Extraordinary Fees in **Court-Appointed Appeals**

By Liisa R. Speaker

The U.S. Constitution guarantees the right to counsel.[1] The guarantee applies not only in criminal cases, but also to parents in child welfare proceedings.[2] Tensions arise in court-appointed cases because county-adopted pay rates may not equal "reasonable compensation," but an attorney desiring a reasonable fee for work performed will have to frame the request as an extraordinary fee arising from a more-than-normal amount of effort. While extraordinary fees are rarely requested in court-appointed child welfare cases, recently there has been an uptick in requests for extraordinary fees and appeals from the denial of such fees. To date, the appellate decisions regarding these requests have all arisen in the criminal context; however, the principles involved in these decisions apply just as forcefully to court-appointed appeals in the child welfare context.

Appointed attorneys are entitled to reasonable fees

The Michigan Supreme Court has declined to adopt a specific formula for calculating reasonable compensation for appointed attorneys.[3] Reasonable compensation requires that

At a Glance:

In court-appointed child welfare cases, extraordinary fees are rarely requested. However, there has been a recent uptick in requests for extraordinary fees and appeals from the denial of such fees. When attempting to show extraordinary fees, an attorney should attach a detailed description of the work done and the reasons why the matter required more care and diligence than a normal court-appointed appeal.

the "compensation *actually* paid must be reasonable in relation to the representational services that individual attorneys *actually* perform."[4] (emphasis in original).

Attorney John Ujlaky has repeatedly attempted to increase his fees in court-appointed appeals. Although he has been mostly unsuccessful in getting additional fees, he has achieved success for the bar by obtaining some law on reasonable fees for court-appointed cases. Most significantly, Ujlaky obtained an order from the Michigan Supreme Court holding that "the trial court shall either award the requested fees, or articulate on the record its basis for concluding such fees are not reasonable."[5] Bradley Hall, administrator of the Michigan Assigned Appellate Counsel System (MAACS) commented that MAACS "encourages its roster attorneys to move for reasonable fees whenever the trial court's fee policy does not otherwise allow them."[6]

Attorney Mitchell Foster obtained a significant published decision from the Court of Appeals on this topic. In *In re Attorney Fees of Mitchell T. Foster*,[7] Foster was appointed to represent the defendant in a plea-based conviction appeal. He filed an application for leave to appeal in the Court of Appeals that was denied for lack of merit presented. He then filed a petition for reasonable fees in the trial court to recover fees for his time preparing the application. The trial court ruled that because it is in a poor county, it could not afford to pay for services that have "no merit" or grounds to be filed. Foster then appealed on the ground that the trial court cannot deny him a reasonable fee for the work performed on the appointed appeal. The Court of Appeals agreed with Foster and concluded that because there is no merit in the appeal does not mean the attorney is not entitled to a reasonable fee. The Court reversed the trial court's decision and remanded the case to a different trial judge to determine the reasonable fee.

Hall commented that "it's important to remind the courts that…difficult and unpredictable work carries real financial risk for appointed counsel, and the courts should not be free to avoid their constitutional obligations simply by adopting policies that provide reasonable compensation only in the rarest and simplest of cases."[8]

How to establish the need for an extraordinary fee

In addition to the 2015 Supreme Court order in *In re Attorney Fees of John W. Ujlaky*, Ujlaky has obtained unpublished opinions that provide instruction to other appellate attorneys on how to meet the burden of proving extraordinary fees. In *In re Attorney Fees of John W. Ujlaky*, decided in 2017, for example, Ujlaky submitted a request for extraordinary fees after the Court of Appeals denied leave. The trial court awarded him $300 but denied the rest of the request without reasoning.[9] The paperwork that Ujlaky filed shows he properly checked the "motion for extraordinary fees" box on the MAACS form. This box also requests that a motion be attached; instead of a motion, Ujlaky provided an itemized copy of the billing. After the trial court denied his request, Ujlaky filed a motion for reconsideration in the trial court, stating that "a course of conduct was developed, which required extensive legal research." The trial court denied the motion to reconsider, finding that Ujlaky did not show that the trial court committed palpable error or abused its discretion. Ujlaky then appealed the denial of fees to the Court of Appeals, which affirmed the trial court's decision.

