

National Resource Center on Domestic Violence and Firearms and Giffords Law Center to Prevent Gun Violence Legal Services Attorney Training September 27, 2023

Understanding Civil Restraining Orders: Domestic Violence, Extreme Risk Protection Orders, and More

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Firearms, BWJP & Hon. Sherrill A. Ellsworth (ret.), Judicial Consultant
Giffords Law Center to Prevent Gun Violence

**GIFFORDS
LAW CENTER**
TO PREVENT GUN VIOLENCE



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Overview

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Acknowledgement

This project was supported by Grant No. 15JOVW-21-GK-02232-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this program are those of the authors and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

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Three Areas of Focus Today

- 1) Defining the Problems
- 2) Civil Legal Framework & Options
- 3) What Attorneys Can Do

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A Variety of Tools in Our Toolboxes

- Federal and state laws
- Family law divorce, separation, and parentage actions
- Arrest, prosecution, incarceration
- Criminal protective orders
- Civil domestic violence restraining orders
- Civil harassment & stalking orders
- Mental health + prohibitions
- Safety planning with survivors
- “Control”/compliance planning with prohibited folks
- Dangerousness and risk assessments
- Parenting plan provisions
- Counseling and education
- Safe/confidential housing
- Economic support
- Childcare
- Responsive services and opportunities
- Voluntary separation from firearms
- Safe storage of firearms

Image by macrovector on freepik

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Today's Focus: Primarily Two Legal Remedies Involving Firearms & Ammunition Prohibitions

DOMESTIC VIOLENCE CIVIL RESTRAINING ORDERS

- Governed by state and federal law
- Significant variation
- Longstanding
- Designed to address a variety of situations
- Limited legal representation for petitioners and respondents

EXTREME RISK PROTECTION ORDERS

- Governed by state law
- Significant similarities
- New-ish (2016 in CA)
- Designed to prevent suicide and mass shootings, generally
- Law enforcement often petitioners

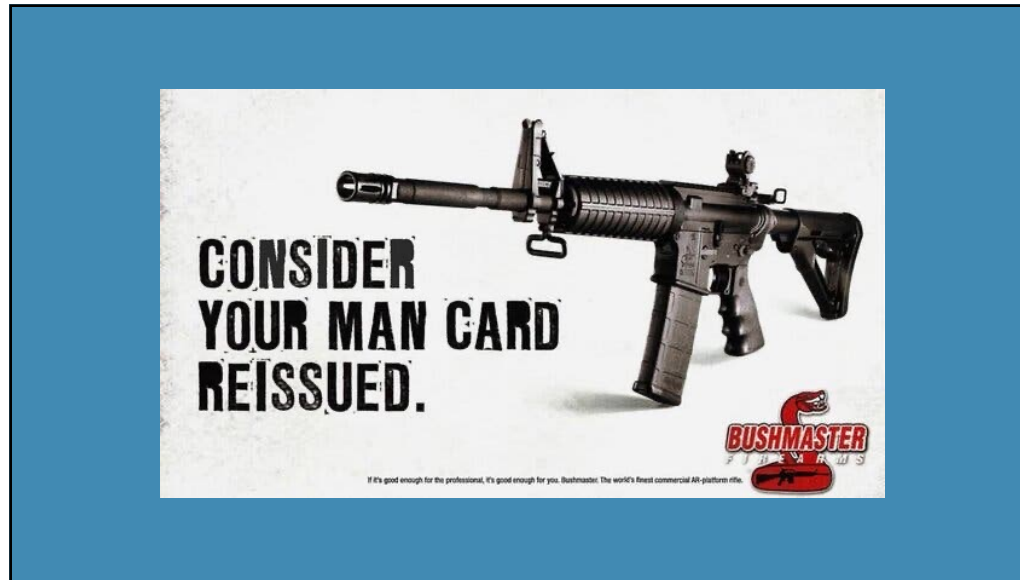
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Current Landscape: Firearm Access & Violence

