

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 26, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0575-FT

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

In the Interest of Kurt J.B.,
A Person Under the Age of Eighteen:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KURT J.B.,

Respondent-Appellant.

APPEAL from orders of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Order affirmed in part and reversed in part; order reversed.*

NETTESHEIM, J. Kurt J.B. appeals from a juvenile court dispositional order adjudging him delinquent and from an order denying postdisposition relief. Kurt argues that the dispositional order improperly imposed, and then stayed, a transfer of his custody to the Department of Health

and Social Services for placement at the Ethan Allen School. Based on this defect, Kurt also contends that a subsequent order lifting the stay was of no legal effect.

We agree with Kurt's arguments. We conclude that § 48.34, STATS., does not permit the juvenile court to simultaneously: (1) impose and stay a transfer of a child's legal custody to the department for placement at a secured correctional facility, and (2) then place the child under supervision. We reverse that portion of the dispositional order imposing and staying transfer of Kurt's legal custody to the department for placement at Ethan Allen. We affirm that portion of the order placing Kurt under the supervision of the local department.

Since we hold that the original transfer of Kurt's legal custody was void, we also hold that the juvenile court's later lifting of the stay against the transfer was of no legal effect. We also reject the State's further argument that the postdispositional proceedings in this case were a change in placement proceeding within the meaning of § 48.357, STATS., which served to correct the defect in the original order.

The facts pertaining to the appellate issues are not disputed. Kurt was adjudicated delinquent following his admissions to charges of disorderly conduct, burglary and disorderly conduct while armed. Two additional charges, theft and carrying a concealed weapon, were dismissed but read in. At the dispositional hearing on September 22, 1994, the juvenile court ordered the transfer of Kurt's legal custody to the state Department of Health and Social

Services for placement at Ethan Allen. The court, however, stayed this transfer of custody and placed Kurt under the supervision of the Walworth County Department of Human Services. Kurt did not object to this disposition.

The juvenile court also imposed many conditions of Kurt's supervision, one of which required that Kurt not become involved in any further violations of the law. Four days later, Kurt was involved in a fight at school and was cited yet again for disorderly conduct. That same day, a juvenile court intake worker filed an affidavit reciting this incident to the court.

Based on this information, the juvenile court signed a *capias* directing the sheriff to apprehend Kurt and deliver him to Ethan Allen. The sheriff carried out the order. We accept the parties' characterization of the *capias* as an order lifting the stay.

Kurt responded with various motions challenging the juvenile court's lifting of the stay on both factual and legal grounds. The juvenile court rejected these challenges. Kurt appeals.

We begin with the challenge to the juvenile court's original disposition order which first imposed and stayed a transfer of Kurt's legal custody to the department for placement at Ethan Allen and then placed Kurt under the supervision of the local department. Although neither Kurt nor the State objected to this disposition at the dispositional hearing, both agreed during the postdisposition hearing that such a disposition is not authorized by §

48.34, STATS. Kurt and the State continue their agreement on this point on appeal.

We also agree. Section 48.34, STATS., recites the various dispositional options available to the juvenile court. Subsection (4m) authorizes a transfer of a child's legal custody to the department for placement at a secured correctional facility. However, the statute, with two exceptions not applicable here, recites such a disposition as an "exclusive disposition." Section 48.34. It is thus clear that if a juvenile court chooses to transfer a child's custody to the department for placement at a secured correctional facility, such disposition cannot be combined with other dispositions recognized under the statute.

Our supreme court has held that the juvenile code represents "a chapter of carefully spelled-out definitions and procedures and enumerated powers." *C.A.K. v. State*, 154 Wis.2d 612, 617-18, 453 N.W.2d 897, 899 (1990). In

addition, the court has stated:

The chapter reflects the legislature's desire to specifically define the authority of appropriate officers. Where there is evidence of such enumeration, it is in accordance with accepted principles of statutory construction to apply the maxim, *expressio unius est exclusio alterius*; in short, if the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power.

State ex rel. Harris v. Larson, 64 Wis.2d 521, 527, 219 N.W.2d 335, 339 (1974).

We therefore hold that the portion of the original dispositional order imposing and staying the transfer of Kurt's legal custody to the

department for placement at Ethan Allen was void. From this, it logically follows that the court's later lifting of the stay was similarly of no legal effect.

The State argues, however, that the juvenile court's lifting of the stay was cured by postdispositional proceedings. The State contends that those proceedings were the equivalent of a change in placement proceeding pursuant to § 48.357(2m), STATS. This is a facially tempting argument because the postdispositional hearings in this case explored, in certain respects, some of the considerations which would apply in a change in placement proceeding. Nonetheless, we reject the State's argument for three reasons.

First, the change in placement statute assumes that the original placement was legal, but that a change is appropriate and necessary for other reasons. That, of course, is not the case.

Second, although § 48.357(2m), STATS., envisions that the child, among others, may bring a change in placement motion, Kurt's motion challenging the lifting of the stay was not brought pursuant to the statute. Nor did Kurt seek a change in placement. Rather, he sought to confirm and reinstate the supervision provisions of the original dispositional order.

Third, if the postdispositional hearings were truly a change in placement proceeding pursuant to § 48.357, STATS., it was the State, not Kurt, which advocated for the change. As such, it is proper to hold the State to the procedural and notice requirements of § 48.357(1). The affidavit of the juvenile intake worker fails to satisfy certain provisions of this statute, particularly that

portion which requires a statement why the new proposed placement is preferable to the present one and how the proposed change will satisfy the objective of the juvenile court's treatment plan. *See id.*

We conclude that the only fair and correct way to remedy the procedural mistakes in this case is to vacate the provision of the dispositional order imposing and staying the transfer of Kurt's legal custody to the department for placement at Ethan Allen. We also reverse the postdispositional order rejecting Kurt's legal challenge to the lifting of the stay.

We affirm all other provisions of the dispositional order. If the State wishes to pursue a change in placement, it may then proceed pursuant to § 48.357, STATS.

By the Court.—Order affirmed in part and reversed in part; order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.