When to 'Un-pack the Heat':
Florida Guardianships and Mental Health Proceedings
and an Individual's Right to Keep and Bear Arms

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I. The Right to Bear Arms and Federal Law

"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." U.S.C.A. Const. Amend. II

The Second Amendment of the United States Constitution creates an individual right to bear arms and this right is explicitly guaranteed by the Bill of Rights, creating a fundamental right to bear arms. Florida further protects an individual's right to keep and bear arms by incorporating the Second Amendment into the Florida Constitution, by way of the Privileges and Immunities Clause of the 14th Amendment.

District of Columbia v. Heller, 554 U.S. 570 (2008)

In *Heller,* the District of Columbia passed a law that (1) banned the possession of a handgun, (2) made it a crime to carry an unregistered firearm, and (3) prohibited the registration of handguns. Upon review, the United States Supreme Court held that a statute, such as the D.C. law, that prohibited the rendering of any lawful firearm operable for the purpose of immediate self-defense and which essentially banned handgun possession in the home, violated the Second Amendment. This case is important as the Court indicated that the right to bear arms is a constitutional guarantee, deeply rooted in American tradition.

The Court, however, further indicated that the right to bear arms does not exist as a constitutional guarantee without limitation. The right to bear arms, while identifiable as a fundamental right, is subject to limitations by the state. The *Heller* Court announced:

> "Like most rights, the right secured by the Second Amendment is not unlimited… nothing in our opinions should be taken to cause doubt on longstanding prohibitions on the possession of firearms by felons and mentally ill…".

Thus, in *Heller,* the Court clearly supported some identifiable restrictions on the possession of firearms, including the prohibition of the possession of firearms by the mentally ill. As will be further discuss in these materials, various federal and state laws prohibit the sale of or restricted access to firearms to individuals with mental illnesses.

McDonald v. City of Chicago, 561 U.S. 742 (2010)

In a landmark case, the U.S. Supreme Court ruling authorized state and local governments to regulate the right to keep and bear arms.

In *McDonald v. City of Chicago*, Chicago resident Otis McDonald, a 76-year-old (in 2010) retired maintenance engineer, had lived in the Morgan Park neighborhood since buying a house there in 1971. His home and garage had been broken into a combined five times. McDonald legally owned shotguns, but believed them too unwieldy in the event of a robbery, and wanted to purchase a handgun for personal home defense. Due to Chicago's requirement that all firearms in the city be registered, yet refusing all handgun registrations after 1982 when a citywide handgun ban was passed, he was unable to legally own a handgun. As a result, in 2008, he joined three other Chicago residents in filing a lawsuit which became the case herein.

The Court held that the right of an individual to "keep and bear arms," protected by the Second Amendment, is incorporated by the Due Process Clause of the Fourteenth Amendment and applies to the states. "It is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty"

The decision cleared up the uncertainty left in the wake of *District of Columbia v. Heller* as to the scope of gun rights with regard to the states.

Kolbe v. Hogan en Banc opinion, On February 20, 2017, the United States Court of Appeals for the Fourth Circuit upheld Maryland's ban on assault weapons and high-capacity magazines, ruling that **Second Amendment protections do not extend to what it called "weapons of war."**

Judge Robert King, writing for the 10-4 majority, said that the landmark *Heller v. District of Columbia* decision, rendered in 2008, explicitly allows governments to regulate firearms similar in design and function to those issued to members of the military.

"We are convinced that the banned assault weapons and large-capacity magazines are among those arms that are 'like' M-16 rifles — 'weapons that are most useful in military service' — which the *Heller* Court singled out as being beyond the Second Amendment's reach," the decision reads. "Put simply, we have no power to extend Second Amendment protection to the weapons of war that the *Heller* decision explicitly excluded from such coverage."

The decision is the first to exclude AR-15s and other similar guns from Second Amendment protection on the grounds that they are virtually indistinguishable from weapons of war. The court found that such a designation overrides considerations of the common usage or suitability for home self-defense of a gun like the AR-15.

Federal Gun Control Act, 18 USC § 922 (1968) – Prohibits the possession of a firearm by any person who has been "adjudicated as a mental defective…." and also prohibits the sale or transfer of a firearm to any such person.[1]

[1] 18 U.S.C. §922(d).

