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Divorcing Guns: How Family Law Could Change Parental Gun Ownership and Save Kids' Lives

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Divorcing Guns: How Family Law Could Change Parental Gun Ownership and Save Kids' Lives

Marcia A. Zug*

Abstract

Guns are deadly. They are especially deadly for children yet, currently, parental gun ownership is not a major factor in custody disputes. This needs to change. Making irresponsible gun ownership a routine factor in custody cases could transform parental gun behavior. In other contexts, the potential loss of custody has proven to be an extremely strong deterrent. Moreover, unlike other proposed solutions to gun fatalities, this is a change that can be made right now. Making guns a part of custody disputes does not require the enactment of new legislation or even a judicial determination. By simply raising the issue of gun safety in custody cases, family lawyers can reduce dangerous gun behavior and save children's lives. This solution won't end all childhood gun injuries, but it could make a real difference.

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INTRODUCTION

In the wake of one of the worst school shootings in history, gun reform still appears impossible. Gun reform advocates need new tactics. As a family law scholar, and a parent, the question I keep returning to is: Can family law can do anything about gun violence? I believe answer is yes and the path forward requires neither a legislative nor policy change. Family lawyers just need to routinely raise the issue of irresponsible gun ownership in custody proceedings. This easy change could reduce thousands of children's access to guns, and it can be done right now. Moreover, not only will this action save children's lives, it also benefits clients.

This essay will argue that family law provides an underutilized, yet potentially effective means of reducing child gun deaths. Part II will show that irresponsible gun ownership is harmful to children and is exactly the type of parental behavior courts can consider in child custody determinations. It will then demonstrate that constitutional protections do not prevent courts from making such considerations and that a handful of courts have already issued such decisions. Part III will explain that the potential loss of custody is an extremely strong deterrent and that parents frequently cease dangerous or negative behaviors if they believe continuing such actions could adversely affect their custody case. This part will then argue that it is likely such fears could also change the behaviors of gun owning parents. Lastly, Part IV will examine the role played by family lawyers in these cases and reveal the concrete steps lawyers representing gun owning and non-gun owning parents, can take to help their clients and protect children.

I. GUN OWNERSHIP AND BEST INTERESTS

Custody decisions impact more than a million children every year.¹ Many of these decisions occur in relation to divorce

1. Many of these decisions occur in relation to divorce. In 2019, there were 746,971 divorce cases, and 40% percent of these cases involved children. See Amy Holtzworth-Munroe et al., *Intimate Partner Violence and Family*

but can also involve the children of never married parents.² Sometimes these custody agreements are reached easily. Often, they are not. Parents who cannot agree on custody will need to go before a judge and argue why it is in their child's best interest to reside with them, and not the other parent.³ Currently, gun ownership is not a major factor in custody disputes. This needs to change. By consistently raising the issue of gun safety in custody disputes, family lawyers could reduce dangerous gun behavior and save children's lives.

Significant numbers of gun owning parents are not responsible gun owners and their gun behaviors are endangering the safety of their children. Research shows that 4.6 million children in the United States live in a home with at least one unlocked and loaded firearm.⁴ This poses a substantial danger. The vast majority of child and teen shootings occur in the home.⁵ In 2020 alone, there were at least 369 unintended shootings by children in the United States and most occurred in homes where children could access family guns.⁶ Tragically,

Dispute Resolution: 1-Year Follow-Up Findings from a Randomized Controlled Trial Comparing Shuttle Mediation, Videoconferencing Mediation, and Litigation, 27 PSYCH., PUB. POL'Y & L. 581, 582 (2021) (citing *National Marriage and Divorce Rate Trends for 2000–2016*, CDC/NCHS (2016), <https://perma.cc/KW8X-MVV7> (PDF)). However, many involve unmarried parents. See Vanessa Taylor, *Actually, Having Kids *Doesn't* Increase Your Chances of Divorce—But Here's What Does*, ROMPER (May 12, 2018), <https://perma.cc/2AJ4-3V8T> (noting custody decisions can also involve the children of never married parents).

