**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

February 25, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-2770-FT**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**IN THE MATTER OF ATTORNEY FEES IN RE:**
**IN THE INTEREST OF FELICIA L.T. AND JAMES L.T.:**

**JOAN I. SCHWARZ,**

**APPELLANT,**

**V.**

**DANE COUNTY,**

**RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed*.

DEININGER, J.[1] Attorney Joan Schwarz appeals an order denying payment she requested for services performed as court-appointed counsel for a

[1] This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS. This is also an expedited appeal under RULE 809.17, STATS.

parent who was a respondent in juvenile proceedings alleging that his children were in need of protection or services (CHIPS). She claims the trial court erroneously exercised its discretion in denying her request for $7,553 in payment for services for the months of October and November 1997, after it had previously authorized the payment of $2,720 for her work on the case in July through September. We conclude that the court's denial of the additional payment was not an erroneous exercise of its discretion.

## BACKGROUND

The trial court appointed Schwarz on July 8, 1997, to represent, at county expense, J.T., the father of two minors who were the subject of CHIPS proceedings. She had represented him in the CHIPS cases prior to her court appointment, and had also represented him "for approximately four years in other matters," including a pending divorce action. The order appointing Schwarz as counsel for J.T. recited that her fees "shall be paid by Dane County at the rate of $70.00 per hour."

The CHIPS petitions alleged that J.T.'s children were in need of protection or services because they were "at substantial risk of becoming the victim[s] of abuse … based on reliable and credible information that another child in the home has been the victim of such abuse." *See* § 48.13(3m), STATS. J.T. had admitted to police that he had had sexual contact with his two step-daughters while they lived with him and his wife, the girls' mother. His statement to police largely corroborated the step-daughters' allegations.[2]

[2] According to an "Administrative Review of Permanency Plan," which is in the record before us, J.T. was subsequently convicted of "four counts of sexual assault of his step-daughters" and was sentenced to three-and-one-half years in prison.

The step-daughters were the subject of separate CHIPS proceedings in Sauk County. They were placed with their maternal grandmother pursuant to a dispositional order dated May 27, 1997, in which the court found that the step-daughters were "in need of protection or services because: § 48.13(3), (3m), (8) (10) & (10m) sexual abuse; inadequate care; neglect or unable to provide necessary care." Based on that order, the State moved for summary judgment in the Dane County CHIPS case involving J.T.'s children, asserting that

> there is no genuine issue as to any material fact. Sauk County records reflect that [J.T.'s step-daughters] were adjudicated CHIPS on May 27, 1997. This adjudication stemmed from sexual abuse perpetrated by their step-father, [J.T.]. Due to the conduct that precipitated this prior CHIPS adjudication of [J.T.]'s step-children, [J.T.'s two children] are at risk of being a victim of abuse under Wisconsin Statutes 48.13(3m).

The court granted the State's motion on November 17, 1997, and J.T.'s children were subsequently placed in foster care following a dispositional hearing in December.

There is ample indication in the record that J.T. suffered from a mental illness. His competency to proceed was raised in both the CHIPS proceedings and in the criminal case relating to his alleged sexual assault, and he was apparently evaluated at Mendota Mental Health Institute. In addition to raising J.T.'s competency to proceed in the CHIPS cases, Schwarz filed motions on his behalf to suppress his statements to the police, and for psychological examinations of the two step-daughters, both children, J.T. himself, and his wife. Schwarz also filed a lengthy response opposing the State's summary judgment motion.

Schwarz submitted a statement for fees on August 5, 1997, which requested payment of $1,117 for 16.1 hours of legal services rendered during July.

