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## ***Schnedler v. Lee: Some (Re)Assembly Required***

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## *Schnedler v. Lee*: Some (Re)Assembly Required

What is a parent? The answer depends on who you ask. Some say that parental status revolves around biology. Others say that it depends on love and support. Some insist that parents are always a pair, while others believe one will suffice. In any case, the picture of a parent can look different depending on a person's experiences and can shift and change over time. Perhaps the picture eventually expands to include all of the ideas that depict what a parent could possibly be. In law, the definition of a parent evolves in a similar way.

However, the law is not really concerned with the societal ideal of what a parent is. The law must be able to answer the more difficult questions such as: who has the right to physical custody of children, and who should be financially responsible for their care? The answers to these questions depend on the status of parentage. In Oklahoma, these questions are typically answered by the Uniform Parentage Act, which dictates the requirements for what it takes to be a legal parent.<sup>1</sup> For many years, the Uniform Parentage Act answered most of the law's parentage questions.

However, a problem arose when same-sex marriage came to the state in 2014. This development introduced different combinations of figures to the picture of who could be a legal parent. The courts did adjust to accommodate these new figures, and the decisions still involved the traditional number of parents: two. But that did not last long. In 2017, *Schnedler v. Lee* posed a question that had never been asked in Oklahoma before: what do we do when the puzzle comes with an extra piece?

This Note explores the possible answers to that question. Part I details what measures the court took in developing the standards regarding same-sex couple custody issues leading up to *Schnedler*. Part II describes the case itself. Part III is divided into three sections which examine (1) the previous case that formed the basis for the outcome of *Schnedler*, (2) how the court applied the standard developed in that case, and (3) whether that standard was appropriate in the first place. Finally, Part IV provides suggestions for other standards that the court may use to provide a more satisfactory answer to our question in the future.

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1. 10 OKLA. STAT. §§ 7700-101 to 7800 (2011).

*I. Putting It Together: Law Before the Case*

Same-sex marriage was officially recognized in Oklahoma<sup>2</sup> nearly a year before the Supreme Court mandated that it be recognized across the nation.<sup>3</sup> Since then, Oklahoma courts have been required to restructure parentage and custody issues to accommodate the newly-recognized same-sex family unit.<sup>4</sup> Progress was made in fairly short order when *Eldredge v. Taylor*<sup>5</sup> came down from the Oklahoma Supreme Court about four months after the ban on same-sex marriage was lifted.

In *Eldredge*, Karen Taylor and Julie Eldredge were in a same-sex relationship for ten years.<sup>6</sup> The two entered into a civil union in New Zealand and returned to Oklahoma, where they purchased a home together and ultimately had two children.<sup>7</sup> They used an anonymous sperm donor and Taylor carried the children, with Eldredge providing full support at every stage.<sup>8</sup> Following the birth of each child, the parties entered into co-parenting agreements to “guarantee that both parties would be considered natural, legal, and acknowledged parents” of their children.<sup>9</sup> When the parties separated Taylor took the children, changed their last names to “Taylor,” and eventually prepared to remove them from Oklahoma.<sup>10</sup>

In her answer to Eldredge’s complaint, Taylor did not contend that Eldredge was an unfit parent, but unwittingly relied on the now-defunct theory that Oklahoma public policy frowned upon same-sex couples raising children and that her status as the biological mother would protect her position.<sup>11</sup> The court ruled that “a person has standing to seek a best-interest-of-the-child hearing when the sole biological parent relinquishes some of her parental rights to the person by entering into a written co-parenting agreement.”<sup>12</sup> However, the court also recognized that “[t]he

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2. *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014) (affirming that the Oklahoma ban on same-sex marriages was unconstitutional).

3. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

4. *See generally* Robert G. Spector, *Same Sex Marriage Came to Oklahoma: Now What Happens?*, 69 OKLA. L. REV. 1 (2016), <http://digitalcommons.law.ou.edu/olr/vol69/iss1/1>.

5. 2014 OK 92, 339 P.3d 888.

6. *Id.* ¶ 4, 339 P.3d at 890.

7. *Id.*

8. *Id.* ¶ 4, 339 P.3d at 891.

9. *Id.* ¶ 5, 339 P.3d at 891.

10. *Id.* ¶ 6, 339 P.3d at 891.

11. *Id.* ¶ 11, 339 P.3d at 892.

12. *Id.* ¶ 1, 339 P.3d at 890.

unique and compelling facts of this case make it difficult to create a general rule” and limited the ruling to the facts of the case.<sup>13</sup> This meant that a non-biological mother in a same-sex parental unit had standing only when enforcing a written co-parenting contract.

*Ramey v. Sutton* expanded on *Eldredge* by “acknowledging the rights of a non-biological parent in a same-sex relationship who has acted *in loco parentis*” rather than requiring a written agreement.<sup>14</sup> The facts of *Ramey* were similar to the facts of *Eldredge*. Charlene Ramey and Kimberly Sutton were in a relationship for over eight years during which they decided to have a child together, with Sutton carrying the child.<sup>15</sup> Using a mutual friend as a donor, the couple had a baby boy in 2005 and raised the child together for several years until they separated.<sup>16</sup> Ramey then filed an action to secure her parental rights.<sup>17</sup>

The *Ramey* court chose to continue the tradition of giving “compelling consideration to the best interests of the minor child in custody matters.”<sup>18</sup> Further, it acknowledged that “when persons assume the status and obligations of a parent without formal adoption they stand *in loco parentis* to the child, and, as such, may be awarded custody even against the biological parent,” indicating that a biological link was not necessary to grant a person parental status.<sup>19</sup> The court rejected the argument that Ramey had no parental rights because the parties chose not to marry even though the option was open outside of Oklahoma.<sup>20</sup> The court established a three-prong test to establish when a non-biological parent has acted *in loco parentis*: “where the couple, prior to *Bishop* . . . (1) [was] unable to marry legally; (2) engaged in intentional family planning to have a child and to co-parent; and (3) the biological parent acquiesced and encouraged the same sex partner’s parental role following the birth of the child.”<sup>21</sup>

When an individual satisfies all prongs of the *Ramey* test, she acts *in loco parentis* and establishes standing to bring a best-interests-of-the-child hearing.<sup>22</sup> After *Ramey*, courts began using the test to make standing

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13. *Id.* ¶ 21, 339 P.3d at 895.

