

CHAPTER VI

Gun Trusts

Glen B. Blumhardt
Chambers & Ennis PLLC
Raleigh, NC

NORTH CAROLINA

BAR ASSOCIATION
seeking liberty + justice

North Carolina Bar Association (NCBA) publications are intended to provide current and accurate information and are designed to assist in maintaining professional competence. Nonetheless, all original sources of authority presented in NCBA publications should be independently researched in dealing with any client's or your own specific legal matters.

Information provided in North Carolina Bar Association publications is for educational purposes only; nothing in this publication constitutes the provision of legal advice or services, or tax advice or services, and no attorney-client relationship is formed. Publications are distributed with the understanding that neither the North Carolina Bar Association nor any of its authors or employees render any legal, accounting or other professional services.

Copyright © 2018 North Carolina Bar Association.

ALL RIGHTS RESERVED. Permission is hereby granted for the limited copying of pages or portions of pages of this book by or under the direction of licensed attorneys for use in the practice of law. No other use is permitted without the express written consent of the North Carolina Bar Association.

CHAPTER VI
Gun Trusts

Glen B. Blumhardt – Raleigh

Need for Firearms Planning	VI-1
Acquiring Firearms in NC.....	VI-1
Federal Firearms Laws	VI-2
Key Terms	VI-2
National Firearms Act 1924 and Gun Control Act 1968	VI-3
NFA Firearms.....	VI-3
Transfer and Possession	VI-3
Prohibited Persons from Possessing a Firearm.....	VI-4
Firearms Transfer Related Issues	VI-4
Transfer and Possession Challenges	VI-4
Criminal Conduct and NFA Items	VI-5
Firearms Ownership Options.....	VI-5
Gun Trusts.....	VI-5
Gun Trusts do the Following	VI-6
References.....	VI-6

This page is intentionally blank.

CHAPTER VI **Gun Trusts**

Need for Firearms Planning:

- 390 million firearms in U.S. (accounts for 45% of firearms in world), estimated that 25% to 40% of households in America; NC population = 10.3 Million (800,000 veterans); NC is a 'firearms friendly' state; Firearms provide unique benefits AND unique risks
 - Constitutional issues exist
 - Energetic controversy... emotional charged for both sides
 - Risk of criminal or civil liability for 'misuse'
- Firearms are heavily regulated at the State and Federal level; Increasing complicated federal and state laws regulate firearms POSSESSION and TRANSFER; these laws change frequently based on current events

Acquiring Firearms in NC:

- NC Firearms Laws Publication Revised December 2015 by then Attorney General Roy Cooper (see www.ncdoj.com)
- Purchase of a Handgun: a Pistol Purchase Permit issued by the sheriff in the county of one's residence (N.C.G.S. § 14-402); OR a NC issued Concealed Handgun Permit is required (N.C.G.S. § 14-415.25). Presenting either of these exempts the buyer from the on-the-spot NICS background check;
- Purchase of a Long Gun (Rifle or Shotgun) from licensed seller: No permit required – a licensed dealer will conduct on-the-spot NICS background check;
- Handgun transfers by private sellers (non-firearms dealers) require a background check (i.e. Pistol Permit or proof of Concealed Carry Weapon Permit); Long gun transfers by private sellers are not subject to background checks in NC, although federal and state purchaser prohibitions still apply.
- All National Firearms Act (NFA) of 1934 weapons (also known as Title II weapons under the Gun Control Act of 1968) are allowed in NC, as long as federal rules are followed
- Transfer of firearms to beneficiaries after death (handguns require permit)

- ▶ Title is vested in Personal Representative after decedent’s death; HOWEVER, NC law contradicts the proper method for transfer of ownership to qualified beneficiary.
- ▶ N.C.G.S. 14-402(a) states “it is unlawful for any person, firm or corporation in this State to sell, give away, or transfer, or to purchase or receive, at any place within this State from any other place within or without the State any pistol unless (i)...a permit is first obtained or....(ii)...unless a valid North Carolina concealed handgun permit is held...”
- ▶ BUT – in application, the NCDNJ has never required a PR to obtain a Pistol Purchase Permit before taking possession of an estate-transferred firearm.
- ▶ This said, the PR must not transfer a handgun to a beneficiary unless the PR has received either:
 - ▶ (i) a valid handgun purchase permit; or
 - ▶ (ii) proof of a NC concealed handgun permit