2. Also, over 40% of U.S. births are to unmarried mothers. *Id.* (citing Joyce A. Martin et al., *Births: Final Data for 2009*, 60 NAT'L VITAL STATS REPS. 1 (2011)). In addition, "children of unmarried parents experience more parent partnership changes than children of married parents." *Id.* (citing Wendy D. Manning, *Cohabitation and Child Well-Being*, 25 FUTURE OF CHILD. 51 (2015), <https://perma.cc/FQY9-WKTL>).

3. In fact, at least one fourth of divorcing couples with children will need to participate in extensive litigation before finalizing their divorce. JANET R. JOHNSTON & VIVIENNE ROSEBY, *IN THE NAME OF THE CHILD: A DEVELOPMENTAL APPROACH TO UNDERSTANDING AND HELPING CHILDREN OF CONFLICTED AND VIOLENT DIVORCE* 4 (1st ed. 1997).

4. Matthew Miller & Deborah Azrael, *Firearm Storage in US Households with Children: Findings from the 2021 National Firearm Survey*, JAMA NETWORK OPEN (Feb. 22, 2022), <https://perma.cc/T7Q3-PV9R>.

5. *Child & Teen Gun Safety*, EVERYTOWN FOR GUN SAFETY, <https://perma.cc/C7MS-5UYJ> (last updated Dec. 29, 2021).

6. Unintentional shootings were four times higher in homes with guns. These shootings caused 142 deaths and 242 injuries. The COVID pandemic

unintentional shootings are not the only danger children face when guns are accessible. In homes with guns, children have a three times higher risk of homicide⁷ and a four times higher risk of suicide.⁸

Despite the gravity of these statistics, these dangers have not convinced Congress, or most state legislatures, to act.⁹ But the increased risks posed to children are clear and family courts are obligated to consider them.¹⁰ In all U.S. jurisdictions, the standard for making child custody decisions between two fit parents is some version of “the best interest of the child.”¹¹ To help courts apply this standard, the majority of state codes include a list of factors for courts to consider.¹² Most also contain a catch-all provision permitting courts to consider any other

further increased these numbers. Between March 2020 and December 2020, unintended shooting deaths by kids increased more than 30%. Judy Schaechter, *Guns in the Home: Keeping Kids Safe*, AM. ACAD. OF PEDIATRICS (June 1, 2022), <https://perma.cc/EJ5A-U2WV>.

7. Fifty-eight percent of shooting deaths in children and teens are homicides and over three million children witness gun violence every year. EVERYTOWN FOR GUN SAFETY, *supra* note 5.

8. Forty percent of these suicides involved guns and 9 out of 10 of these deaths were caused by guns victims accessed from their own home or from a relative’s home. Schaechter, *supra* note 6.

9. See, e.g., Henry H. Foster, Jr. & Doris Jonas Freed, *Child Custody (II)*, 39 N.Y.U. L. REV. 615, 623 (1964) (discussing several cases detailing what is considered in custody matters without mentioning gun ownership).

10. See, e.g., *supra* note 6 and accompanying text (emphasizing the increased danger for children in homes with guns).

11. See Julie E. Artis, *Judging the Best Interests of the Child: Judges’ Accounts of the Tender Years Doctrine*, 38 L. & SOC’Y REV. 769, 774–75 (2004) (discussing the emergency of the “best interests of the child” standard).

12. See Jessica Feinberg, *Consideration of Genetic Connections in Child Custody Disputes Between Same-Sex Parents: Fair or Foul?*, 81 MO. L. REV. 331, 356 (2016)

Factors that courts commonly weigh include the bond between each parent and the child, the needs of the child and the ability and disposition of each parent to meet the child’s needs, past caretaking responsibilities, the child’s need for continuity, the wishes of the parents, the wishes of the child provided he or she is of sufficient age, the mental and physical health of each parent and the child, the willingness of each parent to facilitate a close and continuing relationship between the child and the other parent, and any history of violence, abuse, or neglect on the part of either parent.

relevant information that affects the best interests of the child.¹³ In making such custody determinations, courts have considered obvious dangers such as physical, sexual, or emotional abuse but also less obvious ones such as obesity,¹⁴ smoking,¹⁵ listening to music with explicit lyrics,¹⁶ and non-marital relationships.¹⁷ Notably, the fact that some harmful parental behaviors may be constitutionally protected does not prevent their consideration in a custody determination.

