STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1130

In re the Matter of:
Mary Alice Hay,
Respondent,

vs.

Sloan Renee King,
Appellant.

Filed January 22, 2013
Affirmed
Crippen, Judge[*]
Dissenting, Worke, Judge

Hennepin County District Court
File No. 27-FA-08-4765

Valerie A. Arnold, Lisa A. Pletcher, Arnold, Rodman & Pletcher, PLLC, Bloomington, Minnesota (for respondent)

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Considered and decided by Worke, Presiding Judge; Chutich, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

CRIPPEN, Judge

Appellant, a former Minnesota resident who now lives in Arizona, challenges the district court's determination that Minnesota courts have continuing, exclusive jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) over her ongoing child custody dispute with respondent, who is a Minnesota resident. Appellant also disputes the court's order permitting respondent to enroll the child in a summer program during the child's Minnesota visits to respondent. We affirm.

FACTS

Appellant Sloan King and respondent Mary Hay had a domestic relationship that ended in January 2008. Appellant is the biological mother of NRK, who was born on July 15, 2003, during the parties' relationship. During the first four and one-half years of NRK's life, both parties acted as parents to the child; in the words of the district court's visitation order, "both provided for his daily needs, including feeding him, bathing him, getting him ready for bed, selecting daycare providers and transporting him to and from daycare. Both parties provided NRK with love, guidance, and nurturing." When the parties ended their relationship, appellant and NRK moved from respondent's house.

After the separation, appellant initially allowed respondent to have occasional visits with NRK, but appellant terminated these visits in June 2008. In July 2008, respondent petitioned the district court for third-party visitation rights; the court granted temporary visitation rights to respondent based on a finding that respondent had functioned as a parent to NRK. In December 2008, the parties attempted to mediate the visitation dispute; after

learning that appellant intended to move to Arizona, the court directed appellant not to leave before a planned hearing in January 2009. Despite the court order, appellant moved with the child to Arizona in December 2008. Upon this new circumstance, respondent amended her petition to request legal and physical custody of NRK.

In May 2009, the district court made a preliminary finding that respondent had established a prima facie case for a right to legal custody of NRK; the court noted evidence of the close, "parent-child" relationship between the child and respondent, supported by appellant until January 2008, and that appellant's abrupt move to Arizona and her post-separation interference with respondent's visitation and telephone contacts caused the child emotional distress and would endanger the child's well-being in the long run. The court also noted that appellant's clandestine removal of the child contravened a court order, that the child had home and community interests in Minnesota, and that respondent supported the child's relationship with appellant and the child's extended family. An evaluation of custody and visitation performed by a neutral third party in October 2009 concluded that both parties were fit to care for the child.

Shortly before trial of respondent's claim in January 2010, respondent voluntarily altered her request for relief to one for permanent visitation. In April 2010, following trial proceedings, the district court granted respondent permanent visitation privileges, to include visitation with the child in Arizona for nine weekends spread over nine months, visits in Minnesota for six days in December, and two non-consecutive weeks in Minnesota during the summer, increasing to two two-week periods in 2012. Respondent was also granted telephone contact and weekly computer-contact time with the child. The court ordered that

respondent could make "day-to-day decisions in order to meet NRK's basic needs" during the visitation period, but respondent was not permitted to enroll NRK in activities without appellant's permission.

The district court's April 2010 order contained findings of fact that were given renewed attention by the court in 2012, when the court determined its continuing jurisdiction: (a) respondent had "a bonded parent-child relationship" with the child as a result of sharing with appellant the care of the child since he was born; the child is emotionally attached to respondent;[1] (b) despite confusion and sadness of the child due to moving with appellant, according to an expert's observation, the move did not presently endanger the child's well-being—prompting respondent to presently seek only permanent visitation contacts; the child's best interests were served by respondent's continued visitation contacts, because of the child's attachment to respondent and serious consequences that could be suffered by the child if the relationship were severed; (c) appellant's move to Arizona with the child contradicted the court's direction and occurred without disclosing those plans to respondent until one week before the departure, two months after the plans for departure started, and without giving the child an opportunity to say goodbye to respondent; the genuineness of appellant's motives for moving, either as to the health of the child, the child's educational needs, or financial considerations, was questionable; and appellant has been largely responsible for the high level of conflict in the

[1] The supporting evidence included this observation of the custody evaluator: "[T]here would have been no way for an observer doing a 'blind' home or office visit without the benefit of background information to see [them] as having any relationship other than mother and son."

proceedings; (d) appellant's complaints that visits of the child interfere with her parent-child relationship were not reliable or credible, and that the court was more concerned that appellant has deliberately engaged in conduct intended to interfere with respondent's relationship with the child; respondent is motivated to avoid interfering with appellant's parent-child relationship and to do everything she can to insure that her visits complement the child's best interests.

