Roger Williams University Law Review

Volume 10 | Issue 3 Article 5

Spring 2005

Reasonable Efforts Not So Reasonable: The Termination of Parental Rights of a Developmentally Disabled Mother

Esme Noelle DeVault
Roger Williams University School of Law

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I. INTRODUCTION

In *In re Christopher B.*,[1] the Rhode Island Supreme Court examined the termination of the parental rights of a cognitively impaired mother, Mary Ann R., over her two children, Christopher and Kayla. In most instances, prior to terminating a parent's rights under Rhode Island law, the state must attempt to reunite the parent with his or her child by providing social services that address the cause of the initial state intervention.[2] Such services are commonly referred to as "reasonable efforts."[3] In this case, the Rhode Island Supreme Court retreats from prior case law that required a higher (or at least different) bar for services provided to cognitively disabled parents,[4] and the application of a true totality of the circumstances analysis.[5] For Mary Ann, the court's inconsistent analysis resulted in the loss of her children without an adequate opportunity to improve her parenting and rehabilitate herself into a "fit" parent prior to the termination of her parental rights.

Judicial termination of parental rights requires a three-step analysis: first, the court must consider the weighty fundamental interests that parents have in the "care and custody" of their chil-

1. 823 A.2d 301 (R.I. 2003).
2. *See id.* at 306; R.I. GEN. LAWS § 15-7-7(a)(3) (2000).
3. *See In re Christopher B.*, 823 A.2d at 306.
4. *See In re* William, 448 A.2d 1250, 1255 (R.I. 1982).
5. *See In re* Joseph S., 788 A.2d 475, 478 (R.I. 2002) (per curiam) ("[t]he issue of the reasonableness of the department's efforts must be determined from the 'particular facts and circumstances of each case'" (quoting *In re* Kristen B. 558 A.2d 200, 203 (R.I. 1989))).

dren;[6] second, the court must balance the parent's fundamental rights with the state's interest in regulating the parent-child relationship; and third, the court must balance the interests of the parent and the state in relation to the paramount "best interests of the child" in having a permanent, nurturing environment in which to develop.[7] Termination of parental rights cases are heart-wrenching; in every case, at least one party – either the parents, the state or the child – undoubtedly feels dissatisfied with the end result. Further complicating an already difficult process are the vague yet complex mandates of the "reasonable efforts" standards set forth in federal[8] and state statutes[9] and refined by each state's case law. Federal law bases state funding of foster care and other child services for children in state custody on the achievement by state officials of "reasonable efforts," by offering rehabilitative services to parents within a strict timeline prior to terminating parental rights. States are pressured to meet the standards within the statutory timeframe or risk jeopardizing their funding.[10]

In general, however, the "reasonable efforts" standard is ill-defined and inconsistently applied.[11] As applied to developmentally disabled parents like Mary Ann, the "reasonable efforts" offered are often inadequate reunification services that fail in any meaningful way to rehabilitate the parent's fitness.[12] These efforts would be improved if the state were to enact formal guidelines that define with greater specificity what constitutes "reasonable efforts." Such guidelines could provide the Rhode Island courts with a better framework with which to measure the state's burden

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6. *See* Santosky v. Kramer, 455 U.S. 745 (1982).

7. *See In re* Lester, 417 A.2d 877, 880 (R.I. 1980) ("In all such situations the approach should be three-dimensional, with due consideration given to the interests of the parents, the children, and the state.").

8. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500; Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. (2000)).

9. *See, e.g.*, R.I. GEN. LAWS § 15-7-7 (2000).

10. *See* Adoption and Safe Families Act, 42 U.S.C.A. § 671(a) (2000).

11. *See generally* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259 (2003).

12. *See* Chris Watkins, Comment, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CALIF. L. REV. 1415, 1445- 47 (1995).

in providing reunification services. These improved guidelines could be especially helpful in cases involving developmentally disabled parents like Mary Ann.

Mary Ann was thrice a victim: first, of the biology that limited her cognitive abilities; second, of the violent men who abused her and her children; and finally, of the state that failed to adequately acknowledge these two other factors – both in the unsuccessful attempt by the Department of Children, Youth and Families (DCYF) to provide her with "reasonable efforts" to reunify her with her children, and in the failure of the Rhode Island Supreme Court to incorporate these underlying factors into its totality of the circumstances analysis. Enacting formal guidelines that clearly delineate the requirements of the "reasonable efforts" standard for Rhode Island would better ensure that parents like Mary Ann receive services that account for their developmental disabilities. This way, the court can more effectively hold the state to the higher burden that the "reasonable efforts" standard supposedly requires.

Part II of this case note provides the facts and procedural history of Mary Ann's case, while focusing on the court's analysis of the "reasonable efforts" standard. Part III briefly traces the nationwide application of the "reasonable efforts" guidelines as mandated by the Federal Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1996, as well as the difficulty that the Rhode Island Supreme Court has encountered when attempting to reconcile Rhode Island statutory law with these federal mandates. Part IV further illustrates how the court's failure to abide by its own established precedent led to the flawed legal reasoning underlying the holding in *Christopher B.* Finally, Part V discusses how formal "reasonable efforts" guidelines would provide a solution for improving reunification services to developmentally disabled parents by creating baseline factors that could guide the court to a more consistent analysis of "reasonable efforts." In addition, Part V further explains how formal guidelines could incorporate relevant psychological and sociological research on developmentally disabled parents and domestic violence into a totality of the circumstances analysis. Accordingly, legal guidelines that are more attentive to the special needs of developmentally disabled parents could provide parents like Mary Ann with the resources necessary to rehabilitate their parental fitness.

II. FACTS AND PROCEDURAL HISTORY OF IN RE CHRISTOPHER B.

A. *Factual Background*

Mary Ann's parenting first came under state scrutiny when the state received a call to its hotline concerning Christopher and Kayla, Mary Ann's two children.[13] On July 28, 1998, an investigator for the state found the children bruised and dirty, living in a filthy and odiferous home.[14] The children were removed from the home and placed under seventy-two hour hold away from their parents.[15] Soon after, the family court placed the children in temporary custody of the DCYF, and on April 6, 1999, after Mary Ann admitted to dependency as to both children, the state committed the children to DCYF's care, custody and control.[16]

Within a few months, Mary Ann and her husband Dennis were referred to a supervised visitation program run through the Providence Children's Museum. Mary Ann was also subjected to both psychological and parenting evaluations, conducted by a Ph.D. psychologist, John Parsons, and a clinical social worker, Pauline Santos, respectively.[17] In light of Mary Ann's mild mental retardation, both practitioners recommended "specialized parenting education" and a host of other services.[18] While acknowledging that even with such efforts Mary Ann might not successfully reunite with her children, both asserted that she ought be given the chance to prove herself. [19]

DCYF, however, neglected to offer Mary Ann specialized parenting education or any other form of specialized service that would address her cognitive impairment.[20] Ironically, the foster parents with whom Christopher and Kayla were placed received months of "intensive, specialized training sessions aimed at parenting special needs children."[21] Mary Ann was offered (and received) some marriage counseling to address her volatile

13. *In re* Christopher B., 823 A.2d 301, 304 (R.I. 2003).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 305.
19. *Id.* at 304-05.
20. *Id.* at 305.
21. *Id.*

relationship with Dennis.[22]

On February 3, 2000, DCYF petitioned the family court to terminate Mary Ann's parental rights,[23] alleging three separate statutory bases for termination:[24] Mary Ann's mental deficiency;[25] her alleged substance abuse;[26] and, under section 15-7-7(a)(2)(i) of the Rhode Island General Laws, the "catch-all" provision of the state's Termination of Parental Rights statute (TPR), a lack of any other alternative.[27] This catch-all provision allows termination when children have been

