

FIDUCIARIES AND FIREARMS

A MINEFIELD FOR THE MISINFORMED

by

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In his “other life,” Jeff has over fifty years of experience with virtually all types of modern small arms. He has trained at the Smith and Wesson Academy, LFI of New Hampshire and various other facilities. He is a former member of the American Society for Law Enforcement Training and is a “retired” Safety Officer in the International Defensive Pistol Association.

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† The laws relating to firearms are extremely complex. This outline is intended solely to illustrate issues. No reliance may be placed on any statement or conclusion in this outline. Please do your own research before opining on any firearms law.

I. Introduction:

A. What this Talk is about.

- 1. Keeping Yourself and your Clients out of Trouble.**
- 2. Knowing what you have.**
- 3. How to lawfully sell most firearms and transfer them to beneficiaries.**

B. What this Talk is Not about.

For the most part, **this talk is NOT about non “garden variety” firearms.** It is primarily about the rifles, shotguns, pistols and revolvers which are found in many American households. **QUERY:** Do you know if your client or decedent owns or owned any firearms and, if so, what kind?

From our Estate Planning Questionnaire:

“Do you own any **firearms**? _____

This question is not meant to ‘pry’. The reason for it is that firearm laws sometimes have an impact on the choice of executor and on who may be a beneficiary. This question is optional. You do not have to answer it.”

NOTE: This can open a dialogue. **HOWEVER,** you might not want to ask them how many they own. Many gun owners consider this an impolite question.

C. SAFETY FIRST ! If you have a modern or antique firearm in an estate and are not 100% SURE OF HOW TO OPERATE IT, don’t touch it. Call someone who understands how it works.

II. Staying out of Trouble.

A. Avoid Felonious Fiduciaries.

Do you routinely ask executors and trustees if they have a police record?
Most people would consider that question as a gross invasion of their

privacy. Nevertheless, you must ask this sometimes delicate question as a part of your initial estate settlement meeting. There are firearms in 40% of American households. Many of your clients own them for sport or protection.

1. Federal Law. The **mere possession** of any type of firearm or ammunition by a “prohibited person” is a **Federal crime**. There is **no exception for fiduciaries**. That means that, upon accepting a fiduciary appointment, an executor may be an “instant criminal.” Following is a partial list of “disqualifiers.”

- a.** Conviction in any court of, a crime punishable by imprisonment for a term exceeding one year
- b.** Being a fugitive from justice
- c.** Being an unlawful user of, or addicted to, any controlled substance
- d.** Having been adjudicated as a mental defective or committed to a mental institution
- e.** Being an illegal alien
- f.** Having been discharged from the Armed Forces under dishonorable conditions
- g.** Having renounced one’s citizenship
- h.** Being subject to a court order that restrains the person from harassing, stalking, or threatening his or her intimate partner or that partner’s child
- i.** Having been convicted in any court of a misdemeanor crime of domestic violence

NOTE: This list is illustrative only. For the complete text of the Statute, see 18 U.S.C., § 922 (g).

2. Connecticut Law – Stricter than Federal law.

a. All Firearms. In addition to the Federal Statute, a felon or someone who has been convicted of a “serious **juvenile offense**” cannot take possession of **any** firearm. § 53a-217. These juvenile offenses include selling drugs, loan sharking and misconduct with a motor vehicle. See § 46b-120.

b. Handguns. As to pistols and revolvers, Connecticut law is even stricter. In addition to the general disqualifiers described above, possession of a pistol or revolver by persons convicted of certain misdemeanors is a felony. For example, if an executor or trustee who was convicted of “illegal possession of narcotics,” “negligent homicide” or “first degree reckless endangerment” took possession of a handgun, he or she could be in serious trouble. **NOTE:** These are not necessarily violent crimes. They could include motor vehicle offenses and crimes committed as a “youth.” The Statute includes people who have been discharged with the previous twenty years after having been found not guilty of a crime (not just a felony) due to mental disease or defect. § 53a-217c.

