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## Family Ties: A Comparison of the Changing Legal Definition of Family in Succession Rights to Rent-Regulated Housing in the United States and Great Britain

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# FAMILY TIES: A COMPARISON OF THE CHANGING LEGAL DEFINITION OF FAMILY IN SUCCESSION RIGHTS TO RENT-REGULATED HOUSING IN THE UNITED STATES AND GREAT BRITAIN

## I. INTRODUCTION

In recent years the question of how to define "family" has become increasingly controversial. Social practices have influenced both the colloquial and the legal definitions of family.<sup>1</sup> One of the areas in which the legal definition of family is currently disputed is in succession rights to rent-regulated housing.<sup>2</sup> Frequently, the relevant statutory law states that "members of a tenant's family"<sup>3</sup> may succeed to the tenancy upon the death of a tenant. Therefore, defining who is a member of a tenant's family has inspired heated debates between landlords and tenants in a period in which the possession of a rent-regulated dwelling is viewed as an important property right of the tenant.<sup>4</sup>

The legislatures and courts of both the United States and Great Britain are being challenged to expand the legal definition of "members of a tenant's family" in this area.<sup>5</sup> This challenge results from demands<sup>6</sup> that the definition be expanded beyond traditional, legally recognized relationships of blood, marriage, and adoption.<sup>7</sup> The traditional nuclear family — a breadwinner husband, a wife who stays at home, and their minor children — is no longer a valid reflection of the majority of families in either country.<sup>8</sup> Indeed, many "families" are composed of diverse rela-

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1. Note, *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1603 (1989) [hereinafter Note, *Sexual Orientation and the Law*].

2. See, e.g., *infra* notes 131-54, 227-42 and accompanying text.

3. See *infra* notes 43-80, 176-78, 187-97 and accompanying text.

4. Note, *All in the Family: Succession Rights and Rent Stabilized Apartments*, 53 BROOKLYN L. REV. 213, 214 (1987) [hereinafter Note, *Succession Rights*]. "An apartment, especially an 'affordable' one, is a valuable commodity . . . a new type of wealth [is created] by sealing in guaranteed security of possession." *Id.* at 243.

5. See *infra* notes 131-54, 227-42 and accompanying text.

6. See *infra* notes 131-54, 227-42 and accompanying text.

7. See *infra* notes 92, 235-36 and accompanying text.

8. In 1988 only 27%, or 24.6 million of the United States 91.1 million households came under the traditional definition of a family. This is a dramatic drop from 1970 when 40% of American households were defined as traditional. N.Y. Times, May 28, 1989, at 6, col. 1. In April 1990 the Census Bureau made a major change in family categories, which reflects this shift. For the first time, couples who live together will be allowed

tionships that include unmarried couples living together (homosexual as well as relationships which are companionate and not sexual), single-parent "families," foster "families," stepfamilies, extended "families," and groups of unrelated individuals living together who function as a family.<sup>9</sup> The traditional nuclear fam-

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to call themselves "unmarried partners." United States Census Form, D-1, 1990, U.S. Dept. of Commerce, Bureau of the Census; see also Isaacson, *Should Gays Have Marriage Rights?*, TIME, Nov. 20, 1989, at 101, col. 1 [hereinafter Isaacson]. The divorce rate in the United States has doubled in the last 25 years; the level currently is one divorce for every two marriages. N.Y. Times, May 28, 1989, at 6, col. 1; see also Hafen, *The Family as an Entity*, 22 U. C. DAVIS L. REV. 865, 866 (1989) [hereinafter Hafen].

In 1987 a total of 44.1% of all households in Great Britain were composed of traditional nuclear families. London Times, Jan. 25, 1990, at 10, col. 8. As of 1989, the nuclear family is continuing to decrease and accounted for a minority of households; single parent families and more informal cohabitation arrangements constituted an increasing proportion of households. Hudson, *Lords Debate The Family*, 139 NEW L.J. 1675 (Dec. 8, 1989). The ratio of marriages to divorce in Great Britain was three to one in 1989; Great Britain has the highest divorce rate in the European Community. 86 LAW SOC'Y GAZETTE 5 (Apr. 19, 1989).

9. These groups include the handicapped, the elderly, and the mentally ill. See Korngold, *Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy*, 22 U. C. DAVIS L. REV. 951, 952-53 (1989) [hereinafter Korngold].

In this Note, the term "traditional family" is used interchangeably with "nuclear family" to describe a family consisting of a husband, a wife, and their minor children. Legally adopted children will fall under this definition. R. CLAYTON, *THE FAMILY, MARRIAGE, AND SOCIAL CHANGE* 90 (1975) [hereinafter R. CLAYTON].

Extended family is defined as a family with at least one additional relationship not usually included in the traditional or nuclear family context. For example, a grandmother living with the nuclear family makes the family an extended family. *Id.* A relationship that replaces one of the relationships included in the nuclear family is also considered an extended family in this Note. Thus, a grandmother who replaces a mother falls within the definition of an extended family. See generally *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (the definition of family is broadened to include an extended family consisting of a grandmother and her two grandsons).

In this Note, a kinship or kin-oriented family means a group of people who live together or in close proximity, and who are all related by blood. See generally R. CLAYTON, *supra*, at 38-63.

"Functional equivalent" of a family means one or more surrogate parents and a number of foster children living together in a stable, family-like existence. This definition is usually used in zoning situations to enable families with foster children and group homes to come under the definition of family. Since group homes and foster families serve to create a replacement family for victims of abuse and neglect, they do not detract from the family and youth values that one-family residence zoning is intended to protect. See *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977); *Baer v. Town of Brookhaven*, 73 N.Y.2d 942, 537 N.E.2d 619, 540 N.Y.S.2d 234 (1989); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985); *Group House of Port Washington, Inc. v. North Hempstead*, 45 N.Y.2d 266, 380 N.E.2d 207, 408 N.Y.S.2d 377 (1978).