Federal Firearms Laws:

- ▶ 1791: 2nd Amendment – “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall NOT be infringed.”
- ▶ 1934: National Firearms Act – Regulates six categories of dangerous weapons (currently Title II of the Gun Control Act of 1968).
- ▶ 1968: Gun Control Act – expanded record keeping and licensing requirements, restricted certain sales and further defined persons banned from possessing firearms. Prohibited mail order of rifles and shotguns.
- ▶ 1972: Bureau of Alcohol Tobacco and Firearms – Enforcement of GCA given to the Dept. of Treasury’s ATF Tax Division of the IRS, which was renamed.
- ▶ 1994: Brady Handgun Violence Prevention Act – 5 day waiting period and background check before a licensed dealer can deliver a handgun to individual. Required a new National Instant Criminal Background Check System (1998 background checks began).

Key Terms:

- ▶ NFA Firearms
- ▶ POSSESSION (*Actual vs Constructive – is there a difference?*)
- ▶ TRANSFER: at purchase; during life; after death – a Gun Trust is designed to address all of these events
- ▶ PROHIBITED PERSONS
 - ▶ ACCIDENTAL FELONY: criminal consequences \$250K / 10yrs / confiscation of firearms / loss of gun rights; Reinstatement of Gun Rights (State vs Federal)

- ▶ NC Pistol Permit – EVERY time handgun/pistol changes hands / a permit is required; permit is good for 5x years (Pistol... Revolver... Handgun...)
- ▶ NC Concealed Carry Permit

National Firearms Act 1934 & Gun Control Act 1968

- ▶ Title I: 1968 – regulates interstate sales of firearms
- ▶ Title II: incorporates the original National Firearms Act (1934) – regulates AND imposes taxes on transfer of the following:
 - ▶ Machine guns (unlawful to transfer or possess a machine gun, except those made prior to 1986) 18U.S.C. 922(o)
 - ▶ Short-barreled rifles (a rifle having a barrel less than 16 inches in length or overall length less than 26 inches)
 - ▶ Short-barreled shotguns (shotgun with a barrel length less than 18 inches)
 - ▶ Silencers (amended to include parts/components)
 - ▶ Any Other Weapon (AOW)
 - ▶ Destructive Devices

NFA Firearms

- ▶ An individual owner MUST be present with the NFA firearm at ALL times; POSSESSION by another is a violation of Federal law and the firearm is subject to seizure and forfeiture
- ▶ To acquire an NFA item requires a Federal Tax Stamp (transfer tax of \$200 paid to Fed Govt)
- ▶ NFA firearms can be owned individually, by a business entity, or by a trust
- ▶ In NC, it is legal to own ALL categories of NFA firearms
 - ▶ In NC, it is legal to hunt with short barrel rifles and/or suppressors/silencers; N.C.G.S. § 113-291.1. Manner of taking wild animals and wild birds (effective October 1, 2013)

Transfer and Possession:

- ▶ Transfer not limited to a gift, sale, or at death (devise)... occurs when somebody else has ACCESS TO your firearm
- ▶ Transfer maybe unlawful absent a background check
- ▶ Possession: Actual vs. Constructive
 - ▶ In hand = Actual
 - ▶ Under control = Constructive
 - ▶ Does it matter.... NO – the law treats them the SAME!
- ▶ Okay for the other person to possess?

- ▶ Gun owner allows possession of a friend
- ▶ What if friend is from another state?
- ▶ What if Trustee allows use by Beneficiary
 - ▶ Can Beneficiary possess alone?
 - ▶ Can Beneficiary allow some other to possess/enjoy?

Prohibited Persons from possessing a Firearm:

- ▶ Federal Law states that a Prohibited Person cannot possess a firearm (18 U.S.C. § 921(a))
- ▶ State Law ALSO defines prohibited persons as well as stating conditions for reinstatement of rights.
- ▶ Persons Such as...
 - ▶ Those convicted for crimes punishable for term > 1 year;
 - ▶ Fugitive from justice;
 - ▶ Drug addict/unlawful user;
 - ▶ Adjudicated Mentally defective;
 - ▶ Illegal alien;
 - ▶ Dishonorably discharged from Military Service;
 - ▶ Renounced Citizenship;
 - ▶ Subject to a restraining order; and
 - ▶ Convicted of domestic violence.