> placed in the legal custody or care of [DCYF] for at least twelve (12) months; and the parents were offered or received services to correct the situation which led to the child being placed, and provided further that there is not a substantial probability that the child will be able to return safely to the parents' care within a reasonable period of time considering the child's age and the need for a permanent home.[28]

After an eight day hearing, the family court terminated Mary Ann's parental rights under the mental deficiency and the catch-all provisions.[29] With respect to the finding under section 15-7-7(a)(2)(i) (mental deficiency), the trial justice found that despite DCYF's failure to offer Mary Ann services appropriate to her cognitive disability, he was "compelled" to terminate her parental rights.[30] Citing the best interests of the children, he noted there was little evidence that Mary Ann was capable of becoming a more effective parent.[31] As to the finding under section 15-7-7(a)(3) (the catch-all provision), the trial justice found that the children were in the custody of DCYF for twelve months, and that Mary Ann was offered services (marriage counseling) to correct the situation

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22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* The substance abuse allegation was dismissed by the family court for lack of evidence. *Id.* at 306.
27. *Id.* at 305 n.5 & 306.
28. *Id.* at 305 n.5; R.I. GEN. LAWS § 15-7-7(a)(3) (2000).
29. *Id.* at 306.
30. *Id.*
31. *Id.*

that led to their initial placement, but that there was no substantial probability that the children could safely be returned home within a reasonable time.[32] Accordingly, Mary Ann's parental rights were terminated.

B. *The Rhode Island Supreme Court*

1. *Termination Under the "Mental Deficiency Provision"*[33]

Mary Ann appealed the family court's termination decision to the Rhode Island Supreme Court. She asserted that DCYF had failed to make the requisite "reasonable efforts" to encourage and strengthen the parental relationship as required by section 15-7-7(a)(2)(i), the mental deficiency provision of the Rhode Island TPR statute.[34] Additionally, Mary Ann claimed that DCYF failed to provide her with appropriate services to correct the issues which led to the children's initial placement in state custody, as required under the catch-all provision of the statute.[35] Mary Ann did not dispute the trial justice's factual findings in regards to her mild mental retardation, placing her I.Q. at about sixty-six and her reading ability at a third grade level.[36] Nor did Mary Ann dispute the trial justice's finding that she was "an extremely defensive and

32. *Id.* at 313.

33. § 15-7-7(a)(2)(i).

34. *See In re Christopher B.*, 823 A.2d at 303. The portion of the statute that the family court used as one basis for termination has since been amended in 2000 by section 1 in chapter 69 of the Rhode Island Public Laws, which now allows for termination if the court finds by clear and convincing evidence that the parent is unfit by reason of "[i]nstitutionalization of the parent, including imprisonment, for a duration to render it improbable for the parent to care for the child for an extended period of time." 2000 R.I. Pub. Laws 69 § 1. Prior to this amendment, section 15-7-7(a)(2)(i), as applied to Mary Ann's termination proceeding, allowed for termination if the parent was found unfit by reason of "[e]motional illness, mental illness, mental deficiency, or institutionalization of the parent, including imprisonment, of such a duration to render it improbable for the parent to care for the child for an extended period of time . . . ." *In re Christopher B.*, 823 A.2d at 305.

35. *See In re Christopher B.*, 823 A.2d at 303. In addition to Mary Ann's two bases for appeal, DCYF joined a petition for a writ of certiorari "to review the family court's initial order requiring visitation [by Mary Ann to her children] to continue during the appeal." *Id.* at 307. As the focus of this article is entirely on the "reasonable efforts" prong of Mary Ann's appeal, the visitation issue will not be discussed herein.

36. *See id.* at 308.

dependent individual . . . lacking insight and exhibiting poor judgment."[37]

In analyzing Mary Ann's case, the court acknowledged that "reasonable efforts" are fact specific[38] and must be "consistent with a totality of the circumstances approach,"[39] taking into account intellectual limitations of the parent(s).[40] In light of this approach, the court discussed in detail the recommendations made by the two psychological experts who examined Mary Ann: Dr. John Parsons and social worker Pauline Santos.[41] These recommendations included counseling based on a "cognitive behavioral approach" and "a comprehensive assortment of wraparound services," which would include counseling, parenting classes, and an educational advocate for the children.[42] Subsequently, DCYF made no new referrals to Mary Ann based on these recommendations, other than for marriage counseling – a recommendation that the trial justice found "incongruous" in light of the domestic violence between Mary Ann and Dennis.[43] Mary Ann did participate in the Families Together program – a visitation program supervised by museum staff – at the Providence Children's Museum; however, the trial court found,[44] and the Supreme Court agreed, that this program was really not a "parenting" program per se, but essentially a supervised visitation mechanism, that did not prove to be very helpful.[45]

The court agreed with Mary Ann that this complete failure by the state to provide services that took into account her mental disability did not in fact constitute "reasonable efforts," and sustained Mary Ann's appeal on this count.[46] Discussing the trial justice's conclusion that he was "compelled" to terminate Mary Ann's rights because she was essentially incapable of improving her par-

37. *Id.*
38. *Id.*
39. *Id.* (quoting *In re* Joseph S., 788 A.2d 475, 478 (R.I. 2002) (per curiam)).
40. *Id.*; *see also In re* William, 448 A.2d 1250, 1255 (R.I. 1982).
41. *In re Christopher B.*, 823 A.2d at 309.
42. *Id.*
43. *Id.* at 310.
44. *In re* Blais, Nos. 98-1715-1 & 98-1715- 2, at 14, 15 (R.I. Family Ct., 2001).
45. *See In re Christopher B.*, 823 A.2d at 308, 312.
46. *Id.* at 313.

enting skills, the court stated: "[T]o hold that she would not benefit from services never attempted would be to adopt a rule that mentally impaired parents are per se incapable of parenting – a holding that even the trial justice said he wished to avoid."[47]

The court thus decided that regardless of the likelihood of success, prior to a finding of parental unfitness the state must employ "reasonable efforts" before the analysis can shift to the "best interests" of the children.[48] The court stated that the "urgent need of the children for permanency in their lives"[49] is an inappropriate focus, prior to a finding of parental unfitness.[50] The court held that:

> Because the trial justice found that Mary Ann's mental deficiency was directly related to the situation that led to the children's placement and because her mental health interfered with her ability to parent Christopher and Kayla effectively, we hold that DCYF, in petitioning for a TPR decree on mental deficiency grounds, was required to demonstrate that it undertook reasonable efforts to address these mental-deficiency issues in the services that it offered to this parent.[51]

In other words, under this section of the statute,"reasonable efforts" are a condition precedent to termination. Because the efforts made by the state were insufficient, the court would not uphold termination on this ground.

2. *Termination Under Section 15-7-7(a)(3)*

The court did uphold the termination on other grounds, however. Section 15-7-7(a)(3)[52] is the catch-all provision of the Rhode

47. *Id.* at 312.
48. *Id.*
49. *Id.* at 310.
50. *See id.*
51. *Id.* at 313.
52. R.I. GEN. LAWS § 15-7-7(a)(3) (2000). This section, entitled "Termination of parental rights," permits termination if the court finds by clear and convincing evidence that:

> The child has been placed in the legal custody or care of the department for children, youth and families for at least twelve (12) months; and the parents were offered or received services to correct the situation which led to the child being placed; provided, that there is not a substantial probability that the child will be able to return safely to

Island TPR statute in that it allows for terminations for reasons other than those specifically enumerated within the statute.[53] Terminations under this provision arise from some combination of circumstances that propel the child into state custody, and when it seems unlikely those circumstances will change. This section allows for termination of parental rights when a child has been in state custody for a year, the state has provided the parent with some services to rectify the original problem(s) that led to state custody, and there is not a substantial likelihood that the child can return home safely in the near future.[54]

As to this portion of the termination petition, Mary Ann did not argue on appeal that she was not offered or did not receive *any* services to correct the problems that led to the children's being placed in state custody. Rather, she claimed that DCYF was required to show "reasonable efforts" in providing the services that it *did* offer.[55] DCYF countered by claiming that "under this subsection of the statute . . . the agency was not required to make *reasonable* efforts to strengthen and encourage the parental relationship," but rather that *any* efforts to offer services (including DCYF's minimal efforts) which "were – at least in some small way – aimed at addressing Mary Ann's problems," must be considered reasonable.[56] The difference here is between efforts that, when accrued, are enough to be seen as "reasonable," versus *any* minute effort at all.

