STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

In re the commitment of Michael L. McGee:

State of Wisconsin,

Petitioner-Respondent,

District: 2
Appeal No. 2016AP01082
Circuit Court Case No. 2003CI000001

County of Kenosha,

Intervenor-Appellant-Cross-Respondent,

v.

Michael McGee,

Respondent-Respondent-Cross-Appellant,

Appeal from Circuit Court for Racine County
The Honorable Allan B. Torhorst, Presiding
Case No. 03-CI-000001

COMBINED BRIEF OF INTERVENOR-APPELLANT AND CROSS RESPONDENT

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INTERVENOR-APPELLANT-CROSS-RESPONDENT'S REPLY BRIEF

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INTRODUCTION

A Racine County Judge ordered placement of a Racine County resident (who is a violent sex offender), in Kenosha County because there was allegedly no placement available anywhere in Racine County. Kenosha County intervened and asserted that the placement of Michael McGee ("McGee") in Kenosha County was inappropriate. Specifically, the Department of Human Services ("DHS"), McGee and the Racine County Circuit Court failed to establish "good cause" to look outside Racine County in light of recent legislative changes. Kenosha County also argued that DHS failed to consult with Kenosha County Law Enforcement and the Kenosha County Victim Coordinator. (R. 39, A. App. 154-155; R. 82 at 36-40; 40, A. App. 145-146; R. 41, A. App. 147-151; R. 82 at 11-12, 27-28.)[1]

DHS and the Racine County District Attorney have stayed silent on the majority of the issues presented in this case. Neither DHS nor the District Attorney filed any responsive pleadings in support of or against Kenosha County's position on appeal. McGee, however, is vigorously opposing Kenosha County's appeal and advocating on behalf of DHS that all the statutory requirements were followed. This is not surprising

[1] In citing the record on appeal, the brief refers to docket entries in the record with the abbreviation R. ___ at ___. Citations to Intervenor-Appellant-Cross Respondent' Appendix are referred to as A. App. at___."

considering McGee's main objective is to be released into the community. McGee cannot, however, change or ignore the facts of this case. Specifically, that the placement is inappropriate, that DHS failed to meet the statutory requirements and no one established "good cause" to look outside of Racine County for placement after the law changed.

ARGUMENT

I. The Trial Court Erred In Finding The Supervised Release Plan Was Appropriate.

McGee attempts to downplay the importance of public safety in his response brief. (McGee Response Brief at 5.) Specifically, he argues the treatment needs of violent sex offenders must be balanced. (Id.) Kenosha County does not deny that a Supervised Release Plan must address the treatment needs of the offender. But, the need to find a residence and a place for treatment does not give DHS or the Circuit Court the right to ignore undisputed safety risks.

In reviewing Chapter 980 cases, Courts have stressed the importance of public safety and acknowledged the "legitimate public safety concerns involved in placing a sexual offender in the community." *See* State v. West (In re West), 2011 WI 83, ¶ 78, 336 Wis. 2d 578, 800 N.W.2d 929 (2011); *citing* State v. Carpenter, 197 Wis. 2d 252, 271, 541 N.W.2d 105 (1995). Courts have further found that the concerns for public safety "are perhaps even more strongly implicated in the decision to release the individual back

into the community, because the initial determination involves a finding that the individual is likely to reoffend." West, 2011 83, at ¶ 80.

In the present case, no one disputes that McGee raped a woman and then sexually molested a ten-year-old boy.[2] (R. 1; R. 31; R. 82 at 48, 58; A. App. 116.) No one disputes that he was found to be a sexually violent person under Chapter 980 of the Wisconsin Statutes. No one disputes that DHS, in its own documents, described McGee's targeted victims as "prepubescent males." (R. 53, A. App. 116; R. 82 at 58.) Despite this fact, both DHS and the Circuit Court intend to place McGee right next door to a one-year-old male child.

McGee contends that DHS knew of this information and considered it "relevant," but still believed the placement was appropriate. (McGee Response Brief at 7.) The question here is not whether DHS was aware that a one-year-old child was living right next door to the proposed residence. The question at the crux of this case is whether DHS should have advised the Court and the Racine County District Attorney of this fact before Kenosha County intervened. Also, whether the Circuit Court erred in approving the Supervised Release Plan simply because McGee was never "convicted" of an offense against a child.

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[2] In his brief, McGee suggests that no one knows if his parole was revoked for molesting a young boy. (McGee Response Brief at 8, footnote 2.) DHS did not dispute that the molestation occurred at any time throughout the evidentiary hearing and this was a fact set forth in documents prepared and submitted by DHS. (R. 53; A. App. 116; R. 82 at 58.)

