Which County DSS Files the A/N/D Petition: That Is the Jurisdictional Question!

*SINCE THIS POST WAS PUBLISHED, THE N.C. SUPREME COURT REVERSED AND REMANDED THE COURT OF APPEALS DECISION DISCUSSED BELOW. A new blog post discussing the NC Supreme Court decision can be read here.

Earlier this year, the North Carolina Court of Appeals published In re A.P., 800 S.E.2d 77 (2017), which held that the county DSS that had an open child protective case did not have standing to file a neglect and dependency petition. As a result, the district court did not have subject matter jurisdiction to hear the action, and the adjudication and disposition orders were vacated. Since *In re A.P.* was decided, there are lots of questions about when a county DSS has standing to file an abuse, neglect, or dependency (A/N/D) petition and what happens in conflict of interest cases requiring a case to be transferred to a different county DSS.

In re A.P. -- The Facts and 3 Counties

A.P. was born in Cabarrus County when her mother was living there. Shortly after A.P. was born, her mother was involuntarily committed in a facility in Mecklenburg County. A.P.'s mother agreed to a safety plan with Cabarrus DSS that during her in-patient treatment A.P. would live in Rowan County with Ms. B, a staff member of the home where mother and A.P. had been living. When mother was discharged, she and A.P. moved into her grandfather's (A.P.'s great-grandfather's) home in Mecklenburg County. Cabarrus DSS transferred the protective services case to Mecklenburg DSS. Mother left her grandfather's house with A.P., which ultimately led to A.P. returning to Ms. B in Rowan County. Mecklenburg DSS continued to work with mother, who agreed A.P. could stay in Rowan County. Rather than engage in needed treatment and other services in Mecklenburg County, mother temporarily moved in with a friend in South Carolina but returned to Mecklenburg County, where she was jailed and later hospitalized. Mother eventually notified Mecklenburg DSS that she moved to Cabarrus County. Mecklenburg DSS contacted Cabarrus DSS to transfer the case back but Cabarrus DSS was unable to confirm that mother was living there. The next day (which was four months after A.P. was placed with Ms. B for the second time), Ms. B informed Mecklenburg DSS she could no longer care for A.P. Mecklenburg DSS filed an A/N/D petition, obtained a nonsecure custody order, and retrieved A.P. from Rowan County. A.P. was adjudicated neglected and dependent, and the disposition order placed A.P. in the custody of Mecklenburg DSS. Mother appealed on the basis that Mecklenburg DSS did not have standing to file the A/N/D petition.

In re A.P. -- Standing and the Definition of DSS Director

Standing is a jurisdictional issue. The petitioner in an A/N/D action must have standing to invoke the court's jurisdiction to judicially resolve the merits of the case. Under G.S. 7B-401.1(a), only a

county DSS director (or authorized representative) has standing to file a petition alleging abuse, neglect, or dependency. The court of appeals looked to the definition of director at G.S. 7B-101(10), which says "the director of the county department of social services *in the county in which the juvenile resides or is found*…." and held that only a director of a county DSS where the child resides or is found at the time the petition is filed has standing. The court of appeals held that Mecklenburg DSS did not have standing because the child was found and resided in Rowan County. Based on that, Rowan DSS had standing to file the A/N/D petition.

- **Residence**

The court of appeals recognized that the Juvenile Code does not define child's residence and looked to the venue statute (G.S. 7B-400), which refers to G.S. 153A-257 – the statute that defines a child's legal residence for purposes of social services.

- A minor has the residence of the parent or other relative with whom she resides.
- If the minor does not reside with a parent or relative, and is not in a foster home, hospital, mental institution, nursing or boarding home, educational institution, confinement facility or similar institution or facility, *she has the legal residence of the person with whom she resides* (emphasis in *In re A.P.*).
- Any other minor has the legal residence of mother, or if her residence is unknown, then the legal residence of father, and *if both parents' residences are unknown, the minor is a legal resident of the county in which she is found (*emphasis in *In re A.P.)*.

The court of appeals noted that (1) the petition did not allege the address or residence of A.P. or mother and (2) A.P. remained in her mother's legal custody until the nonsecure custody order was obtained. In applying G.S. 153A-257(a)(3), the court of appeals determined that A.P. had resided with Ms. B in Rowan County for four months since Ms. B's home was not a foster home or other designated facility or institution. As a result, A.P.'s legal and physical residence was Rowan County with Ms. B. It is not clear from the opinion whether the court made that determination based on A.P. physically residing with Ms. B for four months or whether it was because mother's residence (there is no mention of a father) was unknown.

- **Found**

The court of appeals does not discuss "found". Other opinions have interpreted "found" to mean where the child is physically present. *In re J.L.K*., 165 N.C. App. 311 (2004); *In re Leonard*, 77 N.C. App. 439 (1985). The opinion simply states that Mecklenburg DSS found A.P. in Rowan County. It is not known from the facts whether Mecklenburg DSS brought A.P. to the county before or after it filed the petition and nonsecure custody was ordered. It appears that the petition did not allege where A.P. was found. If A.P. was present in Mecklenburg County when the petition was filed and that fact was alleged in the petition, Mecklenburg would have had standing to file the petition.

In re A.P. -- The Take Away

A county DSS should include necessary jurisdictional facts regarding standing in the petition. Regarding a child's residence, the Juvenile Code requires the petition include (1) the child's address, (2) the address of each party [note, absent a statutory exception, parents are parties, G.S. 7B-401.1(b)], and (3) the information required by G.S. 50A-209, which includes the child's present address or whereabouts and the names and present addresses of persons with whom the child has lived with during the previous five years. G.S. 7B-402(a), (b). This information should be sufficient to establish the child's residence. The petition could also specifically allege the child's residence. When in doubt about the child's residence, a county DSS director will have standing when the child is physically present in the county at the time the petition is filed. The petition should allege the child's presence in the county at the time the petition is filed.

