



By order of the court, **GRANTED** Judge **PERRY B. INOS**

1 FOR PUBLICATION



E-FILED
CNMI SUPERIOR COURT
E-filed: Jun 2 2009 10:27AM
Clerk Review: N/A
Filing ID: 25443734
Case Number: 08-0566-FCD
N/A

4 **IN THE SUPERIOR COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

6 **JACK CUNDIFF,**

7 **Petitioner,**

8 **v.**

10 **JANNA B. WILGUS,**

11 **Respondent.**

) **FCD-UR CIVIL ACTION NO. 08-0566**

) **ORDER GRANTING
PETITIONER'S MOTION TO DISMISS
RESPONDENT'S COUNTERCLAIMS**

) **AND**

) **DENYING PETITIONER'S MOTION
TO DISMISS RESPONDENT'S
AFFIRMATIVE DEFENSES**

14 THIS MATTER came for hearing on March 31, 2009, at 1:30 p.m. on petitioner Jack
15 Cundiff's ("Petitioner") motion to dismiss respondent Janna B. Wilgus' ("Respondent")
16 affirmative defenses and counterclaims. Assistant Attorney General Tom Schweiger appeared
17 on behalf of Petitioner. Respondent appeared with counsel, Pamela Brown, Esq.

19 Having considered the arguments of counsel, the pleadings, materials on record, and the
20 relevant rules and case law, the Court is prepared to rule.

21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 This case arises out of a divorce in which Joseph Cundiff and Respondent were ordered
23 to divide parental rights and responsibilities with regard to their two children, Kathryn and
24 Lauren Cundiff. *Cundiff v. Cundiff*, No. DR 95-904 (Ct. Com. Pl., Lawrence County, Ohio,
25 filed November 17, 1998) ([Unpublished] Judgment Entry/Decree of Divorce, Final Appcalable
26 Order). Initially, Joseph Cundiff received custody (residential parent) of the children and
27 Respondent was ordered to pay \$2,000.00 per month in child support. *Id.* at 2-5. After
28



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FOR PUBLICATION

**IN THE SUPERIOR COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

JACK CUNDIFF,)	FCD-UR CIVIL ACTION NO. 08-0566
)	
Petitioner,)	ORDER GRANTING
)	PETITIONER’S MOTION TO DISMISS
v.)	RESPONDENT’S COUNTERCLAIMS
)	
JANNA B. WILGUS,)	AND
)	
Respondent.)	DENYING PETITIONER’S MOTION
)	TO DISMISS RESPONDENT’S
)	AFFIRMATIVE DEFENSES

THIS MATTER came for hearing on March 31, 2009, at 1:30 p.m. on petitioner Jack Cundiff’s (“Petitioner”) motion to dismiss respondent Janna B. Wilgus’ (“Respondent”) affirmative defenses and counterclaims. Assistant Attorney General Tom Schweiger appeared on behalf of Petitioner. Respondent appeared with counsel, Pamela Brown, Esq.

Having considered the arguments of counsel, the pleadings, materials on record, and the relevant rules and case law, the Court is prepared to rule.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of a divorce in which Joseph Cundiff and Respondent were ordered to divide parental rights and responsibilities with regard to their two children, Kathryn and Lauren Cundiff. *Cundiff v. Cundiff*, No. DR 95-904 (Ct. Com. Pl., Lawrence County, Ohio, filed November 17, 1998) ([Unpublished] Judgment Entry/Decree of Divorce, Final Appealable Order). Initially, Joseph Cundiff received custody (residential parent) of the children and Respondent was ordered to pay \$2,000.00 per month in child support. *Id.* at 2-5. After

1 Respondent moved to the Commonwealth of the Northern Mariana Islands (CNMI), the Ohio
2 court determined that she had abandoned her children. *Cundiff v. Cundiff*, No. 02-CS-95 (Ct.
3 Com. Pl. Probate/Juvenile Division, Lawrence County, Ohio, filed August 27, 2003)
4 ([Unpublished] Judgment Entry at 1-2); *Cundiff v. Wilgus*, No. 95-DR-904 (Ct. Com. Pl.,
5 Lawrence County, Ohio, filed Jul. 8, 2004) ([Unpublished] Entry at 2). The children resided
6 with their father from 1998 through 2000. *Cundiff v. Wilgus*, No. 95-DR-904 (Ct. Com. Pl.,
7 Lawrence County, Ohio, filed Jul. 8, 2004) ([Unpublished] Entry at 1). The situation
8 deteriorated, however, at which point the children began residing with their paternal
9 grandparents, Petitioner Jack Cundiff, and Bobbi Jo Cundiff, in Lawrence County, Ohio. *Id.* at
10 1-2. In the summer of 2001, the children moved to Georgia to live with their aunt, Sharon
11 Cundiff. *Id.* at 2. Sharon Cundiff later moved to Cincinnati, Ohio, and the children were
12 relocated back to Lawrence County, Ohio, with their grandparents. *Id.*