The district court reviewed visitation contacts in April 2011 because of ongoing conflicts of the parties; on this occasion, appellant did not question the continued jurisdiction of the court. The court appointed a visitation expeditor, granted respondent permission to take NRK to scheduled activities occurring during respondent's visits with NRK in Arizona, and ordered respondent not to place NRK in daycare or enroll him in activities during her visitation time, without appellant's express permission.

In November 2011, after receiving notice of respondent's motion to address parenting time issues, appellant registered the visitation order with the Arizona court and asked that, under the UCCJEA, jurisdiction be transferred from Minnesota to Arizona. She also petitioned the Arizona court for an order substantially reducing respondent's visitation contacts, addressing fact issues already resolved in Minnesota. Respondent asked the Minnesota district court to retain jurisdiction and requested that she be allowed to enroll NRK in childcare or summer camp activities during her four-week summer visitation time in Minnesota.

In January 2012, the Minnesota district court conducted a joint hearing with an Arizona judge, followed by a conference with the Arizona judge. The Arizona court

determined that Minnesota should make a jurisdictional determination before any further litigation would occur in Arizona. On May 7, 2012, the Minnesota district court concluded that the Minnesota courts continue to have exclusive jurisdiction. Respecting current visitation conflicts, the court determined that respondent could enroll NRK in one of three identified summer programs; the court ordered that if respondent was unable to enroll NRK in one of the three identified programs, appellant could not compel respondent to use either appellant's mother or appellant's friends as an alternative to these summer camps. If the parties were unable to agree on alternative arrangements, the court would choose among competing proposals.

Addressing its jurisdiction in the 2012 order, the district court stated four reasons for its determination that respondent claims a right to legal custody and is thus a person acting as a parent. First, the court cited the detailed court determination that respondent had made a prima facie showing for her custody claim in 2009, confirmed by findings of fact in 2010, suggesting the legitimacy of respondent's claim of a right to custody under Minnesota law. Second, the court concluded that respondent's choice to pursue only third-party visitation coincided with court policy to carefully narrow the issues before submitting them to trial, and that "[t]he fact that [respondent] did not pursue her [custody] claim through trial does not negate the legitimacy of her claim." Third, the court cited respondent's 2008 assertions that appellant's actions endangered the welfare of the child, as well as the court's relevant 2010 findings of fact, and the court found that these circumstances "remain true to this day," that respondent "likely still could make a prima facie showing for third party custody under Minn. Stat. §257C.03, subd. 7(a)." The court found significance both in the child's

relationship with respondent and the danger to the child's emotional health associated with efforts of appellant that sever this relationship:

> The extraordinary circumstances that the Court found after trial continue today. [NRK] and [respondent] have continued their parent-child relationship through court-ordered monthly, winter break and summer visitation, phone and Skype contact. [Appellant] continues to try to restrict the relationship. This Court likely would find that cutting [respondent] out of [NRK's] life would endanger him emotionally. The claims made by [appellant] in her Arizona motion to restrict visitation are virtually the same as those rejected by this Court in the April 21, 2010 order.

Finally, in its accompanying memorandum, the court cited the conflict between appellant's actions and the purpose of the UCCJEA to avoid re-litigating issues in other states. The court noted appellant's concession at trial that respondent and the child have "a parent-child relationship."

Appellant filed a petition for a writ of prohibition, which this court denied on June 26, 2012, because the district court's May 7, 2012 order is appealable. On July 3, 2012, the district court denied appellant's motion for a stay of the May 7 order pending resolution of this appeal.

D E C I S I O N

Continuing Jurisdiction

Under the federal Parental Kidnapping and Prevention Act (PKPA), state courts making a child custody or visitation determination retain jurisdiction over the matter as long as the state remains the residence of "any contestant" and as long as the state otherwise has jurisdiction over the relevant question(s) under its own laws. 28 U.S.C.A. § 1738A(d)

(West 2006). It is not disputed that, for purposes of the PKPA, respondent both resides in Minnesota and is a "contestant" in the parties' current visitation dispute. Therefore, whether Minnesota has jurisdiction over the parties' visitation dispute depends on whether Minnesota courts have jurisdiction over the dispute under Minnesota law.