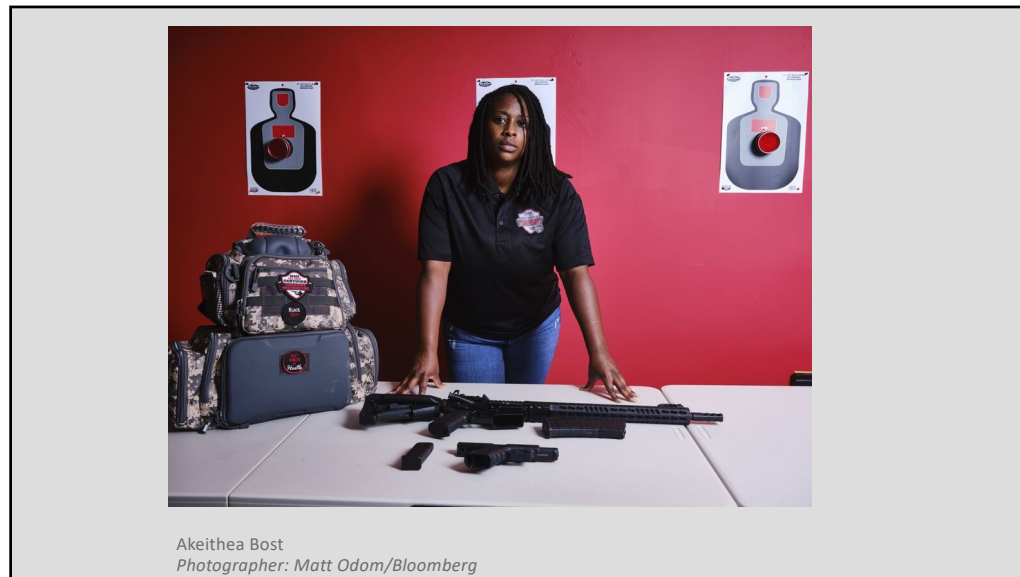
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Akeitha Bost
Photographer: Matt Odom/Bloomberg

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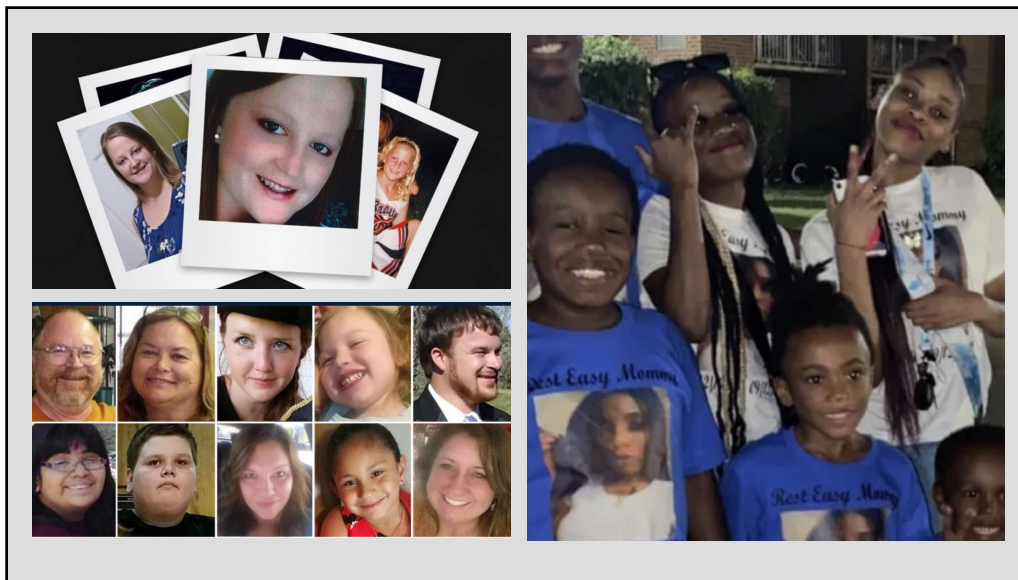
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Domestic violence victims are five times more likely to be killed when their abuser has access to a gun.¹¹

25 million US adults have been threatened or nonfatally injured by an intimate partner with a firearm.¹²

Women in the United States are 21 times more likely to be killed with a gun than women in other high-income countries.¹³

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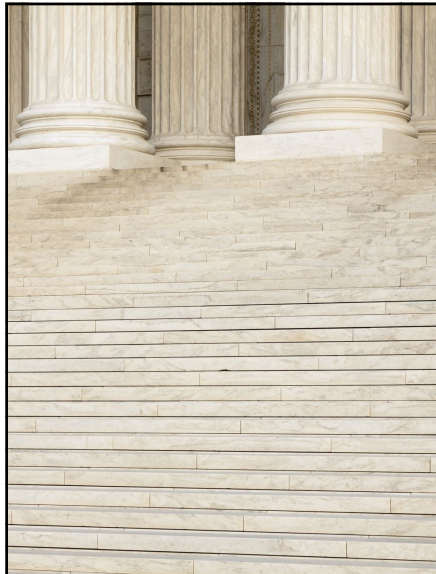
**Gun Control Act
(GCA), 18 U.S.C. . .
§922(g): certain
categories of
people prohibited
(firearms and
ammunition)**