The term "adjudicated as a mental defective,…" as defined within the federal regulations drafted to implement the provisions of the Gun Control Act means "a determination by a court, board, or commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs."[2]

i. Intended to regulate interstate transfers of firearms.
ii. § 922(d)(4) makes it unlawful for any person to sell or otherwise dispose of a firearm or ammunition to any person knowing or having reasonable cause to believe that such person "has been adjudicated as a mental defective or has been committed to any mental institution."
iii. § 922(g)(4) likewise prohibits any person who has been adjudicated as a mental defective[3] or who has been committed to a mental institution from shipping or transporting "in interstate or foreign commerce… any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."
iv. The Act – importantly – proscribes the sale or disposition of a firearm to one who has been adjudicated a mental defective but **does not address the situation of an older adult who ages in place with a firearm.** Consider – what about the vast majority of cognitively and functionally impaired persons who do not receive a formal adjudication attesting to this fact, nor have they been committed to a mental institution?
v. According to a 21 Sep 2011 "Open Letter to All Federal Firearms Licensees" from ATF, **holders of state-issued medical marijuana cards** are automatically "prohibited persons" under 18 U.S.C 922 (g)(3) and "shipping, transporting, receiving or possessing firearms or ammunition" by a medical marijuana card holder is a violation.[4]

Brady Handgun Violence Prevention Act (1993) § 922 of Title 18 United States Code - The Brady Bill requires that background checks be conducted on individuals before a firearm may be purchased from a federally licensed dealer, manufacturer or importer—unless an exception applies. If there are no additional state restrictions, a firearm may be transferred to an individual upon approval by the National Instant Criminal Background Check System (NICS) maintained by the FBI.

Section 922(g) of the Brady Bill prohibits certain persons from shipping or transporting any firearm in interstate or foreign commerce, or receiving any firearm which has been shipped or transported in

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[2] 27 C.F.R. § 478.11 (2014).

[3] The Act defines "adjudicated mental defective" as a "determination by a court, board, commission or other lawful authority that a person, as a result or a marked subnormal intelligence, or mental illness, incompetency, condition, or disease is (1) a danger to himself or others or (2) lacks the mental capacity to contract or manage his own affairs." 27 C.F.R. § 478.11 (2017).

[4] Herbert, Arthur (September 26, 2011). "Open Letter to All Federal Firearms Licensees" (PDF). *atf.gov*. U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives. Archived from the original (PDF) on February 16, 2013.

interstate or foreign commerce, or possessing any firearm in or affecting commerce. Among other individuals who are restricted, these prohibitions apply to any person who:

1. Is an **unlawful user of or addicted to any controlled substance**;
2. Has **been adjudicated as a mental defective or committed to a mental institution**;

The Brady Act mandated the creation of the National Instant Criminal Background Check System (NICS) and requires a federally licensed firearm dealer to utilize NICS in order to determine whether an individual buyer is eligible to purchase the firearm.

National Instant Criminal Background Check System – The national database, maintained by the FBI, to allow background checks and identification of those who are prohibited from purchasing a firearm. The database provides fast information used to make determinations for eligibility to purchase firearms. State reporting is voluntary to NICS although the NICS Improvements Act of 2008 provided for federal grant incentives for states to report the information.

II. Florida Guardianship Statutes and the Right to Bear Arms

The measures and regulations as provided for in the Federal Gun Control Act of 1968 and the Brady Handgun Violence Prevention Act of 1993, do not address situations in which an individual has not been adjudicated incapacitated nor committed to a mental institution, who already owns a firearm, and begins to show signs of decline in cognitive functioning.

Since the law is clear that states may also create their own laws restricting firearms, how do the laws of the state of Florida function to fill in the gaps in these Federal regulations? At the state level, a guardianship proceeding may be one of the possible means to restrict access to a firearm from an older adult with dementia or age related cognitive disorder.

Florida statutes specify the rights that are both retained and subjected to removal, if the court makes a determination of incapacity in a mental health proceeding. As outlined in Fla. Stat. § 744.3215, the court may determine the rights that the alleged incapacitated person may be incapable of exercising.

Florida Statutes § 744.3215(2) lists the specific rights that may be removed from persons and may *not* be delegated to the guardian. The delineated rights are as follows:

> (a) To marry. If the right to enter into a contract has been removed, the right to marry is subject to court approval.
> (b) To vote.
> (c) To personally apply for government benefits.
> (d) To have a driver license.
> (e) To travel.
> (f) To seek or retain employment.

