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The Broadening of Succession Rights: Braschi v. Stahl Associates

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NOTES

THE BROADENING OF SUCCESSION RIGHTS: *BRASCHI v. STAHL ASSOCIATES*

INTRODUCTION

Affordable rental housing in New York City is rapidly becoming a thing of the past. With an unofficial vacancy rate of minus one percent[1] and the continuing conversion of buildings from rental to condominium or co-operative, it is nearly impossible for people of moderate means to find an apartment where the rent is within their recognized range of affordability.[2] In this environment there is little wonder why tenants who possess rent controlled apartments place great value on them. As a result of the inherent value of a rent controlled apartment, there has been a growing interest in recent years in the succession rights to these apartments upon the death or departure of the tenant of record.

A succession right is the right of one individual to take over the lease on a rent controlled apartment when the tenant of record either abandons the apartment or dies.[3] These rights are governed by New

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1. N.Y. Times, Feb. 16, 1986, § 8, at 1, col 1.(The unofficial vacancy rate is the official rate of two percent minus the three percent of the housing stock which is dilapidated).

2. Note, *All in the Family: Succession Rights and Rent Stabilized Apartments*, 53 BROOKLYN L. REV. 213 (1987). An important policy behind the implementation of both Rent Control and Rent Stabilization was preventing an exodus of the middle class from New York City. It was feared that a free housing market would drive rents to a level prohibitive to the middle class and that as a result New York would become a city of the very rich and very poor.

3. *See* Braschi v. Stahl Assocs., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989); Doubledown Realty Corp. v. Gibbs, 122 Misc. 2d 32, 469 N.Y.S.2d 887 (N.Y. Civ.

York City Rent and Eviction Regulation 9 section 2204.6(d) (hereinafter "2204.6(d)") which provides: "[n]o occupant of housing accommodations shall be evicted under this section[4] where the occupant is either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant."[5] Consequently, in applying section 2204.6(d), the courts have had to determine: (1) who qualifies as a surviving spouse or "family member" of the tenant of record; and (2) what facts need to be established before a family member satisfies the "living with" requirement.[6]

This note analyzes section 2204.6(d). Part I describes the benefits and burdens that succession rights impose on the tenant and landlord. Part II analyzes the "family member" requirement and illustrates the effects of the *Braschi v. Stahl Associates*[7] decision. Part III analyzes the "living with" requirement. Part IV discusses the ramifications of the *Braschi* decision. Finally, this note concludes that the *Braschi* decision created greater equity in the extension of succession rights.

I. THE BENEFITS AND BURDENS OF SUCCESSION RIGHTS

Succession rights confer two benefits to the individual who takes over the lease on a rent controlled apartment. First, the new tenant takes over a lease with a below market rental charge,[8] and second, the new tenant is entitled to the insider price on his apartment should the owner of the building convert it from rental units to a condominium or cooperative.[9] The combined real dollar value of these two benefits provide ample incentive for the potentially suc-

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Ct. 1983).

4. The language in § 2204.6(d) prohibiting eviction "under this section" refers to § 2204.6(a) where the landlord is entitled to evict the tenant of record if the apartment is not being used as his primary residence.

5. N.Y. UNCONSOL. LAW § 2204.6(d) (McKinney 1987). While this regulation only deals with a deceased tenant of record, it has uniformly been applied where the tenant of record has merely vacated the apartment. Herzog v. Joy, 74 A.D.2d 372, 376, 428 N.Y.S.2d 1, 3 (N.Y. App. Div. 1980), *aff'd*, 53 N.Y.2d 821, 422 N.E.2d 582, 439 N.Y.S.2d 922 (1981).

6. *See infra* notes 17-69 and accompanying text.

7. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

8. *See* J. Gilbert and J. Freund, *Apartment Succession Rights in New York City: A Case Study of Housing Gridlock*, Real Est. Fin. J. 44, 47 (Fall 1988). The differential between free market rents and regulated rents tends to grow over time because the periodic rent increases that the Rent Control Law allows generally will not equal the rent increases that occur in the free market.

9. *See infra* notes 14-16 and accompanying text.

ceeding tenant to litigate where there is the possibility that he will be awarded the rent regulated lease.

On the other hand, succession rights impose substantial costs on the owner of the rent controlled apartment. The loss of an available rent increase,[10] the loss of the freedom to choose his next tenant,[11] and the potential for a material lengthening of the lease term[12] are all negative effects that succession rights have on landlords. These negatives have a significant real dollar impact upon the return that the landlord will realize on his property[13] and he therefore has a strong incentive to litigate when confronted with an individual claiming to have succession rights to a particular apartment.