14. *Ramey v. Sutton*, 2015 OK 79, ¶ 2, 362 P.3d 217, 218.

15. *Id.* ¶ 6, 362 P.3d at 219.

16. *Id.*

17. *See generally, id.*

18. *Id.* ¶ 14, 362 P.3d at 221.

19. *Id.* ¶ 15, 362 P.3d at 221.

20. *Id.* ¶ 13, 362 P.3d at 220.

21. *Id.* ¶ 2, 362 P.3d at 218.

22. *Id.* ¶ 15, 362 P.3d at 221.

determinations in same-sex couple custody disputes.<sup>23</sup> However, a new problem arose when the facts of the case shifted slightly, as they did in 2017 with *Schnedler v. Lee*.

## II. *New Piece to the Puzzle: Schnedler v. Lee*

### A. *Mirror Images; The Parties Agree*

Plaintiff Lori Schnedler and Defendant Nicole Lee dated and cohabitated before Oklahoma permitted same-sex marriages.<sup>24</sup> During their relationship, the women decided to have a child and raise it together.<sup>25</sup> Lee's co-worker, third-party Defendant Kevin Platt, agreed to be the sperm donor, and the insemination was performed at Schnedler and Lee's home without medical assistance.<sup>26</sup> Lee gave birth to the child, J.A.L., in July 2007.<sup>27</sup> After the child was born, Schnedler established a guardianship over J.A.L. in order to put the child on her insurance.<sup>28</sup> Schnedler and Lee lived together at the time of the birth, and continued to live together with the child until April 2015 when Lee left the residence.<sup>29</sup> In November 2015, Lee stopped allowing Schnedler to visit with J.A.L.<sup>30</sup> After the suit was filed, Lee asserted that Platt was a necessary party to the case because he was the biological father, and Platt joined the case to be adjudicated the father.<sup>31</sup>

### B. *The Individual Pictures: Spot the Differences*

#### 1. *Schnedler's Story*

Schnedler testified that she and Lee maintained a relationship from the time they met in 2002 until Lee left their home in August 2015.<sup>32</sup> According to Schnedler, Platt signed a written agreement that he would not assert any parental rights over the child; however, such a document was not

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23. See, e.g., *Fleming v. Hyde*, 2016 OK 23, ¶¶ 2-5, 368 P.3d 435, 435; *Newland v. Taylor*, 2016 OK 24, ¶¶ 2-5, 368 P.3d 435, 436.

24. *Schnedler v. Lee*, No. 115,362, slip op. at 2 (Okla. Civ. App. Aug. 18, 2017), cert. granted (Okla. Dec. 18, 2017).

25. *Id.*

26. *Id.*

27. *Id.* at 5.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 3.

32. *Id.* at 4.

produced in evidence.<sup>33</sup> To Schnedler's knowledge, Platt never had contact with J.A.L., nor did he provide any financial support.<sup>34</sup> Schnedler avers that she and Lee followed a visitation agreement until Lee terminated the agreement in November 2015.<sup>35</sup> Essentially, Schnedler's picture of the situation depicted a fairly typical scenario: two people, raising a child together—until one decided to leave and take the child with them, ultimately refusing to allow the other parent visitation rights.

### 2. *Lee and Platt's Story*

Lee acknowledged that she and Schnedler were in a relationship, and that they planned to have the child together.<sup>36</sup> Lee claimed, however, that the relationship ended after J.A.L.'s birth and that she and Schnedler lived together as roommates, not as partners.<sup>37</sup> Lee further averred that before the birth of the child, she made it known that she intended to be the sole parent.<sup>38</sup> As for Platt's relationship with J.A.L., Lee and Platt corroborated each other's stories. According to them, Platt visited the child frequently, provided some financial support, and even introduced the child to his family.<sup>39</sup> Platt testified that he always intended to be the parent and have a father-daughter relationship with J.A.L.<sup>40</sup> He further suggested that he was only casually acquainted with Schnedler, and claimed he had never signed any document that would terminate his parental rights.<sup>41</sup> In short, Lee and Platt painted a very different picture: two people, raising a child together—and the mother had a roommate who now seems to think that she has parental rights.

### C. *The Decision*

Lee and Platt's story managed to sway the court. It concluded that Platt did not agree to give up his parental rights with regards to J.A.L. and that he had a relationship with the child and provided financial support.<sup>42</sup> Based on this finding, Schnedler had no standing to establish *in loco parentis* status

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33. *Id.* at 5.

34. *Id.*

35. *Id.*

36. *Id.* 4-5.

37. *Id.*

38. *Id.* at 5.

39. *Id.* at 6.

40. *Id.*

41. *Id.*

42. *Id.* at 7.

because she failed to meet the third prong of the parentage test laid out by *Ramey*.<sup>43</sup> This conclusion hinged on the question of whether or not Platt's acquiescence to Schnedler's relationship with the child was truly necessary under the meaning of the test.