In his article *Parent-Child Speech and Child Custody Speech Restrictions*, Professor Eugene Volokh describes the wide range of constitutionally protected behaviors that have factored into custody decisions.¹⁸ He notes that in Texas, for example, it is permissible to consider a parent's religious "beliefs, teachings, or practices" as part of the best interests inquiry, if the jurors

13. See Artis, *supra* note 11, at 774–75 (explaining that many statutes allow courts to consider "all relevant factors" when making a custody determination).

14. See Kristen E. Brierley, *Family Law—Childhood Morbid Obesity: How Excess Pounds Can Tip the Scales of Justice in Favor of Removing a Child from the Home and/or Termination of Parental Rights*, 35 W. NEW ENG. L. REV. 129, 132 (2013) (arguing that Massachusetts courts should consider the parents' health when determining whether they can provide adequate care for a morbidly obese child).

15. See Crystal R. Dawson, *Life in the Smoky Lane: An Evaluation of Environmental Tobacco Smoke and Bans on Smoking in Vehicles Containing Children*, 4 PHOENIX L. REV. 885, 894–95 (2011) (explaining how courts have used the *parens patriae* doctrine to "enjoin smoking in the presence of children as a part of custody arrangements").

16. See, e.g., *McCorvey v. McCorvey*, 916 So. 2d 357, 373 (La. Ct. App. 2005) (restricting visitation in part, because father permitted child to listen to music "by the group 'Outkast' and [telling] her that the song 'Hey Ya' is a 'good song' in spite of the fact that the song advocates sex in the back of a car using explicit, sexual, slang terminology unfit for a child and offensive to the sensibilities of many adults"); *In re Fam. Ct. Act v. Yonalda L.F.*, No. V–06599–03/04A, slip op. at *8 (N.Y. Fam. Ct. 2004) (noting mother exposed daughter to "age [in]appropriate . . . music" as factor in denying mother custody).

17. See 17 DARREN K. OGLESBY ET AL., *EXTRAMARITAL RELATIONSHIPS*, WEST'S PA. PRAC., FAMILY LAW § 28:12 (8th ed. 2022) (discussing various cases considering whether extramarital relationships should be considered in custody determinations).

18. These include swearing, watching R-rated movies, surfing the internet, listening to explicit music, and viewing pornography. Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 638–39 (2006).

conclude that those “beliefs, teachings, or practices [are] illegal, immoral, or . . . harmful to the child.”¹⁹ Similarly, “a court can limit a parent’s expressing broader viewpoints that also expressly or implicitly condemn the other parent.”²⁰ In the 2011 South Carolina case *Purser v. Owens*,²¹ the court even considered the mother’s abortion in its best interest analysis.²² In *Purser*, the father argued that the mother’s abortion demonstrated her parental unfitness and the family court agreed.²³ The judge stated, “having an abortion. That’s irresponsible. I am concerned about the environment.”²⁴ On appeal, the family court was reversed, but not because abortion was a constitutionally protected right.²⁵ The appellate court simply concluded, “Mother’s abortion had no direct or indirect effect on Child and therefore was not relevant to the custody determination.”²⁶

Irresponsible gun ownership has a clear negative effect on children. If this issue were routinely raised in custody disputes, there is little doubt that many of the thousands of family courts making best interests determinations every year would conclude that irresponsible gun ownership is a relevant, and

19. *Id.* at 639 (internal quotes omitted).

20. *See id.* at 640–41 (internal citations omitted)

One parent, for instance, was ordered to ‘make sure that there is nothing in the religious upbringing or teaching that the minor child is exposed to that can be considered homophobic,’ because the other parent was homosexual. Parents have had their rights reduced based, in part, on their having told their children that the other parent was destined for damnation, or otherwise criticizing the other parent’s religion. A court could likewise restrict a father’s teaching his children that women must be subservient to men, since such speech might undermine the mother’s authority.