An additional cost may be imposed on the landlord if he plans to convert his building from rental space to a condominium or cooperative. New York's General Business Law requires a landlord to sell a percentage of his building's units to existing tenants.[14] To induce the tenants to buy, the landlord may be forced to offer the units at a less than market value discount.[15] Thus, a landlord who wishes to

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10. N.Y. UNCONSOL. LAW § 2102.3(b) (McKinney 1987) provides for renewal and vacancy rent increases. A renewal rent increase is awarded to a landlord when a tenant of record's lease term is up and that same tenant renews the lease for a new term. A vacancy rent increase is available to the landlord when the tenant of record vacates the regulated apartment. The increases allowed on vacancy are greater than the increases allowed on renewal. In the absence of succession rights, the owner of the rent controlled apartment would be entitled to a vacancy rent increase. When an occupying tenant takes over a rent controlled lease under § 2204.6(d), the landlord is not entitled to any rent increase until the term of that lease expires. At that time the landlord would be entitled to the lesser renewal increase.

11. Section 2204.6(d) dictates to the landlord who is eligible to take over the rent controlled lease. If an individual qualifies for succession rights, the landlord is forced to accept that person as his tenant.

12. A very common succession rights situation is one where a child attempts to take over the lease of a deceased parent. Thus, the landlord will be forced to renew the rent controlled lease with a far younger tenant who is very likely to continue his/her tenancy for an extended period. *See infra* notes 24-32 and accompanying text. The rent gap between the regulated rent and the market rent grows over the extended period of the lease term. *See supra* note 8 and accompanying text.

13. A landlord's return on property is the operating income plus tax benefits divided by the price paid for the building. Below market rents cause a below market operating income which in turn causes the landlord to realize a below market return on his property. *See* P. Weitzman, *Economics and Rent Regulation: A Call for a New Perspective*, 13 N.Y.U. REV. L. & SOC. CHANGE 975 (1984-85).

14. N.Y. GEN. BUS. LAW 352-2(c)i & (d)i (McKinney 1984). Under this statute, if the conversion plan is a non-eviction plan, it may not be declared effective until written purchase agreements are executed for at least 15% by bona fide occupants. If the plan is an eviction plan, at least 51% of bona fide tenants in occupancy must execute written purchase agreements.

15. The discounted price that is offered to "in place" tenants is referred to as an "insider" price.

convert his building has a strong economic incentive to litigate the validity of succession rights in the subject apartments.[16]

II. Who Qualifies as a Surviving Spouse or Family Member

A. *The Case Law Prior to Braschi v. Stahl Associates*

Because of its economic effects, section 2204.6(d) has induced many landlord-tenant disputes. The litigation resulting from these disputes has centered on the issue of who qualifies for surviving spouse and family member status.[17] Prior to the court of appeals decision in *Braschi v. Stahl Associates*[18] (see Part III), the courts, in interpreting section 2204.6(d), relied on traditional definitions of "spouse" and "family member."[19] Thus, the courts had little trouble deciding this issue when the occupying tenant[20] had a traditional relationship[21] with the tenant of record.[22] However, the courts were often times inconsistent when faced with the task of deciding whether the term "family" encompassed those living in non-traditional arrangements such as gay-life partnership[23] or long standing heterosexual cohabitation.[24]

In *M & L Jacobs, Inc. v. Delgrosso*,[25] the New York Appellate Term was presented with a traditional family relationship. In that case, the occupying tenant was the daughter of the deceased tenant

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16. The landlord who is planning to convert his building to condominiums or cooperatives has an interest in maintaining or causing the vacancy of the apartments in that building in order to avoid selling those units to the existing tenants at a discounted "insider" price. Upon conversion, an apartment is worth significantly more money on the open market than a landlord may realize by selling at an insider price to a tenant in possession. Thus, by exercising the right to maintain the vacancy of an apartment, the differential between the insider price and the market price becomes a source of economic gain for the landlord. Note, *supra* note 2 at 217. In this setting, § 2204.6(d) is a vehicle through which landlords see an opportunity to discontinue a rent control tenancy and gain the valuable vacancy of an apartment.

17. *See infra* notes 24-67 and accompanying text.

18. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

19. *See infra* notes 24-67 and accompanying text.

20. The term "occupying tenant" will be used hereinafter in reference to the individual who is attempting to invoke the succession rights provision to remain in possession of the rent controlled apartment.

21. *See infra* notes 24-67 and accompanying text.

22. *See infra* notes 24-32 and accompanying text.

23. "Gay life partners" is a term that represents the individuals in a long term, monogamous homosexual relationship. *See also* discussion of Braschi v. Stahl Assoc., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) and Koppleman v. O'Keeffe, 140 Misc. 2d 828, 535 N.Y.S.2d 871 (N.Y. Sup. Ct. 1988). *See infra* notes 35-46 and accompanying text.

24. *See infra* notes 35-55 and accompanying text.