McGee contends that the Circuit Court did consider the risks and whether McGee was likely to reoffend and made a well-reasoned decision. (McGee Response Brief at 6.) This is not supported by the record. Contrary to McGee's argument, the Circuit Court did not consider McGee's offenses or his victim patterns. (R. 57, A. App. 119-125.) There is also nothing in the record to indicate why Judge Torhorst thought the one-year-old boy would be safe. (Id.) Instead, the Circuit Court relied solely on the fact that McGee was not "convicted" of sexually assaulting a child and therefore, in his opinion, he did not need to reconsider the placement. (Id.) The Circuit Court's failure to explain its reasoning or identify facts to support its position constitutes a misuse of discretion. McCleary v. State, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

The Circuit Court also failed to explain why the District Attorney's objection was not valid. It is undisputed that the Racine County District Attorney withdrew his support for this Plan once all the facts were made known. (R. 82 at 5-6, R. 59, A. App. 117-118.) Specifically, the District Attorney stated that based on his experience with this case and his knowledge of McGee's background, he never would have agreed to the Supervised Release Plan if all of the facts were known. (Id.) Yet, the Circuit Court failed to address this objection or articulate why it was still

necessary to release McGee into this residence. (R. 57, A. App. 119-125.) Again, this shows that the Circuit Court simply wanted to go forward with the placement. This was a misuse of discretion and the District Attorney should be given the opportunity to voice his concerns. The Circuit Court erred in simply moving forward with the Supervise Release Plan.

II. DHS DID NOT FOLLOW THE STATUTORY PROCEDURES OR REQUIREMENTS SET FORTH IN WIS. STAT. § 980.08(4).

McGee makes two arguments on behalf of DHS. First, he argues that DHS did follow the requirements of the statute. Next, he asserts that even if there were some failures with regard to following the statutory requirement, it did not warrant invalidating the Court's decision. (McGee Response Brief 10-18.) Neither one of these arguments are valid.

A. DHS' Failure To Consult With Law Enforcement And The Victim Witness Coordinator Warrants Rescission Of The Plan.

Contrary to McGee's arguments, it is clear that DHS failed to follow the plain language of the revised Wis. Stat. § 980.08(4)(em).

There is no case law interpreting the new statutory requirements set forth by 2015 Wisconsin Act 156. The plain language of the statute, however, requires DHS to "consult" with law enforcement having jurisdiction over any prospective residential option identified for a particular sex offender. Under any interpretation, "consult" means speak with or communicate with the other party about the facts. There is no

question that DHS failed to consult with the Sheriff's Department about the placement of Michael McGee.

It is undisputed that the Sheriff's Department did not have any knowledge that McGee was going to be placed in Kenosha County until after the Supervised Release Plan was approved. (R. 40, A. App. 145-146, R. 41, A. App. 147-151; R. 82 at 11-12, 27-28.) No one from DHS ever contacted the Sheriff's Department. (Id.) No one from Department of Corrections ("DOC") ever contacted the Sheriff's Department before the decision to release McGee into the community was made. (Id.)

McGee does not dispute these facts. Instead, McGee claims the new provision of Wis. Stat. § 980.08(4)(em) was inserted simply to ensure that DHS could collect information about the new residence and that DHS complied with new statewide residency restrictions created by Act 156. (McGee Response Brief at 13.) Again, however, the facts in this case fail to support this interpretation.

DHS relied on the report created by Detective David Smith. Detective Smith prepared the report at the request of DOC for the placement of a different sex offender. (R. 82 at 11.) Because the specific sex offender was considered a "serious child sex offender," Detective Smith was asked a limited question. He was asked if there were any children living next door to the proposed residence. (R. 82 at 11-12, 18-19; R. 41, R. 47, A. App. 147-151.) He answered that specific question and only that

specific question in his report. (Id.) Because the presence of a child legally prevented the placement, no further analysis was needed.

Contrary to McGee's arguments, Detective Smith was not asked about the new statewide restrictions. (Id.) He was not asked to weigh in on the location of any school premises or child care facilities. (Id.) Further, he was not asked about the location of any public parks, places of worship or youth centers. (Id.) Wis. Stat. § 980.08(4)(f) 2. Thus, even if one were to believe McGee's assertion that DHS was only required to ask law enforcement about the residence to ensure the new statutory requirements were met, DHS undeniably failed in this regard as well.

McGee's arguments are also weakened by DHS' own words. In the Supervised Release Plan, DHS specifically stated that "the Sheriff's Department was requested to submit a report to DHS to provide any information or concerns they may have regarding Mr. McGee's potential placement. The Sheriff's Department submitted a report on April 1, 2016." (R. 31; R.52.) McGee now argues that this was simply a "badly drafted submission to the circuit court." (McGee's Response Brief at 15.) How can McGee argue what DHS intended by that statement? Kenosha County does not believe these words were used in error. To the contrary, Kenosha County believes this was an acknowledgement of one of the statutory requirements and DHS represented it was completed.

Finally, with regard to both consulting with law enforcement and the victim witness coordinator, McGee essentially argues that even if DHS failed to take required steps, it does not warrant revoking the Supervised Release Plan. (McGee Response Brief at 10-18.) Again, Kenosha County disagrees with this assertion.