In *Ujlaky*, decided in 2017, the Court of Appeals laid out rules that must be adhered to for extraordinary fees to be awarded:

- The box requesting extraordinary fees on the county's fee request form must be checked and a conforming motion must be attached.[10] This puts the burden of proof on the party requesting fees to show the extraordinary circumstances associated with the case leading to the higher request.[11]
- The reasonableness of the fees depends on "the totality of special circumstances applicable to the case at hand."[12]

[A]n attorney desiring a reasonable fee for work performed will have to frame the request as an extraordinary fee arising from a more-than-normal amount of effort.

- The party requesting fees must show beyond a simple recitation of their proposed billing why extraordinary fees are reasonable.[13]
- There must have been an abuse of discretion by the trial court.[14]

The Court of Appeals held that Ujlaky was unable to recover extraordinary fees beyond the court-appointed cap because "he did not attach a conforming motion for extraordinary fees. The billing statements did not provide the legal framework for his request or apply the relevant facts to that framework for purposes of determining whether his requested fees were reasonable."[15] Thus, Ujlaky failed to meet his burden.

In *In re Attorney Fees of Mitchell T. Foster*, the Supreme Court reversed the Court of Appeals' decision denying Foster extraordinary fees.[16] In that case, Foster had to review more than 2,000 pages of financial records and spent a significant amount of time consulting with a defense expert witness. Foster's client eventually entered a no-contest plea. As noted by the dissenting opinion in the Court of Appeals, the county denied the fee request based on the county's budgetary constraints, asserting that most of the work was unnecessary since the defendant took a plea and the county had already authorized payment of $500, which was $115 more than the county rate for a criminal plea.[17] Foster requested extraordinary fees for the work he performed, using the county's hourly rate of $45 per hour. The county also authorized Foster to hire and pay a financial expert $12,500 to assist in the case. As Judge Elizabeth Gleicher noted in her dissent, "[a]n extraordinary fee analysis should not pit a lawyer's appropriate and effective efforts against a court's budget…"[18] The Supreme Court remanded to the trial court for further proceedings on the extraordinary fee request.

The Court of Appeals allowed a request for extraordinary fees to move forward in *In re Attorney Fees of Kenneth Malkin*.[19] After winning at trial, attorney Malkin submitted a request for fees beyond the $5,850 awarded by the trial court for 90 hours of work. Malkin showed that he worked 151 hours and was entitled to an additional $3,965 based on the county's hourly rate of $65 per hour. Once again, the Court of Appeals reversed the denial of fees and reminded that if a trial court does not award fees, it must articulate on the record its basis for concluding the fees are not reasonable. An "extensive analysis by the court is not required but it must indicate *how* the claimed hours are being adjusted."[20] The efforts of Ujlaky, Foster, and Malkin have given court-appointed appellate attorneys some guidance as to what the courts expect when extraordinary fees are requested. These explanations may pave the way for court-appointed appellate attorneys to be able to recover more of the fees they so often deserve.

Lessons learned from the MAACS pilot project

MAACS has been working on a pilot project to make this process clearer and assure that criminal defendants are being provided effective assistance of counsel in their appeals. The

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fee request form for the pilot project clearly states that the "request for fees beyond the maximum must be accompanied by a motion explaining why the case reasonably required additional effort."[21] In addition, the form helps identify what might qualify as an extraordinary fee by stating that "potential grounds for excess fees include, but are not limited to, lengthy trials, complex legal issues, fact investigation, and trial court litigation."[22]