Minnesota law regarding jurisdiction over questions of child custody is set out in Minnesota's version of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), Minn. Stat. §§ 518D.101-.317 (2012). *See* Minn. Stat. §§ 518D.201, .202 (addressing initial and subsequent "child custody determinations," respectively). The UCCJEA defines a "child custody determination" and a "child custody proceeding" to include orders and "proceeding[s]," respectively, addressing "legal custody, physical custody, or visitation." Minn. Stat. § 518D.102(d), (e). Further, the type of jurisdiction addressed by the UCCJEA is subject matter jurisdiction. *In re Welfare of Children of D.M.T.-R.*, 802 N.W.2d 759, 762-63 (Minn. App. 2011); *see Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002) (noting that, under the UCCJEA's predecessor statute, the question was "whether the district court erred in finding that it lacked subject matter jurisdiction over [appellant's] custody claim"). Thus, whether Minnesota courts have subject matter jurisdiction to address the parties' visitation dispute is governed by the UCCJEA.

Continued Custody Under UCCJEA

With an exception not at issue here, the relevant part of the UCCJEA states that:

> [A] court of this state which has made a child custody determination . . . has exclusive, continuing jurisdiction over the determination until:

. . . .

> (2) a court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

Minn. Stat. § 518D.202. The Minnesota district court ruled that respondent is a "person acting as a parent" to NRK, and hence that the UCCJEA's requirements for Minnesota to retain exclusive continuing jurisdiction over the parties' visitation dispute are satisfied. Appellate courts review de novo the existence of subject matter jurisdiction under the UCCJEA. *Schroeder v. Schroeder*, 658 N.W.2d 909, 911 (Minn. App. 2003); *see Johnson*, 648 N.W.2d at 670 (stating that the same de novo standard of review was applicable under the UCCJEA's predecessor statute).

Because it is undisputed that the child and the child's parent do not presently reside in Minnesota, the question becomes whether respondent, who does reside in Minnesota, is a "person acting as a parent" to the child. Minn. Stat. § 518D.202(a)(2). The UCCJEA defines a "person acting as a parent" as

> a person, other than a parent, who:
>
> > (1) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
> >
> > (2) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

Minn. Stat. § 518D.102(n).

It is undisputed that respondent is a person other than a parent and thus is "acting as a parent" only if she satisfies the two prongs of the statutory definition.

The UCCJEA defines "physical custody" as "the physical care and supervision of a child." Minn. Stat. § 518D.102(o). Respondent does not currently have physical custody of NRK. But the record shows that the parties ended their relationship in January 2008, and that this child custody proceeding was commenced in July 2008 when respondent petitioned the district court for third-party visitation rights. The parties lived together with the child for the second half of 2007 and the first part of January 2008. Therefore, respondent shared "physical care and supervision" of the child for at least six months of the year before she started this action, and she satisfies the physical-custody prong of the definition of a "person acting as a parent."[2]

Respondent has not been "awarded legal custody by a court," the first stated alternative for the legal-custody prong of the definition of a "person acting as a parent." Minn. Stat. § 518D.102(n)(2). Therefore, if respondent is to satisfy this part of the definition of a "person acting as a parent[,]" it must be because respondent "claims a right to legal custody under the law of this state." *Id.* The UCCJEA does not define "legal custody." Nor does chapter 257C, the chapter under which respondent started this proceeding in July 2008. Chapter 257C does state, however, that chapter 518 applies to custody proceedings under chapter 257C. Minn. Stat. § 257C.02(a) (2012). And chapter

[2] For purposes of the first, physical-custody prong of the statute, respondent must show her actual physical custody for the requisite period of time, but the language does not require that this be pursuant to a judicial award of custody. By contrast, the legal custody alternative deals with a court award of legal custody or claim for legal custody. Minn. Stat. § 518D.102(n)(1), (2).

518 defines "legal custody" as "the right to determine the child's upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(a) (2012).

Neither the arguments nor the briefing create the occasion in this case for an exact statement on what will satisfy the "claims a legal right to custody" language in the legal-custody prong of the definition of a person "acting as a parent" for Minnesota law purposes. Rather, this case turns on appellant's confined assertion that the present-tense phraseology of the statute—"claims"—requires respondent, in order to be a "person acting as a parent[,]" to have a claim for legal custody of NRK pending during the current visitation dispute. Because respondent has not stated a claim to legal custody during the current visitation conflict, appellant's argument continues, respondent is not a person acting as a parent and, as a result, Minnesota lacks subject matter jurisdiction to address the parties' visitation dispute. Appellant argues that this view of the statutory language governs the case despite the district court's examination of the child's best interests and the interests of the parties that developed during the course of the proceeding and the preceding years. Although the Minnesota courts have yet to definitively address the relevant statutory provisions, we must reject appellant's argument on the record in this case.