As to the question of whether any efforts, no matter how minimal, suffice as "reasonable efforts," the Rhode Island Supreme Court held that, "§15-7-7(a)(3) [requires] a showing that the services offered amount to reasonable efforts on the part of the agency to correct the situation that led to the removal of the children from the parental home."[57] The court went on:

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the parents' care within a reasonable period of time considering the child's age and the need for a permanent home.

Id.

53. *See e.g.*, § 15-7-7(a)(1) (willful neglect for one year or more); *id.* § 15-7-7(a)(2)(ii) (cruel and abusive conduct); *id.* § 15-7-7(a)(v) (torture, chronic abuse or sexual abuse); *id.* § 15-7-7(a)(2)(vi) (murder or felony assault of another child).

54. *See id.* § 15-7-7(a)(3); *supra* note 52 and accompanying text.

55. *In re Christopher B.*, 823 A.2d at 313.

56. *Id.* at 314-15 (emphasis added).

57. *Id.* at 315.

> After all, if such services are to have any chance of success in correcting the situation that led to the removal of the children from the family home, they must be 'reasonable' in the sense of being capable of remedying the particular problem(s) that caused the children to be removed.[58]

The court relied on prior case law to conclude that this portion of the statute requires "reasonable efforts" by the state to provide services "regardless of the unlikelihood for success" until the time that the termination petition is filed.[59] Accordingly, parents whose cases might otherwise be dismissed as hopeless by DCYF and who are offered little or no assistance by the state are protected. The court exposed the fallacy in DCYF's reasoning as follows: "Indeed, if we followed DCYF's argument to its logical conclusion, after twelve months of placement, the department would be able to succeed on a TPR petition if it offered *any* form of services to the parents, regardless of their [actual] utility to the parents . . . ."[60] Moreover, Mary Ann's cognitive disability and her need for parenting assistance and education persuaded the court to find that:

> the trial justice misconceived material evidence and clearly was wrong in concluding that DCYF offered Mary Ann reasonable services aimed at correcting this aspect of the situation . . . in light of the trial justice's findings that Mary Ann's mental condition was *directly related* to Christopher's and Kayla's placement.[61]

Nevertheless, the court held that the trial justice's error as to *this* particular basis under the catch-all provision[62] was harmless. The court determined that DCYF sustained its burden under this section as to "another" aspect of the circumstances leading to the children's placement: "the mother's recurrent involvement with abusive, dangerous men and her resultant inability to provide a safe living environment for her children."[63]

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58. *Id.*

59. *Id.* (quoting *In re* Joseph S., 788 A.2d 475, 477-78 (R.I. 2002) (per curiam)); *see also In re* Brianna D., 798 A.2d 413, 415 (R.I. 2002); *In re* William, 448 A.2d 1250, 1255 (R.I. 1982).

60. *In re Christopher B.*, 823 A.2d at 315.

61. *Id.* at 315-16 (emphasis added).

62. R.I. GEN. LAWS § 15-7-7(a)(3) (2000).

63. *In re Christopher B.*, 823 A.2d at 316.

The court premised its conclusion in favor of termination under the catch-all provision upon three specific grounds. First, the court cited the abuse that Mary Ann's husband, Dennis, as well as a subsequent boyfriend, perpetrated against her and the children.[64] Second, the court acknowledged the state's willingness to provide marriage/couples therapy to Mary Ann so as to remedy her propensity to enter into relationships with violent men.[65] Finally, the court regarded her resistance to initiate divorce proceedings against Dennis as conclusive evidence that Mary Ann was unwilling to protect her children from her relationships with violent men.[66] To bolster its conclusions, the court described in some detail the testimony provided by Mary Ann's marriage counselor as to the many incidents of abuse against Mary Ann, some of which occurred while Mary Ann was pregnant.[67] Regarding the effect of Mary Ann's cognitive disability on her inability to separate from these abusive relationships, the court discussed the trial justice's finding that "the mother's intellectual limitations also created concerns with respect to her ability to protect her children from her abusive husband or other boyfriends."[68] Additionally, the court acknowledges that "Mary Ann's mental deficiencies . . . affected her inability to navigate her relationships with these men in such a way as to protect the children from abuse."[69] Finally, the court terminates Mary Ann's rights, "given Mary Ann's lack of cooperation in ending these abusive relationships – despite DCYF's reasonable efforts in this regard"[70] and considering the best interests of Christopher and Kayla. In essence, the court blames the victim.

III. REASONABLE EFFORTS IN TERMINATION OF PARENTAL RIGHTS CASES: A GENERAL BACKGROUND

The majority in *In re Christopher B.* based its holding on prior Rhode Island Supreme Court interpretations of statutory requirements for "reasonable efforts" in termination of parental

64. *Id.* at 314-15.
65. *Id.* at 314, 315 n.10.
66. *Id.* at 316-17.
67. *Id.* at 316.
68. *Id.* at 317.
69. *Id.*
70. *Id.* at 318.

rights cases. In these prior cases, the court sought to reconcile state statutory law with federal mandates that conditioned the receipt of funding for foster care and child welfare services upon a willingness of the states to enact programs designed to prevent children from being removed from their homes, and to increase the likelihood that foster children would eventually be reunited with their natural parents. In attempting to deconstruct the court's analysis of Mary Ann's case, it is important to understand the original intent of the federal "reasonable efforts" mandate and the subsequent application of it to Rhode Island termination of parental rights cases.

Originally, federal funding for state child protective services and foster care was allocated under Title IV of the Social Security Act.[71] This funding was expanded upon and modified in 1980 by the Adoption Assistance and Child Welfare Act of 1980 (Child Welfare Act),[72] and again in 1997 by the Adoption and Safe Families Act of 1997 (ASFA).[73] Prior to 1980, the federal government made payments to states for foster care, but did not offer similar or adequate funding for preventative and family reunification services; the focus was on protecting children from abusive and neglectful parents, rather than on addressing parenting problems to repair the child's biological family unit.[74] The Child Welfare Act enhanced funding for reunification services and family intervention, but conditioned the funding on states' plans that provided for reasonable efforts "(A) prior to placement of a child in foster care, to prevent or eliminate the need for removal from a child from his home, and (B) to make it possible for the child to return to his home."[75] Unfortunately, the legislation offered little assistance to the states in defining the contours of reasonable efforts and determining when (and if) such efforts had been met. [76] The purpose of this language, however, did seem clear: it was included to in-

71. 42 U.S.C. §§ 601 – 679(b) (2000). Chapter 7 of Title IV is entitled "Grants to States for Aid and Services to Needy Families with Children and for Child Welfare Services." *See id.* §§ 670-675.

72. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C. (2000)).

73. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. (2000)).

74. *See* Crossley, *supra* note 11, at 270.

