CONTEMPT: THE UNTAPPED POWER OF JUVENILE COURT

*Gerard Glynn**

I. INTRODUCTION

Experienced attorneys who do not regularly appear in juvenile court are often flabbergasted by the lack of respect shown to the court and the judge.[1] Attorneys and parties often come to court poorly dressed, move around the courtroom randomly, and talk while the court is in session.[2] However, the greatest disrespect is shown in the lack of compliance with court orders.[3] Parties regularly ignore court orders.[4] Such conduct is contemptuous and punishable by fines and incarceration.[5] Until juvenile judges enforce their orders with

* Gerard Glynn is an attorney who has represented children in juvenile court for over twenty years. He now works with nonprofit agencies and courts that serve children and other disadvantaged populations. He also trains lawyers on children law topics. Previously, he spent twenty-three years as a professor at four law schools where he supervised law students who represented children in juvenile courts in four different states. Some of the material for this Article was published as part of the training the author gave at the National Association of Counsel for Children national conference in August 2007.

[1] *See* Janet E. Ainsworth, *The Court's Effectiveness in Protecting the Rights of Juveniles in Delinquency Cases*, THE FUTURE OF CHILDREN, Winter 1996, at 64, 66-67.

[2] A judge can hold someone in contempt immediately upon that person's disrespectful behavior. Mayberry v. Pennsylvania, 400 U.S. 455, 463 (1971). Although this conduct is clearly contemptuous and punishable, this Article will focus on the ability of the parties and the courts to use contempt to get services and permanency for children. Thus, it will not address the often disrespectful conduct of the litigants.

[3] *See* Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 636 (1988) (explaining that states may use contempt proceedings as a tool to ensure "swift and certain compliance with valid court orders").

[4] *See, e.g.*, *id.* at 627-28 (a father was held in contempt for failing to comply with a child support order); *In re* MB, 3 P.3d 780, 784 (Wash. Ct. App. 2000) (analyzing six linked appeals of contempt proceedings for willfully failing to abide by a court order).

[5] *See Feiock*, 485 U.S. at 627-28 (sentencing the defendant "to 5 days in jail on each [contempt] count"); Shillitani v. United States, 384 U.S. 364, 365 (1966) (sentencing defendants to jail based on their contemptuous conduct before a grand jury); United

contempt, parties will continue to ignore and disrespect the power of the court.[6] As the United States Supreme Court has repeated, "[T]he power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice, and in maintaining the authority and dignity of the court, is most important and indispensable."[7] Although there are statutes granting judicial contempt power, it is clear that a court has inherent authority to impose contempt sanctions.[8]

There are two types of contempt—civil contempt and criminal contempt.[9] As Justice O'Connor explained, "Civil contempt proceedings are primarily coercive; criminal contempt proceedings are punitive."[10] As another court explained, "[T]he purpose of civil contempt is to coerce future compliance by imposition of a sanction of indefinite duration terminable on compliance or inability to comply. Criminal contempt is to preserve the authority of the court by punishing past misconduct."[11] Courts have often used civil contempt in family law matters dealing with divorce and child custody to ensure that a

States v. United Mine Workers of Am., 330 U.S. 258, 303 (1947) (discussing the fine a trial court judge can order parties to pay when they are found in contempt).

[6] *See In re MB*, 3 P.3d at 796-99 (citing multiple instances where minors refused to comply with court orders until contempt proceedings ensued).

[7] Roadway Express, Inc., v. Piper, 477 U.S. 752, 764 (1980); *Mayberry*, 400 U.S. at 464; Sacher v. United States, 343 U.S. 1, 30 (1952); Cooke v. United States, 267 U.S. 517, 539 (1925).

[8] *Shillitani*, 384 U.S. at 370. *But see In re MB*, 3 P.3d at 784 (concluding that the juvenile "statutes are . . . the first source of the court's contempt powers, and the juvenile court may not exercise inherent contempt powers unless the statutory powers are clearly inadequate").

[9] For a detailed analysis of the distinctions between civil and criminal contempt, see Susan Apel, *Custodial Parents, Child Sexual Abuse, and the Legal System: Beyond Contempt*, 38 AM. U. L. REV. 491, 501-512 (1989). It has often been stated that it is not easy to distinguish civil and criminal contempt. *E.g.*, *In re MB*, 3 P.3d at 788. In one U.S. Supreme Court case, although the parties argued that the case involved criminal contempt, the Supreme Court concluded the remedy clearly indicated an imposition of civil contempt sanctions. *See Shillitani*, 384 U.S. at 368-69.

[10] *Feiock*, 485 U.S. at 646 (O'Connor, J., dissenting); *see also* Billiot v. Billiot, 805 So. 2d 1170, 1173 (La. 2002) ("In a criminal contempt proceeding, the court seeks to punish a person for disobeying a court order, whereas in a civil contempt proceeding, the court seeks to force a person into compliance with a court order.").

[11] *In re* A.W., 399 N.W.2d 223, 225 (Minn. Ct. App. 1987).

parent complies with visitation or child support orders.[12] In civil contempt, the contemnor will purge him or herself of the contempt sanction once the contemnor has complied with the court order.[13]

A court may hold anyone in contempt who does not comply with one of its orders after the court provides the individual with proper notice and opportunity to be heard.[14] In juvenile court proceedings, judges should use contempt to force all parties to provide the services that a family or child needs, to ensure protection and services for a child while under state supervision, and to expedite a permanent solution to the problems that bring a family to juvenile court.[15] Courts should use contempt to force a state agency to provide services and to force parents to comply with mandated tasks, treatment, visitation, and support.[16]

---

[12] *See* Apel, *supra* note 9, at 503. This Article will not discuss this usage of contempt power. Although child welfare orders may include visitation and child support, this Article will focus on the orders issued to reach the permanency goals of the child welfare proceedings. *See infra* Part II.

[13] Mackowiak v. Mackowiak, No. CA2010-04-009, 2011 WL 2448997, at *5 (Ohio Ct. App. June 20, 2011). An example of a civil contempt order is when a court orders a state agency to pay four hundred dollars a day until it finds an appropriate placement for a child. *See In re* Thomas M., 803 N.W.2d 46, 53 (Neb. 2011).

[14] *See* Cooke v. United States, 267 U.S. 517, 536-37 (1925) (explaining that contempt proceedings require "that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation").

[15] *See, e.g.*, *In re Thomas M.*, 803 N.W.2d at 50; Oregon *ex rel*. Casey v. Casey, 153 P.2d 700, 702 (Or. 1944).

[16] Courts can and unfortunately do use contempt to force children to comply with court orders. *See, e.g.*, A.A. v. Rolle, 604 So. 2d 813, 814 (Fla. 1992) (detaining four foster children for running away from their foster placements); R.M.P. v. Jones, 419 So. 2d 618, 619-20 (Fla. 1982) (detaining a foster child for twenty days for running away and violating an order to "not associate" with another child). This author does not support a court's use of contempt power in this way in a dependency proceeding against the child. Although children are parties to these proceedings in most states, they are victims in these proceedings, and the courts should not use their power to punish the children for what are often normal, adolescent reactions to situations beyond their control. *See* Gerard Glynn, *The Child Abuse Prevention and Treatment Act—Promoting the Unauthorized Practice of Law*, 9 J.L. & FAM. STUD. 53, 71-72 (2007). Courts should more appropriately use the power of contempt to force adults to provide services to children rather than use the power as a method of further alienating child victims.