Appellate courts review construction of statutes de novo, and our objective when construing a statute, is to effectuate the intent of the legislature, reading the statute as a whole. *Rohmiller v. Hart*, 811 N.W.2d 585, 589 (Minn. 2012) (citing *Toth v. Arason*, 722 N.W.2d 437, 440 (Minn. 2006); Minn. Stat. § 645.16 (2010)). Further, to the extent possible, Minnesota courts try to read Minnesota's version of the UCCJEA in a way similar to the way the same provisions are read in other states. *See* Minn. Stat. § 645.22 (2012)

(stating that "[l]aws uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them"); *Johnson*, 648 N.W.2d at 670 (citing Minn. Stat. § 645.22 (2000) for this proposition when interpreting the predecessor to the UCCJEA).

Addressing whether grandparents with whom a child lived were "claiming a right to legal custody" under the UCCJEA, the North Dakota Supreme Court recently noted that it had yet to address what was meant by "claims a right" to legal custody, and stated:

> A survey of judicial decisions in other states reveals there is no consistent interpretation of the requirement. However, national case law consistently presents three elements considered in determining if a person claims a right to legal custody under the laws of a state: 1) formality, 2) timing and 3) plausibility.

Schirado v. Foote, 785 N.W.2d 235, 241 (N.D. 2010). As set out below, on the record here, based on an examination of the elements reviewed in *Schirado*, the district court did not err in determining that respondent "claims a right" to legal custody.

It is evident, initially, that respondent made a formal statement of her claim for legal and physical custody in December 2008, immediately upon the occasion of discovering that appellant contradicted a court order and removed the child from Minnesota when respondent requested legal and physical custody of NRK.[3]

[3] In light of the absence of an earlier, definitive statement of law on the subject, it is significant that the *Schirado* court acknowledged that other states have required a lower level of formality under the UCCJEA. Hence, for example, *Schirado* cites *Adoption House, Inc. v. A. R.*, 820 A.2d 402, 408-09 (Del. Fam. Ct. 2008) (determining that "the right to claim legal custody" qualifies a person as one who claims a right). *Schirado*, 785 N.W.2d at 241. For purposes of our review, we have considered appellant's assertions in light of the more demanding considerations employed by the North Dakota court.

Regarding the timing of a claim for legal custody, *Schirado* concludes that the person's claim must occur at or before "the initial filing related to the instant litigation." *Id.* at 243 (rejecting the view in a small number of jurisdictions that the claim can occur at any point in the litigation). But the aim, the North Dakota court declared, is to avoid allowing a party "to divest a state of jurisdiction" by changing the analysis after the proceeding has begun. *Id.* Here, the proceedings first began in July 2008, and respondent claimed legal and physical custody in December 2008, before trial proceedings and after appellant removed the child from the jurisdiction. There is no evidence that the claim was stated in respect to matters of court jurisdiction. We find no authority to suggest under these circumstances that the time of respondent's formal claim is fatal to her qualification as a person who claims a right to legal custody.

Finally, *Schirado* indicates that the plausibility requirement is satisfied by a "colorable claim[,]" which it described as "a claim asserted in good faith and based on some plausible legal theory." *Id.* at 243-44; *see also Black's Law Dictionary* 282 (9th ed. 2009) (stating that a "colorable claim" is "[a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)"). The record here, as set out above, reflects an extensive relationship between respondent and the child that on multiple occasions was described by experts and the court alike as similar to a parent-child relationship. And the record reflects the danger to the child implicated in efforts to interfere with his relationship with respondent. Therefore, we have no reason to doubt that respondent's claim for legal custody was at least "colorable."

Appellant cites no authority requiring that a claim that otherwise demonstrates a person "claims a right" of legal custody would be deemed insufficient simply because it was withdrawn. In addition, as the district court observed, to put this weight on withdrawal of the claim would discourage stipulated resolutions of such claims. Such attention to withdrawal would not just encourage but require otherwise unnecessary litigation—a consequence that is not in the best interest of the child, the parties, or the courts. We also observe in this respect that the statute establishes continuing Minnesota jurisdiction without regard to the outcome of the Minnesota resident's claim. Thus, a non-parent claims a right to custody despite a court determination to deny the claim. *See O'Rourke v. Vuturo*, 638 S.E.2d 124, 128 (Va. Ct. App. 2006) (initial-jurisdiction question also requiring a "person acting as a parent"). It is not evident that respondent's claim is flawed by her willingness to withdraw the claim or remain supportive of an active visitation role.

