

AFFIRMED; Opinion Filed November 27, 2018.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-18-00216-CV

**LASHONDA SMITH, Appellant
V.
CLYDE MALONE, Appellee**

**On Appeal from the 301st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DF-17-23407-T**

MEMORANDUM OPINION

Before Justices Myers, Evans, and Brown
Opinion by Justice Evans

Lashonda Smith appeals an order denying her motion to dismiss Clyde Malone's original suit affecting the parent-child relationship (SAPCR) regarding the couple's son pursuant to the Texas Citizen's Participation Act (TCPA). In her motion, Smith asserted Malone's lawsuit was filed in retaliation for her seeking child support from Malone. For the reasons set forth below, we affirm the trial court's order.

BACKGROUND

Smith and Malone had a son together in 2011. On November 28, 2017 Malone filed an original petition seeking orders for conservatorship with respect to the child, alleging there were no existing court-ordered conservators, custodians, or guardians. Malone requested Smith and he be named joint managing conservators, but that he have the exclusive right to designate the primary

residence of the child. In the petition, Malone indicated he was not requesting child support from Smith at this time.

Smith filed an answer to Malone's petition. She also filed a counter-petition in which she pleaded Malone was the father of their child and requested among other relief (1) she be designated the conservator with exclusive right to determine the child's residence, (2) child support from Malone, and (3) Malone have access or possession of their child on the first, third, and fifth weekends and fourteen days each summer. Smith pleaded all these requests were in the best interest of the child. Simultaneously, Smith filed a motion to dismiss Malone's petition under the TCPA. In her dismissal motion, Smith asserted Malone's lawsuit was filed in response to Smith's exercising "the right to petition" for child support. Specifically, Smith alleged and provided evidence of texts and/or phone calls she had with Malone prior to his filing of the SAPCR in which she informed Malone she had contacted the Texas Attorney General's Office for assistance in obtaining child support from him. In response, Malone indicated he would seek custody of their son. She also alleged on November 17, 2017, Malone stated he received a "child support letter today." In support of her motion, Smith further alleged the Attorney General's Office told her "they actively did things to open my case during November, and . . . [they] 'Judicially Filed an A.O.P.' on November 13, 2017, (these are their words, which they told me means a filing to accept paternity—which begins the child support collection process)."¹

Malone did not file a response to Smith's motion to dismiss. The trial court held a hearing on the motion and Smith's affidavit, along with other affidavits on her behalf, were admitted into evidence. Malone's attorney argued against the application of the TCPA to Malone's suit but submitted no controverting evidence. The trial court denied the motion. Smith timely appealed.

¹ An A.O.P. is an Acknowledgement of Paternity.

ANALYSIS

A. Standard of Review

We review de novo the trial court's ruling on a motion to dismiss under the TCPA. *See Mohamed v. Ctr. for Security Policy*, 554 S.W.3d 767, 773 (Tex. App.—Dallas 2018, pet. denied). As relevant here, to obtain a dismissal under the TCPA, Smith must first show by a preponderance of the evidence that Malone's original petition is based on, relates to, or is in response to Smith's exercise of the right to petition. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.005(b)(2) (West 2015).² Among other things, "exercise of the right to petition" includes a communication in or pertaining to (1) a judicial proceeding or (2) an executive or other proceeding before a department of the state or federal government. *See id.*, § 27.001(4)(A)(i) & (iii). Once Smith satisfies this burden, Malone then must establish by clear and specific evidence³ a prima facie case for each essential element of the claim in question to avoid dismissal. *Id.* at § 27.005(c). However, even if Malone meets his burden, the court must dismiss the action if Smith establishes "by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." *Id.* at 27.005(d).

² Smith does not contend seeking help from the Attorney General's Office to obtain child support implicated her right of free speech or her right of association. In her motion, Smith specifically argued she was exercising her right to petition as defined in the TCPA because seeking the assistance of the Attorney General's Office to obtain child support from Malone was "an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(4)(A)(iii) (West 2015). In her appellate brief, Smith contends her communications with the Attorney General's Office in petitioning for child support are communications in or pertaining to either: "a judicial proceeding", "an official proceeding, other than a judicial proceeding, to administer the law", or "an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government." *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.001(4)(A)(i), (ii), and (iii). Smith also cites the statute's definition of "governmental proceeding" in support of her argument that the TCPA applies.

³ "Clear and specific evidence is not a recognized evidentiary standard[,] and "[although it sounds similar to clear and convincing evidence, the phrases are not legally synonymous." *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015).

B. Applicability of the TCPA

Smith contends she met her burden to show the applicability of the TCPA because she proved Malone's custody suit was in response to Smith's communications to petition the government for assistance to obtain child support. Smith further argues SAPCR lawsuits are not among those types of legal actions enumerated in the statute as exempt from the TCPA. *See id.* at § 27.010 (enumerating exemptions). Malone, on the other hand, argues the TCPA does not apply to a SAPCR petition seeking orders for the best interest of the child and that his action had nothing to do with Mother's right to seek assistance from the Attorney General's Office in her effort to obtain an order for child support.