25. 133 Misc. 2d 542, 509 N.Y.S.2d 237 (N.Y. App. Term. 1986).

of record. The court ruled that upon the death of the father, the mother, as surviving spouse, and the daughter, each acquired a right to the apartment.[26] The court further ruled that the daughter retained her right to possession when the mother vacated the apartment.[27]

The courts have supported succession rights where the traditional relationship was far more distant than the parent-child relationship in *Delgrosso*. In *Bistany v. Williams*,[28] the City Court of New York rejected the argument that section 2204.6(d) applied only to a tenant of record's "immediate" family.[29] As a result, the court held that the nephew of a deceased tenant of record was entitled to possession of the rent controlled apartment.[30] The courts have similarly upheld succession rights where the occupying tenant has been the tenant of record's sibling,[31] grandchild,[32] and in-laws.[33]

Reliance on the presence of a traditional family relationship gave courts an easy guideline to follow in settling succession right controversies. The problem, however, was that with simplicity came inflexibility and a resulting inability to deal effectively with non-traditional living arrangements.[34] The courts of New York were continuously confronted with these non-traditional arrangements and the result was inconsistent and unjust holdings.[35]

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26. *Id.* at 543, 509 N.Y.S.2d at 237-38.

27. *Id.* The court held that the right to possession vested in both the mother and the daughter independently. Thus, when the mother moved out of the apartment the daughter continued to have a possessory right to it. *Id.*

28. 83 Misc. 2d 228, 372 N.Y.S.2d 6 (N.Y. Civ. Ct. 1975).

29. "The petitioner argues, based on the case of Cesbron v. Reardon, that the protection of the rent control law is limited to members of the deceased tenant's immediate family. This court disagrees with that decision. The regulation speaks of occupancy by 'some other members of the deceased tenant's family' not 'immediate family'." (citation omitted) *Id.* at 229, 372 N.Y.S.2d at 7.

30. *Id.*

31. *See* Herzog v. Joy, 74 A.D.2d 372, 428 N.Y.S.2d 1 (N.Y. App. Div. 1980) *aff'd*, 53 N.Y.2d 821, 422 N.E.2d 582, 439 N.Y.S.2d 922 (1981) (tenant of record's sister was given possession of the apartment).

32. *See* Doubledown Realty v. Harris, 128 Misc. 2d 403, 494 N.Y.S.2d 601 (N.Y. Sup. Ct. 1985) (grandson awarded possession of his grandmother's apartment). *See also* Soybel v. Gruber, 136 Misc. 2d 430, 518 N.Y.S.2d 920 (N.Y. Civ. Ct. 1987).

33. *See* Waitzman v. McGoldrick, 20 Misc. 2d 1085, 121 N.Y.S.2d 515 (N.Y. Sup. Ct. 1953) (mother-in-law and sister-in-law of the tenant of record were awarded possession of the apartment when the tenant of record vacated).

34. Among the non-traditional living arrangements are co-habitating heterosexual and homosexual couples and unofficial adoptions where the child has lived with the tenant of record for a significant period of time and has, for all intent and purposes, become a member of the family.

35. *See infra* notes 37-68 and accompanying text.

The shortcomings of section 2204.6(d) were particularly evident when the courts were called upon to decide the status of so called "gay life partners."[36] The appellate term in *Braschi v. Stahl Associates*,[37] was confronted with an occupying tenant who: (1) was the gay life partner of the deceased tenant of record; and (2) had lived in the rent controlled apartment for ten years.[38] The court in that case stated that:

> While plaintiff has set forth sufficient proof to establish that he and the deceased lived as a couple for ten years and had a long term relationship marked by love and fidelity for each other, he did not sustain his burden of proving the likelihood of success on the merits of his argument that as a gay life partner of the deceased he is one of the classes of individuals designated by section 2204.6(d) as entitled to remain in an apartment after the death of the tenant of record.[39]

The court further stated that "plaintiff has not presented arguments to dissuade us from an interpretation of section 2204.6 as only protecting surviving spouses and family members within traditional, legally recognized familial relationships."[40]

In *Koppelman v. O'Keefe*,[41] the appellate term, first department was presented with a case very similar to *Braschi*. In *Koppelman*, the surviving occupying tenant had been the gay life partner of the tenant of record and he had lived in the rent controlled apartment for ten years.[42] While the court again ruled against the occupying tenant,[43] based on the *Braschi* decision,[44] it recognized the hardships

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36. Gay life partners, in general argue that they are either the equivalent of surviving spouses or are de facto family members. *See infra* notes 39-47 and accompanying text. (As a de facto family member the gay life partner would also have to satisfy the "living with" requirement).

37. 143 A.D.2d 44, 531 N.Y.S.2d 562 (N.Y. App. Div. 1988), *rev'd*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

38. 143 A.D.2d at 44, 531 N.Y.S.2d at 561-63.

39. *Id.*

40. 143 A.D.2d at 45, 531 N.Y.S.2d at 563. The requirement that occupying tenants have a traditional or legally recognized relationship with the tenant of record is particularly burdensome for the gay life partner because: (1) their relationships are obviously not traditional; and (2) homosexuals are prohibited from marrying in New York and adult adoption is allowed in only limited situations. This standard thus acts as a complete denial of succession rights to gay life partners. *See infra* note 50. *See* Reidinger, *We Are Family? Not if Nontraditional*, 74 A.B.A.J. 96 (1988).

41. 140 Misc. 2d 828, 535 N.Y.S.2d 871 (N.Y. App. Term. 1989).