**5th Circuit:
U.S. v. Rahimi**

- convicted in any court of a crime punishable by imprisonment for a term exceeding one year;
- fugitive from justice;
- unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, codified at 21 U.S.C. § 802);
- adjudicated as a mental defective or has been committed to any mental institution;
- illegal alien;
- discharged from the Armed Forces under dishonorable conditions;
- renounced his or her United States citizenship;
- subject to a court order restraining the person from harassing, stalking, or threatening an intimate partner or child of the intimate partner; or
- convicted of a misdemeanor crime of domestic violence.

The GCA at 18 U.S.C. § 922(n) also makes it unlawful for any person under indictment for a crime punishable by imprisonment for a term exceeding one year to ship, transport, or receive firearms or ammunition.

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**5th Circuit Rahimi Decision Struck Down
Prohibition in Texas, Louisiana, Mississippi**

- 18 U.S.C. § 922(g)(8) burdened Rahimi's 2nd Amendment right to bear arms under *Bruen*
- The federal prohibition is not supported historically and is an "outlier"
- The court did not find the arguments the government put forth to ground the prohibition in history supportable

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Judge Ho's Concurrence in Rahimi

- “Many divorce lawyers routinely recommend pursuit of civil protection orders for clients in divorce proceedings...as a tactical leverage device.”
- “...there's a “tremendous” risk that courts will enter protective orders automatically—despite the absence of any real threat of danger.”
- “In one case, for example, a family court judge granted a restraining order on the ground that the husband told his wife that he did not love her and was no longer attracted to her.”

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Beyond Prohibitions: Threat-Related Cases

- **Caniglia v. Strom (U.S. Supreme Court, 2021)**
 - “Neither the holding nor logic of *Cady* justifies such warrantless searches and seizures in the home....[a] recognition of the existence of “community caretaking” tasks, like rendering aid to motorists in disabled vehicles, is not an open-ended license to perform them anywhere”
- **Counterman v. Colorado (U.S. Supreme Court, 2023)**
 - “The State must prove in true-threats cases that the defendant had some subjective understanding of his statements’ threatening nature, but the First Amendment requires no more demanding a showing than recklessness.”

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Domestic Violence Civil Protection/Restraining Orders

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“For twelve years since her marriageshe has managed to support herself and her four children...[her husband has faced criminal sanctions four or five times] for beating her, knocking out her teeth, and nearly killing her [son]. Each time he returned from prison...more brutal.... and seized whatever money or furniture she had managed to obtain, breaking up her home over and over again. She applied...for a Protection Order...”

Frances Power Cobbe, writing in 1868

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- While there are differences from state to state, all protective order statutes allow the judge to order one or more of the following provisions:
 1. **Cease abuse**- order the abuser to stop hurting or threatening you.
 2. **Stay away**- the majority of states' orders can instruct the abuser to stay away from you, your home, your workplace, or your school.
 3. **No contact**- to prohibit all contact, whether by telephone, text messages, notes, mail, fax, email, through a third person, or delivery of flowers or gifts.
 4. **Support**- order the abuser to pay you temporary child support or continue to make mortgage payments on a home owned by both of you.
 5. **Exclusive use**- to award you sole use of a home or car owned by both of you.
 6. **Restitution**- to pay you for medical costs or property damage caused by the abuser, for example.
 7. **Relinquish firearms**- some courts might be able to order the abuser to turn over any guns, rifles and ammunition s/he has.
 8. **Treatment**- to attend a batterers' treatment program, appear for regular drug tests, or start alcohol or drug abuse counseling.
 9. **Custody, visitation, and child support**- many jurisdictions also allow the court to make decisions about the care and safety of your children as part of your restraining order. Courts can order the abuser to stay away from and have no contact with your children's doctors, daycare, school or after-school job and many courts can make temporary custody/visitation decisions. Some can even issue child support orders within the restraining order. You can also ask the court to order supervised visitation, or to specify a safe arrangement for transferring the children back and forth between you and the abuser.

Credit: womenslaw.org

Lassen County Times
Susanville, Ca. 96130

Page 5
Tuesday, Jan. 24, 1988

Spousal abuse: Lassen families in crises

Violence can take many forms

Violence can take many forms

By Curt Asher
City Editor


Black eyes and bruises are not the only marks left by violence in the home.