This is not a new concept.[17] Legislators vested contempt power in some of the earliest juvenile codes, and some of the earliest courts enforced the contempt power.[18]

There can be procedural hurdles to succeed in a contempt action, but often the mere filing of a contempt motion can get relief for the child or the family.[19] To find a party in contempt, a court must make factual findings of a violation of an unambiguous order or observe conduct in the courtroom that shows contempt for the court.[20]

This Article will focus on child welfare proceedings[21] and analyze how courts and attorneys can use the power of contempt to benefit children. Although the focus is on child welfare proceedings,

---

[17] *See* Brown v. Commw., 132 S.E. 332, 332 (Va. 1926) (reaffirming a contempt judgment of the juvenile and domestic relations court against a mother that refused to comply with a court order to appear in court with her two minor children).

[18] *Id*.

[19] *See* Apel, *supra* note 9, at 503. When this author was directing a legal clinic that had a contract to represent up to 150 foster children at any one time, the office began to regularly file motions to show cause why an agency responsible for providing child services should not be held in contempt. After the agency had to appear in court to defend its failures to comply with court orders on several occasions, the attorney for the agency asked that the clinic institute a new policy. The clinic agreed to call the attorney and give him forty-eight hours to remedy the noncompliance. After instituting this agreement, there was no need for court hearings on motions to show cause. Each time the clinic drafted a motion to show cause, it provided the motion to opposing counsel and he or she had his or her client comply before the clinic filed the motion. This experience shows that if an advocate uses the threat of contempt properly, he or she can get opposing parties to show appropriate respect to the court by complying in a timely manner.

[20] F.T.C. v. Trudeau, 579 F.3d 754, 763 (7th Cir. 2009); United States v. Straub, 508 F.3d 1003, 1011 (11th Cir. 2007).

[21] This Article will use the term "child welfare proceedings" to describe court proceedings related to child abuse or neglect. Different states refer to these proceedings with lots of different terminology, such as "dependency proceedings," "child deprivation proceedings," or "child in need of services proceedings." *See, e.g*., Stanley v. Illinois, 405 U.S. 645, 650 (1972) (using the term "dependency" proceedings); Smith v. Dinwiddie, 510 F.3d 1180, 1183 (10th Cir. 2007) (using the term "deprived-child proceedings"); Millspaugh v. Cnty. Dep't of Pub. Welfare of Wabash Cnty., 937 F.2d 1172, 1173 (7th Cir. 1991) (using the term "child in need of services" proceedings).

similar issues arise in delinquency and child-in-need-of-services ("CHINS")[22] proceedings.[23] The rules for enforcement of contempt are the same.[24] This Article will discuss why this power can help accomplish the goals of child welfare proceedings and review the procedural hurdles the parties and courts will have to overcome to accomplish the goal of providing services for the children involved in these cases.

II. WHY JUVENILE COURT SHOULD USE CONTEMPT POWER

Juvenile courts oversee all the actions of the child welfare system in the United States.[25] A court approves the initial removal of children and monitors services and actions by the children's parents.[26] These court actions are necessary to reunite a family or find an alternative permanent placement for a child who has been a victim of abuse or neglect.[27]

---

[22] The acronym "CHINS" in this Article refers to cases arising out of status offenses, such as truancy, running away, or incorrigibility. Different jurisdictions call these proceedings different things such as "family in need of services" or "persons in need of services." *See* Louisiana *ex rel.* C.T., Jr., 997 So. 2d 891, 892 (La. Ct. App. 2008) (using the term "family in need of services" proceeding); *In re* N.A., No. CVA99-042, 2001 WL 339428, at *1 (Guam Apr. 10, 2001) (using the term "person in need of services" proceeding).

[23] Courts more commonly use contempt in divorce proceedings to enforce child support or visitation. *See, e.g.*, Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624, 626-27 (1988) (illustrating the power of contempt and complications that can arise). Although courts can order child support in dependency proceedings, they rarely do. *See, e.g.*, *In re* P.N.L., 491 S.E.2d 434, 437 (Ga. Ct. App. 1997) (holding that parents who did not pay court-ordered child support for four years were not to be held in contempt, but, rather, they would not regain custody of their child). Therefore, this Article will not discuss enforcement of child support as a tool of juvenile court.

[24] *See* Duemling v. Fort Wayne Cnty. Concerts, Inc., 188 N.E.2d 274, 276 (Ind. 1963) (stating that a court can use fines or imprisonment to coerce parties into adherence with court orders).

[25] *See* Publ'n Dev. Comm. Victims of Child Abuse Project, *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, 18 (Spring 1995), http://www.ncjfcj.org/sites/default/files/resguide_0.pdf.

[26] *Id.* at 14-15.

[27] *Id.*

Although differences exist in each state's child welfare system, the systems are all structured similarly due to federal financial incentives.[28] The federal government has encouraged states to create centralized reporting systems,[29] maintain standards for foster care in accordance with national accrediting organizations,[30] provide advocates for children,[31] maintain monthly visits by a case worker for any child placed in foster care,[32] develop procedures to appeal a finding of abuse and neglect,[33] maintain confidentiality of records in matters of child abuse,[34] place a child with a relative if a child cannot remain at home,[35] conduct background checks before placing a child in a foster or a relative's home,[36] ensure that children removed from families are attending school,[37] place siblings together if possible,[38] and provide services to older and former foster youth to assist in a successful transition to adulthood.[39] One reoccurring concern related to federal funding has been that these funds will encourage states to remove more

---

[28] Frank E. Vandervort, *Federal Child Welfare Legislation*, *in* CHILD WELFARE AND PRACTICE 199-200 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010). The federal government has been funding state child welfare systems since the 1930s. *Id.* at 200. However, the federal government's role increased dramatically in the 1970s with the passage of the Child Abuse and Protection Act. *Id.* at 201. The federal government has mandated numerous reforms over the years and states have complied because the federal government has offered substantial financial incentives. *Id*. at 199-200.

[29] 42 U.S.C. § 5106a(b)(2)(B)(i) (Supp. V 2011).

[30] 42 U.S.C. § 671(a)(10) (2006 & Supp. V 2011).

[31] 42 U.S.C. § 5106a(b)(2)(B)(ii), (xiii).

[32] 42 U.S.C. § 622(b)(17) (2006).

[33] 42 U.S.C. § 5106a(a)(2)(B)(i).

[34] 42 U.S.C. § 5106a(b)(2)(B)(viii).

[35] 42 U.S.C. § 671(a)(19) (2006). There has to be an effort to search and find relatives willing to care for the child within thirty days of removal. 42 U.S.C. § 671(a)(29) (Supp. V 2011).

[36] 42 U.S.C. § 671(a)(20) (2006 & Supp. V 2011).

[37] 42 U.S.C. § 671(a)(30) (Supp. V 2011). There is also a provision to ensure that young children with disabilities have access to special education services. 42 U.S.C. § 5106a(b)(2)(B)(xxi).

[38] 42 U.S.C. § 671(a)(31) (Supp. V 2011).

[39] 42 U.S.C. § 677 (2006 & Supp. V 2011).

children and have them languish in foster care longer.[40] So, the federal government has mandated various procedures for states to follow to ensure that children remain in their homes of origin,[41] are returned home as soon as possible,[42] or are placed in a permanent alternative if returning them home is not possible.[43]

A key component to accomplishing these federal mandates is the judicial oversight of each child welfare case.[44] Judges must review and approve removals of children and case plans.[45] Judges also have a federal statutory obligation to conduct ongoing reviews of placements and services.[46]

---

[40] Vandervort, *supra* note 28, at 203-04.

[41] The federal government first encouraged states to provide "reasonable efforts" at eliminating the need to remove a child by passing the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.); Congress clarified "reasonable efforts" in 1997 by passing the Adoption and Safe Families Act, which is now codified in 42 U.S.C. § 671(a)(15)(A)-(B).