In *Ramey*, the biological father did not want to be a part of the family, and therefore he had neither a relationship with the child nor did he provide support.<sup>44</sup> Thus, the *Ramey* court did not distinguish between the mother or the father when it referenced the "biological parent" in its test, and made no requirement of consent from the father.<sup>45</sup> Unlike the sperm donor in *Ramey*, Platt stayed in the picture.<sup>46</sup> The court here reasoned that it should be implicit that in the opposite situation, one where a biological father is present and active, acquiescence from him should be a requirement under the test.<sup>47</sup>

The court also gave great consideration to the limiting statement from *Ramey*: "This decision does not extend any *additional* rights to step-parents, grandparents, or others."<sup>48</sup> If Platt had "additional rights" as a parent, then this would exclude him from the "others" category and bump him into the "biological parent" category.<sup>49</sup> In order to determine whether Platt possessed these "additional rights," the court explored adoption cases.<sup>50</sup> The court found that Platt would have the right to acquiesce or decline in an adoption proceeding; therefore, Platt had "additional rights" in the meaning of the *Ramey* test and fit into the "biological parent" category.<sup>51</sup> The court continued to discuss what it means to act *in loco parentis*, finding that "[t]he requisites to establish the status of *in loco parentis* are stated to include consent of the 'legal parent.'"<sup>52</sup> Thus, in order to obtain *in loco parentis* status and bring suit, Schnedler had to show that both biological parents acquiesced and encouraged her relationship with

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43. *Id.* at 8 (citing *Ramey v. Sutton*, 2015 OK 79, ¶ 2, 362 P.3d 217, 218 ("(3) the biological parent acquiesced and encouraged the same sex partner's parental role following the birth of the child")).

44. *See Ramey*, ¶ 2, 362 P.3d at 218.

45. *Id.*; *see also Schnedler*, slip op. at 11.

46. *Schnedler*, slip op. at 9-10.

47. *Id.* at 11-12.

48. *Id.* at 9.

49. *Id.* at 10.

50. *Id.* at 12-13.

51. *Id.* at 12 (finding the evidence sufficient to show Platt had an active role in the child's life and thus that he had the right to acquiesce in an adoption).

52. *Id.* at 13-14.

J.A.L.,<sup>53</sup> but Lee and Platt's testimony seemed to suggest just the opposite.<sup>54</sup>

It is worth noting that the court's opinion is meant to decide the issue of Schnedler's standing, yet the discussion is devoted to determining Platt's rights, rather than investigating what rights Schnedler may have. Ultimately, it appears Schnedler was denied standing because, (1) the court accepted the version of the story in which Platt was an active, biological father who chose to remain in the picture, and (2) Platt's apparent right to acquiesce in an adoption proceeding translated to his right to acquiesce in a proceeding to establish *in loco parentis* status under *Ramey*. However, the analysis does not seem to follow the *Ramey* test at all.

### *III. The Big Picture: How Does the New Piece Fit?*

#### *A. Mismatched Pieces: Puzzling Out Ramey*

The technical application of *Ramey* is fairly straightforward. The opinion created a three-pronged test to establish *in loco parentis* status, and extends standing for a best-interests-of-the-child hearing to those non-biological same-sex partners who meet the criteria.<sup>55</sup> But the spirit of the opinion was a little more complicated. The court concentrated heavily on the best-interests-of-the-child standard, at one point stating “[t]his couple, and *more importantly*, their child, is entitled to the love, protection and support from the only parents the child has known.”<sup>56</sup> The court also gave great deference to what is “fair” to the parties involved. The facts section of the opinion discussed *Ramey*'s relationship with the child at length,<sup>57</sup> and returned to the theme during its analysis, stating “*Ramey* has been intimately involved in the conception, birth and parenting of their child, at the *request* and invitation of *Sutton*.”<sup>58</sup> The court pointed out that “[t]he uncertainty facing *Ramey*, as reflected in this litigation, is the *exact* peril identified in *Obergefell*.”<sup>59</sup> Such emphatic and conscientious dicta suggests that there is

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53. *Id.* at 15.

54. *Id.* at 6.

55. *See Ramey v. Sutton*, 2015 OK 79, ¶ 2, 362 P.3d 217, 218.

56. *Id.* ¶ 17, 362 P.3d at 221.

57. *Id.* ¶ 8, 362 P.3d at 219.

58. *Id.* ¶ 16, 362 P.3d at 221.

59. *Id.* *Obergefell* featured couples whose marital statuses and rights were in question in states that had not yet legalized same-sex marriage. *See generally* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

something going on in this case that is a bit more complex than a mere application of the *in loco parentis* doctrine.

While the court in *Ramey* did manage to find a legal basis on which to apply its decision, the basis of the three-pronged test seems to be something more akin to equity. The first prong requiring the parties to be “unable to marry legally” was qualified with the caveat “prior to *Bishop*, or *Obergefell*.”<sup>60</sup> The court briefly stated that the fact that Oklahoma law prevented the couple’s marriage should not be a bar to Ramey’s rights as a parent.<sup>61</sup> This, it argued, is not law, this is simply what is fair. The second prong, “engaged in intentional family planning,” is also simply an application to the fact of the case.<sup>62</sup> It merely suggests that if the parties planned to have a child together, each party ought to—and ought to have the opportunity to—see it through. It is not until the third prong of the test that a truly “legal” implication appears: “the biological parent acquiesced and encouraged the same sex partner’s parental role.”<sup>63</sup> Here we see a nod to the *in loco parentis* doctrine, in requiring the acquiescence and encouragement of the biological parent. And it is this prong that the *Schnedler* court latched on to in making its analysis, to the exclusion of the spirit of the rest of the *Ramey* test, and indeed, to the rest of the opinion.

#### *B. Forcing a Fit: Applying Ramey to Schnedler*

Ultimately, the biggest issue is that *Schnedler* and *Ramey* are not the same case. Their facts, while similar in some respects, are clearly—and admittedly—distinguishable in others.<sup>64</sup> The court stated: “[v]iewed strictly, *Ramey* does not address the issue presented by the fact of the case here under review,”<sup>65</sup> and that “[a] strict interpretation method would have this Court limit *Ramey* to its specific facts and specific result[s].”<sup>66</sup> The court further explained that the other option was to interpret *Ramey*:

to include not only relief for a civil union partner but also relief for a biological father by requiring evidence to show whether the biological father acquiesced and encouraged the civil union

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60. *Ramey*, ¶ 2, 362 P.3d at 218.

61. *Id.* ¶ 13, 362 P.3d at 220-21.

