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A COMPREHENSIVE TREATISE ON CONTEMPT OF COURT IN WYOMING

*Tori R.A. Kricken**

This article, first conceived on December 5, 2007, began its infancy in the form of a Confidential Bench Memorandum for the Second Judicial District in response to contempt proceedings initiated in rather infamous private road litigation.¹ Since that time, that original memo has gained some renown amongst Wyoming trial judges as an attempt to clarify contempt proceedings, both civil and criminal, and provide the judges with guidance. From there, it made the leap into the world of Wyoming practitioners as a two-part article in *Wyoming Lawyer* in the fall/winter of 2011.² But, one last incarnation is required to update that original 2007 version with current contempt matters and address issues heretofore never imagined by this author, so as to provide an all-inclusive treatise—albeit a short one—on the issue of contempt of court in Wyoming. Here goes.

I. DEFINING CONTEMPT OF COURT: CIVIL VERSUS CRIMINAL, DIRECT VERSUS INDIRECT

A. Considering Civil Versus Criminal Contempt

“Contempt” is defined as the “act or state of despising; the condition of being despised,” and, more relevantly, “[c]onduct that defies the authority or dignity of

* Thanks to Ronda Munger for her contributions to this article and for introducing me to Katniss Everdeen. Thanks as well to the four judges who continue to inspire and guide me: Judge Jeff Donnell, Judge Wade Waldrip, Judge Robert Castor, and Judge Ken Stebner.

¹ See *Goodman v. Voss*, 248 P.3d 1120 (Wyo. 2011); *Voss v. Goodman*, 203 P.3d 415 (Wyo. 2009); *Voss v. Albany Cnty. Comm’rs*, 74 P.3d 714 (Wyo. 2003). See also *Voss v. Albany Cnty. Comm’rs*, Albany County Docket No. 29691; *Voss v. Stevens*, Albany County Docket No. 28595; *Goodman v. Voss*, Albany County Docket No. 30241, *Goodman v. Voss*, Albany County Docket No. 31729.

² See Tori R.A. Kricken, *Contempt of Court: A Practical Guide for Lawyers and Judges, Part II: Criminal Contempt*, WYO. LAW., Dec. 2011; Tori R.A. Kricken, *Contempt of Court: A Practical Guide for Lawyers and Judges, Part I: Civil Contempt*, WYO. LAW., Oct. 2011.

a court or legislature.”³ Contempt is a “disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language.”⁴ Contempt charges may be brought against parties to proceedings; lawyers or other court officers; jurors; witnesses; or people who insert themselves in a case, such as protesters outside a courtroom.⁵ Recently, the Wyoming Supreme Court offered this guidance:

Historically, contempt of court meant contempt of a *royal* court at common law, and the contempt power was employed by the courts of early England as a means of punishing a presumed contempt or disrespect of the king’s authority. The modern concept of contempt encompasses a clear and open willful disregard for the authority of the court, or any act calculated to embarrass, hinder, or obstruct the court in the administration of justice. Chief Justice Earl Warren once observed how the right of courts to conduct their business in an untrammled way lies at the foundation of our system of government. A courts’ power to punish for contempt is therefore a means of assuring the enforcement of justice according to law.⁶

Contempt of court can be classified as either civil or criminal in nature and, within each classification, either as direct contempt (committed in the court’s presence) or indirect contempt (committed outside of the hearing or view of the judge).⁷ The distinction between criminal and civil contempt is vitally important, as it controls the procedures mandated for contempt actions. A reviewing court will “determine the nature of a contempt based on the manner in which it occurred and the reasons why a particular penalty was imposed.”⁸

³ BLACK’S LAW DICTIONARY 336 (8th ed. 2004). See also *In re Contempt of Dougherty*, 413 N.W.2d 392 (Mich. 1987) (offering a thorough review of contempt).

⁴ BLACK’S LAW DICTIONARY 336 (8th ed. 2004) (citing Edward M. Dangel, *Contempt* § 1, at 2 (1939)).

⁵ See *In re Contempt of Dougherty*, 413 N.W.2d 392 (Mich. 1987) (offering a thorough review of contempt).

⁶ *Weidt v. State*, 312 P.3d 1035, 1040 n.3 (Wyo. 2013) (emphasis added) (some internal citations omitted) (quoting *Wood v. Georgia*, 370 U.S. 375, 383 (1962); Edward Gregory Mascolo, *Procedures and Incarceration for Civil Contempt: A Clash of Wills Between Judge and Contemnor*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 174 (1990); *Sacher v. United States*, 343 U.S. 1, 24, 72 S. Ct. 451, 462, 96 L.Ed. 717 (1952) (Frankfurter, J., dissenting)) (internal quotation marks omitted) (citing *In re Contempt of Haselhubn*, 740 P.2d 387, 390 (Wyo. 1987) (“It is undisputed that a court’s power to punish for contempt is a necessary and integral part of the independence of the judiciary.”)).

⁷ *Swain v. State*, 220 P.3d 504, 507–08 (Wyo. 2009). See also *Horn v. District Court*, 647 P.2d 1368 (Wyo. 1982) (finding direct contempts are those committed in the court’s presence and constructive contempts are those committed outside the hearing or view of the judge).

⁸ *United Mine Workers of Am., Local 1972 v. Decker Coal Co.*, 774 P.2d 1274, 1279 (Wyo. 1989) (quoting *Anderson v. Anderson*, 667 P.2d 660, 662 (Wyo. 1983)). See also *Jensen v. Milatz-Jensen*, 304 P.3d 969, 971 (Wyo. 2013); *Swain*, 220 P.3d at 508.

Generally speaking civil contempt is intended to compel a party to comply with a lawful court order, while criminal contempt is punitive in nature and is enforced to vindicate the authority of the law and the court. Civil contempt results in wholly remedial punishment, serves only the purposes of the complainant, and is not intended as a general deterrent to offenses against the public. “Stated simply, the primary purpose of criminal contempt is to punish while the primary purpose of civil contempt is to coerce.”⁹ The Wyoming Supreme Court has set forth the following test for determining whether the punishment is remedial or punitive:

[R]emedial punishment is punishment imposed because the contemnor refused to do an affirmative act but which will be discontinued as soon as the contemnor does the affirmative act required; punitive punishment is punishment imposed because the contemnor did something he was expressly ordered not to do. Conversely, punitive punishment treats the contemnor’s doing what he had been expressly told not to do as being in defiance of the authority which issued the command.¹⁰

In essence, civil contempt is curative, seeking to enforce compliance with a court order or to compensate an injured party.¹¹ Civil contempt consists of insubordinate or disobedient conduct that results in detriment to another party in a civil proceeding, in essence, the refusal to do an act the court has ordered for the benefit of a party.¹² For example, the failure of a noncustodial parent to pay child support, in violation of the court’s order, may amount to civil contempt. Accordingly, the purposes of these contempt proceedings are compensatory and coercive in seeking to force the offending party to comply with the court’s order or to compensate the injured party for damage caused by the contempt. Thus, where a contempt ruling imposes imprisonment conditioned upon compliance with a court order requiring the contemnor to do some act, the failure of which generated the finding of contempt, such contempt is considered civil in nature. “When the petitioners carry ‘the keys of their prison in their own pockets,’ the action ‘is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees.’”¹³

⁹ *Horn v. Welch*, 54 P.3d 754, 759 (Wyo. 2002) (internal citations omitted).

¹⁰ *United Mine Workers of Am., Local 1972*, 774 P.2d at 1279 (internal citations omitted).

¹¹ *Jensen*, 304 P.3d at 971; *Hamilton v. Hamilton*, 228 P.3d 51, 53 (Wyo. 2010); *Swain*, 220 P.3d at 508.

¹² See generally 17 AM. JUR. 2D *Contempt* § 4 (June 2014 update).

¹³ *Connors v. Connors*, 769 P.2d 336, 343 (Wyo. 1989) (internal citations omitted).

Civil contempt differs from criminal contempt in that the court seeks only to coerce the defendant to do what a court had previously ordered him to do.¹⁴ On the other hand, “criminal contempt” consists of disobedient conduct committed either in the presence of the court (direct criminal contempt) or directed to the court but not committed in its presence (indirect criminal contempt).¹⁵ “Criminal contempt involves conduct that is calculated to embarrass, hinder, or obstruct the administration of justice and is used to vindicate the authority of a court and to punish the offending participant.”¹⁶ The consequence of such conduct is a punitive sanction designed to vindicate the court’s authority for a person’s noncompliance with a court order and, therefore, cannot be cured by the accused.¹⁷ “Stated simply, the primary purpose of criminal contempt is to punish while the primary purpose of civil contempt is to coerce.”¹⁸

In determining whether a contempt is criminal or civil, a reviewing court will consider the following factors:

1. In what manner did the contempt happen, that is, did the contemnor refuse to do an affirmative act or did the contemnor do that which he was ordered not to do;
2. What was the substance of the proceeding;
3. What kind of punishment was imposed; and
4. For what reasons did the court impose that kind of punishment.¹⁹

¹⁴ *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011) (internal quotation omitted).

¹⁵ Direct contempt is defined as “contempt (such as an assault of a testifying witness) committed in the immediate vicinity of a court; esp., a contempt committed in a judge’s presence.” BLACK’S LAW DICTIONARY 337 (8th ed. 2004). Indirect contempt is defined as “[c]ontempt that is committed outside of court, as when a party disobeys a court order.” *Id.*

¹⁶ 17 AM. JUR. 2D *Contempt* § 5 (June 2014 update).

¹⁷ *Id.*; see also *Swain v. State*, 220 P.3d 504, 508 (Wyo. 2009).

[W]here the imprisonment is for a definite term, is mandatory, and release is not conditioned upon the contemnor’s compliance with any order of the court, the contempt is criminal in nature and the rights of due process attach. Unlike civil contempt where the court’s exercise of its contempt authority is for the purpose of compelling action on the part of the contemnor for the benefit of the complainant, the purpose of imposing a criminal contempt sanction is to punish the contemnor for his actions or disobedience with a lawful order of the court to vindicate the court and its authority.

Connors, 769 P.2d at 344.

¹⁸ *Hamilton v. Hamilton*, 228 P.3d 51, 53 (Wyo. 2010) (citing *Horn v. Welch*, 54 P.3d 754, 759 (Wyo. 2002)).

¹⁹ *Stephens v. Lavitt*, 239 P.3d 634, 638 (Wyo. 2010) (citing *Munoz v. Munoz*, 39 P.3d 390, 393 (Wyo. 2002)).

Under the first factor, if the alleged contemnor *refuses* to perform an affirmative act ordered by the court, the proceeding is considered civil in nature, whereas if he *does* something he was ordered *not* to do, the proceeding often amounts to criminal contempt.²⁰ However, a court order need not be in place necessarily for criminal contempt to occur, as in the case of disorderly, contemptuous, or insolent behavior.²¹

The second factor addresses the “course of proceedings.”²² Wyoming Rule of Criminal Procedure 42 identifies and governs criminal contempt proceedings.²³ However, it is important to recognize that a court’s compliance with Rule 42 will not *per se* categorize the proceedings as criminal in nature.²⁴ Indeed, a court may, and often will, provide an accused contemnor with all the protections and advisements provided by this rule without rendering the proceeding criminal in nature.²⁵ Likewise, a court’s failure to provide an alleged contemnor with Rule 42’s protections will not automatically render the contempt action civil in nature.

Under the third factor, the type of punishment imposed is a factor that influences the nature of the contempt proceeding, as is a consideration of whether the contemnor can purge any contempt.²⁶ A court must consider whether the punishment is “for a definite term,” generally indicating criminal contempt, or whether it is conditional upon compliance with a court order, thereby indicating civil contempt.²⁷

The last factor requires consideration of whether the punishment is intended as a deterrent versus a means to compel a party to obey the court’s order. If the court aims to punish, it invokes its criminal contempt powers; if it aims to coerce or compel, it utilizes its civil contempt authority.²⁸ Notably, the third and fourth

²⁰ See *Stephens*, 239 P.3d at 638.

²¹ See WYO. R. CRIM. P. 42 (2011).

²² *Stephens*, 239 P.3d at 638.

²³ See WYO. R. CRIM. P. 42 (2011).

²⁴ *Stephens*, 239 P.3d at 638.

²⁵ *Id.*; see also *Munoz v. Munoz*, 39 P.3d 390, 393 (Wyo. 2002). Notably, even where a court has referred to a contempt action as “criminal” and has utilized criminal contempt procedures, the course of proceedings and other factors involved may render the proceeding civil in nature. *Stephens*, 239 P.3d at 638.

²⁶ See *Hamilton v. Hamilton*, 228 P.3d 51, 53 (Wyo. 2010). And, although the Wyoming Supreme Court generally considers a court’s assessment of attorney’s fees as “more punitive than remedial in nature,” the court has allowed for the recovery of attorney’s fees in civil contempt cases. *Id.*

²⁷ See *id.* (citing *Connors v. Connors*, 769 P.2d 336, 344 (Wyo. 1989)).

