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Family Law. *Furia v. Furia*, 692 A.2d 327 (R.I. 1997). The proper distribution of a plaintiff's pension is the monthly payment of an amount equal to one-half of the monthly pension benefits which the plaintiff would have received had she chosen to retire.

In *Furia v. Furia*[1] (*Furia II*), the Rhode Island Supreme Court expanded a prior ruling[2] when it decided the equitable distribution of a spouse-teacher's pension. In 1992, the court held that the pension of a public school teacher was subject to equitable distribution.[3] However, Mrs. Furia—the plaintiff in *Furia II*—while vested in her pension plan, chose not to retire.[4] In *Furia II*, the court confronted the question of how to distribute a spouse-teacher's pension before the participating spouse actually retired.[5]

Facts and Travel

The plaintiff, Lucille Furia, and the defendant, Richard Furia, divorced in May of 1992 on the grounds of irreconcilable differences.[6] The family court judge provided for equitable distribution of most of the marital property.[7] During the Furia divorce proceeding, a supreme court case, *Moran v. Moran*,[8] was pending on the issue of equitable distribution of a spouse's pension.[9] The family court judge reserved a determination regarding the distribution of Mrs. Furia's teacher's pension, pending that decision. The *Moran* court held that the pension of a public school teacher was subject to equitable distribution.[10] However, Mrs. Furia, though vested in her pension plan, chose not to retire. Therefore, the *Moran* decision did not apply to the Furia case.[11] The family court judge certified to the Rhode Island Supreme Court the question whether a nonparticipating spouse had a right to receive pension benefits

1. 692 A.2d 327 (R.I. 1997) (*Furia II*).
2. *See* Furia v. Furia, 638 A.2d 548 (R.I. 1994) (*Furia I*).
3. *See* Moran v. Moran, 612 A.2d 26, 33 (R.I. 1992).
4. *See Furia II*, 692 A.2d at 328.
5. *See id.*
6. *See id.*
7. *See id.*
8. 612 A.2d 26 (R.I. 1992).
9. *See id.* at 33.
10. *See id.* at 33.
11. *See Furia II*, 692 A.2d at 328.

from the state employees' retirement system before the participating spouse actually retired.[12]

BACKGROUND

Rhode Island has an equitable distribution statute[13] that enumerates four factors the trial judge must consider when dividing up the marital estate upon divorce.[14] Those four factors are: (1) the length of the marriage; (2) the conduct of the parties during the marriage; (3) the contribution of each party in the acquisition, preservation or appreciation in value of his/her respective estate and (4) the contribution and services of either party as a homemaker.[15] The concept of equitable distribution has evolved as a means by which the law can divide marital assets.[16] Marriage is, among other things, an economic partnership between two people striving to make a better life for themselves.[17]

When a married couple divorces, section 15-5-16.1 of the Rhode Island General Laws provides the factors that enable the court to recognize on a practical level the existence of that partnership, to consider each spouse's relative efforts to foster it and to divide fairly the assets of that joint enterprise. Equitable distribution of marital property takes into consideration all of the tangible and intangible contributions each party has made over the course of the marriage.[18]

Rhode Island views pensions as marital property subject to equitable distribution.[19] The pension represents delayed compensation for work performed over the course of the marriage. It is an

12. *See id.* (citing Furia v. Furia, 638 A.2d 548 (R.I. 1994) (*Furia I*)).

13. R.I. Gen. Laws § 15-5-16.1 (1996).

14. *See id.*; *see also* Whited v. Whited, 478 A.2d 567, 569 (R.I. 1984) (listing determinative factors when dividing the marital estate).

15. *See* R.I. Gen. Laws § 15-5-16.1.

16. *See* Stevenson v. Stevenson, 511 A.2d 961, 964 (R.I. 1986).