62. *Id.* ¶ 2, 362 P.3d at 218.

63. *Id.*

64. *Schnedler v. Lee*, No. 115,362, slip op. at 9 (Okla. Civ. App. Aug. 18, 2017).

65. *Id.*

66. *Id.* at 10.

partner's parental role and thereby exclude the biological father from the "or others" limitation stated by the *Ramey* court.<sup>67</sup>

Despite its recognition that the facts of the cases do not fit together, the court chose the latter option, determined to find a way to make Platt fit into the picture *Ramey* created.

The court recognized there was no biological father in *Ramey*,<sup>68</sup> but it failed to acknowledge that the very fact that the biological father was not at issue in *Ramey* could suggest that the court did not contemplate a biological father's rights when it created its test. In fact, footnote four of the *Ramey* decision specifically points out that the donor was not a party to the action.<sup>69</sup> When the *Ramey* court said "biological parent" in the third prong of the test, it was likely referring to only the biological mother. Thus, the court's interpretation of whether Platt fell into the "biological parent" status was misguided and not in keeping with what the *Ramey* court intended in the application of its test.

In the absence of a biological father, the *Ramey* court did not require his consent.<sup>70</sup> The *Schnedler* court, however, inverted this logic and stated that it is "implicit" that if the absence of a biological father rendered his consent unnecessary, the presence of a biological father must render his consent necessary.<sup>71</sup> The court's position is a deductive fallacy not based on any affirmative statement made by the *Ramey* court. It represents pure conjecture based on the court's inference from an issue that was *not* decided in *Ramey*. But this deduction was not quite enough for a conclusion; the court needed to actually apply the test.

The *Schnedler* court relied on the adoption standard to reach its decision as to whether Platt qualified as a "biological parent" for the third prong of the test.<sup>72</sup> The court chose this standard by picking apart the limitation statement from *Ramey*,<sup>73</sup> which limited its decision to the facts of the case, and declined the extension of "additional rights" to "step-parents, grandparents, or others" under its test.<sup>74</sup> From this statement, the *Schnedler* court inferred, again, that any parent who has any additional rights to a

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67. *Id.*

68. *Id.*

69. *Ramey v. Sutton*, 2015 OK 79, ¶ 6 n.4, 362 P.3d 217, 219 n.4.

70. *Id.*

71. *Schnedler*, slip op. at 11-12.

72. *Id.* at 12-13.

73. *Id.* at 13.

74. *Id.* at 12-13 (quoting *Ramey*, ¶ 19, 362 P.3d at 221).

child cannot be considered one of the “others” in the meaning of the limitation, and must therefore be a “biological parent.”<sup>75</sup> By establishing that Platt’s consent is required in an adoption, the court reasoned that this gives him “additional rights” as referenced in the limiting statement of the *Ramey* decision,<sup>76</sup> and therefore renders him a “biological parent” rather than an “other.” This meant that his consent was required under the *Ramey* test in order to allow *Schnedler* status of *in loco parentis*.<sup>77</sup>

The court’s reasoning here was tenuous at best, and the court misplaced its reliance when it analyzed the adoption standard for this purpose. *Ramey* pointed out that the doctrine of *in loco parentis* is “one who has assumed the status and obligations of a parent *without formal adoption*.”<sup>78</sup> The *Schnedler* court itself quoted this statement in its analysis.<sup>79</sup> It also asserted that “for the purposes of determining whether the consent of the biological father is required, there is no legal distinction between *in loco parentis* and adoption.”<sup>80</sup> But this was nothing other than more conjecture based, apparently, on the fact that adoption and *in loco parentis* status both require the consent of a biological parent. So why did the court rely so heavily on Platt’s rights in an adoption, when it purported to be determining *Schnedler*’s status under the *Ramey* test?

The court’s discussion of whether Platt has rights under the adoption standard is an analysis of what status he fits into for the purposes of the *Ramey* test’s third prong. However, this defeats the intended use of the test. First, the *Ramey* test does not contemplate the status of the biological *father* at all.<sup>81</sup> Second, the *Ramey* court’s limitation statement that “[t]his decision does not extend any additional rights to step-parents, grandparents, or others” does not necessarily mean that any biological parent who would have additional rights under *another* legal standard is automatically not an “other” in the context of the *Ramey* decision.<sup>82</sup> Thus, the court’s analysis of whether Platt has rights under the adoption standard was irrelevant. Platt’s status was not contemplated by the *Ramey* court, and his right to consent in

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75. *Id.* at 13.

76. *Id.*

77. *Id.* at 8.

78. *Ramey*, ¶ 2 n.2, 362 P.3d at 218 n.2 (quoting *Workman v. Workman*, 1972 OK 74, ¶ 10, 498 P.2d 1384, 1386 (emphasis added)).

79. *Schnedler*, slip op. at 13.

80. *Id.* at 15.

81. *See generally Ramey*, 2015 OK 79, 362 P.3d 217.

82. *Id.* ¶ 19, 362 P.3d at 221.

an adoption is immaterial as to whether his consent is required to allow Schnedler *in loco parentis* status under the *Ramey* test.

*C. Flaws in Ramey, Exacerbated by Schnedler*

Based on the misapplication of the *Ramey* test in *Schnedler*, it seems safe to say that the test's purpose is best served when the test is applied to fact patterns nearly identical to *Ramey*. Even then, however, the test represents more of a short-term reprieve from same-sex couple custody issues than a long-term solution.<sup>83</sup> Each prong of the test has its own problems and limitations that prevent it from being an easy-to-apply bright line rule.