And the abusers don't belong to any specific class or race. Domestic violence is a problem at all levels of society and it can take many forms.

The effects of psychological, verbal or even economic abuse are often as crippling as a fist, claims Lassen Family Services, a domestic violence assistance program.

In most abuse cases, a need to control another person's life is the driving factor, said Family Services spokesman Georgianna Barton.

Candy O'Donel-Browne, leader of a national women's



Police, courts recognize dangers in some homes

complaint and then within hours have the victim in the police station asking them to drop charges.

If there are no visible injuries and police do not witness any violence, they cannot make an arrest. Normally, when the situation is volatile, officers try to separate the couple for the night.

They also provide both parties with written information on restraining orders and the phone number of Crisis Line, an organization that can provide safe shelter and emergency assistance.

"Once (beatings) happen, there's a good chance they'll recur unless some kind of action is taken," said Burk. "It's a way of life for some of these we run across. It's kind of scary in a way, to live that way and think it's all right. You never know when it's going to go all the way."

There are several legal steps a victim of abuse can take to stand to protect their assailants.

Domestic violence complaints taken by Lassen police and sheriff's deputies come into the district attorney's office and are reviewed by District Attorney Bill Scott. Scott issues a complaint based on the information in the police reports. He doesn't interview the victim before filing the complaint.

Even if the victim is hostile and lies on the stand, Scott said he may be able to convict a batterer based on the physical evidence and statements from the scene. He said hostile testimony in a case supported by evidence often convinces a jury of an assailant's guilt.

Scott said not all domestic violence cases end up in the courtroom. Before any proceedings take place he talks with the victim and tries to assess the situation. If there is a sincere concern on the couple's part and no serious injury, he may not prosecute.

"Normally I try to assess it. If

Violence in

DOMESTIC VIOLENCE

Keeping the Promise

Victim Safety and Batterer Accountability

- Judges had crossed off firearm prohibitions from the Judicial Council's orders. We confirmed the existence of this practice in interviews in two counties and from testimony at a regional hearing about judges in three counties;

Report to the California Attorney General from the Task Force on Local Criminal Justice Response to Domestic Violence

June 2005

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9 b. The person in 2 must:

- Sell to, or store with, a licensed gun dealer, or turn in to a law enforcement agency, any guns or other firearms within his or her immediate possession or control. Do so within 24 hours of being served with this order.
- Within 48 hours of receiving this order, file with the court a receipt that proves guns have been turned in, sold, or stored. (Form DV-800, Proof of Firearms Turned In, Sold, or Stored, may be used for the receipt.) Bring a court filed copy to the hearing.

c. The court has received information that the person in 2 owns or possesses a firearm.

d. The court has made the necessary findings and applies the firearm relinquishment exemption under Family Code section 6389(h). Under California law, the person in 2 is not required to relinquish this firearm (specify make, model, and serial number of firearm): _____
The firearm must be in his or her physical possession only during scheduled work hours and during travel to and from his or her place of employment. Even if exempt under California law, the person in 2 may be subject to federal prosecution for possessing or controlling a firearm.

10 **Record Unlawful Communications**
The person in 1 has the right to record communications made by the person in 2 that violate the judge's orders.

11 **Care of Animals**
The person in 1 is given the sole possession, care, and control of the animals listed below. The person in 2 must stay at least _____ yards away from and not take, sell, transfer, encumber, conceal, molest, attack, strike, threaten, harm, or otherwise dispose of the following animals: _____

12 **Child Custody and Visitation**
Child custody and visitation are ordered on the attached Form DV-140, Child Custody and Visitation Order or (specify other form): parties to call _____ within 24 hours

13 **Child Support** to schedule mediation

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Mother of Children Killed by Their Father Said She Lived in Fear

The woman obtained a restraining order in 2021 after telling a California court, "He has not killed me because he would not know where to go with the children."

Give this article



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Recommended Guidelines and Practices for Improving the Administration of Justice in Domestic Violence Cases

FINAL REPORT OF THE DOMESTIC VIOLENCE PRACTICE AND PROCEDURE TASK FORCE

JANUARY 2008



Domestic Violence and Firearms in California Family and Juvenile Dependency Court Matters

Effective 1/1/22, SB 320 codified in statute California Rule of Court 5.495 (eff. 7/2014). The bill added Family Code section 6322.5 and amended Family Code sections 3044, 6304, 6306, 6323, 6389, WIC section 213.5, and several Penal Code sections.