42. *Id.* at 829, 535 N.Y.S.2d at 872.

43. *Id.*

44. *Id.* at 830, 535 N.Y.S.2d at 873.

that result from the loss of a rent controlled apartment[45] and criticized section 2204.6(d) for its lack of clarity.[46] Justice Stanley S. Ostrau, in his concurring opinion, was particularly critical of section 2204.6(d), stating that:

> At best, Rent and Eviction Regulation section 2204.6(d) is archaic and, as my colleagues have pointed out, inscrutable . . . . [B]ecause the area is one involving such fundamental and important rights, it seems to me it is now for the Legislature - not an administrative agency - not the court - to assume responsibility for making the hard choice as to which occupants - if any - residing in rent regulated apartments . . . may succeed to the tenancy upon the death of the tenant of record, and if succession rights are recognized in an occupant, under exactly what terms, conditions and rent status succession is to take place.[47]

Thus, the court admitted that it had trouble applying section 2204.6(d) to the wide variety of factual situations with which it was being presented and was asking the state legislature to provide some guidance.[48]

In another non-traditional setting, the courts had to decide the status of cohabiting heterosexual couples. In *Zimmerman v. Burton*,[49] the occupying tenant had lived in the rent controlled apartment for eleven years and had shared a "close and loving relationship" with the tenant of record from the time that he moved in.[50]

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45. "We of course realize that the permutations of human relationships are many and that one in residence with a statutory tenant, whatever the nature of his or her personal relationship with the statutory tenant, faces significant hardship if forced to relocate in a housing market in which rent controlled accommodations simply cannot be duplicated." *Id.* at 832, 535 N.Y.S.2d at 874.

46. "[R]ent Control is an emergency scheme significantly impairing the free market dynamic in favor of the statutory tenant [citation omitted] and the court may not sua sponte, and in derogation of landlord's rights, formulate new succession rights to protect persons who have not been protected by Rent and Eviction Regulation section 2204.6(d). The hardship necessarily occasioned by the displacement of such persons in residence with a statutory tenant upon the death of the tenant is a problem best addressed by the Legislature . . . We do note, however, that the exact scope of familial relationships falling within the ambit of Rent and Eviction Regulation section 2204.6(d) is far from clear, . . . and certainly, beyond the immediate family, and indeed even at times including the immediate family, personal relationships are oft times far 'closer' than familial relationships." 140 Misc. 2d at 832-33, 535 N.Y.S.2d at 874.

47. *Id.* at 835, 535 N.Y.S.2d at 876.

48. This decision has been effectively overruled by the court of appeals decision in Braschi.

49. 107 Misc. 2d 401, 434 N.Y.S.2d 127 (N.Y. Civ. Ct. 1980).

50. *Id.* at 402, 434 N.Y.S.2d at 128. The court in Koppelman v. O'Keefe used very similar language to describe the relationship between the tenant of record and the occupying tenant in that case. Thus, it would appear that the nature of the relationship between the

The court recognized that, had the couple been married, there would not have been any question as to the rights of the occupying tenant.[51] From there the court reasoned that, although long term cohabitation does not equal common law marriage in New York, it cannot be distinguished from marriage for the purposes of section 2204.6(d).[52] As a result, the occupying tenant was awarded possession of the apartment.[53]

The issue of the status of cohabiting heterosexual couples was not settled, however, because in *Lepow v. Gress*[54] the court held against the occupying tenant. In a very technical decision, the court ruled that the occupying tenant's status "had not progressed beyond that of a mere licensee, the passage of time notwithstanding."[55] The court further held that:

> Persons who choose [sic] to live together without solemnized ceremony do so ". . . without benefit of the rules of law that gov-

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tenants is a factor to which the courts give considerable weight.

51. *Id.* Clearly the occupying tenant would, if married to the tenant of record, have been entitled to remain in the apartment as the surviving spouse.

52. Although cohabitation for 33 years does not constitute common law marriage in New York, cohabitation for a number of years cannot be distinguished from marriage for all purposes. Section 56(d) of the New York City Rent Regulations [§ 2204.6(d)] provides that family members of a tenant may not be removed from their homes in rent controlled apartments upon death of the tenant. The rationale for that rule does not permit a distinction to be made between a bereaved respondent and a widower with a marriage certificate. *Id.* at 403, 434 N.Y.S.2d at 128-29 (quoting Rutar Co. v. Gensuke Yoshito, (N.Y. Civil Ct. of N.Y. No. 53042/79)). *Cf.* Note, *The Rights of Unmarried Cohabitating Couples to Housing in New York*, 11 FORDHAM URB. L.J. 381, 400 (1982) (proposing an amendment to the Human Rights Law to give unwed couples the protection of marital status).