There are **no exceptions for fiduciaries.**

3. “Background Check” You might, upon opening a new estate, check with the decedent’s family as to whether the decedent owned any firearms. It does not matter whether they are modern or antique; long guns or handguns. If the answer is “yes,” then it would be prudent to tell all fiduciaries that, if their past was less than perfect, they might want to decline to serve.

B. Specific Firearms.

There are two classes of guns that you have to be extremely careful with. One is “NFA Items” which are strictly regulated by the National Firearms Act of 1934. The other is so-called “assault weapons.”

DEFINITIONAL NOTES:

“Automatic firearms”, sometimes called “full autos” are machine guns. They continue to fire as long as the trigger is pressed. They are NFA Items. **Semi-automatic firearms** are “self loading.” They fire one shot when the trigger is pressed. Semi-autos include many recreational and defensive firearms. They are not “machine guns.”

“Assault Weapon” is a political and journalistic term. A true assault rifle is a fully automatic military weapon. Special authorization from the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) is required to possess one.

So-called “assault weapons” just look “military.” They are actually no different, in operation and power, from rifles commonly used for recreation and hunting.

1. “NFA Items.”

a. Generally. Certain firearms and accessories are classified as “NFA Items.” These include pistols with detachable shoulder stocks, rifles and shotguns with barrels under a certain length, sound suppressors (so-called “silencers”) and certain other, rather esoteric items. The unauthorized possession of them by anyone (not just convicted criminals) is a federal

crime. As in almost any criminal matter, ignorance of the law is not a defense.

b. Transferring NFA Items. If the decedent had lawfully possessed an NFA weapon, the executor **must** have the registration and tax documents. The Federal regulations allow an executor a “reasonable time” (generally, before the estate is closed) to transfer a lawfully possessed NFA weapon to an heir or beneficiary, provided that the recipient may lawfully possess it. The transfer must be made in accordance with all federal and state laws and must be properly documented.

c. G.I. Joe’s Machine Gun. Returning soldiers sometimes brought captured weapons back as souvenirs. There is generally no problem with most rifles and handguns. Fully automatic weapons could be brought back if they were “deactivated war trophies,” or DEWATs, which have been rendered incapable of firing by welding in a specified manner. Sometimes, however, a DEWAT is not a DEWAT. In order to be lawful, a DEWAT must have the proper paperwork with it. Even though they were properly de-activated, if the documents are missing, then they are treated the same as active NFA weapons which, without proper documentation, are “contraband.”

d. Undocumented NFA Items. If an executor has any NFA weapons and he cannot find any documentation, he should contact BATFE to find out

if they were properly registered. This is important because properly documented NFA items are quite valuable and are, in general, lawfully saleable and transferrable. Undocumented NFA items are contraband. The executor should arrange with ATF for their “abandonment.” Failure to comply with all of the regulations could have serious consequences for the fiduciary. Mere possession of an undocumented fully automatic firearm could result in confiscation of a car or house in which it was found and time in a Federal penitentiary..

- e. Don’t act in haste.** Don’t assume that, because you can’t find the registration documents, that you have to turn the item in to BATFE. You can request a search by serial number to find out if the decedent possessed the item lawfully. In fact, it is probably an executor’s fiduciary duty to do this.

EXAMPLE: We settled an estate that contained a substantial number of firearms, including a World War II German MP-40 sub-machine gun and a 20mm Swiss Solothurn anti-tank rifle. We contacted BATFE, we were given copies of the documents showing that the decedent had properly registered them under the amnesty provisions of the 1968 gun control act. We sold both of these to collectors.

Further reading: For an excellent discussion of NFA weapons, please see the following articles by Joshua Prince:

“Grandpop’s Machine Gun in the Chest,” PA Elder, Estate & Fiduciary Law Blog, September 12, 2007

<http://paelderandficiary.blogspot.com/2007/09/i-bequeath-my-machinegun-to.html>, and

“Estate Planning 101 under the National Firearms Act”
<http://paelderandficiary.blogspot.com/2007/11/estate-planning-for-grandpops-gun-in.html>.

f. NFA Trusts. People shoot NFA items in specialized competitions. For items purchased personally, the buyer must obtain the consent of his or her chief of police on the transfer form. Arbitrary bureaucratic roadblocks often prevent law abiding citizens from buying them. The NFA regulations provide a safe harbor – the “chief sign off” is not required for transfers to trusts. But cf. proposed Regulation 41-P which, if promulgated, would substantially modify this provision.

