No. 27858-1-III

Korsmo, J. (concurring) — The majority opinion correctly states the points necessary to resolve this case: (1) the plain language of the statute, which does not need construction, excludes J.R.; (2) his constitutional challenges fail. As to the latter, it is clear that the Legislature is not required to redress all aspects of a problem. An underinclusive approach does not necessarily create equal protection difficulties. *E.g., Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 901, 83 P.3d 999 (2004) (age limit on services for children with developmental disabilities); *Seeley v. State*, 132 Wn.2d 776, 806, 940 P.2d 604 (1997) (classification of marijuana as schedule I substance while other drugs not so classified). For these reasons, I agree with and have signed the majority opinion.

I write separately solely to explain that the language used by the Legislature does not live up to its stated goal. The legislative history indicates that the 2008 amendment to RCW 13.34.215(1) was supposed to help address the problem of dependent children who are not placed and would otherwise linger in the system without a permanent plan until

they age out. In the rare circumstance where the children have a biological parent willing and able to take care of them, the amendment allows for the possibility of reinstatement of parental rights. Unfortunately, the language used partially contradicts that purpose.

The problem arises because subsection (1)(c)[1] ties the possibility of reinstatement to the timing of the permanency plan rather than whether or not one is (or ever was) in place. For example, a permanency plan could be entered 37 months after the termination of parental rights. Under the plain language of existing subsection (1)(c), a child still could seek to have parental rights reinstated even though there was a permanency plan in place. That is not what the Legislature intended.

It appears that the Legislature wanted a minimum period of time, in this instance 36 months, to pass before a child could seek reinstatement because no permanency plan had been achieved. A clearer way to state that would be to break subsection (c) into two parts, perhaps as follows:

(c)(i) the child has not achieved his or her permanency plan; (ii) three years have passed since the final order of termination.

This approach breaks the nexus between the timing of the permanency plan and the possibility of reinstatement. The Legislature could also then clarify if it wanted children in J.R.'s situation who once had a permanency plan, but no longer did, to qualify

[1] "The child has not achieved his or her permanency plan within three years of a final order of termination." RCW 13.34.215(1)(c).

for reinstatement of parental rights. It must decide whether the benefits of the expanded approach outweigh any drawbacks such as the possibility that a child would sabotage a permanency plan in hopes of reunion with a parent. That policy decision is for the legislative, not judicial, branch of our government.

With this request for clarification from the Legislature, I agree that the judgment should be affirmed.

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Korsmo, J.