[42] States that accept the federal funds must provide reasonable efforts to reunify families. § 671(a)(15)(B)(ii). However, this mandate is not absolute. If a court determines that a parent has committed one of a list of serious offenses against children or has previously had parental rights terminated to a sibling of this child, reasonable efforts before removal or to reunify are not necessary. § 671(a)(15)(D); *see also* 42 U.S.C. § 5106a(b)(2)(xvi) (Supp. V 2011) (stating that the state does not have to require reunification of a child with a parent who has been found, by a competent court, of committing crimes).

[43] 42 U.S.C. § 622(b)(8)(A)(iii) (2006).

[44] *See* Brown v. Feaver, 726 So. 2d 322, 324 (Fla. Dist. Ct. App. 1999).

[45] *See* Louisiana *ex rel.* BH v. AH, 968 So. 2d 881, 888 (La. Ct. App. 2007).

[46] Section 675(5)(B) mandates that each child's status be

> reviewed periodically but no less frequently than once every six months by either a court or by administrative review (as defined in paragraph (6)) in order to determine the safety of the child, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to and safely maintained in the home or placed for adoption or legal guardianship.

Although this provision permits an administrative review, those states that use an administrative review process usually have the review approved by a judge. *See, e.g.*, TENN. CODE. ANN. § 37-2-406(3) (2010) (stating that it is the responsibility of the

Each case must have a case plan[47] with a clear goal.[48] The court has an obligation to ensure that all the parties are making progress toward that goal.[49] The court does this by issuing orders to the parents and state agencies responsible for supporting the parents' progress and serving the children.[50] These orders should state clear timelines for completion because the goal is to end the case in a year.[51] This cannot be accomplished if parties are not given clear interim deadlines.[52]

The court can only accomplish these obligations to push the system if the parties are worried about the court's power—that is, the

---

foster care review board to conduct case plan reviews, but a judge having jurisdiction may elect to personally review each case or personally review certain cases instead of assigning them to the board for review).

[47] 42 U.S.C. § 675(1), (5)(A) (2006).

[48] The Adoption and Safe Families Act mandates that a state receiving federal money to support its child welfare system makes assurances that the system has a service program to help children meet one of the following goals: reunification, adoption, placement with a legal guardian, or some other permanent planned living arrangement. § 622(b)(8)(A)(iii). States refer to this mandate as a permanency goal. *E.g.*, Div. of Family Servs. v. James, No. CS09-02602, 2009 WL 6328182, at *3, *15 (Del. Fam. Ct. Dec. 18, 2009).

[49] *See* § 675(5)(B) (explaining that the court has a statutory obligation to review the status of each child periodically to determine the safety of the child, the continuing necessity for placement, and the extent of progress that has been made toward the cause that necessitated placement).

[50] CHILD WELFARE INFORMATION GATEWAY, HOW THE CHILD WELFARE SYSTEM WORKS 4-5 (2013), *available at* http://www.childwelfare.gov/pubs/factsheets/cpswork.pdf.

[51] Federal law mandates that there be a permanency review by a court if a child has been out of home for twelve months. § 675(5)(C). If a child has been in foster care for fifteen of the last twenty-two months, the state must move to terminate parental rights unless the court finds a "compelling reason" that filing a petition would not be in the best interest of the child. § 675(5)(E).

[52] These deadlines are the statutory deadlines. D. DEPANFILIS & M.K. SALUS, OFFICE ON CHILD ABUSE & NEGLECT, CHILDREN'S BUREAU, *Child Protective Services: A Guide for Caseworkers*, *available at* http://www.childwelfare.gov/pubs/usermanuals/cps/cpsf.cfm (2003). The statutory deadlines include the status of each child being reviewed periodically, but no less frequently than once every six months, and if a child is in foster care, no less frequently than every twelve months. § 675(5)(B)-(C).

power to hold parties in contempt.[53] If courts do not use their power, cases will languish and children will not get what is most needed—a forever family.[54] For children, time is of the essence.[55] More than anyone else in the system, the court has the power to make sure children do not lose critical time languishing in foster care.[56]

III. ROLE OF THE PARTIES IN LAYING THE GROUND WORK FOR CONTEMPT

A. Specific Orders

Before a court can enforce an order through contempt, it needs to be sufficiently specific to direct an individual party to perform a specific task within a specific timeframe.[57] A classic unenforceable order is one that states, "the mother should have reasonable visitation."[58] What is "reasonable"? Who is responsible for providing transportation of the child or parent? Where is the visitation to take place? Is it supervised or unsupervised? A better order would be as follows:

The mother is to have a four-hour visit every week on Wednesdays after the child returns from school. Visitation shall take place at the home of the maternal grandparents. The mother is responsible for her transportation to the visit. Ms. Anne Jones, the caseworker for the family, is responsible for transporting the child to the visit.

An order this detailed can be cumbersome because one would have to seek court approval to change the location or time of a visit if

---

[53] *See* Shillitani v. United States, 384 U.S. 364, 370 (1966) (explaining that courts have inherent power to enforce compliance with their lawful orders through contempt).

[54] *See* Publ'n Dev. Comm. Victims of Child Abuse Project, *supra* note 25, at 14.

[55] *Id.*

[56] *Id.* at 14-15.

[57] *See* Hornbeck Offshore Servs., L.L.C. v. Salazar, 713 F.3d 787, 792-93 (5th Cir. 2013).

[58] *Id.* at 792; *see* Taylor v. Taylor, 387 P.2d 648, 649-51 (Okla. 1963).

that becomes necessary.[59] There is also a likelihood that the caseworker will change.[60] Thus, most litigants will compromise with an order that is specific enough to enforce but loose enough to allow some flexibility to address changing circumstances without a new court order.[61]

Courts have overturned some efforts at contempt because the underlying orders have been too vague for enforcement.[62] An example of vagueness is a case in which the court found that an agency had made "an appropriate placement."[63]

Thus, the parties need to ask for enforceable orders when in court, and judges need to think about enforcement when drafting orders.[64] Orders should identify who, what, when, where, and how.[65] Parties should understand their obligations in as much detail as possible while being allowed some flexibility.[66]

---

[59] *See, e.g.*, N.C. GEN. STAT. ANN. § 50-13.7 (West 2013).

[60] MARSHA K. SALUS, OFFICE ON CHILD ABUSE & NEGLECT, CHILDREN'S BUREAU, *Supervising Child Protective Services Caseworkers* 67 (2004), *available at* https://www.childwelfare.gov/pubs/usermanuals/supercps/supercps.pdf ("The annual turnover of child welfare caseworkers is between 30 and 40 percent, with the average duration of employment less than 2 years.").

[61] *Hornbeck Offshore Servs.*, 713 F.3d at 792. There is another problem in some jurisdictions with orders that are too specific. In Florida, the Department of Children and Families has successfully argued that the courts have overstepped their constitutional authority when they order the Department to provide a specific service by a specific provider. *See* Brown v. Feaver, 726 So. 2d 322, 324-25 (Fla. Dist. Ct. App. 1999). The argument is that a court cannot dictate how the Department spends its money within the parameters of its legislatively granted authority. *See id.* Other state agencies may argue the same separation of constitutional authority in other states.

[62] Thomas M. v. Thomas M., 803 N.W.2d 46, 53-54 (Neb. 2011).

[63] *Id.* ("The written order of July 21, 2010, did not notify [the Department of Health and Human Services] of the specific attributes of an 'appropriate placement' and, in particular, failed to advise [the Department] that the failure to arrange counseling three times a week for [the child] would be deemed insufficient and result in contempt.").

[64] *See* Neiman v. Naseer, 31 So. 3d 231, 232 (Fla. Dist. Ct. App. 2010); Ross v. Botha, 867 So. 2d 567, 571 (Fla. Dist. Ct. App. 2004).