On October 10, she requested payment of $1,603 for 22.9 hours of legal services rendered during August and September. All requested fees were billed at the rate of $70 per hour. The court approved these payments to Schwarz totaling $2,720. However, when she submitted her next billing in December for October-November services which requested payment of $7,553 for 107.9 hours, the court denied the payment. In a letter dated January 12, 1998, the court informed Schwarz as follows:

> I have been asked to review billings by you for services rendered in the above captioned matter. Currently you are requesting an additional $7,553.00 in fees.
>
> I find your billing to be totally out of line for the services required in this matter. The court regards this as a rather uncomplicated CHIPS case and the hours you spent are not justified. Furthermore some of the hours appear to be more for [J.T.]'s criminal representation and not juvenile matters.
>
> You have already been paid $2,720.00 by the County for your representation. This exceed the monthly amount of $2,567.00 we pay our contract guardian ad litems for all hours of work monthly on all of their cases.
>
> Another comparison is the contract with attorneys who are appointed on CHIPS cases. They are paid $900.00 per case with an estimate of 12 hours of work per case.
>
> For these reasons, the Court is denying further payment and denies your request for additional fees.

The court subsequently entered an order denying the "request to approve payment of an additional $7,553.00 to Atty. Schwarz for her representation" of J.T. in the CHIPS proceedings. The order incorporated the reasons set forth in the earlier letter. A copy of a schedule showing projected case assignments and monthly compensation for Dane County guardians ad litem was also attached to the order. Schwarz appeals the order denying her payment request.

## ANALYSIS

The parties do not dispute the standard for our review. A trial court's determination of attorney fees is discretionary and we will reverse only for an erroneous exercise of that discretion. *See* ***Standard Theatres, Inc. v. DOT***, 118 Wis.2d 730, 747, 349 N.W.2d 661, 671 (1984). We will uphold a discretionary determination if the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *See* ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Moreover, this court will look for reasons to sustain a trial court's discretionary decision, *see* ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968), and if a trial court fails to adequately explain its reasoning, we will independently review the record to determine whether it provides a reasonable basis for the trial court's discretionary ruling, *see* ***State v. Clark***, 179 Wis.2d 484, 490, 507 N.W.2d 172, 174 (Ct. App. 1993).

Schwarz first argues that the trial court's order denying her payment request violates SCR 81.02(1) (West 1999), which provides that "attorneys appointed by any court to provide legal services … for indigents … shall be compensated at the rate of $70 per hour or a higher rate set by the appointing authority." This argument misses the mark, however, since the court's order appointing Schwarz specifies that her fees were to be paid at the rate of $70 per hour. It is clear from the court's letter to Schwarz that its disagreement with her payment request was not with the hourly rate, but with the number of hours for which she was seeking compensation: "the hours you spent are not justified."

The court evidently considered $2,720 to be proper compensation for legal services reasonably rendered on J.T.'s behalf from the time of Schwarz's appointment on July 8, 1997, through the entry of the dispositional order in December. At the rate of $70 per hour, this would equate to approximately thirty-nine hours of services. Thus, the question before us is whether the court erroneously exercised its discretion in limiting Schwarz's total compensation to that level, given that she submitted billings requesting payment for some 147 hours of services. Schwarz asserts that the trial court "did not assess the complexity of the case" in its determination, and she urges us to evaluate the compensation issue according to the criteria set forth in ***Joni B. v. State***, 202 Wis.2d 1, 19, 549 N.W.2d 411, 418 (1996), which are to guide a court's initial decision whether to appoint counsel for an indigent parent in a CHIPS case.

We reject Schwarz's proffered analysis under the ***Joni B.*** criteria. It is not necessary for us to import concepts from other types of determinations, inasmuch as Wisconsin case law has clearly laid out the relevant criteria for evaluating the reasonableness of fees sought by attorneys appointed by a trial court to represent indigents. In ***State v. Sidney***, 66 Wis.2d 602, 607, 225 N.W.2d 438, 441 (1975), the supreme court noted that "the trial judge has the responsibility of determining what services were reasonably necessary as well as fixing the rate of compensation," and it listed the following "things to be taken into consideration" by the trial court when doing so:

> the amount and character of the services rendered, the labor, the time, and trouble involved, the character and importance of the litigation, the amount of money or value of the property affected, the professional skill and experience called for, and the standing of the attorney in his profession.

A similar listing of factors which a court may consult when reviewing the reasonableness of attorney fees is found in SCR 20:1.5 (West 1999), the most relevant of which to the present dispute are the following: "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly"; "the fee customarily charged in the locality for similar legal services"; and "the amount involved and the results obtained."

