

CASE NO. S-19-0215

IN THE NEBRASKA SUPREME COURT

IN RE INTEREST OF JEREMY UNDERWOOD, et al.,
Children Under Eighteen Years of Age

APPEAL FROM THE SEPARATE JUVENILE COURT OF
DOUGLAS COUNTY, NEBRASKA

The Honorable Chad Brown
Presiding Juvenile Court Judge

APPELLEE'S REPLY BRIEF TO APPELLANT'S ANSWER BRIEF ON CROSS-APPEAL
TIFFANY GARDNER
Natural Mother.

Prepared and Submitted by:

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PROPOSITIONS OF LAW

I. THE STATE IS NOT REQUIRED TO PROVE PROPER VENUE, BECAUSE PROOF OF VENUE IS IMMATERIAL TO THE DETERMINATION OF WHETHER A JUVENILE

FALL WITHIN THE MEANING OF § 43-247. *In re Interest of Breana*, 18 Neb.App. 910, 795 N.W.2d 660, (2011)

II. JURISDICTION OF THE SUBJECT MATTER MEANS THE AUTHORITY TO HEAR AND DETERMINE BOTH THE CLASS OF ACTIONS TO WHICH THE ACTION BEFORE THE COURT BELONGS AND THE PARTICULAR QUESTION WHICH IT ASSUMES TO DECIDE. *In re Interest of Breana*, 18 Neb. App. 910, 795 N.W.2d 660, (2011).

III. THE COUNTY ATTORNEY OR CITY ATTORNEY, HAVING KNOWLEDGE OF A JUVENILE WITHIN HIS OR HER JURISDICTION WHO APPEARS TO BE A JUVENILE DESCRIBED IN SUBDIVISION (1), (2), (3)(B), OR (4) OF SECTION 43-247 AND TAKING INTO CONSIDERATION THE CRITERIA IN SECTION 43-276, MAY PROCEED AS PROVIDED IN THIS SECTION. *Neb. Rev. Stat. § 43-274(1)*.

IV. UNDER THE JUVENILE CODE, THE JUVENILE COURT HAS SUBJECT MATTER JURISDICTION OVER “ANY JUVENILE” WHO LACKS PROPER PARENTAL CARE BY REASON OF THE FAULT OR HABITS OF THE CHILD’S PARENTS. THE JUVENILE CODE DOES NOT INDICATE THAT THIS SUBJECT MATTER JURISDICTION IS LIMITED BY THE CHILD’S TEMPORARY RESIDENCE IN ANOTHER COUNTY. *In re Interest of Breana*, 18 Neb. App. 910, 795 N.W.2d 660, (2011).

V. IT IS ERROR FOR A JUVENILE COURT TO DISMISS A PETITION BECAUSE A CHILD IS CURRENTLY RESIDING IN A DIFFERENT COUNTY. *In re Interest of Breana*, 18 Neb. App. 910, 795 N.W.2d 660, (2011) citing *In re Interest of Tegan V.*, 18 Neb.App. 857, 794 N.W.2d 190 (2011)

SUMMARY OF ARGUMENTS

Ms. Tiffany Gardner (hereinafter Appellee) concedes that venue was proper, however, avers that the juvenile court erred in finding that it has jurisdiction over this matter where the state failed to offer evidence showing that the children resided in Douglas County, Nebraska or that the alleged events occurred in Douglas County, Nebraska thus conferring authority upon the county attorney to file its neglect petition and giving the trial court subject matter jurisdiction over the matter.

ARGUMENT

I.

THE APPELEE CONCEDES THAT VENUE WAS PROPER.

The Appellee concedes that venue was proper pursuant to *In re Interest of Breana*, 18 Neb. App. 910, 795 N.W.2d 660, (2011). *In In re Interest of Breana*, the parents lived in Douglas County while the child of Interest resided intermittently with the mother's grandmother in Cass County for over a year because the mother was unable to care for her properly. The mother removed the child from her grandmother's home on several occasions and were taken back to the mother's home in Douglas County because the grandmother reported her drug use to authorities. The mother always returned the child to her grandmother's home because she was unable to care for child due to continuing drug use. At the time of the petition and the motion for temporary custody were filed, the parents were threatening to take the child from her grandmother again. The mother filed her motion to dismiss for lack of personal jurisdiction and venue because the child did not reside in Douglas County but continued to reside in Cass County. In *In re Interest of Breana*, the court found that "the State is not required to prove

proper venue, because proof of venue is immaterial to the determination of whether a juvenile fall within the meaning of § 43-247.” Thus, where the Appellee’s children resided is not determinative on the issue of venue.

II.

THE JUVENILE COURT ERRED WHEN IT FOUND THAT THE JURISDICTION OF THE COURT IN THIS MATTER WAS PROPER.

