

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-87

JANINE MARIE BALISTRERI

vs.

TATIANA MARIE BALISTRERI & another.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff (grandmother) appeals, pro se, from a judgment dismissing her petition, pursuant to G. L. c. 119, § 39D, seeking visitation rights with her grandson (grandchild). A judge of the Probate and Family Court dismissed the petition under Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), for failure to state a claim, in accordance with Blixt v. Blixt, 437 Mass. 649, 665-666 (2002), cert. denied, 537 U.S. 1189 (2003). We affirm.

"To accord with due process, an evaluation of the best interests of the child under [G. L. c. 119, § 39D,] requires that a parental decision concerning grandparent visitation be given presumptive validity." Blixt, 437 Mass. at 657-658. "To

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<sup>1</sup> Nicholas E. Zaccagnini.

obtain visitation, the grandparents must rebut the presumption." Id. at 658. "More specifically, to succeed, the grandparents must allege and prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare." Id. "The requirement of significant harm presupposes proof of a showing of a significant preexisting relationship between the grandparent and the child. In the absence of such a relationship, the grandparent must prove that visitation between grandparent and child is nevertheless necessary to protect the child from significant harm." Id.

Because the litigation of a grandparent visitation complaint "can itself be 'so disruptive of the parent-child relationship'" as to implicate the parent's constitutional rights, the complaint must "make an initial showing that satisfies a judge that the burden of proof . . . can be met." Id. at 666, quoting Troxel v. Granville, 530 U.S. 57, 75 (2000). "To this end, any complaint filed under the statute should be detailed and verified or be accompanied by a detailed and verified affidavit setting out the factual basis relied on by the plaintiffs to justify relief." Id. Additionally, "[t]o survive a rule 12 (b) (6) motion to dismiss, a pleading must include 'factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief'" (quotation omitted).

Martinez v. Martinez-Cintron, 93 Mass. App. Ct. 202, 204 (2018), quoting Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). "Allegations, therefore, 'must be enough to raise a right to relief above the speculative level.'" Id., quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). "We review an order allowing a motion to dismiss de novo." Frazier v. Frazier, 96 Mass. App. Ct. 775, 777 (2019), citing Martinez, supra.

In her affidavit, the grandmother alleged that when she went to visit the defendant (mother) and grandchild in the hospital shortly after his birth, the mother told the grandmother to leave. The grandmother is not allowed any visits with her grandchild. The grandmother also alleged that the mother's father (who has a relationship with the grandchild) instructed the mother to not have a relationship with the grandmother, convinced the mother to "stop going to counseling," and had substance use issues and a criminal history. She alleged that the grandchild's father "never wanted children" and "takes medication for mental issues." The grandmother alleged that, without visits with her, the grandchild will suffer from the loss of (i) teachings about diversity, integrity, respect, compassion, and his family's history, (ii) love and care from the grandmother, (iii) supervision of health and other needs,

(iv) trips to the library, museum, and park, and (v) parties and celebrations.

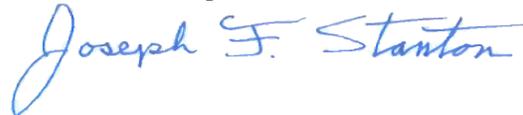
Acknowledging that she has no significant preexisting relationship with the grandchild, the grandmother nevertheless contends that there are "substantial questions of credibility," presumably related to other family members, and that the "proper disposition was to deny the motion and appoint a guardian ad litem." After reviewing the grandmother's allegations and accepting them as true, we conclude that they do not either plausibly suggest that court-ordered visitation between her and the grandchild is necessary to protect him from significant harm or rebut the presumption of parental fitness. The grandmother has not made any allegations upon which a judge could reasonably infer that the failure to grant the grandmother visitation would cause the grandchild significant harm by adversely affecting his health, safety, or welfare. Cf. Martinez 93 Mass. App. Ct. at 203, 206 (where grandmother only met grandchild once, had no significant relationship with grandchild, and wanted to see him on weekly basis but grandchild's mother would not allow it, grandmother's affidavit insufficient to state claim). Contrast Sher v. Desmond, 70 Mass. App. Ct. 270, 283-284 (2007) (judgment of dismissal reversed where grandmother's allegations "indicate the possibility of serious physical abuse of an ongoing nature

and a pattern of isolating the child from family and neighbors").

The motion judge correctly dismissed the petition under rule 12 (b) (6).

Judgment affirmed.

By the Court (Meade, Shin & Hershfang, JJ.<sup>2</sup>),



Clerk

Entered: August 11, 2022.

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<sup>2</sup> The panelists are listed in order of seniority.