In ***Gibson v. State Public Defender***, 154 Wis.2d 809, 454 N.W.2d 46 (Ct. App. 1990), we applied the ***Sidney*** factors, and noted SCR 20:1.5, in reviewing a determination by the State Public Defender Board to "reduce the number of out-of-court hours attorney John Gibson had billed to the State Public Defender for defending an indigent defendant," ***id***. at 810, 454 N.W.2d at 47. We described the agency's action as follows:

> Gibson billed the State Public Defender $15,849.66, claiming compensation for 38.9 in-court hours and 422.3 out-of-court hours. The bill was accompanied by a seventeen-page document, indicating the character of the services Gibson rendered and the amount of the time spent on each service. The State Public Defender reviewed Gibson's bill and paid him a total of $9,923.05, reducing his out-of-court hours to 245.2. Included with the payment was a form entitled "Explanation of Private Attorney Bill Reduction," indicating the reasons for the bill reduction. Two reasons were indicated for the reduction, only one of which is relevant to this appeal:
>
> > Attorney time was billed in excess of what the agency considered reasonable on this case. Reducing a bill is always a difficult action to take and may be necessary even where time is accurately billed. The reductions do not reflect criticism of the attorney's dedication, but rather acknowledge the limits of the state's ability to pay.

***Id***. at 811, 454 N.W.2d at 47. The board sustained the agency's action, and the issue on appeal was "whether the Board's conclusions are reasonable and its findings are supported by substantial evidence." ***Id***. at 810-11, 454 N.W.2d at 47.

We acknowledge that our standard when reviewing an administrative agency's decision is articulated differently than the standard which governs our review of a trial court's discretionary determinations. Nonetheless, in both instances, reasonableness and a basis in the record for the result reached, are the touchstones of our review. And, we defer in both instances to an entity with appropriate expertise and superior positioning to make the determination. *See* ***Standard Theatres, Inc. v. DOT***, 118 Wis.2d 730, 747, 349 N.W.2d 661, 671 (1984), (citing ***Tesch v. Tesch***, 63 Wis.2d 320, 334-35, 217 N.W.2d 647, 654 (1974)), where the supreme court observed that

> [t]he judge has been aware of the amount of time consumed by the trial and the nature and complexity of the issues involved. He has observed the quality of the services rendered and has access to the file in the case to see all of the work which has gone into the action from its inception. He has the expertise to evaluate the reasonableness of the fees with regard to the services rendered.

In ***Gibson***, we sustained the State Public Defender's comparison to hours billed in typical cases of a similar nature, noting that, according to its experience in reviewing defense counsel billings, a typical ratio for out-of-court to in-court hours was 2-to-1 to 4-to-l, and that the agency had approved a 6-to-1 ratio for Gibson's billing, as opposed to the 10-to-1 ratio on the bill he had submitted.[3] ***Id***. at 815, 349 N.W.2d at 49. We concluded that the agency's evaluation of the amount of time required for proper representation was reasonable, even though

[3] Our review of Schwarz's billings for July through November indicate that she sought compensation for 5.6 hours for court appearances, which included in-court time at the hearing on the competency issue in the criminal case. The trial court's allowance of thirty-nine hours of total compensated services is comparable to the 6-to-1 ratio we sustained as reasonable in ***Gibson***. Schwarz's submitted billings for 147 total hours represents a ratio of 25-to-1 for out-of-court to in-court time.

Gibson had attempted to justify the larger time expenditure because of the "unusualness" of the case and difficulties in communicating with his client.

Here, the trial court compared Schwarz's work in this case to that of Dane County's contract guardians ad litem and to attorneys who contract with the county for representation in CHIPS cases, matters which would seemingly involve similar issues and time expenditures as the present case. Like Gibson, attorney Schwarz attempts to justify her significantly larger time expenditure on the basis of the claimed complexities of the case and its interrelationship with the pending divorce and criminal matters. The trial court concluded, however, that the CHIPS case involving J.T.'s children was "a rather uncomplicated CHIPS case" and that some of the hours Schwarz billed "appear to be more for [J.T.]'s criminal representation." Our review of the record indicates that the trial court's conclusions were not unreasonable.