53. However, courts in New York have unanimously held that same-sex couples have no right to marry. *See, e.g.*, Anonymous v. Anonymous, 67 Misc. 2d 982, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). Thus, the logic utilized by this court could not necessarily extend to the gay-life partner situation. Due to the denial of the protection of marriage laws, gay couples who seek to establish a legal basis for their relationship have occasionally tried adoption. Adoption brings the relationship itself within the purview of the law and automatically creates certain rights and duties in both parties. While this issue is outside the scope of this paper, for an in depth discussion of adoption by same-sex adults and New York property law see Note, *Property Rights of Same-Sex Couples: Toward a New Definition of Family*, 26 J. Fam. L. 357 (1987-88). The most recent case law in New York suggests a willingness by the court to consider gay couples as "families." *See* In re Adoption of Robert Paul P., 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984); In re Adult Anonymous II, 88 A.D.2d 30, 452 N.Y.S.2d 198 (N.Y. App. Div. 1982); In re Adoption of Adult Anonymous, 106 Misc. 2d 792, 435 N.Y.S.2d 527 (N.Y. Fam. Ct. 1981).

54. N.Y.L.J., July 2, 1983, p.14, col. 1 (N.Y. App. Term. July 25, 1983).

55. *Id.* at 14. As a licensee, an occupying tenant is subject to the roommate laws which provide that, "no occupant, . . . shall without express written permission of the landlord, acquire any right to continued occupancy in the event the tenant vacates the premises." *Id.* N.Y. REAL PROP. LAW § 235-f(6) (McKinney 1989).

> ern property and financial matters between married couples." To confer property rights upon [a cohabiting occupying tenant] as a "surviving spouse" under section [2204.6(d)] would be contrary to the Legislature's abolition of common law marriage in 1933.[56]

Comparing *Zimmerman* with *Lepow*, it appeared that the status, for the purpose of section 2204.6(d), of a cohabiting heterosexual occupying tenant depended upon whether the court deciding the case used a policy sensitive methodology or a rigid technical methodology.[57]

The final nontraditional living arrangement that confronted the court was that of an unadopted "child" who had lived with the tenant of record over an extended period of time. In *2-4 Realty Associates v. Pittman*,[58] the unadopted child was a forty eight year old man who had lived with the deceased tenant of record for twenty five years. The court held that while the relationship between the deceased and the occupying tenant had begun as boarder-landlord, it had evolved over the twenty five years into that of father and son.[59] The court then applied a constitutional due process analysis to section 2204.6(d) and reasoned that it would be irrational, and, thus, violative of due process, to apply a narrow reading to the regulation given the ends[60] which the regulation sought to achieve.[61] Based on this analysis the court gave section 2204.6(d) an expansive reading and awarded possession of the apartment to the occupying tenant.[62]

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56. N.Y.L.J., July 2, 1983, at 14, col. 1 (N.Y. App. Term. July 25, 1983).

57. In Zimmerman v. Burton, 107 Misc.2d 401, 403, 434 N.Y.S.2d 127, 129 (N.Y. Civ. Ct. 1980), the court followed a policy based methodology. They reasoned that the object of § 2204.6(d) was to protect bereaved partners from eviction and that the presence or absence of a marriage license was immaterial to meeting that objective. Alternatively, in Lepow v. Gress, the court applied a rigid technical analysis looking strictly at the law and seemed to give no consideration to the effect of their decision on the parties involved. N.Y.L.J., July 2, 1983, at 14, col. 1.

58. 137 Misc. 2d 898, 523 N.Y.S. 2d 7 (N.Y. Civ. Ct. 1987).

59. 137 Misc. 2d at 903, 523 N.Y.S.2d at 13.

60. The court does not state what the ends are that § 2204.6(d) seeks to achieve. From the text of the opinion, however, it appears that the court sees those ends as being the protection of the "family unit" from eviction from the family residence.

61. 137 Misc. 2d at 903, 523 N.Y.S.2d at 12-13. The court relies in this case on a denial of due process argument stating that:

> [t]he issue then is whether [2204.6(d)] can survive the test of a reasonable relation between the end sought and the means used to achieve it by restricting its protection to family members related solely by blood or marriage. Under the circumstances here . . . it would be irrational and violative of the respondent's due process rights for the Regulations to be read in such a restrictive manner. *Id.*

62. *Id.*

In *Athineos v. Thayer*,[63] the court was again confronted with an adult occupying tenant who had lived as a family member with the tenant of record for a long period of time.[64] The court ruled that "[a]lthough there was no de facto adoption[65] in this case, there can be no doubt that [the occupying tenant was so] assimilated into this family as to be the equivalent of the [tenant of record's] daughter."[66] The court then extended succession rights to the "daughter."[67]

Based on the holdings in *Pittman* and *Athineos*, the courts seemed to feel that justice required the extension of succession rights to an unadopted child who had lived as a member of the tenant of record's family for an extended period of time. The courts, however, found it difficult to extend those rights. In *Pittman*, the court based its holding on the Constitution, while in *Athineos*, the court wrote a rather vague opinion and then simply concluded that the occupying tenant was a family member.[68]

B. *Braschi v. Stahl Associates*

Although the courts had supported succession rights in cases with extended traditional relationships,[69] and even to those non-traditional relationships not considered too far removed from traditional definitions,[70] the courts failed to consistently extend succession rights to long term stable relationships of either the homosexual or heterosexual type. However, in July, 1989, New York's highest court

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63. 153 A.D.2d 825, 545 N.Y.S.2d 337 (N.Y. App. Div. 1989).