21. 722 S.E.2d 225 (S.C. Ct. App. 2011).

22. *Id.* at 226–27.

23. *Id.* at 228.

24. *Id.* at 227.

25. *Id.* at 228.

26. In fact, in *Purser*, the abortion was arguably in the son’s best interest. The mother explained that because of her son’s disabilities he required extra care and attention that she would not be able to provide were she to have another child. She also argued that this was especially true given the assumed likelihood that another child could share the same developmental disabilities as her son. *Id.*

potentially determinative, custody factor.²⁷ Some courts already have.

In the 2005 case *Anderson v. Anderson*,²⁸ a Nebraska court awarded custody to the mother based in part, on the fact that the father kept loaded guns in the house and the guns were accessible to the children.²⁹ The court considered such irresponsible gun ownership a negative custody factor and weighed it against the mother's own negative behaviors which included, a "relationship with a 'federal drug felon,'" her destruction of the husband's "business sign in front of and with the children," and her "use of alcohol."³⁰ The *Anderson* court believed both parents were acting in ways that negatively affected their children's best interests, but that the father's gun behaviors were the most problematic.³¹ In the 2021 Illinois case, *Hackney v. Hackney*,³² the court reached a similar conclusion.³³

27. Currently, in most custody cases involving guns, guns are only viewed as a negative custody factor if the parent has threatened violence or engaged in some other illegal actions. *See, e.g., In re Cecil T.*, 717 S.E.2d 873, 881 (W. Va. 2011) (holding the father's gun possession "put the child's health, welfare and safety squarely at risk"). Because the father,

possessed a number of firearms when he knew that he was prohibited by law from having guns, and thus jeopardized his ability to care for the infant. He knew he could be arrested for having firearms, and he knew if he were arrested there were no other family members located by DHHR who could or would care for the infant in his stead. Additionally, Appellee kept the guns in the home where the child was living and the actual sale of the deadly weapons occurred in the baby's presence.

28. No. A-04-1232, 2005 WL 2076668 (Neb. Ct. App. Aug. 30, 2005).

29. The court was also concerned that guns in the home made it more likely that the father, who had previously been suicidal, might use them on himself in front of the children. *See id.* at *3.

30. *Id.* Similarly, in the much older case, *Eaton v. Eaton*, 365 N.E.2d 647 (Ill. App. Ct. 1977), the mother's gun ownership was treated on par with other potentially concerning behaviors such as non-marital relationships and occasional drug use. *Id.* at 652. The court noted, "Neither do her employment as a cocktail waitress and a bartender; her possession of a gun, in view of her reason for having it; or her disputed occasional use of marijuana [affect her fitness to have custody]." *Id.*

31. *Anderson*, 2005 WL 2076668, at *8.

32. No. 1-21-0380, 2021 WL 5493988 (Ill Ct. App. Nov. 23, 2021).

33. *See id.* at *1 (holding that there was "no legal basis in the record to warrant reversal" of trial court's custody decision considering gun ownership as a determining factor).

In *Hackney*, the mother filed an emergency custody petition based on the father's possession and use of dozens of guns.³⁴ Although the court noted there had been "no serious incidents," it "struggle[d]" with the fact that the father had "38 guns in the house."³⁵ Fearing for the children's safety amidst so many firearms, the court ordered the father to store the guns outside of the home.³⁶ When the father did not comply, it limited his visitation.³⁷ According to the *Hackney* court, the father's decision to fill his home with guns was "conduct that endangers the child's mental, moral, and physical health, and . . . has significantly impaired the child's emotional development."³⁸ Such gun behavior, explained the court, demonstrated that the father was not able to "appropriately care for the minor child."³⁹ The court then granted sole legal and residential custody to the mother and made any increase in the father's parenting time contingent on his non-use of "guns, ammunition, weapons, etc."⁴⁰

In *Anderson* and *Hackney*, custody was contingent on responsible gun behavior and such decisions could become the norm.⁴¹ Although gun-based custody decisions are currently rare, they shouldn't be.⁴² The reasoning behind decisions like

34. *Id.* at *2.