[65] *See id.*

[66] *See id.*

B. Orders Must Apply to Parties or Others with an Opportunity to Object

Courts can only hold parties in contempt who know about an order.[67] Courts can order absent parties to perform tasks, but the courts must provide notice of the hearing and an opportunity for the party to be heard.[68] There are also nonparties who affect children's lives that juvenile courts attempt to order to do things.[69] For example, there may be grandparents who are interfering with the proceedings, or the court may want to order the school system to provide transportation for a child in compliance with federal law.[70] However, a court cannot order grandparents and school systems to comply with a court order unless the court provides them notice of a request for such an order and an opportunity to participate in a hearing prior to issuing the order.[71] Without this process, any effort to hold the nonparty in contempt will be futile.[72]

Attorneys can avoid this problem by providing nonparties the opportunity to be heard prior to the court's issuing the order or having the court order the parties to work with the nonparties for the results the court seeks.[73] For example, if the problem is that the paternal grandparents are interfering by telling the child that the child's mother is evil and souring the mother-child relationship, the court can order the father to prevent the paternal grandparents from having any contact with the child while in his custody. If the issue is that the school system will

---

[67] *See supra* note 14 and accompanying text.

[68] *See supra* note 14 and accompanying text.

[69] *See In re* Martzen, 600 So. 2d 487, 488 (Fla. Dist. Ct. App. 1992).

[70] *Id.* The McKinney-Vento Homeless Assistance Act provides states federal funding to address homelessness. *See* 42 U.S.C. § 11301 (2006). States that accept the funding must ensure that homeless children receive a free, appropriate public education. 42 U.S.C. § 11431 (2006); Bollock v. Bd. of Educ. of Montgomery Cnty., 210 F.R.D. 556, 556-57 (D. Md. 2002). Some foster children fall under the Act's definition of homeless. 42 U.S.C. § 11434a(2)(B)(i) (2006). For more information on this Act contact the National Center for Homeless Education at http://www.serve.org/nche/.

[71] Columbo v. Legendre, 397 So. 2d 1043, 1043-44 (Fla. Dist. Ct. App. 1981).

[72] *See id.*

[73] *See* Taylor v. Sturgell, 553 U.S. 880, 892-95 (2008).

not provide the child transportation to stabilize the child's education, the court can order the state agency to ensure the child maintains his schooling, including providing the child transportation until the school system provides the transportation.[74]

C. Monitoring Compliance

Juvenile courts must conduct review hearings every six months pursuant to a federal mandate.[75] Lawyers often only learn of noncompliance with a court order days or perhaps minutes before the next six-month review hearing.[76] This does not help the child involved in the proceedings.[77] Six months is a very long time for a child to be denied necessary counseling or a family to be denied the homemaking services mandated.[78] To ensure timely compliance with court orders, attorneys and courts need to verify compliance regularly and as soon as possible.[79]

Attorneys for the agencies or parents ordered to comply can create reminders to call and monitor compliance or have support staff

---

[74] New Jersey v. New York, 872 F. Supp. 2d 204, 209-10 (E.D.N.Y. 2011). Although such an order will be burdensome on the state agency, this burden will give the state agency the incentive to force the school system to comply with its obligations under the McKinney-Vento Act. *See* 42 U.S.C. § 11432(e)(3)(C)(i)(III)(cc), (ii)(II), (E)(i)(III) (2006 & Supp. V 2011).

[75] 42 U.S.C. § 675(5)(B) (2006).

[76] *See* Sandra Simkins, *Out of Sight, Out of Mind: How the Lack of Postdispositional Advocacy in Juvenile Court Increases the Risk of Recidivism and Institutional Abuse*, 60 RUTGERS L. REV. 207, 210-11, 214-15 (2007) (noting that, in the juvenile justice context, when lawyers are not involved with a child's posttrial programs, the lawyers do not learn important information regarding compliance until it is too late); STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES 14-15 (1996), *available at* http://www.americanbar.org/content/dam/aba/migrated/family/reports/standards_abuseneglect.authcheckdam.pdf (stating that lawyers should "ensure that services are provided and that the court's orders are implemented in a complete and timely" manner).

[77] *See* Publ'n Dev. Comm. Victims of Child Abuse Project, *supra* note 25, at 14-15.

[78] *See id.*

[79] *See* STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 76, at 14-15.

do such tasks.[80] Attorneys for the children can create a similar tickler system or have Court Appointed Special Advocates for Children ("CASAs") do such monitoring.[81]

These six-month review hearings are structured to address compliance with a case plan.[82] The case plan will have tasks for the parents and the agency.[83] There should also be tasks for the caregivers of the children to ensure that they are meeting the children's needs.[84] When the court approves these case plans, they become the equivalent of court orders.[85] The issue at these review hearings is whether people are complying with these tasks.[86] The court should ensure that each

---

[80] *See id.* Agency attorneys often have high caseloads. STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING CHILD WELFARE AGENCIES 19-20 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/child_law/agency-standards.authcheckdam.pdf. However, national standards mandate monitoring compliance as part of the agency attorneys' jobs. *See id.* at 14-15. The lawyer is not just a mouthpiece for the agency; it is the duty of all the lawyers to ensure their respective clients comply with court orders. *See id.*

[81] *See* STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 76, at 14-15, 17. Studies have shown that CASAs are very effective at monitoring court compliance, and attorneys for children should use this resource when available. *See* U.S. DEP'T OF JUSTICE, AUDIT REPORT 07-04, NATIONAL COURT–APPOINTED SPECIAL ADVOCATE PROGRAM 27 (December 2006) [hereinafter AUDIT REPORT]; *Evidence of Effectiveness*, CASA COURT APPOINTED SPECIAL ADVOCATES FOR CHILDREN, http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5332511/k.7D2A/Evidence_of_Effectiveness.htm (last visited Oct. 15, 2013); Caliber Assocs., *Evaluation of CASA Representation Research Summary*, N.Y. STATE OFFICE OF CHILDREN AND FAMILY SERV. iii (Jan. 20, 2004), http://ocfs.ny.gov/main/recc/caliber_casa_study_summary.pdf. The National Association of Counsel for Children standards for lawyers states: "The child's attorney should monitor the implementation of the court's orders and communicate to the responsible agency and, if necessary, the court, any non-compliance." STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 76, at 14-15.

[82] *See* 42 U.S.C. § 675(5)(A)-(B) (2006).

[83] *See* § 675(1)(A)-(B).

[84] *See* § 675(1)(B).

[85] *See* Publ'n Dev. Comm. Victims of Child Abuse Project, *supra* note 25, at 13-15.

[86] *See* § 675(5)(B). The reason for this check is to make sure that the parties are making progress toward an established goal. *Id.* This is often referred to as

party is complying with these tasks.[87]

Courts have held parents in contempt for failure to comply with drug treatment,[88] submit to psychological testing or treatment,[89] keep the state informed of a current address,[90] assist in the medical treatment of the child,[91] participate in parenting classes,[92] or participate in domestic violence programs.[93] One of the controversies in this area is whether juvenile courts should hold parents in contempt for failure to comply with treatment.[94] The California Supreme Court concluded that a parent's threatened loss of custody and potential termination of parental rights are appropriate sanctions under the state's statutes.[95] However, the overwhelming majority of other states have found that a juvenile court does have authority to hold a parent in contempt for

---

permanency. *See* 42 U.S.C. § 673b(i)(2)(C) (2006). The ultimate goal is that children should have a forever family. Emily W. McGill, *Agency Knows Best? Restricting Judges' Ability to Place Children in Alternative Planned Permanent Living Arrangements*, 58 CASE W. RES. L. REV. 247, 276 (2007). Foster care should be temporary and last no longer than twelve months. *See* 42 U.S.C. § 675(5)(C); Ernestine Steward Gray, *The Adoption and Safe Families Act of 1997 Confronting an American Tragedy*, 46 LA. B.J. 477, 478 (1999). Thus, the court's role should be to keep people moving toward the goal, which is done by people complying with tasks quickly. *See* Harriet O'Neill, *Courts: Gatekeepers for Families in Crisis*, 70 TEX. B.J. 666, 668 (2007).