²⁸ See *Stephens*, 239 P.3d at 639 (citing *Anderson v. Anderson*, 667 P.2d 660, 662 (Wyo. 1983)).

factors are “often denominated as the principal considerations in determining whether a contempt proceeding is criminal or civil.”²⁹

Of course, within some of these factors certain caveats exist. For example, concerning the substance of the proceeding, the fact that an ex-husband, as a private party, initiated a contempt proceeding against his former spouse did not alter the ultimately criminal nature of the contempt proceeding.³⁰ In that case, the ex-husband asked the court to penalize the ex-wife for her conduct in selling cattle in contravention of the court’s divorce order awarding cattle to husband as his sole and separate property.³¹ Nor did the fact that the court ordered the ex-wife to make the contempt payment directly to the private party (ex-husband) change its criminal nature.³² Further, a court’s suspension of determinate punishment on the condition of the contemnor’s obedience of court orders to pay child support did not make the punishment/relief civil in nature.³³ A suspended punishment, without more, remains determinate.³⁴

Ultimately, the categorization of contempt depends on substance, not form, though the appearance of the process may suggest its underlying substance. Generally speaking, where the course of a contempt proceeding reflects its civil nature (e.g., being brought by a private party rather than the state, to enforce compliance with the protections provided in a court order), then the contempt itself will be deemed civil, rather than criminal, even if the court proceeds under the criminal contempt rules and procedures.³⁵

B. Considering Direct Versus Indirect Contempt

After parsing the nuances of civil versus criminal contempt, the distinctions between “direct” and “indirect” contempt are much easier to tackle:

A direct contempt is an act that occurs in the presence of the court and is intended to embarrass or engender disrespect for the court. Shouting in the courtroom or refusing to answer questions for a judge or attorney under oath is a direct contempt.

²⁹ *Id.* at 638.

³⁰ See *Anderson v. Anderson*, 667 P.2d 660 (Wyo. 1983).

³¹ *Id.*

³² *Id.*

³³ See *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624 (1988); *Garber v. United Mine Workers of Am.*, 524 P.2d 578 (Wyo. 1974). See also *United Mine Workers of Am., Local 1972 v. Decker Coal Co.*, 774 P.2d 1274, 1280 (Wyo. 1989) (internal citations omitted); *Stephens*, at 638; *Munoz v. Munoz*, 39 P.3d 390, 393 (Wyo. 2002).

³⁴ *Hicks*, 485 U.S. at 634–35.

³⁵ *Stephens*, 239 P.3d at 637–39.

Indirect contempt occurs outside the presence of the court, but its intention is also to belittle, mock, obstruct, interrupt, or degrade the court and its proceedings. Attempting to bribe a district attorney is an example of an indirect contempt. Publishing material that results in a contempt charge is an indirect contempt. Other kinds of indirect contempt include preventing process service, improperly communicating to or by jurors, and withholding evidence. One man was threatened with contempt charges because he had filed more than 350 lawsuits that the judge considered frivolous. Indirect contempt also may be called constructive or consequential contempt; all three terms mean the same thing.³⁶

A court can constitutionally punish a directly contemptuous act in a summary manner so long as the act is committed in the face of the court.³⁷ And, conduct appropriately may be identified as direct criminal contempt even though the underlying action is of a civil nature. For example, where there is no lawful order of the court with which a party has failed to comply and where the judge imposes a fine for punitive reasons, rather than for the purpose of vindicating the rights of a party, the contempt is criminal regardless of the underlying civil litigation.³⁸ Again, the nature of the consequences, and the reasons they are imposed, often are controlling in determining the character of the contempt before the court.

II. THE POWER OF CONTEMPT: FROM WHERE DERIVES A COURT'S AUTHORITY?

At the core of a court's inherent authority is its right and ability to ensure compliance with its orders. "The power to punish for contempt is inherent in all courts of general jurisdiction in Wyoming."³⁹ The question, then, is not *whether* Wyoming courts have the ability to wield contempt powers but, rather, *how* they do so.

³⁶ THE FREE DICTIONARY, <http://legal-dictionary.thefreedictionary.com/Contempt+of+Court> (last visited Jan. 2, 2015) (emphasis in original). Direct contempt also has been defined as "contempt (such as an assault of a testifying witness) committed in the immediate vicinity of a court; esp., a contempt committed in a judge's presence." BLACK'S LAW DICTIONARY 337 (8th ed. 2004). Indirect contempt has been defined as "[c]ontempt that is committed outside of court, as when a party disobeys a court order." *Id.*

³⁷ WYO. R. CRIM. P. 42(b) (2011).

³⁸ *See Horn v. District Court*, 647 P.2d 1368 (Wyo. 1982).

³⁹ *Swain v. State*, 220 P.3d 504, 507 (Wyo. 2009). Except to the extent the Wyoming Rules of Civil Procedure do not apply to certain proceedings in Circuit Court (and the resulting impact on civil contempt), contempt powers apply to the Circuit Courts of Wyoming as well. *See also Townes v. State*, 502 P.2d 991 (Wyo. 1972); *In re Estate of Mayne*, 345 P.2d 790 (Wyo. 1959); *Fisher v. McDaniel*, 64 P. 1056 (Wyo. 1901).

Courts generally are empowered with the authority to declare contempt under the Wyoming Rules of Criminal Procedure, which are worth quoting here in their entirety. First, Rule 42 provides:

- (a) Types. Criminal contempts of court are of two kinds, direct and indirect.
 - (1) *Direct*. Direct contempts are those occurring in the immediate view and presence of the court.⁴⁰
 - (2) *Indirect (Constructive)*. Indirect (constructive) contempts are those not committed in the immediate presence of the court, and of which it has no personal knowledge.⁴¹

⁴⁰ Direct Contempt includes, but is not limited to the following acts: (A) Disorderly, contemptuous or insolent behavior, tending to interrupt the due course of a trial or other judicial proceedings; (B) A breach of the peace, boisterous conduct, or violent disturbance, tending to interrupt the business of the court; and (C) Refusing to be sworn or to answer as a witness. WYO. R. CRIM. P. 42 (2011).

⁴¹ Indirect contempt includes, but is not limited to the following acts:

- (A) Misbehavior in office, or other willful neglect or violation of duty, by an attorney, court administrator, sheriff, coroner, or other person appointed or elected to perform a judicial or ministerial service;
- (B) Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding;
- (C) Disobedience of any lawful judgment, order, or process of the court;
- (D) Acting as or assuming to be an attorney or other officer of the court without such authority;
- (E) Rescuing any person or property in the custody of an officer by virtue of an order or process of the court;
- (F) Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from the court where the action is to be tried;
- (G) Any other unlawful interference with the process or proceedings of a court;
- (H) Disobedience of a subpoena duly served;
- (I) When summoned as a juror in a court, neglecting to attend or serve, improperly conversing with a party to an action to be tried at the court or with any person relative to the merits of the action, or receiving a communication from a party or other person in reference to it, and failing to immediately disclose the same to the court;
- (J) Disobedience, by an inferior tribunal or officer, of the lawful judgment, order, or process of a superior court proceeding in an action or special proceeding, in any court contrary to law after it has been removed from its jurisdiction, or disobedience of any lawful order or process of a judicial officer; and
- (K) Willful failure or refusal to pay a penalty assessment levied pursuant to statute.

- (b) Direct Contempt Proceedings. A criminal contempt may be punished summarily if the judge saw or heard the conduct constituting the contempt and the conduct occurred in the immediate view and presence of the court. It may be dealt with immediately or, if done without unnecessary delay and to prevent further disruption or delay of ongoing proceedings, may be postponed to a more convenient time.⁴²
- (c) Indirect (Constructive) Contempt. A criminal contempt, except as provided in the preceding subdivision (b) concerning direct contempt, shall be prosecuted in the following manner:
- (1) *Order to Show Cause*. On the court's motion or upon affidavit of any person having knowledge of the facts, a judge may issue and sign an order directed to the accused, stating the essential facts constituting the criminal contempt charged and requiring the accused to appear before the court and show cause why the accused ought not be held in contempt of court. The order shall specify the time and place of the hearing, with a reasonable time allowed for preparation of a defense.
 - (2) *Motions; Answer*. The accused, personally or by counsel, may move to dismiss the order to show cause, move for a statement of particulars or answer such order by way of explanation or defense. All motions and the answer shall be in writing unless specified otherwise by the judge. An accused's omission to file motions or answer shall not be deemed as an admission of guilt of the contempt charged.
 - (3) *Order of Arrest; Bail*. If there is good reason to believe the accused will not appear in response to the order to

⁴² WYO. R. CRIM. P. 42(b) further requires

[t]he judgment of guilt of contempt shall include a recital of those facts upon which the adjudication is based. Prior to the adjudication of guilt the judge shall inform the accused of the accusation and afford the accused an opportunity to show why the accused should not be adjudged guilty of contempt and sentenced therefor. The accused shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court and reduced to writing, signed by the judge and entered of record. Rule 32 shall not apply to judgment and sentencing for direct contempt.

show cause the judge may issue an order of arrest of the accused. The accused shall be admitted to bail in the manner provided by these rules.

- (4) *Arraignment; Hearing.* The accused shall be arraigned at the time of the hearing, or prior thereto upon the request of the accused.⁴³
 - (5) *Disqualification of Judge.* If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the hearing and shall assign the matter to another judge.
 - (6) *Verdict; Judgment.* At the conclusion of the hearing the judge shall sign and enter of record a judgment of guilty or not guilty. In addition to the requirements of Rule 32, a judgment of guilt for contempt of court shall include a recital of the facts constituting the contempt.
 - (7) *Sentence.* Unless an accused may be sentenced to the penitentiary, a presentence investigation is not required but may be ordered. In other respects, Rule 32 shall apply to sentencing for contempt.
- (d) *Punishment.* Punishment for contempt may not exceed the criminal jurisdiction of the court. A sanction for contempt of court may be imposed by a justice of the supreme court, a judge or commissioner of a district court, a circuit court judge or magistrate or a municipal judge.
 - (e) *Jury Trial.* Sentence to imprisonment upon a conviction on a charge of criminal contempt shall not exceed a term of six months unless the accused shall have been afforded the right to trial by jury on the charge.

⁴³ WYO. R. CRIM. P. 42(C)(4) further states:

A hearing to determine the guilt or innocence of the accused may follow a plea of not guilty or may be set for trial at a later date or time. The judge may conduct a hearing without assistance of counsel or may be assisted by the attorney for the state or by an attorney appointed by the court for that purpose. The accused is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and may testify in his own defense. Unless the charged contempt is tried to a jury as provided in subdivision (e), all issues of law and fact shall be heard and determined by the judge.

- (f) Other Criminal or Civil Remedies. An action for or adjudication of criminal contempt shall not limit nor be limited by any other criminal or civil remedies.⁴⁴

Second, its companion, Rule 42.1, states, in part:

- (a) Initiation of Proceedings. The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of any person aggrieved by a contempt of court in the criminal proceeding to which the contempt is related. The proceeding shall be civil in nature and the Wyoming Rules of Civil Procedure shall apply.⁴⁵

Rule 42.1 also grants the court authority⁴⁶ to initiate contempt proceedings and provides the court with an array of remedial sanctions it can impose upon a contemnor, after due process is afforded. The court is permitted to impose imprisonment, additional court orders, or other remedial sanctions designed to ensure compliance with the court's orders.⁴⁷ The court also may "order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees."⁴⁸ That said, some specifics with respect to a court's specific authority to preside over contempt proceedings are noteworthy as they apply to specific courts:

A. District Courts, Juvenile Courts, and District Court Commissioners

Although these procedural rules, in conjunction with Wyoming case law, recognize an all-inclusive right of the district courts to enforce their court orders, the Wyoming Legislature has, on occasion, specifically commented upon a court's contempt powers.⁴⁹ For example, district courts have express contempt authority in domestic relation cases regarding violations of orders concerning the care, custody and visitation of the children.⁵⁰ The Wyoming Legislature also has recognized this authority in a multitude of other situations, including, but not limited to,

⁴⁴ WYO. R. CRIM. P. 42.

⁴⁵ WYO. R. CRIM. P. 42.1.

⁴⁶ The rule extends this authority to justices of the supreme court, district judges, district court commissioners, circuit judges, circuit court magistrates, and municipal judges. *See* WYO. R. CRIM. P. 42.1(e).

⁴⁷ WYO. R. CRIM. P. 42.1(b).

⁴⁸ WYO. R. CRIM. P. 42.1(c).

⁴⁹ *Kovach v. State*, 299 P.3d 97, 125 n.2 (Wyo. 2013).

⁵⁰ *See* WYO. STAT. ANN. § 20-2-204 (2013); *Walker v. Walker*, 311 P.3d 170, 178 (Wyo. 2013) (holding courts have inherent and statutory authority to enforce their orders in domestic relations cases through contempt sanctions).

failure to comply with court-ordered genetic testing;⁵¹ failure to pay a court-ordered crime victim's surcharge;⁵² duties of custodians to deliver the will of a deceased to the court;⁵³ and the requirement of a guardian to file a report regarding the condition of the ward.⁵⁴ Other examples of a district court's contempt authority include: the failure of jurors to attend court when summoned;⁵⁵ the refusal of a witness to answer or subscribe to a deposition when subpoenaed;⁵⁶ and the failure of a purchaser of realty to pay the purchase price.⁵⁷ In fact, the Wyoming Legislature took great care to clarify that courts have the power to punish for contempt, even in the absence of an express statutory provision prohibiting the offending conduct.⁵⁸

The same holds true in a district court's juvenile court capacity, where the legislature repeatedly recognized the court's contempt powers.⁵⁹ Thus, a juvenile court has the power to punish a party for contempt when the party fails to comply with an order of the court.⁶⁰ The juvenile court's contempt authority is broad, limited only by the sanctions that may be imposed.⁶¹

Contempt authority also has been extended to district court commissioners, both expressly and impliedly. As far as the former, Wyoming statutes grant commissioners the power to punish for contempt.⁶² Considering the latter, Wyoming

⁵¹ See WYO. STAT. ANN. § 14-2-814 (2013).

