

FIREARMS IN AN ESTATE  
Planning and Distribution

Presented to  
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1. Planning for and distributing Tangible Personal Property generally
  - a. Will
  - b. Trust
  - c. Separate Writing (will or trust)
  - d. Government involvement? (For example, vehicles)
  
2. How are firearms different from other TPP?
  - a. *Some* states regulate transfers of firearms at death (but not AZ)
  - b. *Some* states regulate certain *types* of firearms (but not AZ)
  - c. *Federal* government regulates certain *types* of firearms (Class III/Title II/National Firearms Act of 1934/"NFA")
  - d. *Hoplophobia* – Irrational fear or dislike of firearms which interferes with rational thinking
    - i. Seven-year-old expelled for biting Pop Tart into shape of gun
    - ii. Veterans Day celebration cancelled (after 80 years) because 21-gun salute violates school's "no tolerance for guns on campus" policy.
  
3. Most common situation: owner dies, widow or PR is not knowledgeable about firearms, and/or fears firearms, so one or more of the following occurs:
  - a. Calls the police and says "Get these icky things out of my house." See, *e.g.*, news story about a person who turned in a World War II souvenir German submachine gun to the police in exchange for a \$200 gift card. FMV about \$30,000.
  - b. Calls firearms dealer (or pawnshop!) and sells for a fraction of FMV. A reputable dealer will pay about 50-60% of FMV. A disreputable dealer will pay (much) less.
  - c. Calls firearms dealer or neighbor who "cherry-picks" the good stuff, and leaves the hard-to-sell stuff.
  - d. Firearms "disappear out the back door" and nobody ever knows. (Same risk with all untitled, valuable tangible personal property. Sometimes a Rolex watch disappears, nobody ever knows.)
  - e. News item: Brooklyn police department checks death notices against firearms registrations, confiscates guns from decedents' families.
  
4. Arizona legal requirements for transferring firearms from a decedent's estate (or trust) to a beneficiary: *NONE*. Same as transferring silverware or furniture or shop tools. Just give the property to the beneficiary.
  
5. What about liability? What if the beneficiary uses the gun to commit a crime? Is the fiduciary liable?
  - a. *Generally*, no. No more liable than if fiduciary distributes \$5,000 cash, which the beneficiary uses to buy methamphetamine, or hire a hitman. No more liable than if fiduciary distributes a chainsaw or ax, which the beneficiary uses to commit

murder. No more liable than if the fiduciary distributes an automobile, which the beneficiary uses to drive drunk and kill a baby in its stroller.

- b. Possible exception: “Negligent entrustment.” Would a reasonable person have any reason to know that the beneficiary intended to use the property for an illegal purpose? If the beneficiary is known to be a drunk driver with a suspended license, the fiduciary may have liability for giving that person a car. If the beneficiary says “Hurry up and give me that gun (or chainsaw) so I can go murder my neighbor,” then the fiduciary probably has liability.
  - c. Absent knowledge that the beneficiary is likely to misuse a firearm, or car, or money (or the contents of the medicine cabinet?), there is no general duty to do a “background check” on the beneficiary.
  - d. Why not do a background check “just to be safe”? (In other words, why not do a background check because of hoplophobia? “Guns are scary, and I don’t like them, so I am going to make this transfer as expensive and inconvenient as possible, as an expression of my disapproval.”)
    - i. It costs money..
    - ii. It is an inconvenience.
    - iii. It is an invasion of privacy. “Just because you are paranoid doesn’t mean they are not out to get you.” Other states use firearms registrations to harass visitors – really.
6. Selling firearms from an estate:
- a. If you are going to sell to a dealer, get two or three bids, so you know if you’re being lowballed.
  - b. If you are going to sell to a dealer, sell all or nothing. Do not let the dealer cherry-pick the good stuff, leaving you with the hard-to-sell stuff.
  - c. To get an idea of fair market value of similar guns, or to sell, there are two online sites: [gunsamerica.com](http://gunsamerica.com) and [gunauctions.com](http://gunauctions.com), where you can compare FMVs of similar guns. (The challenge is knowing which guns are really “similar.”)
  - d. There are two auction houses that deal with “collections” (enough guns with enough value to be worth their while): Rock River Auctions and Julia Auctions. Here’s the trade-off if you decide to auction: If you sell to a dealer, you will get 50-60% of FMV, a substantial cost to the beneficiary. If you auction, you may get top dollar (less auction fees), but you assume the risk that you may get very little.