The first prong, which requires that the couple be unable to marry when the child was conceived, is limited both temporally and as a matter of policy. Temporally, the prong will become irrelevant with the passage of time. Retroactivity issues aside, as years pass, the time in which same-sex couples were unable to marry will slip further and further into the past. Although the issue of same-sex marriage was still germane to the issue in *Schnedler*, this prong cannot be a long-term solution to the same-sex child-custody issue.<sup>84</sup>

In addition, despite the *Ramey* court's attempt to keep to the spirit of *Obergefell*, it incidentally created inequality. A consideration as to whether a couple could or did marry is not a requirement to determine parentage in an opposite-sex couple.<sup>85</sup> However, the *Ramey* court made a consideration of marriage one of the considerations for same-sex couples.<sup>86</sup> To even consider the marital status (or the possibility thereof) of a same-sex couple when the same is not required for opposite-sex couples is unequal treatment based on sexual orientation in violation of *Obergefell*.<sup>87</sup> Further, the *Ramey* court adopted this requirement when it was unnecessary, and likely did so simply as a response to Sutton's argument that *Ramey* was not entitled to

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83. See generally Spector, *supra* note 4.

84. *Id.* at 9.

85. See 10 OKLA. STAT. § 7700-201 (2011).

86. *Ramey*, ¶ 2, 362 P.3d at 218.

87. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). (extending equal treatment to same-sex couples, the Court emphasized that “[same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right.”); see also *Pavan v. Smith*, 137 S. Ct. 2075, 2078-79 (2017) (holding that Arkansas' requirements that a male father be named on the birth certificate were marriage-based and therefore in violation of *Obergefell* when these requirements denied a mother's same-sex partner the right to be named on the birth certificate of their child).

parental status because the two never married.<sup>88</sup> The Uniform Parentage Act provides that children born outside of wedlock will be treated the same as children who were born to parents who are married.<sup>89</sup> The court could have applied this standard to children of same-sex couples, obviating the need for any consideration of marital status.

The second prong of the test is likely the least problematic of the three. It requires the couple to have “engaged in intentional family planning.”<sup>90</sup> For same-sex couples, this is necessary in order to have a child in the first place because “[for] same-sex couples, children do not come about by accident.”<sup>91</sup> Thus, this prong seems to be the most helpful for determining parentage, because it focuses on the intent of the parties. Admittedly, there can be debate as to what the parties intended (as in *Schnedler*). Courts may be required to engage in some fact-finding to determine the parties’ true intentions when they decided to have a child. However, for the most part, this prong would be relatively easy to rely on based upon the fact that the intent to have a child is usually required in the context of same-sex couples.

Finally, the *in loco parentis* doctrine espoused by *Ramey*’s third prong may be an improper standard to apply. *In loco parentis* status applies to any person who acts in the place of a parent, whether that person be a step-parent, grandparent, or any other “third person.”<sup>92</sup> While courts in same-sex couple custody disputes point out that they do not intend for their opinions to extend to grandparents, step-parents, etc.,<sup>93</sup> this represents a slippery slope which should not be tested. The parties in these cases are not generally some third party who has simply acted like a parent. They are individuals whose relationship with the biological parent and desire for a family led to the child’s very existence, despite the fact that they share no biological connection to the child. The doctrine of *in loco parentis* fails to truly capture the essence of this particular relationship.

*Schnedler* solved none of these issues. Rather than attempting to find a solution that was tailored to fit the fact pattern, the *Schnedler* court attempted to force the facts to fit the existing test.<sup>94</sup> In essence, it affirmed

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88. *Ramey*, ¶ 4, 362 P.3d at 219.

89. 10 OKLA. STAT. § 7700-202 (2011).

90. *Ramey*, ¶ 2, 362 P.3d at 218.

91. Spector, *supra* note 4, at 15.

92. Francis C. Amendola et. al., 67A C.J.S. *Parent and Child* § 366 (2018).

93. See *Ramey*, ¶ 19, 362 P.3d at 221; *Eldredge v. Taylor*, 2014 OK 92, ¶ 21, 339 P.3d 888, 895.

94. See *Schnedler v. Lee*, No. 115,362, slip op. at 8-10 (Okla. Civ. App. Aug. 18, 2017).

the use of the test and suggested a “make it work” attitude toward it. This seems like a step backward. Not only was the application of the test improper, it also denied a mother the right to seek visitation of the child who she had loved and raised for eight years. This is not what was intended when same-sex couples were finally granted equal treatment. It is likely that, over time, new and more complex permutations of the family image will be presented, and the *Ramey* test will simply not be able to account for all of them. The *Schnedler* court should have looked elsewhere for the solution to the issues before it.

#### *IV. Completing the New Picture; Suggested Solutions*

##### *A. Change the Uniform Parentage Act*

The Uniform Parentage Act “applies to [the] determination of parentage” in Oklahoma, and focuses on establishing the existence of a parent-child relationship.<sup>95</sup> A woman is generally determined to be the mother of a child by either giving birth to or adopting the child.<sup>96</sup> The determination of the father, however, has a few more possible tests.<sup>97</sup> In any case, the definitions included in the UPA suggest that it applies solely to opposite-sex couples.<sup>98</sup> In 2017, the National Conference of Commissioners on Uniform State Laws released a new draft of the UPA that is gender neutral.<sup>99</sup> But this new UPA has not yet been enacted in Oklahoma. Nevertheless, the courts could begin to at least attempt to apply a gender-neutral reading of the state’s existing UPA. The decisions under these readings might lead to an understanding of what issues need to be addressed in this relatively new arena. In fact, some other state courts have begun to test this solution.<sup>100</sup>

In *Elisa B. v. Superior Court*, the California Supreme Court struck down a decision that ruled a woman could not be adjudicated the mother of her twins because she was not a parent within the meaning of California’s

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95. 10 OKLA. STAT. §§ 7700-103, -201 (2011).

96. *Id.* § 7700-201.

97. *Id.*

98. *Id.* § 7700-102.

99. UNIF. PARENTAGE ACT § 204 (NAT’L CONF. OF COMM’RS ON UNIF. ST. L., Proposed Official Draft 2017), [http://www.uniformlaws.org/shared/docs/parentage/UPA2017\\_Final\\_2017sep22.pdf](http://www.uniformlaws.org/shared/docs/parentage/UPA2017_Final_2017sep22.pdf) (using “individual” rather than “man,” even if the mother being female is essentially required, to determine who can be the presumed other parent).