15 In 2004, legal custody of the children was eventually awarded to the grandparents.
16 *Cundiff v. Wilgus*, No. 95-DR-904, (Ct. Com. Pl., Lawrence County, Ohio, filed Jul. 8, 2004)
17 ([Unpublished] Entry at 3). In 2005, the Ohio court modified the original child support order
18 lowering Respondent's monthly payment to \$1,200.00 per month. *Cundiff v. Wilgus*, No. 95-
19 DR-904, (Ct. Com. Pl., Lawrence County, Ohio, filed Jan. 25, 2005) ([Unpublished] Agreed
20 Judgment Entry at 1). Although Lauren and Kathryn began living in West Virginia with their
21 older sibling, Ashley Capper, on November 14, 2006, the Ohio court has not modified the child
22 support order to reflect the lack of a continuing custodial relationship with Petitioner. (Kathryn
23 Cundiff Decl. 1; Lauren Cundiff Decl. 1; Ashley Capper Decl. 1.) In 2008, the Ohio court
24 lowered Respondent's monthly payment to \$734.40 per month. *Cundiff v. Wilgus*, No.
25 95DR904B (Ct. Com. Pl., Lawrence County, Ohio, filed February 12, 2008) ([Unpublished]
26
27
28

1 Revised Child Support Judgment Entry, Final Appealable Order at 1). That amount reflected
2 the fact that Kathryn Cundiff is no longer subject to any support order because she has been
3 emancipated. (*Id.*) Respondent's current monthly child support payment is thus \$600.00 per
4 month instead of \$1,200.00 per month. (*Id.*) Respondent also pays \$120.00 per month towards
5 what she owes in arrears, and a monthly processing fee. (*Id.*)
6

7 In May 2007, Kathryn Cundiff moved to the CNMI and began residing with
8 Respondent. (Answer, Affirmative Defenses and Verified Counter Claims 3.) Shortly after
9 moving to the CNMI, Kathryn began attending Northern Marianas College. (*Id.*) Lauren
10 Cundiff has continued to reside with her older sibling, Ashley Capper, in West Virginia.
11 (Lauren Cundiff Decl. 1; Ashley Capper Decl. 1; Answer, Affirmative Defenses and Verified
12 Counter Claims 3.) Lauren turned eighteen on December 15, 2008, and plans to move to the
13 CNMI in June 2009 to attend Northern Marianas Collage. (Answer, Affirmative Defenses and
14 Verified Counter Claims 3.) Kathryn Cundiff has had no contact with her grandparents for over
15 two years. (Kathryn Cundiff Decl. 1; Ashley Capper Decl. 2.) Lauren Cundiff occasionally
16 spoke on the telephone with her grandparents until January 2008. (Lauren Cundiff Decl. 1;
17 Ashley Capper Decl. 2.) Since November 2006, Kathryn and Lauren have been totally
18 supported by Respondent and their older sibling, Ashley Capper, and have received no support
19 from their grandparents. (Kathryn Cundiff Decl. 2; Lauren Cundiff Decl. 2; Ashley Capper
20 Decl. 2.)
21
22
23

24 Petitioner remains a resident of Ohio. (Child Support Enforcement Transmittal #1 –
25 Initial Request 2; Answer, Affirmative Defenses and Verified Counter Claims 2.) The Office of
26 the Attorney General of the CNMI brings this claim on behalf of Petitioner pursuant to 8 CMC
27 § 1511, et seq., which requires the Attorney General to represent individuals and state or
28

1 political subdivisions, and the instrumentalities thereof, to whom a duty of support is owed
2 under the Uniform Reciprocal Enforcement of Support Act (URESA). Petitioner's Complaint
3 seeks recognition and enforcement of the Ohio Judgment entered on February 12, 2008.¹ That
4 Judgment includes a provision requiring a wage deduction order to be filed for the monthly
5 amount of \$734.40 per month. *Cundiff v. Wilgus*, No. 95DR904B (Ct. Com. Pl., Lawrence
6 County, Ohio, filed February 12, 2008) ([Unpublished] Revised Child Support Judgment Entry,
7 Final Appealable Order at 2).