35. *Id.* at *1.

36. *Id.*

37. *See id.* at *5 (detailing examples of the father's noncompliance with the court).

38. *Id.* at *3.

39. *Id.*

40. *Id.* The case was not solely about guns. The court also had concerns about the child's access to the drug paraphernalia the dad used in relation to his use of medical marijuana. *See id.* at 5 (discussing the negative implications of the father's drug possession in the presence of the child).

41. *See Anderson, supra* note 29 (weighing parental gun ownership as a factor against awarding custody); *Hackney, supra* note 33 (restricting parental visitation because of their gun usage).

42. The 2003 case *Wiley v. Wiley* shows just how far concerns about guns can be taken. In *Wiley*, a Washington state court held that the parent's possession of a gun themed magazine, which was made available to children, was potentially harmful enough to be considered in its custody determination. Volokh, *supra* note 18, at 638 (citing Excerpt of Court Proceedings, *Wiley v. Wiley*, No. 31061-9-11, at *14 (Wash. Ct. App. June 25, 2003)) (expressing judge's concerns about "this gun magazine" being available to children). The magazine was apparently *Special Weapons: Weapons of the Special Forces*.

Anderson and *Hackney* is routine family law. It is the job of family courts to decide what factors affect a child's best interests and abusive gun ownership is exactly the kind of behavior courts must consider. Once parents know guns may affect their custody case, it is likely this knowledge will change their gun behavior.

II. LOSS OF CUSTODY IS A GREAT DETERRENT

Many parents will refrain from certain behaviors if they believe continuing such behavior could hurt their custody case. In the context of gun ownership, there is every reason to expect the same result. Professor Volokh illustrates this point with the following scenario pertaining to parental speech:

Say you were a parent expecting a difficult custody battle, and you had heard that some judges—not necessarily all judges, but some—had considered parents' teaching of certain views as a factor in their custody decisions. Would you express those views to your children? Or would you reasonably conclude that the safer course is to remain quiet, to the children and perhaps even to others, so as not to give the other parent ammunition and not to give a family court judge an item to count against you? And this may happen even if the risk of a court's using your speech against you in the custody decision is small; risk-averse parents may be deterred even by small risks, especially when the harm (loss of custody) is so grave.⁴³

As Professor Volokh notes, parents will alter their behaviors based on their perception of judicial preferences. They will also do so in response to their attorney's perceptions of

E-mail from Scott Horenstein, lawyer in *Wiley v. Wiley*, to June Kim, UCLA Law Library (Sept. 21, 2005) (on file with the New York University Law Review); e-mail from Devin Theriot-Orr, lawyer in *Wiley v. Wiley*, to June Kim, UCLA Law Library (Sept. 14, 2005) (on file with the New York University Law Review)).

43. Volokh, *supra* note 18, at 654 (citing *People ex rel. McGrath v. Gimler*, 60 N.Y.S.2d 622, 626–27 (Sup. Ct. 1946)) (discussing mother's decision to change her daughter's religious upbringing in an apparent attempt to make her custody case more appealing to court); see also *The Establishment Clause and Religion in Child Custody Disputes: Factoring Religion into the Best Interest Equation*, 82 MICH. L. REV. 1702, 1720–21 (1984) (describing concern that parents may change religious behavior to gain advantage in custody determinations).

judicial preferences. In the Indiana case, *Elbert v. Elbert*,⁴⁴ the lower court expressed a preference for parents who “practice[d] religious beliefs through church attendance”⁴⁵ and, as a result, the appellate court noted it was likely that attorneys practicing in that judge’s court would begin to “fashion their cases and advise their clients to alter their religious practices—or their representation of their practices—to conform to this judge’s guidelines for raising children in their religion.”⁴⁶