⁵² See WYO. STAT. ANN. § 1-40-119 (2013).

⁵³ See WYO. STAT. ANN. § 2-6-119 (2013).

⁵⁴ See WYO. STAT. ANN. § 3-2-109 (2013).

⁵⁵ See WYO. STAT. ANN. § 1-11-115 (2013).

⁵⁶ See WYO. STAT. ANN. § 1-12-106 (2013). See also *West v. State*, 311 P.3d 157, 161 (Wyo. 2013).

⁵⁷ See WYO. STAT. ANN. § 1-17-320 (2013).

⁵⁸ Wyoming Statute § 6-1-102 provides:

- (a) Common-law crimes are abolished. No conduct constitutes a crime unless it is described as a crime in this act or in another statute of this state. This section does not limit the power of the court to:
 - (i) Punish for contempt or to employ any sanction authorized by law for the enforcement of an order lawfully entered or a civil judgment or decree[.]

WYO. STAT. ANN. § 6-1-102 (2013).

⁵⁹ See WYO. STAT. ANN. §§ 14-6-242, 14-6-229(f)(vii) (2013); *ELR v. State (In re Interest of EWR)*, 902 P.2d 696 (Wyo. 1995).

⁶⁰ See *BW v. State (In re Interest of BD)*, 226 P.3d 272 (Wyo. 2010).

⁶¹ *Id.*

⁶² Wyoming Statute § 5-3-307 provides:

- (a) Each district court commissioner shall have the powers in respect to every suit or proceeding pending in the district court of the county for which he was appointed, as follows:
 - (i) If no judge qualified to hear or act in the proceeding or action is present in the county for which such commissioner was appointed, to make any order

precedent recognizes that commissioners have authority to preside over contempt proceedings.⁶³ District courts, however, are still tasked with the requirement of reviewing and approving the orders made by their district court commissioners.⁶⁴

B. Circuit Courts

The ability of the circuit courts to flex their contempt authority is much cleaner in its statutory expression. Wyoming Statute Section 5-9-133 unambiguously specifies that a circuit court may “[p]reserve and enforce order in its immediate presence and in the proceedings before it according to the Wyoming Rules of Criminal Procedure for Circuit Courts⁶⁵ and punish for contempt as provided therein[.]”⁶⁶

Similarly, Wyoming Statute Section 1-21-901 provides:

- (a) A circuit court judge may punish for contempt in the following cases and no others:
 - (i) Persons guilty of disorderly, contemptuous and insolent behavior toward a judge engaged in any judicial proceeding, which tends to interrupt such proceedings or impair the respect due the judge’s authority;

which a judge of the district court is authorized by law to make in chambers and to hear and determine cases of mental illness or mental incompetency, and to hold juvenile detention or shelter care hearings;

- (ii) To make any order which a judge of the district court is authorized by law to make in chambers, upon the written statement of such judge, filed with the papers, that he is disqualified in such case;
- (iii) To administer oaths;
- (iv) To hear, try and determine all issues whenever an application shall have been made for a change of judge;
- (v) To take evidence and make findings, and report the same to the district court;
- (vi) To take depositions;
- (vii) *To punish persons for contempts committed during hearings had before him.*

WYO. STAT. ANN. § 5-3-307 (2013) (emphasis added).

⁶³ *Gaines v. Doby*, 773 P.2d 442 (Wyo. 1989).

⁶⁴ *Mau v. Stoner*, 76 P. 584 (Wyo. 1904).

⁶⁵ There are no “Wyoming Rules of Criminal Procedure for Circuit Courts” other than the Wyoming Rules of Criminal Procedure.

⁶⁶ WYO. STAT. ANN. § 5-9-133(i) (2014).

- (ii) Persons guilty of resistance or disobedience to any lawful order or process made or issued by the judge.⁶⁷

The companion statutes outline the procedures required of circuit courts in exercising their contempt powers, requiring certain due process protections.⁶⁸ Thus, circuit courts must be cognizant of these additional limitations imposed upon their contempt authority.

C. *Administrative Agencies and Municipal Courts*

Under the Wyoming Administrative Procedure Act, administrative agencies also have the authority to punish those who fail to comply with their orders.⁶⁹ This authority has been recognized as applicable to various administrative boards as well.⁷⁰ However, agencies should be cautious because their contempt authorities are limited by their roles prescribed by the separation of powers doctrine: “An administrative agency is an arm of the executive branch of government, and it, unlike the judicial branch, has no inherent power to enforce discovery. Any such power that the administrative agency may possess is derived entirely from legislative mandate incorporated in an appropriate statute.”⁷¹

⁶⁷ WYO. STAT. ANN. § 1-21-901 (2014).

⁶⁸ Those statutes provide: “No person shall be punished for contempt before a circuit court judge until after an opportunity to be heard and for that purpose the judge may issue his warrant of attachment to bring the offender before him.” WYO. STAT. ANN. § 1-21-903 (2013). “The warrant of commitment for contempt must set forth the particular circumstances of the offense or it is void.” WYO. STAT. ANN. § 1-21-905 (2013).

⁶⁹ Wyoming Statute provides:

- (c) In all contested cases, depositions and discovery relating thereto, agencies shall have the authority to administer oaths and affirmations, subpoena witnesses and require the production of any books, papers or other documents relevant or material to the inquiry. In case of refusal to obey a subpoena issued by the agency in a contested case, deposition or discovery relating thereto, to any person, the district court for the district in which the hearing or deposition or other proceeding is being conducted, or for the district where the person may be served, may upon application by the agency issue to the person refusing to obey the subpoena an order requiring the person to show cause for the refusal or to appear before the agency or other person designated by it there to produce documentary evidence if so ordered or there to give evidence touching the matter in question. Any failure to show cause or obey the order of court may be punished by the court as a contempt thereof.

WYO. STAT. ANN. § 16-3-107 (2013).

⁷⁰ See, e.g., WYO. STAT. ANN. § 12-21-801 (2014) (recognizing contempt powers of arbitration board); WYO. STAT. ANN. § 11-36-110 (2014) (state board of agriculture); WYO. BD. OF CONT. LEGAL ED. R. 11 (recognizing contempt powers of board of continuing legal education); WYO. STAT. ANN. § 35-11-112 (2014) (recognizing contempt power of environmental quality council).

⁷¹ *In re Contempt Order Issued Against Anderson*, 765 P.2d 933, 935–36 (Wyo. 1988) (citing *Interstate Commerce Comm’n v. Brimson*, 154 U.S. 447 (1894); *Hupp v. Emp’t Sec. Comm’n of*

Finally, municipal courts also hold comparable contempt powers within their jurisdictional limits. The Wyoming Legislature has identified the circumstances in which municipal courts have contempt authority, as well as specific procedural and remedy-related limitations.⁷² Additionally, court rule includes municipal contempt powers within those possible, stating: “Punishment for contempt may not exceed the criminal jurisdiction of the court. A sanction for contempt of court may be imposed by a justice of the supreme court, a judge or commissioner of a

Wyo., 715 P.2d 223 (Wyo. 1986); *United States v. Sec. State Bank and Trust*, 473 F.2d 638 (5th Cir. 1973)). For example, the Wyoming statute that authorizes discovery in contested cases before administrative agencies states:

- (c) In all contested cases, depositions and discovery relating thereto, agencies shall have the authority to administer oaths and affirmations, subpoena witnesses and require the production of any books, papers or other documents relevant or material to the inquiry. In case of contumacy or refusal to obey a subpoena issued by the agency in a contested case, deposition or discovery relating thereto, to any person, the district court for the district in which the hearing or deposition or other proceeding is being conducted shall upon application of the agency issue to the person refusing to obey the subpoena an order requiring the person to appear before the agency or other person designated by it there to produce documentary evidence if so ordered or there to give evidence touching the matter in question. Any failure to obey the order of court may be punished by the court as a contempt thereof.

WYO. STAT. ANN. § 16-3-107(c) (2014).

⁷² Wyoming Statute § 5-6-301 provides:

- (a) A person convicted before a municipal judge shall be fined and imprisoned as provided by ordinance. Except as provided by W.S. 15-1-103(a)(xli) or subsection (c) of this section, no fine shall exceed seven hundred fifty dollars (\$750.00), and no imprisonment shall exceed six (6) months.
- (b) The municipal judge shall punish for contempt in the same manner as district court. Before any person is imprisoned for the willful refusal to pay a fine, the court shall determine whether the defendant has an ability to pay or that a reasonable probability exists that the defendant will have an ability to pay.
- (c) A district court has jurisdiction to grant injunctive relief and to impose any civil penalty authorized by ordinance adopted pursuant to W.S. 15-1-103(a)(xlvi).

WYO. STAT. ANN. § 5-6-301 (2013).

Further, Wyoming statute § 5-6-202 provides:

- (b) The municipal judge shall enforce due obedience to all orders, rules and judgments made by him. The judge has the same power as the district court in the issuance of warrant, search warrant, subpoena or other necessary process and may fine or imprison for contempt offered to him or to process issued by him in the same manner and to the same extent as the district court. Before any person is imprisoned for the willful refusal to pay a fine, the court shall determine whether the defendant has an ability to pay or that a reasonable probability exists that the defendant will have an ability to pay.

WYO. STAT. ANN. § 5-6-202 (2014). *See also* *State ex rel. Hoke v. Owens*, 733 P.2d 240 (Wyo. 1987); *Jurisdiction of Municipal Courts over DWUI after 1982*, Wyo. Op. Atty. Gen. 44 (1982); Wayne R. Johnson, *North Dakota’s New Contempt Law: Will it Mean Order in the Court?*, 70 N.D. L. REV. 1027 (1994).

district court, a circuit court judge or magistrate or a municipal judge.⁷³ These powers, however, are appealable to a district court, subject to an arbitrary and capricious standard of review.⁷⁴

III. THE ORIGINATION OF CONTEMPT PROCEEDINGS: WHO MAY INITIATE?

Having established the authority of the various courts and agencies to punish or coerce, by use of their contempt powers, one might be called upon to query how contempt proceedings commence. In contrast to criminal contempt cases, civil contempt proceedings occur between the original parties and are considered merely a facet of the original cause of action.⁷⁵ As a result, these proceedings are instituted and addressed as part of the underlying case.⁷⁶ To be authorized to initiate civil contempt proceedings, the complainant must meet two requirements: (1) possession of a legally recognized interest in the court order (for instance, as the party for whose benefit the judgment or order was made) and (2) injury caused by the alleged violation.⁷⁷ Under these circumstances, the complainant can initiate a civil contempt action, generally by virtue of seeking an *order to show cause* why the allegedly non-complying party should not be held in contempt for failure to abide by court order.

Meanwhile, conduct amounting to criminal contempt is considered a crime and is prosecuted to preserve the court's power and to vindicate the court's dignity. A criminal contempt prosecution "is between the public and the contemnor and is a separate and independent proceeding from, and is not a part of, the original case in which the contempt arose—it is instituted, tried and treated as a distinct criminal action."⁷⁸ Accordingly, "[a] private party has no standing to prosecute an action for criminal contempt."⁷⁹ Such actions must be brought by the court, of its own accord, or prosecuted by the State, as independent criminal proceedings.⁸⁰

⁷³ WYO. R. CRIM. P. 42.

⁷⁴ *Badley v. City of Sheridan*, 440 P.2d 516 (Wyo. 1968).

⁷⁵ *Swain v. State*, 220 P.3d 504, 508 (Wyo. 2009).

⁷⁶ *Id.*

⁷⁷ 17 AM. JUR. 2D *Contempt* § 150 (June 2014 update).

⁷⁸ *Swain*, 220 P.3d at 508 (citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444–51 (1911)).

⁷⁹ 17 AM. JUR. 2D *Contempt* § 151 (June 2014 update).

⁸⁰ *See Garber v. United Mine Workers of Am.*, 524 P.2d 578, 579 (Wyo. 1974). However, criminal contempt proceedings may be prosecuted by private attorneys appointed by the court for that purpose. 17 AM. JUR. 2D *Contempt* § 152 (June 2014 update). Wyoming Rule of Criminal Procedure 42(c), which applies to indirect criminal contempt, states: "The judge may conduct a hearing without assistance of counsel or may be assisted by the attorney for the state or by an attorney appointed by the court for that purpose[.]" WYO. R. CRIM. P. 42.1(c).

IV. STEP BY STEP: MANDATORY CONTEMPT PROCEDURES

Regardless of whether contempt proceedings are civil or criminal, or direct or indirect, in nature, courts must follow certain procedures to ensure proper procedural due process protections of those involved.⁸¹ At the heart of constitutional notions of procedural due process lie the concepts of (1) notice and (2) the opportunity to be heard.⁸² When a court fails to follow proper procedures, it risks reversal⁸³ and, perhaps more importantly, the diminution of the actual and perceived authority of the court to govern the proceedings before it.⁸⁴

Again, although the requirements for civil contempt proceedings are less than those associated with criminal contempt, Wyoming Rule of Criminal Procedure 42.1 is relevant to civil contempt in criminal cases and outlines the necessary requirements of those actions.⁸⁵ So, while civil contempt proceedings necessarily permit fewer due process procedural protections than criminal contempt cases, that is not to say that those constitutional notions are to be ignored.⁸⁶ These mandatory procedures encompass the right to a hearing and an opportunity to interpose a defense.⁸⁷ Additional issues regarding constitutional due process,⁸⁸ and other constitutional concerns,⁸⁹ will be addressed later in this article.