9 Respondent asserts several affirmative defenses and has filed two counterclaims, which
10 are the subjects of the instant motion to dismiss. Respondent's counterclaims include explicit
11 modifications to the amount she pays in current child support and to the total amount she owes
12 in arrears. With regard to current child support, Respondent argues that neither of her children
13 resides with Petitioner, and that she should therefore not be required to pay current child support
14 to Petitioner. (Answer, Affirmative Defenses and Verified Counter Claims 4-6.) With regard to
15 what she owes in arrears, Respondent argues that the amount she currently owes should be
16 offset by the payments she has made since November 2006 because her children have not
17 resided with Petitioner since that time. (*Id.* at 2-6.) Petitioner argues that the Ohio court that
18 issued the child support order has continuing, exclusive jurisdiction over the order and that the
19 Superior Court of the CNMI lacks jurisdiction to modify the order.² (Mot. to Dismiss at 3.)

23
24 ¹ In the Complaint, Petitioner refers to an Ohio Judgment entered on February 8, 2008. The date of the relevant
25 order is actually February 12, 2008. *Cundiff v. Wilgus*, No. 95DR904B (Ct. Com. Pl., Lawrence County, Ohio,
26 filed February 12, 2008) ([Unpublished] Revised Child Support Judgment Entry, Final Appealable Order).

27 ² Although Petitioner's motion to dismiss does not specify the rule upon which his motion is based, Petitioner
28 indicated at oral argument that his motion is based on Commonwealth Rule of Civil Procedure 12(b)(3).
Nevertheless, the motion is more appropriately brought under Commonwealth Rule of Civil Procedure 12(b)(1)
and 12(b)(6). Challenges to subject matter jurisdiction may be raised at any time, by any party, or by the Court.
See Emrich v. Touche Ross & Co., 846 F.2d 1190 (9th Cir. 1988) (analyzing the Federal Rule after which the
Commonwealth Rule is modeled). The Court is therefore raising the issue of subject matter jurisdiction *sua*
sponte.

1 Commonwealth Rules are modeled). If the court lacks jurisdiction, it has no power to enter
2 judgment and may only dismiss. *Atalig*, 2006 MP1 citing *Dassinger v. S. Cent. Bell Tel. Co.*,
3 505 F.2d 672, 674 (5th Cir. 1974), 10 WRIGHT & MILLER § 2713 at 404-05.

4
5 2. Standard for Dismissal under Com. R. Civ. P. 12(b)(6)

6 Under Com. R. Civ. P. 12 (b)(6), a complaint may also be dismissed for failure to state a
7 claim upon which relief can be granted. The Court follows the standard for Rule 12(b)(6)
8 described in *In re Adoption of Magofna*, 1 N.M.I. 449 (1990). To avoid dismissal, a claim must
9 pass either part of *Magofna's* two-pronged test: "A complaint must contain either direct
10 allegations on every material point necessary to sustain a recovery on any legal theory . . . or
11 contain allegations from which an inference fairly may be drawn that evidence on these material
12 points will be introduced at trial." *Id.* at 454.

13
14 **B. Discussion**

15 1. The Full Faith and Credit for Child Support Orders Act (FFCCSOA) Supersedes
16 Inconsistent State Law.

17 The FFCCSOA, 28 U.S.C. § 1738B, was established to resolve problems related to
18 different jurisdictions operating under different laws in determining their authority to establish
19 child support orders. "Under the Supremacy Clause of the United States Constitution, the
20 provisions of the FFCCSOA are binding on all states and supersede any inconsistent provisions
21 of state law, including any inconsistent provisions of uniform state laws such as URESA"
22 *Kelly v. Otte*, 474 S.E.2d 131, 134 (N.C. Ct. App. 1996), *disc. review denied*, 479 S.E.2d 204
23 (N.C. 1996); *see also Witkowski v. Roosevelt*, 199 P.3d 1072 (Wyo. 2009); *Wilkie v. Silva*, 685
24 A.2d 1239 (N.H. 1996); *Dept. of Revenue ex. Rel. Jorda v. Fleet*, 679 So. 2d 326 (Fla. App.
25 1996); *In re Marriage of Carrier*, 576 N.W.2d 97 (Iowa 1998). In this case, Petitioner seeks an
26 income withholding order in the CNMI according to an Ohio child support order. Respondent
27
28

1 argues that Public Law 14-34 authorizes a hearing to determine the correct amount of support
2 and arrearage in an income withholding order. (Opp. to Mot. to Dismiss at 5.) Respondent also
3 argues that Section 12 of Public Law 14-34 provides authority for modification of a support
4 order from another State. (Opp. to Mot. to Dismiss at 7.) The FFCCSOA supersedes Public
5 Law 14-34, however, to the extent the two laws are inconsistent.
6