The TCPA provides a procedure for expeditiously dismissing a non-meritorious legal action that is based on, relates to, or is in response to the party's exercise of the right to petition, which refers to a wide range of communications relating to judicial, administrative or other governmental proceedings. *See In re Lipsky*, 460 S.W.3d at 586 n.5. In other words, the TCPA's purpose is to identify and summarily dispose of lawsuits designed only to chill First Amendment rights, not to dismiss meritorious lawsuits. *See id.* at 589. The legislature has instructed that the TCPA "shall be construed liberally to effectuate its purpose and intent fully." *See* TEX. CIV. PRAC. & REM. CODE § 27.011(b); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017). We interpret the statute in accordance with its express statutory language. *See Jordan v. Hall*, 510 S.W.3d 194, 197 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

As Smith correctly points out, the text of the TCPA does not contain an exception to its application that entirely exempts custody proceedings or family matters. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.010. We need not address the applicability of the TCPA to Malone's claims, however. Even assuming without deciding the TCPA applies, the record before us establishes that Malone has met his burden to establish by clear and specific evidence a prima facie case for

seeking orders of conservatorship with respect to his child and Smith has not established a valid defense.

C. Prima Facie Case

By Malone's SAPCR suit, he sought an order for joint managing conservatorship of his child with exclusive right to determine the child's primary residence. The public policy regarding conservatorship actions is to assure children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child, to provide a safe, stable, and nonviolent environment for the child, and to encourage parents to share in the rights and duties of raising their child after the parents have separated. *See* TEX. FAM. CODE ANN. § 153.001(a)(1), (2) and (3) (West 2014). The primary consideration for the court's determinations with respect to conservatorship is always the best interest of the child. *Id.* at § 153.002. Smith contends that once she established the TCPA applies to Malone's SAPCR, Malone had to demonstrate by clear and specific evidence a "prima facie" that he was entitled to "to have custody modified."⁴

A prima facie case, however, "refers to evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted." *See In re Lipsky*, 460 S.W.3d at 590. In determining whether a case should be dismissed under the TCPA, the court shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defenses is based. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 27.006(a). Smith seems to assert Malone must have presented evidence that the custody arrangement he sought was in the best interest of the child to avoid dismissal under the TCPA. We do not agree. The best interest of the child is not identified as an *element* of a conservatorship proceeding but is instead the appropriate standard for deciding issues of conservatorship between parents. *See In re J.R.D.*, 169 S.W.3d 740, 744

⁴ Although there were no existing orders of conservatorship, Smith asserts Malone sought to modify custody by his petition because the child was living with Smith.

(Tex. App.—Austin 2005, pet. denied). Moreover, subject to a provision addressing a party's history of domestic violence or sexual abuse not pertinent here, unless the court finds that appointment of the parent or parents would not be in the best interest of the child, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child. *See* TEX. FAM. CODE ANN. § 153.131(a). Finally, there is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. *See id.* at § 153.131(b).

As Smith's attorney conceded in oral argument, Malone, as the child's father, was entitled to seek orders of conservatorship. Smith's cross-petition for conservatorship judicially admitted that Malone was the child's father and that Malone should have some access to and possession of the child. As the trial court acknowledged at the hearing on Smith's motion to dismiss, "[E]ven if [Malone] has no pleadings on file, the Court is going to name a conservator out of one of the—if I don't grant your client's relief, the opposite, the flip side of that coin by default it's dad, even if he has no pleadings on file." To the extent the parties sought different relief with respect to their competing requests for conservatorship, such as the exclusive right to determine the child's residence, those differences implicated the trial court's remedy not whether the parties were entitled to orders of conservatorship. Because the record before us established that Malone presented a prima facie case that he was entitled to seek orders of conservatorship for his child, and Smith failed to establish a valid defense to his case, we conclude the trial court did not err in denying Smith's motion to dismiss.

CONCLUSION

On the record of this case, we affirm the trial court's order denying Smith's motion to dismiss.

/David Evans/
DAVID EVANS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

LASHONDA SMITH, Appellant

No. 05-18-00216-CV V.

CLYDE MALONE, Appellee

On Appeal from the 301st Judicial District
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Trial Court Cause No. DF-17-23407.

Opinion delivered by Justice Evans,

Justices Myers and Brown participating.

In accordance with this Court's opinion of this date, the order of the trial court denying appellant's motion to dismiss appellee's petition under the Texas Citizens' Participation Act is **AFFIRMED**.

It is **ORDERED** that appellee Clyde Malone recover his costs of this appeal from appellant Lashonda Smith.

Judgment entered this 27th day of November, 2018.