Throughout this entire proceeding, and as set forth repeatedly in these briefs, McGee has stated that DHS is the entity charged with making sure that provisions of Chapter 980 of the Wisconsin Statutes are complied with and Kenosha County has no standing. DHS evaluates the offender's status, the treatment needs of the offender and the risk to the community. DHS also evaluates residential options and provides information to the District Attorney's Office and the Circuit Court regarding an offender's release. If information is being overlooked or not communicated, it calls into question the entire suitability and reliability of the Plan.

For example, as mentioned above, the District Attorney stated that he was unaware the residence was next to a one-year-old child and if he had known this he would have objected to the Plan. (R. 82 at 5-6, R. 59, A. App. 117-118.) This information should have been provided to the Circuit Court and the District Attorney. Furthermore, one of the main questions, as addressed below, is whether there was truly "good cause" to look outside of Racine County. If errors and mistakes were made with regard to some statutory provisions, it is reasonable to assume DHS made other mistakes as

well. For these reasons, the approval of the Supervised Release Plan needs to be reversed and the case should be remanded to make sure all of the requirements are met with regard to placement.

B. The Proposed Residence Is Within 1,500 Feet Of A County Park.

McGee acknowledges that Chapter 980 of the Wisconsin Statutes does not contain a very detailed definition of the meaning of a "public park." (McGee Response Brief at 24.) It simply states that it is a "park or playground that is owned or maintained by the state or by a city, village, town or county." Wis. Stat. § 980.01(3g).

While McGee might not agree, Sheriff Beth unequivocally testified at the evidentiary hearing that the bike path, which is frequented by kids and families, is considered part of Kenosha County's parks. (R. 82 at 23, 35.) He also testified that there is a fishing area for locals located near the property and this is just a hundred feet from the residence and this is also maintained by Kenosha County. (R. 82 at 23.)[3]

Contrary to McGee's assertions, there is no authority indicating that Chapter 980 or the recent legislative changes intended to change how local municipalities defined and addressed parks. Moreover, there is nothing to suggest that DHS adequately considered these locations or the risks

[3] The fishing area referred to by Sheriff David Beth at the evidentiary hearing and in his affidavit, and referred to in the affidavit of Sheriff Beth, Mark Smith Rogers and Constable Robert Santelli is the Fox River Water Trail. Information on this water trial can be found at http://www.co.kenosha.wi.us/1737/Fox-River-Water-Trail.

associated with these locations when they approved the residence for McGee. This information would have been relayed and appropriately considered if DHS had "consulted" with the Sheriff's Department as required by the revised statutes.

C. The Circuit Court And DHS Failed To Establish "Good Cause" To Look Outside Of Racine County.

Chapter 980 of the Wisconsin Statutes has always encouraged counties to keep their own violent sex offenders in their community. Even before the law changed, the statute required the court to have "good cause" to select another county of residence. *See* Wis. Stat. § 980.08(4)(cm). The most recent legislative changes, set forth by 2015 Wisconsin Act 156, went even further and clarified that "good cause" to look out of county could not be based on local ordinances or resolutions seeking to limit housing opportunities for sex offenders. Id.

As McGee points out, there is no definition of "good cause" in the statute and no specific procedure mentioned. (McGee Response Brief at 21.) The common meaning of "good cause," however, is "a cause or reason sufficient in law; one that is based on equity or justice or that would motivate a reasonable [person] under all the circumstances. " *See* Pyles v. Nwaobasi, 829 F.3d 860, 865 (7th Cir. 2016), *citing* WEBSTER'S THIRD NEWS INT'L DICTIONARY 978 (1986); see also MERRIAM WEBSTER'S DICTIONARY OF LAW 69 (1996)("a substantial reason put

forth in good faith that is not unreasonable, arbitrary, or irrational and that is sufficient to create an excuse under the law.")

The common sense meaning of the phrase "good cause" contemplates that the party attempting to demonstrate it would put forth some evidence or reason to support its position and the court would make a ruling on whether it was sufficient after listening to the arguments or evidence. Here, no testimony or evidence was taken after the law changed to substantiate the claim that "good cause" still existed to look outside of Racine County for a placement for Michael McGee.

Initially, both McGee's counsel and the District Attorney stated it was necessary to look outside of Racine County because of the local zoning regulations in place. (R. 76 at 4; R. 77 at 2.) The Court accepted this argument and approved looking for a placement in Kenosha County. (R. 19; A. App. 101-102.) Yet, the parties acknowledge that the law undeniably changed and explicitly stated that local zoning ordinances had no effect when trying to find a placement under Chapter 980. *See* Wis. Stat. § 980.135. Notwithstanding that change, the parties in the present case simply attempted to move forward with the previously identified placement.

Once Kenosha County intervened and a hearing was held, the parties summarily said there was still not housing available. (R. 82 at 96.) No one has ever been able to articulate precisely why. DHS and McGee's counsel

have stated that there are less restrictions on McGee's placement since he is not a convicted child sex offender. *See* Wis. Stat. § 980.08(4)(f). Yet, somehow Racine County is still unable to find a place for him. The record does not contain any evidence of what specific search efforts DHS made specifically in Racine County. This violates the clear intent of the statute and it was error for Racine County Circuit Court to simply move forward with placing a violent sex offender in Kenosha County.

