

**RICHARD FREDERICK SIMMERS v. SUSAN LEE SIMMERS, DECEASED**

*preliminary objections - failure to conform pleadings - pretrial statement - judge's signature-standing to intervene*

In the Court of Common Pleas of Northampton County, Pennsylvania, Civil Law Division, No. C0048CV2002-000807.

Order of Court entered granting in part and denying in part Defendant's Preliminary Objections.

Order of Court entered on October 22, 2003 by the Honorable F.P. Kimberly McFadden.

**Description of Decision**

Petitioner filed Preliminary Objections to the petitions of Joseph J. Exley and Faye B. Exley, maternal grandparents (hereinafter "Respondents"), requesting that they be granted permission to intervene in this matter. Petitioner seeks to have the Respondents' pleadings dismissed and the Custody Complaint stricken. Petitioner argues that the Respondents failed to conform to Pennsylvania Rule of Civil Procedure 1915.3 (e), in that they neglected to plead in Paragraph 7 of the Custody Complaint, facts establishing the elements of a cause of action under §§ 5313 (b) (1), (2) and (3). The Court found that the Respondents failed to sufficiently provide facts to support a cause of action pursuant to the three elements required. Therefore, Respondents were ordered to file an Amended Custody Complaint in accordance with Pa.R.C.P. 1915.3(e) and 1915.15(a).

Petitioner also filed Preliminary Objections, arguing that the required Pretrial Statement not filed with the Court, and further that it requires the signature of the interveners, which was not provided. The Court found that the Pretrial Statement was filed by the Respondents on April 17, 2003. This Court further found that although the Pretrial Statement submitted on behalf of the Respondents was signed by their counsel, and not by the Respondents, the failure of the Respondents to sign to not constitute fatal error as to dismiss their Complaint. The Court ordered the Respondents to re-file the Pretrial Statement with the appropriate signatures.

Petitioner next argued that the Respondents failed to secure the Court's signature on an "Order of Court" requiring the Petitioner to appear for a custody conference. The Court found that this was in error and that the Order of Court must be signed by a judge.

Petitioner argued that the Respondents lack standing to intervene in this suit pursuant to 23 Pa.C.S.A. § 5313(a) and (b). This Court found that Respondents have standing to petition for custody of the child in this case.

Finally, Petitioner argued that the Respondents failed to provide sufficient information to substantiate their claims under 23 Pa. C.S.A. §§ 5311 or 5313, and therefore their pleadings should be stricken. This Court found that it would be premature at this stage to address the substantive issues of whether it is in the child's best interests to grant the Respondents partial custody or visitation and/or physical and legal custody because the depositions provided from prior proceedings in New Hampshire were lacking in specificity toward the issues involved in the case at bar. Further, the Court found that it would be premature to decide the welfare of a

child without first receiving the results from the psychological evaluation performed. Therefore, the Court ordered that this matter shall be heard on the nonjury list at which time all relevant additional evidence shall be presented.

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY,  
PENNSYLVANIA  
CIVIL DIVISION - LAW**

**RICHARD FREDERICK SIMMERS,** :  
 : **No. C0048CV2002-000807**  
**Plaintiff/Petitioner** :  
 :  
v. :  
 :  
**SUSAN LEE SIMMERS, Deceased,** :  
 :  
**Defendants/Respondents** :

**OPINION OF THE COURT**

Presently before the Court for disposition are the Preliminary Objections of the Petitioner, Richard Frederick Simmers (hereinafter "Petitioner"), to the petitions of Joseph J. Exley and Faye B. Exley, maternal grandparents (hereinafter "Respondents"), requesting that they be granted permission to intervene in the above-referenced matter. By way of Preliminary Objections, Petitioner seeks to have the Respondents' pleadings dismissed and the Custody Complaint stricken.

This matter was assigned to the Honorable F.P. Kimberly McFadden on the August 26, 2003, argument list. Following review of the Petition of the Respondents and the briefs submitted in relation thereto, this matter is now ready for disposition.