75. *Id.*

76. *See id.*

crease the quality and amount of reunification services offered to parents prior to foster care placement in an attempt to provide permanency to children and reduce both the number of children in foster care and the overall cost to society. [77]

The "reasonable efforts" provisions under the Child Welfare Act were further amended in 1997 by the ASFA. The ASFA extended "reasonable efforts" beyond reunification and family services to include permanency planning for the child, with revised timelines that "end[ed] the obligation to make reasonable efforts much sooner."[78] Critics have stated that rather than ensuring reasonable efforts are made in every case prior to placement in foster care and eventual termination, the "ASFA moves in the opposite direction . . . [and] does not significantly shore up family support, preservation, and reunification services."[79] These changes could have been a reaction to continued "foster care drift," in which children languished for years in foster care with no permanent family unit, or to isolated cases of extreme abuse and child death, which pressed the entire system toward removal and more expedited adoption of children.[80]

The federal "reasonable efforts" mandate has left the states, for the most part, on their own to interpret what "reasonable efforts" entail. David Herring, a critic of the "reasonable efforts" mandate, has stated that the "reasonable efforts" requirement punishes the child by creating an irrelevant "condition precedent to TPR."[81] Other critics, including Will Crossley, conversely believe that "reasonable efforts" provisions punish the parent by adding "boilerplate services" to social work case plans (i.e., parenting classes) which are "unrelated to the conditions that gave rise to intervention, and then penal[ize] parents who fail to fulfill these ancillary requirements."[82] Another critic, Hilary Baldwin,

77. *See id.* at 272.
78. *Id.* at 281-82.
79. *Id.* at 282.
80. *See id.* at 270-77.
81. David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System,* 54 U. PITT. L. REV. 139, 142 (1992). Herring discusses his belief that inclusion of a "reasonable efforts" requirement "increases the risk that children will not be provided with permanent homes in time to meet their developmental needs." *Id.* at 142.
82. Crossley, *supra* note 11, at 305.

has noted that the ASFA shifts the focus in spending to post-termination placements, not pre-termination services to parents, and that "an equal emphasis should be placed on the services provided to natural parents before the termination proceedings"[83] because "the money we spend on foster families might be better spent on the biological family."[84]

Discerning the line between "reasonable" and "less than reasonable" efforts is no simple task. Nevertheless, prior to *In re Christopher B.*, the Rhode Island Supreme Court in a number of cases set out to set parameters for analyzing this "reasonable efforts" federal mandate. The court held that "the department is required, pursuant to § 15-7-7(a)(3), to make reasonable efforts to strengthen the parental relationship, until a termination petition is filed pursuant to § 15-7-7(b)(2)."[85] DCYF is required to make such efforts, "regardless of the unlikelihood for success."[86] It is only after there has been a finding of "reasonable efforts" that it is permissible to examine the fitness of the parent and ultimately weigh the best interests of the child.[87] Such language creates a "reasonable efforts" condition precedent (or a "necessary precondition"[88]) before shifting the focus to an examination of parental fitness. In other words, if the state has not made "reasonable efforts" to provide services that will rehabilitate the parent or rectify the circumstances that put the child in state custody initially, the court cannot find the parent unfit.[89]

The court has also employed a totality of the circumstances approach in analyzing the reasonableness of the efforts made by

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83. Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 292 (2002).

84. *Id.* at 294. In *In re Christopher B.*, both the trial justice and the supreme court note the disparity between the "minimalist" services offered to Mary Ann R. as Christopher and Kayla's biological parent, and the extensive and intense services provided to the children's foster parents. *In re Christopher B.*, 823 A.2d at 305.

85. *In re* Joseph S., 788 A.2d 475, 477-78 (R.I. 2002) (per curiam).

86. *Id.* at 477-78.

87. *See In re* Nicole B., 703 A.2d 612, 615 (R.I. 1997); *see also In re* Kristen B., 558 A.2d 200, 203 (R.I. 1989); *In re* Lafreniere, 420 A.2d 82, 84 (R.I. 1980).

88. *In re Christopher B.*, 823 A.2d at 308.

89. This, of course, does not apply to the sections of the statute under which reasonable efforts themselves are not necessary prior to termination, which includes those discussed previously, *supra* note 52, such as torture, murder of another child, etc.

the state[90] that takes into account the "particular facts and circumstances of each case,"[91] as well as the intellectual limitations of the parent(s) being petitioned.[92] In a case decided after *In re Christopher B.*, the Rhode Island Supreme Court again confirmed that "when a parent is cognitively impaired . . . reasonable services should address such an impairment."[93] Nonetheless, the court has held that there is a limit to what the state must do to meet the "reasonable efforts" requirement to reunite children with their parents: "DCYF does not guarantee and ought not be burdened 'with the additional responsibility of holding the hand of a recalcitrant parent.'"[94] However, there is also a baseline below which "reasonable efforts" may not fall: "Generally, it requires that the agency show that 'reunification of the family was attempted in good faith,'"[95] even in a post-ASFA world with the ASFA's abbreviated timelines for permanency. In sum, the Rhode Island Supreme Court has held, under a totality of the circum-

90. *See In re* William, 448 A.2d 1250, 1256 (R.I. 1982). In that case, the court further stated that "[t]he requirement that the child welfare agency seeking termination exert 'reasonable efforts' to nurture the parental relationship has been said to express a societal judgment that the state should not take such a drastic step as termination without first attempting to rebuild the parent-child bond." *Id.* (*citing* H. Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute,* 46 ST. JOHN'S L. REV. 215, 237 (1971)). In *In re William,* the court also noted that the relevant statute, § 15-7-7, provides no guidelines as to what constitutes "reasonable efforts," but referenced the comparative New York statute, N.Y. SOC. SERV. LAW § 384(b) (McKinney 1981), which describes the New York equivalent "diligent efforts" as requiring, in pertinent part:

> (1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family; (2) making suitable arrangements for the parents to visit the child; (3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and (4) informing the parents at appropriate intervals of the child's progress, development, and health.

Id. at 1257 n.3.

91. *See In re* Joseph S., 788 A.2d 475, 478 (R.I. 2002) (per curiam) (quoting *In re* Kristen B., 558 A.2d 200, 203 (R.I. 1989), citing *In re* Ann Marie, 461 A.2d 394, 395 (R.I. 1983)).

92. *See In re William*, 448 A.2d at 1254.

93. *In re* William R., 839 A.2d 529, 532 (R.I. 2004).

94. *In re Joseph S.*, 788 A.2d at 478 (quoting *In re Kristen B.*, 558 A.2d at 204).

95. *In re* Jarvis R., 766 A.2d 395, 398 (R.I. 2001) (quoting *In re* Dennis P., 749 A.2d 582, 586 (R.I. 2000)).

stances analysis, that "reasonable efforts" made by the state to reunite parents with their children held in state custody must be made in good faith, tailored to the facts and circumstances of each case, taking into consideration intellectual or cognitive limitations of the parents.

IV. REASONABLE EFFORTS IN *IN RE CHRISTOPHER B.*

The court's opinion in *In re Christopher B.* is both internally inconsistent and incompatible with a totality of the circumstances precedent. In its opinion, the court fails to account for the need to consider the effects of the interaction of developmental disability and domestic violence in determining what constitutes "reasonable efforts" for this particular parent. In attacking the "reasonable efforts" made by a state to assist a parent, the parent is not necessarily claiming that no services were provided at all, but rather that those provided gave the parent little or no opportunity to rehabilitate her parental fitness. Tactically, an attack on the services provided by the state is a means of attempting to unravel the state's termination of a parent's rights without having to address the issue of parental unfitness because "a finding of "reasonable efforts" by DCYF is a necessary precondition for a finding of parental unfitness, and a prerequisite to the granting of a TPR petition."[96]

In its analysis of the "reasonable efforts" made by the state to assist Mary Ann in reuniting with her children and correcting the situation that led to their placement in state custody, the Rhode Island Supreme Court did not examine or emphasize all of the factors it should have in determining the true "totality of the circumstances." On the one hand, the court found that the state's efforts to address Mary Ann's parenting, as affected by her cognitive disability, fell far short of the minimum threshold of reasonableness. The court echoed the trial justice's conclusion that, "[t]he tragedy . . . is that [Mary Ann] was never even offered services that would be the most appropriate for her cognitive level of functioning. Unfortunately, the system has failed Maryann [sic] R[]."[97]

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96. *In re* Christopher B., 823 A.2d 301, 308 (R.I. 2003) (citing R.I. GEN LAWS § 15-7-7(b)(1) (2000)); *see also In re* Brianna D., 798 A.2d 413, 415 (R.I. 2002); *In re Kristen B.*, 558 A.2d at 203.

