In re Perrin, 10 ROP 169 (2003)
In the Matter of
DAVID C. PERRIN,
Respondent.

DISCIPLINARY PROCEEDING
NO. 03-01

Supreme Court, Disciplinary Tribunal
Republic of Palau

Issued: September 22, 2003

Disciplinary Counsel: Douglas Parkinson

Counsel for Respondent: Pro se

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

Appeal from Supreme Court, Disciplinary Tribunal.

PER CURIAM:

On July 22, 2003, this Tribunal ordered Respondent, David C. Perrin, to show cause why he should not be held in contempt for failing to comply with the Tribunal's June 13, 2003 Decision that imposed sanctions consisting of a fine and Disciplinary Counsel's fees and costs. On July 29, 2003, Respondent timely responded to the show cause order. No supporting materials were submitted with Respondent's response, nor has there been, despite the passage of more than two months, compliance with the order in whole or in part.

⊥170 Respondent asserts that his failure to pay the fine and fees is non-contumacious because his violation was not intentional. He alleges that he lacks the financial ability to pay the fine and fees and that he has attempted and continues to seek assistance to secure the means to pay the sanctions by way of contract and litigation. Respondent also argues that no contempt may lie where there is no adequate or effective remedy for the review of an order or where the underlying order is "transparently invalid."

The elements of contempt are "the existence of a court order, actual or constructive notice of the order, a violation of that order, and a violation that was neither accidental nor unintentional." *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 219 (1994). Respondent does not contest the first three elements, and thus, his only challenge concerns whether the violation was unintentional.

Respondent argues that because he is unable to pay, his violation is not intentional. In support, he quotes from American Jurisprudence to the effect that "[t]he inability of an alleged

contemnor, without fault on his part, to obey an order or decree of the court is generally recognized as absolving him from being held in contempt for violating the order or decree." 17 Am. Jur. 2d *Contempt* § 161 (1990). We agree with this general proposition. Respondent, however, failed to address the remainder of the authority upon which he relies:

> A person who seeks to satisfy the court that his failure to obey an order or decree was due entirely to his inability to render obedience, without fault on his part, must prove such inability. In other words, the burden of proving inability to comply with the order allegedly violated is on the alleged contemnor.

Id. (citing *Johansen v. State*, 491 P.2d 759, 766 (Alaska 1971) (finding that inability to pay as justification for violation of child support order is affirmative defense); *McCormick v. Sixth Jud. Dist. Ct.*, 218 P.2d 939, 943 (Nev. 1950) (holding that "the burden of proving inability to comply is upon contemnors")); *see also Rolex Watch, U.S.A., Inc. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996) (holding that alleged contemnor "must produce evidence showing a present inability to comply"); *Huber v. Marine Midland Bank*, 51 F.3d 5, 10 (2d Cir. 1995) ("The alleged contemnor bears the burden of producing evidence of his inability to comply."); *S.E.C. v. Bankers Alliance Corp.*, 881 F. Supp. 673, 678 (D.D.C. 1995) ("[R]espondent who raises the defense of impossibility must demonstrate his inability to comply categorically and in detail." (internal quotations and citations omitted)); *N.Y. State Nat'l Org. for Women v. Terry*, 697 F. Supp. 1324, 1333 (S.D.N.Y. 1988) (rejecting contemnor's allegation of inability to pay where no evidence of such was presented). Respondent has not provided this Tribunal with affidavits, bank records, or any other proof of insolvency. Unlike the contemnor in the case upon which he primarily relies, *Tinsley v. Mitchell*, 804 F.2d 1254, 1256 (D.C. Cir. 1986), all that Respondent has presented is his unsupported allegation that he is unable to pay.[1] Thus, ⊥171 Respondent has not proven his inability to comply with the order.

Respondent also asserts that his failure to comply with the order should not be punished because he has attempted to secure the funds to pay by invoking the indemnification clause of his employment contract and that his employer has refused to honor that clause. As with his assertion of inability to pay, Respondent has failed to submit any evidence of his attempts to secure collateral sources. The success or failure of Respondent to collect indemnity from his employer does not excuse him from having to pay the sanctions levied upon him and in the absence of evidence of his own inability to pay it will not stand to justify his conduct. Accordingly, we reject Respondent's defenses of inability to pay and failure of alternate sources, and we find that his violation of the order was "neither accidental nor unintentional."

Respondent also argues that no contempt should lie in this case because the underlying

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[1]Respondent also argues that his inability to pay was the reason he did not seek a stay of the judgment during appeal because, he alleges, he would have been unable to pay a supersedeas bond. Appellate Procedure Rule 8(b) states that "[r]elief *may* be conditioned upon the filing of a bond or other appropriate security" (emphasis added). Respondent did not apply for a stay, and therefore it is unknown whether a bond would have been required. In that regard, Respondent's reliance on *Clemente v. United States*, 766 F.2d 1358 (9th Cir. 1985), is unavailing. The *Clemente* court found that the appellants' immediate efforts to obtain a stay negated any "willful and deliberate defiance of the court's order." *Id.* at 1367.

order was invalid. Our starting point is the collateral bar rule, which is "the bedrock principle that court orders, even those that are later ruled unconstitutional, must be complied with until amended or modified." *In re Providence Journal Co.*, 820 F.2d 1342, 1345 (1st Cir. 1986). Respondent contends that he may nevertheless challenge the underlying order under two exceptions to the collateral bar rule.

Respondent asserts in the conclusion of his response to the show cause order that "the lack of opportunity for review of the order preclude[s] the underlying order from serving as a basis for contempt." Respondent's conclusion rather overstates the relief that is available to him upon a finding of the unavailability of a mechanism for review. If review is unavailable, that merely permits Respondent to collaterally challenge the validity of the underlying order as a defense to contempt. Respondent appealed this matter and his appeal was dismissed as outside the jurisdiction of the Appellate Division. *See In re Perrin*, 10 ROP 132-33 (2003). Given the lack of appellate review of the underlying order, we agree that Respondent is permitted to attack its validity as a defense in this contempt proceeding. We note that Respondent has made identical substantive challenges in his Motion for Relief From Judgment pursuant to Rule 60(b). We have comprehensively examined Respondent's challenges in an order denying that motion, *see In re Perrin*, 10 ROP 162 (2003), and rely on that analysis in rejecting Respondent's claim that the underlying order was invalid.[2]

Respondent is hereby ordered to pay within ten (10) days the fine and Disciplinary Counsel's fees, $1000 and $2149.50, respectively, imposed by this Tribunal's June 13, 2003 Decision or Respondent may be subject to a finding of contempt and the imposition of additional penalties.

[2]Because we have reached the issue of the validity of the underlying order due to the lack of available review, we need not address Respondent's contention that the collateral bar rule should not apply because the order was transparently invalid.