In *Elbert*, the lower court judge had made his religious preferences clear.⁴⁷ However, lawyers may also advise clients to change behaviors they only suspect a judge disfavors. One Texas attorney believed judges preferred religious parents, so he advised potential clients to become more religious:

Many, many custody cases are won and lost by one point, one factor, and you should be aware that a careless attitude toward this issue can cost you the whole case. You need to have a reasonable attitude toward religion . . . and evaluate . . . how it can affect your case.⁴⁸

Convincing parents to adopt responsible gun behaviors may appear difficult but, such changes are far less drastic than many others parents have willingly accepted. Currently, it is not uncommon for parents to alter their romantic relationships or even marry, if they believe such changes will improve their custody chances. Cases like the 1990 Michigan decision *Helms v. Helms* shows why parents are willing to make such extreme lifestyle changes.⁴⁹

In *Helms*, the unmarried mother lost custody of her children based on her unmarried cohabitation. The court ruled against the mother despite case law holding that unmarried cohabitation did not constitute immorality. The *Helms* court distinguished these previous cases holding that, because the mother in *Helms* was cohabitating *and* pregnant, the present case was different. It then awarded custody of the children to

44. 579 N.E.2d 102 (Ind. Ct. App. 1991).

45. *Id.* at 110.

46. *Id.* at 111.

47. See *supra* note 45 and accompanying text.

48. Volokh, *supra* note 18, at 654 n.106 (citing James Whalen, *Child Custody and Divorce: Free Legal Advice*, <https://perma.cc/S56E-3FLJ>).

49. 185 Mich. App. 680 (Mich. Ct. App. 1990).

their father.⁵⁰ Similarly, in the 2000 case *Ulvund v. Ulvund*,⁵¹ the lesbian mother sought to avoid a ruling like *Helms* by refraining from all displays of affection with her partner in front of her children.⁵² She still lost custody.⁵³ According to the *Ulvund* court, the mother's lack of affection with her partner was unnatural and harmful.⁵⁴ Thus, like the *Helms* court, the *Ulvund* court placed the child with the father.⁵⁵

Given such custody rulings, many parents have concluded that the best way to avoid subjective and possibly biased judgments about their romantic relationships is to marry. Marriage helps insulate parents from such rulings and can even negate previous perceptions of a parent's romantic behaviors.⁵⁶ For example, in the 2016 case *Robertson v. Robertson*, the court was deeply concerned that both the mother and father were in non-marital cohabitating relationships.⁵⁷ Nevertheless, once the mother married her boyfriend, these concerns vanished and she was declared the more "moral" parent.⁵⁸ Similarly, in the 2018 Alabama case, *Sylvester v. Cartee*,⁵⁹ the father became the preferable parent once he remarried.⁶⁰ According to the court, because the father was now married, his household was the more "stable and suitable home environment."⁶¹

50. *Id.* at 685.

51. No. 224566, 2000 WL 33407372 (Mich. Ct. App. Aug. 22, 2000).

52. *See id.* at *10.

53. *Id.*

54. *Id.*

55. *Id.* at *4. It is likely that mother's sexual orientation likely played a role in the court's decision. This is one of the many reasons same sex couples fought for the right to marry. Marriage would have helped protect the mother.

56. *See, e.g., Robertson v. Robertson*, 370 P.3d 569, 572 (Utah Ct. App. 2016) (rejecting the father's argument "that the trial court should not have determined that [the mother] had higher moral standards than he did based upon the fact that she and her husband were married while Robertson was cohabitating with his girlfriend").

57. *See id.* at 572 (finding that the trial court's consideration of the parents' cohabitation with other partners was not clearly erroneous).

58. *Id.* at 571.

59. 279 So. 3d 596 (Ala. Civ. App. 2018).

60. *See id.* at 603 (outlining the trial court's finding that the father had remarried, which would "greatly benefit the minor child").