CONCLUSION

Judge Torhorst erroneously exercised his discretion when he approved the Supervised Release Plan notwithstanding the fact that DHS failed to abide by several of the new statutory requirements. This Court should therefore reverse approval of the Supervised Release Plan.

Dated this 21st day of November, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,798 words.

Dated this 21st day of November, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 21st day of November, 2016.

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CERTIFICATION OF THIRD-PARTY

DELIVERY

I certify that on November 21, 2016, this brief was delivered to a third-party carrier for overnight delivery to the Clerk of the Court of Appeals. I further certify that the brief was correctly addressed.

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NOTE: You may also file an affidavit of mailing or delivery, setting forth the same information. See §809.80(4), Wis. Stats.

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STATEMENT OF THE ISSUES

1. Was the Intervenor-Appellant-Cross Respondent, Kenosha County, entitled to intervene as a matter or right in this proceeding under Wis. Stat. § 803.09(1)?

Trial Court Answer: Yes. After reviewing the pleadings and listening to oral argument, the Circuit Court appropriately exercised its discretion and concluded that Kenosha County was allowed to intervene as a matter of right under Wis. Stat. § 803.09(1).

2. Was Kenosha County entitled to permissive intervention under Wis. Stat. § 803.09(3)?

Trial Court Answer: The Circuit Court did not address this issue since it found that Kenosha County was allowed to intervene as a matter of right under Wis. Stat. § 803.09(1). Nonetheless, Kenosha County would be entitled to permissive joinder under the facts of this case.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Kenosha County agrees that the issues presented can be resolved by applying well-established legal principles surrounding intervention to the facts of this case. Publication may be warranted to clarify whether a county of intended placement for a violent sex offender under Chapter 980 of the Wisconsin Statutes has the right to intervene in the proceedings

STATEMENT OF THE CASE AND FACTS

The facts and circumstances surrounding this case have been thoroughly briefed by the parties and many of them are not disputed.[4] Nonetheless, for the purposes of this response, Kenosha County will highlight a few facts that Michael McGee's ("McGee") counsel failed to address or minimized in his brief.

As McGee acknowledges, the State and McGee's counsel had several hearings to address McGee's proposed placement. (R.74; R, 76; R.78.) During these hearings, DHS and McGee's counsel indicated that no housing was available in Racine County. (Id.) At the status conference on June 22, 2015, District Attorney W. Richard Chiapete stated that it was necessary to look in different counties "because of the ordinances that a number of counties have." (R. 76 at 4.) As a result, Judge Torhorst ordered that residential options be explored in both Kenosha and Racine County. (R. 19; A. App. 101.) Similarly, on October 5, 2015, McGee's counsel stated there were "issues right now with finding placements as a result of these local ordinances." (R. 77 at 2.) Following these hearings, Judge Torhorst authorized DHS to look for placements outside of Racine County and in Kenosha County.

[4] Kenosha County refers the Court to the Statement of Facts set forth in its moving brief filed with the Court on September 7, 2016.

The law surrounding Chapter 980 placements changed pursuant to 2015 Wisconsin Act 156. One of the main purposes was to prevent local ordinances from trumping the State Statute and to encourage counties to keep their own residents who were considered sexually violent persons. Among other things, the new law "impose[d] distance restrictions, provide[d] for limited preemption of local sex offender residency ordinances, require[d] DHS to search for known victims and consult local law enforcement, and constrain[ed] placement of an SVP outside his or her home county." *See* 2015 Wisconsin Act 156, Wisconsin Legislative Council Act Memo. The Act made clear that "a court cannot rely upon an actual or alleged lack of available housing because of an enacted or proposed ordinance or resolution within the county as good cause for selecting another county" for the placement of a sexually violent person. Id.

After this law changed, DHS asked Judge Torhorst to revisit the issue of "good cause." (R.31; A. App. 106-115; R.52.) Judge Torhorst declined and the parties moved forward with the placement in Kenosha County. (R. 32; A. App. 105.) Importantly, even though the law was intended to make it easier to place sexually violent offenders in the offender's county of residence, both DHS and McGee argued there was still no placement available in Racine County. (R. 82.) No witness ever articulated how or why 2015 Wisconsin Act 156 failed to have any

effect on finding more housing options in Racine County or how DHS modified its search attempts after the passing of this new law now that local ordinances were preempted. (R. 82.)

In addition, in his moving brief, McGee ignores some critical facts regarding DHS' approval of the Wheatland property. McGee acknowledges that Act 156 required DHS to "consult" with local law enforcement before authorizing placement of a sexually violent person. (McGee Appellant Brief at 4-5.) McGee contends that DHS met this requirement and, through the Department of Corrections, obtained a report regarding the Wheatland Property. (McGee Appellant Brief at 5.) Again, it is undisputed that the report on which DHS relied was not prepared for the placement of Michael McGee. (R.41, A. App. 147-151; R.82 at 9-13; R. 47; R.50.) It was for a different sex offender (T. Johnson). (Id.)