[87] *See* Publ'n Dev. Comm. Victims of Child Abuse Project, *supra* note 25, at 14-15.

[88] *See In re* Nolan W., 203 P.3d 454, 459, 462, 467 (Cal. 2009); Utah *ex rel.* B.G. v. Utah, No. 20051150-CA, 2006 WL 1516392, at *1 (Utah Ct. App. June 2, 2006); *In re* Anderson, 550 So. 2d 192, 193, 195 (La. Ct. App. 1989). In *Nolan*, the California Supreme Court stated that, although the lower court found the mother in contempt, the lower court exceeded its authority in holding the mother in contempt. *In re Nolan W.*, 203 P.3d at 459, 462, 467. The court explained, "When the Legislature has established a specific penalty for a transgression, courts may not impose a contempt punishment that is inconsistent with the legislative scheme." *Id.* at 462.

[89] *In re Anderson*, 550 So. 2d at 193-95.

[90] *Id.*

[91] *Id.* at 194-95.

[92] *Id.*; *B.G.*, 2006 WL 1516392, at *1.

[93] *B.G.*, 2006 WL 1516392, at *1.

[94] *See In re* Nolan W., 203 P.3d 454, 457 (Cal. 2009); *B.G.*, 2006 WL 1516392, at *1; *In re Anderson*, 550 So. 2d at 193.

[95] *In re Nolan W.*, 203 P.3d at 465.

failing to comply with a dependency court order.[96]

There is a special category of contempt for custodians, whether parents or otherwise.[97] There have been several cases dealing with a parent's refusal to disclose the location of a child.[98] The constitutional issue is whether a parent can refuse to disclose the location of his or her child because of the parent's Fifth Amendment right against self-incrimination.[99] The United States Supreme Court found that a parent could not refuse to produce a child who is subject to a child welfare proceeding due to the threat that such a production would lead to incrimination of misconduct.[100] In that case, the child had been in foster care and returned to the mother.[101] The contempt arose when the mother refused to produce the child and the state feared that the mother

---

[96] *E.g.*, *B.G.*, 2006 WL 1516392, at *1; *In re Anderson*, 550 So. 2d at 194-95; Brown v. Virginia, 132 S.E. 332, 333-34 (Va. 1926).

[97] *Infra* notes 98-116 and accompanying text.

[98] *E.g.*, Balt. City Dep't of Soc. Servs. v. Bouknight, 493 U.S. 549, 551, 553-54 (1990); *In re* Ariel, 858 A.2d 1007, 1008-09 (Md. 2004).

[99] "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Although a missing child heightens the tensions in a child welfare proceeding, courts place parents in a quagmire in many circumstances. Although child welfare proceedings are civil in nature, often with the goal of helping a family reunify, there are criminal statutes for abuse or simple neglect. *E.g.*, MISS. CODE ANN. § 97-5-39 (2013); N.J. STAT. ANN. § 2C:24-4 (West 2005); TENN. CODE ANN. § 39-15-401 (2010 & Supp. 2011). Consider the following circumstances: A prosecutor could use a parent's disclosure from a child welfare proceeding in a companion criminal proceeding. If a parent does not disclose and cooperate in the child welfare proceeding, he or she will lose custody of his or her child, and a court may view the parent as noncooperative in the case plan. However, if the parent decides to disclose, the parent may be providing the state with the testimony it needs to prosecute the parent in a criminal proceeding. *See* U.S. CONST. amend. V; MISS. CODE ANN. § 97-5-39 (2013); N.J. STAT. ANN. § 2C:24-4 (West 2005); TENN. CODE ANN. § 39-15-401 (2010 & Supp. 2011).

[100] *Bouknight*, 493 U.S. at 560-61. The Court focused on the dimensioned Fifth Amendment protection "[w]hen a person assumes control over items that are the legitimate object of the government's noncriminal regulatory powers." *Id.* at 558. The Court detailed the conditions the mother consented to as part of the return of the child, which reduced her expectation of Fifth Amendment protection. *Id.* at 558-560. The dissent challenged the Court's characterization that juvenile proceedings are similar to other noncriminal regulatory processes. *Id.* at 568 (Marshall, J., dissenting).

[101] *Id.* at 551-52 (majority opinion).

had abused the child again.[102]

In a Maryland case, the court concluded that there is a difference when a court has not given a parent custody of a child.[103] The appellate court found that a mother retains her Fifth Amendment rights if she has not agreed to a conditional return of her child.[104] A key finding of that decision was that the lower court did not ask the mother to produce the child.[105] Thus, in a missing-child case, a court should focus on an order for a parent to act rather than seek testimony.[106]

Courts have held agencies[107] in contempt for failing to find placements,[108] reunify a child,[109] provide counseling,[110] pay for relative placements,[111] or provide visitation as ordered.[112]

---

[102] *Id.* at 552-53.

[103] *See In re Ariel*, 858 A.2d at 1012.

[104] *Id.* at 1013-14, 1016. The Maryland court distinguished its case from the *Bouknight* decision because its case involved testimony rather than a parent's obligation to produce a child or a parent's agreeing to conditions of a child welfare proceeding. *Id.* at 1012-14.

[105] *Id.* at 1012.

[106] *See id*.

[107] Although court orders or statutory provisions make states or specific agencies responsible for complying with court orders, individual representatives are the ones whom courts may threaten with incarceration for noncompliance. *E.g.*, *In re* Krystal P., 557 N.W.2d 26, 27-28 (Neb. 1996) (holding that incarceration of two case workers is proper until the workers comply with a visitation order).

[108] *E.g.*, *In re* Thomas M., 803 N.W.2d 46, 53 (Neb. 2011) (holding that a juvenile court retained the authority to find the Department of Health and Human Services in contempt for breach of a placement order).

[109] *E.g.*, Torrey Y. v. Fond Du Lac Cnty., No. 92-2118-FT, 1993 WL 853, at *2 (Wis. Ct. App. Jan. 6,1993).

[110] *E.g.*, *In re Thomas M.*, 803 N.W.2d at 52-53 (holding that a juvenile court retained the authority to find the Department of Health and Human Services in contempt for breaching the placement order that ordered Thomas to receive counseling).

[111] *See, e.g.*, *In re* Darlene T., 78 Cal. Rptr. 3d 119, 124, 126 (Ct. App. 2008). However, the appellate court found that the relative needed to exhaust administrative remedies before seeking court action. *Id.* at 126-27.

[112] *E.g.*, *In re Krystal P.*, 557 N.W.2d at 30 (holding that the court retained the authority to find the Department of Social Services in contempt for failure to comply with a visitation order).