In sum, the district court's recognition of its continuing jurisdiction coincides with considerations of the formality, timing, and plausibility of respondent's claim of right for legal custody. Appellant's contrary position, singularly premised on the current nature of respondent's claim and giving undue weight to pre-trial withdrawal of her formal claim for custody, is not persuasive and is not founded on relevant authority. We reach this conclusion on the analysis previously stated and after interpreting the statute in light of these additional considerations:

a. Appellant's interpretation of the statute rests on isolating the word "claims" from the statutory phrase, "claims a right." This excludes parties in circumstances with the child that establishes their right to claim custody. The added language of the statute enlarges the

reason to doubt that the legislature intended the narrow construction of "claims" that eliminates a person constituting an alternative custodian.

b. Our determination of continuing jurisdiction avoids an application of the law that frees a parent to defeat local jurisdiction, despite risks of danger to a child in the event of loss of the child's relationship with a caretaker in this state, by the simple mechanism of moving with the child to another jurisdiction. As the district court observed, appellant's narrow construction of the statute contradicts the purposes of the UCCJEA. Commentary to Minnesota's enactment declares that the Act "should be interpreted" according to purposes stated in the prior law, the Uniform Child Custody Jurisdiction Act (UCCJA); three (of five) purposes are as follows:

> (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
> . . .
> (3) Discourage the use of the interstate system for continuing controversies over child custody;
> . . .
> (5) Avoid relitigation of custody decisions of other States in this State[.]

Minn. Stat. Ann. § 518D.101 (official cmt.) (West 2010). The district court emphasized that appellant's move from Minnesota and her effort to re-litigate visitation and the underlying fact issues in Arizona were part of her attempt since 2008 to damage or defeat the child's relationship with respondent.

c. Appellant's construction of "claims" invites a late-filed claim for legal custody, in anticipation of a continued-jurisdiction determination, which conflicts with the preference

for an early claim that was recognized in *Schirado*. *See Schirado*, 785 N.W.2d at 243 ("[T]o qualify as a 'person acting as a parent' under the UCCJEA, a nonparent's claimed right to legal custody must occur prior to, or simultaneous with, the initial filing.").

d. We also observe that the UCCJEA definition of a person "acting as a parent," is set in the context of provisions, noted earlier, that define a "child custody determination" to include "questions of custody and visitation." Minn. Stat. § 518D.102(d), (n). The statute similarly defines a "child custody proceeding." Minn. Stat. § 518D.102(e). In these proceedings, respondent has consistently acted on her right to caretaking contact with the child, and the district court has repeatedly recognized that right. These additional provisions coincide with observations that respondent's claim is not lacking in form or timing.

e. Finally, the statutory interpretation and the determination of subject matter jurisdiction should reflect the historic insistence of the Minnesota judiciary, even in the application of statutory law, that the justice interests of adult caretakers do not predominate over the best interests of the child; instead, the child's best interests are the paramount consideration in child custody decisions. *State ex rel. Flint v. Flint*, 63 Minn. 187, 189, 65 N.W. 272, 273 (1895) (characterizing recognition of the paramount interest of the child as a "cardinal principle"); *see also Schisel v. Schisel*, 762 N.W.2d 265, 270 (Minn. App. 2009) ("A child's best interests are the fundamental focus of custody decisions" (citing *Flint*, 63 Minn. at 189, 65 N.W. at 273)); *Olson v. Olson*, 534 N.W.2d 547, 549 (Minn. 1995) (quoting *Flint*, 63 Minn. at 189, 65 N.W. at 273, and stating "we have reiterated that premise in many recent cases" (citation omitted)). The district court's jurisdiction analysis addresses risks to the child's vital interests in his contacts with respondent and avoids

unnecessary litigation and conflict that threatens to interfere with his relationship. Concerning the child's paramount interests, we also observe that each child custody case is unique such that the Minnesota courts have resisted for over two decades any effort to determine cases on narrow, presumptive standards. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 477 (2000) (observing absence of restrictive legal standards permitting appellate questioning of trial court best-interests determinations).

Having in mind the considerations just reviewed, together with our examination of the application of the governing statute to the particular circumstances of this case, we reject appellant's constrictive view of the UCCJEA to require a currently pending claim for legal custody in order to be a person acting as a parent and affirm the district court in the circumstances of this case. This conclusion rests on respondent's prior filing of a claim for legal custody. In addition, bearing especially on the plausibility of her claim, it is founded on the particular facts of the case respecting (a) respondent's bonded relationship with the child, (b) appellant's attempts to interfere with this relationship in the course of continuing conflict in the case, and (c) the child's notable interest in maintaining a valuable relationship with respondent. These considerations were detailed by the district court in its 2010 findings of fact and its rationale in its 2012 order on continuing jurisdiction.