In this Note, all nontraditional and nonnuclear families, as described in the text, will be referred to as diverse-relationship families. See Teitelbaum, *Placing the Family in*

ily, however, is still seen by many to be a basic unit of social organization and possibly an ideal form of family life.<sup>10</sup>

This Note begins by briefly examining the origin and evolution of the family from a sociological viewpoint. It then describes the legal definition of family in succession rights to rent-regulated housing in the statutory and case law of both the United States and Great Britain. For purposes of this comparison, this Note focuses on the jurisdiction of New York State, which has the longest history of rent-regulated housing in the United States. It compares and contrasts the current definitions in New York State and Great Britain. This comparison illustrates that in the last two decades, many areas of the United States appear to be responding to both societal and political demands by dramatically increasing the rights of tenants. Significantly, New York State courts have recently recognized a broader definition of family within the statutory law of succession rights to rent-controlled housing.<sup>11</sup> Great Britain is currently heading in a different direction. After seventy years of legislation that gave tenants massive protection in the form of controlled rents and secured tenure, Great Britain has recently enacted new legislation that greatly diminishes these rights, including succession rights to statutory tenancies.<sup>12</sup> This Note argues that the legal definition of "members of a tenant's family" should reflect the reality of twentieth century family life. It is maintained that this definition should recognize alternative "relationships that meet the

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*Context*, 22 U. C. DAVIS L. REV. 801, 825-27 (1989) [hereinafter Teitelbaum].

10. Note, *Sexual Orientation and the Law*, *supra* note 1, at 1604 n.1 (citing Note, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134, 134 n.1 (1987-88)); see generally Teitelbaum, *supra* note 9, at 809-12; see also Hafen, *supra* note 8, at 905. An institution is "an organized system of social relationships . . . that is pervasively implemented in society and that serves certain basic needs of society." R. CLAYTON, *supra* note 9, at 19. There are at least five basic institutions: family, education, economics, government, and religion. *Id.*

11. See *infra* notes 228, 234-36 and accompanying text.

12. See *infra* notes 63-80 and accompanying text. It can be speculated that these varying changes reflect the differences in each country's divergent historical and cultural traditions. The United States has a population largely composed of the descendants of immigrants who came "to avoid one type of life and to live some other type of life." D. SNOWMAN, *BRITAIN & AMERICA: AN INTERPRETATION OF THEIR CULTURE 1945-1975*, at 26 (1977) [hereinafter D. SNOWMAN]. Therefore, there are many variations within the population that have contributed to the diversity of life-styles and beliefs to be found within the country. The United States vast geographical variations have also added to this diversity. But Great Britain, uninvasion for 900 years, has a far longer history, a "more traditional culture, and a more compact and homogeneous society." *Id.* at 23-24, 26, 80.

human need for closeness, trust and love in ways that may jar some conventional sensibilities[.]”<sup>13</sup> Finally, this Note suggests further actions regarding the succession rights to rent-regulated housing. It recommends that diverse-relationship families be recognized as having such rights by the legislatures of both the United States and Great Britain, and that a practical and flexible approach be used in determining members of families. Otherwise, courts may shape future family choices, rather than leaving such choices to individuals.<sup>14</sup>

## II. THE ORIGIN AND EVOLUTION OF THE FAMILY

The European family of the Middle Ages<sup>15</sup> was consanguine, based on the importance of blood relationships.<sup>16</sup> It centered on

13. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1418 (2d ed. 1988).

14. See Korngold, *supra* note 9, at 954-55; see also *infra* notes 267-73 and accompanying text.

15. The time period of the Middle Ages is from 1500-1700. See Stone, *The Rise of the Nuclear Family in Early Modern England: The Patriarchal Stage*, *THE FAMILY IN HISTORY* 13-14 (C. E. Rosenberg ed. 1975) [hereinafter Stone].

Our earliest ancestors lived together in small, communal groups. How the groups were organized and what sort of relationships were formed within the groups is unknown. Whether any sort of family existed in these primeval living groups remains largely conjectural. Therefore, the focus on the origin of the family must begin where there is adequate information to draw conclusions. Weaver, *The Search for Our Ancestors*, 168 *NAT'L GEOGRAPHIC* 560, 615 (Nov. 1985). It is speculated that the earliest family unit was that of a mother and child. In the primeval world there was probably little to hold a man and a woman together on a permanent basis. Our ancestors were also not aware of the concept of biological paternity, but since infants and small children remain dependent on their mothers for an extended period of time, it seems likely that the mother-child relationship could be the basic building block of the family. R. CLAYTON, *supra* note 9, at 39-42.

Although the information that anthropologists and archaeologists have been able to gather about these living groups is slim and indirect, archaeologists have found evidence that these early ancestors had strong social bonds within the living group. For instance, members of a group buried their dead and took care of those who were injured or who could no longer care for themselves. This shows that these early men and women had a social conscience, were altruistic, and cared about the other members of the living group. Putman, *The Search for Modern Hunters*, 174 *NAT'L GEOGRAPHIC* 439, 452 (Oct. 1988).

Indeed, the complete answer to the origin of the family will probably never be known because “a social institution such as the family is poorly reflected in the archeological record . . . [it] . . . leaves no artifact . . . most aspects of ancient family patterns are unrecorded. They simply were not interesting enough at the time.” R. CLAYTON, *supra* note 9, at 39 (quoting D. SCHULZ, *THE CHANGING FAMILY* 90 (1972)).

16. Stone, *supra* note 15, at 14. Consanguinity still remains an important element of the legal definition of family. It is the basis of incest statutes in both the United States and Great Britain, as well as everywhere else. “Marriages between brother and sister, parent and child, or grandparent and grandchild are universally prohibited.” Note, *The Legal Family — A Definitional Analysis*, 13 *J. FAM. L.* 781, 783 (1973-74) [hereinafter Note, *The Legal Family*].

the male line, giving the father or head of the family the greatest authority.<sup>17</sup> One's status in life was derived from one's role in the family.<sup>18</sup> This type of family could be described as a group of people who lived together or close to one another and who were related by blood.<sup>19</sup> The outer boundaries of this family group, where the blood relationships became attenuated, were weak and permeable.<sup>20</sup> These kinship or consanguine families were linked together by the mutual needs and obligations of the individual members.<sup>21</sup> They revolved around economic support rather than affective bonding.<sup>22</sup> In a kin-oriented family, ties formed by marriage were weaker than those based on blood relationships.<sup>23</sup>

A different sort of family slowly started to evolve between 1500 and 1700.<sup>24</sup> The ties of blood relationships began to weaken and the marital relationship grew stronger as it became more common to marry for love or companionship rather than economic necessity.<sup>25</sup> As a result, affective bonds tying the conjugal

17. Stone, *supra* note 15, at 13-14. The evidence is that families have more frequently centered on the male line rather than the female line. R. CLAYTON, *supra* note 9, at 43.