17. *See id.*

18. *See id.*

19. *See id.* (holding that a police officer's pension is a marital asset for the purpose of property division upon divorce); *see also* Duke v. Duke, 675 A.2d 822 (R.I. 1996) (applying the same rationale to firefighters' pensions); Casey v. Casey, 494 A.2d 80 (R.I. 1985) (awarding the husband a portion of a vested pension fund under the terms of the division of marital assets); Whited v. Whited, 478 A.2d 567 (R.I. 1984) (finding no abuse of discretion where the trial judge did not award the wife an interest in the husband's boats, medical equipment or small pension).

enforceable contract right, and therefore a form of property.[20] A pension is reasonably analogous in form to a forced savings account whose funds will become available to the parties upon retirement.[21]

In *Moran v. Moran*,[22] the Rhode Island Supreme Court held that the pension of a public school teacher was subject to equitable distribution.[23] The court adopted the rationale set forth in a Pennsylvania Supreme Court case, *Young v. Young*,[24] that pensions in general are subject to equitable distribution.[25] The *Moran* court discussed the basis for viewing pensions as marital property subject to equitable distribution.[26] Pension benefits represent compensation for marital effort. They are substitutes for current earnings which would have increased the marital standard of living or would have been converted into other assets divisible at dissolution. It is just to divide those benefits because in most cases the retirement benefits constitute the most valuable asset the couple has acquired. Also, they both have relied upon their pension payments for security in their older years.[27] Thus, in *Moran*, the husband's municipal pension was not exempt from distribution.

In *Furia I*,[28] the supreme court answered a certified question from the family court. The question arose in the context of the family court's attempt to distribute equitably the Furia property.[29] Mr. Furia wanted to receive his portion of Mrs. Furia's pension. Mrs. Furia, while vested, chose not to retire. The supreme court held that Mr. Furia was not entitled to collect the pension benefits per se because Mrs. Furia had not retired. However, depending on

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20. *See Stevenson*, 511 A.2d at 964.

21. *See id.*

22. 612 A.2d 26 (R.I. 1992).

23. *See id.* at 33.

24. 488 A.2d 264 (Pa. 1984) (holding that courts may attach a municipal police pension to satisfy an obligation of support).

25. *See Moran*, 612 A.2d at 33 (following *Young*, 488 A.2d 264 (Pa. 1984)).

26. *Id.* at 32.

27. *See id.* at 33 (citing 3 Rutkin, Family Law and Practice § 37.01(1), at 37-81 (1985)).

28. 638 A.2d 548 (R.I. 1994). *Cf. supra* note 10.

29. *See id.* at 549. The certified question was "[w]hether the non-participating spouse has a right to receive pension benefits pursuant to a Qualified Domestic Relations Order prior to the retirement date of the participatory spouse in a Teacher's/State pension or must he wait until his spouse actually retires and receives pension benefits."

the equitable distribution by the family court, Mr. Furia may not have to wait until Mrs. Furia retired to begin collecting the value of benefits he would receive if she had retired.[30] That is because if the family court awarded Mr. Furia a portion of Mrs. Furia's pension, then Mrs. Furia would have to give him the equivalent of that award until she actually retired.[31]

Applying this holding, the family court judge awarded Mr. Furia one-half of the estimated actuarial value of Mrs. Furia's pension. He ordered Mrs. Furia to pay $30,000 by January 31, 1996, and to execute a promissory note for $180,987.50 including interest of 7% per year.[32] Additionally, Mrs. Furia must make monthly payments not to exceed $1250, with a balloon payment[33] for the total balance due one month after Mrs. Furia reached sixty-five years of age.[34] Mrs. Furia may deduct the interest on the note from her taxable income, while Mr. Furia must report that interest as income.[35] However, since Mrs. Furia had not retired, she did not have pension benefits available to pay that court award. Mrs. Furia timely appealed that decision.[36]

ANALYSIS AND HOLDING

The supreme court, in *Furia II*, expanded the *Furia I* holding. The *Furia II* court explained that the family court's interpretation of *Furia I* assumed Mrs. Furia had retired in December 1995[37] and would live out her estimated life expectancy. The family court allocated Mrs. Furia's pension as if it were a lump-sum payment to her of the approximate cash value of the pension benefits Mrs. Furia would receive during her life.[38] This was an inequitable distribution of Mrs. Furia's actual pension benefits. It did not consider that Mrs. Furia may die before retiring and never collect any actual pension benefits. Had that occurred, Mr. Furia would have