64. The occupying tenant had come to live with the tenant of record's family as a foster child when she was 14 years old. She lived with the family over the next 45 years. *Id.*

65. "On the facts of this case, this is the closest situation to a 'de facto' adoption that could exist. However, 'de facto' adoptions are not recognized in this state. . . . A legal adoption can only be accomplished 'by virtue of proceedings under the Domestic Relations Law'." *Id.*

66. Athineos v. Thayer, 153 A.D.2d at 826, 545 N.Y.S.2d at 338.

67. *Id.*

68. The court in Athineos never mentioned the "traditional or legally recognized relationship" requirement that was so prominent in the gay life partner decisions and in the heterosexual cohabitation decisions.

69. *See supra* notes 28-33 and accompanying text.

70. *See* In re Adult Anonymous II, 88 A.D.2d 30, 452 N.Y.S.2d 198 (N.Y. App. Div. 1982) (court had to interpret an immediate family clause in the tenant of record's lease. The court allowed the adoption of a 43 year old male by a 32 year old male where the parties wished to formalize themselves as a family unit to avoid eviction). "The nuclear family arrangement is no longer the only model of family life in America. The realities of present day urban life allow many different types of non-traditional families . . . . [T]he best description of a family is a continuing relationship of love and care, and an assumption of responsibility for some other person." *Id.* at 35, 452 N.Y.S.2d at 201.

expanded the traditional legal definition of family previously relied upon by the courts in determining succession rights to include a gay couple who had lived together for a decade.[71]

Appellant, Miguel Braschi, lived with the tenant of record, Leslie Blanchard, in a rent controlled apartment from 1975 until Blanchard's death in 1986.[72] Subsequent to Blanchard's death the owner of the building informed Braschi that he was a mere licensee[73] and as such had no right to continue to occupy the apartment.[74] Braschi contested this classification and moved for a preliminary injunction on the question of whether he was a member of Blanchard's family for the purposes of 2204.6(d).[75] While the New York supreme court concluded that justice and equity dictated the extension of succession rights to Mr. Braschi,[76] the appellate division reversed, relying on traditionally recognized familial relationships.[77] The New York Court of Appeals reversed this decision for the reasons discussed below.[78]

The court in *Braschi* began its analysis by recognizing that the term "family" was not defined in the rent control code and that the legislative history was devoid of any specific reference to section 2204.6(d).[79] It was thus necessary for the court to apply general rules of statutory interpretation in an attempt to determine which individuals the legislature intended to protect through section 2204.6(d).[80] In accordance with those rules, the court stated the pol-

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71. Braschi v. Stahl Assocs., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). Although the holding in this case involved a gay couple, the opinion is devoid of any reference to sexual orientation or marital status. Thus this decision could apply to cohabitating heterosexual couples as well as other non-traditional relationships. The court notes "the term family, . . . should not be rigidly restricted to those people who have formalized their relationship by obtaining . . . a marriage certificate . . . ." *Id.* at 211, 543 N.E.2d at 53, 544 N.Y.S.2d at 788.

72. 74 N.Y.2d at 206, 543 N.E.2d at 50, 544 N.Y.S.2d at 785.

73. *Id. See supra* note 55 and accompanying text.

74. 74 N.Y.2d at 206, 543 N.E.2d at 50-51, 544 N.Y.S.2d at 785-86.

75. 74 N.Y.2d at 206, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.

76. "[T]he long-term interdependent nature of the 10 year relationship between appellant [Mr. Braschi] and Blanchard 'fulfills any definitional criteria of the term family.' " *Id.*

77. "The plaintiff has not persuasively demonstrated that in enacting section 2204.6(d) to protect spouses and family members from eviction, the legislature was also including and granting legal status and recognition to nontraditional family relationships." Braschi v. Stahl Assocs., 143 A.D.2d 44, 45, 531 N.Y.S.2d 562, 563 (N.Y. App. Div. 1988), *rev'd*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

78. *Braschi*, 74 N.Y.2d at 207, 543 N.Y.S.2d at 51, 544 N.Y.S.2d at 786.

79. *Id.* at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 787.