Respondent resides in Minnesota and in the circumstances of this case she is not excluded from the definition of a "person acting as a parent." The district court did not err by reserving continuing, exclusive jurisdiction over this matter to the Minnesota courts.

State Connections

Even if the district court has not determined that its jurisdiction ends because of the residence of the parties and the child, the court also ends its jurisdiction if at some stage of the proceedings it determines that the parties and the child "do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships." Minn. Stat. § 518D.202(a)(1). And even if it determines it has jurisdiction, the district court "may decline to exercise its jurisdiction . . . if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." Minn. Stat. § 518D.207(a).

Appellant argues, alternatively, that the district court erred when it declined to find that Minnesota is an inconvenient forum. Appellant does not challenge the district court's related decision that the parties and the child have a significant Minnesota connection and that substantial evidence is available in this state concerning the child's care and relationships.[4]

The court's convenience determination concentrates on the relationship of respondent to the child, emphasizing that the child had and continues to have significant ties to Minnesota and observing prior court findings establishing that the best interests of the child

[4] The statute provides that the measure of significant connections is in respect to connections of "the child, the child's parents, and any person acting as a parent." Minn. Stat. § 518D.202(a)(1). Appellant's arguments relate to the subsection in the sense that she disputes respondent's status as a person acting as a parent. Also, in her inconvenience arguments, appellant asserts that the child's only remaining connection in Minnesota is the occurrence of Minnesota visits with respondent.

are served by maintaining his relationship with respondent in Minnesota. The court also observed that the continued conflict between the parties demanded appointment of a visitation expeditor who serves in Minnesota.

The Minnesota connections and evidence weigh in favor of the continued convenience of this forum at this time. The district court added that inconvenience of the Minnesota forum was due to appellant's choice to leave the jurisdiction; the court noted in its prior finding of fact that appellant's departure was motivated, at least partly, "to make it difficult for [respondent] to continue to have a relationship with [NRK]." The court also observed its superior position to enforce its orders, which appellant has consistently opposed. Finally, we note the appropriate steps of the district court when initiating 2012 proceedings in a joint interstate hearing and conference with an Arizona judge, followed by the Arizona court's conclusion that Minnesota would determine its jurisdiction before further litigation would occur in Arizona.

Minn. Stat. § 518D.207(b) sets forth eight factors for the court to consider when determining if it would be more appropriate for another state to exercise jurisdiction. These factors recognize the three-year absence of the child from the state and the child's residence and schooling in Arizona. *See id.* (b)(2). But the factors also include the Minnesota court's familiarity with the case and the matters of connections and evidence that the court directly addressed. *Id.* (b)(6), (8). The familiarity of the court is highlighted by the numerous orders that it has issued and by its closeness to the issue of enforcing its prior orders. Appellant has failed to show that the district court abused its discretion in determining the significant connection and the remaining convenience of the Minnesota forum for the case.

Enrollment in Summer Programs

Appellant argues that the district court abused its discretion by permitting respondent to enroll NRK in one of three identified summer youth programs during his visitation time with respondent in Minnesota. The court found appellant was trying "to unreasonably control NRK's time with [respondent] from afar" and that "enrollment in any of the three proposed summer camps is in NRK's best interests." The court concluded that it was within its broad discretion in visitation matters to permit respondent to enroll NRK in one of the identified programs.

The district court has broad discretion in visitation matters. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). A parent's fundamental right to the care, custody, and control of a child was recognized by the United States Supreme Court as "perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000). This liberty interest includes "the right of parents to establish a home and bring up children and to control the education of their own." *Id.* (quotation omitted). The court cautioned that "there will normally be no reason for the State to inject itself into the private realm" of the child with a fit parent. *Id.* at 68, 120 S. Ct. at 2061. But although parental rights are described as fundamental, it is equally recognized that the state "may intrude on parental rights in order to protect the general interest in the youth's well being." *SooHoo v. Johnson*, 731 N.W.2d 815, 822 (Minn. 2007) (quotation omitted). The supreme court noted that "a state, in its role as parens patriae, has a compelling interest in promoting relationships among those in recognized family units (for example, the relationship between

a child and someone in loco parentis to that child) in order to protect the general welfare of children." *Id.*

A third party's right to visitation to some extent conflicts with a parent's fundamental right under both the federal and state constitutions "to make decisions concerning the care, custody, and control of his or her children." *Rohmiller v. Hart*, 811 N.W.2d 585, 594 (Minn. 2012). The question is whether the parent retains a right to control aspects of visitation once a third party has been granted the right to unsupervised visitation. We find no authority suggesting, as appellant argues, that the custodial parent normally controls the activities of the child during established visitation periods when the visiting parent is not in fact in the child's immediate company. In any event, in the circumstances before us, the district court did not abuse its discretion in defining the parameters of respondent's visitation rights. Respondent has visitation rights by virtue of her bonded relationship with the child; her visitation with the child is unsupervised; the district court carefully reviewed the proposed programs and determined them to be suitable; and the district court found that respondent's proposal is in the child's best interests.