An “NFA Trust” is specifically designed to acquire and hold NFA items and other firearms. These trusts have specific provisions, including references to federal and state firearms laws, who can be a trustee and a beneficiary, what happens if a trustee becomes a prohibited person, etc. An NFA Trust is also useful for people who want to maintain privacy in passing their guns (not just NFA items, but “regular” guns as well) to their beneficiaries.

For more information about NFA Trusts, please see:
http://ctgunlawyer.com/nfa_trusts.html

PLEASE NOTE: The 2013 Connecticut Statute has placed restrictions on some transfers to trusts. One cannot transfer so-called “assault weapons” to a trust during his

lifetime. Also transfers of “regular” guns to trusts (even revocable trusts) may require the same documentation as purchases.

2. So-Called “Assault Weapons.”

**“Watch it, Watch it, It’s Gonna Get You” -
- Sam the Sham and the Pharoahs, “Wooly
Bully.”**

a. Generally.

“Any person who, within this state, distributes, transports or imports into the state, keeps for sale, or offers or exposes for sale, or who gives any assault weapon, except as provided by sections 29-37j and 53-202a to 53-202k, inclusive, and subsection (h) of section 53a-46a, shall be guilty of a class C felony and shall be sentenced to a term of imprisonment of which two years may not be suspended or reduced.” § 53-202b.

b. The Pre-94 Exception.

1. Generally. The statute exempts some so called “assault weapons.” § 53-202(m) provides:

“Notwithstanding any provision of the general statutes, sections 53-202a to 53-202l, inclusive, as amended, shall not be construed to limit the transfer or require the registration of an assault weapon **as defined in subdivision (3) or (4) of subsection (a) of section 53-202a of the general statutes, revision of 1958, revised to January 1, 2013,** provided such firearm was legally manufactured prior to September 13, 1994” [Emphasis added].

2. Not all “pre-bans” are “Pre-Bans”.

Firearms manufactured prior to September 13, 1994 are commonly referred to as “Pre-Bans.” HOWEVER, all so-called “assault weapons” made before that date are NOT within the ambit of the statute. The statute refers to “**subdivisions (3) or (4)** of subsection (a) of section 53-202a.” These provisions only apply to rifles, pistols and shotguns having certain “ugly cosmetic features,” not to those listed in subsection 1 of the statute. The distinction between “listed weapons” and “configuration weapons” is important.

3. (At Least) Two Statutory Definitions of So-Called “Assault Weapons”.

a. “Listed” Firearms. § 53-202a(1) lists over fifty specific items as so-called “assault weapons”. It is a basic tenet of statutory construction that a criminal statute must define a crime with specificity. If a firearm is not on the list, either by model or by “type,” then it isn’t within the definition of part (a)(1) of the Statute.

EXAMPLE: “AK-47 type” and “UZI carbine.” An AK-47 clone is unlawful because it’s an AK-47 “type.” A carbine manufactured by the [fictional] Southern Uganda Zebra Industries and marked “SUZI” is lawful, even though it looks like an UZI. The statute says “UZI,” not “UZI type.”

b. “Configuration” Firearms. Former § 53-202(a)(3), which is referenced in § 53-202m, defines as a so-called

“assault weapon” any semi-automatic firearm with at least two out of five specified design characteristics. NOTE: The “two feature” test is ONLY for Pre-Bans. The 2013 statute provides for a “one feature” test for guns manufactured after the 1994 date.

c. Distinction May be Vital. The difference between a “listed” firearm and one that is defined by “characteristics” may become very important, both in keeping your clients out of trouble and in being able to effectuate transfers. See Section IV B 3, below.

III. Know What You Have - Duty to Obtain Highest Value. It is axiomatic that a fiduciary must do all that he or she can to maximize the value of the estate or trust assets.

