

## **Is my Florida NFA Gun Trust valid? Warning signs for settlors in Florida.**

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DISCLAIMER: BEFORE YOU CREATE OR AMEND ANY TRUST, INCLUDING A TRUST INTENDED TO HOLD FIREARMS, YOU SHOULD CONSULT WITH AN ATTORNEY. THIS ARTICLE IS NOT LEGAL ADVICE AND DOES NOT CREATE AN ATTORNEY-CLIENT RELATIONSHIP WITH YOU AND THE AUTHOR. RATHER, IT IS MERELY INTENDED AS A STARTING POINT FOR YOU TO OPEN A DIALOGUE WITH YOUR ATTORNEY REGARDING POTENTIAL FEATURES OF A TRUST IN ORDER TO DETERMINE THE APPROPRIATE TRUST, IF ANY, FOR YOUR NEEDS.

### **I. A trust is a trust is a trust...**

A Gun Trust or NFA Trust, from a legal standpoint, is usually nothing more than a revocable or irrevocable trust to which the settlor (i.e. the lawyer's client creating the trust) either transfers NFA items, or money with which to purchase NFA items. This means that in theory, a trust based off of a generic trust form purchased from an office supply store or downloaded from the Internet and consisting of only a page or two might very well be valid. On the other hand, if the generic form does not comply with the particulars of Florida law, the trust may be invalid. If the Gun Trust is invalid or void, this is potentially a very serious problem with respect to the trustee's physical possession of NFA items held by the purported Gun Trust, and requires immediate attention by an attorney.

If you are the settlor, trustee or beneficiary of a Gun Trust that was created without the aid of an attorney, you would be well served to have the Gun Trust reviewed by an attorney if you can afford to. Hopefully, you have a valid Florida trust, just perhaps one not optimized and planned around ownership of NFA items. But if your trust is invalid, you need to see an attorney immediately. Just because the ATF approved your Gun Trust's NFA registration does not mean you have a valid trust under Florida law (and keep in mind, a Gun Trust can be valid now but become invalid later).

### **II. Why do I worry so much about validity?**

Under normal circumstances, I have no reason to believe that the ATF has or will have any serious agenda to declare prior-approved Gun Trust transfers invalid due to an invalid trust. My understanding is that the primary concern is that the \$200 tax is paid every time an NFA item is transferred from one legal entity or person to another. Under normal circumstances, it is hard to imagine the ATF even discovering an invalid Gun Trust. But should you bet your freedom and treasure on that? Absolutely not! Keep in mind, if the Gun Trust never existed (e.g. due to improper execution) or ceases to exist later, then the trustee is technically in possession of NFA items which he has no legal right to possess. That could mean a criminal charge, serious fines, and even jail time. These are things lawyers worry about for their clients.

Consider this: suppose you are the trustee of an NFA item, and while it is in your possession you are attacked, and in what you believe to be a reasonable fear of imminent death or great bodily harm, you shoot your attacker with the NFA item. Now, at the time of writing this article, the case of *The State of Florida v. George Zimmerman* (alleged shooter of Trayvon Martin) has not been decided. But if you observe this case, regardless of how it turns out, it is clear that anyone and everyone in law enforcement, state and federal, is going through Mr. Zimmerman's affairs with a fine toothed comb. So if you do use an NFA item in a defensive shooting incident, I think it is almost certain that the ATF will take a look at the registration of the NFA item and possibly the Gun Trust to confirm that your possession of the NFA item was legal at the time. If not, I could easily see you facing federal charges. Even if there might be defenses to the federal NFA possession charge, your criminal defense attorney will already have his hands full with your shooting case and your NFA possession case will be a major drain on your defense funds.

I am not trying to scare you. Your Gun Trust does not need to be perfect in the sense that it may not have planned for every possible contingency or may not even contain any NFA or firearm language whatsoever. But I do think your Gun Trust needs to be perfectly valid, or else you could be facing serious problems down the road.

**Side note:** In fact, I have heard of some ultra-conservative attorneys who recommend the use of corporations instead of Gun Trusts to hold NFA items. Their reasoning is that fewer things can go wrong and invalidate a corporation once the State of Florida has certified its existence. Basically, as long as the annual returns are filed and the annual fee is paid, the corporation legally exists. I don't necessarily agree that a corporation is the better route, primarily because for many clients the annual fees in Florida are simply too prohibitive. But the point is, even if your trust is not an ideal "Gun Trust," you really ought to take any question of your trust's validity seriously.

### **III. Invalidity Problem #1: Is the trustee the sole beneficiary?**

In Florida, a trust is invalid in the first instance if the sole trustee is the sole beneficiary. §736.0402(1)(e). Note that under Florida case law, this can happen after the trust was created. For example, suppose a Gun Trust is created by a father naming himself as trustee, and his minor son as the sole beneficiary. The trust is valid. But suppose the minor son dies in a tragic accident. At that point, the father might inherit the son's interest in the Gun Trust, and thereby become the sole beneficiary. Generally, any time the trustee and beneficiary are identical, Florida's "merger doctrine" may apply and cause the Gun Trust to cease to exist as a matter of law (poof!), causing a serious legal problem for the trustee in possession of NFA items.

### **IV. Invalidity Problem #2: Was the Gun Trust validly executed?**

Generally speaking, Florida Gun Trusts need to be executed (i.e. signed) with the same formalities as a valid Florida will, as set forth in § 732.502. With few exceptions, two

witnesses are necessary for the Gun Trust settlor's signing, in addition to proper notarization. If the Gun Trust was not properly executed, then some or all of it may be invalid, leaving the trustee in possession of NFA items with a very serious legal problem.

#### **V. Should I worry if my trust doesn't have....?**

There are a number of features that distinguish a well-drafted Gun Trust by a qualified attorney from a generic asset trust downloaded off the Internet or created with shrink-wrapped software. But that does not mean the latter kinds of trusts are legally invalid when used as Gun Trusts. Just because a trust is only a few pages long or contains no NFA or firearms specific language does not mean anyone should panic, and is no basis to assume that such a Gun Trust is invalid or even inadequate.

That said, if an attorney did not help you prepare your Gun Trust documents, then it will hurt nothing but your pocketbook to have the Gun Trust reviewed for a) validity, and b) suggested amendments to the Gun Trust that will make life easier for the trustee and beneficiary, and provide greater security for the trust assets.

#### **VI. Conclusion**

This article addresses some of the main problems that can cause a Gun Trust to be invalid or void. It by no means addresses all such potential problems. But if your Gun Trust was put together without the assistance of a Florida attorney, you owe it yourself and especially the trustee in possession of the NFA items to consult an attorney or at a minimum, examine your Gun Trust for the warning signs enumerated above.