- 

At the scene and at service (EPO, TRO, OAH), law enforcement **MUST** remove firearms in plain sight or found through a consensual search (PC 18250). Relinquishment **MUST** occur immediately upon request by a law enforcement officer serving an order under FC 6389(c)(2).
- 

If not relinquished then, restrained party has 24 hours to relinquish and 48 hours to turn in proof to law enforcement and the court under FC 6389 and per court forms. DV-800/JV 252 may be used to provide proof of relinquishment to the court. Therefore, cases involving firearms should have DV-800 or similar information showing compliance in the court file within 48 hours of service.
- 

DV-800-INFO has statewide, general information on how to comply. However, courts **MUST** provide local info on how to relinquish under FC 6304.
- 

Before a noticed hearing, the court runs a check under FC 6306, including whether respondent/restrained party has firearms. If the check, or other info provide by a party shows firearm possession, the court **MUST** consider whether there's been a violation (FC 6306 and 6322.5; information might, for example, be available on the request for order in #9 on DV-100).
- 

Under FC 6322.5(a), when info about firearms is provided to the court, the court **MUST** consider whether there is a violation, **MUST** make a written record of the determination, and **MUST** provide it to the parties (see also FC 6322.5(c)).
- 

To make the determination, courts **MAY** set review hearings as provided under 6322.5(c).

Under FC 6306(f), the court **MUST** make a written record of whether a prohibited party has provided proof of relinquishment.

Extreme Risk Protection Orders

Firearm Safety Warrants

Information about warrants that allow police officers to search for and take firearms away from someone when there is an immediate risk of personal injury

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Remedies	DV Civil Orders	Extreme Risk Orders	
Names protected parties			
Restricts where the restrained person can go			
Child custody and visitation remedies			
Financial Remedies			
Services			
No contact, no abuse			
Access to victim advocates			
Firearm prohibitions under state or federal law (ERPO only state)			

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Civil Protective Orders Effective in Stopping or Reducing Partner Violence

Extreme Risk Protection Orders: Designed to Prevent Suicide and Mass Shootings - and to Fill Gaps in Existing Criminal and Civil Approaches

Opinion | Here's how to make red-flag laws most effective against gun violence

By [Marionna Poser](#)

'They're not gonna help you': Why domestic violence survivors say they're being failed by police and the 'red flag' law

By [Andrew Kenney](#) · Feb. 2, 2023, 4:00 am

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Who is using Colorado's 'red flag' law?

Extreme Risk Protection Orders can be requested by law enforcement or, in certain cases, by private citizens. Individuals have filed most of the petitions so far, but law enforcement requests are far more likely to be granted by judges.

Search in table

Page 1 of 9

Filer	Cases initiated	Cases resulting in two-week order	Cases resulting in one-year order	Percent resulting in one-year order
Individual	186	61	30	16%
Denver Police Department	88	88	74	84%
Lakewood Police Department	9	8	6	67%
Boulder Police Department	7	6	7	100%
Douglas County Sheriff's Office	7	4	4	57%

Multiple types of orders may be issued in one case, such as a two-week order followed by a one-year order. Data covers January 2020, when the law went into effect, through mid-November 2022. Some numbers may be inaccurate due to court paperwork errors.

Table: Andrew Kenney/CPR News • Source: Colorado Public Radio

Colorado Public Radio

<https://www.cpr.org/2023/01/30/erpo-red-flag-cases-in-colorado/>

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CALIFORNIA COURTS
SELF-HELP GUIDE

Type of Case ▾ Court Information ▾ Español E.g. divorce, name change

< Previous Page ☰ Index: All Pages Gun Violence Prevention
Get information and resources

Gun Violence Restraining Orders in California

This guide can help you:

- Learn about gun violence restraining orders, sometimes called a "red flag" gun law
- Learn what you must do if you receive restraining order papers
- Ask for a gun violence restraining order
- Find free resources for help

Was this helpful?

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NEXT STEPS

Learn more about your next step

I received form EPO-002. What's my next step?

Get help understanding an emergency protective order (form EP-002) and see options to respond

I received form GV-109. What's my next step?


Get help understanding a gun violence restraining order (form GV-100) and see options to respond

Ask for a Gun Violence Restraining Order

Get step-by-step instructions for each part of the process

Was this helpful?