In re A.P. -- Unanswered Questions

- **When does a child's residence change?**

Earlier this year, the NC Department of Health and Human Services Division of Social Services ("DHHS") established a safety planning policy that set forth four types of safety plans, one of which involves the separation of the child and a parent or other household member. *See* DHHS, Family Services Manual Ch. VIII, § 1408 (July 2017). A parent and DSS may enter into a "temporary parental safety agreement" as part of its assessment and provision of protective services, where a child may stay in an agreed to safety provider's home for a certain period of time. These agreements occur before any court action. An example is A.P.'s placement with Ms. B. *In re A.P.* raises questions about the child's residence. Does it change as soon as a child stays with an agreed to temporary parental safety provider or does a certain period of time have to pass? If so, how much time? Does the child's residence only change if the both parent's residences are unknown?

If the child is with a temporary safety provider in another county and there is a disagreement about which county is the resident county, G.S. 153A-257(d) authorizes DHHS to resolve the issue. A county DSS may want to obtain documentation of that decision to attach to the A/N/D petition to establish the child's residence. A county DSS also satisfies standing requirements by having the child physically located in the county at the time the petition is filed, and that fact should be alleged in the petition. A temporary parental safety agreement may need to include transportation issues regarding the child, e.g., the parent and/or safety provider will transport the child to the county DSS office or agreed to location upon request.

- **What happens when a county DSS has a conflict of interest (COI)?**

When a COI exists for a county DSS, it transfers the case to a partner DSS. The ability to make the transfer is a result of the structure of North Carolina's child welfare system, which is a state

supervised, county-administered system. Although 100 different county child welfare agencies (DSS) provide child welfare services to children and families in North Carolina, DHHS is designated as the single state agency responsible for administering or supervising the administration of social services programs, which include child welfare services. G.S. 108A-71; *see* G.S. 108A-1; 108A-74; 7B-101(8a). A county DSS acts as an agent of DHHS. G.S. 108A-14(a)(5); In re N.X.A., ___ N.C. App. ___ (Aug. 1, 2017). The state Social Services Commission adopts binding regulations that the county DSS's must follow when providing child welfare services. G.S. 143B-153; 108A-74.

The state regulations require a county DSS to refer an assessment of a report of abuse, neglect, or dependency to another county DSS when there is a conflict of interest (COI). 10A N.C.A.C. 70A.0103. The regulation lists circumstances that create a COI, such as when the report involves an employee of the county DSS, but includes a catch-all for "when in the professional judgment of the county director, the department would be perceived as having a conflict of interest in the conduct of a child protective services investigation…." The regulation does not address who files the A/N/D petition when court action is necessary. However, G.S. 7B-400(b) authorizes a county DSS director who conducts an assessment in another county because of a COI to file a resulting petition in either county. This statute addresses venue. Does this language distinguish COI cases from the holding in *In re A.P.*? Does it give meaning to the introductory sentence to the definition statute, "unless the context clearly requires otherwise"? G.S. 7B-101. Or, does this statute simply give the partner DSS the right to choose which county to file in (venue) while the child is physically located in the county of the partner DSS at the time the petition is filed? What happens when the child is unable to be moved, for example the child is hospitalized? Does the partner county DSS never have the ability to file the action despite the language in G.S 7B-400(b)?

Although not binding, DHHS has issued a COI policy that addresses case transfer and the responsibilities of the partner and resident (the one with the COI) DSS. The policy goes beyond the assessment period that is addressed in the regulation, and states the partner DSS is responsible for filing the petition. *See* Family Services Manual, Ch. VIII, §1410 (Dec. 2016). Under *In re A.P.*, the county DSS director will only have standing if the child is physically present (or residing) in the county when the petition is filed. The partner DSS may not be willing or able to have the child brought to the county (e.g., it does not have authority to transport the child; the child cannot be moved; or it is not in the child's best interests because the child would miss school). If the child is not physically present in the county at the time the petition will be filed, there appears to be only two options available to protect the child. First, despite the policy, the resident county DSS files the petition since it has standing as the county were the child resides. The partner DSS could intervene as a DSS with an interest in the proceeding and take the lead on providing services to the family. *See* G.S. 7B-401.1(h). *See also* Dear County Directors letter, CWS-28-2017. Second, the partner DSS files the A/N/D petition and raises with the court the jurisdictional issue such that the court decides whether a COI distinguishes the case from *In re A.P*. *See* G.S. 7B-800.1(5a). If the court decides there is no jurisdiction, that order may be appealed under G.S. 7B-1001(a)(1). If the court determines the county DSS does have standing as a COI case, note that subject matter jurisdiction can be raised at any time and ultimately an appellate court may disagree with the trial court.

Finally, an individual's placement on the state Responsible Individuals List results from a county DSS director's determination that abuse or serious neglect of a child occurred and the person is the responsible individual (RI). G.S. 7B-320(c). The director must send notice to the alleged RI. G.S. 7B-320(a). The alleged RI has a right to file for a judicial review in the district court in the county where the abuse or serious neglect report arose. G.S. 7B-323(a). The matter should be calendared for hearing within 45 days of when the petition is filed. G.S. 7B-323(b). If the child does not reside in the partner DSS county, at what point in the RIL process does the child have to be found for the director to have authority to place the person on the RIL? Or, since the director is not filing a petition, does the holding of *In re A.P.* not apply?

There are many more questions than answers I know. What are your thoughts?