The billings Schwarz submitted sought compensation for over twenty hours of telephone and office conferences with J.T.'s defense counsel in the criminal case, which is almost double the 10.8 hours claimed for conferring with J.T. himself. The bulk of Schwarz's hours were expended in the days leading up to the hearing on the State's summary judgment motion, which apparently consumed one hour of court time. These billings include 1.5 hours to review the State's one-page motion, to which was attached a one-page affidavit and some sixteen pages consisting of a petition, dispositional report and order from the Sauk County CHIPS case. Schwarz's billings for preparation of J.T.'s response to that motion total at least 42.9 hours over the period November 5 through 16, 1997, and include the following entries: initial draft, 2.5 hours; research, 4.8 and 3.2 hours; "continued preparation," entries of 6.5, 7.4, and 5.8 hours; preparation of attorney affidavit, 1.2 hours; "revise answer to summary judgment motion," 4.5 hours;

"final revision," 2.2 hours; and "preparation for summary judgment hearing," 4.8 hours.[4]

We conclude that it was not unreasonable for the trial court, given its vantage point of familiarity with the facts of the CHIPS case, its procedural posture and the parties' positions, to conclude that the hours Schwarz submitted for compensation were excessive. The State's burden in the CHIPS case was to establish by clear and convincing evidence that J.T.'s children were "at substantial risk of becoming the victim[s] of abuse … based on reliable and credible information that another child in the home has been the victim of such abuse." *See* § 48.13(3m), STATS. The State had in hand an adjudication from an adjoining county providing "reliable and credible information" that the predicate abuse had occurred; J.T. himself had provided a statement to authorities acknowledging his involvement in the sexual abuse of his step-daughters; and there was little dispute that J.T.'s mental illness created significant obstacles to his present ability to parent his children.[5] It was not unreasonable for the trial court to conclude on this record that the efforts to vigorously contest the CHIPS allegations were more related to J.T.'s criminal defense needs than to his position as a father whose children were alleged to be in need of protection or services from the court.

We thus conclude that the trial court's denial of payment to Schwarz, above and beyond the $2,720 she had previously received to represent

[4] Schwarz's billings for November 10th alone total 19.6 hours. Schwarz asserts in her reply brief that this "clearly is a mistake," that some of the hours recorded for November 10th were actually performed on November 11th, and had the trial court pointed out the discrepancy, she would have "corrected the mistake."

[5] The children's mother did not appear at either the hearing on the State's summary judgment motion or the dispositional hearing. Court minutes from the earlier plea hearing indicate that the mother admitted the allegations of the CHIPS petitions.

J.T. in the CHIPS proceedings, was not an erroneous exercise of trial court discretion. We also deny Schwarz's request that we exercise our discretionary reversal authority under § 752.35, STATS. Although we affirm the appealed order, we acknowledge that it may have been preferable for the court to provide Schwarz with its expectations as to what typically constitutes reasonable compensation for court-appointed counsel in cases of this nature at the time of her appointment, or perhaps at the time she submitted her initial billings for $2,720.

We also acknowledge that when disputes of this nature arise, a trial court should permit appointed counsel a formal opportunity to challenge the court's reduction of the amount requested. *See* ***State v. Sidney***, 66 Wis.2d 602, 608-09, 225 N.W.2d 438, 441 (1975). Schwarz communicated her objection to the trial court's rejection of her request for the $7,533 payment in a five-page letter to the chief judge, attached to which were seventeen exhibits supporting her claim for the additional payment. The record indicates that Schwarz's letter, which raises many of the arguments Schwarz presents to this court on appeal, was copied to the trial court judge prior to his entry of the final order denying the payment. Thus, it appears that the trial court was aware of Schwarz's concerns, and of her arguments as to why she was entitled to receive the additional payment she had requested for representing J.T. in the CHIPS case. And, since we have concluded that the trial court did not erroneously exercise its discretion in denying the additional payment, we also conclude that a remand for further proceedings on the matter would serve no useful purpose.

*By the Court.*—Order affirmed.

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