100. See *Elisa B. v. Superior Court*, 117 P.3d 660, 665-70 (Cal. 2005); *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 588 (Colo. App. 2013).

UPA.<sup>101</sup> The parties to the case were two women who had been in a romantic relationship and chose to be artificially inseminated in order to raise a family together.<sup>102</sup> Later the two split up, and the biological mother, Emily, sought child support from the non-biological mother, Elisa.<sup>103</sup> According to California's UPA, a man could be adjudicated to be a parent by showing that he had taken the child into his home and held it out as his own.<sup>104</sup> After analyzing several other cases where a female had been adjudicated the mother of a child based on this same standard,<sup>105</sup> the court found that Elisa was the mother of the children, since the evidence showed that she had taken "the children into her home" and held them out openly as her own.<sup>106</sup> Thus, a child may have two parents who are both women, by way of the court analyzing a woman's conduct the same way that they would analyze a man's. Here, a gender-neutral reading of the state's UPA solved the same-sex couples' custody dispute.

The *Schnedler* court could have used a similar method. Rather than forcing the case into the *Ramey* test, the court could have discussed Oklahoma's UPA and considered its meaning to be gender neutral. The Oklahoma UPA states that a man can be considered the presumed father of a child if "[f]or the first two (2) years of the child's life, he resided in the same household with the child and openly held out the child as his own," which is similar to the wording of the California Act discussed in *Elisa B.*<sup>107</sup> If the court applied this standard in a gender-neutral manner, it would likely find that Schnedler was indeed the other presumed parent of J.A.L. Schnedler lived with J.A.L. from the time she was born and arguably held the child out as her own.<sup>108</sup> But for Platt coming back into the picture and asserting his paternity, Schnedler would be the only other party available for this parentage position.<sup>109</sup> Of course, Platt's voluntary

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101. *Elisa B.*, 117 P.3d at 671-72.

102. *Id.* at 663.

103. *Id.*

104. *Id.* at 664 (citing CAL. FAM. CODE § 7611(d)(Deering 2018)).

105. *Id.* at 666-69.

106. *Id.* at 670.

107. 10 OKLA. STAT. § 7700-204 (2011).

108. *Id.*; see also *Elisa B.*, 117 P.3d at 668 (citing a case that states that "the most compelling evidence" that she held out the child as her own was that the eight-year-old child "believed appellant was his mother" (quoting *In re Salvador M.*, 4 Cal. Rptr. 3d 705, 708 (Cal. Ct. App. 2003)).

109. 10 OKLA. STAT. § 7700-204 (2011); see also Spector, *supra* note 4, at 11 ("The parentage provisions . . . are primarily geared to presuming fatherhood couples with

acknowledgement of his parentage complicated matters.<sup>110</sup> But, the fact that Schnedler could meet a presumption of parentage with a gender-neutral reading of the UPA could at the very least allow her standing for a best-interests-of-the-child hearing.

*B. Recognize that There Can Be More than Two Parents*

In all same-sex couple custody actions, there will invariably be, at the very least, three people who could be considered a parent—the two biological parents and the same-sex partner. In many cases, the “donor parent” will have given up all rights to parentage, which makes things easier for the courts.<sup>111</sup> However, the facts in *Schnedler* make it clear that tri-parent families are an issue that must be considered in Oklahoma. Rather than attempting to force these parties into the “traditional” image of a family by means of already existing parentage standards, the courts—and eventually the legislature—should devise a more novel way of examining the pieces of these somewhat more intricate parent-child relationships.

The 2017 draft of the Uniform Parentage Act allows state legislatures to choose to recognize more than two parents.<sup>112</sup> A handful of states have already worked tri-parent families into their Parentage Acts.<sup>113</sup> The California code states: “[i]n an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child.”<sup>114</sup> The standard is essentially based on the best

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parentage proceedings the primary method of determining parentage in non-married couples.”).

110. *Schnedler*, slip op. at 6.

111. See *Ramey v. Sutton*, 2015 OK 79, ¶ 6 n.4, 362 P.3d 217, 219 n.4.

112. UNIF. PARENTAGE ACT § 613 (NAT’L CONF. OF COMM’RS ON UNIF. ST. L., Proposed Official Draft 2017), [http://www.uniformlaws.org/shared/docs/parentage/UPA2017\\_Final\\_2017sep22.pdf](http://www.uniformlaws.org/shared/docs/parentage/UPA2017_Final_2017sep22.pdf) (giving a choice to ratify the act with either “Alternative A,” which limits parents to two” or “Alternative B,” which allows courts to recognize more than two parents).

113. See CAL. FAM. CODE § 7612 (Deering 2018) (expressing that the court may find two or more parents); DEL. CODE ANN. tit. 13, § 8-201(c)(1) (2013) (indicating a de facto parent may be adjudicated a parent if the “parent or parents” fostered the relationship with the child, inferentially allowing more than two parents); D.C. CODE § 16-909 (2013) (having multiple presumptions of parentage with no limit on the number of parents, thereby inferentially allowing for the possibility of more than two people being presumed parents); ME. REV. STAT. ANN. tit. 19-A, § 1853(2) (2017) (conveying the concept that a court may find more than two parents).