§ 744.3215(3) lists the rights that may be removed from a person by an order determining incapacity and which may be delegated to the guardian include the right:

(a) To contract.
(b) To sue and defend lawsuits.
(c) To apply for government benefits.
(d) To manage property or to make any gift or disposition of property.
(e) To determine his or her residence.
(f) To consent to medical and mental health treatment.
(g) To make decisions about his or her social environment or other social aspects of his or her life.

Further, Fla. Stat. § 744.3215(1) sets forth which rights are retained by the ward, regardless of capacity:

(a) To have an annual review of the guardianship report and plan.
(b) To have continuing review of the need for restriction of his or her rights.
(c) To be restored to capacity at the earliest possible time.
(d) To be treated humanely, with dignity and respect, and to be protected against abuse, neglect, and exploitation.
(e) To have a qualified guardian.
(f) To remain as independent as possible, including having his or her preference as to place and standard of living honored, either as he or she expressed or demonstrated his or her preference prior to the determination of his or her incapacity or as he or she currently expresses his or her preference, insofar as such request is reasonable.
(g) To be properly educated.
(h) To receive prudent financial management for his or her property and to be informed how his or her property is being managed, if he or she has lost the right to manage property.
(i) To receive services and rehabilitation necessary to maximize the quality of life.
(j) To be free from discrimination because of his or her incapacity.
(k) To have access to the courts.
(*l*) To counsel.
(m) To receive visitors and communicate with others.
(n) To notice of all proceedings related to determination of capacity and guardianship, unless the court finds the incapacitated person lacks the ability to comprehend the notice.
(*o*) To privacy.

The rights outlined in Fla. Stat. § 744.3215 **do not make reference to an individual's right to bear arms** and is therefore not one of the rights specifically retained, terminated or delegated upon a determination that an individual lacks incapacity.

Does the silence in the statute create a presumption that the right to bear arms, since it is not specifically removed, may inherently remain a fundamental right of the ward despite a finding of incapacity?[5]

The silence of the Florida guardianship statutes leaves open discretion of the Courts and therefore possible inconsistencies in treatment of this fundamental right between the Circuits, as well as puts the practical aspects of handling a ward with existing guns in the hands of the guardian.

III. Beyond Guardianship – Other Florida State Restrictions and Regulations relating to Mental Health and Firearms

Florida Statute Chapter 790 addresses state regulations of weapons and firearms and ownership restrictions as they relate to individuals with mental illness.

Specifically, Fla. Stat. §790.065(2)(a)(4), provides that the Department of Law Enforcement is required to review any records available to determine if the potential buyer or transferee of firearms has been *adjudicated mentally defective or has been committee to a mental institution by a court* and as a result is prohibited by federal law from purchasing firearms[6].

Florida Statute § 790.065(2)(a)(4)(a) defines the term "adjudicated mentally defective" as meaning "a determination by a court that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, is a danger to himself or herself or to others or lacks the mental capacity to contract or manage his or her own affairs." The statute further states that "the phrase includes a judicial finding of incapacity under § 744.331(6)… ."

i. Chapter 790 Reporting Requirements

Florida Statute § 790.065 (2)(a) creates a mechanism to submit or report a ward's name in order for them to be entered into the Florida Department of Law Enforcement (FDLE) database of people prohibited from purchasing firearms. The statute defines who should be entered into a Mental Competency (MECOM) Database. The statute further requires the FDLE to "compile and maintain and automated database and requires the Clerks of Court to submit records within one month after the rendition of the adjudication or commitment.

The FDLE Firearm Purchase Program (FPP) is the entity that conducts the required background checks to prevent purchase of firearms by persons who are ineligible under federal and state laws to receive them.[7]

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[5] *See, Grandparents, Guns, and Guardianship: Incapacity of the Right to Bear Arms,* Carla-Michelle Adams, The Florida Bar Journal, December, 2013 Volume 87, No. 10.

[6] Firearm is defined by Fla. Stat. §790.001 as "… any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a crime.

[7] *See* fdle.state.fl.us and fes.fdle.state.fl.us

The MECOM Database was established by FDLE in 2007 to receive and store orders entered by the Clerks of Court on persons "adjudicated mentally defective" or "committed to a mental institution" or a judicial finding of incapacity. This information is then uploaded to NICS and used in the determination process for firearm sales nationwide. This database information is shared with the Florida Department of Agriculture and Consumer Services for the issuance and retention of concealed weapon licenses.