Firearms Transfer Related Issues:

- ▶ An 'Accidental Felony' occurs when a person is subject to prosecution as a result of an inadvertent and unintended criminal 'transfer' of a firearm and/or the resultant 'possession'
- ▶ Many Gun Enthusiasts use firearms socially in activities.... where they might share their firearms... which is a transfer
- ▶ After death (by function of your estate plan to a beneficiary) ... which is a transfer
- ▶ Can the person lawfully receive the firearm...are they a prohibited person? Is there an issue with 'possession'?
- ▶ Can you share your firearm with a family member... a friend... ? Does it matter what type of firearm it is?

Transfer and Possession Challenges:

- ▶ Firearms are heavily regulated by numerous State and Federal Laws.... *that are ever changing*
- ▶ TRANSFER to a Prohibited Person by gift, sale, sharing, or inheritance

- ▶ Criminal POSSESSION (by either a prohibited person or in a prohibited place)
- ▶ TRANSFER to a State where a firearm type is illegal
- ▶ Negligent storage and upkeep of firearms
- ▶ Uncertainty of what to do at death of owner

Criminal Conduct and NFA items:

- ▶ Conduct considered a criminal offense includes...
 - ▶ Receiving or possessing a firearm TRANSFERRED in violation of the NFA;
 - ▶ Receiving or possessing a firearm MADE in violation of the NFA;
 - ▶ Receiving or possessing a firearm NOT REGISTERED in the National Firearms Registration and Transfer Record;
 - ▶ TRANSFERRING or MAKING a firearm in violation of the NFA;
 - ▶ Removing or altering the serial number of the firearm....

Firearms Ownership Options:

- ▶ Individual ownership is simplest – but lack of structure creates risk since there is no legal framework for transfers
- ▶ Entity Ownership is desirable for NFA firearms – provides structure for lawful use by multiple persons... *and more*
 - ▶ Business (LLC) – for specific circumstances but requires filing fees and if administrative dissolution occurs can be problematic
 - ▶ Gun Trusts came about in large part because of the ability to side step CLEO approval and other information requirements (fingerprint cards, photo)... BATF Rule 41F addresses the so-called *Gun Trust loop Hole*
 - ▶ Gun Trusts are the best choice in most cases for private collectors as they are amendable, private and cost effective

Gun Trusts

- ▶ Allows for Acquiring, possessing, sharing firearms during lifetime
 - ▶ Written rules of use
 - ▶ Financial and liquidity issues
 - ▶ Firearms in multiple states
- ▶ Provides for Disposition at Incapacity and at Death
 - ▶ Specific gifts to specific persons (beneficiaries)
 - ▶ Marital planning, outright and trust dispositions

- ▶ Provides Guidance to Trustee to avoid liability issues:
 - ▶ Negligent Entrustment
 - ▶ Negligent Maintenance
 - ▶ Transfer to a Prohibited Person
 - ▶ Criminal Possession
 - ▶ Transfer to a state where a firearm type is illegal
 - ▶ Transfer between states unlawfully

Gun Trusts do the Following:

- ▶ Holds LEGAL TITLE to regulated and non-regulated firearms;
- ▶ Allows only LEGAL BENEFITS for selected individuals;
- ▶ Allows only LEGAL TRANSFERS of firearms by gift, sale, transfer at death, or sharing;
- ▶ Shifts responsibility / personal liability to a Trustee in possession (so long as Grantor is not also negligent);
- ▶ Allows Grantor to reserve key powers and serve as Trustee and Beneficiary;
- ▶ Allows Grantor to add AND remove lifetime beneficiaries or trustees or Special Trustees to 'share' firearms;
- ▶ Allows Grantor to maintain the power to amend or change the Trust as gun laws change;
- ▶ Provides a plan if Grantor is ever incapacitated (avoids potential Guardianship issues);
- ▶ Provides an estate plan for firearms (Avoids Probate)... protects Grantor's loved ones from Accidental Felonies...

References:

- ▶ *National Firearms Act of 1934*
- ▶ *Federal Gun Control Act of 1968*
- ▶ *26 U.S.C. Chapter 53 §§ 5801-5871*
- ▶ *NC Firearms Laws Publication Revised December 2015*