



## **INFORMATION BULLETIN:**

### ***FIREARM ESTATE PLANNING – “GUN TRUSTS”***

NOVEMBER 14, 2022

Given the complexity of state and federal firearm laws, particularly as applied to the transfer of a firearm in California, many gun owners have questions on how best to pass down a personal firearm collection to their children or heirs. The following information bulletin has been prepared to assist gun owners who are in the process or are considering creating estate planning documents such as a trust that include a personal firearm collection.

Be warned, the following information focuses on California firearm laws. It generally does not go into detail on estate planning laws or other issues. As a result, should you be considering creating estate planning documents, be sure to consult with a knowledgeable attorney with experience creating wills and trusts.

#### **I. FIREARM TRANSFER REQUIREMENTS – IN GENERAL**

Before addressing specific estate planning issues, it is important to have a basic understanding of state and federal transfer requirements concerning firearms.

##### **a. Federal Law**

In general, federal law prohibits any person from transferring, selling, trading, giving, transporting, or delivering any firearm to any person who is not a resident of the state in which the transferor resides.<sup>1</sup> When a person wishes to transfer a firearm to someone who lives in a different state, the firearm must first be delivered to a federal firearms licensee (“FFL”) within the recipient’s state of residence. The FFL will then process the transfer to the intended recipient in accordance with state and federal laws.

But these federal interstate transfer requirements do not apply to the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of their residence.<sup>2</sup>

<sup>1</sup> 18 U.S.C. § 922(a)(5). It is also prohibited to sell or dispose of any firearm to any person knowing or having reasonable cause to believe the recipient is prohibited from owning or possessing firearms. 18 U.S.C. § 922(d).

<sup>2</sup> 18 U.S.C. § 922(a)(5). An exception is also given for the loan or rental of a firearm to any person for temporary use for lawful sporting purposes. *Id.*



## **b. California Law**

Under California law, when neither party to a firearm transaction is a California licensed firearms dealer (“CFD”), the parties to the transaction must complete the transfer through a CFD.<sup>3</sup> Notably, all CFDs also possess a valid FFL in addition to any required local license.<sup>4</sup>

To process a firearm transfer, California law requires the CFD to submit the person’s information to the California Department of Justice (“CADOJ”) using a web-based portal known as the Dealer Record of Sale (“DROS”) Entry System (“DES”).<sup>5</sup> Although federal law generally requires dealers to submit firearm transfer paperwork to the National Instant Criminal Background Check System (“NICS”), California is one of 13 states commonly called a “point of contact” state, meaning CFDs instead contact CADOJ directly to conduct the required background check on the purchaser/transferee.<sup>6</sup> A CFD accomplishes this by using DES to submit a DROS transaction.

### **i. CADOJ’s Automated Firearm System**

As noted above, the submission of a DROS using DES is a means for completing the required background check on the purchaser/transferee. But the submission of a DROS also serves a second purpose of generating a record in CADOJ’s Automated Firearm System (“AFS”). Note that AFS records are not “registration” records. Instead, the record simply means that on the date of transaction, the individual was deemed eligible to own and possess firearms.<sup>7</sup> It *does not* indicate ownership of the firearm.

### **ii. Additional California Transfer Requirements**

In addition to the requirement to using a CFD to process a firearm transfer, California generally prohibits dealers from transferring or giving possession or control of any firearm to any person under 21 years of age.<sup>8</sup> There is also a 10-day waiting requirement<sup>9</sup>, and a requirement that the purchaser/transferee present both a Firearm Safety Certificate<sup>10</sup> (“FSC”) and “clear evidence of the person’s identity and age”<sup>11</sup> which is defined as either a valid California driver’s license or valid California identification card.<sup>12</sup>

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<sup>3</sup> Cal. Pen. Code § 27545.

<sup>4</sup> Cal. Pen. Code § 26700.

<sup>5</sup> See <https://DES.doj.ca.gov>.

<sup>6</sup> See <https://www.atf.gov/rules-and-regulations/permanent-brady-state-lists>.

<sup>7</sup> California Department of Justice, Division of Law Enforcement, 2009-BOF-03: *Critical Changes to the Law Enforcement Gun Release (LEGR) Program* (Jan. 4, 2010), available at <http://michellawyers.com/wp-content/uploads/2019/01/Info-Bulletin-re-Changes-to-LEGR-Program.pdf>.

<sup>8</sup> Cal. Pen. Code § 27510(a).

<sup>9</sup> Cal. Pen. Code § 27540(a).

<sup>10</sup> Cal. Pen. Code § 27540(e).

<sup>11</sup> Cal. Pen. Code § 27540(c).

<sup>12</sup> Cal. Pen. Code § 16400. It should also be noted that these requirements are just a summary of some of the requirements California imposes on firearm transfers. Addressing every requirement would far exceed the scope of this bulletin. Should you have questions about any additional requirements, you should contact an attorney experienced in firearm laws for more information.

