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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

In re the Matter of:

MAUREEN G. MULVANEY,

Petitioner,

Case No. FC 2019-098271

**RESPONDENT ILYN OLESEN'S MOTION TO
DISMISS**

and

DAVID C. OLESEN,

Respondent,

and

ILYN OCANG OLESEN,

Respondent.

*(Assigned to the Honorable
Lisa Wahlin)*

Respondent, **Ilyn O. Olesen** ("Mother"), pursuant to Rule 29(a)(6), *Ariz.R.Fam.Law.P.* hereby moves this Court for its order dismissing Petitioner's *Amended Petition for Contempt re: Grandparent Visitation* filed February 17, 2023, insofar as any and all claims against her; pursuant to Rule 29(a)(1), *Ariz.R.Fam.Law.P.*, Mother further moves this Court for its order dismissing Petitioner's *Petition to Modify Agreement and Final Order Re: Visitation Entered May 17, 2021* filed April 11, 2024.

In support of her *Motion*, Mother states as follows:

1. **Background/Facts.**

1 1. On May 17, 2021 this Court entered an Agreement and Final Order Re: Visitation.
2 The only parties subject to that Agreement/Order are Petitioner (natural grandmother),
3 Maureen Mulvaney, and Respondent, David Olesen ("Father"). The Agreement/Order
4 provided for certain (albeit limited) visitation between Petitioner and the two (2) minor
5 children subject to this matter, to wit: Mikayla Olesen and Matthew Olesen.

6 2. On September 9, 2021 Mother legally adopted both minor children.

7 3. In late January 2023 Respondents decided to relocate from Arizona to improve the
8 quality of life for their family. Shortly thereafter (early February 2023) Father relocated to
9 Kentucky and Mother travelled with the children to the Philippines. Mother and the
10 children remained in the Philippines.

11 4. On February 17, 2023 Petitioner filed an *Amended Petition for Contempt Re:*
12 *Grandparent Visitation*, alleging that Father "prevented Grandmother from exercising her
13 scheduled visitation for the weekend of February 3 – 4, 2023, as well as her scheduled
14 phone contact on February 11, 2023"; Petitioner solicited for sanctions to be imposed in
15 accordance with A.R.S. §25-414(A), including that of makeup visitation and an award of
16 attorney's fees.

17 5. On May 3, 2023 Petitioner filed a Motion to join Mother as a party to these
18 proceedings, stating in relevant part: "... Adoptive Mother must be joined as a third-party
19 respondent to ensure Grandmother will not be denied further in-person and telephonic
20 visitations with the children . . ."

21 6. On May 15, 2023 this Court issued an Order joining Mother as Third-Party
22 Respondent to this action. Shortly thereafter, Petitioner served Mother with a copy of the
23 *Amended Petition for Contempt*. The matter was subsequently scheduled for Evidentiary
24 Hearing, to occur on June 12, 2024.

25 7. On February 8, 2024 Petitioner filed a Petition for Recognition of Foreign
26 Judgment/Order in the Republic of the Philippines Supreme Court, Regional Trial Court,
27 Eighth Judicial Region, requesting the "recognition and enforcement" of the Arizona Order
28 Re: Visitation entered on May 17, 2021, and specifically requesting for that Court to issue

1 an order “enforcing and giving full effect to all the terms and provisions set forth under the
2 Agreement and Order Re: Visitation”.

3 8. On February 22, 2024 Petitioner filed a Petition to Register Out of State Decree in
4 the Commonwealth of Kentucky, Boyd Circuit Court, specifically stating that “Kentucky
5 has home state jurisdiction regarding this matter” and requesting that the Kentucky Court
6 give “full faith and credit” to the Agreement and Final Order entered by the Arizona Court
7 on May 17, 2021 to “continue visitation and communication between Petitioner and the
8 minor children”.

9 9. On March 18, 2024 Father filed Notice of Simultaneous Proceedings with this
10 Court, providing notice that Petitioner had initiated proceedings in the State of Kentucky
11 and in the Republic of the Philippines Supreme Court.

12 10. On March 21, 2024 Father filed a Motion for Court Communications soliciting for
13 this Court to hold a conference with the Courts in Kentucky and the Philippines regarding
14 the jurisdictional issues. This was denied by the Court on April 15, 2024.

15 11. On April 11, 2024 Petitioner filed a *Petition to Modify Agreement and Final Order*
16 *Re: Visitation Entered May 17, 2021*.

17 12. On April 23, 2024 Father filed a Motion to Dismiss the Petition to Modify for lack
18 of subject matter jurisdiction.