**I. FACTUAL/PROCEDURAL HISTORY**

The Petitioner is the father of Deanna Simmers (hereinafter "Deanna"). Deanna was born on September 9, 1999, to Petitioner and his former wife Susan Lee Simmers (hereinafter "Mother"), deceased. While pregnant with Deanna, Mother was diagnosed with breast cancer. Despite medical advice, she decided not to have an abortion, but rather undergo light chemotherapy and a mastectomy, and give birth to Deanna. Mother also suffered from bi-

polar disorder. Mother was hospitalized three weeks after Deanna's birth, at which time Respondents cared for her in their home in New Hampshire, upon the parties agreement.

On October 3, 2000, when Deanna was thirteen months old, Petitioner and Mother separated permanently. Mother took Deanna and moved into her sister's home in Syracuse, New York. On February 8, 2002, Petitioner filed for divorce from Mother. A custody conference was scheduled for March 26, 2002. Soon after, counsel for Mother and Respondents entered his appearance and negotiations began with Father's counsel.

There is much discrepancy as to the location of Mother and Deanna from October 2000 through April 28, 2002, when Mother died. On October 24, 2002, Respondents filed a Petition in the Court of Common Pleas of Grafton County, New Hampshire requesting an ex-parte emergency hearing regarding Deanna. New Hampshire has no provisions in the statutes regarding grandparents' custody, and an Emergency Order was granted by the Honorable Susan B. Carbon, Family Division Judge on October 24, 2002. A hearing was held on November 6, 2002, wherein the Court appointed a guardian ad litem and granted gradual visitation to Father. An Order was entered on November 8, 2002. The guardian ad litem, Jane Vaillancourt, filed two reports, dated December 15, 2002, and January 10, 2002, regarding her involvement with Deanna and her family.

A hearing was held on January 13, 2003, in front of the Honorable Bruce A. Cardello, in which he Ordered the approval of the recommendations of the guardian ad litem and scheduled a hearing for March 31, 2003. A final report from the guardian ad litem was received on April 3, 2003, recommending termination of the guardianship. A final hearing was scheduled on April 7, 2003, at which time the guardianship was terminated. Deanna began residing with Father on February 23, 2003, and has since that date resided with him. She has had two three

day visits with Respondents in March 2003.

Respondents filed a Custody Complaint on April 17, 2003, requesting this Court to grant joint legal custody of Deanna to themselves and Father. They further requested shared physical custody of Deanna for themselves and Father. On May 2, 2003, Petitioner filed Preliminary Objections to Respondents' Custody Complaint. Respondents filed a response to Petitioner's Preliminary Objections on May 28, 2003. Both Respondents and Petitioner filed briefs in support of their positions.

## **II. DISCUSSION**

### **A. Failure to Conform to Pa.R.C.P. 1915.3(e)**

Petitioner argues that the Respondents failed to conform to Pennsylvania Rule of Civil Procedure 1915.3 (e), in that they neglected to plead in Paragraph 7 of the Custody Complaint, facts establishing the elements of a cause of action under §§ 5313 (b) (1), (2) and (3). Petitioner argues that the Respondents' failure to set forth the required elements in the Custody Complaint constitutes a fatal defect in their pleadings, and therefore the matter should be dismissed.

Pa.R.C.P. 1915.3 (e) states:

(e) A grandparent seeking physical and/or legal custody of a grandchild pursuant to 23 Pa.C.S. § 5313(b) must plead, in paragraph 7 of the complaint set forth at Rule 1915.15(a), facts establishing the elements of a cause of action under §§ 5313(b)(1), (2) and (3).

Pa.R.C.P. 1915.3(e).

The elements of 23 Pa.C.S. § 5313(b) referred to in Pa.R.C.P. 1915.3(e) include a grandparent:

- (1) who has genuine care and concern for the child;
- (2) whose relationship with the child began with the consent of a parent of the child or pursuant to an order of court; and
- (3) who for 12 months has assumed the role and

responsibilities of the child's parent, providing for the physical, emotional and social needs of the child, or who assumes the responsibility for a child who has been determined to be a dependent child pursuant to 42 Pa.C.S. Ch. 63 (relating to juvenile matters) or who assumes or deems it necessary to assume responsibility for a child who is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or mental illness. The court may issue a temporary order pursuant to this section.

