

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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, STATS.

No. 98-0436-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**IN THE INTEREST OF DEVLIN D.D.,
A CHILD ALLEGED
TO BE MENTALLY ILL:**

WAUKESHA COUNTY,

PETITIONER-APPELLANT,

v.

DEVLIN D.D.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Affirmed.*

SNYDER, P.J. Waukesha County appeals from the dismissal of a ch. 51, STATS., petition on Devlin D.D. The petition alleged that Devlin was mentally ill because of a suicide attempt while he was confined at Lad Lake. At

the time of the probable cause hearing on the ch. 51 petition, the trial court was informed by corporation counsel that she had received an “order to detain” from the Department of Corrections (DOC). According to the information provided, Devlin was the subject of an existing juvenile court dispositional order in Sheboygan County which had placed him in the custody of the DOC. Pursuant to that custody, the DOC had placed him at Lad Lake. At the time of the probable cause hearing on the ch. 51 proceeding, the DOC requested that “if this matter is dismissed that [Devlin] be returned to Ethan Allen School.”

The trial court determined that the case should be dismissed because although it had jurisdiction, venue and competence, “in the Tiffany [*State ex rel. Bohren v. Circuit Court*, 192 Wis.2d 407, 532 N.W.2d 135 (Ct. App. 1995)] case the Court of Appeals said that it was error for the court to exercise the jurisdiction and authority that it had because another circuit court in this state was already quote, ‘exercising jurisdiction’ unquote.” According to the trial court, “It appears that [this] court can’t even take preliminary steps or emergency steps to exercise its jurisdiction as I understand the Tiffany case.” Because the trial court believed that it was precluded from considering any argument by either side “once it comes to the court’s attention that another circuit court is exercising jurisdiction at that time, the remedy ... is dismissal.”

While we also conclude that dismissal was appropriate, we base our decision on different grounds. See *State v. Holt*, 128 Wis.2d 110, 125, 382 N.W.2d 679, 685 (Ct. App. 1985) (an appellate court may sustain a lower court’s holding on a theory not considered by the lower court). Our holding in *Bohren* does not govern this appeal. There is another basis for the dismissal of this case, and based on statutory provisions the dismissal was proper.

At the time the ch. 51, STATS., petition was brought in Waukesha County, Devlin was under the care and supervision of the DOC. He was also considered to be “in custody,” according to § 946.42(1)(a), STATS., which defines custody as “actual custody of an institution, including a secured correctional facility, ... a secured child caring institution, ... a secure detention facility, ... a Type 2 child caring institution, ... or a juvenile portion of a county jail” Under Devlin’s placement at Lad Lake, he was in the custody of the DOC.

If a juvenile is in the custody of the DOC, § 938.505(1), STATS., then becomes applicable. It provides in relevant part:

When a juvenile is placed under the supervision of the department under s. 938.183 [original adult court jurisdiction for criminal proceedings], 938.34(4h) [serious juvenile offender program], (4m) [correctional placement] or (4n) [aftercare supervision] ... the department or county department having supervision over the juvenile shall have the right and duty to protect, train, discipline, treat and confine the juvenile [Emphasis added.]

Id. Based on the plain language of this statutory section, the issue before the court was not whether it had jurisdiction. Although Devlin was transferred from Lad Lake under an emergency detention petition, the DOC still retained “the right and duty to protect, train, discipline, treat and confine the juvenile” *See id.* The court was informed through corporation counsel that she had received a request from the DOC that Devlin be returned to Ethan Allen School. The trial court in Waukesha County did not have to consider whether it could exercise its jurisdiction when Devlin was under an existing dispositional order because that order had effectively turned his care and custody over to the DOC. Because the DOC stood ready and willing to exercise its custody and supervision of Devlin, the trial court was correct in dismissing this action.

We therefore affirm the dismissal of this action by the trial court.

By the Court.—Order affirmed.

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