30. *See id.* at 553.
31. *See id.*
32. *See Furia II*, 692 A.2d at 328.
33. A balloon payment is the final payment of principal under a balloon note, commonly representing essentially the entire principal. *See* Black's Law Dictionary 143 (6th ed. 1990).
34. *See Furia II*, 692 A.2d at 328.
35. *See id.*
36. *See id.*
37. December of 1995 is the month the family court entered the original order for the distribution of the pension. *See id.*
38. *See id.*

received one-half of the estimated value of Mrs. Furia's lifetime pension. Also, the court posited, if Mrs. Furia died two months after retiring, then she would have collected "virtually none" of her pension benefits, but Mr. Furia would have received one-half of the total value of the pension.[39]

In *Furia II*, the Rhode Island Supreme Court expanded the *Furia I* ruling. The *Furia II* court held that the proper distribution of Mrs. Furia's pension is the payment each month of an amount equal to one-half of the monthly pension benefits that Mrs. Furia would have received had she chosen to retire.[40] Additionally, *Furia II* held that after her retirement, Mrs. Furia should continue to pay Mr. Furia one-half of her actual pension benefits on a monthly basis throughout her retirement. Mr. Furia must pay taxes on the monthly payments received from Mrs. Furia.[41]

CONCLUSION

Furia II raises a tax issue. Normally, alimony is tax deductible by the payor, and taxable to the receiver.[42] In *Furia II*, Mrs. Furia decided not to retire. She still had to give Mr. Furia the money he would have received if she had retired. This payment comes out of her salary, under the title of equitable distribution. Her paycheck is subject to federal and state taxation. Thus, Mrs. Furia—here, the worker—has the tax liability, and Mr. Furia—the non-working spouse—receives the money tax-free. In *Furia II*, the Rhode Island Supreme Court decided that the recipient of half of the ex-spouse's pension must pay tax on that money. The Internal Revenue Service has stated otherwise. Unless a person can afford to pay their ex-spouse, the practical effect of *Furia II* may be that it forces one into an undesired retirement.

Vicki J. Ray

39. *Id.* at 329.
40. *Id.* at 328.
41. *See id.*
42. *See* I.R.C. §§ 71(a), 215(a) (1996).

Family Law. *In re Kyle S.*, 692 A.2d 329 (R.I. 1997). Interpretation by the Department of Children, Youth, and Families (DCYF) of section 15-7-7(1)(b)(iv) of the Rhode Island General Laws, as amended by 1994 Public Laws chapter 233 section 1, involuntarily terminating parental custody of children where prior siblings had voluntarily been released to the state, does not comport with the legislative intent of the statute.[1] The portion of the statute including prior terminations as one of the requisite conditions for parental unfitness does not include prior voluntary terminations.[2]

FACTS AND TRAVEL

Kyle S. (Kyle) was born on March 18, 1995 to Janice Woodward Sabatini and Thomas Sabatini (Sabatinis).[3] The Sabatinis had extensive involvement with DCYF prior to Kyle's birth. Previous allegations of abuse were documented against both parents.[4] Two months prior to Kyle's birth, the Sabatinis voluntarily agreed to relinquish their rights to his older siblings.[5] In granting the termination, the family court made no finding of parental unfitness.[6] Based on the couple's prior dealings with DCYF, the hospital authorized Kyle's seventy-two hour detention and notified DCYF of his birth.[7] During the seventy-two-hour detention, DCYF obtained an ex-parte detention order from the family court and took temporary custody of Kyle. Soon thereafter, Kyle was placed in nonrelative foster care.[8]

On the basis of the prior voluntary terminations, DCYF filed a petition to involuntarily terminate the Sabatinis' parental rights to

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1. *In re* Kyle S., 692 A.2d 329 (R.I. 1997) (holding that DCYF's interpretation did not comport with the legislative intent of the statute and the supreme court did not need to address the constitutional issue of equal protection).

2. *See id.* at 334.

3. *See id.* at 330.

4. *See id.*

5. In August of 1994, DCYF filed involuntary petitions to terminate the Sabatinis' parental rights. Before the involuntary petitions could be considered by the family court, the Sabatinis voluntarily agreed to terminate their parental rights to Kyle's five older siblings. *See id.*

6. Because the Sabatinis voluntarily consented to the termination of Kyle's five siblings, a parental-fitness hearing was unnecessary. *See In re Kyle*, 692 A.2d at 330; *see also* R.I. Gen. Laws §§ 15-7-5, -6 (1956).

7. *See In re Kyle*, at 692 A.2d at 330.