23 Pa.C.S.A. § 5313(b).

In reviewing the Custody Complaint filed by the Respondents, the Court agrees with Petitioner that the Respondents failed to set forth facts in Paragraph 7 establishing the elements of a cause of action under 23 Pa.C.S.A. §§ 5313(b) (1), (2) and (3). In reviewing the Custody Complaint, the Court finds that Paragraph 46 and its subparagraphs attempts to fulfill this requirement. However, in reading Paragraph 46 and its subparagraphs, the Court finds that the Respondents failed to sufficiently provide facts to support a cause of action pursuant to the three elements required.

Paragraph 46 and its subparagraphs generally discuss that the maternal grandparent's cared and provided for the child since she was three (3) weeks old, but make no mention that this was at the request of a parent or by an order of court as required by element (2). Further, although they state that they have cared and provided for the child since she was three weeks old, they make no indication that they acted as a parental figure for twelve months, as required by element 3. Paragraph 46 continues on with allegations regarding the father's alleged poor parenting skills, the child's lack of adjustment to her father, and his absence from the child's life. However, at no time does the Complaint adequately set forth facts establishing the above three elements as required by Pa.R.C.P. 1915.3(e). Therefore, Respondents are ordered to file an Amended Custody Complaint in accordance with Pa.R.C.P. 1915.3(e) and 1915.15(a).

Therefore, the above stated Preliminary Objections of the Petitioner are hereby GRANTED and the Respondents are granted twenty (20) days to amend.

**B. Pretrial Statement Not Filed with the Court, and Signature of Interveners Not Provided**

Petitioner argues that the required Pretrial Statement not filed with the Court, and further, it requires the signature of the interveners, which was not provided. For the above stated reasons, Petitioner argues that the pleadings are defective and must be stricken from the record and the Custody Complaint must be dismissed.

After reviewing the docket and file in the above captioned matter, the Court finds that said Pretrial Statement was filed by the Respondents on April 17, 2003. This Court further finds that the Pretrial Statement submitted on behalf of the Respondents was signed by their counsel, and not by the Respondents. However, the Court finds the failure of the Respondents to sign to not constitute fatal error as to dismiss their Complaint. Therefore, the Court orders the Respondents to re-file the Pretrial Statement with the appropriate signatures.

**C. Failure to Secure Judge's Signature on Order of Court to Appear for Custody Conference**

Petitioner next argues that the Respondents failed to secure the Court's signature on an "Order of Court" requiring the Petitioner to appear for a custody conference. The Court finds that this was in error. The Order of Court must be signed by a judge. Therefore, the Respondents are ordered to re-file said order, obtain Court's signature and praecipe the prothonotary's office.

**D. Standing to Intervene Pursuant to 23 Pa.C.S.A. § 5311**

Petitioner argues that if Respondents are permitted to intervene, it shall

only be with respect to their request for partial custody or visitation pursuant to 23 Pa.C.S.A. § 5311. 23 Pa.C.S.A. § 5311 provides:

If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

23 Pa.C.S.A. § 5311.

Therefore, Petitioner is not challenging the grandparents' standing to petition the court for custody pursuant to this statute. However, the Petitioner further argued that when partial custody or visitation is pursued, it will be determined that partial custody or visitation will not be in the child's best interests. It is clear that Petitioner is attempting to put forth substantive argument with regard to the best interests of the child. The Court will address the substantive issue regarding the child's best interest in subsection F below. Therefore, the Preliminary Objection of Petitioner is hereby DENIED and the Respondents are granted permission to intervene pursuant to 23 Pa.C.S.A. § 5311.