7 First, any changes to the amounts Respondent pays per month in current child support
8 and arrears are “modifications” of the Ohio child support order. The FFCCSOA defines a
9 modification as “a change in a child support order that affects the amount, scope, or duration of
10 the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child
11 support order.” 28 U.S.C. § 1738B(b). In her first counterclaim, Respondent seeks to offset the
12 amount she owes in arrears based, in part, on the allegation that the children have not resided
13 with Petitioner since November 2006. (Answer, Affirmative Defenses and Counter Claims 3.)
14 Respondent therefore requests that the total amount she owes in arrears be offset by the amount
15 she has paid since November 2006. (*Id.* at 4.) In her second counterclaim, Respondent seeks to
16 “retroactively modify child support orders entered in the state of Ohio in Case 95-DR-904”
17 requiring her to pay child support after the termination of the custodial relationship between
18 Petitioner and the children. (*Id.* at 5.) The offset and modification sought by Respondent affect
19 the amount Respondent is required to pay according to the Ohio child support order and would
20 therefore be “modifications” of that order.
21
22
23

24 Modifying the Ohio child support order pursuant to Public Law 14-34 would be
25 inconsistent with the FFCCSOA. For example, if this Court held a hearing pursuant to Public
26 Law 14-34 to calculate the correct amount of support and arrearage Respondent must pay, the
27 Court would have to issue an income withholding order contrary to what was ordered by the
28

1 Ohio court. Respondent would then be subject to two conflicting orders. This is precisely the
2 type of conflict the FFCCSOA was designed to avoid. The FFCCSOA explicitly requires this
3 Court to “enforce according to its terms a child support order made consistently with this
4 section by a court of another State” 28 U.S.C. § 1738B(a)(1). The FFCCSOA therefore
5 supersedes provisions of Public Law 14-34 which would allow this court to modify the Ohio
6 child support order.
7

8 2. The Ohio Court that Issued the Child Support Order Has Continuing, Exclusive
9 Jurisdiction over the Child Support Order.

10 The FFCCSOA states that “[a] court of a State that has made a child support order
11 consistent with this section has continuing, exclusive jurisdiction over the order if the State is
12 the child’s State or the residence of any individual contestant” 28 U.S.C. § 1738B(d).
13 Here, the Court of Common Pleas in Lawrence County, Ohio, is the only court that has issued
14 or modified child support orders in this case. That court initially issued an order requiring
15 Respondent to pay \$2,000.00 per month in child support. *Cundiff v. Cundiff*, No. DR 95-904
16 (Ct. Com. Pl., Lawrence County, Ohio, November 17, 1998) ([Unpublished] Judgment
17 Entry/Decree of Divorce, Final Appealable Order at 5). On January 25, 2005, the same court
18 modified the order reducing Respondent’s payments to \$1,200.00 per month. *Cundiff v.*
19 *Cundiff*, No. 95-DR-904 (Ct. Com. Pl., Lawrence County, Ohio, Jan. 25, 2005) ([Unpublished]
20 Agreed Judgment Entry at 1). On February 12, 2008, the same court modified the child support
21 order again, lowering Respondent’s monthly payment to \$734.40 per month. *Cundiff v. Wilgus*,
22 No. 95DR904B (Ct. Com. Pl., Lawrence County, Ohio, filed February 12, 2008) ([Unpublished]
23 Revised Child Support Judgment Entry, Final Appealable Order at 1). Petitioner is a
24 “contestant” for purposes of 28 U.S.C. § 1738B(d).³ In 2005, the Court of Common Pleas in
25
26
27
28

³ The FFCCSOA defines a “contestant” as,

1 Lawrence County, Ohio listed Petitioner's address as 403 Township Road 1204, Proctorville,
2 Ohio 45669. *Cundiff v. Cundiff*, No. 95-DR-904 (Ct. Com. Pl., Lawrence County, Ohio, filed
3 Jan. 25, 2005) ([Unpublished] Agreed Judgment Entry at 3). This address was confirmed on
4 April 26, 2005. (Child Support Enforcement Transmittal #1 – Initial Request 2.) Moreover, in
5 making her counterclaims, Respondent asserted that Petitioner is a resident of the state of Ohio.
6 (Answer, Affirmative Defenses and Counter Claims 2.) Therefore, because the Ohio court
7 issued the child support order and Petitioner still resides in Ohio, the Ohio court has continuing,
8 exclusive jurisdiction over the order.
9