In contrast, “[c]riminal contempt is ‘a crime in every fundamental respect’ and a conviction for criminal contempt is indistinguishable from an ordinary criminal conviction.”⁹⁰ Because of the punitive nature of criminal contempt proceedings and the associated punishment, a court *must* protect the defendant’s due process

⁸¹ Notably, the Wyoming Rules of Civil Procedure, Wyoming Rules of Evidence, and Wyoming Code of Civil Procedure govern in criminal cases relative to proceedings for contempt. *See* WYO. STAT. ANN. § 7-11-403 (2013). However, the Wyoming Rules of Evidence, other than those with respect to privileges, are held not to apply to contempt proceedings in which the court may act summarily. *See* WYO. R. EVID. 1101(b)(4).

⁸² *Tracy, Green & Co. v. Warner*, 704 P.2d 1306 (Wyo. 1985).

⁸³ *United Mine Workers of Am., Local 1972 v. Decker Coal Co.*, 774 P.2d 1274 (Wyo. 1989).

⁸⁴ *See Horn v. Welch*, 54 P.3d 754 (Wyo. 2002). At the very least, a court, in every instance of contempt, should fully explain the nature and effect of a finding of contempt. *See Haselhuhn v. State*, 740 P.2d 387 (Wyo. 1987).

⁸⁵ WYO. R. CRIM. P. 42.1

⁸⁶ *See Turner v. Rogers*, 131 S. Ct. 2507 (2011).

⁸⁷ *See GGV v. JLR*, 105 P.3d 474, 480 (Wyo. 2005) (finding civil contempt due process rights include “ample notice, an opportunity to be heard, and a reasonable opportunity to employ counsel to represent her if she so desired”).

⁸⁸ *See infra* notes 182–85 and accompanying text.

⁸⁹ *See infra* notes 176–236 and accompanying text.

⁹⁰ *BW v. State (In re Interest of BD)*, 2010 WY 18, ¶ 3, 226 P.3d 272, 273 (Wyo. 2010) (quoting *Swain v. State*, 220 P.3d 504, 508 (Wyo. 2009)).

rights.⁹¹ Thus, criminal contempt proceedings are independent criminal actions and should be conducted accordingly.⁹²

Above all, the Wyoming Supreme Court has repeatedly enforced the requirement that criminal contempt proceedings be treated as independent and separate proceedings, affording an alleged contemnor with full due process rights.⁹³ Failure to adhere to the “separate and independent action” rule constitutes a fatal jurisdictional defect, which renders any finding of contempt void.⁹⁴ Additionally, when imposing criminal contempt, a court also must comply with the due process requirements of Wyoming Rule of Criminal Procedure 42, quoted herein.⁹⁵

The requirements of that rule differ based upon the type of criminal contempt—direct versus indirect. Because the rule provides distinct procedures that must be followed for direct and indirect contempt, a court must subcategorize its criminal contempt proceedings.⁹⁶ Direct criminal contempt proceedings are those aimed at punishing conduct that occurs in the presence of the court.⁹⁷ Even where the underlying action is civil in nature, contempt proceedings can be criminal where the punishment is intended for punitive reasons.⁹⁸ In such instances, Rule 42 permits, or requires, the application of certain procedures.⁹⁹ Thus, to summarize, these direct contempt procedures generally require a trial court to:

⁹¹ *Id.*

⁹² *Garber v. United Mine Workers of Am.*, 524 P.2d 578 (Wyo. 1974).

⁹³ See *In re BD*, 226 P.3d at 274; *Swain*, 220 P.3d at 508–09; *United Mine Workers of Am., Local 1972 v. Decker Coal Co.*, 774 P.2d 1274, 1283–84 (Wyo. 1989); *Garber*, 524 P.2d at 579–80; *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 444–45 (1911).

⁹⁴ *In re BD*, 226 P.3d at 274.

⁹⁵ *Horn v. Welch*, 54 P.3d 754, 760 (Wyo. 2002). In 1992, Rule 42 superseded Wyoming Rule of Criminal Procedure 41(b), which had previously addressed contempt proceedings. However, the Wyoming Supreme Court has noted that “nothing in the language of Rule 42 . . . mandate[s] a different result [than Rule 41(b)].” *Swain*, 220 P.3d at 509 n.4.

⁹⁶ *Horn*, 54 P.3d at 759.

⁹⁷ *Horn v. District Court*, 647 P.2d 1368, 1373 (Wyo. 1982).

⁹⁸ *Id.* at 1373–74.

⁹⁹ Rule 42(b) provides:

- (b) Direct Contempt Proceedings. A criminal contempt may be punished summarily if the judge saw or heard the conduct constituting the contempt and the conduct occurred in the immediate view and presence of the court. It may be dealt with immediately or, if done without unnecessary delay and to prevent further disruption or delay of ongoing proceedings, may be postponed to a more convenient time. The judgment of guilt of contempt shall include a recital of those facts upon which the adjudication is based. Prior to the adjudication of guilt the judge shall inform the accused of the accusation and afford the accused an opportunity to show why the accused should not be adjudged guilty of contempt and sentenced therefor. The accused shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be

- (1) Inform the accused of the accusation against him;
- (2) Give him an opportunity to show why he should not be held in contempt; and
- (3) Allow him to present evidence of mitigating circumstances.¹⁰⁰

Notably, as addressed elsewhere in this article, the United States Supreme Court has recognized that an indigent defendant subject to criminal contempt proceedings (other than summary proceedings) may have a right to state-appointed counsel.¹⁰¹

Finally, “[u]pon an adjudication of guilt, the sentence for direct contempt is to be pronounced in open court and reduced to writing.”¹⁰² In addressing the sufficiency of the documentation involved (e.g., the contempt order), the court must enter a written order stating “all the essential facts on which the order of contempt is based.”¹⁰³ This writing requirement holds true even where the contempt occurred in the presence of the court, so as to protect the appeal rights of the contemnor.¹⁰⁴

In contrast to the due process protections generally afforded a criminal defendant, the law also recognizes that a judge may punish a contemnor “summarily” if that judge saw or heard the conduct constituting direct contempt.¹⁰⁵ “One charged with committing a direct contempt in the presence of the court is not generally entitled to be heard in his or her own defense; no constitutional rights are infringed by refusing a hearing and punishing summarily.”¹⁰⁶ In these cases, the contemnor has no right to counsel; no right to indictment or trial by jury; and no right to technical pleadings.¹⁰⁷ “Where

signed by the judge and entered of record. Sentence shall be pronounced in open court and reduced to writing, signed by the judge and entered of record. Rule 32 shall not apply to judgment and sentencing for direct contempt.

WYO. R. CRIM. P. 42(b).

¹⁰⁰ See WYO. R. CRIM. P. 42(b); *see also* *Horn v. Welch*, 54 P.3d 754, 759 (Wyo. 2002).

¹⁰¹ See *Turner v. Rogers*, 131 S. Ct. 2507, 2516 (2011) (citing *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Cooke v. United States*, 267 U.S. 517, 537 (1925)).

¹⁰² *Horn*, 54 P.3d at 759.

¹⁰³ *Badley v. City of Sheridan*, 440 P.2d 516, 518 (Wyo. 1968); *see also* WYO. R. CRIM. P. 42(b); *Horn*, 54 P.3d at 1376–77; WYO. STAT. ANN. § 1-21-905 (2013) (governing circuit courts).

¹⁰⁴ *Badley*, 440 P.2d at 518.

¹⁰⁵ WYO. R. CRIM. P. 42(b); *see also* 17 AM. JUR. 2D *Contempt* §§ 169, 193 (June 2014 update); WYO. STAT. ANN. § 1-21-904 (2013) (allowing summary proceedings in circuit courts).

¹⁰⁶ 17 AM. JUR. 2D *Contempt* § 170 (June 2014 update).

¹⁰⁷ *Id.* §§ 176, 193.

a direct contempt occurs in the presence of the court, the court should usually act promptly to impose sanctions.”¹⁰⁸ However, if the court delays in imposing punishment, then “[d]ue process requires that the contemnor’s rights to notice and a hearing be respected[.]”¹⁰⁹ Thus, a court making a summary disposition must observe procedural safeguards.¹¹⁰

Meanwhile, indirect criminal contempt, for conduct occurring outside the presence of the court, requires separate procedures to protect the constitutional due process rights of the alleged contemnor.¹¹¹ Essentially, a court must arraign

¹⁰⁸ *Id.* § 170. “When a direct contempt is committed in the immediate presence of the court, summary adjudication without pleading, affidavit, or formal charges is constitutionally permissible. When the misconduct occurs in open court, the affront to the court’s dignity is widely observed, justifying summary contempt procedures.” *Id.* § 191.

¹⁰⁹ *Id.* § 170.

¹¹⁰ *Townes v. State*, 502 P.2d 991 (Wyo. 1972).

¹¹¹ Again, Rule 42(c) provides:

- (c) Indirect (Constructive) Contempt Proceedings. A criminal contempt, except as provided in the preceding subdivision (b) concerning direct contempt, shall be prosecuted in the following manner:
- (1) *Order to Show Cause.* On the court’s motion or upon affidavit of any person having knowledge of the facts, a judge may issue and sign an order directed to the accused, stating the essential facts constituting the criminal contempt charged and requiring the accused to appear before the court and show cause why the accused ought not be held in contempt of court. The order shall specify the time and place of the hearing, with a reasonable time allowed for preparation of a defense.
 - (2) *Motions; Answer.* The accused, personally or by counsel, may move to dismiss the order to show cause, move for a statement of particulars or answer such order by way of explanation or defense. All motions and the answer shall be in writing unless specified otherwise by the judge. An accused’s omission to file motions or answer shall not be deemed as an admission of guilt of the contempt charged.
 - (3) *Order of Arrest; Bail.* If there is good reason to believe the accused will not appear in response to the order to show cause the judge may issue an order of arrest of the accused. The accused shall be admitted to bail in the manner provided by these rules.
 - (4) *Arraignment; Hearing.* The accused shall be arraigned at the time of the hearing, or prior thereto upon the request of the accused. A hearing to determine the guilt or innocence of the accused may follow a plea of not guilty or may be set for trial at a later date or time. The judge may conduct a hearing without assistance of counsel or may be assisted by the attorney for the state or by an attorney appointed by the court for that purpose. The accused is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and may testify in his own defense. Unless the charged contempt is tried to a jury as provided in subdivision (e), all issues of law and fact shall be heard and determined by the judge.

an individual charged with indirect criminal contempt so as to comply with the adequate notice criteria of Wyoming Rule of Criminal Procedure 11 and advise the defendant of his attendant rights.¹¹² In summary, the Wyoming rules governing indirect criminal contempt require other procedural safeguards.¹¹³ “[I]ndirect contempt proceedings can only be prosecuted upon notice stating the time and place of the hearing and allowing a reasonable time for preparation of a defense.”¹¹⁴ A defendant must be afforded reasonable time to prepare his defense to allegations of indirect criminal contempt.¹¹⁵

Wyoming circuit courts, one should recall, face limitations in their contempt powers, as outlined in Wyoming Statutes Sections 1-21-901 through 1-21-909.¹¹⁶ While those statutes do not offer many procedural differences as compared to Rule 42, they limit a circuit court’s authority to punish for contempt.¹¹⁷

Finally, because criminal contempt is a crime, the State carries the burden of proving an accused’s guilt “by establishing every essential element of the crime.”¹¹⁸ This statement necessarily begs the question: What are the elements and the burdens of proof regarding the various forms of contempt?

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- (5) *Disqualification of Judge.* If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the hearing and shall assign the matter to another judge.
 - (6) *Verdict; Judgment.* At the conclusion of the hearing the judge shall sign and enter of record a judgment of guilty or not guilty. In addition to the requirements of Rule 32, a judgment of guilt for contempt of court shall include a recital of the facts constituting the contempt.
 - (7) *Sentence.* Unless an accused may be sentenced to the penitentiary, a presentence investigation is not required but may be ordered. In other respects, Rule 32 shall apply to sentencing for contempt.

WYO. R. CRIM. P. 42(c).

¹¹² *Skinner v. State*, 838 P.2d 715 (Wyo. 1992).

¹¹³ The safeguards require the court to: (1) issue an order directed to the accused stating the essential facts supporting the contempt charge, informing the contemnor of the criminal nature of the charge, and requiring the contemnor to appear and show cause why he should not be held in contempt; (2) provide an arraignment for the purpose of entering a plea; (3) provide a hearing to determine guilt or innocence; (4) issue a judgment of guilty or not guilty; and (5) in the event of a judgment of guilt, issue a judgment reciting the facts constituting the contempt. *See* WYO. R. CRIM. P. 42(c); *see also* WYO. STAT. ANN. §§ 1-21-901–909 (2011) (governing circuit courts).

¹¹⁴ *Horn v. Welch*, 54 P.3d 754, 760 (Wyo. 2002); *United Mine Workers of Am., Local 1972 v. Decker Coal Co.*, 774 P.2d 1274, 1282 (Wyo. 1989).

¹¹⁵ *Townes*, 504 P.2d at 46–47.

¹¹⁶ *See* WYO. STAT. ANN. §§ 1-21-901–909 (2013).