## II. "OPERATION OF LAW" TRANSFERS IN CALIFORNIA

The requirement to use a CFD to facilitate a firearm transfer in California does not apply to a person who takes title or possession of a firearm by "operation of law," provided the person themselves is not prohibited from owning or possessing firearms.<sup>13</sup> California provides definitions for the terms "operation of law" and "[a] person taking title or possession of a firearm by operation of law."<sup>14</sup> But these definitions are limited in their application.

### a. Application of "Operation of Law"

First, the term "operation of law" only applies to Penal Code sections 26500 through 26590 which concern the licensing requirements for the sale, lease, or transfer of firearms and its exceptions. Among these sections, the actual phrase "operation of law" only appears in Penal Code section 26505, which concerns the exception to the CFD requirement for a "person acting pursuant to operation of law."<sup>15</sup> In effect this means a person does not need to obtain a CFD license when acting in their capacity. Those situations, as outlined in the definition of the term "operation of law," include the following:

- The executor, personal representative, or administrator of an estate, if the estate includes a firearm;
- A secured creditor or an agent or employee of a secured creditor when a firearm is possessed as collateral for, or as a result of, a default under a security agreement under the Commercial Code;
- A levying officer;
- A receiver performing the functions of a receiver, if the receivership estate includes a firearm;
- A trustee in a bankruptcy performing the duties of a trustee, if the bankruptcy estate includes a firearm;
- An assignee for the benefit of creditors performing the functions of an assignee, if the assignment includes a firearm;
- A transmutation of property between spouses;
- The transfer of a firearm by a law enforcement agency to the person who found the firearm where the delivery is to the person as the finder of the firearm;
- A firearm received by a family of a police officer or deputy sheriff from a local agency;
- The trustee of a trust that includes a firearm and that was part of a will that created the trust;
- A person acting pursuant to the person's power of attorney;
- A limited or general conservator appointed by a court;
- A guardian ad litem appointed by a court;
- A trustee of a trust that includes a firearm that is under court supervision;
- A special administrator appointed by a court; and,
- A guardian appointed by a court.<sup>16</sup>

### b. Application of "A Person Taking Title or Possession of a Firearm by Operation of Law"

The term "[a] person taking title or possession of a firearm by operation of law" includes all the above but also the following additional persons:

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<sup>13</sup> Cal. Pen. Code § 27920(a).

<sup>14</sup> Cal. Pen. Code §§ 16960, 16990.

<sup>15</sup> Cal. Pen. Code § 26505(a).

<sup>16</sup> Cal. Pen. Code § 16960.

- A firearm passing to a surviving spouse;
- The transfer of a firearm by a law enforcement agency to the person who found the firearm where the delivery is to the person as the finder of the firearm;
- A firearm passed to a decedent's successor; and,
- The trustee of a trust.<sup>17</sup>

But like the term "operation of law," the term "[a] person taking title or possession of a firearm by operation of law" only appears in Penal Code sections 27920 and 27925, both of which concern exceptions to using a CFD for processing a firearm transaction in California.<sup>18</sup> As applied to Penal Code section 27920, a person taking title or possession of a firearm by operation of law does not need to process the transfer through a CFD, but only if the following conditions are met:

- For persons who are neither a levying officer or a person receiving the firearm pursuant to subdivision (g), (h), (i), (j), (l), or (q) of Penal Code section 16990, the person must submit a report to CADOJ, in a manner prescribed by CADOJ, within 30 days of taking possession.
- For persons taking title or possession is receiving the firearm pursuant to subdivisions (g), (h), (l), or (q) of Penal Code section 16990, the person must do both of the following:
  - Submit a report to CADOJ, in a manner prescribed by CADOJ, within 30 days of taking possession; and,
  - Obtain a valid FSC prior to taking possession.
- When family of a police officer or deputy sheriff receive a firearm pursuant to Government Code section 50081, the law enforcement agency shall forward all necessary information to CADOJ via the California Law Enforcement Telecommunications System ("CLETS").
- When a person receives title or possession of a firearm pursuant to subdivision (j) of Section 16990, the law enforcement agency shall forward all necessary information to CADOJ via CLETS. In addition, the law enforcement agency shall not deliver the firearm to the person unless they hold a valid FSC.

Conversely, Penal Code section 27925 states that a person need not process a transfer of a firearm through a CFD if that person is taking possession by operation of law in a representative capacity and subsequently transfers ownership to themselves in an individual capacity, but only if the person obtains an FSC prior to transferring ownership. Notably absent here is any requirement that the person report such transfers to CADOJ (likely because no transfer to another person is taking place).

### III. "GUN TRUSTS"

A "gun trust," as many gun owners understand it, is a legal trust that is specifically created to acquire, hold ownership to, and facilitate the transfer of firearms. Such trusts typically include a "trustee" (a person who holds and administers the property of the trust) and a "beneficiary" (the person whom the property is held for). In other words, a gun trust is basically just a legal relationship that holds firearms for the benefit of another.

When individuals speak of "gun trusts" in California, they usually mean one of two things: (1) trusts that are specifically created to hold ownership and acquire firearms regulated by the National Firearms Act of 1934;

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<sup>17</sup> Cal. Pen. Code § 16990.