**E. Standing to Intervene Pursuant to 23 Pa.C.S.A. § 5313(a) and (b)**

Petitioner argues that the Respondents lack standing to intervene in this suit pursuant to 23 Pa.C.S.A. § 5313(a) and (b). Petitioner argues that in order for the Respondents to petition to intervene, they must meet the statutory requirements of the following subsections.

These two sections provide, in pertinent part:

§ 5313. When grandparents may petition

(a) Partial custody and visitation. - If an unmarried child has resided with his grandparents . . . for a period of 12 months or more and is subsequently removed from the home by his parents, the grandparents . . . may petition the court for an order



granting them reasonable partial custody or visitation rights, or both, to the child. The court shall grant the petition if it finds that visitation rights would be in the best interest of the child and would not interfere with the parent-child relationship.

(b) Physical and legal custody. - A grandparent has standing to bring a petition for physical and legal custody of a grandchild. If it is in the best interest of the child not to be in the custody of either parent and if it is in the best interest of the child to be in the custody of the grandparent, the court may award physical and legal custody to the grandparent. This subsection applies to a grandparent:

- (1) who has genuine care and concern for the child;
- (2) whose relationship with the child began with the consent of a parent of the child or pursuant to an order of court; and
- (3) who for 12 months has assumed the role and responsibilities of the child's parent, providing for the physical, emotional and social needs of the child, or who assumes the responsibility for a child who has been determined to be a dependent child pursuant to 42 Pa.C.S. Ch. 63 (relating to juvenile matters) or who assumes or deems it necessary to assume responsibility for a child who is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or mental illness. The court may issue a temporary order pursuant to this section.

23 Pa.C.S.A. § 5313 (a) and (b).

The issue of standing pursuant to 23 Pa.C.S.A. § 5313 was recently addressed in R.M. v. Baxter, 777 A.2d 446, 565 Pa. 619 (Pa. 2001). In this case, a grandmother sought custody or partial custody and/or visitation of her grandchild who had been declared a dependent child and placed in the custody of Children and Youth Services. Baxter at 448, 621-22. The child's guardian filed preliminary objections, arguing that the grandmother failed to satisfy the standing requirements of § 5313. Id. The court noted the 1996 amendment of § 5313, changing the heading of the section from "[w]hen child has resided with grandparents" to "[w]hen grandparents may petition," and adding subsection (b), leaving the old language in subsection (a). Id. at 450, 624. The court found that the new subsection (b) recognized a grandparent's right to make a claim for physical and legal custody, rather than what it previously referred to as

partial custody and visitation. Id. Therefore, the court found that the amendment expanded grandparents' rights and addressed the issue of a grandparent's standing. Id. at 450, 625.

The Court in Baxter found that the language in the statute, specifically that “[a] grandparent has standing to bring a petition for physical and legal custody of a grandchild” confers upon a grandparent a right to petition for custody simply by virtue of a familial relationship. Id. at 450-51, 626-27. The Court added that the language “[t]his subsection applies to a grandparent who . . .,” refers to the requirements a grandparent must establish to prevail on the merits of the custody claim. Id. at 451, 627. However, the Court noted in a footnote that “the legislature’s conferral of automatic standing to seek the physical and legal custody of a grandchild does not affect a grandparent’s evidentiary burden to prove his/her custody claim on the *merits*. It merely eliminates the preliminary standing requirement that a party establish a direct and substantial interest in the custody proceeding before the court.” Id. FN4 (emphasis added).

Following the Pennsylvania Supreme Court’s ruling in Baxter, this Court finds that Respondents have standing to petition for custody of the child in this case. Therefore, the Petitioner’s Preliminary Objection to the Respondents’ petition for intervention is hereby DENIED.