Courts have held foster parents in contempt for traveling without authority,[113] interfering with mental health treatment,[114] permitting media contact with the foster children,[115] and obstructing sibling visitations.[116]

IV. PROCEDURAL DUE PROCESS

A contempt proceeding may lead to a loss of property or liberty.[117] Thus, individuals have a constitutional right to procedural due process before a court can find a person in contempt.[118] The level of process differs according to whether the contempt is direct or indirect.[119] Direct contempt occurs in the presence of a judge, such as a disruption in the courtroom.[120] Indirect contempt occurs when someone does not follow a court's order.[121]

Although this Article is focusing on indirect contempt, it is important to recognize that a court can have truncated procedures when there is contemptuous behavior in the courtroom.[122] When a judge witnesses misbehavior, the judge can summarily act to convict the contemnor and impose punishment immediately.[123] As the United

---

[113] *In re* Griffin, 690 A.2d 1192, 1195, 1203-04 (Pa. Super. Ct. 1997).

[114] *Id.* at 1203, 1206-07.

[115] *Id.* at 1207, 1210.

[116] *Id.* at 1203, 1205-06.

[117] Mahopac Teachers Ass'n v. Bd. of Educ. of the Mahopac Cent. Sch. Dist., 533 N.Y.S.2d 520, 521 (App. Div. 1988).

[118] *See In re* Oliver, 33 U.S. 257, 275 (1948).

[119] *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 827 & n.2 (1994). "Direct contempts that occur in the court's presence may be immediately adjudged and sanctioned summarily . . . ." *Id.* at 827 n.2.

[120] Paul A. Grote, *Purging Contempt: Eliminating the Distinction Between Civil and Criminal Contempt*, 88 WASH. U. L. REV. 1247, 1254 (2011); *see, e.g.*, Illinois v. Allen, 397 U.S. 337, 339-40 (1970) (removing a defendant from the courtroom after multiple outbursts during voir dire).

[121] Mackowiak v. Mackowiak, No. CA2010-04-009, 2011 WL 2448997, at 5 (Ohio Ct. App. June 20, 2011) ("[I]ndirect contempt . . . is defined as behavior that occurs outside the presence of the court and demonstrates a lack of respect for the court or its lawful orders."); Grote, *supra* note 120, at 154.

[122] *See* Cooke v. United States, 267 U.S. 517, 534-35 (1925).

[123] *Id.*

States Supreme Court explained,

> To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law, and the punishment imposed is due process of law. . . . It was there held that a court of the United States, upon the commission of a contempt in open court, might upon its own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender, immediately proceed to determine whether the facts justified punishment and to inflict such punishment as was fitting under the law.[124]

What process is due may also depend on whether it is criminal or civil contempt.[125] As indicated earlier, the purpose of civil contempt is to coerce compliance and the purpose of criminal contempt is punishment.[126]

Civil contempt may only require notice and an opportunity to be heard.[127] Because the purpose of civil contempt is to force the person or entity to comply with a court's order, the order can only continue as long as the underlying act is relevant.[128] If the court finds that further sanctions will not lead to compliance, the court should release the party

---

[124] *Id.* at 534-35 (citing *In re* Terry, 128 U.S. 289, 313 (1888)). However, in criminal proceedings a judge has to be careful to avoid prejudicing the accused. *See* Mayberry v. Pennsylvania, 400 U.S. 455, 465-66 (1971).

[125] *See* Grote, *supra* note 120, at 1265.

[126] *In re* A.W., 399 N.W.2d 223, 225 (Minn. Ct. App. 1987).

[127] Apel, *supra* note 9, at 504-05.

[128] *See id.* at 502.

from its contempt sanction.[129]

If it is criminal contempt, criminal procedures apply.[130] This includes the rights to a public trial,[131] an attorney, present evidence,[132] call witnesses, cross-examine witnesses, a jury trial, protection from compelled self-incrimination, and proof beyond a reasonable doubt.[133]

The procedures also differ between rights of individuals and a government entity.[134] Courts view the constitutional due-process protections as protecting citizens from abuses of a government entity.[135] As the Nebraska Supreme Court recognized, a government entity may not qualify for constitutional due process protection, but adequate notice and meaningful opportunity to be heard are still required.[136]

V. MOVING FOR SHOW CAUSE

After a party has obtained a clearly mandated order and has discovered that the party ordered to do a task has failed to fulfill its obligation to the court, the party seeking enforcement must first move the court to issue a show-cause order.[137] To hold someone in contempt, a court must give that person an opportunity to explain his or her

---

[129] *See In re* Parish, 613 F. Supp. 356, 356-57 (S.D.N.Y. 1985) (holding that the defendant met "the burden of persuading [the judge] that there is no 'realistic possibility that continued confinement might cause [him] to testify'"); *In re* Dohrn, 560 F. Supp. 179, 181 (S.D.N.Y. 1983) (noting that "the [c]ourt still retains the power to release a recalcitrant witness whenever it concludes that further incarceration will not cause the witness to testify").

[130] *In re* M.B., 3 P.3d 780, 788 (Wash. Ct. App. 2000); *In re A.W.*, 399 N.W.2d at 225.

[131] Mayberry v. Pennsylvania, 400 U.S. 455, 466 (1971).

[132] *See In re M.B.*, 101 Wash. App. at 469-71 (holding that the rules of evidence, such as inadmissibility of hearsay and unsworn testimony, apply in criminal contempt proceedings).

[133] Cooke v. United States, 267 U.S. 517, 536-537 (1925); *In re A.W.*, 399 N.W.2d at 225; Apel, *supra* note 9, at 511.

[134] *See infra* notes 135-36 and accompanying text.

[135] *In re* Thomas M., 803 N.W.2d 46, 54 (Neb. 2011) (concluding that a state agency is neither a natural nor an artificial person protected under the federal or state constitution).

[136] *Id.*

[137] Mercer v. Mitchell, 908 F.2d 763, 768 (11th Cir. 1990).

noncompliance.[138] Thus, the court issues an order for the party to come to court and explain why the court should not hold him or her in contempt.[139] This initial hearing will not be the evidentiary hearing.[140] It can appear to be more like an arraignment or first appearance.[141] However, the lines between this initial hearing that provides notice to the accused and the evidentiary hearing blur.[142]

In most cases, a motion for order to show cause is all that is necessary to get compliance.[143] Once a person knows he or she will have to explain his or her conduct to a court and potentially face jail or a fine, the person is likely to comply.[144]

VI. CONTEMPT TRIAL

A. Burden of Proof

The burden at the evidentiary hearing will partially depend on the remedy a party is seeking.[145] Although there is often confusion about the difference between civil and criminal contempt, it is clear that criminal contempt requires proof beyond a reasonable doubt.[146] Criminal contempt also requires an element of willfulness.[147] The burden in civil contempt usually involves a finding by a preponderance of the evidence.[148]

---

[138] *Id.* at 767.

[139] *Id.* at 768; *In re* Oliver, 333 U.S. 257, 275 (1948).

[140] *See, e.g.*, UTAH R. JUD. ADMIN. 10-1-501(5) ("The opposing party's first appearance on the order to show cause . . . shall not be the evidentiary hearing.").

[141] *See id.*

[142] *See* Von Hake v. Thomas, 759 P.2d 1162, 1171-72 (Utah 1988) (finding that a show-cause hearing affords a party the right to present evidence and confront witnesses).

[143] *See* Apel, *supra* note 9, at 503.

[144] *Id.*; *see* Mercer v. Mitchell, 908 F.2d 763, 768 (11th Cir. 1990) (stating that courts can impose sanctions or hold a party in contempt to ensure compliance).

[145] *See infra* notes 146-48 and accompanying text.

[146] *In re* Anthony N., 430 N.Y.S.2d 1012, 1016 (Fam. Ct. 1980).

[147] *Id.*

[148] Barrett v. Barrett, 368 A.2d 616, 621 (Pa. 1977).