18. M. GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 12 (1981) [hereinafter M. GLENDON]. "A person's class is a group of people with whom he or she is identified; status, on the other hand, is more an individual matter, a question of the esteem or praise that a person receives or feels entitled to." D. SNOWMAN, *supra* note 12, at 131.

19. See generally L. STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND (1500-1800)* (1977) [hereinafter L. STONE]. "Kinship" families probably included servants. *Id.* at 26-27. Indeed, the Latin word *familia*, from which family is derived, originally meant the servants of one master. Note, *The Legal Family*, *supra* note 16, at 781.

20. M. GLENDON, *supra* note 18, at 12.

21. M. GLENDON, *supra* note 18, at 12-13.

22. M. GLENDON, *supra* note 18, at 12.

23. Marriages were usually made for economic reasons and were arranged by parents. Land was the principle form of wealth at the time and keeping it within the family was very important. Marriages were arranged in order to increase land, or to bring in capital to help support the land. See generally L. STONE, *supra* note 19, at 86-89.

24. Stone, *supra* note 15, at 13.

25. The emphasis on land as the chief source of wealth began to shift towards an emphasis on capital. There was an increasing separation between the family and economics; economic functions that held the family together decreased. One of the reasons for the shift from a kin-oriented family to a conjugal family was the increasing geographic mobility of people at this time. This new mobility may have contributed more than any other factor to the shift; because more people were traveling and leaving their original homes, it became almost impossible for the kinship family to retain its strength over its members, some of whom became transients without deep connections to their families. Stone, *supra* note 15, at 21-23. Another reason was that people also began looking for mates beyond their own kin. M. GLENDON, *supra* note 18, at 12. All of these reasons were interconnected and had an impact on each other.

unit increased.<sup>26</sup> There were also shifts in values; the ideal of loyalty to kin was being replaced by loyalty to spouse and loyalty to the state.<sup>27</sup>

This transitional stage in the evolution of the family eventually gave way to the more companionate and egalitarian nuclear family of the nineteenth century.<sup>28</sup> There was a change on a global scale in the freedom to choose one's mate.<sup>29</sup> The central zone of the family became the husband and the wife, and the structure and roles of a family became more important than its functions.<sup>30</sup>

At this point in time, the family became a traditional nuclear model, consisting of a father, a mother, and their minor children.<sup>31</sup> This family was marked by the mutual attraction between the husband and wife, the close parent-child relationships, and the weakness of the associations with kin.<sup>32</sup> It was a close-knit, inwardly-turning family.<sup>33</sup> The nuclear family was not merely a unit of cohabitation, but also the focus of psychological satisfaction, loyalty, and devotion.<sup>34</sup>

The nuclear family remained the predominant type of family until the early 1960s, when, as the result of many factors, it began to wane.<sup>35</sup> The economic interdependence of family members decreased.<sup>36</sup> Capital was no longer the principle form of wealth; for most people, employment and work-related benefits, like pensions, became the major forms of property.<sup>37</sup> These new

26. M. GLENDON, *supra* note 18, at 12.

27. Stone, *supra* note 15, at 23-24. "As society became more dense, more complex and more organized, there developed a series of semi-public bodies, town authorities, parish overseers . . . which took over many of the functions previously performed by the kin and by the family." *Id.* at 21.

28. M. GLENDON, *supra* note 18, at 12.

29. R. CLAYTON, *supra* note 9, at 44.

30. The functions of a modern, diverse relationship family "include: maintaining the physical health and the safety of members; providing conditions for emotional growth; helping to shape a belief system; and encouraging shared responsibility." N.Y. Times, May 28, 1989, at 6, col. 1. R. CLAYTON, *supra* note 9, at 90-91.

31. Although the parents are not equally powerful, the father's absolute authority has begun to weaken, especially as women entered the work force. M. GLENDON, *supra* note 18, at 17, 20.

32. M. GLENDON, *supra* note 18, at 12; *see also* Hafen, *supra* note 8, at 870.

33. M. GLENDON, *supra* note 18, at 14.

34. Stone, *supra* note 15, at 25. *See also* N.Y. Times, Aug. 31, 1989, at C1, col. 6.

35. *See supra* note 8.

36. M. GLENDON, *supra* note 18, at 12.

37. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter Reich]. Indeed, it is estimated that up to 40% of a worker's compensation comes in the form of fringe benefits, including health insurance benefits. Isaacson, *supra* note 8, at

forms of property also became the basis of status; one's occupation or, viewed in a negative light, one's dependency on the government became one's status.<sup>38</sup>

Both blood ties and marriage ties have greatly weakened in the modern, diverse-relationship family. The individual is freed from the network of both kin-oriented family and the conjugal family.<sup>39</sup> Marriage ties are easily broken; it is relatively easy to detach from one's spouse.<sup>40</sup> Membership in the diverse-relationship family can be described as fluid, detachable, and interchangeable.<sup>41</sup> Just as companionate marriages and loyalty to state threatened the kin-oriented family, individual freedom of choice now threatens the nuclear family.<sup>42</sup>

### III. BRITISH STATUTORY AND CASE LAW

#### A. *Statutory Law*

##### 1. Member of the Tenant's Family

In response to housing shortages during World War I, Great Britain enacted the Increase of Rent and Mortgage Interest (War Restrictions) Act of 1915.<sup>43</sup> This act was supposed to be a temporary wartime measure.<sup>44</sup> In 1920, however, the Increase of Rent and Mortgage Interest (Restrictions) Act of 1920 (Rent Re-

101, col. 1.