A. Small Distinctions. Sometimes, the difference between a valuable item and a “shooter” is an “attenuated subtlety.” **NOTE:** The expression “attenuated subtleties” was coined by Mr. Justice Holmes in *Lucas v. Earl*, 281 U.S. 111, 114 (1930).

EXAMPLE: The Government had a huge number of .45 pistols manufactured during World War II. Industries rapidly converted from producing consumer goods to manufacturing “1911 pistols.”

QUERY: Would you know the difference between pistols made by Remington Rand, Union Switch and Signal and Singer Sewing Machine? The first one is a “shooter.” The second is a “collectible.” The third is a very rare museum piece (the last one sold at auction went for \$80,000). As with other assets, failure to obtain proper appraisals can be costly.

B. The Appraisal Dilemma. Obviously, a fiduciary must ascertain the value of the estate or trust assets and then either sell them or deliver them to the beneficiaries. Finding a competent appraiser is no more difficult

with firearms than with any other type of asset. However, imagine bringing Aunt Hazel's china to an appraiser and, after being advised of the value, being told that the appraiser could not return the china to the executor. Sound farfetched? It's not! Consider the following scenario:

EXAMPLE: You represent an executor of a man who had a collection of firearms, including several historically interesting items. The executor delivers them to a dealer to have them appraised. The dealer gives the executor an opinion of value, and says that he will accept the guns for sale on a consignment basis. After a few months, they haven't sold. The executor wants to take them to another dealer. The first dealer declines to give them back. What can the executor do? **Nothing.**

Under Connecticut law, a rifle, pistol or shotgun may only be lawfully "transferred" to someone who has a valid State permit to carry pistols and revolvers, an "eligibility certificate" (allows purchase of handguns but does not permit carry) or a "long gun certificate" (all issued by the State Police) or a Federal Firearms License. Re-delivery to an unauthorized executor by the appraiser-dealer is a "transfer" within the Statute. The executor's only options are to leave the guns with the dealer or sell them to him outright. He cannot obtain them back. What might be the executor's (and his advisors') liability if these assets must be sold below fair market value? One answer to this dilemma might be to have the appraiser come to you. Secondly, before consigning firearms to a dealer, be sure that the executor does not want to change his mind.

IV. Transferring Firearms to Beneficiaries.

A. In State - Generally.

Other than NFA items and so called "assault weapons," most guns can be freely transferred during lifetime and at death

In addition to the prohibitions on transfers to felons, certain misdemeanants, etc., Connecticut imposes additional requirements with

which you must be familiar in order to avoid becoming, or having your client become, an inadvertent criminal.

1. Transferee must be an authorized person.

a. Pistols and Revolvers.

“[N]o person may purchase or receive any pistol or revolver unless such person holds a valid permit to carry a pistol or revolver or an eligibility certificate.” § Sec. 29-33(b).

b. Long guns. One can obtain a “long gun eligibility certificate” which enables him or her to receive rifles and shotguns. A holder of a pistol permit can receive any lawful firearms. § 29-37a

2. Transferor Must Comply with All Procedural Requirements”

- a.** Form DPS-67, contains a series of questions relating to “disqualifiers”
- b.** Form DPS-3, report of sale or transfer
- c.** Transferee must be personally known or identified to transferor
- d.** Background check and authorization number from the State Police required

Source: §§ 29-33(c), 29-37a, (d) and (e)

3. An “Escape Hatch” that you don’t want to rely on.

“If the court finds that a violation of this section is not of a serious nature and that the person charged with such violation (1) will probably not offend in the future, (2) has not previously been convicted of a violation of this section, and (3) has not previously had a prosecution under this section suspended pursuant to this subsection, it may order suspension of prosecution. The court shall not order

suspension of prosecution unless the accused person has acknowledged that he understands the consequences of the suspension of prosecution.” § 29-33(h).