80. *See* 74 N.Y.2d at 207-08, 543 N.E.2d at 51, 544 N.Y.S.2d at 786 "It is fundamental that in construing the words of a statute, '[t]he legislative intent is the great and controlling principle,' " citing People v. Ryan, 774 N.Y. 149, 8 N.E. 313, 274 N.Y.S. 149 (1937);

icies behind rent control and section 2204.6(d) and expanded the scope of family member coverage to make it consistent with those policies.[81]

The court emphasized that the intent of section 2204.6(d) was to protect remaining familial occupants from eviction after the passing of the tenant of record.[82] In order to advance this protective policy, the court chose to disregard definitions based on fictitious legal distinctions or genetic history in favor of objective criteria which more adequately portrays the reality of family life. In the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence. This view comports both with our society's traditional concept of 'family' and with the expectations of individuals who live in such nuclear units."[83]

The factors that the court relied on to determine whether individuals constituted a family unit were: the "exclusivity and longevity of the relationship[;] the level of emotional and financial commit-

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Ferres v. New Rochelle, 68 N.Y.2d 446, 502 N.E.2d 972, 510 N.Y.S.2d 57 (1986); In re Petterson v. Daystrom Corp., 17 N.Y.2d 32, 215 N.E.2d 338, 268 N.Y.S.2d 1 (1966). The court further states that "[s]tatutes are ordinarily interpreted so as to avoid objectionable consequences and to prevent hardship or injustice." Braschi at 207-08, 543 N.E.2d at 51, 544 N.Y.S.2d at 786. Thus, where a court has a choice between two constructions of a statute, it should consider the results of each interpretation and adopt that which produces the least harm. *Id.*

81. The court viewed the policies of the rent control laws as: (1) regulating the housing market so as to prevent abusive rental charges and leases; (2) protecting the public health; (3) preventing uncertainty, hardship and dislocation; and (4) providing a gradual transition of the housing market from one of regulation and price fixing to one of free bargaining between landlord and tenant. Id. at 208, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. The court reasoned that a definition of family member which relies on objective criteria rather than legal status, is consistent with all the above policies because it: (1) "[prevents] dislocation and [preserves] family units which might otherwise be broken apart upon eviction"; and (2) "foster[s] the transition from rent control to rent stabilization by drawing a distinction between those individuals who are, in fact, genuine family members, and those who are mere roommates." *Id.* at 212, 543 N.E.2d at 54, 544 N.Y.S.2d at 787. The court supports its belief that the objective standard facilitates the transition to rent stabilization by reasoning that a standard based upon blood, marriage and adoption would provide even wider succession rights protection. *Id.* at 212, n. 1, 543 N.E.2d at 54, n. 1, 544 N.Y.S.2d at 789, n. 1.

82. *Braschi*, 74 N.Y.2d at 209, 543 N.E.2d at 52, 544 N.Y.S.2d at 787. The court reasoned that since the nature of the statute is protective, the statutory interpretation most favored would be one that avoids objectionable consequences and prevents hardship and injustice. *See* N.Y. STATUTES LAW § 141, 143, 146 (McKinney 1971).

83. *Braschi*, 74 N.Y.2d at 211, 543 N.E.2d at 53, 544 N.Y.S.2d at 788-89. In fact, although the *Braschi* decision was the first to affirmatively state such an idea, *see* 420 E. 80th Co. v. Chin, 115 Misc. 2d 195, 455 N.Y.S.2d 42 (N.Y. Sup. Ct. 1982), where the court implied that a homosexual lover constituted part of a tenant's immediate family.

ment[;] the manner in which the parties had conducted their everyday lives and held themselves out to society[;] and the reliance placed upon one another for daily family services."[84] These factors more adequately identify the class of individuals the legislature intended to protect: "those who reside in households having all of the normal familial characteristics."[85] In the instant case, the couple had lived together for ten years; were regarded by each other and friends as spouses; shared all obligations including a household budget, joint credit cards, savings and checking accounts; and regularly visited each others families. Appellant was also named the beneficiary of Blanchard's life insurance policy.[86]

Based on its new criteria, the court concluded that the appellant, Braschi, had demonstrated a likelihood of success on the merits in that he was not, as a matter of law, excluded from seeking non-eviction protection under section 2204.6(d).[87] The court remitted to the appellate division for reconsideration consistent with the objective standard set forth in its opinion.[88]

III. What Facts Satisfy the "Living with" Requirement?

The second element of section 2204.6(d) is the requirement that any "family member" must have been living with the tenant of record prior to his death or departure to be eligible to succeed to the rent controlled apartment.[89] In *Goodhue House Co. v. Bernstein*,[90] the Appellate Term stated that:

> It will be seen that the regulation does not specify any particular period of time during which the family member must have been living together with the controlled tenant. Manifestly, the purpose of the section is to give a measure of protection to those who have been residing with the deceased (or vacated) tenant as an integral member of that tenant's family unit. Such relationships usually connote a fair degree of permanence and continuity. Each case is

84. *Braschi* 74 N.Y.2d at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

85. *Id.* at 212, 543 N.E.2d at 54, 544 N.Y.S.2d at 789. "This definition of 'family' is consistent with both of the competing purposes of the rent-control laws: the protection of individuals from sudden dislocation and the gradual transition to a free market system." *Id.*

86. *Id.* at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

87. Braschi v. Stahl Assocs., 74 N.Y.2d 201, 214, 543 N.E.2d 49, 55, 544 N.Y.S.2d 784, 790 (1989).

88. *Id.*

89. *See* N.Y. Unconsol. Law § 2204.6(d) (McKinney 1987).