97. *In re* Blais, Nos. 98-1715-1 & 98-1715- 2, at 13 (R.I. Family Ct. 2001).

The court then isolated for examination the domestic violence that Dennis perpetrated against Mary Ann, and asserted that the services provided to address *this* issue were reasonable.[98] As such, because of her perceived unwillingness to terminate her relationship with her abusive husband, the court found Mary Ann unfit, and therefore that termination would be in the best interests of the children. The court found her to have been an unfit parent, even though the trial justice made no findings of fact as to whether Mary Ann was offered or received services appropriate to address her repeated problems with abusive male relationships.[99] This isolation of the domestic violence issue, and the subsequent finding of "reasonable efforts" made to address this problem, does not accord with a totality of the circumstances approach in determining "reasonable efforts." As such, the court failed to acknowledge Mary Ann's cognitive disability and its effect on her ability to extract herself from her situation with Dennis.

Prior to its final termination holding, the court stated that in order to reunite with her children, Mary Ann needed to address

> two discrete – albeit related – problems that led to her children's initial placement: first, her need for basic parenting education in light of her limited cognitive abilities; and second, her need to address her abusive relationships with Dennis and the other men in her life, which were affecting adversely her ability to raise Christopher and Kayla in a safe environment.[100]

The fallacy in the court's reasoning is rooted in its attempt to separate the issue of Mary Ann's disability and parenting from the matter of domestic violence in her household. In fact, the court acknowledged that the three elements are unalterably intertwined in that the domestic violence affected Mary Ann's parenting, which was in turn affected by her cognitive disability. Ironically, the court even cites as support for its conclusions the trial justice's statement:

> "Clearly the situation which led to the children being placed with respect to Mary Ann is directly related to her

98. *See In re Christopher B.*, 823 A.2d at 316-18.
99. *See id.* at 314.
100. *Id.*

> mental retardation. . . . Her intellectual limitations . . . create concerns with respect to her ability to protect her children from her abusive husband or other boyfriends."[101]

Thus, although the court made a factual finding that nothing was done to adequately address Mary Ann's parenting or cognitive disability, the court nonetheless found that "reasonable efforts" *were* made to address this domestic abuse. Yet, the court ultimately lost sight of the causal link between Mary Ann's cognitive disability and her propensity for entering into abusive relationships. This isolation of a single factor (domestic violence), while not accounting for other strongly relevant factors (Mary Ann's disability) that the court itself acknowledges, does not comport with a totality of the circumstances approach.

Moreover, the court failed to recognize the Hobson's choice that DCYF presented Mary Ann as it pertained to her relationship with Dennis. Here, the court cites DCYF's referral of Mary Ann and Dennis to marriage counseling as the linchpin service intended to correct the domestic violence situation, and uses this as the basis for a finding of "reasonable efforts." However, there is no mention in either the trial justice's or the supreme court's opinions of other services provided to Mary Ann to "correct" this domestic violence situation.[102] Rather, on the one hand, the court faults Mary Ann for missing counseling sessions with her *marriage* counselor (counseling that would presumably aid her in maintaining her marriage), [103] but on the other hand faults her for not ex-

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101. *Id.*

102. The court noted that the trial justice found the referral to couples therapy "incongruous under the circumstances." *Id.* at 310. These circumstances were that Mary Ann was being violently abused by Dennis. There is no mention in either the trial or supreme court opinions of other services offered that might have been more appropriate than couples therapy, such as referrals to domestic violence resource agencies, shelters, battered women's groups, or anything else of that nature. However, the court did state in another section of the opinion that efforts to provide services must be "reasonable in the sense of being capable of remedying the particular problem(s) that caused the children to be removed," *id.* at 315, yet the state appears to have offered Mary Ann little to assist her and her children in removing themselves to a safer environment.

103. "Indeed, the only counseling Mary Ann needed about her 'couplehood' with Dennis was to dump the profane, violent, child-abusing bum." Brief for Appellant at 10, *In re* Christopher B., 823 A.2d 301 (R.I. 2003) (No. 2001-150-

tricating herself from the domestic violence in this same relationship. It seems that the court is simultaneously suggesting that Mary Ann ought to try harder to stay and repair the marriage and at the same time leave to protect her children, a suggestion that is contradictory at best. In fact, the trial record indicated that Mary Ann had acquired some insight into the necessity of ending her relationship with her husband. Indeed, the appellate brief presented by Mary Ann's counsel emphasized that "more often than not, Mary Ann (who recognized that Dennis was an impediment to her reunification with the children) focused [in these sessions] on whether she should stay with Dennis. Eventually, in fact, Mary Ann *did* leave Dennis."[104] The court made much of the fact that Mary Ann's marriage counselor "repeatedly offered to assist Mary Ann in filling out the necessary paperwork to procure a divorce," and that "Mary Ann resisted initiating divorce proceedings against Dennis."[105] However, the court criticized the efforts that Mary Ann *did* make to protect herself and her children from Dennis's violence, such as "call[ing] the police on numerous occasions to escape domestic violence initiated by Dennis,"[106] recognizing that Dennis was a "roadblock" to reunification with her children, asking to initiate divorce proceedings against Dennis, and ultimately leaving him.[107] The court even construed the fact that when Dennis got out of prison he assaulted her "by grabbing her and by attempting to throw her out of the house while she was pregnant"[108] as evidence *against* Mary Ann.[109]

The court's attempt to avoid the true totality of the circumstances is further encapsulated in a confounding statement by which the court sought to minimize the significant impact that Mary Ann's cognitive disability had upon her ability to protect herself and her children from abusive relationships: "Nevertheless, protecting her children from the unsafe conditions created by these abusive relationships was one thing, but correcting her en-

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M.P.).

104. *Id.* at 6 (citing the trial record at page 10); *In re* Blais, Nos. 98-1715-1 & 98-1715-2, at 15 (R.I. Family Ct. 2001).

105. *In re Christopher B.*, 823 A.2d at 316.

106. *Id.*

107. *Id.*

108. *Id.*

109. *See id.* at 316-17.

try into and her failure to end such relationships was quite another."[110] A totality of the circumstances determination of "reasonable efforts," however, would examine the entry into *and* continuation of a relationship embroiled with domestic violence together. Moreover, the court contradicts itself when it states that "protecting her children . . . was one thing," separate and apart from Mary Ann's "failure to end such relationships," because its own determination of Mary Ann's failure to protect her children is grounded in the fact that the relationship did continue.[111] Protecting the children from *any* abusive situation should be of paramount concern to all parties involved; however, from a legal standpoint, the "best interests of the child" prong of the analysis is not reached until there has been an initial finding of "reasonable efforts," as determined by examining the totality of the circumstances, followed by a finding of parental unfitness.[112] This is the precedent that the court has created; if such a series of hoops is not adequately protecting children, perhaps it should expressly overrule that precedent rather than try to force Mary Ann's case to fit into the existing framework by giving short shrift to the causal link between her cognitive disability and her perceived unfitness.

The court's internal conflict with the three step process is most evident in a footnote of its opinion, in which the court distinguishes Mary Ann's case from a case that DCYF relied upon, *In re Michael B.*[113] DCYF cited to *Michael B.* to support its proposition that "mentally impaired parents [can be found to be] *per se* incapable of parenting."[114] Seeking to avoid such a holding, as the trial justice had wished to do, the court distinguished Mary Ann's case from *Michael B.*

In *Michael B.*, the court stated that "[w]e are constrained to concur with the trial justice's assessment that no amount of effort on the part of DCYF was likely to enable these parents 'to change

110. *Id.* at 317.