¹¹⁷ WYO. R. CRIM. P. 42(b); *see also* WYO. STAT. ANN. §§ 1-21-901–909 (2011).

¹¹⁸ *ELR v. State (In re Interest of EWR)*, 902 P.2d 696, 700 (Wyo. 1995).

V. ELEMENTS AND BURDEN OF PROOF FOR CONTEMPT

A. *Civil Contempt*

Undoubtedly, one alleging contempt holds the burden of proving that the alleged contemnor violated a court order. However, the degree of that burden was historically unclear. In 2011, the Wyoming Supreme Court declined to address the burden of proof for civil contempt,¹¹⁹ stating:

It is clear that the district court found that Mr. Walters had proved the elements of compensatory civil contempt by clear and convincing evidence. In this appeal, both parties accept that clear and convincing requirement We will accept that requirement for purposes of this case, cautioning that research of our jurisprudence has not located any decision preferring “clear and convincing” over “preponderance.” A definitive holding on that issue must await another day.¹²⁰

The Wyoming Supreme Court’s opinion suggested that the lesser standard may be appropriate in contrast to federal court opinions on the topic, which required clear and convincing evidence.¹²¹ And, in fact, the bulk of recent case law from other jurisdictions also suggests that the clear and convincing standard is applied more often than the preponderance standard.¹²²

Since that time, the court has clarified the “clear and convincing” standard is applicable to civil contempt motions.¹²³ Clear and convincing evidence, of course, is that kind of proof that would persuade the trier of fact that the truth of the contention is highly probable.¹²⁴ In 2014, the Wyoming Supreme Court stated:

Like a majority of jurisdictions, *we agree civil contempt must be proven by clear and convincing evidence.* Clear and convincing evidence is evidence that would persuade a finder of fact that the truth of the contention is highly probable. *The elements of civil*

¹¹⁹ See *Walters v. Walters*, 249 P.3d 214, 227 (Wyo. 2011).

¹²⁰ *Id.* (internal citations omitted). The court also cited Doug Rendleman, *Compensatory Contempt: Plaintiff’s Remedy When a Defendant Violates an Injunction*, 1980 U. ILL. L.F. 971, 980–81 (1980), for a discussion on the burden of proof in compensatory civil contempt cases. 249 P.3d at 227 n.1.

¹²¹ *Skinner v. Lampert*, 457 F.Supp.2d 1269 (D. Wyo. 2006).

¹²² See, e.g., *Bradford v. State*, 21 A.3d 123 (Md. Ct. Spec. App. 2011); *Crick v. Starr*, No. 08 MA 173, 2009 WL 4895270 (Ohio Ct. App. Dec. 9, 2009); *Porter v. Porter*, No. 07CA3178, 2008 WL 4717164 (Ohio Ct. App. Oct. 22, 2008); *Johnson & Placke v. Norris*, No. 38-300 (La. App. 2d Cir. May 12, 2004); 874 So.2d 340.

¹²³ *Shindell v. Shindell*, 322 P.3d 1270, 1274–75 (Wyo. 2014).

¹²⁴ *Meckem v. Carter*, 323 P.3d 637, 644 (Wyo. 2014).

*contempt include: 1) an effective court order that required certain conduct by the alleged contemnor; 2) the contemnor had knowledge of the order; and 3) the alleged contemnor disobeyed the order. Once those elements are proven, the burden shifts to the person charged with contempt to show he or she was unable to comply.*¹²⁵

Thus, to prevail in civil contempt proceedings, the one alleging the contempt must prove, by clear and convincing evidence, that the alleged contemnor had knowledge of an existing and effective court order and disobeyed that order. Once proven, to avoid being held in civil contempt of court, the accused must demonstrate that he was unable to comply with the court's order.

B. Criminal Contempt

Regarding criminal contempt, the Wyoming Supreme Court has opined that criminal contempt is a crime in every fundamental respect, and the State therefore carries the burden of proving every element of a charge of criminal contempt beyond a reasonable doubt.¹²⁶ Accordingly, the State has the burden of proving that the alleged contemnor willfully disobeyed the district court's order.¹²⁷

Further, the Wyoming Supreme Court has clarified:

We have also recognized that "criminal contempt necessarily implies an element of intent that must be proved before a contempt citation can be upheld." Rule 42 simply defines the relevant form of indirect criminal contempt as "[d]isobedience of any lawful judgment, order, or process of the court." The rule is procedural in nature, and does not purport to define the elements of criminal contempt.

"Disobedience," however, means a refusal or failure to obey. Judge Cardozo once quipped that "[d]isobedience is impossible unless there is something to be obeyed.

Federal courts have therefore rejected findings of contempt when it was impossible to comply with the terms of an order, or when an order contained no legal commands. Mistake,

¹²⁵ *Shindell*, 322 P.3d at 1274 (emphasis added) (citing 17 AM. JUR. 2D *Contempt* § 183 (2014); *TMC v. State, Dep't of Family Servs. (In re ARC)*, 258 P.3d 704, 708 (Wyo. 2011); *MN v. State, Dep't of Family Servs. (In re Interest of MN)*, 78 P.3d 232, 234 (Wyo. 2003); *United States v. Ford*, 514 F.3d 1047, 1051 (10th Cir. 2008)).

¹²⁶ *Weidt v. State*, 312 P.3d 1035 (Wyo. 2013); *ELR v. State (In re Interest of EWR)*, 902 P.2d 696 (Wyo. 1995). See also G. R. B., *Degree of Proof Necessary in Contempt Proceedings*, 49 A.L.R. 975 (orig. pub. in 1927).

¹²⁷ *Weidt*, 312 P.3d 1035.

inadvertence, or neglect are likewise not “disobedience” in the context of criminal contempt.

Most of the federal circuits require proof of a willful violation of a reasonably specific order to establish criminal contempt for disobedience of a court order. We believe the majority federal rule is the correct approach. It also provides much-needed clarification in an area of the law that has “bedeviled” courts, judges, lawyers, and legal commentators. *We conclude that indirect criminal contempt for disobedience of a court order requires the State to prove three elements beyond a reasonable doubt: (1) a reasonably specific order; (2) violation of the terms of the order; and (3) willful intent to violate the order.*¹²⁸

As to the third element, a willful intent to violate the court’s order, such willfulness must consist of a “deliberate or intended violation,” or a “volitional act done by one who knows or should reasonably be aware that his conduct is wrongful.”¹²⁹ The court recognized, however, that a contemnor’s state of mind “cannot usually be proven directly, and must instead be ascertained from all the acts, words, and circumstances surrounding the events.”¹³⁰

VI. REMEDIES FOR CIVIL AND CRIMINAL CONTEMPT: COERCION VERSUS PUNISHMENT

Because it is determinative of the classification of contempt as civil or criminal in nature, Wyoming courts often are called upon to address the available remedies, or penalties, for contempt proceedings.¹³¹ Thus, a reviewing court must “determine the nature of a contempt based on the manner in which it occurred and the reasons why a particular penalty was imposed.”¹³² This necessarily leads to a consideration of what types of remedies a court may order for the various contemptuous acts:

¹²⁸ *Weidt*, 312 P.3d at 1041–42 (emphasis added) (some internal citations omitted) (quoting WYO. R. CRIM. P. 42(a)(2)(C); *Standard Chems. & Metals Corp. v. Waugh Chem. Corp.*, 131 N.E. 566, 567 (1921).) (citing *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 n.3 (1994)). *Accord* 18 U.S.C. § 401(3) (2013) (federal courts may punish by fine or imprisonment contempt consisting of “[d]isobedience or resistance to [a federal court’s] lawful writ, process, order, rule, decree, or command”).

¹²⁹ *Id.* at 1043.

¹³⁰ *Id.* (internal citations omitted).

¹³¹ The type of punishment to be imposed is the factor that decides whether a civil or criminal contempt has been committed. *Horn v. District Court*, 647 P.2d 1368 (Wyo. 1982).

¹³² *United Mine Workers of Am., Local 1972 v. Decker Coal Co.*, 774 P.2d 1274, 1279 (Wyo. 1989) (quoting *Anderson v. Anderson*, 667 P.2d 660, 662 (Wyo. 1983)); *see also Swain v. State*, 220 P.3d 504, 508 (Wyo. 2009).

A. *Coercion for Civil Contempt*

Civil contempt sanctions are intended to compel a party to comply with a lawful court order. In essence, the contemnor carries the keys of his prison in his own pocket, and can obtain release by complying with the order of the court that sent him there. Put another way, one held in civil contempt may usually purge himself by compliance.¹³³

Courts have the inherent power to enforce compliance with their orders through civil contempt, including the ability to impose a penalty for contempt “reasonably commensurate with the gravity of the offense, the social harm caused by the defendant’s actions, and the objective of deterring such conduct in the future.”¹³⁴ The degree of punishment rendered lies within the court’s sound discretion and may include incarceration.¹³⁵ For example, one district court properly “punished” a contemnor with forfeiture of his easement rights where that individual used the road across another’s property in violation of court order.¹³⁶

However, because the aim of civil contempt proceedings is to compel compliance with a court’s order, “a court may not impose punishment when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.”¹³⁷ And, upon compliance with the court’s order, the contemnor is purged of the contempt and the consequences must cease.¹³⁸ The incarceration of one found in contempt only until the contemnor has purged himself of such contempt by complying with the court order is a decisive characteristic of civil contempt.¹³⁹ Better said, the contemnor is in a position to remove the contempt by complying with the underlying order. Presumably to allow a contemnor the keys to the jailhouse, Wyoming statute provides: “A person committed to the county jail for contempt of court may be granted probation to continue his employment[.]”¹⁴⁰

¹³³ Meckem v. Carter, 323 P.3d 637, 644 (Wyo. 2014) (citations omitted).

¹³⁴ 17 AM. JUR. 2D *Contempt* § 195 (June 2014 update).

¹³⁵ *Id.*

¹³⁶ Stephens v. Lavitt, 239 P.3d 634 (Wyo. 2010).

¹³⁷ Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011) (citing Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 638 n.9 (1988)).

¹³⁸ *Id.*

¹³⁹ 17 AM. JUR. 2D *Contempt* § 204 (June 2014 update).

¹⁴⁰ WYO. STAT. ANN. § 7-13-504 (2013).

Generally speaking, the trial court has discretion to craft a civil contempt sanction for a contemnor's disregard of provisions of its divorce decree.¹⁴¹ For example, ordering a husband's arrest and confinement, and conditioning his release from confinement upon payment of temporary support arrearage, was within a trial court's authority to impose civil contempt sanctions in divorce action based on husband's failure to appear or to pay temporary support.¹⁴² Likewise, a wife's contempt, based on her spending money in violation of a temporary restraining order in a divorce case was civil, not criminal, even though a requirement for wife to purge the contempt was to pay attorney fees incurred by husband in the contempt proceeding. This contempt categorization was correct because the basic purpose of the contempt order was to remedy the harm done to husband, not to protect the public.¹⁴³

But a court must be cognizant of the extent of the imposed remedies in that punitive discipline of an offending parent for violating custody provisions of a divorce decree is not appropriate if it is in contravention of what may be in the best interests of the child.¹⁴⁴ Although not common, courts and practitioners should be aware of any limitations in the fines or penalties provided by Wyoming Statutes.¹⁴⁵ Also, a court is somewhat limited in its abilities and jurisdiction based upon the requested relief.¹⁴⁶

B. Punishment for Criminal Contempt

On the other hand, criminal contempt is a punitive sanction designed to support and defend a court's authority vis-à-vis a person's noncompliance with

¹⁴¹ Carbaugh v. Nichols, 315 P.3d 1175, 1179–80 (Wyo. 2014); Olsen v. Olsen, 310 P.3d 888 (Wyo. 2013); Roberts v. Locke, 304 P.3d 116 (Wyo. 2013); Salmeri v. Salmeri, 554 P.2d 1244 (Wyo. 1976).

¹⁴² Honan v. Honan, 809 P.2d 783 (Wyo. 1991).

¹⁴³ Hamilton v. Hamilton, 228 P.3d 51 (Wyo. 2010). See also Walker v. Walker, 311 P.3d 170 (Wyo. 2013); Sims v. Day, 99 P.3d 964 (Wyo. 2004); Bickerstaff v. State (*In re Interest of Bickerstaff*), 950 P.2d 46 (Wyo. 1997); Ready v. Ready, 906 P.2d 382 (Wyo. 1995); Graham v. Fenno, 734 P.2d 983 (Wyo. 1987); Hepp v. Hepp, 420 P.2d 118 (Wyo. 1966).

¹⁴⁴ Rogers v. Rogers, 973 P.2d 1118 (Wyo. 1999).

¹⁴⁵ Earthman v. Earthman, 476 P.2d 169 (Wyo. 1970). For example, Wyoming Statute § 14-3-438 limits a court's ability to impose sanctions for contempt to a fine of not more than five hundred dollars (\$500.00) and/or incarceration of not more than ninety days.