The state (hereinafter Appellant) does not appear to address the Appellee’s argument in its brief that the trial court erred when if found that the jurisdiction of the court in this matter was proper. Venue and subject matter jurisdiction are not the same. “Jurisdiction of the subject matter means the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to decide. *Id.*” *In re Interest of Breana*, 18 Neb. App. 910, 795 N.W.2d 660, (2011). “The county attorney or city attorney, having knowledge of a juvenile within his or her jurisdiction who appears to be a juvenile described in subdivision (1), (2), (3)(b), or (4) of section 43-247 and taking into consideration the criteria in section 43-276, may proceed as provided in this section.” *Neb. Rev. Stat. § 43-274(1)*. Arguably, if the events that gave rise to the filing of the petition and/or a juvenile is not residing in the county in which the county attorney exercises his or her authority then that county attorney lacks any authority to initiate neglect proceedings pertaining to that juvenile which in turn deprives the court of subject matter jurisdiction to hear the case.

In *In re Interest of Breana*, as stated above, the child had been removed from her grandmother’s home in Cass County on several occasions by her mother and taken back to her parent’s home in Douglas County, Nebraska. At the time of the filing of the neglect petition in Douglas County, Nebraska, the child was temporarily residing in Cass County, Nebraska, and

the mother was threatening to remove the child again from the grandmother's home. The parents filed motions to dismiss prior to the hearing on the allegations in the petition, and the court granted the motion. On appeal, the court found that the trial court in Douglas County, Nebraska had subject matter jurisdiction, despite the child temporarily residing in Cass County, Nebraska. *In re Interest of Breana* specifically found that "Under the juvenile code, the juvenile court has subject matter jurisdiction over "any juvenile" who lacks proper parental care by reason of the fault or habits of the child's parents. The juvenile code does not indicate that this subject matter jurisdiction is limited by the child's **temporary residence** in another county. And we are unable to find any other statute or case law which suggests that a juvenile court must dismiss a petition because the child **temporarily resides** in a different county. In fact, this court has recently held that it is error for a juvenile court to dismiss a petition because a child is **currently residing** in a different county. *In re Interest of Tegan V.*, *supra* (reversing juvenile court's dismissal of petition when child was placed outside of county after original petition was filed)."

Unlike in *In re Interest of Breana*, where a petition was filed in the county where the juvenile previously was living in or domiciled, in the present case there was no evidence presented at the adjudication hearing that the children had at any time resided in Douglas County, Nebraska or was residing in Douglas County, Nebraska at the time of the filing of the petition. The testimony of Christensen on direct examination that the children were located in Douglas County, Nebraska at the time of the filing of the affidavit (62:100-12, 62:13-15) is not sufficient to show that the children at any time resided in Douglas County, Nebraska. Further, there was no evidence presented at the adjudication hearing that the events giving rise to the filing of the petition occurred in Douglas County, Nebraska thus conferring authority upon the

county attorney to file its neglect petition and giving the trial court subject matter jurisdiction over the matter.

As stated in Appellee's Brief on Cross-Appeal, Ms. Christensen testified that she saw Jeremy and interviewed the Appellee the day of or the next day of Jeremy's birth in October 2018 and visited Ashton and Savannah at the hospital (51:15-20, 66:8-25, 69:19-21) prior to the removal. However, when asked on direct examination by the state as to what hospital she was at, Ms. Christensen testified that she did not recall which hospital (51:7-8). Ms. Christensen did not testify as to what county or state that the hospital was located in. Further, Ms. Christensen testified that she subsequently went to Tina Gardner's home where Ashton and Savannah resided and observed the condition of the home (70:12-15, 71:7-20, 73:10-24, 74:14-16). However, Ms. Christensen did not testify as to what county or state that Tina's home, where Savannah and Ashton resided, was located in. There was simply no evidence presented by the state during the trial as to where the alleged incidents in its petition occurred, and without that evidence, the court cannot find that it has jurisdiction in this matter.

CONCLUSION

The Appellee concedes that that venue was proper, however, avers that the court lacked subject matter jurisdiction. Though there was testimony that the children were located in Douglas County, Nebraska at the time of the filing of the affidavit, there was no evidence presented by the Appellant that the children resided in Douglas County, Nebraska or a showing that the alleged events occurred in Douglas County, Nebraska thus conferring authority upon the county attorney to file its neglect petition and giving the trial court subject matter jurisdiction over the

matter. For the foregoing reasons, Appellee respectfully prays that the Nebraska Supreme Court find that the lower court lacked jurisdiction and dismiss this matter on this ground.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the **26th day of August 2019**, a true and correct copy of the above foregoing Appellee's Reply Brief to Appellant's Answer to Cross-Appeal was sent by electronic delivery/email to: Tony Hernandez, deputy county attorney, tony.hernandez@douglascounty-ne.gov; Jamie Cooper, guardian ad litem, jamie@johnsonpeknylaw.com; and Jerri James, HHS attorney, Jeri.James@nebraska.gov; Jacki Barfield, attorney for father, Jbarlaw@aol.com.

/s/ Reginald Young

Reginald Young, Attorney

Certificate of Service

I hereby certify that on Monday, August 26, 2019 I provided a true and correct copy of this *Reply Brief Appellate* on Cross Appeal to the following:

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Signature: /s/ Reginald Young (20760)