**F. Substantive Issues Regarding 23 Pa.C.S.A. §§ 5311 and 5313 (a) and (b)**

Petitioner argues that the Respondents failed to provide sufficient information to substantiate their claims under 23 Pa. C.S.A. §§ 5311 or 5313, and therefore their pleadings should be stricken. Petitioner argues that if the Respondents wish to proceed, they must comply properly with the rules and plead the case properly. In response, the Respondents filed a Brief in Response to Petitioner’s Preliminary Objections. The Respondents argue that it is

premature at this stage to formulate arguments on the substantive issues of whether they meet the requirements to obtain partial custody or visitation or physical and legal custody under either 23 Pa. C.S.A. §§ 5311 or 5313 until new relevant depositions and rebuttal testimony can be taken regarding this specific issue at a custody trial, and results from the psychological evaluation to which all parties participated, are returned. This report, which is to be prepared by Dr. Robert Gordon, is scheduled to be completed no later than September 30, 2003.

The Superior Court of Pennsylvania stated in Douglas v. Wright, 801 A.2d 586 (Pa.Super. 2002) that the granting of partial custody or visitation rights pursuant to § 5311 requires that “the trial court perform a detailed, child-centered analysis when crafting its order granting partial custody to grandparents.” Douglas, 801 A.2d at 591. Further, as stated in Baxter regarding physical and legal custody, it is the “grandparent’s evidentiary burden to prove his/her custody claim on the merits. Baxter, 777 A.2d at 451, 565 Pa. at 627.

Therefore, this Court agrees with the Respondents that it would be premature at this time to address the substantive issues of whether it is in the child’s best interests to grant the Respondents partial custody or visitation and/or physical and legal custody. The Court finds that the depositions provided from proceedings in New Hampshire on December 6, 2002, are lacking in specificity toward the issues involved in the case at bar. Further, the Court finds that it would be premature to decide the welfare of a child without first receiving the results from the psychological evaluation performed by Dr. Robert Gordon. Therefore, the Court orders that this matter shall be heard on the nonjury list at which time all relevant additional evidence shall be presented.

## **VI. CONCLUSION**

**For these reasons, Petitioner’s Preliminary Objections are hereby granted in**

**part and**

**denied in part.**

**WHEREFORE, we enter the following:**

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY,  
PENNSYLVANIA  
CIVIL DIVISION - LAW**

<b>RICHARD FREDERICK SIMMERS,</b>	:	
	:	<b>No. C0048CV2002-000807</b>
<b>Plaintiff/Petitioner</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>SUSAN LEE SIMMERS, Deceased,</b>	:	
	:	
<b>Defendants/Respondents</b>	:	

**ORDER OF COURT**

**AND NOW this                    day of October, 2003, upon consideration of the Preliminary Objections of Petitioner, Richard Frederick Simmers, and Respondents', Joseph J. Exley and Faye B. Exley, Maternal Grandparents, response thereto, it is hereby ORDERED and DECREED that:**

1.        Petitioner's Preliminary Objection to the Respondents failure to conform to Pennsylvania Rule of Civil Procedure 1915.3 (e) is hereby GRANTED and Respondents are granted leave to file an Amended Custody Complaint.

2.        Petitioner's Preliminary Objection for failure of Respondent to file a Pretrial Statement with the court is hereby DENIED. Further, Respondents are hereby Ordered to re-file the Pretrial Statement with the appropriate signatures.

3.        Petitioner's Preliminary Objection regarding the Respondents failure to secure the Court's signature on an "Order of Court" is hereby GRANTED.

4.        Petitioner's Preliminary Objection to Respondents' Petition to Intervene pursuant to 23 Pa.C.S.A. § 5311 is hereby DENIED.

5. Petitioner's Preliminary Objection to Respondents' Petition to intervene

pursuant to 23 Pa.C.S.A. § 5313 (a) and (b) is hereby DENIED.

6. Petitioner's Preliminary Objection regarding Respondents' failure to meet

the substantive elements of 23 Pa.C.S.A. §§ 5311 and 5313 (a) and (b) is hereby DENIED as premature at this stage and the Court orders that new relevant depositions be taken in this matter at a custody trial and the report from Dr. Gordon be reviewed before a decision be rendered.

**BY THE COURT:**

\_\_\_\_\_

**Judge**

\_\_\_\_\_

**F.P. KIMBERLY McFADDEN,**