e. I know several gun dealers in town that I do not think highly of, but I won't mention their names. There are two dealers in town that I have known personally for many years, whom I trust to be fair and honest: Legendary Guns of the West in Phoenix (Dave Larue) and Pistol Parlour in Mesa (Clyde Helquist). Undoubtedly there are others; I just don't know them personally.

7. The easy solution: "Special Trustee." It's in the boilerplate of most trusts, for example:

*Special Trustee. If for any reason the Trustee is unwilling or unable to act as to any trust property or matter, such person, nominee, partnership, or qualified corporation as the Trustee designates in writing will act as special trustee as to that property or matter, and may be removed or replaced by the Trustee. Any person or corporation acting as special trustee may resign at any time by written notice to the Trustee. Each special trustee will have the powers granted to the Trustee by this trust agreement, to be exercised only with the approval of the Trustee. Any net income and the proceeds from sale of any part or all of the property administered by the special trustee will be remitted to the Trustee to be administered under this trust agreement.*

That works for firearms as well as for any "tricky" property, like animals, operating businesses, art collections. It's usually in the trust, but often overlooked. If there is anything in the trust that makes the Trustee uncomfortable, appoint a Special Trustee.

8. Planning technique before death: Trustor *nominates* a Special Trustee, typically a friend whom the Trustor knows is knowledgeable and honest (won't self-deal). For example:

*Special Trustee for Firearms. At any time that HUSBANDTRUSTOR is not acting as Trustee, the Trustors' friend, JOE GOODGUY, will be the Special Trustee with respect to any firearms, ammunition, holsters, slings, scopes and all other property related to shooting and hunting that is part of the trust estate. If he is unable or unwilling to serve or continue to serve as Special Trustee, a successor Special Trustee will be appointed by the Trustee then acting. The Special Trustee for firearms (and related property) will have the powers granted to the Trustee by this trust agreement with respect to such property, to be exercised only with the approval of the Trustee. Any net income and the proceeds from sale of any part or all of the property administered by the Special Trustee will be remitted to the Trustee to be administered under this trust agreement.*

9. Same can be done in Wills:

- a. Give PR power to appoint "Special PR" in all wills, or
- b. Testator can appoint Special PR in will.

- c. “Precatory” appointment: “I request but do not require that my PR (or Trustee) consult with a person who is knowledgeable about firearms. The following people are known to me to be knowledgeable: X, Y, and Z.”
10. *Federal regulations.*
    - a. *Generally*, only firearms bought/sold/transferred through a “Federal Firearms Licenced Dealer” (“FFL”) are subject to “background check” and record-keeping.
    - b. *Generally*, private sales/gifts/transfers are *not* subject to Federal background check/record-keeping. This is the much-publicized “gun show loophole” which has implications far beyond gun shows. (Some states – but not AZ – have their own regimes.)
    - c. *Generally*, there is no Federal law requiring firearms transferred from an estate or trust to pass through the hands of an FFL. (Except for *interstate* transfers.)
  11. *Federal regulations for certain types of firearms.*
    - a. National Firearms Act of 1934 (“NFA” or “Class III”)
    - b. Special regulations for transfer/possession of:
      - i. “Machine guns” (“fully automatic”)
      - ii. Shotguns with barrel shorter than 18", overall length at least 26"
      - iii. Rifles with barrel shorter than 16", overall length at least 26"
      - iv. “Silencers” (actually “suppressors”)
      - v. Destructive Device and “Any Other Weapon” (“AOW”)
  12. To purchase/possess a Class III item (old rules):
    - a. Complete the application (Form 4)
    - b. Two sets of fingerprints
    - c. Two passport-size photographs
    - d. Approval of “Chief Law Enforcement Officer” (“CLEO”)
      - i. In Maricopa County, MCSO
      - ii. Personal appearance, not mail
      - iii. *Another* set of fingerprints, done by MCSO
    - e. \$200 “transfer tax”
    - f. Regular form (“Form 4473”) used for all firearms
    - g. Another background check (in addition to the Federal and MCSO).
  13. Process from application to receipt of approval takes 9 months to a year.