111. *See id.* The court stated that "Mary Ann failed to take the required steps to end these relationships or to restructure them in such a way so as to ensure domestic safety for herself and her children." *Id.*

112. *See id.* at 312. The court itself states that "absent a finding of reasonable efforts, the balance of inquiry does not yet shift to the 'best interests of the child.'" *Id.* (citing *In re* Nicole B., 703 A.2d 612, 615 (R.I. 1997)).

113. 796 A.2d 467 (R.I. 2002).

114. *In re Christopher B.*, 823 A.2d at 312 n.9.

[their] conduct and to improve the conditions that caused [Michael] to enter DCYF care initially.'"[115] However, the court noted that the parents in *Michael B.* were uncooperative with DCYF and refused to comply with their case plans, whereas Mary Ann "cooperated with DCYF in attending programs when her caseworker informed her about them.[116] For example, [the caseworker] testified that Mary Ann would regularly arrive as much as two hours early for supervised-visitation . . . ."[117] The court also concluded that in *Michael B.*, "although the parents exhibited some mental-health problems, the primary factor that led to the child's placement . . . was domestic violence."[118]

As such, DCYF's reliance upon *Michael B.* was misplaced because in that case domestic violence was the *primary* basis for termination, whereas mental illness was merely a collateral issue. Therefore, DCYF's argument that mental incapacity could be a *per se* basis for a finding of parental unfitness was wholly without merit. Furthermore, because Mary Ann's cognitive disability was the *primary* basis for the removal of her children, the facts in *Michael B.* were not dispositive. Despite its attempt to distinguish the holding in *Michael B.* from Mary Ann's case, the court inexplicably based its final termination on domestic violence, without considering Mary Ann's "mental health problems" (the reason for initial placement) as part of its totality of the circumstances analysis. Thus, the court undermined its own basis for terminating Mary Ann's parental rights. In *Michael B.*, uncooperative parents with "mental health issues" have their parental rights terminated based on "the primary factor that led to the child's placement . . . domestic violence."[119] The court distinguished Mary Ann's case, noting that Mary Ann is "cooperative" and her chil-

115. *In re Michael B.*, 796 A.2d at 469 (quoting *In re* John W., 682 A.2d 930, 932 (R.I. 1996)).

116. The statement there, "when her caseworker informed her about them," refers to the fact that the social worker in Mary Ann's case made a referral to the Blackstone Valley Community Action Program for parenting education classes, but could not remember if she ever told Mary Ann about the referral. *See In re Christopher B.*, 823 A.2d at 308. Mary Ann denied ever being told of this referral. Trial Record at 6, *In re* Christopher B., 823 A.2d 301 (R.I. 2003) (No. 2001-150-M.P.).

117. *In re Christopher B.*, 823 A.2d at 312, n.9.

118. *Id.*

119. *Id.* (citing *In re* Michael B., 796 A.2d 467, 469 (R.I. 2002)).

dren are primarily placed due to problems arising from her cognitive disabilities, not domestic violence. However, the court then terminates due to the *lack of cooperation* Mary Ann displays in addressing domestic violence.

The court's opinion in *Christopher B.* is both internally inconsistent and incompatible with past precedent that has established a totality of the circumstances approach to the "reasonable efforts" analysis. The court seemingly floundered as it sought to find a way to terminate this parent's rights and ensure permanency for her children. This is because the measurement of what establishes "reasonable efforts" is so case specific due to the fact that the Rhode Island TPR statute lacks overarching guidelines. The court fails to account for the effects of Mary Ann's developmental disability in determining what constitutes "reasonable efforts" for this parent. The inadequacy of the services provided to Mary Ann and the court's failure to acknowledge this deficiency and hold the state to its "reasonable efforts" burden call for adjustments to the requirements the state must meet in providing services to developmentally disabled parents.

V. "REASONABLE EFFORTS" GUIDELINES FOR DEVELOPMENTALLY DISABLED PARENTS: THE DOMESTIC VIOLENCE IN MARY ANN'S CASE AS AN EXAMPLE

A. *Reasonable Efforts with the Developmentally Disabled Parent*

The foregoing analysis of Mary Ann's case begs the question: What should the court require of the state for a finding of "reasonable efforts" for parents who are developmentally disabled? Certainly the issues are complex, and the need for children who have been placed in state custody to find permanence often overshadows the needs of their biological parents to rehabilitate themselves into fit parents. "Reasonable efforts" is a difficult concept to define[120] and put into effect for prototypical parents (if there is such a thing in TPR cases, which are frequently complex in general), much less with developmentally disabled parents. How far must the state go to assist these parents in becoming fit?[121] The

120. *See* discussion *infra* Part III.

121. In Mary Ann's case, the trial justice in his opinion specified that he "did not mean to suggest that this case falls within the purview of the Ameri-

Rhode Island Supreme Court has clearly stated that the "particular needs" of cognitively impaired parents must be considered,[122] and that "efforts to encourage and strengthen the parental relationship with respect to an average parent are not necessarily reasonable to an intellectually limited one."[123] But concretely, what does this mean?

The appellate courts in sister states have held that there must be limitations on what the court can require of the state to fulfill the "reasonable efforts" mandate with developmentally disabled parents. In a parallel situation to that of Mary Ann's case, the Massachusetts Court of Appeals stated that "the requirement includes accommodating the special needs of biological parents who are handicapped or disabled. Nevertheless, heroic or extraordinary measures, however desirable they may at least abstractly

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cans with Disabilities Act (ADA), [however], it is perhaps instructive to been (sic) in mind that Federal statute's stated purpose is 'to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities to assure equality of opportunity and full participation . . . in the benefits of the services, programs and activities of a public entity." *In re* Blais, Nos. 98-1715-1 & 98-1715- 2, at 9 (R.I. Family Ct., 2001). Courts have been in conflict as to whether the ADA can be utilized as a defense to a termination of parental rights (TPR) petition, but the trend thus far has been that the ADA cannot be used as a defense at the TPR stage; rather, if it is to be raised at all, it must be done prior to the filing of the TPR petition when services are initially offered. *See, e.g.*, *In re* Terry, 610 N.W. 2d 563, 570 (Mich. Ct. App. 2000); *In re* Antony B., 735 A.2d 893, 898-99 (Conn. App. Ct. 1999); *In re* B.K.F., 704 So. 2d 314, 317-18 (La. Ct. App. 1997); *In re* B.S., 693 A.2d 716, 720 (Vt. 1997); *see generally* Sherry S. Zimmerman, *Parents' Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights-Applicability of Americans with Disabilities Act*, 119 A.L.R. 5th 351. One of the most cited cases in this area of law, *In re Terry*, 610 N.W. 2d 563, stated that "termination of parental rights proceedings do not constitute 'services, programs, or activities' within the meaning of [the ADA] 42 U.S.C. § 12132." *Id.* at 570. For further discussion on the applicability of the ADA to developmentally disabled parents facing termination of their parental rights, *see generally* Susan Kerr, *The Application of the Americans with Disabilities Act to the Termination of the Parental Rights of Individuals with Mental Disabilities*, 16 J. CONTEMP. HEALTH L. & POL'Y 387 (2000); Duffy Dillion, Comment, *Child Custody and the Developmentally Disabled Parent*, 2000 WIS. L. REV. 127 (2000); Watkins, *supra* note 12; Teri L. Mosier, Note, *"Trying to Cure a Seven-Year Itch": The ADA Defense in Termination of Parental Rights Actions*, 37 BRANDEIS L.J. 785 (1998-99); Dave Shade, *Empowerment for the Pursuit of Happiness: Parents with Disabilities and the Americans with Disabilities Act*, 16 LAW & INEQ. 153 (1998).

122. *In re* William, 448 A.2d 1250, 1256 (R.I. 1982).