61. *Id.* at 603; *see also West v. West*, 21 P.3d 838, 841 (Alaska 2001) (holding that because the husband planned to get remarried, he could provide a better household, by which it meant a "two-parent household," than the

As the above examples demonstrate, child custody concerns convince parents to change their speech, their religion and even their marital status. Consequently, there is every reason to expect they can also influence parental gun behavior. The 2015 New York case *Lilly NN. v. Jerry OO.*,⁶² is one example. *Lilly NN.* involved a custody dispute that arose after the couple's child shot another child with a pellet gun.⁶³ The incident occurred at the mother's home, after she left the child unsupervised with the gun.⁶⁴ Despite her own negligence, the mother blamed the shooting on the father, claiming the child's aggression was due to the father's interest in hunting and trapping and his decision to expose the child to that "way of life."⁶⁵ Unlike the mother, the father "did not permit his children to use guns unsupervised and attempt[ed] to educate them in safety and proper usage."⁶⁶ The father had done nothing wrong. Nonetheless, in response to the mother's custody challenge, he agreed to refrain from hunting with his older child.⁶⁷ The court then rewarded him for his willingness to alter his gun behavior by granting him increased visitation.⁶⁸

As the *Lilly NN.* case demonstrates, the benefits of the best interests gun strategy is that it doesn't rely on changing a gun owning parent's views on guns.⁶⁹ The parent does not need to believe that their gun behavior "should" affect custody, just that it might. Similarly, the parent raising the gun ownership issue does not have to be a gun control advocate. They don't need to dislike guns and they can even own guns themselves. To raise gun ownership in a custody dispute, one parent just needs to argue that their gun behavior is better for the child than the other parent's. In custody disputes, if one parent has a potential advantage over the other, most will use it.

unmarried mother); *Mullaney v. Mullaney*, 527 P.2d 1146, 1148 (Okla. Ct. App. 1974) (examining the mother's remarriage as basis for change in custody).

62. 21 N.Y.S.3d 477 (2015).

63. *Id.* at 480.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *See, e.g., supra* note 62 and accompanying text.

III. GUNS, CUSTODY, AND THE FAMILY LAWYER

Making irresponsible gun ownership a factor in child custody cases does not require courts to take a particular view on guns. Courts only need to accept the possibility that certain parental gun behaviors may not be in a child's best interest.⁷⁰ Some courts have already demonstrated a willingness to consider irresponsible gun ownership in custody cases.⁷¹ Moreover, as this number increases, family lawyers will have an incentive, as well as an obligation, to discuss the role of gun ownership in their clients' custody case.

Asking clients about gun ownership, both theirs and that of the other parent, should become standard practice for family law attorneys. For those representing a non-gun owning/responsible gun owning parent in a custody dispute with an irresponsible gun owner parent, the benefits of raising this issue are clear. Irresponsible gun ownership is behavior that could weigh strongly against the other parent.⁷² Raising the issue of gun ownership could help the client parent gain custody and ensure their child is placed in a home without access to guns.

For attorneys representing gun owner parents, the increasing use of guns in custody cases means, even if they don't wish to raise the issue of gun ownership themselves, they will still need to inquire into their clients' gun behaviors and potentially advise them to make changes. As previously noted, such advice is common with respect to many other parental behaviors. Irresponsible gun ownership would just be added to the list.⁷³

70. See, e.g., *supra* note 62 at 479–80 (discussing how the parent's gun ownership affected the children).

71. See, e.g., *id.* (considering gun habits as a factor for custody determination).

72. *Id.*

73. Common examples include the advice to not speak disparagingly about the other parent, to stop posting on social media or to stop swearing. See, e.g., Marissa Mallon, *Post-Separation Parent-Child Contact Problems: Understanding a Child's Rejection of a Parent and Interventions Beyond Custody Reversal*, 33 J. AM. ACAD. MATRIM. LAW. 609, 643 (2021) ("Lawyers must serve as an educational source for their clients and advise them against exhibiting parental alienating behaviors."); see also LINDA D. ELROD, CHILD CUSTODY PRAC. AND PROC. § 2:9 (2021) (discussing the lawyer's role to educate