38. See Reich, *supra* note 37, at 785. American society has always been less stratified than British society; opportunities for social mobility are often believed to be more extensive in the United States than in Great Britain. Therefore, there are more perceived social paths in the United States. D. SNOWMAN, *supra* note 12, at 109.

39. See generally Hafen, *supra* note 8, at 876-78; see also M. GLENDON, *supra* note 18, at 13.

40. M. GLENDON, *supra* note 18, at 12, 19. This is reflected in the high divorce rate in both countries, which began to rise in the 1970s. Currently, one out of every two marriages ends in divorce in the United States; and one out of every three marriages ends in divorce in Great Britain. See Gilvarry, *Divorce Law — Solicitors Air Some Doubts*, 87 LAW Soc'y GAZETTE 5 (Nov. 7, 1990); see also *supra* note 8.

41. M. GLENDON, *supra* note 18, at 13.

42. Stone, *supra* note 15, at 23-24.

43. Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, 5 & 6 Geo. 5, ch. 97. M. HARWOOD, *MODERN ENGLISH LAND LAW* 137 (1982) [hereinafter M. HARWOOD]. High rents were being charged in areas where munitions factories were located, and the influx of workers caused an increased demand for housing. The President of the Local Government Board stated when the bill was introduced into the House of Commons: "[the rent-raising] has produced a very deep feeling of bitterness and resentment . . . the minority who happen to hold houses, are taking advantage of wartime to exploit the war for their own benefit." *Id.*

44. See Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, 5 & 6 Geo. 5, ch. 97.



strictions Act)<sup>45</sup> was passed because of continued housing shortages and societal demands for greater protection of tenants.<sup>46</sup>

The Rent Restrictions Act controlled rents and guaranteed security of tenure for houses, flats, and other dwellings that were valued below a certain amount.<sup>47</sup> The phrase "member of the tenant's family" was first used in the Rent Restrictions Act in the context of succeeding to a statutory tenancy.<sup>48</sup> Nevertheless, the Rent Restrictions Act failed to give a definition of this phrase. This lack of definition continued through succeeding statutory law regarding rights to succeed to statutory tenancies, leaving the task of defining "member of the tenant's family" to the courts.<sup>49</sup>

There were many further changes in landlord-tenant law, but all the succeeding legislation was finally consolidated in the Rent Act of 1977 (Rent Act).<sup>50</sup> The previous statutory changes had fluctuated between decontrolling many of the larger dwellings and preventing new tenancies from being controlled,<sup>51</sup> and returning the same dwellings under the rent control laws.<sup>52</sup> These various statutory changes account for the profusion of dates.<sup>53</sup>

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45. Increase of Rent and Mortgage Interest (Restrictions) Act (Rent Restrictions Act), 1920, 10 & 11 Geo. 5, ch. 17 [hereinafter Rent Restrictions Act]. The Rent Restrictions Act provides for succession to a statutory tenancy by: "the widow of a tenant . . . who was residing with him at the time of his death, or, where a tenant . . . leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court." *Id.* at § 12(1)(g).

46. M. HARWOOD, *supra* note 43, at 137-38.

47. M. HARWOOD, *supra* note 43, at 136-38.

48. When a tenant's contractual tenancy has been determined and the tenant retains possession by virtue of the act, the tenant has a statutory tenancy which continues as long as the tenant occupies the dwelling. A statutory tenancy cannot be assigned; it cannot pass at death by will or intestate, but it can pass to the tenant's spouse (if living with the tenant at time of death), or, if there is no spouse, to any member of the deceased tenant's family who has lived with the tenant for at least six months. The tenancy of the successor is a statutory tenancy by succession. M. HARWOOD, *supra* note 43, at 141.

49. Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, 10 & 11 Geo. 5, ch. 17; Rent and Mortgage Interest Restrictions Act, 1923, 13 & 14 Geo. 5, ch. 32; Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, 23 & 24 Geo. 5, ch. 32; Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, 25 & 26 Geo. 5, ch. 13; Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, 1 & 2 Geo. 6, ch. 26; Rent and Mortgage Interest Restrictions Act, 1939, 2 & 3 Geo. 6, ch. 71; Rent Act, 1968, ch. 23, *amended by* Rent Act, 1974, ch. 51.

50. Rent Act, 1977, ch. 42, § 2(1)(b).

51. *See* Rent Act, 1957, 5 & 6 Eliz. 2, ch. 25, § 11.

52. *See* Rent Act, 1965, ch. 75, §§ 1, 10, 11, sched. 1, para. 3.

53. R. MEGARRY, *THE LAW OF REAL PROPERTY* 1103 (1984).

The Rent Act also fails to clearly define who is considered a member of a tenant's family.<sup>54</sup> Like the original Rent Restrictions Act, it provides two instances in which a person may succeed to a statutory tenancy. A surviving spouse may become a statutory tenant if two requirements are met: residency in the dwelling immediately before the death of the tenant and occupancy of the dwelling as a residence.<sup>55</sup> If there is no surviving spouse or if the spouse does not qualify under the provisions of the statute,<sup>56</sup> then the tenancy can pass to a member of the original tenant's family under two circumstances. First, the family member must have resided with the tenant at the time of the tenant's death, and second, the family member must have lived there for a period of six months immediately prior to the tenant's death.<sup>57</sup> This lack of a statutory definition of who is a member of a tenant's family has given rise to litigation requesting an interpretation of the phrase.<sup>58</sup>

In contrast to the Rent Act, the Housing Act of 1980, which is now consolidated in the Housing Act of 1985 (Housing Act),<sup>59</sup> defined the meaning of "member of the original family." The Housing Act is legislation that only affects tenants of public housing. Until the enactment of the Housing Act, if a tenant's landlord was the government or a public agency, there were no

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54. Rent Act, 1977, ch. 42, sched. 1, para. 3.