19 13. On April 26, 2024 Petitioner filed a Motion to Consolidate the Petition for Contempt
20 and the Petition to Modify, which was granted by this Court on May 13, 2024; Petitioner’s
21 Petition to Modify was set to be heard by this Court on June 12, 2024 with her pending
22 Petition for Contempt.

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1 14. Upon information and belief, Father was served with Petitioner's Petition for
2 Modification on April 22, 2024; Mother has not been properly served¹.

3 15. On May 23, 2024 Petitioner filed a Notice of Issues of which (for the first time)
4 announces Petitioner's intention to solicit sanctions against Mother as it relates to the
5 underlying *Petition for Contempt*.

6
7 **II. Law/Argument.**

8 **Petition for Contempt.**

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10 Rule 29(a)(6), *Ariz.R.Fam.Law.P.* is the family law equivalent of *Arizona Rule of*
11 *Civil Procedure* 12(b)(6). See *Kline v. Kline*, 221 Ariz. 564, 568–69 ¶ 13, 212 P.3d 902,
12 906–07 (App. 2009) (noting that law interpreting other statewide rules is applicable when
13 “the language of the family law rules is substantially the same”). “When adjudicating
14 a Rule 12(b)(6) motion to dismiss, Arizona courts look only to the pleading itself
15 and consider the well-pled factual allegations contained therein.” *Cullen v. Auto-Owners*
16 *Ins. Co.*, 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). Dismissal is warranted if, as a
17 matter of law, Petitioner is not “entitled to relief under any interpretation of the facts
18 susceptible of proof.” *Fid. Sec. Life Ins. Co. v. State Dep't of Ins.*, 191 Ariz. 222, 224, ¶ 4,
19 954 P.2d 580, 582 (1998).

20 As it relates to Mother, the Petition for Contempt fails to state a claim upon which
21 relief can be granted. The underlying Petition alleges that Father “prevented Grandmother
22 from exercising her scheduled visitation for the weekend of February 3 – 4, 2023, as well
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24 ¹ Petitioner filed the Petition to Modify on April 11, 2024 and on April 26, 2024 she filed
25 a Motion to Consolidate that Petition with the Petition to Enforce that was scheduled for
26 Evidentiary Hearing on June 12, 2024 – the Motion to Consolidate was granted two weeks
27 later. On May 17, 2024 Petitioner filed a Motion for Alternative Service requesting leave
28 to serve Mother with the Petition for Modification via email. That Motion is still pending.
Rule 91, *ARFLP* requires for service of a Petition to Modify to be completed no later than
“20 days before the Hearing”. As of the date of this filing, the Hearing is scheduled to occur
in thirteen (13) days, and Mother has not been formally served with the Petition to Modify.

1 as her scheduled phone contact on February 11, 2023”. Essentially, there are three distinct
2 violations alleged. Notably, the Petition requests this Court to issue sanctions solely against
3 Father for the alleged violations (see *Petition for Contempt*, pages 6-8). The Petition also
4 claims a lack of notice/information being provided to Petitioner regarding the children’s
5 relocation from Arizona and solicits specific orders that – in substance – aim to create a
6 notice requirement similar to that found under A.R.S. § 25-408. However, the notice and
7 other requirements under A.R.S. § 25-408 do not apply to grandparent visitation. *Sheehan*
8 *v. Flower*, 217 Ariz. 39, 43, ¶ 18, 170 P.3d 288, 292 (App. 2007).

9
10 After filing the Petition, Petitioner moved to have Mother joined as a party so that
11 “Grandmother would not be denied further in-person and telephonic visitations with the
12 children”, implying joinder was necessary to enforce any *future* orders regarding visitation.
13 There have been no further amendments to the (Amended) Petition filed February 17, 2023.

14 Fifteen (15) months later Petitioner files a Notice of Issues (May 23, 2024) asserting
15 (for the first time) an intention to seek sanctions directly against Mother for her alleged
16 behavior of “aiding and abetting” contempt. Properly plead claims and reasonable notice
17 issues aside², Petitioner has provided no authority upon which this Court can impose
18 sanctions against Mother (or any third-party) for “aiding and abetting” an alleged violation
19 of visitation orders. To be sure, A.R.S. § 25-414, governing violation of visitation rights,
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21 ² The Petition does not request a finding of contempt against Mother, nor does it solicit
22 sanctions against Mother. If A.R.S. § 25-414 applied to Mother in the instant action (which
23 it does not, because Mother is not subject to the Visitation Order Petitioner seeks to
24 enforce), the Petition must give reasonable notice to the alleged violating parent. Likewise,
25 Rule 91.5, *ARFLP* requires a petition to enforce to include the “specific remedies” sought.
26 Mother learned for the first time that Petitioner was seeking sanctions against her as
27 relating to the Petition for Contempt upon her receipt of the May 23, 2024 Notice of Issues
28 (filed 15 months after the Petition for Contempt and less than three (3) weeks prior to the
scheduled Evidentiary Hearing). Petitioner has not properly plead for enforcement of the
Visitation Order against Mother, nor has Mother been afforded reasonable notice of
Petitioner’s request for sanctions directly against her.

