

GUN TRUSTS
THE LETHAL PITFALLS IN DRAFTING THEM
AND
FIREARMS ISSUES IN PROBATE

SEAN P. HEALY

Healy Law Offices, P.C.
113 E. Houston St.
Tyler, Texas 75702-8130
Tel: (903) 592-7566
Fax: (903) 592-7589
www.healylaw.com
genghis@healylaw.com

ALAN S. GASSMAN

Gassman, Crotty & Denicolo, P.A.
1245 Court Street, Suite 102
Clearwater, Florida 33756
Tel: 727-442-1200
Fax: 727-443-5829
<http://gassmanlaw.com>
agassman@gassmanpa.com

State Bar of Texas
FIREARMS LAW:
WHAT EVERY TEXAS LAWYER NEEDS TO KNOW
September 30 - October 1, 2021

Table of Contents

1. <u>Introduction</u>	8
a. Crimes Committed with Legal NFA Firearms are “Minimal”	8
b. Number of Registered NFA Firearms	8
c. Effect of Gun Control Laws on National Defense and Law Enforcement	9
d. Scope and Purpose of This Paper	9
e. Changes from Prior Versions	10
f. Professional Considerations: Business, Ethics, and Avoiding Malpractice	11
2. <u>National Firearms Act (NFA) Trusts</u>	12
a. <u>Summary of Legal Principles</u>	12
b. <u>The Law</u>	13
i. Federal Law	13
(1) National Firearms Act	13
(a) General Provisions	13
(b) Definition of “Firearm”	13
(c) “Assault Weapons”	15
(d) Machine Gun Freeze	15
(e) Definition of “Person”	16
(f) Requirements for Acquiring NFA Firearms	16
(g) Criminal Penalties	17
(h) Death of Owner	17
(2) Gun Control Act	17
(a) Definition of “Firearm”	17
(b) GCA Provisions Applicable to NFA Firearms	18
(i) Prohibited Persons	18
(ii) Minors	18
(iii) Transfers to Prohibited Persons	19
(c) Criminal Penalties	19
ii. Texas Law	19
(1) “Prohibited Weapons” and Criminal Penalties	19
(2) Hunting with Suppressors	19
(3) Trusts	20
(a) Same person as settlor, trustee, and beneficiary	20
(b) Spendthrift Trusts	20
(c) Same person as settlor and beneficiary	21
(d) Powers of trustees	21
c. <u>Recent Developments</u>	22
i. ATF Regulation 41F (Responsible Persons, etc.)	22
(1) Original Proposal, Docket No. ATF 41P	22
(2) Public Response	23
(3) Final Rule, Docket No. ATF 41F	24
(4) Issue Regarding Transfers from an Estate to a Beneficiary	25
(5) Transition Period	26
(6) What was the law like before Regulation 41F?	27
(7) Advantages of NFA trusts that existed before Regulation 41F	28
(a) ATF processed applications by trusts more quickly	28
(b) CLEO approval was not required for trusts	28
(c) Fingerprints and photos were not required for trusts	29
(8) When are you required to submit information on “responsible persons”?	29
(9) Impact on gun trusts and other entities	29
ii. Electronic Filing	30
(1) 7/10/13 Rule	30
(2) Evolution of eForms System	30
(3) Wait Times	31
(a) Current Wait Times	31
(b) Past Wait Times	32
(4) Changes with Regulation 41F	33
(5) Future Improvements	33
iii. Bump Stocks	33