B. In State: So-Called “Assault Weapons.”

- 1. General Prohibition.** With some important exceptions, it is a class “C” felony to transfer any so-called “assault weapon.” § 53-202b.
- 2. Exemption for Pre-1994 “Configuration” Firearms.** | § 53-202m exempts certain so called “assault weapons” if they were manufactured before September 13, 1994. [See Sec. II B 2, above]. If you want to rely on this Statute, you should be sure of what you have and when it was manufactured. The best evidence of date of manufacture is a letter from them manufacturer.
- 3. “Listed” Firearms.** Anyone who lawfully possessed a “listed” firearm prior to October 1, 1993 could obtain a “Certificate of Possession” from the Department of Public Safety. § 53-202d(a). The certificate essentially entitles the owner to possess the firearm at home and transport it to a shooting facility or dealer and to transfer it at death.
- 4. Post-1994 “Configuration” Firearms.** These are treated the same as pre-1994 “listed” firearms, if the owner was in lawful possession of the item before April 4, 2014 and applied for a certificate of possession before January 1, 2014.
- 5. Lifetime transfers prohibited.** Except for transfers at death, “certificated” firearms may only be sold to a dealer or transferred out of state through a dealer.

6. Transfers at Death “Certificated” pre-1994 “listed” weapons and post 1994 “configuration” weapons may be transferred by bequest or intestate succession or, “upon the death of a testator or settlor: to a trust, or from a trust to a beneficiary who is eligible to possess the assault weapon”. § 53-202d(b)(1)].
WHAT DOES THIS MEAN? Does it mean that one may transfer these items to a trust via a will provision? It would seem so, but the “official position” seems to be that one can only transfer them to pre-April 4, 2013 trusts.

If the heir or beneficiary is a Connecticut resident and wishes to retain the item, he or she must obtain a certificate from the Department of Public Safety. C.G.S. § 53-202d(b).

7. Some Fiduciaries Protected. § 53-202b(b)(2) provides an exemption for “a person who is the executor or administrator of an estate that includes [a certificated” firearm] which is disposed of as authorized by the Probate Court....” Once again, this raises the issue of firearms held in trusts.

C. Out of State. What should an executor do if a beneficiary is out of state?

1. Hand them over. Give them to the beneficiary while he is in Connecticut, so that he may drive home with them? **NO.** This may be lawful under Federal law, but it can be extremely risky. See the material on the McClure-Volkmer Act at the end of this outline.

2. Ship them himself. Send them by UPS? **NO.** This is a Federal crime.
18 U.S.C. § 922

3. Dealer to Dealer Transfer. Have a licensed dealer in Connecticut transfer and ship them to a licensed dealer in the recipient state. **YES.** This is the only absolutely safe way to effectuate an out of state transfer.

V. Conclusion. Firearms are one of the most heavily regulated products in the country. Myriad federal, state and local statutes and regulations can easily make criminals out of uninformed fiduciaries and, possibly, their advisors. Sometimes almost imperceptible differences can separate a perfectly legal firearm from a prohibited one. These subtleties can also have a large effect on value.

Be Careful.

ADDITIONAL MATERIALS

Blue Book of Gun Values -- 30th Edition (2009-10). Available on Amazon.com.

Firearms Law Deskbook, by Stephen P. Halbrook (available on Westlaw, Amazon.com or stephenhalbrook.com/deskbook).

AUCTION HOUSES SPECIALIZING IN FIREARMS

James D. Julia, Fairfield, Maine. www.jamesdjulia.com/firearms

Kull's Old Town Station, Topeka, Kansas. www.ArmsBid.com

J. C. Devine, Milford, New Hampshire. www.jcdevine.com

WEBSITES

BUYER AND SELLER MUST WORK THROUGH LICENSED DEALERS

Gunauction.com

Gunsamerica.com

Gunbroker.com

EXCERPT FROM THE "McCLURE-VOLKMER ACT

18 U.S.C. § 926A Interstate Transportation of Firearms. "Notwithstanding any other provision of any law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle: Provided, That in the case of a vehicle without a compartment separate from the driver's compartment the firearm or ammunition shall be contained in a locked container other than the glove compartment or console." **CAUTION:** This material is inserted for informational purposes only. People who have obeyed this law have nevertheless been prosecuted, notably in New York and New Jersey. Be careful when transporting firearms. If you have any doubts, obtain letters from the state police in all states that you are traveling through which explains those states' positions.