¹⁴⁶ Connors v. Connors, 769 P.2d 336 (Wyo. 1989) (finding trial court had no jurisdiction to modify child support obligations when wife sought to have husband held in contempt for failing to comply with his child support obligations but did not request support modification). See Shindell v. Shindell, 322 P.3d 1270, 1277 (Wyo. 2014) (addressing the posting of a bond). See also Annotation, *Right Of Injured Party To Award Of Compensatory Damages Or Fine In Contempt Proceedings*, 85 A.L.R.3d 895 (orig. pub. in 1978).

a court order and, therefore, cannot be cured by the accused.¹⁴⁷ A court has the inherent power to punish contempt and the discretion to determine the appropriate sanction.¹⁴⁸ However, punishment for criminal contempt may not exceed the criminal jurisdiction of the court.¹⁴⁹ Further, any fine imposed must inure to the benefit of the court and state, not a private litigant.¹⁵⁰

Under federal law, federal courts historically were obligated to consider the sentencing guidelines when imposing sentence by referring to the maximum sentences for a crime that most closely equates to the charged contempt.¹⁵¹ Wyoming Rule of Criminal Procedure 42.1 outlines non-exclusive coercive and compensatory remedies available to the courts when punishing contempt.¹⁵² In addition to the remedial sanctions allowed by court rule, the Wyoming Supreme Court has recognized, for example, a district court's discretionary authority to declare a contemnor's property access easement forfeited based upon that individual's violation of an injunction amounting to misuse of the easement.¹⁵³ Thus, court rules and case law demonstrate that Wyoming courts generally hold vast discretion when imposing punishment for criminal contempt.

C. A Mixed Bag: Confusion over the Results

"Where both criminal relief and civil relief are imposed in a contempt order, the criminal feature is dominant and fixes the order's character for purposes of review."¹⁵⁴ Thus, the statute making the disobedience of an injunction a

¹⁴⁷ See *Swain v. State*, 220 P.3d 504, 508 (Wyo. 2009).

[W]here the imprisonment is for a definite term, is mandatory, and release is not conditioned upon the contemnor's compliance with any order of the court, the contempt is criminal in nature and the rights of due process attach. Unlike civil contempt where the court's exercise of its contempt authority is for the purpose of compelling action on the part of the contemnor for the benefit of the complainant, the purpose of imposing a criminal contempt sanction is to punish the contemnor for his actions or disobedience with a lawful order of the court to vindicate the court and its authority.

Connors, 769 P.2d at 344.

¹⁴⁸ *Stephens v. Lavitt*, 239 P.3d 634, 639 (Wyo. 2010).

¹⁴⁹ WYO. R. CRIM. P. 42(d). The author was unable to locate any case law that analyzed the limitation on punishment as "not exceed[ing] the criminal jurisdiction of the court." Wyoming Rule 42(d) differs from Federal Rule of Criminal Procedure 42 in this respect. See generally FED. R. CRIM. P. 42. One might presume that this phrase limits a court's punishment for contempt to the greatest maximum punishment (by way of fines and/or incarceration) that it can impose for *any* criminal proceeding properly within its jurisdiction.

¹⁵⁰ *Horn v. District Court*, 647 P.2d 1368 (Wyo. 1982).

¹⁵¹ See 17 AM. JUR. 2D *Contempt* § 206 (June 2014 update).

¹⁵² See generally WYO. R. CRIM. P. 42.1.

¹⁵³ *Stephens*, 239 P.3d at 640.

¹⁵⁴ *Horn v. Welch*, 54 P.3d 754, 759 (Wyo. 2002).

contemptuous act is both remedial and punitive in that it authorizes the restitution to the injured party and security for obedience to the injunction, as well as the imposition of a fine for the county's use.¹⁵⁵ For example, a contempt order ultimately was considered criminal where it held a labor union and its members in contempt for blocking a highway; impeding travel of employer's employees to a mine; and damaging the employer's property in violation of preliminary injunction.¹⁵⁶ This result held true although the proceeding was initiated by the employer and initially characterized by the trial court as civil contempt. Of note, the criminal characterization was recognized where the court awarded damages of over \$6,700 to the employer, assessed attorney fees, and imposed a fine of \$100 on each individual union member.¹⁵⁷ Frankly, any time a court considers incarceration as an option for coercion or punishment, it should be keenly aware of travelling down that precarious road. For example, disobedience of an injunction may be punished as a contempt, and the contemnor fined and compelled to make restitution. Going one step further, however, the contemnor may be imprisoned for nonpayment of said fine, but not for nonpayment of costs.¹⁵⁸

Recently, the Wyoming Supreme Court reiterated the authority of a court to order compensation of an aggrieved party for damages caused by a contemnor's failure to comply with court order, noting that options include the award of a judgment for money damages as a compensatory contempt sanction, so long as the compensatory award was based on actual loss.¹⁵⁹ Failure to craft the compensatory award to actual losses suffered by the aggrieved party, and order them paid to that party, would result in a speculative and arbitrary award, as specifically noted:

The penalty imposed here cannot be considered compensatory, as it is to be paid to the court. We must determine whether the penalty is really a fine, which would only be appropriate in criminal contempt. After reviewing our precedent, we answer that question in the affirmative; that is, the purpose of the \$100 a day penalty could only have been to punish Appellants if they do not remove the obstructions, although it would certainly have had a coercive effect.

This contempt proceeding was unquestionably civil in nature. While the penalty of \$100 per day payable to the court until the obstructions were removed might have been a fitting fine

¹⁵⁵ *Porter v. State*, 92 P. 385 (Wyo. 1907).

¹⁵⁶ *United Mine Workers of Am., Local 1972 v. Decker Coal Co.*, 774 P.2d 1274 (Wyo. 1989).

¹⁵⁷ *Id.*

¹⁵⁸ *Porter*, 92 P. at 387.

¹⁵⁹ *Meckem v. Carter*, 323 P.3d 637, 645–46 (Wyo. 2014). *See also* *Walker v. Walker*, 311 P.3d 170, 178 (Wyo. 2013); *Walters v. Walters*, 249 P.3d 214, 229 (Wyo. 2011).

for criminal contempt, it is not an appropriate sanction for civil contempt. . . . The district court was therefore without jurisdiction to impose the fine as it did.¹⁶⁰

Although it found the trial court's immediate action without jurisdiction in *Meckem v. Carter*, the Wyoming Supreme Court also reminded courts that, if the contemnor continued in willful disobedience of court order, then the court had continuing coercive measures available to it, including incarceration.¹⁶¹ This decision is an appropriate reminder of the factors necessary to determine whether a contempt is civil or criminal in nature; hence, the results are cyclical in nature.¹⁶²

VII. DEFENSES

Having established the elements required to prove contempt, whether civil or criminal in nature, it quickly becomes apparent that the defenses available to an alleged contemnor largely mirror the proof of the elements required to prove the claimed contempt, with the addition of the inability to abide by the court's order.¹⁶³

In *Shindell v. Shindell*,¹⁶⁴ an alleged contemnor (Mother) argued she could not be held in contempt of court for failure to abide by court order requiring her to pay the children's travel expenses when she could not afford to do so.¹⁶⁵ The Court responded:

In the present case, other than stating in her brief that she receives government assistance because she only earns \$15,000 per year, Mother does not provide any support for her claim that the limited travel expenses are beyond her capabilities. Her brief does include a citation to the record for the information regarding her resources, but the page number cited is not part

¹⁶⁰ *Meckem v. Carter*, 323 P.3d 637, 645–46 (Wyo. 2014) (citations omitted).

¹⁶¹ *Id.*

¹⁶² In determining whether a contempt is criminal or civil, a reviewing court must consider:

1. In what manner did the contempt happen, that is, did the contemnor refuse to do an affirmative act or did the contemnor do that which he was ordered not to do;
2. What was the substance of the proceeding;
3. What kind of punishment was imposed; and
4. For what reasons did the court impose that kind of punishment.

Stephens v. Lavitt, 239 P.3d 634, 638 (Wyo. 2010) (citing *Munoz v. Munoz*, 39 P.3d 390, 393 (Wyo. 2002)).

¹⁶³ *Carbaugh v. Nichols*, 315 P.3d 1175, 1179–80 (Wyo. 2014).

¹⁶⁴ 322 P.3d 1270 (Wyo. 2014).

¹⁶⁵ *Id.* at 1276–77.

of the record on appeal. Consequently, there is no factual basis to support her claim that she could not afford to pay the girls' travel expenses. On this record, the district court did not abuse its discretion by requiring Mother, as part of the sanctions for her contempt, to pay the girls' travel expenses for winter break 2012–13 and spring break 2013.¹⁶⁶

However, where an individual is able to demonstrate an inability to comply with the court order, contempt is not proper.¹⁶⁷

Still, a contemnor cannot rely upon post-order facts and circumstances to defend against contempt proceedings, unless those facts establish the inability to comply with the court's order. More specifically, the Wyoming Supreme Court recognized that facts arising subsequent to issuance of divorce decree may render modification of such decree proper, but such facts could not be interposed as defense in related contempt proceedings.¹⁶⁸

Additionally, contempt carries with it an element of intent, a *mens rea*, so to speak, such that the mere fact that a litigant fails to comply with a court's directives does not equate, *per se*, to a finding of contempt of court, particularly where the conduct does not indicate a flagrant disregard of the individual's obligations.¹⁶⁹ Consequently, before a court can hold the accused in contempt of court, it must consider whether the proper intent was proved and whether the complained-of acts actually obstructed the proceedings.¹⁷⁰

VIII. CONSTITUTIONAL CONSIDERATIONS

Perhaps the most obvious defense to contempt allegations lies post-adjudication in an indirect attack based upon constitutional violations. The authority to exercise contempt powers is well established, both in statutory and case law, but this authority carries with it certain procedural constitutional considerations that must be addressed simultaneously. Although often not obvious until after a finding of contempt has been imposed, courts and practitioners should be cognizant of constitutional considerations that could affect the validity of an order of contempt of court. By no means an exhaustive analysis of constitutional issues surrounding contempt proceedings, the key points discussed below should alert courts and practitioners of particularly hot topics of which to be wary.

¹⁶⁶ *Id.*

¹⁶⁷ *Secrest v. Secrest*, 781 P.2d 1339 (Wyo. 1989) (finding that father was not in contempt for failure to comply with child support order based on evidence that father was financially unable to comply with court's previous orders); *Carbaugh*, 315 P.3d at 1179–80.

¹⁶⁸ *Weppner v. Weppner*, 319 P.2d 127 (Wyo. 1957).

¹⁶⁹ *Salmeri v. Salmeri*, 554 P.2d 1244 (Wyo. 1976).

¹⁷⁰ *Horn v. District Court*, 647 P.2d 1368 (Wyo. 1982).

A. *Jurisdiction (Personal and Subject Matter)*

Jurisdictional considerations, both personal and subject matter, tend to be less an immediate concern in contempt proceedings, largely because the court generally already has jurisdiction over the litigants as part of the underlying proceedings from which the contempt originated.¹⁷¹ But, when courts reach beyond those immediate participants, jurisdiction can become an issue. Of course, a court's jurisdiction, or lack thereof, over the subject matter and the person is reviewable upon appeal.¹⁷²

For example, in one case, a juvenile court lacked personal jurisdiction over a female minor's boyfriend, who was never ordered to appear and never made party to the juvenile proceeding. The court's temporary restraining and protection order issued against the boyfriend was void.¹⁷³ As a result, the juvenile court lacked authority to hold the boyfriend in contempt for violation of that court order, and the court's issuance of a temporary restraining and protection order against the boyfriend violated his due process right.¹⁷⁴ Similarly, where there was a failure of service (of the order to show cause) on an alleged contemnor, the court lacked jurisdiction to hold the subsequent contempt proceedings.¹⁷⁵ Such failure can be cured, or waived, where the defendant voluntarily submits to the order of the court to show cause and appears in person without questioning the jurisdiction.¹⁷⁶

B. *Due Process*

"[T]he due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Art. 1, [Section] 6 of the Wyoming Constitution guarantee a criminal defendant the right to due process of law."¹⁷⁷ More specifically, article 1, section 6 of the Wyoming Constitution provides: "No person shall be deprived of life, liberty or property without due process of law."¹⁷⁸ Procedural due process considerations have been at the forefront of contempt proceedings insofar as the court's ability to deprive the contemnor of liberty or property.

A court stands on solid ground vis-à-vis constitutional procedural due process concerns where it adequately informs the contemnor of the nature and effect of

¹⁷¹ Notably, where a suit was removed to federal court, the district court lacked jurisdiction to enter a contempt order at a later date, even though the basis for the order occurred prior to the removal. *Garber v. United Mine Workers of Am.*, 524 P.2d 578 (Wyo. 1974).

¹⁷² *Ex parte Bergman*, 26 P. 914 (Wyo. 1890).

¹⁷³ *KT v. State (In re Interest of BLM)*, 902 P.2d 1288 (Wyo. 1995).

¹⁷⁴ *Id.*

¹⁷⁵ *See Oedekoven v. Oedekoven*, 475 P.2d 307 (Wyo. 1970).

¹⁷⁶ *Bergman*, 26 P. at 919.

¹⁷⁷ *West v. State*, 311 P.3d 157, 161 (Wyo. 2013).

¹⁷⁸ WYO. CONST. art. 1, § 6.

the finding of contempt but runs afoul when it fails to clearly apprise an individual of the basis for contempt.¹⁷⁹ It should be noted that a juvenile court exceeded its authority and violated a juvenile's due process right where the juvenile was not informed that she could be declared a delinquent child and placed in the Wyoming Girls' School for an indefinite period for failure to comply with the court's orders.¹⁸⁰ This case goes as much to the fatal notions of jurisdiction as it does due process. Regardless, the results are noteworthy. So long as the participants follow the procedures outlined in this article with respect to the various forms of contempt, most procedural due process issues can be avoided.