B. Burden of Persuasion

Who has the burden of persuasion is a little more complicated.[149] The order to show cause initially puts the burden on the person or entity of contempt to *show cause* as to why the court should not hold them in contempt.[150] However, once that party has shown a reason, the burden may switch to the movant to show why a court should hold the person or entity in contempt.[151]

C. Defenses

Often an evidentiary hearing will consist primarily of the party threatened with contempt explaining why he or she has not complied with the court order or seeking relief from the order.[152] However, there are defenses including lack of knowledge of the order and impossibility of compliance.[153] Unless a person is aware of an order, a court cannot hold that person in contempt.[154] If there is a conflicting legal obligation of an entity, a court cannot hold that entity in contempt.[155] This latter

---

[149] *See* Edward G. Mascolo, *Procedures and Incarceration for Civil Contempt: A Clash of Wills Between Judge and Contemnor*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171, 186-89 (1990) (explaining the procedures and purpose for civil and criminal contempt including the shifting burden of persuasion).

[150] *See id.* at 185-87; *see also* Moreman v. Butcher, 891 P.2d 725, 728 (Wash. 1995) (both the burden of proof and burden of persuasion were on the defendant to show cause as to why the court should not have held him in contempt; when he failed, the court reinstated the order of contempt).

[151] Mascolo, *supra* note 149, at 189.

[152] *Id.* at 186-89.

[153] *See* Fla. Dep't. of Health and Rehabilitative Servs. v. Florida, 616 So. 2d 66, 68 (Fla. Dist. Ct. App. 1993) (holding that compliance with the order was impossible and impossibility was a valid defense where compliance would result in violation of a federal court decree); Douthit v. Swift, 865 P.2d 479, 481 (Or. Ct. App. 1993) (stating that a prima facie case for contempt requires knowledge and voluntary noncompliance).

[154] *See Douthit*, 865 P.2d at 481.

[155] *See Fla. Dep't. of Health and Rehabilitative Servs.*, 616 So. 2d at 68-69. The trial court held the Florida Department of Health and Rehabilitative Services in contempt for failure to place a child in a high-risk program, but the Department was unable to comply because of its obligation under a federal court consent decree. *Id.* at 68. The appellate court overruled the trial court, concluding that the federal court obligation

defense is an affirmative defense, meaning the burden is on the entity facing contempt to prove the impossibility.[156] The entity must establish the defense by a preponderance of the evidence.[157] Thus, if the impossibility is lack of money, the entity would have to prove that it has no money.[158] It cannot just state this on the record.[159] Furthermore, the impossibility cannot be an impediment that the contemnor created.[160]

VII. REMEDIES

A. Fines or Jail

The most common punishment for contempt is a fine or a short term of imprisonment.[161] If the contempt is civil, the goal of either the fine or imprisonment is to get the party to comply with the original court order or make the beneficiary of the order whole.[162] Thus, when a parent has absconded with a child in violation of a previous court order, the court may imprison the parent until he or she discloses the location of the child.[163] If a state agency has refused to provide a court-ordered service, the court may punish the agency or the employee responsible for complying with the order by imposing a fine on the agency or employee until the respective party complies.[164] It is appropriate for

---

made compliance with the trial court order impossible. *Id.* The appellate court rejected the trial court's position that the state's voluntary entrance into the consent order made the "impossibility" of its own making. *Id.* at 68-69.

[156] *Id.* at 68.

[157] *Id.*

[158] *In re* S.L.T., 180 So. 2d 374, 380 (Fla. Dist. Ct. App. 1965) (holding that the defendant cannot be held in contempt where he met his burden of proving that he was unable to make child support payments of any kind).

[159] *Id.* at 379 (stating that a defendant has met his burden of proof by providing affirmative evidence that he was unable to pay child support).

[160] *Florida Dep't. of Health and Rehabilitative Servs*., 616 So. 2d at 68.

[161] *See* Mascolo, *supra* note 149, at 176-77.

[162] *Id.*

[163] Apel, *supra* note 9, at 493-94. There is an infamous case out of Washington, D.C., in which a mother spent over a year in jail refusing to disclose the location of her child in a child custody battle with her ex-husband, who was accused of abusing the child. *Id.* at 491-93.

[164] *See In re* Thomas M., 803 N.W.2d 46, 53 (Neb. 2011) (upholding a court-imposed

trial courts to order daily fines until a party complies with an order[165] and to order the payment of attorneys' fees.[166]

B. Use of Fines

If the goal of a contempt proceeding is to get children services, the court can order a fine equal to the cost of the service.[167] Ideally, the court would then use those funds to pay for the service.[168] For example, suppose that a court orders an agency to provide tutoring for a foster child to help him catch up in his schooling, which was delayed by multiple transfers to different foster homes, but the state fails to provide the tutoring. An advocate for the child presents to the court a private tutoring service which will provide the tutoring for three months for one thousand dollars. The court then fines the agency one thousand dollars every three months until the agency arranges adequate tutoring with the first payment due in twenty-four hours. After the court receives the first payment, the court authorizes release of the funds to pay for the tutoring for the next three months by a private provider identified by the advocate for the child.

C. Other Remedies

A court is not restricted to fines or jail remedies.[169] Due to the broad power of courts dealing with contempt, especially in juvenile proceedings, a court can use its power to be creative in fashioning a remedy that accomplishes the goal of the underlying order or meets the overall generic goal of juvenile court—serving the best interest of the

---

fine of four hundred dollars a day until the agency in contempt complied with the court's order); *In re* Krystal P., 557 N.W.2d 26, 27-28 (Neb. 1996) (holding that incarceration of two case workers is proper until the workers comply with a visitation order).

[165] *In re Thomas M.*, 803 N.W.2d at 50.

[166] *See In re Krystal P.*, 557 N.W.2d at 29; *see also* Torrey Y. v. Fond Du Lac Cnty., No. 92-2118-FT, 1993 WL 853, at *2 (Wis. Ct. App. Jan. 6,1993) (holding that attorneys' fees are an appropriate remedial sanction under the statute).

[167] *See In re Thomas M.*, 803 N.W.2d at 54-55; Mascolo, *supra* note 149, at 201-04.

[168] *See In re Thomas M.*, 803 N.W.2d at 54-55; Mascolo, *supra* note 149, at 201-04.

[169] *In re* Larsen, 478 N.W.2d 18, 19 (Wis. 1992).

child.[170] One court concluded that the appropriate remedy for contempt by prospective adoptive parents was to remove the children and to place them with alternative adoptive parents.[171]

D. Ability to Purge Civil Remedies

As indicated, courts should design civil contempt findings to persuade the contemnor to comply with the court order.[172] This is only possible if the contemnor has the ability to comply.[173] Thus, a court cannot make the necessary act for purging dependent on the acts of a third party.[174]

E. Preparation for the Remedy

Before a party files a motion for order to show cause, the party should prepare a specific remedy.[175] A party seeking a contempt proceeding should know, with specificity, which remedy the party wants.[176] Is the remedy merely punitive to deter the contemptuous conduct in the future, or is the remedy coercive to acquire a service?[177] If punitive, a court will have to comply with the procedures for criminal contempt, and the parties will have to prepare appropriately.[178] If

---

[170] *See id.* at 19. In *Larsen*, the court approved a civil contempt order that allowed a father who had not complied with child support orders to purge the civil contempt by attending therapy for posttraumatic stress disorder ("PTSD"). *Id.* The trial court recognized that PTSD was preventing him from keeping a job, which was preventing him from paying the child support. *Id.* "If a circuit court grants a purge condition, the purge condition should serve remedial aims, the contemnor should be able to fulfill the proposed purge, and the condition should be reasonably related to the cause or nature of the contempt." *Id.* at 20-21.

[171] *In re* Griffin, 690 A.2d 1192, 1213 (Pa. Super. Ct. 1997).