10
11 3. *This Court Does Not Have Authority to Modify the Child Support Order Because One*
12 *of the Contestants Still Resides in Ohio and Has Not Filed Written Consent to Let this*
13 *Court Modify the Order.*

14 The FFCCSOA's exceptions allowing a State to modify a child support order issued by
15 another State are not met in this case. The FFCCSOA precludes this Court from seeking to
16 modify the child support order except as allowed under subsections (e), (f) and (i). 28 U.S.C. §
17 1738B(a)(2). Under subsection (e) of the FFCCSOA, this Court may modify a child support
18 order of another State if the following requirements are met:

19 (1) the court has jurisdiction to make such a child support order
20 pursuant to subsection (i); and

21 (2) (A) the court of the other State no longer has continuing,
22 exclusive jurisdiction of the child support order because that State
23 no longer is the child's State or the residence of any individual
24 contestant; or

25 (A) a person (including a parent) who--
26 (i) claims a right to receive child support
27 (ii) is a party to a proceeding that may result in the issuance of a child
28 support order; or
29 (iii) is under a child support order; and
30 (B) a State or political subdivision of a State to which the right to obtain child
31 support has been assigned.

32 28 U.S.C. § 1738B(b).

1 (B) each individual contestant has filed written consent with
2 the State of continuing, exclusive jurisdiction for a court of another
3 State to modify the order and assume continuing, exclusive
jurisdiction over the order.

4 28 U.S.C. § 1738B(e).

5 The first part of this exception, described in 28 U.S.C. § 1738B(e)(1), requires this court
6 to have jurisdiction pursuant to subsection (i), which states the following:
7

8 If there is no individual contestant or child residing in the issuing
9 State, the party or support enforcement agency seeking to modify,
10 or modify and enforce, a child support order issued in another State
shall register that order in a State with jurisdiction over the
nonmovant for the purpose of modification.

11 28 U.S.C. § 1738B(i). Here, Petitioner is the contestant residing in the issuing Ohio. Therefore,
12 the Superior Court of the CNMI does not have authority to modify the order.
13

14 Similarly, in order for the CNMI to make a modification of the child support order, 28
15 U.S.C. § 1738B(e)(2)(A) requires that the issuing state no longer has continuing, exclusive
16 jurisdiction because the issuing state is no longer the Child's state or the state of any individual
17 contestant. Again, the issuing state is Ohio and Petitioner is an individual contestant residing in
18 Ohio. Therefore, the requirements of U.S.C. § 1738B(e)(2)(A) are not met. Finally, the
19 requirements of 28 U.S.C. § 1738B(e)(2)(B) are not met because Petitioner has not filed written
20 consent with the Court of Common Pleas in Lawrence County, Ohio, to allow the Superior
21 Court of the CNMI modify the order. This Court therefore does not have jurisdiction to modify
22 the Ohio child support order. Accordingly, Respondent has failed to state counterclaims upon
23 which relief can be granted and her counterclaims must be dismissed.
24

25
26 4. Affirmative Defenses

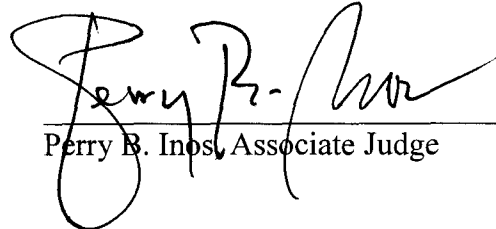
27 Although the Court lacks jurisdiction to modify the Ohio child support order, the Court
28 does have jurisdiction over the enforcement proceeding pursuant to 8 CMC § 1534. Unlike

1 Petitioner's argument with regard to modification of the Ohio child support order, nothing in the
2 FFCCSOA precludes the Court from enforcing the Ohio order. In fact, the FFCCSOA requires
3 this Court to enforce the order according to its terms. See 28 U.S.C. § 1738B(a)(1). Therefore,
4 enforcing the order is not inconsistent with federal law. Because Respondent's affirmative
5 defenses are only applicable to enforcement and not modification of the order, the affirmative
6 defenses will not be dismissed at this stage of the pleadings. The Court will rule upon the
7 affirmative defenses either at trial or upon a motion for summary judgment if one is filed.
8

9
10 **III. CONCLUSION**

11 For the foregoing reasons, the Court hereby GRANTS Petitioner's motion to dismiss
12 Respondent's counterclaims without prejudice, and DENIES Petitioner's motion to dismiss
13 Respondent's affirmative defenses.

14 So ORDERED this 1st day of June, 2009.

15
16
17 
18 _____
19 Perry B. Inos, Associate Judge
20
21
22
23
24
25
26
27
28