(1) State Laws	34	
(2) Las Vegas Shooting	34	
(3) DOJ's New Bump Stock Rule	34	
(4) Bump Stock Lawsuits	35	
(5) Are Bump Stocks "Machine Guns"?	35	
iv. Stabilizing Braces.	37	
v. Zero Tolerance for FFL's	37	
d. <u>Advantages of Gun Trusts</u>	38	
i. Access to NFA Firearms	38	
ii. Protection From Criminal Prosecution	39	
iii. Continuity	39	
iv. Estate Planning Benefits	39	
v. 24-Month Exemption	39	
vi. Advantages of Non-NFA Gun Trusts	40	
e. <u>Steps Involved in Acquiring or Making NFA Firearms (Including Forming a Trust, if Desired)</u>	40	
i. Order NFA Firearm.	40	
ii. If using a trust, draft and execute it.	41	
iii. Complete and submit form 4 (or Form 1).	41	
iv. Submit two complete copies of Form 4 (or Form 1) with the proper tax.	41	
v. Notify the CLEO.	41	
vi. Wait for ATF to approve the application and return it with the tax stamp.	41	
vii. Complete Form 4473 and submit to NICS check.	41	
viii. Take possession of (or "make") the NFA item.	41	
f. <u>Risks</u>	41	
i. Normal estate planning risks.	41	
ii. Interstate transportation of NFA firearms.	42	
iii. Inadvertent transfers to prohibited persons.	42	
iv. Transfers without Form 4.	42	
v. Inadvertent violation of firearms laws.	43	
vi. Changes to the law.	43	
g. <u>Losing Form 4; Problems with the NFRTR</u>	43	
h. <u>Drafting NFA Trusts</u>	43	
i. Conduct an adequate consultation with the client.	43	
ii. Consider the client's overall situation, and general estate planning needs.	44	
iii. Thoroughly educate the client (and to the extent possible, the other trustees) regarding the legal principles and requirements for acquiring, possessing, and transferring NFA firearms.	44	
iv. Start with the standard form.	44	
v. Draft a valid trust.	45	
vi. Customize the trust for its intended purpose.	45	
vii. Limit civil liability as much as possible.	46	
viii. Limit criminal exposure as much as possible.	46	
ix. Maximize client's control of the trust and assets.	46	
x. Determine what assets the trust will hold.	46	
xi. Maximize flexibility of the trust.	47	
xii. Provide continuity.	47	
xiii. Maximize privacy.	47	
xiv. Include related documents.	47	
(1) Letter of explanation.	47	
(2) Removal of Trustee.	47	
(3) Appointment of Additional (or Successor) Trustee.	48	
(4) Change of Beneficiary	48	
(5) Assignment (to add property to trust)	48	
(6) Declaration of Trust	48	
i. <u>Sources of Gun Trusts</u>	48	
(1) Download or Copy the forms.	48	
(2) Standard living trust form from office supply store, Quicken, or LegalZoom (\$5.00 to \$50.00).	48	
(3) Gun Shop NFA Trusts (\$20.00 to \$25.00).	49	
(4) Inexpensive lawyer-drafted trusts (\$195.00 or so).	49	
(5) Professional gun trusts (\$500.00 to \$3,500.00).	49	
j. <u>Different Types of Gun Trusts.</u>	49	