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JDF 572 	Instructions for Extreme Risk Protection Orders
----------------------------------------------------------------------------------------------	-----------------------------------------------------------

Note These standard instructions are for informational purposes only and do not constitute legal advice about your case. If you choose to represent yourself, you are bound by the same rules and procedures as an attorney.

General Information

- ♦ A family or household member of the respondent, a community member, or a law enforcement officer may request a Temporary Extreme Risk Protection Order (ERPO) without
 - A family, household, or community member is considered the following:
 - The person is related by blood, marriage, or adoption to
 - The person has a child or children in common with the marriage or whether they have lived with the respondent
 - The person regularly resides or has regularly resided within the last six months.
 - The person is a domestic partner of the respondent.
 - The person has a biological or legal parent-child relationship (including stepparents and stepchildren, grandparents a
 - The person is acting or has acted as the respondent's legal guardian
 - The person is the spouse or former spouse of the Respondent
 - In the past the person has been in or is presently in an intimate relationship with the Respondent.
 - The person is a licensed health-care or mental health professional who has provided services to the Respondent, or their child, within the last six months.

Step 2: You are ready to file your papers with the Court.

- Provide the Court Clerk with the documents completed as described in Step 1 above.
- A hearing on an Extreme Risk Protection Order, where the court decides if an Order will issue that will be effective for 364 days, will be set in 14 days. You are required to appear for that hearing.
- At the hearing, the court may deny the Petition for Extreme Risk Protection Order and no further action will take place.

Step 3: Personal Service.

The court will complete personal service on the Respondent with a Notice of Hearing on Extreme Risk Protection Order, through a law enforcement agency.

Step 4: Extreme Risk Protection Order Hearing.

You may call witnesses and present evidence if you wish.

- If the Court grants the Extreme Risk Protection Order, you will be provided with a written order stating such.
- If the Respondent appears for the hearing, the respondent will be served with the order in court.
- If the Respondent is not present for the hearing the court will complete personal service of the Extreme Risk Protection Order through a law enforcement agency.

https://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=280

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UCS-6341 (09/2022)	Page 2 of 5	Index #: _____
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Petitioner alleges that the above-named respondent **is likely to engage in conduct that would result in serious harm to self or others** as defined in MHL § 9.39(a)? and petitions the Court to issue a temporary extreme risk protection order against the respondent pursuant to CPLR § 6342 based upon the facts and circumstances set forth in the following sworn application justifying the issuance of the order, to wit: Petitioner believes that the respondent is likely to engage in conduct that would result in serious harm to self or others because the respondent has engaged in, exhibited, or committed the following behavior(s) or act(s) [check all that apply]:

- A threat or act of violence or use of physical force directed toward self, the petitioner, or another person;
- A violation or alleged violation of an Order of Protection;
- A pending charge or conviction for an offense involving the use of a weapon;
- The reckless use, display or brandishing of a firearm, rifle or shotgun;
- A history of a violation of an Extreme Risk Protection Order;
- Evidence of recent or ongoing abuse of controlled substances or alcohol;
- Evidence of recent acquisition of a firearm, rifle, shotgun or other deadly weapon or dangerous instrument, or any ammunition therefor;
- Other [specify any other relevant factors the Court should consider]:

[https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_\(UCS-6341\)_fillable.pdf](https://www.nycourts.gov/legacypdfs/forms/erpo/Application_Temporary_ERPO_(UCS-6341)_fillable.pdf)

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What Legal Services Attorneys Can Do

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Learn, Ask, and Act

- Consider personal and client risk associated with the nature of cases – and the increase availability of firearms
- Pushing information out as well as collecting info is key
- Consider gun-related safety provisions in crafting parent plans
- Talk about safe storage and prohibitions
- Become familiar with the range of tools available to reduce risk: civil, criminal; state and federal laws
- Assist the court with recognizing dangerousness and the need for a specific set of remedies

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**Firearms Violence Prevention:
Some Key Questions to Consider Asking in Working with Families (2023)**
Developed by Julia F. Weber, JD, MSW
For more information and additional training context: juliafweber@gmail.com

Critical conversations with clients and litigants can make a difference in raising awareness of risks, providing safety planning guidance, and supporting compliance with court orders. **Context is critical, however:** be aware that creating rapport with your client and avoiding bias around owning or not owning firearms can help improve the information you gather and the impact of the information you provide. You may consider providing some initial context: "We ask about firearms because when families/people are in crisis/there has been violence, there is a greater risk for injury or even death. We can help reduce that risk by removing firearms, even temporarily."