C. *Right to Jury Trial*

An alleged contemnor's right to a jury trial has been a significant topic, particularly given the possibility of a period of incarceration in both civil and criminal contempt proceedings. In a civil contempt proceeding, the contemnor has no right to a jury trial.¹⁸¹ This concept underlines the notion that, in civil contempt proceedings, "the contemnor carries the keys of his prison in his own pocket."¹⁸² Meanwhile, in criminal contempt proceedings, the right to a jury trial hinges on the possibility of incarceration, just as it does in other criminal matters. The alleged criminal nature of the contempt proceedings, or possibility of enforcing the court order through contempt proceedings, does not, in and of itself, give an alleged contemnor a constitutional right to a jury trial.¹⁸³ Rather, in cases of criminal contempt, jury trial is required only if the party guilty of contempt is exposed to the possibility of confinement for more than six months.¹⁸⁴

D. *Right to Counsel: Private and/or Court-Appointed*

Historically, the Wyoming Supreme Court declined to address whether an indigent litigant in a civil contempt case is entitled to appointed counsel when

¹⁷⁹ *In re Contempt of Haselhuhn*, 740 P.2d 387 (Wyo. 1987). See also *Osborn v. Manning*, 812 P.2d 545 (Wyo. 1991); *Weiss v. State ex rel. Cardine*, 455 P.2d 904 (Wyo. 1969), cert. denied 398 U.S. 927 (1970).

¹⁸⁰ *TLL v. State (In re Interest of TLL)*, 899 P.2d 44 (Wyo. 1995) (further discussing the lack of contempt petition that stated jurisdictional facts).

¹⁸¹ 17 AM. JUR. 2D *Contempt* § 179 (June 2014 update) ("Civil contempt proceedings resulting in conditional imprisonment, based on the offender's continued defiance of a court order, do not require a jury trial, even where the resulting imprisonment is relatively long, so long as the defendant would be released upon ceasing contempt.").

¹⁸² *Swain v. State*, 220 P.3d 504, 508 (Wyo. 2009) (internal citation omitted).

¹⁸³ *LP v. Natrona Cnty. Dep't. of Pub. Assistance & Soc. Servs. (In re GP)*, 679 P.2d 976 (Wyo. 1984); *Weiss v. State ex rel. Cardine*, 455 P.2d 904 (Wyo. 1969), cert. denied 398 U.S. 927 (1970).

¹⁸⁴ WYO. R. CRIM. P. 42(e); see also *Skinner v. State*, 838 P.2d 715, 722 (Wyo. 1992); 17 AM. JUR. 2D *Contempt* § 179 (June 2014 update).

incarceration is a possible penalty.¹⁸⁵ The United States Supreme Court relatively recently considered an indigent's right to paid counsel.¹⁸⁶ Carefully limiting its holding to civil contempt proceedings involving an indigent individual who is subject to a child support order for arrears owed to a custodial parent,¹⁸⁷ the Court concluded that the Due Process Clause "does not *automatically* require the provision of counsel[.]"¹⁸⁸ However, in finding that the provision of counsel was not required, the Court relied heavily upon the notion of "substitute procedural safeguards," including:

(1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.¹⁸⁹

The Court noted that these suggestions are not the "only possible alternatives," and assistance, other than purely legal assistance, sometimes can prove constitutionally sufficient.¹⁹⁰

In response to *Turner v. Rogers*, the Wyoming Supreme Court addressed the issue of an indigent defendant's right to court-appointed counsel in criminal contempt cases, noting it does not apply to civil contempt proceedings.¹⁹¹ In *Department of Family Services v. Currier*,¹⁹² the court thereafter noted that sufficient substitute procedural safeguards to protect indigent obligors against the possibility of wrongful incarceration were in place, and, therefore, due process did not require appointment of counsel for an indigent obligor in civil contempt proceedings for non-payment of child support brought by Department of Family Services (DFS). The court noted that, although incarceration was a possibility

¹⁸⁵ GGV v. JLR, 105 P.3d 474 (Wyo. 2005).

¹⁸⁶ See *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

¹⁸⁷ The Court specifically noted that it did "not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody." *Id.* at 2520. The Court also specifically excluded from its holding the "unusually complex case where a defendant can fairly be represented only by a trained advocate." *Id.* (quotation omitted).

¹⁸⁸ *Id.* (emphasis in original).

¹⁸⁹ *Id.* at 2519.

¹⁹⁰ *Id.*

¹⁹¹ *State, Dept. of Family Servs. v. Currier*, 295 P.3d 837 (Wyo. 2013).

¹⁹² *Id.*

and DFS was represented by counsel, the procedure employed in the contempt proceedings for failure to pay child support provided the obligor with notice and the opportunity to be heard; that provision of counsel in every case involving the state and an indigent obligor would have resulted in considerable delay; and that the obligor who was unable to pay child support had the obligation and means to seek modification of obligation.¹⁹³ Because of its import, it is worth parsing the court's analysis.

The Wyoming Supreme Court first noted that the Sixth Amendment to the United States Constitution guarantees indigent defendants the right to appointed counsel in criminal cases, including criminal contempt proceedings, but does not apply in civil cases.¹⁹⁴ The Fourteenth Amendment's guarantee of due process does, however, apply to civil contempt actions. In that context, a Fourteenth Amendment right to counsel in civil proceedings has been recognized when an indigent litigant risks being deprived of his liberty, but not in every instance.¹⁹⁵ The Wyoming Supreme Court noted the applicability of the *Mathews*¹⁹⁶ factors to address the specific safeguards the constitutional Due Process Clause required to make a civil proceeding fundamentally fair, namely: (1) the nature of the private interest that will be affected; (2) the comparative risk of an erroneous deprivation of that interest with and without additional or substitute procedural safeguards; and (3) the nature and magnitude of any countervailing interest in not providing additional or substitute procedural requirements.¹⁹⁷ It then turned its focus to the United State Supreme Court's application of those factors:

Applying the *Mathews* factors to Turner's situation, the Court concluded the first factor, "the private interest that will be affected," argued strongly in favor of a right to counsel because that interest involves the possibility of loss of personal liberty by imprisonment. Due to the importance of the interest, it is critical to ensure accurate decision making with regard to the key "ability to pay" question because the answer ultimately determines whether the matter is civil or criminal in nature and whether the obligor will be held in contempt of court. Nevertheless, the Court stated that due process does not always require the appointment of counsel in civil proceedings even when incarceration is threatened and the opposing interests

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 840–44 (emphasis added).

¹⁹⁵ *Id.*

¹⁹⁶ *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976).

¹⁹⁷ *State, Dept. of Family Servs. v. Currier*, 295 P.3d 837, 840–41 (Wyo. 2013) (referencing *Turner*, 131 S. Ct. at 2517–18; *Mathews*, 424 U.S. at 335, 96 S. Ct. at 893).

and the value of providing additional or substitute procedural safeguards must be considered.¹⁹⁸

The Wyoming Supreme Court expressly considered the three considerations, addressed in *Turner*, that influence a required appointment of counsel: (1) the defendant's ability to pay; (2) legal representation (or lack thereof) of the opposing party; and (3) any availability of "substitute procedural safeguards" that reduce the risk of an erroneous deprivation of liberty.¹⁹⁹

Those [substitute procedural] safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (*e.g.*, those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.²⁰⁰

After considering these factors, the result is such that that "the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)."²⁰¹ With that precedent in place, the Wyoming Supreme Court noted that *Turner* expressly failed to address civil contempt proceedings where child support payments are owed to the government.²⁰² The court expressed its concern that "those proceedings resemble debt-collection proceedings and the government is likely to have representation," creating a potentially larger imbalance between the parties.²⁰³ As a result, the Wyoming Supreme Court launched into a *de novo* analysis of the *Mathews* factors.

Regarding the first factor, the private interest to be affected, the Wyoming Supreme Court expressed that the obligor-father's personal liberty would likely be affected by the contempt proceedings in that the Department of Family Services (DFS) sought any appropriate remedy for contempt, including imposition of a jail sentence. In concluding that this factor was strongly indicative of a right to

¹⁹⁸ *Currier*, 295 P.3d at 841 (citations omitted).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (quoting *Turner v. Rogers*, 131 S. Ct. 2507, 2518–19 (2011)) (citations omitted) (emphasis in original).

²⁰¹ *Turner*, 131 S. Ct. at 2520 (emphasis in original).

²⁰² *Currier*, 295 P.3d at 842–43 (Wyo. 2013) (emphasis added). See also Marjorie A. Caner, J.D., Annotation, *Right to Appointment of Counsel in Contempt Proceedings*, 32 A.L.R.5th 31 (1995); Jack W. Shaw, Jr., J.D., Annotation, *Right to Counsel in Contempt Proceedings*, 52 A.L.R.3d 1002 (1973 and Supp. 2004).

²⁰³ *Currier*, 295 P.3d at 842–43 (Wyo. 2013).

counsel, the court opined that “the freedom from bodily restraint lies at the core of the liberty protected by the Due Process Clause.”²⁰⁴ Addressing the second factor, the comparative risk of an erroneous deprivation of the private interest, with and without safeguards, the court placed particular importance on the fact that DFS was represented by counsel when the obligor-father was not, noting:

This factor implicates the key “ability to pay” question which is often dispositive in these matters. The ability to comply with the court-ordered support requirement marks the dividing line between criminal and civil contempt and an incorrect decision could increase the likelihood of a wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in criminal proceedings. Wyo. Stat. Ann. § 20-2-310 (LexisNexis 2011) codifies the ability to pay requirement by requiring a showing that the parent has “willfully” violated a child support order. In *Secrest v. Secrest*, we held unrefuted evidence that the father was financially unable to comply with the court’s previous orders regarding the child’s medical and insurance expenses justified finding him not in contempt of court.

The district court concluded in this case that, because DFS was represented, failing to provide counsel to Father would result in an asymmetry that would make the proceeding unfair. *Turner*, by contrast, involved two unrepresented parties and concluded that allowing counsel would create an asymmetry of representation that would alter significantly the nature of proceeding. We agree that an asymmetry exists when DFS is represented and the obligor is not; however, *Turner* and *Mathews* envision a balancing of the opposing interests and procedural safeguards. Consequently, the fact that DFS was represented is not dispositive. We must consider what procedures are in place or may be put in place to offset the lack of symmetry occasioned by DFS being represented while the obligor is not to determine the comparative risk of erroneous incarceration.²⁰⁵

The court then considered the procedures employed by Wyoming courts in contempt proceedings for failure to pay child support, recognizing that an alleged contemnor is informed, both in the petition and by the court, of the burden on the State to prove that the failure to pay court-ordered child support is willful

²⁰⁴ *Id.* (citations omitted).

²⁰⁵ *Id.* (citations omitted) (internal quotation marks omitted).

and that the alleged contemnor is given an opportunity to explain any reasons for failure to pay child support.²⁰⁶ The court opined:

These procedures meet the notice and opportunity to be heard requirements set out in *Turner*. Given those procedures, it is hard to imagine what more appointed counsel could bring to the dialogue. In addition, district courts should utilize less formal courtroom procedures to give a *pro se* obligor a full opportunity to present a defense on the ability to pay issue. Such accommodations are encouraged in the Wyoming Code of Judicial Conduct: “It is not a violation of [the rule requiring judges to uphold and apply the law and perform all duties fairly and impartially] for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard.” The district court must also make an express finding as to the obligor’s ability to pay in order to determine whether the failure is willful or not. These safeguards weigh against requiring the appointment of counsel.²⁰⁷

Finally, the Wyoming Supreme Court addressed the third *Mathews* factor, which requires consideration of the countervailing interest in not providing the additional safeguards, including the appointment of counsel. The court recognized the delay in proceedings that would be directly caused by requiring the appointment of counsel in every case involving the state and an indigent obligor and commented on the indirect results flowing therefrom: slowing payments to needy families, undermining the overall fairness of the proceedings, and the considerable fiscal and administrative burden to the state.²⁰⁸

Ultimately, the Wyoming Supreme Court concluded that, the procedural safeguards and the disadvantages of providing counsel outweigh the lack of symmetry occasioned by the Wyoming Department of Family Services being represented while the obligor is not. Thus, indigent obligors are not entitled to court-appointed counsel in child support enforcement contempt proceedings, so long as certain procedural safeguards are available. The court left room for the possibility of due process requiring appointment of counsel in an “unusually complex case where a defendant can fairly be represented only by a trained advocate.”²⁰⁹ In the context of civil contempt, then, the issue of the right to counsel is determined in Wyoming as follows: the contemnor must be afforded a

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* (citations omitted).

²⁰⁹ *Id.* at 844 (quoting *Turner*, 131 S. Ct. at 2520).

reasonable opportunity to employ counsel if desired, but the right to appointed counsel is not recognized except, perhaps, in situations of an unusually complex nature where a defendant can only be fairly and adequately represented by counsel.

On the other hand, concerning criminal contempt, the United States Supreme Court has recognized that an indigent defendant subject to criminal contempt proceedings (other than summary proceedings) has a right to appointed counsel.²¹⁰ However, in contrast to the due process protections generally afforded a criminal defendant, the law also recognizes that a judge may punish a contemnor “summarily” if the judge saw or heard the conduct constituting the direct contempt.²¹¹ “One charged with committing a direct contempt in the presence of the court is not generally entitled to be heard in his or her own defense; no constitutional rights are infringed by refusing a hearing and punishing summarily.”²¹² “Where a direct contempt occurs in the presence of the court, the court should usually act promptly to impose sanctions.”²¹³ But, if the court delays in imposing punishment, then “[d]ue process requires that the contemnor’s rights to notice and a hearing be respected[.]”²¹⁴ Thus, in criminal contempt proceedings, an alleged contemnor has a right to counsel for indirect criminal contempt but not for summary proceedings related to direct criminal contempt.