55. Rent Act, 1977, ch. 42, sched. 1, para. 2.

56. Rent Act, 1977, ch. 42, sched. 1, para. 2.

57. Rent Act, 1977, ch. 42, sched. 1, para. 3. The question of succession by a family member often turns on whether the residency requirement has been met prior to the original tenant's death. Family members will often spend time at the home of an elderly relative during a final illness, and it is not always clear whether they have moved in or are still residing somewhere else at the time of the tenant's death. In *Hildebrand v. Moon*, [1989] C.L.Y.B. § 2125, a daughter returned home to nurse her mother. At the time of her mother's death, the daughter had met the requisite residency requirement, but she still owned her own flat. The court of appeal looked at both the daughter's intention to sell her flat as well as the evidence of her residency at her mother's home in determining that the daughter was entitled to succeed to the tenancy.

A landlord may have no wish to evict an elderly tenant who has resided in a dwelling for many years; however, what the landlord does not want is to find that the protected tenancy has been succeeded to by a member of the tenant's family who will enjoy many more years of secured tenancy. Lewis, *Statutory Tenants by Succession*, 139 New L.J. 1353 (Oct. 6, 1989); see also *South Northamptonshire District Council v. Power* [1987] 1 W.L.R. 1433; [1987] 3 All E.R. 831 (C.A.), *petition allowed*, [1988] 1 W.L.R. 319, (H.L. (E.)) (the male partner of an unmarried couple fell outside the relevant provision because he did not meet the residency requirement; "resides" connotes a connection with the property and not merely a close relationship with the tenant).

58. See, e.g., *infra* notes 81-84, 116-19 and accompanying text.

59. Housing Act, 1980, ch. 51, § 50, now Housing Act, 1985, ch. 68, § 87.

laws governing rent increases or protecting a tenant's security of tenure. Like the Rent Act, the Housing Act provides for two ways in which a person can succeed to a statutory tenancy; the residency requirement, however, is for a longer period. A residing spouse or other member of the tenant's family who had resided with the tenant for a period of twelve months prior to the tenant's death, may succeed to the tenancy.<sup>60</sup> A member of a tenant's family is defined as a spouse or a blood relative, or a person who lived with the tenant as "husband and wife."<sup>61</sup> In the case of public tenancies, the only way an unmarried cohabitee is able to establish a family connection is if a "husband and wife" relationship is shown. Despite this statutory definition, however, there is still room for debate regarding who is a member of the original tenant's family.<sup>62</sup>

## 2. The Housing Act of 1988

The regulations relating to succession to tenancies protected by the Rent Act have been changed in favor of landlords by the provisions of the Housing Act of 1988 (1988 Act) that went into effect on January 15, 1989.<sup>63</sup> The provisions of the 1988 Act provide sweeping, significant changes in the rules regulating tenancies protected since the passage of the original Rent Restrictions Act and successive Rent Acts.<sup>64</sup> However, the new regulations do not affect tenancies created before January 15, 1989, and contain certain transitional provisions.<sup>65</sup>

Under this new legislation, landlords are able to regain possession of dwellings more easily. Controls on rents are also abolished.<sup>66</sup> In essence, the 1988 Act separates rent control and se-

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60. Housing Act, 1980, ch. 51, § 50, now Housing Act, 1985, ch. 68, § 87.

61. Housing Act, 1980, ch. 51, § 50(3), now Housing Act, 1985, ch. 68, § 113(1). See *Harrogate Borough Council v. Simpson*, [1985] 2 F.L.R.91; [1986] 16 Fam. 359. On appeal the defendant argued that it was the intention of Parliament that these provisions (Housing Act, 1980, ch. 51, §§ 30, 50 now consolidated in Housing Act, 1985, ch. 68, §§ 87, 113) should apply to unions that had the appearance of two people living together in a form of matrimonial state. The appeal was dismissed, and the court concluded that if the legislature had wished homosexual relationships to be brought within the purposes of the housing legislation, it would have clearly stated so. *Id.* See also *infra* notes 135-43 and accompanying text.

62. See *infra* notes 131-38 and accompanying text.

63. Housing Act, 1988, ch. 50, § 141(3).

64. Webb, *A Guide to the Housing Act — I*, 139 NEW L.J. 252 (Feb. 24, 1989).

65. Storey, *Property Points: the Housing Bill 1988*, 85 LAW SOC'Y GAZETTE 30 (Mar. 16, 1988) [hereinafter Storey].

66. See Housing Act, 1988, ch. 50.

curity of tenure.<sup>67</sup> The interdependency of rent control and security of tenure is a basic principle of the Rent Act and was part of previous legislation regarding housing regulations; the effectiveness of rent-regulations law relies on this interdependency.<sup>68</sup> With the passage of the 1988 Act, this interdependency has been eliminated.

The two main purposes of the government's introduction of these new forms of tenancies are to produce rents that are genuine market rate rents and to decontrol rent-regulated housing.<sup>69</sup> Much of the protection previously given to residential tenants under the Rent Act, however, has been removed, both in terms of security of tenure and of rent control.<sup>70</sup> The 1988 Act replaces security of tenure with a new scheme of assured tenancies.<sup>71</sup> Despite the reassuring name, assured tenancies offer less protection for tenants than the Rent Act.<sup>72</sup> Although tenants' rights have been reduced in most respects, there are some provisions that enhance the rights of tenants; these include antiharassment regulations, improvement grants, and obligations to repair statutes.<sup>73</sup>

Under the 1988 Act, spouses will inherit as before, and in addition, a person living with the tenant as a spouse,<sup>74</sup> if the

67. The purpose of the new law is to give landlords the choice of giving a lease on either an assured tenancy basis with a freely negotiated 'market' rent, but security of tenure; or on the shorthold basis with no security of tenure beyond the original fixed term, but giving either party the right to go to the rent assessment committee for registration of an appropriate shorthold term. See Housing Act, 1988, ch. 50, § 20. See also Rodgers, *Assured Shorthold Tenure: Long Term Insecurity*, 86 LAW Soc'y GUARDIAN GAZETTE 34 (Mar. 2, 1989) [hereinafter Rodgers].