Because T. Johnson was a convicted child sex-offender, the Sheriff's Department was asked simply to determine if a child lived next door. (Id.) The Sheriff's Department answered that question and provided no additional information. No one asked them to prepare a report regarding the placement of Michael McGee. (Id.) No one asked them if the proposed placement was next to a school, church or park. (Id.) If they had been asked, it would have given the Sheriff's

Department the opportunity to provide additional information. (R. 82 at 11-12, 19, 27-28.)

Finally, McGee correctly states the outcome of the motion to intervene and the evidentiary hearing. Kenosha County was allowed to intervene and the Town of Wheatland was not. (McGee's Appellant Brief at 5-6.) Furthermore, Judge Torhorst denied Kenosha County's challenges to the Supervised Release Plan. (McGee's Appellant Brief at 6.)

Because it is relevant to the question of intervention, it is worth noting the positions of the parties. The District Attorney's Office did not take any position on Kenosha County's motion to intervene. (R. 81 at 3.) DHS did not take any position on the motion for intervention. (R. 81 at 9.) Moreover, McGee's counsel argued against it. (R. 81.) During the evidentiary hearing on the viability of the Supervised Release Plan, the District Attorney's Office filed a letter rescinding the State's approval of the Supervised Release Plan in light of the one-year-old child living next door. (R. 82 at 5-6, R. 59, A. App. 117-118.) The District Attorney did not, however, take an active role in the evidentiary hearing or ask any questions concerning DHS' compliance with the statutes or meeting the "consultation" requirements. (R. 82.) The District Attorney also did not question if "good cause" existed to make an out of county placement. (R. 82.)

At the hearing, DHS asserted that it complied with all the statutory requirements and that the approval of the Supervised Release Plan was appropriate. (R. 82 at 107.) Its interest and position was therefore adverse to Kenosha County's.

Additional relevant facts and history will be set forth throughout the argument section of this brief.

STANDARD OF REVIEW

The issue in this case is whether the Circuit Court correctly allowed Kenosha County to intervene in this matter. The decision to allow or deny intervention as a matter of right under Wis. Stat. § 803.09 (1) is a question of law which the appellate courts review *de novo*. *See* Armada Broad. v. Stirn, 183 Wis. 2d 463, 470, 516 N.W.2d 357 (1994), citing State ex rel. Bilder v. Delavan, 112 Wis. 2d 539, 549, 334 N.W.2d 252 (1983). Although the decision to allow or deny intervention as a matter of right is a question of law that reviewing court decides independently, as courts have recognized, "[d]espite its nomenclature, intervention 'as of right' usually turns on judgment calls and fact assessments that a reviewing court is unlikely to disturb except for clear mistakes." Helgeland v. Wisconsin Municipalities, 2008 WI 9 at ¶ 41, 307 Wis. 2d 1, 745 N.W.2d 1, citing Daggett v. Comm'n on Gov't Ethics & Election Practices, 172 F.3d 104, 113 (1st Cir. 1999).

Whether to allow permissive intervention is a matter left to the Circuit Court's discretion. Helgeland, 2008 WI at ¶ 120. Discretion is only erroneously exercised when the Circuit Court applied an incorrect legal standard. State v. Delgado, 223 Wis. 2d 270, 281, 588 N.W.2d 1 (1999).

ARGUMENT

The Circuit Court was correct in holding that Kenosha County was entitled to intervene in this action because it satisfied the standards for intervention both as a matter of right and permissively under Wis. Stat. § 803.09(1) and (2).

I. KENOSHA COUNTY WAS ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

The standard for intervention as a matter of right is not disputed by the parties. To intervene as a matter of right under Wis. Stat. § 803.09(1), a movant must show (1) that the movant's motion to intervene is timely; (2) that the movant claims an interest sufficiently related to the subject of the action; (3) that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and (4) that the existing parties do not adequately represent the movant's interest. Helgeland, 2008 WI 9, ¶ 38. If each requirement is met, the movant must be permitted to intervene in the action. Armada, 183 Wis. 2d at 471. Courts apply a "pragmatic

approach to intervention as of right." Bilder, 112 Wis. 2d at 548. Specifically, "the court should view the interest sufficient to allow the intervention practically rather than technically." Id.

As McGee's counsel acknowledges, no precise formula exists for determining if a potential intervenor meets the requirements of Wis. Stat. § 803.09 (1). Helgeland, 2008 WI 9, ¶ 40. Rather, "[t]he analysis is holistic, flexible, and highly fact-specific." Id. Moreover, Courts are instructed to examine and weigh all of the factors. According to Wisconsin's Supreme Court, "the criteria need not be analyzed in isolation from one another, and a movant's strong showing with respect to one requirement may contribute to the movant's ability to meet other requirements as well." Helgeland, 2008 WI 9 at ¶ 39.