i.	“Equal Powers” Trusts.	49	
ii.	Benevolent Dictatorships.	50	
iii.	Earmark Trusts.	50	
viii.	Irrevocable Trusts.	50	
ix.	Testamentary Trusts	51	
k.	<u>Alternatives to Gun Trusts.</u>	51	
i.	Individual Ownership	51	
ii.	Corporation/Business entity.	52	
l.	<u>Privacy.</u>	53	
i.	Information that Must Be Disclosed to ATF.	53	
ii.	Information that Must be Disclosed to the CLEO.	53	
iii.	Trusts and Privacy.	53	
iv.	Corporations and Privacy.	53	
v.	Practice Notes on Privacy	54	
m.	<u>Operating Gun Trusts.</u>	54	
i.	RELAX - You Don't Need a Law Degree to Run an NFA Trust.	55	
ii.	The Elephant in the Room - This is NOT Your Father's Living Trust	56	
iii.	Source of Authority.	58	
iv.	Operating an NFA Trust.	58	
v.	Basic Training for Trustees.	58	
vi.	The Duty to Preserve and Protect Trust Property.	59	
vii.	Trustees' Liability.	59	
viii.	Routine Matters.	60	
ix.	Acquiring and Spending Money.	60	
x.	Recordkeeping.	60	
n.	<u>Unusual Situations.</u>	61	
i.	Moving the Situs of an NFA Trust.	61	
ii.	Appointing and Removing Trustees.	61	
iii.	Amending NFA Trusts.	62	
o.	<u>Terminating a Gun Trust.</u>	62	
3.	<u>Lethal Pitfalls in Drafting Gun Trusts</u>	62	
a.	<u>Truly Lethal Pitfalls - Resulting in Prison, Disbarment, or Bankruptcy.</u>	63	
i.	Terminating your NFA trust immediately when the settlors die.	63	
ii.	Letting Prohibited Persons possess or have access to guns or ammunition	63	
iii.	Actually giving possession of guns or ammunition to Prohibited Persons	63	
iv.	Allowing ANYONE other than a Trustee to have possession of or access to NFA firearms	63	
v.	Transferring an NFA firearm <i>before</i> submitting the form and getting it approved,	63	
vi.	Actually INSTRUCTING your trustees to commit felonies	63	
vii.	Failing to warn your trustees NOT to commit felonies	63	
viii.	Appointing one person as sole settlor, trustee, and beneficiary.	64	
ix.	Failing to have at least two trustees at ALL times.	64	
x.	Failing to submit and get approval of Form 5320.20 for interstate transport of MG's, DD's, SBR's, and SBS's	64	
xi.	Allowing your Trust to become invalid.	64	
b.	<u>Less Lethal Pitfalls.</u>	64	
i.	Failing to educate your client.	64	
ii.	Failing to educate the client's trustees.	64	
iii.	Failing to Waive the Duty to Make Trust Property Productive.	64	
iv.	Failing to Properly Assign Liability for Damage or Destruction of Trust Property.	65	
v.	Choosing the wrong trust name.	65	
vi.	Failing to adjust the Trustees' powers.	65	
vii.	Failing to give the Settlor the superior right to control and possess trust property.	65	
viii.	Requiring the Trust to spend money.	65	
ix.	Failing to keep proper records.	65	
x.	Failing to safely store firearms	65	
xi.	Neglecting to add a dispute resolution clause to the trust.	65	
xii.	Not giving spouses their proper status.	66	
xiii.	Failing to make provisions for beneficiaries under 21	66	
xiv.	Failing to build in sufficient flexibility.	66	
xv.	Last resort.	66	

xvi.	Omitting or using poor definitions.	66
xvii.	Forgetting that the law changes	66
xviii.	Failing to ensure that Trustees read the Trust and agree to comply with its terms.	66
4.	<u>Legal Issues with Inheriting Firearms</u>	66
a.	<u>Introduction</u>	66
b.	<u>Applicable Gun Laws</u>	67
i.	Federal firearms laws.	67
(1)	Prohibited Persons.	67
(2)	Age Restrictions.	67
(3)	NICS Check.	67
(4)	Interstate Transfers.	67
(5)	Mailing and Shipping Firearms.	68
(6)	National Firearms Act.	68
(7)	Firearms Owner's Protection Act.	69
(8)	Flying with Firearms.	69
ii.	Texas firearms laws.	69
(1)	Prohibited Persons.	69
(2)	Prohibited Weapons.	69
(3)	Places Weapons Prohibited.	69
(4)	"Carrying" a Handgun.	69
(a)	Longstanding ban	69
(b)	Judicial Exceptions	70
(c)	1995 Concealed handgun law	70
(d)	2005 Motorist Protection Act	70
(e)	Inapplicability to rifles and shotguns	71
(f)	Recent amendments to license to carry law	71
(g)	2021 Constitutional carry and other	71
(h)	Second Amendment Sanctuary State	72
(i)	Practical application for personal representatives	72
iii.	Firearms laws in other states.	72
iv.	Choice of Law.	72
c.	<u>Transferring Firearms to Beneficiaries.</u>	72
i.	Who Gets the Guns?	73
ii.	What Estate Planning Method Will Be Used?	73
(1)	Last Will and Testament.	73
(2)	Trust.	74
(3)	Inter Vivos Transfer.	74
(4)	Intestate Succession.	74
iii.	Who Should Be in Charge?	75
iv.	Drafting Concerns	75
v.	Safe Storage.	75
vi.	Special Concerns with NFA Firearms.	76
vii.	Recommended Steps for the Executor to Take.	77
5.	<u>Conclusion</u>	79