14. There was an exception to the law in 1934. The law was designed to dissuade the riff-raff, while letting the one-percenters get their guns.
  - a. In 1934, the only people who had trusts were rich people.
  - b. If a Trust (or other entity) is the applicant, the assumption is that the Trustee will authorize various employees to use the items. (Think security guards.) Since the user cannot be identified (like a “company car”) there is no requirement for fingerprints, photographs, background checks, or CLEO approval. If a trust is the owner, the law assumes that the owner is a fat-cat one-percenter, and therefore exempt from the requirements that apply to the riff-raff.
15. Some people who wanted to buy Class III items simply could not do so, even though they met all the qualifications, because the CLEOs in those jurisdictions automatically and arbitrarily declined all applications (except for campaign donors/celebrities/golfing buddies). Once the “common people” had access to trusts, many people used trusts to bypass the fingerprint/photo/CLEO requirements.
16. New rules effective 7/31/2016 (to close the “trust loophole.”)
  - a. CLEO approval no longer required (just notice), but
  - b. Now all Trustees must be fingerprinted, photographed, background-checked.
17. Types of trusts used:
  - a. Quicken or other DIY trusts that are cheap (or even free), but have no relation to firearms. The trust terms deal with “income,” “principal,” “health, education, support and maintenance,” and other things that have nothing to do with guns. *Usually, the words “firearm” or “guns” do not even appear in the document.* The people at the BATFE know nothing about trusts, so if they see the word “Trust” at the top of the page, they tend to approve the transfer. IMO, these trusts are a time-bomb, and people may get into trouble, if the BATFE starts to disqualify trusts for “form over substance” the way IRS has done with family partnerships.
  - b. Boilerplate firearms trusts (typically \$500 – \$1000). Designed and marketed to other lawyers by a Florida lawyer named David Goldman. They do have the necessary, relevant language with regard to firearms. Often they are not cost-effective for somebody wanting to buy just one Class III item, because the cost of the trust may exceed the cost of the item. *(One that I reviewed for a client said that upon his death, the firearms would be distributed “in accordance with the provisions of his probate estate.”)*

- c. Custom trusts, which have the necessary firearms language, but also are customized to the Trustors' family circumstances, and coordinated with the rest of the estate plan.
18. Firearms-specific trust language includes:
- a. No "disqualified person" can be a Trustee.
  - b. No "disqualified person" can be a beneficiary (*i.e.*, beneficial owner).
  - c. No trust activity (possession/transfer) that would be illegal under federal or state law.
  - d. Authorization to do stuff related to firearms.
  - e. Instructions for use of proceeds of sale.
19. Custom trusts address more than Class III items, more than CLEO avoidance. Used for *all* firearms (and ancillary/related property).
- a. Holding/using items for minor beneficiaries until outright distribution is legal and prudent.
  - b. Beneficiaries who live in "unfree" states like California, New York, Connecticut, etc., where receipt of firearms would be a criminal offense. With a trust, beneficiaries can "visit" and use and enjoy the guns, and take possession if/when they move to a free state, or their home state changes their laws.
  - c. Joint use by beneficiaries, the way that some people form partnerships to buy and use airplanes, for example.

### SUMMARY

- For a totally in-state transaction, involving "normal" guns (not regulated by the NFA), treat like any other tangible personal property – just give the beneficiary the gun(s).
- No liability, unless "negligent entrustment" – prior knowledge of propensity/likelihood to misuse (as with all property).
- Always think Special Trustee.