A. Kenosha County's Motion To Intervene Was Timely.

"The question of timeliness is left to the discretion of the circuit court." Armada, 183 Wis. 2d at 471. The "critical factor is whether in view of all the circumstances, the proposed intervenor acted promptly." Bilder, 112 Wis. 2d at 550.

In early May of 2016, Kenosha County learned that McGee, a Racine County resident and a convicted sexually violent person, was going to be released and placed in Kenosha County. (R.53 at 1.) On May 12, 2016, Kenosha County filed a Motion to Intervene. (R.33; R. 38.) There is no dispute that this motion was timely and McGee

concedes this first element was satisfied in his moving brief. (McGee Appellate Brief at 9.)

B. Kenosha County Has Sufficient Interests In This Action.

Kenosha County has an interest sufficient enough to warrant intervention. McGee disagrees and contends that the "consultation" requirements set forth in Wis. Stat. § 980.08 (4) "do not give a county of intended placement a direct, significant, and **legally protectable interest** in supervised release proceedings." (McGee's Appellant Brief at 11.)(Emphasis added.) McGee also asserts that allowing the county of intended placement to intervene would essentially open the floodgates for multiple petitions for intervention, frustrate judicial efficiency and create due process concerns for individuals being released under Chapter 980. (McGee's Appellant Brief at 15-16.) These arguments misinterpret the law surrounding intervention and Kenosha County's arguments.

Contrary to McGee's argument, Wisconsin has rejected the rigid approach of "verbaliz[ing] the sufficiency of interest factor as in part a question of standing or as **requiring '**a direct, substantial, **legally protectable interest** in the proceeding'" in favor of a "broader, pragmatic approach to intervention as a matter of right." Bilder, 112 Wis. 2d at 547-48 (internal citations omitted) (emphasis added). Accordingly, parties need only show that their interests directly relate

to the subject of the action and "need not demonstrate [that they have] a judicially enforceable right to challenge a decision in order to intervene in the action." Helgeland, 2008 WI 9 at n.46, citing Wolff v. Town of Jamestown, 229 Wis. 2d 738, 601 N.W.2d 301 (Ct. App. 1999).

Courts view the interest test as "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." Armada, 183 Wis. 2d at 472, citing Bilder, 112 Wis. 2d at 549 (internal citations omitted). The relevant inquiry is whether the person or entity will either gain or lose by the direct operation of the judgment. Dairyland Greyhound Park. v. McCallum, 2002 WI App. 259, ¶ 15, 258 Wis. 2d 210, 655 N.W.2d 474, 481 (Ct. App. 2002)(internal citations omitted).

For example, in Bilder, newspapers were allowed to intervene in an employment dispute to challenge the stipulation reached by the police chief and town board to seal the court record, since "newspapers have a protectable legal interest in opening the [court] documents to public examination." Id. at 549. Even though the newspapers could have filed a separate mandamus action to open the file, intervention was granted since intervention "allows a final decision on a key issue to be reached in a single lawsuit rather than having multiple lawsuits and multiple judicial decisions on the same subject." Id. at 550.

The Court of Appeals reached a similar conclusion in Wolff v. Town of Jamestown, 229 Wis. 2d at 738. In Wolff, the Court of Appeals reversed a trial court's denial of a town's motion to intervene in an action where a landowner sought review of a county board of adjustment's decision to deny a conditional use permit. Id. In reversing the lower court, the Court of Appeals held that the town had a right to intervene in the action because it had a "substantial interest in the well-being of the residents and property located within its boundaries." Id. at 746. The same conclusion is warranted here.

Kenosha County's interest in this proceeding is substantial and it will undeniably be affected by the outcome of this case. A Racine County Circuit Court and a Racine County District Attorney, in conjunction with DHS, approved placing a violent sex offender, who is also a Racine County resident, in Kenosha County. This decision was made and approved on the unchallenged premise that there was simply no place in Racine County to place McGee. (R. 76; R. 77.) Kenosha County questioned how that was possible and believed that DHS failed to establish good cause for this out of county placement. As the county of intended placement, Kenosha County was and should be entitled to be heard on this issue. This supports intervention.

Moreover, there can be no question that Kenosha County and its residents will be impacted by this decision. According to the

Supervised Release Plan, once released into Kenosha County, Michael McGee is expected to be reintegrated into the community. (R. 31, A. App. 106-115.) He will be placed in "available community treatment services, which could include an SOT group, individual counseling, or both." (R. 31, A. App. 109.). After one year of community placement, he can participate in various community activities. His healthcare needs are met by local providers and he is required to seek local employment. (R. 31; A. App. 111.) Because Kenosha County was selected as the community of placement, all of these things will take place in its jurisdiction. (R. 31; A. App. 106-115.)

Similar to what was acknowledged by the court in Wolff, Kenosha County has a "substantial interest in the well-being of the residents and property located within its boundaries." Id. at 746. Because McGee is being released into its community, Kenosha County is entitled to ask questions about the offender, the placement and the safety of its residents.