Affirmed.

WORKE, Judge (dissenting)

I respectfully dissent. There is no objective reason for Minnesota courts to continue to exercise jurisdiction over a child and his sole parent who no longer reside in this state. It is important to note that the only issue before this court is whether Minnesota has continuing jurisdiction over this matter. Our review does not include an examination of the merits of child custody, despite the majority's designation of this appeal as "an ongoing child custody dispute." In deciding jurisdiction, this court should be clear in its summary of facts: respondent is not the natural or adoptive parent of the child, has never been awarded physical or legal custody, withdrew a petition for custody before it could be addressed, and has no legal obligation to the child, such as a duty of support. Respondent has third-party visitation with the child.

The majority engages in a strained interpretation of an unambiguous statute in order to affirm the district court's jurisdiction decision. Under the UCCJEA, Minn. Stat. §§ 518D.101-317 (2012), Minnesota retains continuing, exclusive jurisdiction over a child-custody determination until a court determines that a child, the child's parent, and any "person acting as a parent" no longer resides in this state. Minn. Stat. § 518D.202(a). A "person acting as a parent" must either have "been awarded legal custody by a court or claim[ ] a right to legal custody under the law of this state." Minn. Stat. § 518D.102(n). As noted, respondent does not have an award of legal custody, nor is she asserting a current claim to legal custody. This statute is clear and unambiguous on its face; an appellate court does not engage in statutory construction of an unambiguous statute. *Rohmiller v. Hart*, 811 N.W.2d 585, 589 (Minn. 2012); *see* Minn. Stat. § 645.16 (2012).

The majority states that an alleged but withdrawn claim for legal custody satisfied the statute. "Legal custody" is not defined by the UCCJEA, but is defined for purposes of dissolution custody determinations as "the right to determine the child's upbringing, including education, health care, and religious training." Minn. Stat. § 518.003, subd. 3(a) (2012). The same section defines "joint legal custody" to mean that "both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training." *Id.* at subd. 3(b) (2012). The concept of visitation does not include these rights, and respondent has not asserted any right to participate in key decisions. The district court has repeatedly, until its most recent order regarding summer camp, acknowledged that appellant alone has the right to make key decisions regarding the child. In its 2011 order, the district court noted that respondent "is an interested third party and not a legal parent. As such, [respondent] does not have the rights of a legal parent to decide such things as child care." And this court previously determined that appellant "is the child's only parent and only custodian." *King v. Hay*, No. A09-0011 (Minn. App. Jan. 27, 2009) (order). The question of who is the legal custodian of the child has thus been decided and may not be reconsidered. *See In re Estate of Sangren*, 504 N.W.2d 786, 788 n. 1 (Minn. App. 1993) (stating that matters addressed by a special term panel of this court are final and not subject to reconsideration). Respondent's claim is to the right to visit, not the right to legal custody.

The majority asserts that although respondent is not currently asserting a right to legal custody, she nevertheless claims a right because she could establish a prima facie

case to third-party custody. The majority cites *Schirado v. Foote*, 785 N.W.2d 235, 241 (N.D. 2010), noting that the court there concluded that a right to a claim of legal custody depended on "formality, timing, and plausibility."[5] The majority notes that respondent filed a petition for legal custody, establishing the element of formality; *but respondent withdrew this claim*. Under the majority's interpretation, a claim never ceases, never becomes unripe, never needs to be scrutinized by a court, but continues to maintain its vitality even after the lapse of many years, so long as a party at some time contemplated making a claim. There is no formal claim for custody pending here and any claim was short-lived. The statutory language, "*claims* a right to legal custody" is unambiguously written in the present tense. Minn. Stat. § 518D.102(n) (emphasis added); Minn. Stat. § 645.08 (2012) (stating that words of a statute must be interpreted according to their plain meaning).

The majority notes that *Schirado* requires a claim to occur at or before an initial filing. Respondent did indeed file a petition at the appropriate time – but withdrew it. Finally, the majority states that respondent's claim is colorable or plausible. But it is unlikely that respondent could set forth a prima facie case for interested third-party custody. Nothing in this record suggests that appellant is an unfit parent, which is the primary reason for awarding custody to a third party. *See* Minn. Stat. § 257C.03, subd.