<sup>18</sup> See Cal. Pen. Code § 27545.



or, (2) Trusts that are created to hold ownership to and facilitate the transfer of other types of firearms which are readily available to the public and lawful to possess in California.<sup>19</sup>

#### a. California Transfer Restrictions in the Context of Trusts

Recall that in California, all firearm transfers must generally be processed through a CFD. And for a CFD to lawfully deliver the firearm, the person must present clear evidence of identity and age. Although a trust is a legal entity, there does not appear to be any method in which the trust itself can obtain a California driver's license or California identification card. Nor is there any method in which a CFD can lawfully transfer ownership and/or possession of a firearm to more than one person (or in the case of a trust, more than a single trustee). In other words, although California law does not expressly prohibit the transfer of a firearm to a trust, and arguably even contemplates such transfers in certain respects, the procedural requirements placed on a CFD generally preclude such transfers from taking place.

This means the firearm can only be transferred to a single trustee, and only in a personal capacity. Any subsequent transfer to a beneficiary will require another transfer in accordance with all applicable laws. Given California's restrictions on certain firearms such as "assault weapons," subsequent transfers to a beneficiary may be difficult or even flatly prohibited.

#### b. Operation of Law Exceptions and Trusts in California

As stated above, Penal Code sections 27920 and 27925 are the only two exceptions that expressly contemplate the transfer of a firearm to a trustee via operation of law. Meaning the transfer of a firearm in such circumstances need not be processed through a CFD. But as stated in Penal Code section 27920, such transfers still require the person taking possession to "submit a report" to CADOJ, in a manner prescribed by CADOJ, within 30 days.<sup>20</sup>

The form CADOJ has adopted for such transfers is "BOF 4522A (Rev. 01/2020): Report of Operation of Law or Intra-Familial Firearm Transaction."<sup>21</sup> As stated on this form, "[o]nly one applicant" may submit the form, nor can this form be used to report ownership of any "assault weapons." What's more, applicants must submit their California driver's license or California identification card number, date of birth, place of birth, residential address, and citizenship information, all of which is used for a background check to "determine whether [the applicant is] lawfully eligible to possess firearms." Clearly, this form cannot be submitted on behalf of a trust itself. Instead, only a single trustee can submit the form. Practically, the form mirrors that of a DROS used by a CFD to process a firearm transfer. This is because the information in both circumstances is used to conduct a background check and generate a record of the transaction in CADOJ's AFS database.

This leaves the exception outlined in Penal Code section 27925 for persons who take possession by operation of law in a representative capacity and subsequently transfer ownership to themselves in an individual

<sup>19</sup> Because firearms regulated by the National Firearms Act of 1934 are generally illegal to possess in California absent very limited and strict exceptions, they will not be discussed in this bulletin. More information about such trusts can be found in the upcoming 10<sup>th</sup> edition of the California Gun Laws Book, available for pre-order online at <https://californiariflepistol.app.neoncrm.com/np/clients/californiariflepistol/giftstore.jsp>.

<sup>20</sup> And in the case of a transfer to a trustee of a trust that is not under court supervision or part of a will created with the trust, the trustee must also possess a valid FSC before taking title or possession.

<sup>21</sup> Available online at <https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/oplaw.pdf> (last visited Sept. 13, 2022).



capacity. But once again, this exception merely allows such transfers to take place without going through a CFD. Unlike Penal Code section 27920, however, this exception does not require a report to be submitted to CADOJ. Even so, the application of this exception in the context of a trust would be limited to the situation where a trustee takes title and possession in a personal capacity (essentially now a beneficiary). Such situations likely create no real benefit as the trustee would already be in possession of the firearm, and California law would not consider a transfer having taken place (the firearm was already transferred to the beneficiary in their capacity as trustee).

#### IV. OTHER ESTATE PLANNING TOOLS

Setting aside the issues surrounding a trust, there are of course other estate planning tools that can be used by California gun owners to properly pass down their firearms. Such tools, however, may still trigger a requirement that the firearms be processed through probate. Be sure to discuss with an attorney what options you may have, including their benefits and drawbacks.

##### a. CRPA Foundation

California gun owners should also know that in the event they do not know who or how to distribute their firearms upon their passing, one option would be to donate their collection to the CRPA Foundation. For years, CRPA has been receiving such donations to keep special interest programs going in California against all odds. Such donations are used for the direct benefit of California gun owners in the form of grants that seek to educate and benefit women, gun collectors, hunters, target shooters, law enforcement, adaptive shooters, and those who choose to own a gun to defend themselves and their families. To learn more, visit <https://crpa.org/crpa-foundation/>.

#### V. CONCLUSION

The complex requirements of California's firearm transfer requirements appear to act as a practical bar to the creation of a trust where the firearms are to be transferred to the trust itself. This leaves California gun owners with the options of creating a will or other estate planning document that dictate how their firearm collection should be handled upon their passing. While a trust may still have some other benefit to a California gun owner, any such benefit should be discussed with an attorney knowledgeable in the laws as applied to wills and trusts.

#### For More Information

For more information, be sure to visit CRPA's website at [www.CRPA.org](http://www.CRPA.org). And be sure to subscribe to CRPA email alerts to stay informed on the latest developments.

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