68. Rodgers, *supra* note 67, at 34.

69. Kenny, *The Housing Act 1988: Assured Tenancies*, 86 LAW Soc'y GAZETTE 19 (Feb. 1, 1989).

70. Storey, *supra* note 65, at 30.

71. It has been noted that:

This "new style" assured tenancy is a development from, and redefinition of, the "old style" assured tenancies under the Housing Act 1980 — which would . . . be converted to new style assured tenancies under the Bill. It is perhaps unfortunate that the Bill uses the existing expression "assured tenancy" for what is really a new concept.

Storey, *supra* note 65, at 30.

72. Storey, *supra* note 65, at 30; see also *infra* note 78 and accompanying text. Not all tenancies granted on or after January 15, 1989 are necessarily assured tenancies; the circumstances that create a Rent Act protected tenancy, however, have to be exceptional. Housing Act, 1988, ch. 50, §§ 34(1)(b) & (c).

73. Housing Act, 1988, ch. 50, §§ 19, 130, 131.

74. Housing Act, 1988, ch. 50, sched. 4, para. 2. "[A] person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant." *Id.* It may be assumed that this extension of the normal meaning of "spouse"

dwelling is considered the main residence, will become the statutory tenant after the tenant's death.<sup>75</sup> The statute does not contain a provision for children to succeed.<sup>76</sup> Other members of the tenant's family can no longer take a statutory tenancy by succession.<sup>77</sup> Statutory successions other than to a spouse (or an equivalent) of the original tenant may still occur, but the member of the tenant's family is only entitled to an assured tenancy.<sup>78</sup> An assured tenancy either provides rent control or security of tenure, but not both.

Therefore, the conditions for succession for a member of a tenant's family have been changed and narrowed. A spouse or an unmarried partner of the opposite sex is protected, but a member of the tenant's family must be residing in the house with the tenant at the time of death and must have lived there for the previous two years in order to become the statutory tenant.<sup>79</sup> Prior to the 1988 Act, the residency requirement for a member of the tenant's family was only six months.<sup>80</sup> In addition, the 1988 Act provides no protection for homosexual couples or other

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will apply only to couples of different sexes. *See, e.g., Harrogate*, [1986] 16 Fam. 359. An unmarried cohabitee, however, is now included as a spouse; he or she does not have to prove to be a member of the tenant's family.

75. The provisions for succession to Rent Act protected tenancies are amended to the following effect by Housing Act, 1988, ch. 50, sched. 4 (1988 Act):

(i) Succession takes place only to a person residing with the tenant 'in the dwelling-house' (sched. 4, para. 3(a)).

(ii) Persons other than the spouse must satisfy this residence requirement for two years before the death (sched. 4, para. 3(b)). Where the death occurs within 18 months of the provisions coming into force, providing there was six-months residence before that date the two-year period is deemed to be satisfied (sched. 4, para. 3(d)).

(iii) When a successor dies then there is a succession only if the two-year period is satisfied (sched. 4, para. 6).

(iv) A successor other than the spouse of the original tenant becomes entitled to an assured periodic tenancy as provided in § 39 (sched. 4, para. 3(c)).

76. *See generally* Housing Act, 1988, ch. 50, sched. 4.

77. *See* Housing Act, 1988, ch. 50, § 39 & sched. 4. A landlord may charge a free market rent for an assured tenancy. Housing Act, 1988, ch. 50, § 20.

78. Housing Act, 1988, ch. 50, sched. 4, para. 3(c).

79. Housing Act, 1988, ch. 50, sched. 4, para. 3(b).

80. *See* Rodgers, *supra* note 67, at 34. Although the six-month residency requirement was lengthened by the 1988 Act, a reduction had been made from a five-year residency requirement, which was proposed when the 1988 Act was first published. *Id.*

There are transitional provisions in the 1988 Act that apply to cases in which a potential successor was in residence before the act came into force. Also, on the death of a first successor, a person who was a member of the family of both the original tenant and first successor's family, and who satisfied the two years' residency requirement, can also become an assured tenant by succession. *Id.*

diverse-relationship families. It will be hard for many family members to meet these stricter residency requirements.

### B. Case Law

#### 1. The "Ordinary and Popular" Meaning of Family

The lack of definition of "member of the tenant's family" in the Rent Restrictions Act and in subsequent statutory law involving succession rights has forced courts to supply an interpretation of this phrase. In one of the first cases to clarify the statute's language, *Brock v. Wollams*,<sup>81</sup> a daughter of a deceased tenant who had never been legally adopted was entitled to remain in possession of a house that fell within the scope of the Rent Restrictions Act. Although she had never been legally adopted by the tenant and his wife, she had lived with them from a young age until her marriage.<sup>82</sup> After three years of marriage, the daughter returned to her childhood home and took care of her father until his death.<sup>83</sup> The court found that the term "family" in the Rent Restrictions Act should be used in the "ordinary, popular sense"<sup>84</sup> of the word and therefore it included an adopted child, whether or not there had been a legal adoption.

The *Brock* court did not have the help of many prior decisions to "[throw] any light upon the meaning to be given the word 'family' in [the Rent Restrictions Act],"<sup>85</sup> however, there were two earlier decisions that the court found helpful. In the first decision a court had determined that a husband of a deceased statutory tenant was a member of the tenant's family.<sup>86</sup>

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81. [1949] 2 K.B. 388; [1949] 1 All E.R. 715.

82. *Brock*, [1949] 2 K.B. at 388; [1949] 1 All E.R. at 715.

83. *Id.*

84. *Id.* at 394; [1949] 1 All E.R. at 717.

85. *Id.* at 393; [1949] 1 All E.R. at 717.

86. *Salter v. Lask*, [1925] 1 K.B. 584, 132 [1925] L.T.R. 830. Section 12(1)(g) of the Rent Restrictions Act, amended 1923, provides that:

[T]he expression "tenant" includes the widow of a tenant . . . who was residing with him at the time of his death, or, where a tenant . . . leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court for not less than six months immediately before the death.

Rent Restrictions Act, § 12(1)(g). After deciding that a husband comes within the meaning of the words of section 12(1)(g) of the Rent Restrictions Act, the court stated that at some future time, a limit might have to be put on the words "tenant's family," and "whether they are equivalent to 'household' or whether they are limited as meaning blood relations, and in either case what members of the class respectively are indicated."