31. **Introduction**

It comes as a surprise to many people that federal law permits civilians to own machine guns, suppressors, and similar items. That law is called the National Firearms Act (NFA). In this paper I will refer to items regulated by the NFA as “NFA firearms.” I will refer to the Bureau of Alcohol, Tobacco, Firearms and Explosives as “ATF.” Texas law also allows individuals to own and possess NFA firearms.

a. **Crimes Committed with Legal NFA Firearms are “Minimal”**

The NFA was enacted in 1934. It generally banned civilian ownership of machine guns, except those lawfully registered. Since then, there appear to be only two instances where a *legally*-owned machine gun was used in a crime. Both happened in Ohio. One was committed by a law enforcement officer. Crimes committed using *illegally* possessed machine guns are also rare.

http://www.guncite.com/gun_control_gcfullau.html.

In 1986, ATF Director Stephen E. Higgins testified before the Subcommittee on Crime: "Registered machine guns which are involved in crimes are so minimal so as not to be considered a law enforcement problem."

On June 1, 2019, a city engineer murdered twelve people in the Virginia Beach municipal building. It was reported that he used two legally-purchased pistols and a legally-purchased suppressor:

<https://abcnews.go.com/US/suspected-virginia-beach-gunman-resigned-personal-reasons-massacre/story?id=63449625>

Following the massacre, President Trump indicated that he was going to consider pushing for an outright ban on suppressors:

<https://www.washingtonexaminer.com/news/trump-seriously-considering-banning-suppressors-after-virginia-beach-shooting>

Despite the negative publicity, suppressors are also almost never used in crimes. In 2017 ATF released information to the Washington Free Beacon, reported here:

<https://freebeacon.com/issues/atf-despite-nearly-1-3-million-silencers-united-states-rarely-used-crimes/>

ATF reported that as of February 3, 2017, there were 1,297,670 suppressors registered with ATF. Almost 400,000, close to a third of the total number in civilian hands, had been registered in the previous year. ATF reported that it had only recommended prosecutions for 44 crimes involving suppressors in the last decade. Which means approximately .003% of them are used in crime each year. The column reports that in a leaked internal memo, ATF Associate Deputy Director Ronald Turk argued that silencers should be deregulated (no longer regulated under the NFA).

Between 1995 and 2005, there were only 167 federal prosecutions involving suppressors reported in Lexis or Westlaw between 1995 and 2005, out of 75-80,000 prosecutions per year. This includes not only convictions, but also sentence enhancements, allegations in the charging instrument, and similar occurrences. Many of these were for mere possession of a suppressor, without any further wrongdoing. There were eight cases where a suppressor was actually used, but not to hurt anyone. There were only two reported murders involving a suppressor during that time. The bottom line is that NFA firearms are almost never used in crimes.

b. **Number of Registered NFA Firearms**

It may be surprising just how popular NFA firearms have become. As of 2007 there were approximately 2 million firearms registered in the National Firearms Registration and Transfer Record (“NFRTR”), the database of NFA firearms maintained by ATF. ATF National Firearms Registration and Transfer Record (2007), posted at <http://www.justice.gov/oig/reports/ATF/e0706/final.pdf>. As of 1995, there were approximately 240,000 registered machine guns. Bureau of Justice Statistics, “Guns Used in Crime, July, 1995, posted at <http://www.bjs.gov/content/pub/pdf/GUIC.PDF>.

Twelve years later (as of May, 2019) the total number of registered NFA firearms had tripled, to 6,058,390. This includes 2,977,630 destructive devices, 1,750,433 “silencers,” and 699,977 machine guns.