Intervention was also appropriate since Kenosha County is entitled to protect its statutory rights and hold DHS accountable for failing to adhere to Wis. Stat. § 980.08(4). Under the newly revised statutes, DHS should have consulted with law enforcement and the victim witness coordinator about the placement of McGee into its community. DHS failed to do this and as a result, Kenosha County was

deprived of the opportunity to share its concerns and objections until after the release was scheduled to move forward. Kenosha County has a substantial interest in clarifying the requirements and what is expected of DHS and law enforcement with regard to placements.

Finally, McGee's argument that allowing Kenosha County to intervene will interfere with judicial economy or his due process rights is undeveloped and based on nothing more than pure speculation.

The recent changes to the law have created a dispute with regard to what was required by both DHS and the Circuit Courts with regard to approving out of county placements. But, as both parties acknowledge with regard to requesting publication, this decision will help clarify those issues and provide guidance for future litigants regarding the effect of recent amendments to Chapter 980 of the Wisconsin Statutes. Allowing Kenosha County to intervene in this matter, when there is no applicable case law or guidance on these questions, will not destroy how Chapter 980 cases work or subject DHS to multiple petitions for intervention. If anything, allowing intervention and the decision on the merits will alleviate the need for future interventions, especially if this Court clarifies what DHS and the trial court is required to do before authorizing the out of county placement of a violent sex offender. If Kenosha County's motion to

intervene was denied, however, it would leave these issues unresolved and this would more likely lead to increased litigation.

As the above demonstrates, Kenosha County has a direct and substantial interest in the decision to place a violent sex offender in its community. This factor therefore weighs in favor of intervention.

C. Disposition Of This Proceeding Will Impair or Impede Kenosha County's Ability To Protect Its Interests.

Kenosha County also satisfies the third prong of the intervention test since its rights have been and will be significantly affected by this proceeding.

In his moving brief, McGee states that Kenosha County's interests will not be impaired if it is not allowed to intervene. McGee claims Kenosha County does not have a legally protectable interest and the State can represent and advance the County's interest in public protection. (McGee's Appellant Brief at 19.) These arguments fail for a number of reasons.

First, as set forth above, Kenosha County does have an undisputed interest in this proceeding. It has an interest in making sure Chapter 980 of the Wisconsin Statutes was appropriately followed and that DHS and the Racine County Circuit Court are taking all the necessary steps before releasing a violent sex offender into Kenosha County. Furthermore, Kenosha County has an interest in the well-

being and safety of its residents. The District Attorney for Racine County does not and cannot speak on behalf of the citizens of Kenosha County and neither did DHS in this instance.

In addition, Kenosha County's interests would have been impaired if intervention was denied. No party to the proceeding was representing Kenosha County's interests. (R. 82.) No party was arguing that Kenosha County should have been consulted or that it should have input when a violent sex offender is being released into the Kenosha County community. (R. 82.) No one, aside from Kenosha County, was speaking on behalf of Mark Smith Rodgers or his one-year-old son. (R. 82.) Furthermore, no party other than Kenosha County, was contending that DHS failed to meets its statutory obligations. (R. 82.) Finally, no one represented the residents of the Kenosha County who have an interest in the safety of the community. (R. 82.)

Because DHS and Kenosha County are adverse to one another over many aspects of this proceeding, it is disingenuous for McGee to assert that the State can advance the County's position or that Kenosha County's interests would be protected in its absence. (McGee's Appellant Brief at 19). Kenosha County's interests would have undoubtedly been impaired if its motion to intervene was denied.

D. Kenosha County's Interests Were Not Adequately Represented By the Existing Parties.

Contrary to McGee's argument, Kenosha County also fulfills the fourth element of Wis. Stat. § 803.09(1) by making the minimal showing of possible inadequate representation by the existing parties.

Both the United States and the Wisconsin Supreme Court have declared that "the showing required for proving inadequate representation 'should be treated as minimal.'" Armada, 183 Wis. 2d at 476, quoting Trbovich v. United Mine Workers, 404 U.S.528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.E.2d 686 (1972). This requirement is satisfied if the applicant shows that the representation of his interest "may be" inadequate. Wolff, 229 Wis. 2d at 747-48. Adequacy of representation is presumed when the interests of the original party and the intervenor are "identical." Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs, 101 F.3d 503, 508 (7th Circ. 1996), *rev'd on other grounds by* Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159, 148 L.Ed 2d 576, 121 S. Ct. 675 (2001).

McGee acknowledges that the showing required under this factor is "minimal." (McGee's Appellant Brief at 19.) Nonetheless, he argues that the State, through the District Attorney's Office or the

Attorney General's office, fully represents any interest that Kenosha County may have. (McGee's Appellant Brief at 20-23). This argument is flawed in several respects.

First, Kenosha County's interest while similar, is not identical to the parties. Kenosha County is concerned with releasing a violent sex offender into the community and it wants to make sure the proper procedures were followed. It is also concerned with the protection of the public and with the risk inherently involved with placing a violent sex offender right next door to a residence with a one-year-child. (A fact the District Attorney become aware of after Kenosha County's intervention.) But, Kenosha County's interest goes beyond that.