Whether a similar pilot project could be implemented in the child welfare arena has been a topic of discussion. Reasonable and extraordinary fees are even more imperative in child welfare cases as the court-appointed system for termination appeals generally provides even lower fees than court-appointed criminal appeals, and the appointment process is done at the county level without statewide uniform standards. Without uniform standards, navigating the appointed fees system can be daunting, as even neighboring counties may use completely different systems and procedures. While most counties tend to stay within the range of $50–$75 an hour, with some counties dropping as low as $30 an hour, almost all of them differ as to whether they have a cap on attorney fees, the amount of the cap, and at what point in the process the attorneys may submit their itemized bills. Some counties cap the fees for a termination appeal at $1,500, others are even lower at $750, and many counties do not have a cap at all as long as the attorney uses the court-approved rate.[23] Even the State Court Administrative Office does not have a standardized procedure for requesting reasonable or extraordinary attorney's fees in appointed child welfare cases at either the trial court or the appellate level, nor does it maintain a list of all the counties and the various pay rates.

Conclusion

There are options—albeit impractical—for obtaining extraordinary fees. Attorneys requesting the fees carry the burden of proof; they must show why they deserve a fee above the capped amount. An appointed appellate attorney could ask another attorney in the same area who does similar work to review what work needed to be done in the matter and testify as to the necessity and reasonableness of the extraordinary fees requested. However, finding another qualified attorney willing to testify on the matter can be difficult. When attempting to show extraordinary fees, an attorney should attach a detailed description of the work done and the reasons why the matter required more time than a standard court-appointed appeal. ■

Liisa R. Speaker practices exclusively in the field of appeals, particularly child welfare and family law appeals. She has advocated for reasonable fees in many court-appointed child welfare appeals and has trained judges and attorneys on child protection proceedings. She also moderated a session at the 2019 Michigan Appellate Bench Bar Conference on obtaining a reasonable fee in court-appointed child welfare appeals.

ENDNOTES

1. US Const, art VI.
2. *Reist v Bay County Circuit Judge*, 396 Mich 326, 346; 241 NW2d 55 (1976).
3. *In re Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 129; 503 NW2d 885 (1993).
4. *Id.* at 131.
5. *In re Attorney Fees of John W. Ujlaky*, 498 Mich 890; 869 NW2d 624 (2015).
6. Personal interview with Bradley Hall (September 26, 2017).
7. *In re Attorney Fees of Mitchell T. Foster*, 317 Mich App 372; 894 NW2d 718 (2016).
8. Personal interview with Bradley Hall.
9. *In re Attorney Fees of John W. Ujlaky*, unpublished per curiam opinion of the Court of Appeals, issued April 27, 2017 (Docket No. 331067)
10. *Id.* at 5.
11. *Id.* at 5–6.
12. *Id.* at 3.
13. *Id.* at 4.
14. *Id.* at 3.
15. *Id.* at 6.
16. *In re Attorney Fees of Mitchell T. Foster*, 503 Mich 981; 923 NW2d 888 (2019).
17. *In re Attorney Fees of Mitchell T. Foster*, unpublished per curiam opinion of the Court of Appeals, issued February 27, 2018 (Docket No. 334309).
18. *Id.* at 16.
19. *In re Attorney Fees of Kenneth Malkin*, unpublished per curiam opinion of Court of Appeals, issued January 11, 2018 (Docket Nos. 335495 and 335496).
20. *Id.* at 4.
21. Personal interview with Bradley Hall.
22. *Id.*
23. For example, Ingham and Jackson counties pay an hourly rate of $45 to $50 per hour, but cap the pay for an appointed child welfare appeal at $750. Clinton, Leelanau, Livingston, Oakland, and Shiawassee counties pay an hourly rate of $60 per hour, with caps ranging from $1,000 to $1,200. Other counties like Chippewa, Macomb, and Ontonagon pay $50 per hour, but do not cap the amount. "Show Me the Money!" presentation by the author at Child Welfare Breakout, 2019 Michigan Appellate Bench Bar Conference (March 28, 2019). The presentation materials are available at <https://benchbar.org/wp-content/uploads/2019/03/3-21-19-Handout.pdf> [https://perma.cc/GG7W-EC5T] (site accessed September 28, 2019).