Consider starting with: "Do you feel comfortable talking with me about whether there are firearms in your home (or whether your partner/other party has access to firearms)?"

Provide context about why you are talking about firearms: "Easy access to firearms when there is conflict or a crisis in the home or the family can increase risk. We're concerned about suicide, unintentional shootings, injuries, and other harm that can occur to family members and others. There are some key steps that can be taken to reduce risk, however."

"Sometimes the conflict can create a situation where youth/children/adults may be thinking about suicide, struggling with depression, or not being supervised/cared for in ways that if there are firearms in the home, they may hurt themselves or others, intentionally or accidentally."

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Helping the Court/Judges Recognize and Address Dangerousness

- Synthesize client narratives to focus on experienced and potential harm
- Share information about why access to firearms and threats combined increases risk
- Consider prevalence of gun ownership and ideas around "if it was really dangerous, this would be in criminal court"
- Appropriately refer to mental health concerns
- Provide safer options for judicial decisions (for example, with visitation)
- Support compliance with firearm prohibitions

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Parenting Plan Provisions and Examples

- Firearms will be stored safely, locked and unloaded and as legally required
- Neither parent will purchase or maintain firearms in the home without the consent of the other parent
- All laws regarding firearm use will be followed
- Work with clients to follow restraining order and other prohibitions
- Supervised, virtual or no visitation may be appropriate

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WHAT YOU CAN DO
to stop firearm violence


In your home, are there any

- children or teens?
- people who have dementia or other cognitive impairments?
- people who have a problem with drugs or drinking?
- people who think about harming themselves or others?
- firearms?

IF YOU HAVE FIREARMS AT HOME, YOU CAN TAKE STEPS TO AVOID HARM.

- 1 Weigh the risks and benefits**
Know the responsibilities of safe gun ownership and think about whether having firearms in your home now is right for you and for everyone else who spends time there.
- 2 Store firearms safely**
Storing guns safely means keeping them unloaded when not in use and secured from unauthorized access with a locking device. Keep the keys or combinations for locking devices away from those who shouldn't have them.
- 3 Recognize increased risk**
Guns in your home can be especially dangerous if you or someone else at home is going through a time of crisis or has risk factors for gun injury or death. Consider temporarily storing guns away from home or safely disposing of guns if someone in the home is at risk.
- 4 Take action**
If you are worried about your safety or someone else's when a gun is present, reach out to your health care provider, local law enforcement, or emergency services. By keeping guns out of the wrong hands, you're helping keep yourself and your loved ones safe.

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ASSOCIATION OF
FAMILY AND
CONCILIATION COURTS

eNEWS

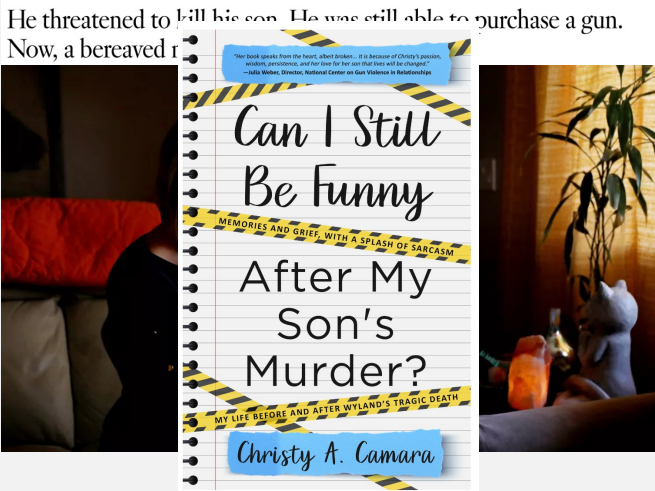
January 2020
VOL. 15 No. 1

Ask the Experts: How Family Law Professionals Can Help Prevent Gun Violence
Hon. Mark A. Juhas and Julia F. Weber, Esq, MSW

Gun violence impacts individuals and families around the world; however, the United States has an exceptionally high rate of firearms violence and the most privately-owned guns of any comparable country. While many gun owners properly store and handle their firearms, too many families have experienced the horrific consequences associated with gun violence. As [Giffords Law Center to Prevent Gun Violence](#) notes, "over 1.2 million Americans have been shot in the past decade, millions more have witnessed gun violence, and hundreds of millions—almost every American—will know at least one victim of gun violence in their lifetime."