Kenosha County is concerned about the out of county placement. It is concerned that no one questioned how or there was no housing available in Racine County for Michael McGee, despite the recent legislative changes. These questions only arose after Kenosha County was allowed to intervene and Kenosha County was the only party pushing DHS on its search methodology. This was an interest unique to Kenosha County.

In addition, Kenosha County's interests diverged from the District Attorney's in another regard. Kenosha County questioned whether DHS met its burden of consulting with Kenosha County Law Enforcement and its Victim Witness Coordinator in light of the fact that

it was going to be the county of intended placement. (R. 82.) Again, the District Attorney failed to weigh in on these questions and its neutral position has continued throughout this appeal. (R. 82.) It is clear from this fact that the District Attorney's position is not identical to Kenosha County's and representation of its interests would not have been sufficient if Kenosha County was not allowed to intervene. Kenosha County does not elect the Racine County District Attorney nor does the District Attorney for Racine have a sworn duty to the citizens or residents of Kenosha County. Kenosha County, and its elected officials, have such a duty and therefore Kenosha County's involvement in this proceeding was necessary.

Because all four requirements for intervention as a matter of right has been established, this Court should uphold the Circuit Court's decision and find the motion to intervene was properly granted.

II. Alternatively, Permissive Intervention Is Warranted Under The Facts Of This Case.

The Circuit Court was correct in finding that Kenosha County had a right to intervene under Wisconsin § 803.09(1). Nonetheless, even if the Circuit Court had not found that Kenosha County had the right to intervene, permissive intervention pursuant to Wis. Stat. § 803.09(2) would be warranted.

Permissive intervention under Wis. Stat. § 803.09(2) permits a party to intervene in an action if its "claims or defense and the main action have a question of law or fact in common." The question of whether to allow intervention under Wis. Stat. § 803.09(2) is left to the sound discretion of the circuit court. Milwaukee Bd. of Sch. Dirs. v. Milwaukee Teachers' Edu. Ass'n, 143 Wis. 2d 591, 600, 422 N.W.2d 149 (Ct. App. 1988). In exercising its discretion, a court may consider a variety of factors including whether the intervenor's participation would "be helpful in fully developing the case." Daggett, 172 F.3d at 113; *see also* Spangler v. Pasadena Bd. of Educ., 552 F.2d 1326, 1329 (9th Cir. 1977).

The Circuit Court did not reach the question of permissive intervention. (R. 81.) Nonetheless, McGee argues that permissive intervention should not be allowed since the State and existing parties were capable of presenting the relevant issues in this case. (McGee's Brief at 25.) This is not supported by the record and it ignores the facts and what transpired at the evidentiary hearing and throughout this case.

Despite McGee's statements, as set forth and explained earlier in this brief, Kenosha County's interests are not represented by existing parties. It is easy for a Racine County Judge to order there is simply no place for a violent sex offender in Racine County. It is also easy for DHS to state that they complied with all the statutory requirements and

for the District Attorney's Office to stay neutral in this regard. Kenosha County is the entity questioning DHS' activities and the placement decision. As demonstrated during the evidentiary hearing and the briefs submitted to date, no entity is making these arguments on behalf of Kenosha County. (R. 82.) Further, none of the existing parties are protecting Kenosha County's interests in these proceedings or seeking clarification on what needs to be established for an out of county placement. (R. 82.)

Moreover, Kenosha County's involvement brought to light many important issues and clarified questions about the new legislative changes. For example, Kenosha County was the party that alerted the District Attorney and the Circuit Court that a one-year-old child lived next door to the proposed residence. (R. 38.) This caused the District Attorney to withdraw his support and caused the parties, and this Court, to examine whether conviction status alone is sufficient. (R. 59, A. App. 117-118.) Kenosha County is also challenging what level of communication is needed between DHS and local law enforcement and what DHS and the Circuit Court need to establish and prove before approval of an out of county placement.

Kenosha County's claims and issues are relevant to the Chapter 980 proceedings since it involves the release of a violent sex offender into its community. Moreover, there is no doubt that Kenosha

County's participation has been helpful and critical in developing these issues and seeking clarification for litigants going forward. It would therefore have been proper for the Circuit Court to grant permissive intervention under the facts of this case.

CONCLUSION

For the reasons stated above, this Court should find that Kenosha County was correctly allowed to intervene as a matter of right pursuant to Wis. Stat. § 803.09(1). It also met the standard for permissive intervention under Wis. Stat. § 803.09(2).

Dated this 21st day of November, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 4,310 words.

Dated this 21st day of November, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 21st day of November, 2016.

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CERTIFICATION OF THIRD-PARTY

DELIVERY

I certify that on November 21, 2016, this brief was delivered to a third-party carrier for overnight delivery to the Clerk of the Court of Appeals. I further certify that the brief was correctly addressed.

Dated this 21st day of November, 2016.

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