Fla. Stat. §790.065 - Reporting requirements apply to prevent these individuals from purchasing firearms:

i. Has been adjudicated mentally defective[8] or has been committed to a mental institution by a court or as provided in sub-sub-subparagraph b.(II)
ii. a judicial finding of incapacity under s. 744.331(6)(a),
iii. an acquittal by reason of insanity of a person charged with a criminal offense,
iv. and a judicial finding that a criminal defendant is not competent to stand trial.

Who does the Chapter 790 reporting requirement *not* apply to?

i. In a mental institution for observation;
ii. Discharged from a mental institution after an initial review by a physician;
iii. Voluntary admission to a mental institution

ii. Restoration of Firearms Eligibility

States treat the reinstitution of gun ownership rights differently depending on how or why the rights were removed in the first place.

In Florida, pursuant to Fla. Stat. §790.065(2)(a)4d, a person who has been adjudicated mentally defective or committed to a mental institution may petition the Circuit Court that made the adjudication or commitment for relief from the firearm prohibition. A copy of the petition must be served on the state attorney for the county in which the person was adjudicated or committed and the state attorney may have the opportunity to object.

Based on a review of the evidence presented, the court must grant the relief it is finds that the circumstances surrounding the firearm disability, and any other evidence, that the petitioner is not likely to act in a manner dangerous to public safety and that granting the relief would not be contrary to public interest. The petitioner may not petition again for one year if the final order denies the relief.

[8] As used in this subparagraph, "adjudicated mentally defective" means a determination by a court that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, is a danger to himself or herself or to others or lacks the mental capacity to contract or manage his or her own affairs.

Florida Statute § 790.065(2)(a)4e provides that, "Upon receipt of proper notice of relief from firearm disabilities granted under sub-subparagraph d., the department shall delete any mental health record of the person granted relief from the automated database of persons who are prohibited from purchasing a firearm based on court records of adjudications of mental defectiveness or commitments to mental institutions."

The Eleventh Judicial Circuit in Miami-Dade County, Florida has Administrative Order No. 14-03 currently in place which addresses the procedures to prohibit the purchase of firearms and eligibility to apply for or retain a concealed weapon or firearms license by mentally ill persons.[9]

IV. 'Alternative' Methods of Regulation

Social Security Administration Involvement

In 2013, in a Presidential Memorandum issued by President Barack Obama, the Social Security Administration proposed linking background checks for firearm ownership to the Social Security Program by means of the representative payee process.[10]

To appoint a representative payee, the Social Security Administration reviews any prior legal restraints on the individual including any court ordered guardian, any pertinent medical evidence from a physician, psychologist, or qualified medical practitioner, and lay person evidence including face to face interviews with the beneficiary prior to making a determination. Accordingly, a representative payee is only appointed after the production of "convincing evidence of the beneficiary's *inability to handle financial affairs*."

According to the rule, if SSA first determines that someone else is handling a person's financial affairs, it will then look at whether the person is mentally impaired. The rules states that, "at the commencement of the adjudication process we will also notify individuals… of their possible federal prohibition on possession or receiving firearms and the consequences of such prohibition… and the available relief from the prohibition…."

An overview of the proposal was officially put forward by the Social Security Administration (SSA)[11] in May of 2016. Page 19 of the overview said:

> Under our representative payee policy, unless direct payment is prohibited, we presume that an adult beneficiary is capable of managing or directing the management of benefits. However, if we have information that the beneficiary has a mental or physical impairment that prevents him or her from managing or directing the management of benefits, we will develop the

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[9] Administrative Order 14-03 is attached to these materials along with the corresponding sample petitions.
[10] NRA Inst. For Legislative Action, *Florida Alert! Obama's Social Security Administration to Strip Gun Rights of Millions of Seniors,* http://www.nraila/articles/201550721/alert-obama-social -security-administration-to-stripgun-rights-of-millions-of-seniors.
[11] https://www.ssa.gov/regulations/NPRM--Implementation%20of%20the%20NICS%20Improvement%20Amendments%20Act%20of%202007%20%28NIAA%29.PDF

> issue of capability. If a beneficiary has a mental impairment, we will develop the capability issue if there is an indication that the beneficiary may lack the ability to reason properly, is disoriented, has seriously impaired judgment, or is unable to communicate with others.

On February 13, 2017, the Senate voted to repeal the Obama administration regulation. The argument behind undoing the rule was that an inability to handle finances would be too sweeping; that it would cover those who are unable to manage their own affairs for a multitude of reasons– from "subnormal intelligence or mental illness" to "incompetency," and unspecified "condition," or "disease."

