short Barreled Rifles..... 7

 F. Short Barreled Shotguns..... 7

 G. Destructive Devices..... 7

 H. Weapons Made From a Shotgun. 7

 I. Weapons Made From a Rifle..... 7

 J. Any Other Weapon "AOW"..... 7

VI. GUN TRUSTS 8

 A. Valid Under State Law. 8

 B. Federal Authority. 8

 C. Possession of Firearms. 8

 D. No Lapse in Right of Possession..... 8

 E. Reference..... 8

VII. CONCLUSION 8

APPENDIX..... 9

GRANNY HAD A GUN

I. INTRODUCTION

A firearm is just another asset of the estate, albeit one fraught with potential devastating consequences for the executor. The general principles guiding the executor in the administration of an estate apply to the manner in which an executor deals with firearms. Many probate attorneys who do not regularly deal with issues relating to firearms labor under two primary misconceptions. The first misconception is that a person must hold a federal firearms license to own or possess NFA Firearms (machine guns, suppressors, and similar items). The second misconception is that if a person dies and he or she owned a NFA Firearm, the executor may immediately deliver the NFA Firearm to a person or entity holding a Class 3 federal firearms license to store the NFA Firearm until it can be sold or otherwise transferred. This article will primarily focus on the issues relating to NFA Firearms in estate administrations. A comprehensive discussion of gun trusts is beyond the scope of this article. However, gun trusts are valid "probate alternatives" for NFA Firearms and will be discussed briefly at the end of this article.

II. TERMINOLOGY

Additional definitions are found in V.

A. National Firearms Act.

The National Firearms Act ("NFA") is found in 26 U.S.C. Chapter 53. Note that Title 26 is the Internal Revenue Code. Violations of the NFA are therefore considered violations of the tax laws.

B. NFA Firearms.

"NFA Firearms" include machine guns, suppressors and silencers, short barrel rifles and shotguns, destructive devices, weapons made from shotguns and rifles and "any other weapon" as defined in 26 U.S.C. §5845 and 18 U.S.C. §921.

C. Gun Control Act of 1968.

The Gun Control Act of 1968 ("GCA"), Pub. L. No. 90-618, 82 Stat. 1213, is the main federal statute regulating firearms. Title I of the GCA, as amended, is codified in 18 U.S.C. Chapter 44 (Part I, Crimes). Title II of the GCA, as amended, is the NFA.

D. Title I Firearms.

Title I of the GCA applies to "normal" guns such as pistols, rifles, and shotguns, and also to most NFA firearms. The GCA is based on Congress' authority to regulate interstate commerce, rather than on its authority to impose taxes.

E. Title II Firearms.

Title II of the GCA applies to NFA Firearms so the terms Title II Firearms and NFA Firearms are used interchangeably.

F. Class 3 Dealers.

All manufacturers, importers, and dealers of firearms are required to be a federal firearms licensee ("FFL"). A FFL who deals with NFA Firearms is required to become a "special occupational taxpayer" ("SOT") 26 U.S.C. §5801. Importers are Class 1 SOTs, manufacturers are Class 2 SOTs and dealers are Class 3 SOTs. For this reason, persons who sell NFA Firearms are sometimes referred to as "Class 3 Dealers."

G. ATF.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") is a federal law enforcement organization within the United States Department of Justice.

H. Prohibited Person.

1. Federal Law.

A "Prohibited Person" is a person who:

1. is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
2. is a fugitive from justice;
3. is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. §802));
4. has been adjudicated as a mental defective or has been committed to any mental institution;
5. who, being an alien, (i) is illegally or unlawfully in the United States; or (ii) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. §1101(a)(26)));
6. who has been discharged from the Armed Forces under dishonorable conditions;
7. who, having been a citizen of the United States, has renounced his citizenship;
8. is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that (i) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(ii)(I)includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or (II)by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

9. has been convicted in any court of a misdemeanor crime of domestic violence.

(18 U.S.C. §922(d))

2. Texas Law.

Texas Penal Code Sec. 46.04 provides that a felon may not possess a firearm for the 5 years following the later of the (i) release from confinement following conviction of the felony or (ii) release from supervision under community supervision, parole, or mandatory supervision. After 5 years, the felon may only possess a firearm in "the premises at which the person lives." A person convicted of a Class A misdemeanor involving family violence may not possess a firearm for the 5 years following the later of the (i) release from confinement following conviction of the misdemeanor or (ii) release from community supervision following conviction of the misdemeanor.

I. Regulations.

ATF Regulations are found in 27 CFR §§447.1 - 479.193.

J. Person.

27 CFR 479.11 defines a person as "a partnership, company, association, trust, corporation, including each responsible person associated with such an entity; an estate; or an individual." 26 U.S.C. §7701(a)(1) has the following definition: "The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation." Because these definitions apply to the NFA, corporations, other entities and trusts may own Title I and II Firearms.

III. SUMMARY OF LEGAL PRINCIPLES

A. Possession of NFA Firearms.

1. Federal Law.

The NFA makes it illegal for any person other than the registered owner to possess a NFA Firearm. 26 U.S.C. §5861(d). Violation of this law is a felony punishable by ten years imprisonment plus a fine of up to \$250,000.

2. Texas Law.

Texas Penal Code Sec. 46.05 provides that a person commits an offense if the person intentionally or

knowingly possesses, manufactures, transports, repairs, or sells:

- (1) any of the following items, **unless the item is registered in the National Firearms Registration and Transfer Record maintained by the Bureau of Alcohol, Tobacco, Firearms and Explosives** or otherwise not subject to that registration requirement or unless the item is classified as a curio or relic by the United States Department of Justice:

- (A) an explosive weapon;
(B) a machine gun; or
(C) a short-barrel firearm;

- (2) armor-piercing ammunition;
(3) a chemical dispensing device;
(4) a zip gun;
(5) a tire deflation device;
(6) a firearm silencer, unless the firearm silencer is classified as a curio or relic by the United States Department of Justice or the actor otherwise possesses, manufactures, transports, repairs, or sells the firearm silencer in **compliance with federal law**; or
(7) an improvised explosive device. (emphasis added)

B. Application and Transfer Tax.

It is illegal to make or transfer an NFA Firearm until an application has been submitted to ATF, a transfer tax paid, if applicable, (\$200.00 for all NFA Firearms except for "any other weapon" which costs \$5.00), and the application returned by ATF with a tax stamp (see Exhibit "A"). Beginning on July 13, 2016, each application must include additional information on "Responsible Persons," including a completed "Responsible Person Questionnaire" (see Exhibit "B") plus fingerprints and photographs of all responsible persons. The chief local law enforcement officer (CLEO) must be notified of each application. Applications submitted prior to July 13, 2016 did not require the "responsible person" information, but individual applications required a CLEO signature.

C. Tax Paid and Tax Exempt Transfers.

Applicants for Tax Exempt Transfers use ATF Form 5 (see Exhibit "C"). An executor transferring an NFA Firearm to a beneficiary would use ATF Form 5. Applicants for Tax Paid Transfers use ATF Form 4 (see Exhibit "D"). An executor selling a NFA Firearm would use ATF Form 4. Note that the \$200 tax is not indexed for inflation. The NFA was enacted in 1934. \$200 in 1934 is the equivalent of \$3,852 in 2020. That hefty "tax" in 1934 probably dissuaded many law

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