8. *See id.*

Kyle pursuant to section 15-7-7(1)(b)(iv) of the Rhode Island General Laws.[9] The Sabatinis moved to dismiss on the basis that section 15-7-7(1)(b)(iv) only authorizes involuntary termination of parental rights upon a judicial finding of parental unfitness.[10] DCYF contended that section 15-7-7(1)(b)(iv) applies whether the termination is involuntary or voluntary.[11] DCYF argued that the statute should be read to encompass both involuntary and voluntary terminations, even though it is silent regarding the nature of the previous termination proceeding.[12] The Rhode Island Supreme Court agreed with the Sabatinis and found that the intent of the General Assembly would be compromised if section 15-7-7(1)(b)(iv) were read to include voluntary terminations. This "would produce results contrary to the policies of the underlying act."[13]

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9. R.I. Gen. Laws § 15-7-7(1)(b)(iv) (1956), as amended by 1994 Pub. Laws ch. 233 § 1. The 1996 reenactment of R.I. Gen. Laws § 15-7-7(1)(b)(iv) redesignated subsection (1)(b)(iv) as (a)(2)(iv) but left undisturbed its language. References will be made to (1)(b)(iv), the statutory designation that was in effect at the time DCYF sought the petition.

10. *See In re Kyle*, 692 A.2d at 330; *see also* Santosky v. Kramer, 455 U.S. 745 (1982) (holding that parental rights may not be involuntarily terminated absent a fitness hearing where, by clear and convincing evidence, the parents are determined unfit).

11. *See In re Kyle*, 692 A.2d at 330.

12. Rhode Island General Laws § 15-7-7(a)(2)(iv) provides in pertinent part:

> (a) The court shall, upon a petition duly filed after notice to the parent and hearing thereon, terminate any and all legal rights of the parent to the child, including the right to notice of any subsequent adoption proceedings involving the child, if the court, by clear and convincing evidence, finds as a fact by clear and convincing evidence that: . . .
>
> (2) The parent is unfit by reason of conduct or conditions seriously detrimental to the child; such as, but not limited to, the following: . . .
>
> (iv) The child has been placed with the department for children, youth, and families and the court has previously terminated parental rights to another child who is a member of the same family and the parent continues to lack the ability or willingness to respond to services which would rehabilitate the parent and provided further that the court finds it is improbable that an additional period of services would result in reunification within a reasonable period of time considering the child's age and the need for a permanent home.

R.I. Gen. Laws § 15-7-7 (a)(2)(iv) (1956), as amended by 1994 Pub. Laws ch. 223 § 1 (formerly R.I. Gen. Laws § 15-7-7 (1)(b)(iv) (emphasis added)).

13. *See id.* at 333 (providing an example of a young mother who gave away her child voluntarily only to find years later she risks the loss of a subsequent child to DCYF).

BACKGROUND

The purpose of section 15-7-7 is to provide children who are in peril with a permanent and safe placement.[14] A parent's rights to the custody and management of a child may be terminated by any one of three statutory mechanisms.[15] Pursuant to section 15-7-5 or section 15-7-6, a parent may voluntarily relinquish his or her rights to a child without explanation or reason.[16] Under this statutory scheme, the legislature's purview was that a finding of parental unfitness is unnecessary because the surrender of custody is voluntarily. The statute further distinguishes voluntary terminations by remaining silent about state-sponsored rehabilitative services. However, under involuntary termination, the state must provide the parent with services designed to encourage and strengthen the parental relationship.[17] When involuntary termination occurs, section 15-7-7 dictates that the trial judge must be persuaded by clear and convincing evidence that a parent is either

14. *See id.* at 332.