[172] *In re* M.B., 3 P.3d 780, 787-88 (Wash. Ct. App. 2000).

[173] *Id.*

[174] *Id.* at 799. A court cannot hold a child in civil contempt if the way to remedy is dependent on the availability of treatment or the availability of a therapeutic foster bed. *Id.* at 799, 802.

[175] *See* S.D. W. VA. R. 4.1.1.

[176] *See id.*

[177] *See* United States v. Int'l Union United Mine Workers of Am., 512 U.S. 821, 827-28. (1994).

[178] *Id.* at 830-31; *In re* A.W., 399 N.W.2d 223, 225 (Minn. Ct. App. 1987).

coercive, a party will have to follow the procedures for civil contempt and consider which remedy will be more coercive—money or incarceration.[179] If civil, the party or court can also develop a purge remedy that accomplishes the underlying goal.[180]

If the goal is to obtain a particular service, the party seeking contempt should also identify a provider and know the timeframe and cost of completion.[181] Whether the sanction is criminal or civil, the court can use its power to ensure the service is provided.[182] If necessary, the court can reroute its fines to fund the service outside of the network of usual providers.[183]

VIII. CONSTITUTIONAL CHALLENGES BY STATES

A. Separation of Powers

State agencies often object to a court directing a specific service provider or specific placement.[184] For example, an agency might argue that a court can order drug treatment but cannot order drug treatment by a specific provider unless the agency agrees. This is often based on specific state constitutional or statutory language.[185]

In a case from the State of Washington, a court ordered a specific residential placement for a child.[186] When the parents filed a contempt motion for the State's failure to comply, the State argued that the court did not have authority to order the specific placement.[187]

---

[179] *Int'l Union United Mine Workers of Am.*, 521 U.S. at 830-31.

[180] *In re* Larsen, 478 N.W.2d 18, 20-21 (Wis. 1992).

[181] *See In re* Thomas M., 803 N.W.2d 46, 54-55 (Neb. 2011); Mascolo, *supra* note 149, at 201-04.

[182] *See* Mascolo, *supra* note 149, at 175-79.

[183] *See* Palmigiano v. DiPrete, 710 F. Supp. 875, 887 (D.R.I. 1989) (holding that a court can use fines that it has imposed for contempt to remedy the underlying problem).

[184] *See In re Thomas M.*, 803 N.W.2d at 54-55; *In re* Eaton, 757 P.2d 961, 965 (Wash. 1988).

[185] *See In re Thomas M.*, 803 N.W.2d at 54-55; *In re Eaton*, 757 P.2d at 965.

[186] *In re Eaton*, 757 P.2d at 962-63.

[187] *Id.* at 963.

Washington's statutory scheme contemplates a disposition recommendation of placement; however, in this case, the court placed the child without allowing the agency to assess and make a recommendation through the disposition process.[188] The Washington Supreme Court agreed and reversed the contempt finding.[189] The court found that the lower court can place a child with an agency but cannot identify the child's placement location.[190]

Each state's juvenile procedures may be slightly different on these matters.[191] To be effective in using the court's contempt power, the courts and parties seeking contempt need to closely follow the particular state's procedure.[192] It is still possible to issue specific orders with timelines and hold the state agencies responsible for noncompliance.[193]

B. Sovereign Immunity

As a general matter, states are immune from lawsuits.[194] Most states have enacted limited statutory exceptions to this immunity.[195]

---

[188] *Id.* at 964-65.

[189] *Id.* at 966.

[190] *Id.* at 965.

[191] *See* Melissa A. Scott, *The "Critically Important" Decision of Waiving Juvenile Court Jurisdiction: Who Should Decide?*, 50 LOY. L. REV. 711, 716 (2004) (stating that every state has established a different and unique juvenile court).

[192] *See In re* Mowery, 169 P.3d 835, 841, 846 (Wash. 2007) (reversing a juvenile court's contempt order because the court did not employ proper procedure).

[193] For example, the court in a Washington case could have pushed the state agency to find an appropriate placement. *In re Eaton*, 757 P.2d at 964-65. As suggested in the decision, the agency may have agreed with the placement. *Id.* at 965. It was the process that was objectionable. *Id.* Washington's statutory scheme requires the court to give the agency a chance to propose a plan, but that plan can be overridden by the court. *Id.* at 964-65. Although the language of the opinion makes it clear that the court cannot say where a child can be located, a court can continue to object to a plan until an agency complies. *Id.* Otherwise the court's oversight becomes meaningless. *See id.* The court has to have the authority to override a recommendation or it becomes a meaningless rubber stamp to the agency's recommendation. *See id.*

[194] U.S. CONST. amend. XI.

[195] *See, e.g.*, McCann v. Michigan, 247 N.W.2d 521, 523 (Mich. 1976) (listing Michigan's statutory exceptions to state immunity).

Contempt is never listed as a statutory exception to the general immunity granted to the states.[196] Thus, states have argued that they are immune from a court's attempt to hold state agencies in contempt and from court sanctions for either civil or criminal contempt.[197] A major weakness in this argument is that sovereign immunity can be waived.[198] Courts have held that waiver occurs when a state initiates an action that later leads to liability.[199] Because states initiate most child welfare cases,[200] courts will find in almost all cases that the state has waived immunity.[201]

XI. CONCLUSION

Parties should follow orders of the court.[202] Attorneys and judges in juvenile court have the duty to ensure that orders are followed.[203] Most of the decisions made in juvenile court are made with a goal of improving the life of a child.[204] If this is true, then all individuals involved need to follow the court's orders.[205] Assessments need to be conducted expeditiously, services need to be provided in a

---

[196] *See, e.g.*, *In re* Bradley Estate, 835 N.W.2d 545, 562 (Mich. 2013) (holding that government agencies are immune from civil contempt petitions).

[197] *See In re* Thomas M., 803 N.W.2d 46, 52 (Neb. 2011) (rejecting a government agency's argument that it is immune from a juvenile court's contempt order because the agency waived immunity by initiating suit).

[198] *Id.*

[199] *See In re* Krystal P., 557 N.W.2d 26, 30 (Neb. 1996) (holding that the State waived its immunity when it initiated suit).

[200] There are exceptions to this general rule; other people can initiate a child welfare proceeding. *See* FLA. STAT. § 39.501(1) (2013) (permitting a petition to be filed by "any other person who has knowledge of the facts alleged"). However, this is very rare. An overwhelming majority of child welfare proceedings are initiated by the state functioning as *parens patriae*. *See* Ryan M. Rappa, *Getting Abused and Neglected Children into Court: A Child's Right of Access under the Petition Clause of the First Amendment*, 2011 ILL. L. REV. 1419, 1422 (2011) (stating that *parens patriae* is "at the heart" of judicial proceedings).

[201] *See, e.g.*, *In re Thomas M.*, 803 N.W.2d at 52-53.

[202] *See supra* Part VII.

[203] *See supra* Part III.C.

[204] *See supra* Part II.

[205] *See supra* Part VII.

timely manner, and visitations need to occur.[206] Expeditious compliance will ensure that children and their families are involved in the system as short a time as necessary, permanency is reached expeditiously, and children are not harmed while in care.[207]

Contempt is an underutilized tool in the arsenal of attorneys and judges in juvenile court.[208] Lawyers and judges need to issue specific orders, monitor compliance, and move for contempt when compliance is not forthcoming.[209] It is the lawyer's job to respect the court and demand that others respect the court and the law.[210] Those of us in juvenile court have not been adequately fulfilling this professional obligation.[211]

---

[206] *See supra* Part II.
[207] *See supra* Part II.
[208] *See supra* Part I.
[209] *See supra* Part III.C.
[210] *See supra* Part III.C.
[211] *See supra* Part I.