The second case held that brothers and sisters of a deceased tenant, living with her at the time of her death, fell within the meaning of the word family.<sup>87</sup> The *Brock* court reasoned that they could interpret family in a similar way as these earlier cases did; the court gave family its ordinary, popular meaning and did not use it as a technical, legal term.<sup>88</sup> Indeed, Lord Cohen said: "the question the county court judge should have asked himself was this: [w]ould an ordinary man, addressing his mind to the question whether Mrs. Wollams was a member of the family or not, have answered 'Yes' or 'No'?"<sup>89</sup>

This ordinary man interpretation of the definition of family was echoed in many subsequent decisions regarding succession to a statutory tenancy. In *Gammans v. Ekins*<sup>90</sup> a man who had lived with a woman (the statutory tenant) for twenty years and who had also adopted her name and posed as her husband, but who had never been legally married to her, was found not to be a member of the tenant's family within the ordinary popular sense of that word in the Rent Restrictions Act.<sup>91</sup> Although the court noted that consanguinity was not a prerequisite of membership in another's family, it decided that prior decisions had limited membership of the tenant's family to three types of relationships: (1) children (including adopted children) of the tenant; (2) legitimate marriages; and (3) in loco parentis situations.<sup>92</sup> The *Gammans* court determined that the law had not extended the definition of a member of a tenant's family beyond these categories.<sup>93</sup>

The *Gammans* decision had strong moral overtones; because the relationship had been a sexual one, the court felt that a per-

[1925] 1 K.B. at 587, 132 L.T.R. at 831.

87. *Price v. Gould*, [1930] 143 L.T.R. 333. After first recognizing that the primary meaning of family is children, the court relied on *Sum v. Teed*, [1870] 23 L.T. 303, L. Rep. 9 Eq. 622 (a case involving the exact scope of the word family within the context of a will). In *Sum*, the court held that family could be extended beyond children and beyond the statutory next of kin. As a result, the *Price* court determined that the word family could include brothers and sisters of the deceased tenant. The court then stated that the meaning of family should be a flexible and wide term.

88. *Brock*, [1949] 2 K.B. at 394; [1949] 1 All E.R. at 718. The court also discussed whether it was the intention of the legislature to protect servants and lodgers and decided that this would be unlikely. *Id.*

89. *Id.*; [1949] 1 All E.R. at 718.

90. [1950] 2 K.B. 328; [1950] 2 All E.R. 140.

91. *Gammans*, [1950] 2 K.B. at 330; [1950] 2 All E.R. at 143; Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, 10 & 11 Geo. 5, ch. 17, § 12(1)(g).

92. *Gammans*, [1950] 2 K.B. at 331; [1950] 2 All E.R. at 141.

93. *Id.*; [1950] 2 All E.R. at 141.

son should not be able to acquire a "status of irremovability" by "living . . . in sin."<sup>94</sup> There were no children from the relationship, however, and the court suggested that the presence of children could have been significant in determining whether the man had been a member of the family.<sup>95</sup>

The three types of relationships noted by *Gammans* were generally followed for a number of years by the courts as criteria for defining a family. Nonetheless, because the interpretation used by the courts for the definition of family was vague and imprecise, subsequent decisions did not always appear to follow the same reasoning as the earlier ones. For example, two married sons of a statutory tenant who were living with their mother, along with their wives, were regarded as members of the tenant's family.<sup>96</sup> A niece by marriage of a statutory tenant, who had assumed, by her conduct, a "filial character," was also found to be a member of the tenant's family because of special circumstances.<sup>97</sup> The court noted that *how* the parties acted together should be considered in making a judgment. In contrast, two first cousins of a statutory tenant who were living with her at the time of her death, and who had been living with her for twenty-nine years, were found not to be members of her family.<sup>98</sup> In this case, the circumstances were not found to be special; the court stated that it was reluctant to extend the meaning of family to relations of every degree, and therefore essentially replace the word family in the Rent Restrictions Act with the

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94. *Id.* at 337; [1950] 2 All E.R. at 144.

95. *Id.* at 331; [1950] 2 All E.R. at 142. Lord Jenkins stated that:

[A]s soon as children of two such parties, or one of them, come into question, there may be said to be *de facto* an actual family, consisting of children and the natural parent or parents of those children. It is then, I think, easy to see how the children could properly be brought within the expression "family" according to the ordinary and popular meaning of the word.

*Id.* at 332; [1950] 2 All E.R. at 142. The *Gammans* court referred to *Jones v. Trueman* ([1949] unreported, C.L.Y.B. § 3385), where a cohabiting couple with children was held to be a family.

96. *Standingford v. Probert*, [1950] 1 K.B. 377; [1949] 2 All E.R. 861. This case did not involve succession to a tenancy. Here, the landlord claimed possession of the house to which the Rent Restrictions Act applied, and he had to offer alternative accommodation to the tenant that was suitable to the tenant's family. *Id.*

97. *Jones v. Whitehill*, [1950] 2 K.B. 204; [1950] 1 All E.R. 71. The court noted that the existence of a family relationship is not always enough to make the surviving person a member of the deceased tenant's family. The manner in which the parties acted is also to be taken into account. *Id.*

98. *Langdon v. Horton*, [1951] 1 K.B. 666; [1951] 1 All E.R. 60.



word relations.<sup>99</sup>

As it became more socially acceptable in the 1950s for couples to live together without being legally married, a fourth category of relationships was found to be protected by the Rent Restrictions Act.<sup>100</sup> In *Hawes v. Evenden*<sup>101</sup> a woman who had cohabited with a man by whom she had had two children was held to be a member of his family, and therefore entitled to succession under the Rent Restrictions Act.<sup>102</sup> In *Gammans* the question of whether the existence of children made a difference had been left open; here, it appears that the presence of children did make a difference in determining that the inhabitants constituted a family.<sup>103</sup>

## 2. *Dyson Holdings*: A Societal Change in Values

*Dyson Holdings Ltd. v. Fox*<sup>104</sup> was a decision that took into account modern morality and social reality. A woman who had lived with a man for over forty years without marrying him nor bearing him children was found to be a member of his family and allowed to succeed him as a statutory tenant.<sup>105</sup> This court defined the "common man" standard by stating that the word family should be used in the sense that would be attributed to it by the ordinary man in the street at the time relevant to the decision of the particular case.<sup>106</sup>

99. *Id.* at 669; [1951] 1 All E.R. at 60. In *Langdon*, Sir Evershed quoted Shakespeare in an attempt to clarify the meaning of the common and popular standard: "the word 'family' is used here, to borrow the words used of the soldier in King Henry V, in a sense, base, common and popular[.]" *Id.* at 669; [1951] 1 All E.R. at 60. Pistol, addressing King Henry: "[A]rt thou officer? Or art thou base, common and popular?" W. SHAKESPEARE, KING HENRY V, Act IV, sc. 1.