"It results in reporting people to the gun ban list that should not be on that list at all," said Sen. Chuck Grassley, Iowa Republican and chief sponsor of the effort to repeal the Obama rule. "It deprives those people [of] their constitutional rights and, in a very important way, violates their constitutional rights without even due process."[12]

***Docs v. Glocks* - Physician Intervention in Florida**

Another possible method of reporting is to involve an individual's healthcare provider in the conversation about whether a patient in cognitive decline should retain possession of a firearm. A medical provider is, arguably, one of the first individuals to detect changes in the cognitive ability of a patient. This alternative approach to reporting has been met with much criticism. Florida was one of the first states to take steps to discourage such inquiries by health care professionals.

In 2011, the Florida legislature passed what is now known as the "Docs v. Glocks" bill which was codified in § 790.338. In pertinent part, Section 790.338(1) states that,

> "… a health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 **may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record** if the practitioner knows that such information is not relevant to the patient's medical care or safety, or the safety of others."

Further, Fla. Stat. 790.338(2) provides that,

> " (a) health care provider licensed under Chapter 456 or health care facility licensed under Chapter 395 shall respect a patient's right to privacy and should **refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home**…"

[12] http://www.washingtontimes.com/news/2017/feb/15/senate-votes-undo-obama-administration-gun-rule/

The Florida legislature was initially intended primarily for pediatricians. Under the law, doctors could potentially lose their licenses or risk large fines for asking patients or their families about gun ownership and gun habits.

In early February 2017, in ***Wollschlaeger v. Governor of the State of Florida,*** D.C. Docket No.: 1:11-cv-22026-MGC, No. 12-14009, a Federal appeals court overturned portions of the 2011 "Docs v. Glocks" law. The U.S. Court of Appeals for the Eleventh Circuit concluded that doctors could not be threatened with losing their license for asking their patients if they owned guns and for discussing gun safety because to do so would violate their freedom of speech.

The Court opined, "Florida does not have carte blanche to restrict the speech of doctors and medical professionals on a certain subject without satisfying the demands of heightened scrutiny…. There is no claim, much less any evidence, that routine questions to patients about the ownership of firearms are medically inappropriate, ethically problematic, or practically ineffective. Nor is there any contention (or, again, any evidence) that blanket questioning on the topic of firearms ownership is leading to bad, unsound, or dangerous medical advice." *Citing to Cf.* Eric J. Crossen et al., *Preventing Gun Injuries in Children,* 36 Pediatrics Rev. 43, 47-48 (2015).

V. Florida Case Law addressing Firearms and Mental Health

Dougan v. Bradshaw, 198 So. 3d 878, (Fla. 4th DCA 2016)

Firearm owner, who filed a replevin action against the sheriff, successfully obtained a court order requiring the return of his firearms, which were taken by officers during a safety check. Appellant was not arrested or taken for an involuntary examination pursuant to the Florida Mental Health Act.

Exhibiting a mental illness, such as expressing suicidal inclinations in one's home, is not, by itself, a violation of the law or breach of the peace for purposes of the statute[13] providing that no pistol or firearm taken by any officer, upon a view by the officer of a breach of the peace, shall be returned except pursuant to an order of a trial court judge. The 4th DCA, citing to Fla. Stat. § 394.459(1), further explains that, "The Baker Act is replete with directives that a person who is admitted as a patient but not charged with a criminal offense should not be treated as a criminal and 'shall not be deprived of any constitutional rights.'"

Keck v. Seminole Cty. Sheriff's Office, 2010 WL 2822011 at 2 n. 6 (M.D.Fla. July 16, 2010)

Citing a 2009 Florida Attorney General's Office opinion, "It is fairly clear, however, that absent an arrest and filing of criminal charges, law enforcement cannot retain – and must return – firearms seized from persons who are taken into custody for an involuntary mental health examination under Florida's Baker Act."

***Jones v. Williams Pawn & Gun, Inc.*, App. 4 Dist.,** 800 So.2d 267 (2001), rehearing denied, review denied 821 So.2d 305

[13] Florida Statute § 933.14(3) provides that "no pistol or firearm taken by any officer with a search warrant or without a search warrant upon a view by the officer of a breach of the peace shall be returned except pursuant to an order of a trial court judge."