123. *Id.* at 1255.

be, are not required."[124] The Connecticut Appellate Court echoed this sentiment when it stated that "reasonable efforts means doing everything reasonable, not everything possible;"[125] however, "such efforts should not make it impossible to attain reunification in a given case."[126] The Connecticut court also acknowledged that the inherent imbalance of power between the individual defending against a petition to terminate parental rights and the state creates a situation in which the state's obligation to provide "reasonable efforts" becomes more weighty:

> "[T]he parent is by definition saddled with problems: economic, physical, sociological, psychiatric or any combination thereof. The agency, in contrast, is vested with expertise, experience, capital, manpower and prestige. Agency efforts correlative to their superiority [are] obligatory."[127]

In general, all parents are presumed "fit" until the state proves otherwise. However, "the presumption that children's best interests are in remaining with their natural parents who wish to raise them' is frequently reversed in reality for developmentally disabled parents. Instead, 'they must prove their competence in the face of myriad presumptions of inadequacy.'"[128] In Mary Ann's case, although two different professional assessments of her cognitive disabilities and their effect on her parenting suggested that she needed a variety of specialized services to assist her, the state did virtually nothing to assist her in her parenting. Rather than offering her specialized services tailored to her developmental disabilities, the state merely offered the minimum level of services it

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124. *In re* Adoption of Lenore, 770 N.E.2d 498, 503 (Mass. App. Ct. 2002) (citations omitted).

125. *In re* Eden F., 710 A.2d 771, 783 (Conn. App. Ct. 1998). In light of this statement, it is interesting to note that the State of Rhode Island arguably did just that in Mary Ann's case by providing the foster family her son was placed with "six months of intensive training, one-on-one, with the agency director, one or two times per week, two to four hours each time," both before and after his placement "while virtually nothing was done to assist Mary Ann in her reunification with Kayla and Christopher." Brief for Appellant, *supra* note 103, at 7, 10.

126. *In re Eden F.*, 710 A.2d at 783.

127. *Id.* (quoting *In re* Sheila G., 61 N.Y.2d 368, 474 (N.Y. 1984)).

128. Dillion, *supra* note 121, at 143 (quoting Watkins, *supra* note 12, at 1448).

might offer to a cognitively able parent. Critics have noted this trend:

> More common than the complete failure to offer reunification services, however, is the failure to offer adequate or reasonably modified services to parents with mental disabilities. In many cases, reunification services are offered *pro forma* with the one size fits all concept. Under these circumstances, failure is projected and expected, not from the parents with the mental disability, but from the judges, social workers and service providers. Despite their efforts, parents are usually found unable to improve.[129]

If these parents are to have any realistic hope of family preservation and potential reunification with their children, they need to have specialized services provided to them. As the Connecticut Appellate Court in *In re Eden F.* instructed, the power to provide rehabilitative services in these circumstances is retained by the state, not by the parents; as such, the state has the primary responsibility to determine which specific services would likely have some beneficial effect for a developmentally disabled parent in light of her particular needs.[130] It is not that Mary Ann (and others like her) is reasonably likely to become a fit parent; rather, it is that she ought to be provided the opportunity to achieve fitness, and that her children should be provided the opportunity to remain with their biological mother. The state cannot be held liable for failing to perform miracles, but the state can be expected to make the minimum "reasonable effort" that might afford some chance of change for these parents.

One possible approach for ensuring that the state more consistently provides all parents with a higher minimum standard of service would be to enact statutory guidelines that the court could then use as a framework in its analysis of whether the state has met its "reasonable efforts" for these parents. Indeed, the Federal Children's Bureau, a division of the Department of Health and Human Services, has issued Guidelines for Public Policy and State Legislation Governing Permanence for Children (Guidelines).[131]

129. Kerr, *supra* note 121, at 415.
130. *See In re Eden F.*, 710 A.2d at 783.
131. *See* Crossley, *supra* note 11, at 313.

These Guidelines purport to provide some insight into the "reasonable efforts" analysis, and suggest that states implement laws requiring courts to consider a variety of factors in making "reasonable efforts" determinations. These factors include:

> 1. the dangers to the child and the family problems that precipitate those dangers;
>
> 2. whether the services the agency provided relate specifically to the family's problems and needs;
>
> 3. whether case managers diligently arranged services for the family;
>
> 4. whether the appropriate services for the family were available and timely; and
>
> 5. the results of the services provided.[132]

These types of Guidelines would force the state to better account for factors such as a developmental disability, and would also allow the courts to hold the state accountable when it fails to provide specialized services to parents who such disabilities. Presently, the court's current totality of the circumstances approach for assessing reasonable efforts does not hold the state to a high enough burden in providing services to these parents, as evidenced by Mary Ann's case. Rhode Island could enact legislation that requires a more specific judicial determination of reasonable efforts. Such legislation could propel DCYF into offering better services to parents whose children are in state custody, and perhaps broaden the array of services available to parents who are cognitively disabled.

Minnesota is one state that has more specific statutory language "that makes clear that the state agency bears the burden of establishing that it has made reasonable efforts and provides a relatively detailed list of factors courts must consider"[133] in analyzing whether the state has met its burden. These factors include whether the services provided by the state are: "1) relevant to the safety and protection of the child; 2) adequate to meet the needs of the child and family; 3) culturally appropriate; 4) available and

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132. *Id.*
133. *Id.* at 303.

accessible; 5) consistent and timely; [and] 6) realistic under the circumstances."[134] Such factors could include requirements that parents suffering from a developmental disability have services provided that address their disability in all realms, not just parenting. In Mary Ann's case, a more comprehensive approach to her developmental disability might have meant that the services provided to address her domestic violence issues would account for her cognitive limitations; this could have taken the form of a "lifeline," as research suggests that developmentally disabled victims of domestic violence require even more specialized services than other victims.[135]

B. *The Domestic Violence in Mary Ann's Case*

Mary Ann's case is complicated not only by the fact that she is developmentally disabled, but because she is a repeat victim of domestic violence.[136] Rather than acknowledging the extreme difficulty of any person separating from a physically abusive relationship, the court faulted Mary Ann for her failed attempts to protect her children and herself from further abuse.[137] Critics claim that this is not uncommon: "Mothers who are victims of domestic violence too often become the subjects of 'double abuse,' . . . first by a partner and then by the state 'through forced unnecessary separation of the mothers from their children on the excuse that this sundering is necessary to protect the children.'"[138] Addi-

134. *Id.*

135. *See generally* Heidi Strickler, *Interaction Between Family Violence and Mental Retardation*, 39 MENTAL RETARDATION 461 (2001); Bonnie E. Carlson, *Mental Retardation and Domestic Violence: An Ecological Approach to Intervention*, 42 SOCIAL WORK 79 (1997).

136. *In re* Christopher B., 823 A.2d 301, 316-17 (R.I. 2003). It should be noted that Mary Ann's husband Dennis also alleged an incident of domestic violence by her, and the Family Court ordered her to attend domestic-violence counseling based on this one occurrence. *Id.* at 316.

137. *See id.* at 316-18. The court recounted how Mary Ann did participate in some counseling, did call the police after Dennis's attacks on numerous occasions, did recognize Dennis as a "roadblock" to reunification with her children, and did voice a desire to leave him and to initiate divorce proceedings. *Id.* at 316. Rather than acknowledging these attempts as evidence of an effort to separate, the court viewed them as evidence of an inability to separate – an incongruous finding, given Mary Ann's eventual permanent separation from Dennis. *Id.* at 316-18.

138. Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11

tionally, these mothers face many obstacles that other parents under scrutiny by the state in abuse, neglect, and termination proceedings do not, such as "increased physical danger to the woman and her children in the period immediately following her departure, the lack of domestic violence shelters, an inability to find permanent housing, and a lack of employment." [139]

In cases like Mary Ann's, the timelines imposed by the ASFA for "reasonable efforts" to occur prior to deciding permanence for the child put more pressure on the parent to rehabilitate at an extraordinary speed. As Catherine Ross notes, in those cases "involving mothers who may or may not be neglectful, or *who are victims in their own right*, ASFA's categorical treatment of mothers and children may not serve all children equally well. Unfortunately, the marginal cases are not rare." [140]

In addition, lurking in the background of many, if not most, TPR cases is the fact that the parents are struggling with extreme poverty. One critic, discussing continuous complaints about the lack of funding for preventative and reunification services, concludes that "although in theory children are not removed from their parents because of poverty . . . this distinction cannot be maintained."[141] Separating from a domestically violent partner while struggling with poverty and child rearing would be insurmountable for many women. For a woman like Mary Ann, who is also developmentally disabled, such a situation would seem perhaps hopeless, particularly given the timelines imposed for rehabilitation.[142]

While the court referred repeatedly to Mary Ann's difficulty leaving Dennis and protecting herself and her children from him, it failed to acknowledge in its totality of the circumstances analysis that research shows this difficulty to be very typical of victims of domestic violence. This is because domestic violence "almost always escalates when the batterer discovers that the victim is about to or actually has left him. . . . Accordingly, a victim's fear of

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VA. J. SOC. POL'Y & L. 176, 218-19 (2004) (quoting Nicholson v. Williams, 203 F. Supp. 2d 153, 163 (E.D.N.Y. 2002)).

139. *Id.* at 220.

140. *Id.* at 179 (emphasis added).

141. *Id.* at 190 (quoting Sarah H. Ramsey, *Children in Poverty: Reconciling Children's Interests with Child Protective Services and Welfare Policies: A Response to Ward Doren and Dorothy Roberts,* 61 MD. L. REV. 437, 445 (2003)).

142. *See supra* note 52.

leaving her abuser, far from being irrational, is highly realistic based just on his threats."[143]

Some critics believe that the tension between domestic violence and the states terminating women's parental rights based on this violence is exacerbated by ASFA. One commentator has stated that:

> [g]uided by ASFA, a state could terminate an abused mother's parental rights because she did not intervene when her batterer killed or abused her child. . . . Thus, the statutory language not only encourages states to assign legal liability to a battered woman for failure to protect her child, but it also allows states to terminate her parental rights on these grounds.[144]

This is precisely what happened to Mary Ann. While it is difficult to fault a court for wanting to protect children that have likely experienced an enormous amount of trauma and uncertainty in their upbringing, the state bears some responsibility for insuring both a family's stability and the children's protection. Unfortunately, it was Mary Ann who additionally suffered, perhaps to a greater extent than she ever deserved. Research suggests that "mother blaming"[145] is a deeply ingrained phenomenon in our society:

> Some data suggests that there may be a bias among child protective services workers monitoring situations of [child] abuse to believe that the abuse is the mother's fault. Lawyers in the system may treat the mother's abuse as a sign of her inability to parent. Finally, courts are often unsympathetic to an abused mother: even when

143. Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 275 (1995).

144. Rachel Venier, *Parental Rights and the Best Interests of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Victims' Rights*, 8 AM. U. J. GENDER SOC. POL'Y & L. 517, 520-21 (2000).

145. *See generally* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family and Criminal Law*, 83 CORNELL L. REV. 688 (1998); Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children From Their Male Partner's Abuse*, 6 HASTINGS WOMEN'S L.J. 67 (1995). For a discussion of different feminist schools of thought on legal perceptions and images of "bad mothers," see Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993).

> she provides evidence of domestic violence, the court may still declare her an unfit parent due to their fundamental misunderstanding of domestic violence's impact on a woman's behavior.[146]

For Mary Ann's children, it is indeed possible that the best action to protect them is the one that the Rhode Island Supreme Court in fact took. However, it is also possible that "the child's best interests would be better served by removing the abuser from the family [rather] than removing the child from the home."[147] The court clearly faulted Mary Ann for not leaving Dennis, as well as the abusive boyfriend who followed Dennis, and took this as a clear implication of unfitness as a parent. The court also found that the marriage counseling provided to Mary Ann constituted "reasonable efforts" to address the domestic violence issue that pervaded her and her children's lives. The court did not, however, account for the fact that

> [l]eaving . . . is often a long and arduous struggle and the difficulty of leaving a batterer is often not appreciated. Some women's ability to escape their husbands' violence is used against other women who are not successful in their attempts. The implication is that the women who are successful are more caring and conscientious caretakers.[148]

The court apparently believed that if Mary Ann just had the will strong enough to leave her abusers, which the motivation to protect her children should have provided her, she could do it. The research, however, suggests otherwise.[149]

Advocates have suggested that for women in Mary Ann's position one possible solution might be more aggressive state inter-

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146. Vernier, *supra* note 145, at 532.

147. *Id.* at 534.

148. V. Pualani Enos, *Recent Development: Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children,* 19 HARV. WOMEN'S L. J. 229, 245 (1996) (citation omitted). *But see generally* Kathryn L. Quaintance, *Response to V. Paulani Enos's "Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children," Published in Volume 19 of the Harvard Women's Law Journal,* 21 HARV. WOMEN'S L.J. 309 (1998).

149. *See* Enos, *supra* note 148, at 255.

vention to protect *the mother*, in the form of guardianship.[150] Traditional empowerment models (such as merely providing victims with some counseling, as Mary Ann experienced, and hoping they will take it from there) do not suffice for some women who, "immobilized by violence, need a more aggressive state intervention than those provided by empowerment-based remedies. Unable to act on their own, these women require an intervention that permits someone else to act on their behalf." [151] This notion of guardianship has obvious resonance for a woman like Mary Ann, who is also developmentally disabled. If the state were to enact guidelines that require more specifically tailored "reasonable efforts" for developmentally disabled parents, perhaps more of these issues would have been addressed in Mary Ann's case.

Terminating Mary Ann's parental rights may indeed save her children from further abuse by Mary Ann's male partners, but it does little to alter her own situation into which she may introduce more children in the future:

> Termination of parental rights can sever a battered woman's relationship with her children, but cannot force her to sever her relationship with the abuser. While the children are spared from witnessing abuse, they are removed from a relationship with their mother and may be left to the vagaries of the foster care system.[152]

If the Rhode Island Supreme Court had been better able to hold the State to a higher burden – perhaps through the use of enacted guidelines that specifically address developmental disability – in proving that true "reasonable efforts" had been provided to Mary Ann, maybe additional measures would have been taken to assist her in a more meaningful way.

VI. CONCLUSION

Termination of parental rights cases are never easily decided. There can be no doubt that the Rhode Island Supreme Court decided *Christopher B.* with the best interests of Christopher and Kayla in mind in an attempt to accord these children the nurtur-

150. *See* Ruth Jones, *Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser*, 88 GEO. L.J. 605, 628 (2000).
151. *Id.*
152. *Id.* at 640.

ing environment and permanency that all children need and deserve. However, based on its own precedent, the court has stated that the best interests of the child are not the only interests that must be accounted for in TPR cases, and that the state has a burden of providing services that meet a "reasonable efforts" standard before eviscerating the interests of the parents involved. These efforts must be analyzed in a totality of the circumstances framework that acknowledges developmental disabilities and accounts for enhanced services for parents that have them. If Rhode Island enacts guidelines that more clearly articulate the burden the state must meet in providing "reasonable efforts," then courts might well arrive at a different outcome than that in Mary Ann's case. Such guidelines would require that the developmental disability of parents facing terminations of their parental rights be addressed in all areas of services provided. Unfortunately for Mary Ann, her rights were terminated prior to the adoption of any such guidelines. In the future, more weight ought to be given to the realities that parents struggling with the myriad of complex issues and problems like Mary Ann face, and the state must better address such issues before seeking to terminate the parental rights of developmentally disabled parents.

Esme Noelle DeVault