

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 03/11/2010
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BY: GH

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

In Re the Matter of:) 1 CA-CV 09-0014
)
RENE D. WEHRUNG,) DEPARTMENT C
)
Petitioner/Appellant,) **MEMORANDUM DECISION**
) (Not for Publication -
v.) Rule 28, Arizona Rules
) of Civil Appellate
JOHN J. KELLAM, SR.,) Procedure)
)
Respondent/Appellee.)
)

Appeal from the Superior Court in Maricopa County

Cause No. DR2000-014500

The Honorable Michael R. McVey, Judge

AFFIRMED

Rene D. Wehrung
Petitioner/Appellant Pro Per

Phoenix

I R V I N E, Presiding Judge

¶1 Rene D. Wehrung ("Wehrung") appeals the family court's order denying her request for an entry of judgment on "fines" for delinquent child support payments that she alleged John J. Kellam, Sr. ("Kellam") owed her. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Wehrung and Kellam were married in 1989 and had one child. Wehrung petitioned for divorce and the marriage was officially dissolved in 2002. Since the family court entered its divorce decree, Wehrung and Kellam have engaged in continuous, contentious, and acrimonious litigation. During this time, Wehrung and Kellam have agreed to multiple modifications to the original dissolution decree, specifically relating to spousal maintenance, child support, and custody. In February 2007, the family court entered a stipulated judgment and order. The order provided that Kellam would pay child support to Wehrung in the amount of \$500 per month. Further, the order stated "[i]n the event [Kellam] is more than thirty days late in making his monthly child support payment, for reasons not set forth above, he shall pay a fine in the amount of \$500.00 to [Wehrung] for each late payment."

¶3 Subsequently, Wehrung filed a "Petition to Enforce Child Support, Child Support Arrears, Medical Insurance Coverage and Motion for Contempt." On February 22, 2008, the family court found that Kellam had failed to pay child support. Further, the court found that Kellam owed \$9120.00 for spousal maintenance arrears, \$3877.00 for child support arrears, and affirmed the previously ordered child support obligation of \$500.00 per month. The court entered judgment against Kellam "in the amount

of \$2,500.00 as and for fines for the 5 months that [Kellam] was delinquent pursuant to the February 22, 2007 order."

¶4 Approximately eight months later, Wehrung filed a "Request for Entry of Judgment" alleging that Kellam had failed to make child support payments pursuant to the family court's February 2008 order. Wehrung requested that the court enter an additional \$3000 judgment against Kellam, which represented six months of fines for delinquent payments. The court, through a different judge than the one who previously awarded Wehrung fines, denied the request and stated that "[t]o the extent that the February 22, 2007 hearing provided for prospective 'fines' of \$500 per month, that judgment is void and unenforceable."

¶5 Wehrung timely appealed and concurrently filed a motion for reconsideration with the family court. After we suspended this appeal, the family court denied Wehrung's motion. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

DISCUSSION

¶6 We reject Wehrung's argument that the family court abused its discretion when it refused to enforce the family court's February 2007 order. Wehrung contends that the court lacked the authority to alter, modify, amend or otherwise change a negotiated and binding agreement pursuant to Arizona Rule of Family Law Procedure 69 and A.R.S. § 25-317 (2007).

¶7 "In analyzing the enforceability of contract provisions the rule followed in Arizona is that an agreement made in advance of breach is an unenforceable penalty unless the amount fixed in the contract is a reasonable forecast of just compensation for the harm that is caused by the breach." *Albins v. Elovitz*, 164 Ariz. 99, 102, 791 P.2d 366, 369 (App. 1990). Here, the parties agreed that Kellam shall pay a "fine" of \$500 if he was more than thirty days late in making his monthly child support payment. It is clear that the fine provision detailed in the February 2007 order is not a reasonable forecast of just compensation, but designed to threaten Kellam and deter him from missing payments. While agreements between parties are generally binding if in writing or made or confirmed on the record before a judge, see Ariz. R. Family Law P. 69, we conclude that the "fines" approved by the family court were an unenforceable penalty.

CONCLUSION

¶8 For the foregoing reasons, we affirm.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

DONN KESSLER, Judge