[5] In any event, the facts of *Schirado* are distinguishable from this matter. In *Schirado*, the father of the child brought suit against the mother, seeking custody of the child, who lived on the Fort Berthold Indian Reservation with his grandparents. 785 N.W.2d at 236. The child's mother had placed the child with the grandparents while she attended school in North Dakota. *Id.* The North Dakota Supreme Court remanded the matter for findings on the district court conclusion that the reservation was the home state for jurisdictional purposes. *Id.* at 244.

7(a) (1) (i-ii) (2012). Like the district court, the majority relies on the third reason: extraordinary circumstances. *Id.* at (a) (1) (iii) (2012). But "extraordinary circumstances" are more than just a litany of best interest factors; they must be "of a grave and weighty nature . . . to support the grant of permanent custody to a third party" over the rights of the natural parent. *In re Custody of N.A.K.*, 649 N.W.2d 166, 176 (Minn. 2002).

Although the district court and the majority discuss at length the bond between respondent and the child and declare that appellant continually seeks to disrupt that bond, the record here confirms that since the third-party visitation order was entered, respondent has enjoyed frequent in-person visits with the child, weekly telephone and Skype contact, extended summer visits, and permission to participate in or to escort the child to activities. Appellant may be reluctant, unhappy, or recalcitrant, but the fact remains that she has complied with the orders, and respondent has liberal access to the child. Indeed, appellant must pay for the child's travel costs to visit with respondent, although she receives no support from respondent; despite these costs, visitation continues to occur. Respondent has not, and cannot, demonstrate that "extraordinary circumstances of a grave and weighty nature" exist that would support a wholly theoretical bid for interested third-party custody. The majority itself acknowledges that "the move [to Arizona] did not . . . endanger the child's well-being."

The majority also characterizes the child as having "significant ties" to Minnesota. But as set forth in the majority's factual statement, the child visits respondent for six days each December and for a total of four weeks each summer; the majority does not note

that the child spends the remaining 47 weeks in Arizona, attending school, participating in community activities, and residing in a new blended family. Despite the positive findings that the child is well-adjusted and thriving in Arizona, the district court and the majority continue to rely on the preliminary findings made in 2009 that respondent established a prima facie claim for a right to legal custody of the child. But a prima facie case "simply means one that prevails in the absence of evidence invalidating it." *Tousignant v. St. Louis County*, 615 N.W.2d 53, 59 (Minn. 2000) (quotation omitted). It establishes nothing, until it is tested, rebutted, explained, contradicted, or proved. *Id.* Respondent's prima facie claim was never put to such a test and cannot serve as a basis for the existence of a continuing claim.

The Official Commentary to section 202 of the UCCJEA states that when "the named persons no longer continue to actually live within the State, . . . unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases." Minn. Stat. Ann. § 518D.202, official cmt (West 2012). The official comment further states, "The Conference decided that a remaining grandparent or other third party who claims a right to visitation, *should not suffice to confer exclusive, continuing jurisdiction on the State* that made the original custody determination after the departure of the child, the parents and any person acting as a parent." *Id.* (emphasis added). We are confronted with just this situation in this case.

As an error-correcting court, we must resist the urge to identify statutory ambiguity where none exists, in particular when we deal with constitutional rights. A

parent's fundamental right to the care, custody, and control of a child was recognized by the United States Supreme Court as "perhaps the oldest fundamental liberty interest[ ]." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2060 (2000) (quotations omitted). This liberty interest includes "the right of parents to establish a home and bring up children and to control the education of their own." *Id.* The Court cautioned that

> so long as a parent adequately cares for his or her children (*i.e.* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at 68-69, 120 S. Ct. at 2061. Appellant is the natural parent of the child; appellant and the child have left the state, and respondent, as a third party with visitation rights, had and has no standing to object to this move, as this court agreed in its special term order. *Hay*, No. A09-0011 (stating that "we have serious concerns about whether [the statutes permitting a court to temporarily restrain a party from leaving the state] can be used to require the child to stay in, or be returned to, Minnesota.")

Finally, the tenor of both the district court and the majority opinion suggests that Arizona, which also adopted the UCCJEA, will not fairly address visitation. This smacks of a continuing power struggle over an appellant who initially ignored what may have been an unenforceable court order. Minnesota at this point has very little control over a parent and child who no longer reside in this state. For all of these reasons, Minnesota should not continue to exercise jurisdiction over this matter, and the district court's order permitting respondent to select summer programs for the child should be set aside.