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He threatened to kill his son. He was still able to purchase a gun.
 Now, a bereaved r



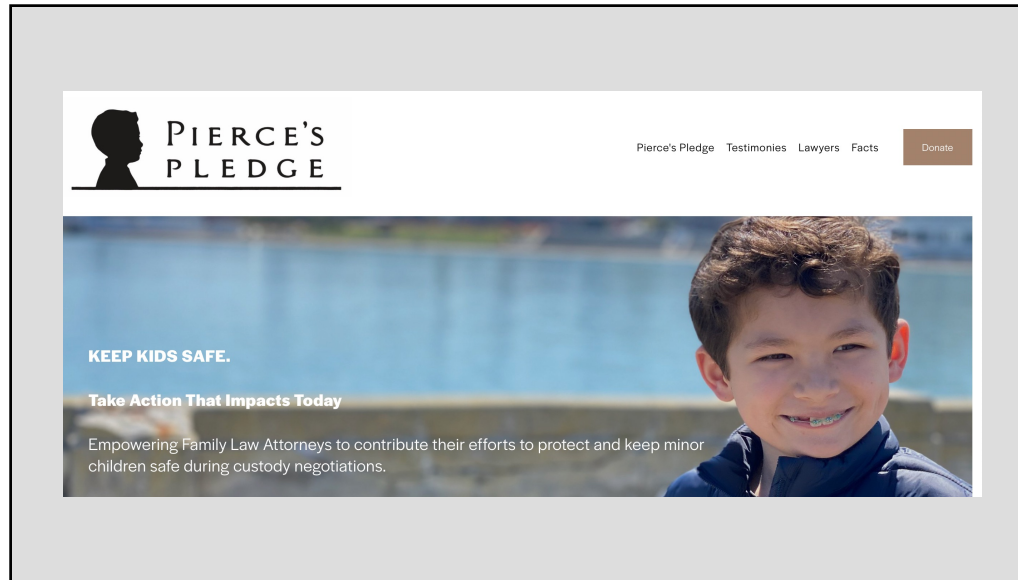
Can I Still Be Funny After My Son's Murder?
 Christy A. Camara

MEMORIES AND GRIEF, WITH A SPLASH OF SARCASTIC
 MY LIFE BEFORE AND AFTER WYLAND'S TRAGIC DEATH

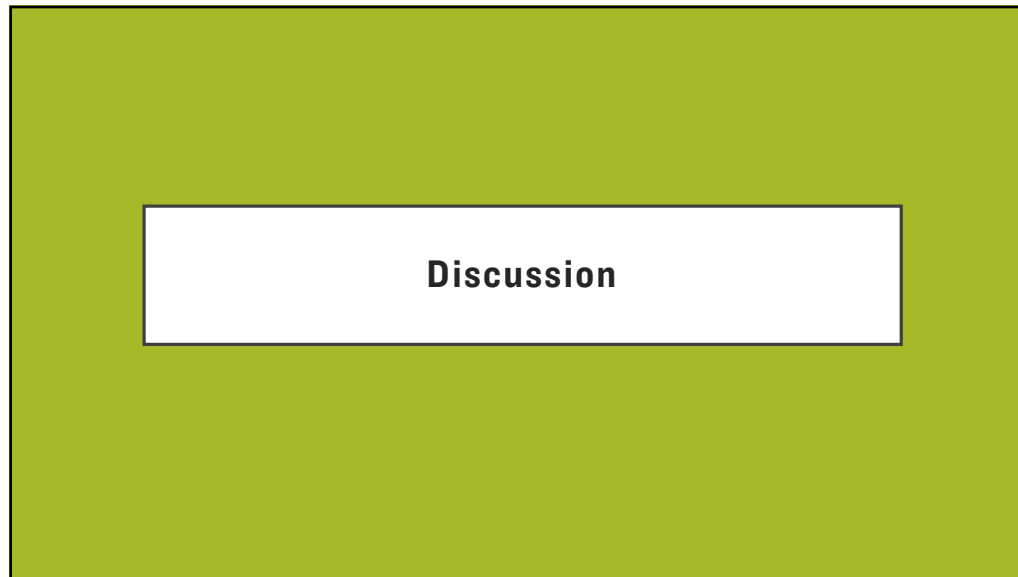
Her book speaks from the heart, about Jordan... It is because of Christy's passion, wisdom, persistence, and her love for her son that more will be changed.
 —Julia Weber, Director, National Center on Gun Violence in Relationships

<https://aliotolegal.com/wp-content/uploads/2022/10/Camara.Petition.Filed.pdf>

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