1 provides that a “violating parent” may be found in contempt and that various sanctions may
2 be imposed against a “violating parent”; Rule 92, *ARFLP* makes clear that civil contempt
3 sanctions are “only for compelling compliance with a court order . . . because of a
4 contemnor’s failure to comply with a court order” (emphasis supplied). However, as
5 outlined below, Mother is neither a “violating parent” nor a “contemnor” because she is
6 not subject to the Orders Petitioner seeks to enforce.

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8 A parent may be found in contempt and sanctioned for their failure to follow a
9 Court’s visitation orders if that parent is subject to those orders. *Munari v. Hotham*, 217
10 Ariz. 599, 603-605, 177 P.3d 860, 864-866 (App. 2008). Mother is not subject to the Orders
11 contained within the Agreement and Final Order Re: Visitation entered on May 17, 2021,
12 and Petitioner has openly acknowledged this more than once³. Mother did not sign the
13 Agreement and Final Order. In fact, at the time the Order was entered, Mother was not
14 even a party to these proceedings. The Petition for Contempt alleges failure to comply with
15 the Visitation Orders on February 3-4 and February 11, 2023; Mother was not joined as a
16 party to this litigation until three months later, on May 15, 2023. Mother cannot be held in
17 contempt, let alone sanctioned, for her alleged failure to follow orders she was not subject
18 to. *Id.* at 605; *see Holt v. Hotham ex rel. County of Maricopa*, 197 Ariz. 614, 616, 5 P.3d
19 948, 950 (App.2000) (“Civil contempt arises when a party refuses to do an act *he lawfully*
20 *is ordered to do . . .*”) (emphasis supplied)).

21 Mother has been joined as a party to this proceeding, potentially subjecting her to
22 *future* orders entered by this Court regarding grandparent visitation (assuming *arguendo*

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24 ³ E.g., *Motion for Joinder* filed by Petitioner on May 3, 2023, page 2, lines 18-19
25 (“Adoptive Mother was not a party to the Visitation Order . . .”); *Petition to Modify* filed
26 by Petitioner on April 11, 2024, page 13, lines 17-18 (requesting by way of relief for
27 Mother to be “confirmed as a party to the Visitation Order”; *Petition for Recognition of*
28 *Foreign Judgement/Order* filed by Petitioner in the Republic of Philippines, as attached to
Father’s *Notice of Simultaneous Proceedings* filed March 18, 2024, page 3, subsection 12
 (“Petitioner likewise filed a Motion for Joinder of Third Party . . . in order to make the
 Agreement and Order Re: Visitation issued by the Court binding upon her”).

1 that Arizona has jurisdiction to enter future orders), but as it relates to the pending Petition
2 for Contempt, Petitioner has no remedy against Mother – she has failed to state a claim
3 upon which relief can be granted, and as a result any/all claims against Mother as associated
4 with the Amended Petition for Contempt filed February 17, 2023 should be dismissed. In
5 the alternative, Petitioner should be precluded from asserting any claims re: contempt
6 against Mother at time of Trial in this matter, and by extension, precluded from seeking
7 sanctions directly against her.

8 **Petition to Modify.**
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10 On April 23, 2024 Father filed a *Motion to Dismiss* the Petition to Modify filed by
11 Petitioner on April 11, 2024; Mother joins Father in his request for dismissal on the ground
12 that this Court lacks subject matter jurisdiction.

13 Arizona has exclusive continuing jurisdiction to modify a child custody
14 determination until “. . . a court of this state or a court of another state determines that the
15 child, the child’s parents and any person acting as a parent do not presently reside in the
16 state”. Father resides in Kentucky and has since February 2023. Mother and the children
17 reside in the Philippines and have since February 2023. Petitioner filed her Petition to
18 Modify in April 2024 – fourteen (14) months after Mother, Father and the children all
19 relocated from Arizona. Petitioner does not qualify as a person acting as a parent to the
20 children (A.R.S. § 25-1002(13)). These facts are undisputed. As such, Arizona lacks
21 exclusive, continuing jurisdiction to modify the Visitation Order.

22 For Arizona to modify a custody order for which it lacks exclusive, continuing
23 jurisdiction, it must have jurisdiction to make an initial determination under A.R.S. § 25-
24 1031(A). Arizona does not have jurisdiction to make an initial determination.