Florida Statute that made it a crime to sell a weapon to a person of an "unsound mind" was not unconstitutionally vague as applied to wrongful death claim against pawn shop, arising when shop sold handgun to mentally retarded purchaser, who used gun to kill victim during attempted robbery; purchaser was unable to care for himself, and fell squarely within the definition of a person of "unsound mind," and statute gave notice that it was a violation to entrust or to sell a dangerous weapon, such as a firearm, to a person like purchaser.

VI. Florida Gun Trusts

In 2007, a Jacksonville attorney was credited with first developing the concept of a NFA (National Firearms Act) firearm trust, commonly referred to as a Gun Trust.[14] Theoretically, a gun trust is no different than any other trusts. The trustee of a gun trust holds the trust property as a fiduciary for one or more beneficiaries, the trustee holds legal title of the trust property, and the beneficiaries are the holders of the equitable title to the trust property.[15]

Put simply, gun trusts are typically created to purchase, receive, or manage certain types of federally restricted firearms. Gun trusts are also created as an estate planning tool for Floridians who may one day become a ward in a guardianship proceeding. For example, during the grantor's lifetime, the gun trust's benefit is that the grantor has a vehicle to own title to his firearms in case of incapacity.[16]

With gun trusts, the trust property typically consists of restricted firearms regulated under federal law, usually referred to as "Title II firearms".[17] The gun trust is then the legal entity that the gun would be registered under. Depending on the terms of the trust, the trustee and beneficiaries would then be able to use the firearms owned by the trust under the conditions set forth in the document and – of course – as per applicable federal, state, and local gun laws.

Why are Title II firearms typically the assets held in gun trusts?

As discussed earlier in the materials, the Gun Control Act of 1968 (GCA) is the main federal statute on gun control today. The GCA is divided into two titles – Title I and Title II. Both titles contain detailed and stringent controls on firearm regulations. Title I addresses federal regulations on handguns and long guns – those of which encompass the vast majority of guns in America. Title II focuses on a more narrow variety of firearms.[18] In terms of discussions concerning gun trusts, the focus is on Title II - which includes machine guns, short-barreled rifles, silencers, explosive ordnance, and "any other weapon".

Title II firearms are typically the corpus of gun trusts because these firearms are subject to more stringent regulation, transfer, and tax requirements than Title I firearms. For instance, Title II

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[14] *In Goldman Gun Trusts*, by Margaret Littman, 97-Feb A.B.A.J, ABA Journal, February 2011.
[15] *See Dispatches from the Trenches of America's Great Gun Trust Wars*, by Lee-Ford Tritt, 108 NW U.L. Rev. 743, Winter 2014.
[16] *See Gun Trusts – What's All the Fuss?* By Michael A. Sneeringer, 31 – APR Prob. & Prop. 10, March/April, 2017.
[17] *See Dispatches from the Trenches of America's Great Gun Trust Wars*, by Lee-Ford Tritt, 108 Nw U.L. Rev. 743, Winter 2014.
[18] *Id.*

weapons must be forfeited to law enforcement if they are not properly registered.[19] When the owner of Title II firearms becomes incapacitated or passes away, the guardian or executor of the decedent's estate must undergo a long and exhaustive process to transfer these Title II firearms, sometimes resulting in forfeiture of the firearms[20] since only the owner of a Title II firearm is allowed to possess the firearm. All other individuals are not allowed to be in possession – which includes constructive possession of the firearm – an important point for guardians, estate executors such as personal representatives, and other fiduciaries to understand.[21]

Up in Arms … Individual ownership vs. Gun Trust ownership

Under current federal law, an individual trying to legally purchase, transfer, or possess "Title II firearms" must first apply for approval through their state government.[22] The application process requires the individual to pay a $200 tax stamp, be fingerprinted for an extensive background check and be photographed. 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.[23]

Title II firearms may also be transferred to trusts or other legal entities. An entity owning a Title II firearm must also complete the required forms, pay the $200 transfer tax, and provide proof of the existence of the entity. Prior to 2016 entities owning Title II firearms were not required to include fingerprints or a picture along with the application. The entities were also not required to obtain the CLEO signature as an individual owner would have needed to obtain. Instead of obtaining the CLEO signature, the federal government investigated the Trust application to ensure the existence of the entity but they did not perform the same background checks as were required for an individual owner's application. Although this difference only related to Title II firearm transfers, it was enough to cause a very heated national debate about the effectiveness and appropriateness of gun trusts.[24]

Effective July 13, 2016, the Department of Justice published revisions under 27 C.F.R Part 479 applicable to machine guns, destructive devices, and certain other firearms.[25] Referred to as Rule 41F, the revisions discuss background checks for "Responsible Persons". This Rule is important because it closed the gap between individual applications and those for entities – such as gun trusts – which did not have the same identification and background check requirements.