15. *See id.* The three mechanisms are: (1) section 15-7-5, (2) section 15-7-6 and (3) section 15-7 -7. Similar statutory mechanisms exist throughout the nation. *See, e.g.*, Ala. Code § 26-18-2 (1994); Alaska Stat. § 29.23.180(c)(3) (Michie 1996); Ariz. Rev. Stat. Ann. § 8-531 (1972); Ark. Code Ann. § 27.3178 (598.19b) (Michie 1994); Cal. Trial Court Code Rule 1463 § 366.26 (1995); Colo. Rev. Stat. § 19-3-604 (1987); Conn. Gen Stat. § 45a-717(h)(5) (1994); Del. Code Ann. tit. 13 § 1103 (1994); D.C. Code Ann. § 16-2351 (1994); Fla. Stat. Ann. § 39.46 (West 1988); Ga. Code Ann. § 15-11-81 (1995); Haw. Rev. Stat. § 571-61 (1995); Idaho Code § 16-2005 (1963); 705 Ill. Comp. Stat. 405/2-29 (1993); Ind. Code § 31-6-5-3 (1978); Kan. Stat. Ann. § 38-1583 (1994); Ky. Rev. Stat. Ann. § 625.090 (Baldwin 1995); La. Rev. Stat. Ann. § 1001 (1995); Mass Gen. Laws Ann. ch. 28A, § 1 (1995). Md. Code Ann. Fam. Law § 5-312 (1995); Me. Rev. Stat. Ann. tit. 22 § 4055 (1983); Mich. Stat. Ann. § 27.3178 (598.19a) (1994); Minn. Stat. Ann. § 260.221 (1995); Miss. Code Ann. § 93-15-103 (1995); Mo. Rev. Stat. § 211.447 (1982); Mont. Code Ann. § 41-3-609 (1993); Neb. Rev. Stat. § 43-292 (1993); Nev. Stat. § 128.005 (1995); N.H. Rev. Stat. Ann. § 170-C:5 (1983); N.M. Stat. Ann. § 32A-4-28 (Michie 1978); N.Y. Social Services Law § 384-b (McKinney 1995); N.J. Stat. Ann. § 9:2-19 (1967); N.C. Gen Stat. § 7A-289.22 (1985); N.D. Cert. Code § 27-20-44 (1991); Ohio Rev. Code Ann. § 2151.353 (Baldwin 1995); Okla. Stat. tit. 10 § 1130 (1995); Or. Rev. Stat. § 419.523 (1979); 23 Pa. Cons. Stat. Ann. § 2511 (West 1993); S.C. Code Ann. § 20-7-1572 (Law. Co-op. 1992); S.D. Codified Laws § 25-5A-7.1 (1992); Tenn. Code Ann. § 37-1-147 (1991); Tex. Fam. Code Ann. § 161.001 (West 1996); Utah Code Ann. § 78-3a-402 (Michie 1996); Va. Code Ann. § 16.1-283 (1995); Vt. Stat. Ann. tit. 33, § 55 (1991); Wash. Rev. Code § 13.34.180 (1994); W. Va. Code § 49-6-5 (1988); Wis. Stat. Ann. § 48.415 (West 1995); Wyo. Stat. § 14-2-309 (1995).

16. *See* R.I. Gen. Laws §§ 15-7-5, -6 (1956).

17. *See In re Kyle*, 692 A.2d at 331-32; *see also* §§ 15-7-7(1)(a), (1)(b)(i), (1)(b)(iii).

unfit or incapable of providing a child with proper care.[18] The statute enumerates seven conditions which outline conditions of parental unfitness.[19] A positive finding on any one of the seven grounds allows the court to conclude a parent is unfit.

ANALYSIS AND HOLDING

The primary question addressed by the court was whether section 15-7-7(1)(b)(iv), on its face, includes both voluntary and involuntary terminations of parental rights.[20] The court's response to this primary inquiry was negative.[21] The rationale given by the court rested primarily on an aggregate reading of all of the statute's provisions.[22] The Rhode Island Supreme Court reasoned that reading the statute to include both voluntary and involuntary terminations would undermine the integrity of the underlying legislation by eliminating the distinction between sections 15-7-5, 15-7-6 and 15-7-7.[23] If the statute applied to voluntary terminations, then DCYF would have unfettered discretion to intervene in the subsequent births of mothers who had voluntarily given up prior

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18. R.I. Gen. Laws § 15-7-7 (1956); *see also In re* Kristina L., 520 A.2d 574, 579-80 (R.I. 1987).