114. CAL. FAM. CODE § 7612(c) (Deering 2018).

interest of the child, just like most custody hearings.<sup>115</sup> If the court in *Schnedler* took a similar view, the issue of whether Schnedler could bring suit would be simple to decide. The evidence was such that the court could have found that each of the parties—Schnedler, Lee, and Platt—played a significant role in the child’s life.<sup>116</sup> Of course, granting Schnedler standing would require the court to conduct a full-scale custody and visitation hearing to reconcile the conflicting stories of the parties and assign the parties’ rights, but this would not have been impossible.<sup>117</sup>

In *Jacob v. Schultz-Jacob*, the Pennsylvania Superior Court addressed the issue of a tri-parent family.<sup>118</sup> In *Jacob*, the court reconciled a custody and support issue for a lesbian couple and their sperm donor.<sup>119</sup> The donor was active in the lives of the children and all parties recognized each other’s place in the children’s lives.<sup>120</sup> In ruling on child support, the trial court “view[ed] the interjection of a third person in the traditional support scenario [as creating] an untenable situation, never having been anticipated by Pennsylvania law.”<sup>121</sup> But the Superior Court disagreed, stating that it was “not convinced that the calculus of support arrangements cannot be reformulated.”<sup>122</sup> The court, recognizing the need for a new approach, noted:

We recognize this is a matter which is better addressed by the legislature rather than the courts. However, in the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have *vis a vis* each other.<sup>123</sup>

The *Schnedler* court should take note.

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115. *Id.*

116. *See* Schnedler, slip op. at 4-6.

117. *See* *Jacob v. Schultz-Jacob*, 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

118. *Id.* at 476.

119. *Id.*

120. *Id.* at 477 (noting that the parties stipulated to non-biological mother’s *in loco parentis* status, while the other two are the acknowledged biological parents).

121. *Id.* at 482.

122. *Id.*

123. *Id.* (quoting *L.S.K. v. H.A.N.*, 813 A.2d 872, 878 (Pa. Super. 2002)).

The basis of the *Schnedler* opinion seems to have nothing to do with the best interests of J.A.L.<sup>124</sup> Compared to *Ramey*, which held a fairly impassioned stance on the mother-child relationship in question,<sup>125</sup> the *Schnedler* opinion reads like a cold calculation of Platt's rights vis-à-vis Schnedler's rights.<sup>126</sup> Not once in its opinion does the court seem to wonder what is best for the child whom Schnedler lived with and acted as mother to for eight years. Rather, it rigidly applied an arguably inappropriate test and ultimately denied Schnedler her day in court.<sup>127</sup> If the court took a more liberal approach, like the court in *Jacob*, it might have recognized that perhaps both Schnedler and Platt qualified as J.A.L.'s parents. Granted, this means that the court would have to devise a new method of assigning responsibilities for these parties. But, as the *Jacob* court points out, the court must sometimes "construct a fair, workable and responsible basis for the protection of children, aside from whatever rights the adults may have vis a vis each other."<sup>128</sup> It seems unlikely that a solution could not somehow be found—if only the court were willing to reimagine the family unit.

### C. Focus on the Intent of the Parties

Essentially, intent to become parents is required in order for a same-sex couple to have a child, as some sort of purposeful insemination must occur.<sup>129</sup> Thus, looking to the intentions of the parties in relation to their parentage status would be a rational, and in many cases simpler, option for determining parentage. Some courts have already begun to do so.

In *K.M. v. E.G.*, the parties were a lesbian couple whose relationship ended after the birth of their twins.<sup>130</sup> K.M. donated her own ova to E.G. in order for E.G. to be able to carry the child, and they chose a sperm donor together.<sup>131</sup> During the donation process, K.M. signed a donor's consent form, which stated that she would relinquish any parental rights to the child

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124. See *Schnedler v. Lee*, No. 115,362, slip op. at 7 (Okla. Civ. App. Aug. 18, 2017) (reviewing the trial court findings, all of which pertain to Platt's position as the biological parent).

125. *Ramey v. Sutton*, 2015 OK 79, ¶ 17, 362 P.3d 217, 221. ("This couple and *more importantly*, their child, is entitled to the love, protection and support from the only parents the child has known.").

126. See *generally Schnedler*, No. 115,362, slip op. (Okla. Civ. App. Aug. 18, 2017).

127. *Id.*

128. *Jacob v. Schultz-Jacob*, 923 A.2d 473, 482 (Pa. Super. Ct. 2007).

129. Spector, *supra* note 4, at 15-16.

130. *K.M. v. E.G.*, 117 P.3d 673, 677 (Cal. 2005).

131. *Id.* at 676.

created.<sup>132</sup> However, K.M. asserted that she saw this form only moments before the procedure and did not believe that every clause applied to her, as it was her understanding that she and E.G. were planning to raise the child together.<sup>133</sup> E.G., on the other hand, insisted that she had always planned to be a single parent, and that she would not have accepted K.M.'s ova if she did not sign the consent form.<sup>134</sup> The California Supreme Court chose to take a closer look to determine the true intentions of the parties.<sup>135</sup>

The court examined an earlier case, *Johnson v. Calvert*,<sup>136</sup> which held that the traditional presumptions of parentage under the UPC did not apply because “the husband and wife in *Johnson* did not intend to ‘donate’ their sperm and ova to the surrogate mother, but rather ‘intended to procreate a child genetically related to them by the only available means.’”<sup>137</sup> The court then extended this reasoning to *K.M. v. E.G.*, and found that “K.M. did not intend to simply donate her ova to E.G., but rather provided her ova to her lesbian partner with whom she was living so that E.G. could give birth to a child that would be raised in their joint home.”<sup>138</sup> Ultimately, the court ruled that both K.M. and E.G. qualified as mothers under a gender-neutral reading of California’s Uniform Parentage Act, rather than relying on the intent test.<sup>139</sup> Nevertheless, the court’s analysis shows that the intent test can be used in matters regarding same-sex couple custody disputes. Further, the result of the intent test in this case was effectively the same as the conclusion the court reached through other means—both women were the mother of the children in question. However, the intent test should be approached with caution.

Relying on the intent test would mean that the determination of parentage would rest upon a “later judicial determination of intent made

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132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 678.

136. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). A heterosexual husband and wife contributed their own genetic materials, implanted in a surrogate mother. *Id.* at 778. The court was required to determine whether the surrogate, who gave birth, or the wife, who provided the ovum, was the natural mother of the child. *Id.* The court ultimately held that the wife was the mother, based on the intentions of the parties. *Id.* at 787.