25 A.R.S. § 25-1031(A) provides four distinct circumstances upon which Arizona can
26 establish initial jurisdiction:

- 27
28 1. Home State. Arizona was not the home state of the children when
Petitioner filed her Petition to Modify, nor was Arizona the home state

1 within six months prior to that filing. In fact, Petitioner has openly
2 acknowledged that Arizona lost home state jurisdiction when Mother,
3 Father and the children left Arizona in February 2023 (see, e.g., Verified
4 Petition to Register Out of State Decree, page 2, filed February 22, 2024
5 in the Commonwealth of Kentucky, Boyd Circuit Court, as attached to
6 Father's Notice of Simultaneous Proceedings filed March 18, 2024 ("...
7 David Olesen and minor children were also residents of Arizona, but have
8 since relocated ... and as a result, Kentucky has Home State Jurisdiction
9 regarding this matter."). Importantly, Mother and the children have
10 resided in the Philippines for the preceding fifteen (15) months (a foreign
11 country is treated as if it were a state for purposes of applying Articles 1
12 and 2 of UCCJEA). As such, the Philippines (not Arizona or Kentucky)
13 is the children's home state. A.R.S. § 25-1002(7)(a).

- 14
- 15 2. Significant Connection. Because the Philippines is the children's home
16 state, and because the Philippines has not declined to exercise jurisdiction
17 on the grounds that Arizona is the more appropriate forum, the significant
18 connection factor is inapplicable. Nonetheless, Father does not have a
19 significant connection with Arizona, nor has he since relocating to
20 Kentucky fifteen months ago. Mother and the children do not have a
21 significant connection with Arizona, nor have they since relocating to the
22 Philippines fifteen months ago. Substantial evidence is not available in
23 Arizona concerning the children's care, protection, training, and personal
24 relationships. The children have not lived in Arizona for more than fifteen
25 months.
- 26 3. More Appropriate Forum. Neither Kentucky nor the Philippines have
27 declined to exercise jurisdiction on the grounds that Arizona is the more
28 appropriate forum.
- 29 4. No Other State Has Jurisdiction. This factor is inapplicable because the
30 Philippines has home state jurisdiction under factor (1). Notably, this is
31 the exact factor Petitioner relies upon in her argument that Arizona has
32 jurisdiction to modify the Visitation Order (Petition to Modify, page 4);
33 Petitioner has argued that the filing of the Petition for Contempt (in
34 February 2023) is the date of the commencement of the proceeding.
35 However, to determine a child's home state – in a modification context –
36 the date of the commencement of the proceeding is the date the Petition
37 to Modify was filed. See A.R.S. § 25-1002(4) and (5). Enforcement
38 proceedings are specifically excluded from the definition. A.R.S. § 25-
39 1002(4)(b). Therefore, Petitioner's argument that her filing of a Petition

1 for Contempt “maintained” Arizona’s exclusive and continuing
2 jurisdiction fails.

3 A plain reading of both A.R.S. §§ 25-1031 and 25-1032 make clear that
4 a state with initial and continuing jurisdiction may nonetheless lose
5 subject matter jurisdiction due to changing circumstances – Arizona is
6 required to re-determine its jurisdictional authority at the time Petitioner
7 filed her Petition to Modify – April 11, 2024. In doing so, only one
8 conclusion can be reached: Arizona lost subject matter jurisdiction to
9 make a custody determination in this case in August 2023, after the
10 children had been residing in the Philippines for six (6) consecutive
11 months. A.R.S. § 25-1002(7)(a).

12 Arizona does not have subject matter jurisdiction over Petitioner’s Petition to
13 Modify filed April 11, 2024 because it lost exclusive, continuing jurisdiction under A.R.S.
14 § 25-1032(A), and none of the factors under A.R.S. § 25-1031(A) for establishing initial
15 jurisdiction can be met. The Petition to Modify should be dismissed.

16 **WHEREFORE**, Respondent/Mother, Ilyn Olesen, respectfully moves this Court
17 for its order dismissing Petitioner’s *Amended Petition for Contempt re: Grandparent*
18 *Visitation* filed February 17, 2023, insofar as any and all claims against her; Mother further
19 moves this Court for its order dismissing Petitioner’s *Petition to Modify Agreement and*
20 *Final Order Re: Visitation Entered May 17, 2021* filed April 11, 2024.

21 **RESPECTFULLY SUBMITTED** this 31st day of May 2024.

22
23 By: Ilyn Olesen
24 Ilyn Olesen,
25 Respondent Pro Per
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27
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1 Original of the foregoing e-filed
2 this 31st day of May 2024 with:

3 Clerk of the Superior Court
4 *Maricopa County*

5 Copies of the foregoing e-delivered/mailed this
6 31st day of May 2024 to:

7 Division of:
8 Honorable Lisa Wahlin,
9 *Judge of Superior Court*

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