The increased interest in NFA firearms has resulted in many more applications and a large increase in tax revenue. ATF publishes a report called “Firearms

Commerce in the United States - Annual Statistical Update.” <https://www.atf.gov/firearms/docs/report/2019-firearms-commerce-report/download>. The 2019 Update shows that in 1990, ATF processed a total of 7,423 transfers using Form 1 (application to make an NFA firearm) or Form 4 (application for tax-paid transfer). I am omitting Form 5 because it includes transfers through probate, but also transfers to governmental entities and certain dealers. The numbers steadily climbed, reaching 12,580 in 2000 and 38,228 in 2010. These applications reached their peak in 2016, totaling 183,896. They totaled 149,904 in 2018, the last year for which numbers are available. The number of transfers in 2018 is more than *twenty times* the number in 2000.

The amount of money ATF has been collecting for the occupational tax (to become an NFA dealer) and the transfer and making tax (to make or acquire an NFA firearm) has increased significantly. In 1984, ATF collected \$596,000 in occupational taxes, and \$666,000 in transfer and making taxes. In 2018, ATF collected \$6,753,000.00 in occupational taxes, and \$33,371,000.00 in transfer and making taxes.

c. Effect of Gun Control Laws on National Defense and Law Enforcement

Our gun laws may or may not have the intended effect, but they also have indirect effects on our national defense and law enforcement. When there is a robust civilian interest in shooting, and a strong market for guns and equipment, those communities benefit. Specifically, the military and law enforcement have benefitted from the advances in technology and technique that have been fueled in part by the civilian market. Consider these examples:

* The widespread enactment of concealed carry laws over the last 35 years or so has encouraged gunmakers to produce models balancing size, weight, and power. Now we have a wide variety of guns intended for carry, each emphasizing these factors to various degrees.

* The “leather slap” (fast draw) competitions grew into the International Practical Shooting Confederation, and its U.S. Region, the United States Practical Shooting Association. Eventually the International Defensive Pistol Association arose as an alternative to IPSC/USPSA. Equipment and techniques developed in the practical shooting sports are routinely adapted for use by the military and police.

* Military and police teams such as the Army

Marksmanship Unit and various SWAT teams compete regularly in 3-gun and other shooting competitions. They develop tactics and try out new equipment that finds its way into the streets and onto the battlefield.

* Civilian interest in self-defense and the shooting sports leads to a general increase in the population’s marksmanship skills. The Civilian Marksmanship Program is based on this concept, seeking to increase those skills by encouraging shooting and by making suitable guns available to civilians.

* Red dot sights first started appearing on civilian guns, as competitors used them to win action pistol matches. Now those sights are common on military and law enforcement firearms.

I believe the availability of NFA firearms like suppressors to consumers has fueled advances in the technology. Civilians may legally own suppressors if they meet the requirements. Manufacturers can create new products and sell them to the public, in addition to the military and police. As a result, today’s suppressors are smaller, lighter, easier to maintain, less expensive, and much more effective in reducing the sound of a gunshot.

In contrast, the technology of machine guns has advanced very little in the last 35 years. Civilians may legally own machine guns manufactured and registered before May 19, 1986, but because of the Hughes Amendment [18 U.S.C. § 922(o)], they may not legally own machine guns made after that date. Manufacturers can create new products, but they can *only* sell them to the government. As a result, today’s machine guns use virtually the same technology that was used in 1986 (and in 1916, for that matter). I believe it is indisputable that the Hughes Amendment has slowed the advance of technology and harmed our readiness.

d. Scope and Purpose of This Paper

The NFA was enacted pursuant to Congress’ power to tax, rather than its power to regulate interstate commerce. For that reason, the NFA was codified in Title 26 of the U.S. Code, otherwise known as the Internal Revenue Code. The Code defines “person” to include trusts, corporations, and other entities, and as a result, it is lawful to form a trust for the purpose of owning NFA firearms. This paper will discuss the various factors that must be considered in drafting National Firearms Act trusts.

The information in this paper is available in three

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Getting Started Drafting Gun Trusts, and Avoiding Lethal Pitfalls

Also available as part of the eCourse

[2021 Estate Planning, Guardianship, and Elder Law eConference](#)

First appeared as part of the conference materials for the
23rd Annual Estate Planning, Guardianship and Elder Law Conference session
"Getting Started Drafting Gun Trusts, and Avoiding Lethal Pitfalls"