E. Double Jeopardy

On occasion, an alleged contemnor has raised constitutional double jeopardy concerns worthy of discussing here. The Fifth Amendment to the United States Constitution and article 1, section 11 of the Wyoming Constitution protect a person from twice being put in jeopardy of prosecution, conviction, or punishment for the same criminal offense.²¹⁵

²¹⁰ See *Turner*, 131 S. Ct. at 2516 (citing *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Cooke v. United States*, 267 U.S. 517, 537 (1925)).

²¹¹ WYO. R. CRIM. P. 42(b); see also 17 AM. JUR. 2D *Contempt* §§ 169, 193 (June 2014 update); WYO. STAT. ANN. § 1-21-904 (2011) (allowing summary proceedings in circuit courts).

²¹² 17 AM. JUR. 2D *Contempt* § 170 (June 2014 update).

²¹³ *Id.* “When a direct contempt is committed in the immediate presence of the court, summary adjudication without pleading, affidavit, or formal charges is constitutionally permissible. When the misconduct occurs in open court, the affront to the court’s dignity is widely observed, justifying summary contempt procedures.” *Id.* § 191.

²¹⁴ *Id.* § 170.

²¹⁵ Wyoming’s version of the double jeopardy clause states:

No person shall be compelled to testify against himself in any criminal case, nor shall any person be twice put in jeopardy for the same offense. If a jury disagree, or if the judgment be arrested after a verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.

WYO. CONST. art. 1, § 11.

Though the two provisions differ in language, this Court has stated, they have the same meaning and are co-extensive in application. Furthermore, we have said that the double jeopardy provisions of both Constitutions provide an accused three protections: 1) protection against a second prosecution for the same offense following an acquittal; 2) protection against a second prosecution for the same offense after a conviction; and 3) protection against multiple punishments for the same offense. The protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. For double jeopardy to bar re-trial in a case where the district court grants a defense motion for a mistrial based upon prosecutorial misconduct, the defense must show prosecutorial intent to goad the defense into moving for a mistrial.²¹⁶

Specifically applied to contempt proceedings, the Wyoming Supreme Court declared an alleged contemnor's constitutional protection against double jeopardy was not violated by proceedings to hold him in contempt for failure to pay child support a second time, even though the second contempt proceeding overlapped the timeframe of the first criminal contempt conviction, and the alleged contemnor was afforded protections and advisements provided by rules of criminal procedure.²¹⁷ In *Munoz v. Munoz*, the second contempt proceeding was initiated by the State because a noncustodial parent did not pay child support in accordance with the district court's earlier order; thus, the alleged contemptuous conduct was father's refusal to perform an affirmative act such that the intent of proceedings was to force the father to comply with the child support order rather than to punish him for noncompliance.²¹⁸

F. Cruel, Unusual, and/or Excessive Punishment

An initial analysis of general Eighth Amendment consideration, including a comparison and contrast of state and federal constitutional law, is appropriate before narrowing the scope to contempt proceedings. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."²¹⁹ "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving

²¹⁶ *Derrera v. State*, 327 P.3d 107 (Wyo. 2014) (citations omitted) (internal quotation marks omitted); *see also* *Landeroz v. State*, 267 P.3d 1075, 1080 (Wyo. 2011).

²¹⁷ *Munoz v. Munoz*, 39 P.3d 390 (Wyo. 2002).

²¹⁸ *Id.*

²¹⁹ U.S. CONST., 8th Amend.

standards of decency that mark the progress of a maturing society.”²²⁰ This approach is necessary because the standard of extreme cruelty necessarily embodies a moral judgment, that application of which changes along with the basic mores of society.²²¹ The Cruel and Unusual Punishments Clause prohibits the imposition of “inherently barbaric punishments” under *all* circumstances under the notion the human attributes of even of those who have committed serious crimes must be respected.²²² On a more limited basis, the Clause also forbids punishments that are disproportionate to the crime.²²³ The concept of proportionality is central to the Eighth Amendment under the principle of jurisprudence that punishment for crime should be graduated and proportioned to the offense.²²⁴

In contrast,

Article 1, § 14 of the Wyoming Constitution provides: “All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall *cruel or unusual* punishment be inflicted.” The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual* punishments inflicted.” *Our state constitution articulates the standard in the disjunctive and the federal constitution in the conjunctive.* We have at least tacitly recognized that under our state constitution we will look at the two words individually.²²⁵

Applying those notions of cruel or unusual punishment, or excessive fines, specifically to a contempt proceeding, Wyoming courts have held that a sentence of six months’ imprisonment and \$500 fine for contempt in attempting to bribe witnesses in presence of court was not so disproportionate to offense and so cruel and excessive as to render it unconstitutional.²²⁶ Ultimately, where the court that imposed the contempt sentence has jurisdiction in other respects, the sentence

²²⁰ *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 290 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598 (1958) (plurality opinion)).

²²¹ *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S. Ct. 2641, 2649 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382, 92 S. Ct. 2726, 2800 (1972) (Burger, C.J., dissenting)).

²²² *Tucker v. State*, 245 P.3d 301, 314 (Wyo. 2010).

²²³ *Id.*

²²⁴ *Tucker v. State*, 245 P.3d 301, 314 (Wyo. 2010).

²²⁵ *Bear Cloud v. State*, 275 P.3d 377, 396 (Wyo. 2012), *cert. granted and judgment vacated*, *Bear Cloud v. Wyoming*, 133 S. Ct. 183 (2012) (emphasis added) (quoting *Johnson v. State*, 2003 WY 9, ¶ 35, 61 P.3d 1234, 1248 (Wyo. 2003)).

²²⁶ *See Fisher v. McDaniel*, 64 P. 1056 (Wyo. 1901).

must be so excessive as to clearly violate constitutional provision against cruel and unusual punishment, and thus utterly void, before a reviewing court can and should interfere.²²⁷

G. First Amendment: Freedom of Speech

As may well be anticipated, where an individual is held in contempt of court, civil or criminal, based on a choice to speak, freedom of speech issues surface. The Wyoming Constitution recognizes that:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right; and in all trials for libel, both civil and criminal, the truth, when published with good intent and [for] justifiable ends, shall be a sufficient defense, the jury having the right to determine the facts and the law, under direction of the court.²²⁸

In contempt proceedings in Wyoming, writings, which were executed by defendant-contemnor and sent to Wyoming Supreme Court by him, were deemed admissible as relating to the alleged contempt.²²⁹ These writings were admissible solely as they related to continuity and perspective of defendant's acts; the intent of the defendant; and his present sincerity or lack of sincerity in purported apology to the Wyoming Supreme Court, and not as to the gravamen of the alleged contempt.²³⁰ Thus, the court could rely upon these remarks in finding the defendant-contemnor guilty of direct contempt without violating his rights to freedom of speech and freedom of press.²³¹

IX. JUDICIAL REVIEW: ISSUES OF APPEALABILITY

Finally, appellate review of contempt proceedings is inevitable. The Wyoming Supreme Court has addressed the ability to appeal a civil contempt order.²³² Noting that, "a majority of courts hold that when contempt proceedings are brought[,] any order short of the order which imposes punishment by fine or imprisonment is interlocutory in nature, and is not a final order from which an appeal can be taken[.]" the court followed suit.²³³ This holding signifies that a

²²⁷ *Id.*

²²⁸ WYO. CONST. art. 1, § 20.

²²⁹ *In re Stone*, 305 P.2d 777 (Wyo. 1957).

²³⁰ *Id.*

²³¹ *Id.*

²³² *See Hamilton v. Hamilton*, 228 P.3d 51, 54–55 (Wyo. 2010).

²³³ *Id.* (citation omitted).

court's finding of civil contempt is not appealable unless and until the punishment has been imposed. "[T]he significant question is whether the punishment has been imposed, not whether a finding of contempt has been made."²³⁴ To that end, the Wyoming Supreme Court has opined:

Father argues this aspect of the district court's order is not appealable because the district court has not ordered Mother to pay a specific amount of travel expenses. In *Inman*, we noted that WRAP 1.05(b) allows appeal of orders affecting a substantial right made in a special proceeding. Given the district court's continuing jurisdiction over divorce matters and its general power to enforce its orders through contempt proceedings, the order requiring Mother to pay the girls' travel expenses affects a substantial right. The reasonableness of Father's expenses can be determined in a later proceeding, if necessary.²³⁵

An order of contempt is a final order, and therefore reviewable.²³⁶ Not only the contemnor, but also the party in whose favor an order has been granted, has the right to appeal from an order adjudging an alleged violator not to be in contempt.²³⁷

Once that contempt order has been entered, the appellate court applies an "abuse of discretion" standard²³⁸ to its review of the contempt proceedings. The inherent power to punish contempt of court is firmly vested in a district court's broad discretion will not be intruded upon unless the court commits a clear and grave abuse of that discretion. In determining whether the district court abused its discretion, the appellate court considers whether the district court could have reasonably concluded as it did.²³⁹

Still, the court also recognized that reversal may be warranted in cases of "serious procedural error, a violation of a principle of law, or a clear and grave abuse of discretion."²⁴⁰ However, mere errors of law in imposing a sentence for contempt, which do not affect the jurisdiction of the trial court, will not be reviewed on habeas corpus.²⁴¹ Ultimately, in reviewing the exercise of a district

²³⁴ *Id.*

²³⁵ *Shindell v. Shindell*, 322 P.3d 1270, 1277 n.1 (Wyo. 2014).

²³⁶ *Porter v. State*, 92 P. 385, 387 (Wyo. 1907); *Laramie Nat'l Bank v. Steinhoff*, 53 P. 299 (Wyo. 1898).

²³⁷ *Laramie Nat'l Bank*, 53 P. at 299.

²³⁸ *Olsen v. Olsen*, 310 P.3d 888, 896 (Wyo. 2013).

²³⁹ *Meckem v. Carter*, 323 P.3d 637, 644 (Wyo. 2014) (emphasis added).

²⁴⁰ *Shindell*, 322 P.3d at 1273 (citing *Roberts v. Locke*, 304 P.3d 116, 120 (Wyo. 2013)).

²⁴¹ *Fisher v. McDaniel*, 64 P. 1056 (Wyo. 1901); *Ex parte Bergman*, 26 P. 914 (Wyo. 1890).

court's broad discretion under its contempt powers, the appellate court generally must determine whether the trial court reasonably could have concluded as it did.²⁴²

In the criminal contempt context, the court has stated that criminal contempt is the only common-law crime not abolished by statute, thereby requiring the State to carry the burden of proving every element of a charge of criminal contempt beyond a reasonable doubt.²⁴³ Likewise, the standard of review of sufficiency of the evidence is well established:

[W]e examine and accept as true the State's evidence and all reasonable inferences which can be drawn from it. We do not consider conflicting evidence presented by the defendant. We do not substitute our judgment for that of the jury [or fact-finder]; rather, we determine whether a jury [or fact-finder] could have reasonably concluded each of the elements of the crime was proven beyond a reasonable doubt. This standard applies whether the supporting evidence is direct or circumstantial.²⁴⁴

Thus, because criminal contempt is considered a crime, it is subject to the same review, and standards therefor, as would be anticipated of any appellate review of criminal proceedings. Courts and practitioners should govern themselves accordingly. So long as courts abide by the procedural and substantive cautions outlined in this article, appellate review should be of little concern, as the Wyoming Supreme Court has consistently recognized the trial courts' need, and ability, to enforce court orders.²⁴⁵

X. CONCLUSION

Unfortunately, contempt continues to be a necessary device for courts to govern the conduct of those appearing before the court and to enforce court orders. Happily, however, developments in case and statutory law have clarified the authority of the courts, the procedures to be utilized, and the extent of the remedies available to them.

²⁴² *Fisher*, 64 P. at 1056; *See also* *Stephens v. Lavitt*, 239 P.3d 634, 639 (Wyo. 2010).

²⁴³ *Weidt v. State*, 312 P.3d 1035, 1040 (Wyo. 2013). *See also* WYO. STAT. ANN. § 6-1-102(a) (2013); *BW v. State (In re Interest of BD)*, 226 P.3d 272, 273 (Wyo. 2010); *Swain v. State*, 220 P.3d 504, 508 (Wyo. 2009); *ELR v. State (In re Interest of EWR)*, 902 P.2d 696, 700 (Wyo. 1995); *Witt v. State*, 892 P.2d 132, 143 (Wyo. 1995).

²⁴⁴ *Weidt*, 312 P.3d at 1040 (quoting *Sweets v. State*, 307 P.3d 860, 865 (Wyo. 2013)).

²⁴⁵ *See, e.g., Weidt*, 312 P.3d at 1040 n.3; *Walker v Walker*, 311 P.3d 170, 178 (Wyo. 2013).

With any luck or skill, this article has provided those appearing in Wyoming courts with a better understanding of the definitions applicable to contempt proceedings, the procedures required therein, the elements and defenses applicable to contempt proceedings, the remedies available, the various constitutional considerations, and the appropriate appellate review of civil and criminal contempt matters. With these useful tools in place, courts can uphold the integrity and decorum of the justice system in the manner in which all those who participate in it deserve.