19. The grounds justifying termination include:

> (1) the willful neglect of a parent to "provide proper care and maintenance for the child for a period of at least one year where financially able to do so," (2) the "[e]motional illness, mental illness, mental deficiency or institutionalization of a parent . . . of such a duration as to render it improbable for the parent to care for the child for an extended period of time," (3) "[c]onduct toward any child of a cruel or abusive nature," (4) placement of the child in DCYF custody and the chronic substance-abuse problem of a parent that prevents the return of the child within a reasonable period, (5) placement of the child in the custody of DCYF "and the court has previously terminated parental rights to another child" in the family, and the parent continues to fail to "respond to services which would rehabilitate the parent," and the court finds it improbable that additional services would result in reunification of the family, (6) placement of the child in the custody of DCYF for at least twelve months, during which the parents have been offered services to correct the situation, but it is unlikely that the child will be able to return to the parents' care within a reasonable time, and (7) a parent's abandonment of the child.

See In re Kyle, 692 A.2d at 332 n.8 (citing R.I. Gen. Laws § 15-7-7 (1956), as amended by 1994 Pub. Laws ch. 223, § 1).

20. *See In re Kyle S.*, 692 A.2d at 330.

21. *See id.*

22. *See id.*

23. Section 15-7-5 and section 15-7-6 do not require a finding of unfitness, while section 15-7-7 does require a finding of unfitness by the family court.

children. In doing so, an independent determination of whether the parent was able to care for the child would never occur. The court reasoned that eliminating this distinction would make little sense, given the purpose of the legislation.[24]

Allowing section 15-7-7 to apply to voluntary terminations would radically alter the parental-fitness portion of the legislation. Under section 15-7-7, the family court must first have a hearing to determine if the parents are "unfit" by clear and convincing evidence.[25] Giving DCYF the option of terminating parental rights to a subsequent child based on previous voluntary terminations renders the threshold inquiry of parental fitness irrelevant. The agency could use past voluntary terminations under section 15-7-5 or section 15-7-6 as a loophole for evading the requirements of section 15-7-7. The absence of such an inquiry would eliminate any concrete distinction between terminating on a voluntary basis versus an involuntary basis and cast away the equal protection requirement of establishing the parents as unfit.[26] In the case of the Sabatinis, Kyle would be extricated from their care without a determination of their current ability to care for him. Finally, the court concluded that if section 15-7-7 was read to include past voluntary terminations, then it would have the effect of discouraging future voluntary terminations that may be in the child's best interest.[27]

CONCLUSION

In refusing to adopt DCYF's interpretation of section 15-7-7(1)(b)(iv), the court gives parents who have voluntarily terminated their parental rights in the past, but have subsequent children, the right to a hearing on their fitness to care for the new child.[28] The Rhode Island Supreme Court reasoned that holding otherwise would circumvent legislative intent and cause results

24. *See In re Kyle*, 692 A.2d at 333.

25. R.I. Gen. Laws § 15-7-7 (1956).

26. It could be argued the denial of a hearing on fitness impinges on the parent's rights under the Due Process Clause. *See* U.S. Const. amend. XIV, § 1; R.I. Const. Art I, § 2. However, the court in *In re Kyle* never had to address this point. *In re Kyle*, 692 A.2d at 334.

27. *See In re Kyle*, 692 A.2d at 333.

28. *See id.* at 334; *see also supra* note 13.

unintended by the underlying legislative rationale.[29] The adoption of such an interpretation of section 15-7-7(1)(b)(iv) could have the unintended result of deterring parents from voluntarily terminating parental rights for the fear that in the future the state would use the previous voluntary termination as a pretext to involuntarily terminate subsequent children. As the goal of the statute is to foster better care for the children of the state, this result would not comport with the underlying intent of the statute nor the goals of DCYF.[30]

William J. Powers, IV

29. *See* Wayne Distributing Co. v. Rhode Island Comm'n for Human Rights, 673 A.2d 457, 460 (R.I. 1996); Sorenson v. Colibri Corp., 650 A.2d 125, 128 (R.I. 1994) (addressing the interpretation of legislative intent behind statutory schemes).

30. The court has noted that it is the duty of DCYF to make reasonable efforts to encourage and strengthen the parental relationship before the termination of rights is effected. *See In re* Ann Marie, 461 A.2d 394, 395 (R.I. 1983) (citing *In re* William, Susan and Joseph, 448 A.2d 1250, 1255 (R.I. 1982)). *Cf. In re* Kristina L., 520 A.2d 574, 581 (R.I. 1987) (holding that, where DCYF imposed its own values regarding proper familial relationships and found foster parents who allowed the child to live in more comfortable means, the agency did not make reasonable efforts to restore relationship between child and parent).