90. N.Y.L.J., December 7, 1981 at 14, col. 3 (App. Term., 1st Dep't).

sui generis . . . .[91]

The New York Court of Appeals in a later case interpreted the language in *Goodhue* to mean that the "living with" requirement would only be satisfied where the concurring occupancy of the tenant of record and the occupying tenant bore some indicia of permanence or continuity.[92] Thus the tenants must have intended that their co-tenancy be continuous and it must have appeared to be permanent to any observers before the "living with" requirement will be satisfied.[93]

IV. RAMIFICATIONS OF THE *Braschi* DECISION

The time has come for the courts to recognize that the traditional concept of a family is not the whole picture any longer. Although this decision was narrowly written to deal with only New York City's rent control regulations,[94] the court's decision is likely to be precedent setting[95] by establishing objective criteria for determining what kinds of relationships qualify as families in other contexts.

Recently, New York State housing officials utilized *Braschi's* expanded definition of family to block landlords from evicting unrelated persons from rent stabilized apartments in the state.[96] Housing Commissioner Richard L. Higgins echoed the *Braschi* court's concerns when he stated that the purposes of the ruling were to "assure that non-traditional family members of tenants, especially those most vulnerable such as the elderly, disabled and persons infected with the AIDS virus, are not unfairly subject to eviction."[97] In addition to expanding the definition of family, the new regulations will also allow current tenants to remain in their apartments even if the

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91. *Id.*

92. *See* 829 Seventh Avenue Co. v. Reider, 67 N.Y.2d 930, 932-33, 493 N.E.2d 939, 941, 502 N.Y.S.2d 715, 717 (1986).

93. In determining whether a family member's occupancy with a statutory tenant is of sufficient continuity and permanence to entitle that family member to succeed to the tenancy of a departing or deceased statutory tenant, both the credibility of the would-be tenant and objective elements of co-occupancy are significant. The cumulative weight of evidence, rather than any single element, will be determinative in any given case. 829 Seventh Avenue Co. v. Reider, 125 Misc.2d 39, 480 N.Y.S.2d 399, 402 (N.Y. App. Term. 1984).

94. N.Y. Times, July 7, 1989, at A1, col. 2.

95. *See Variations on a Theme*, Newsweek, Winter/Spring 1990, at 38 (describing this decision as a "landmark legal decision").

96. N.Y. Times, Nov. 9, 1989, at B1, col. 1.

97. *Id.* Tenants would have to have lived with the tenant for no less that two years (one year for elderly or disabled persons) and show "emotional and financial commitment and interdependence" between themselves and the person on the lease. *Id.* at B7, col. 1.

original lease holder moves.[98] This voids the prior law which allowed eviction of people related by blood, marriage or adoption when the leaseholder moved from a rent stabilized apartment.[99] Additionally, the *Braschi* decision is likely to add momentum to the drive for domestic-partner laws around the country.[100]

While many feel that this is a landmark decision, there are others who feel a decision like *Braschi* was not only overdue, but merely an appropriate response to the changing demographics of society.[101] Figures from the latest annual census report (1988) show that fewer than twenty-seven percent of the nation's ninety-one million households fit the traditional model family.[102] By validating the legitimacy of the non-traditional family, lawmakers are opening the door for extending benefits accorded married heterosexuals, such as health benefits, property and life insurance, bereavement leave, and annuity and pension rights.[103]

CONCLUSION

Section 2204.6(d) was drafted in 1951. At that time, the legislature was regulating a far different society than it is faced with today. Cohabitation was extremely rare and therefore, was not an issue that the legislature had to address when it drafted the succession rights provision. Over the past thirty-seven years, however, cohabitation, both heterosexual and homosexual, has become an open practice which is readily accepted by our society. As a result, the nation's lawmakers have had to catch up with both society's needs

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98. *Id.* at B7, col. 1.

99. *Id.*

100. In June 1989, San Francisco passed one such law. N.Y. Times, July 7, 1989, at B16, col. 1. Domestic-partner laws allow couples in nontraditional relationships to register their partnerships with the city similar to a marriage license. The ordinance defines "domestic-partners" as "two people who have chosen to share one another's lives in an intimate and committed relationship of mutual caring." Newsweek Winter/Spring 1990 at 38.

101. Arthur Leonard, chairman of the New York City Bar Association's Committee on Sex and Law, stated: "The law must follow society and reflect reality, [f]amily has become a fluid concept." *Id.*

102. *Id.* at 39. At the same time, the bureau counted 1.6 million same-sex couples and 2.6 million opposite-sex couples. In addition, records show that there are more than 2 million gay mothers and fathers.

103. In fact, this was one of the reasons behind the "registered-partnership" legislation. *Id.* at 38. In 1988, the city of Madison extended sick and bereavement leave benefits to domestic partners of city employees and granted domestic partners the right to live in single-family zones; the city of West Hollywood in December 1988, offered medical benefits to domestic-partners and extended official registration and hospital and prison visitation rights to those partners. *Id.* at 39.

and the public's recognition of new concepts in family living. The *Braschi* decision is one example of how the courts are responding to society's changing needs in a more equitable manner.

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