The increasing use of guns as a factor in custody determinations means that even if the attorney of a gun owning client does not believe their client's gun ownership will become a negative custody factor, they still have an obligation to warn that it could be.⁷⁴ The Model Rule of Professional Conduct 2.1 (adopted by 37 states)⁷⁵ notes that when representing clients in a custody action, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors."⁷⁶ The model rule uses the word "may," however, this is misleading as "may" often means "shall."⁷⁷ As ethics professor John M. Burman, has noted:

It becomes a "shall" when a client reasonably expects non-legal advice, because a client cannot make an informed decision about representation until the lawyer has explained matters "to the extent reasonably necessary" to permit such decisions. Since it will often be impossible for a client to make an informed decision without understanding the non-legal consequences (such as the decision's impact on children), a lawyer has, in the words of the Preamble to the Rules, the obligation to "provide[] a client with an informed understanding of the client's legal rights and obligations **and explains their practical implications.**"⁷⁸

the client about avoiding "irrational behaviors" including "postings on social media").

74. See MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 1983) (describing the lawyer's role as advisor as extending beyond law to "other considerations such as moral, economic, social and political factors").

75. *Id.*; see also AM. BAR ASS'N, STATE ADOPTION OF THE MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS, <https://perma.cc/84EN-B495> (PDF) (listing the states who have adopted the Model Rules of Professional Conduct). The American Academy of Matrimonial Lawyers echoes this advice noting a family law attorney "should advise the client of the potential effect of the client's conduct on a child custody dispute." AM. ACAD. MATRIM. LAW., BOUNDS OF ADVOCACY: GOALS FOR FAMILY LAWYERS 34 (2012), <https://perma.cc/WNC6-9TG9> (PDF).

76. WYO. RULES OF PRO. CONDUCT r. 2.1 (2008); see also KAN. RULES OF PRO. CONDUCT r. 2.1 (requiring the lawyer to not only render professional advice but to also explain moral, economic, social and political factors that may be relevant).

77. KAN. RULES OF PRO. CONDUCT, *supra* note 76.

78. John Burman, *Ethics in Child Custody Proceedings: Changing from Client-Centered to Family-Centered Representation*, WYO. LAW., Apr. 2010, at 40, 42 (internal citations omitted).

As irresponsible gun ownership becomes a growing factor in custody disputes, family lawyers will have an obligation to advise clients to change their gun behavior and, upon receiving this advice, many parents will.⁷⁹ Potential changes could include a wide range of actions. They might include the purchase of a gun safe, the storage of guns outside of the home, the separation of guns and ammunition, gun safety training or countless other measures. Such actions will vary, but the purpose of all these changes will be the same: to help the gun owner parent refute an accusation that their gun behavior endangers their child. Consequently, nearly all these changes will make children safer. They can also be expected to last. Custody decisions remain modifiable during the entirety of a child's minority.⁸⁰ If parents resume their irresponsible gun behaviors, custody can be modified, something most parents will want to avoid.⁸¹

CONCLUSION

Parents' irresponsible gun decisions can and should be used against them. Access to guns makes kids unsafe. If family lawyers make this argument loudly and often, gun owning parents will be forced to make a choice. Like all other parents anticipating a custody fight, gun owning parents will have to decide whether their gun choices could be perceived as harmful and whether continuing such gun behavior is worth the custody risk. Hopefully, they will decide it is not. Losing custody of one's child is a powerful incentive. Let's use it.

79. See Nancy B. Shernow, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 UCLA L. REV. 677, 684–85 (1988) (explaining various factors considered in custody modification decisions).

80. See *id.* at 680–85 (explaining the legal standards and procedure for custody modification in various jurisdictions).

81. Parents will need to convince courts that such changes are sincere. Courts are aware of the possibility that parents may make short-term changes they do not plan to maintain. See, e.g., *People ex rel. McGrath v. Gimler*, 60 N.Y.S.2d 622, 626–27 (Sup. Ct. 1946) (suggesting that a mother changed her daughter's religious upbringing simply to make her custody case more appealing to the court); *Bonjour v. Bonjour*, 592 P.2d 1233, 1243 (Alaska 1979) (discussing the possibility that parents might “engage in religious practices even if their beliefs are not sincere”).