Rule 41F now requires all responsible persons[26], of trusts or other legal entities, to complete

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[19] I.R.C Sections 5841, 5872 (2006).
[20] *See* Gerry W. Beyer and Jessica B. Jackson, *What Estate Planners Need to Know About Firearms*, Est. Plan. Dev. For Tex. Prof., 2 (Apr. 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1586524.
[21] *See* Beyer, supra note 18.
[22] 27 C.F.R. Section 479.101(2013). Transferring or possession a Title II firearm that is not properly registered is a criminal act covered by I.R.C. Section 5861(e).
[23] 27 C.F.R. Section 479.85; see also IRC Section 5812.
[24] *See Dispatches from the Trenches of America's Great Gun Trust Wars*, by Lee-Ford Tritt, 108 NW U.L. Rev. 743, Winter 2014.
[25] 27 C.F.R. Part 479 (Jan. 15, 2016) available at www.gpo.gov/pkg/FR-2016-00192.pdf.
[26] *Id.* A responsible person is: In the case of an unlicensed entity, including a trust, partnership, association, company, or corporation, any individual who possesses, directly or indirectly, the power or authority to direct the management and policies of the trust or entity to receive, possess, ship, transport, deliver, transfer, or otherwise dispose of a firearm for, or on behalf of, the trust or legal entity.

ATF Form 5320.23 (the National Firearms Act Responsible Person Questionnaire) and (2) submit photographs and fingerprints when the trust or legal entity (a) files an application to make an NFA firearm or (b) is listed as the transferee on an application to transfer an NFA firearm.[27] It also requires that a copy of all applications be forwarded to the CLEO of the district in which the applicant, transferee, or responsible person is located. The purpose of the new form is to ensure that the purported responsible persons are not in fact a "prohibited person" who may not possess an firearm.

Drafting and Practical Tips

An in-depth discussion concerning the unique provisions of an NFA gun trust is beyond the scope of these materials although, a few important points are included here.

Significantly, a gun trust agreement should direct the disposition of a firearm in the event that an owner becomes a legally excluded person. For example, the agreement may provide that, upon incapacity, the incapacitated person will lose all ability to have direct or indirect use of the guns in the trust and that the guns will pass outright in trust to the contingent beneficiaries.

Another noteworthy point - persons who are not allowed to buy or own firearms cannot serve as trustees of gun trusts. The trust terms should not allow for the transfer of a firearm to a person who may not lawfully purchase or possess firearms.

Consider that the trustee(s) of a gun trust have additional contemplations upon the termination of a gun trust and distribution of its assets to beneficiaries. The trustee may be responsible for determining the capacity of the beneficiary and the federal, state, and local laws that apply to the individual before allowing a beneficiary to use a trust weapon or distributing an NFA weapon to a beneficiary. Additionally, a trustee or beneficiary may have additional concerns with transporting the trust assets across state lines and prior approval may be required.

When advising a guardian client or other fiduciary, consider the following: (1) How is the firearm owned (individually or via an entity like a trust)? (2) What is the make and/or legal classification of the firearm? (3) Is the firearm secured or are legally ineligible individuals able to physically access the firearm? (4) Do the Letters Appointing Guardian delegate the ability to handle the ward's property to the guardian? (5) How likely is the ward to recover capacity? and (6) Are there any existing estate planning or advance directives in place that address the disposition of firearms?

It's important to consider the state and federal laws as a whole when advising a client on these points. Above all, no attorney should take any steps to provide access to firearms to those who pose a danger to themselves or others.[28]

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[27] *See ATF, supra,* at 41. *See also,* Gun Trusts – What's All the Fuss? By Michael A. Sneeringer, 31 – APR Prob. & Prop. 10, March/April, 2017.

[28] *See,* Marlin Marcellus Stewart, III, You Can Have My Gun When You Pry It From My Hands Which Are Incapable of Managing My Own Estate By Reason of Advanced Age, Physical Incapacity, or Mental Weakness: Firearms Rights of Wards in Mississippi Guardianship and Conservatorships, 35 Miss. C.L. REV 495 (2017).