137. *K.M.*, 117 P.3d at 678-79 (quoting *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)).

138. *Id.* at 679.

139. *Id.* at 682.

years after the birth of the child.”<sup>140</sup> While there has been a wealth of research regarding the intent test, scholars and courts have yet to reach a consensus as to how, when, and in what context the test should be applied.<sup>141</sup> One major consideration is timing.<sup>142</sup> Most scholars and many statutes that speak to artificial insemination have determined that the moment of conception is the proper interval at which to analyze intent.<sup>143</sup> However, intent has been analyzed at different times.<sup>144</sup> Post-birth intent “may implicitly lie behind definitions of social paternity that require the father to ‘hold out’ the child as his own,” essentially using this “holding out” as evidence of intent.<sup>145</sup> This means that the analysis of post-birth intention can easily translate into already-accepted determinations of parentage, which may be more palatable to many judges.

The intent test alone would not be appropriate for every determination of parentage.<sup>146</sup> Children are still conceived unintentionally in heterosexual relationships, and the law must continue to consider those relationships. Absent a complete change in the legal structure of parentage, custody, and child support, the law cannot base parentage purely on intent.<sup>147</sup> The courts in both *K.M. v. E.G.* and *Johnson v. Calvert* used a combination of the intent test and other UPA-based analyses to determine which parties should

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140. *See id.* But even with heterosexual couples, cases involving artificial insemination will require a judicial determination of parentage after the child has been born. *See, e.g.,* *People v. Sorenson*, 437 P.2d 495, 497 (Cal. 1968) (involving a situation where a heterosexual couple used another man’s sperm to inseminate the wife, the parties divorced, and the court determined that the husband was the father and required to pay child support because he signed an agreement for the insemination, assuming the responsibility of a parent).

141. *See* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 *YALE J.L. & FEMINISM* 210, 227-28 (2012); *see also* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 *B.U. L. REV.* 227 (2006); Heather Kolinsky, *The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights*, 119 *PA. ST. L. REV.* 801 (2015).

142. Purvis, *supra* note 141, at 229.

143. *Id.* at 229-30.

144. *Id.* at 230; *see also* *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (considering post-birth intent); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (same).

145. Purvis, *supra* note 141, at 230.

146. *See generally* Purvis, *supra* note 141.

147. *Id.* at 229.

be deemed the parents of the respective children.<sup>148</sup> After all, the determination of parentage and the legitimacy of children is meant to protect the best interest of the child in question.<sup>149</sup> So why not use multiple avenues to ensure optimal protection?

If the *Schnedler* court was willing to consider the intent test, *Schnedler* would likely have had her day in court. Although the parties' assertions as to their intentions conflict, there is at least some evidence that Lee and Schnedler both intended at some point to be the co-parents of J.A.L.<sup>150</sup> If the court had recognized that intent could confer parental status, Schnedler would have standing under the facts. The court could then analyze various parentage regimes, and possibly combinations thereof, to determine what was in the child's best interest.

#### V. Scattered Pieces: A Picture in Progress

In the case of *Schnedler v. Lee*, the Oklahoma Court of Civil Appeals missed the mark entirely. The right to parent one's child is a fundamental right.<sup>151</sup> And since *Obergefell* officially validated same-sex marriage, courts have leaned toward facilitating the familial rights of same-sex couples, setting aside defunct precedent and creating new tests and standards to meet the novel issues that these cases present.<sup>152</sup> The *Schnedler* court failed to join the trend. Instead the court looked backwards, searching for a bright line rule that would enable it to make a ruling without requiring it to admit that there was no appropriate law to address the facts before it. And as a result, the court denied Lori Schnedler not only standing, but also her relationship with her daughter.

In its search for a bright-line rule, the court settled upon the *Ramey* test, but its reliance on *Ramey* was misguided and misapplied. The *Ramey* test itself was designed to facilitate the novel set of facts that the court confronted. Thus, the test is limited to cases with nearly identical facts—a

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148. See generally, *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

149. See generally Appleton, *supra* note 141.

150. *Schnedler v. Lee*, No. 115,362, slip op. at 4-6 (Okla. Civ. App. Aug. 18, 2017).

151. *Troxel v. Granville*, 530 U.S. 57, 65, 76 (2000).

152. See generally *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014), *aff'd on other grounds*, 760 F.3d 1070 (10th Cir. 2014) (“[T]his court knows a rhetorical shift when it sees one.”); *Jacob v. Schultz-Jacob*, 923 A.2d 473, 482 (Pa. 2007) (“[I]n the absence of legislative mandates, the courts must construct a fair, workable and responsible basis for the protection of children.”).

qualification that *Schnedler* lacked. Further, the *Ramey* test is flawed, and simply cannot be used as a long-term solution for same-sex child-custody disputes. This is especially true considering it is likely that the court will continue to be faced with new and different scenarios that will arise from these relationships. Though there is bound to be some error, new tests must be tried.

There is not yet a consensus as to how to confront the same-sex child custody issue. Some states and courts have enacted a gender-neutral reading of their Uniform Parentage Act, and this approach has garnered some success. Other courts have chosen to recognize that new family units may feature more than the traditional two-parent set. And still other courts have acknowledged that the intentions of the parties play a huge role in who should be deemed a parent. No single test is flawless, nor will any be a perfect fit for each case that comes before the bench. Ultimately, the legislature must work with the courts to find a solution that will make these problems easier to predict and resolve.

In December 2017, the Oklahoma Supreme Court unanimously granted certiorari to review *Schnedler*.<sup>153</sup> While it is not possible to know exactly how the Court will rule, its decision to hear the case may be some indication that the Court recognizes some of the flaws in the lower court's decision. With any luck, a new family portrait is in the making.

*Victoria Johnson*

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153. Order Granting Writ of Certiorari, *Schnedler v. Lee*, No. 115,362 (Okla. Dec. 18, 2017).