100. See *infra* notes 104-106 and accompanying text.

101. [1953] 1 W.L.R. 1169; [1953] 2 All E.R. 737.

102. *Id.* at 1171; [1953] 2 All E.R. at 738.

103. *Tinkham v. Perry*, [1951] 1 K.B. 547; [1951] 1 All E.R. 249 (C.A.). In contrast to *Hawes*, *Tinkham*, which had similar facts — a woman who had lived with a man in an unmarried state and who had had two children with him — was decided differently. It appears that the distinguishing factor between these two cases was that the man in *Tinkham* had already been married (his wife had abandoned him), so he did leave a widow. In *Hawes*, Lord Somervell states that he is applying the test indicated by Lord Cohen in *Brock*: would a common man view this woman as a member of the tenant's family. *Id.* at 1170-71; [1951] 2 All E.R. at 738. It is not clear, however, that a common man would not also think that the woman and two children in *Tinkham* could be seen as members of the tenant's family.

104. [1976] Q.B. 503; [1975] 3 W.L.R. 744; [1975] 3 All E.R. 1030 (C.A.).

105. *Id.*, Rent Act, 1965, ch. 75, sched. 1, para. 3.

106. *Dyson Holdings*, [1976] Q.B. at 508; [1975] 3 W.L.R. at 747; [1975] 3 All E.R. 1030.

The court looked to both *Gammans* and *Hawes* for guidance and decided that it made no sense to consider an unmarried woman who has lived with a man as his wife for many years as a member of the tenant's family only if she has children by him.<sup>107</sup> Lord Denning felt that this was a ridiculous contention which should be rejected by the court.<sup>108</sup> He felt that the court should not be absolutely bound by a previous decision when the decision can no longer be supported.<sup>109</sup> Lord Denning felt that the lapse of time and the change in social conditions made the previous decision of *Gammans* no longer applicable.<sup>110</sup> Lord Denning also decided the case on more conventional grounds by determining that *Gammans* had been wrongly decided.<sup>111</sup> He noted that the House of Lords had decided that when an act uses an ordinary word in its popular meaning as distinct from its legal meaning, it is for the tribunal of fact to decide whether that popular meaning covers the case in hand.<sup>112</sup> Lord Denning also addressed the importance of having an ordinary word such as family applied by each tribunal in the same manner.<sup>113</sup> He stated that it would be intolerable for each court to apply it in a different way.<sup>114</sup> Therefore, in *Dyson Holdings* he gave a definite ruling.<sup>115</sup>

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107. *Id.* at 508-09; [1975] 3 W.L.R. at 747-48. Lord Denning illustrated his point by contrasting two couples, one whose child had died when a few days old or as a young child, and the other whose baby had been still-born or where the woman had had a miscarriage. *Id.* He rejected the distinction that would make the first couple a family, but not the second couple. *Id.*

108. *Id.* at 509; [1975] 3 W.L.R. at 748.

109. *Id.* Lord Denning cited *Cooke v. Head*, [1972] 1 W.L.R. 518; [1972] 2 All E.R. 38 as an instance in which the court departed from a previous decision.

110. *Id.* at 509; [1975] 3 W.L.R. at 748.

111. *Id.*; [1975] 3 W.L.R. at 748.

112. *Id.*; [1975] 3 W.L.R. at 748. In *Gammans*, the Court of Appeal should not have interfered with the lower court's decision unless it was reasonable in the sense that no tribunal not acquainted with the ordinary use of language could reasonably reach that decision. *Id.* Lord Denning cited *Cozens v. Brutus*, [1973] A.C. 854; [1973] 2 All E.R. 1297 to support this statement.

113. *Dyson Holdings*, [1976] Q.B. at 510; [1975] 3 W.L.R. at 748.

114. *Id.*; [1975] 3 W.L.R. at 748.

115. Lord James concurred in Lord Denning's opinion in *Dyson Holdings*. He did not take the view that *Gammans* was decided incorrectly; Lord James believed that if the word 'family' as it was used and understood in 1949 was applied to the facts in *Gammans*, it would result in a finding that the defendant was not a member of the tenant's family. *Id.* at 511-12; [1975] 3 W.L.R. at 750-51. He echoed Lord Denning's opinion that the word must be given its popular meaning at the time relevant to the decision in the particular case. *Id.* at 512; [1975] 3 W.L.R. at 751.

Lord Bridges, who gave the third decision in *Dyson Holdings*, felt some hesitation on giving "effect to this changed social attitude and consequent change in the scope of a

The legal reasoning in *Dyson Holdings* was criticized in later cases although courts seem to treat the decision as binding. In *Helby v. Rafferty*<sup>116</sup> the court acknowledged that an unmarried couple "living together over a very long period" could constitute a family relationship for purposes of the Rent Act,<sup>117</sup> however, the court distinguished *Helby* from *Dyson Holdings* by determining that the unmarried couple did not have a sufficient degree of permanence and stability to justify the view that they were members of a single family.<sup>118</sup> The court pointed to the fact that the woman had wanted to keep her freedom and her own name thus deliberately avoiding permanence in the relationship.<sup>119</sup>

The House of Lords declined the opportunity to rule on the approach to statutory interpretation used in *Dyson Holdings* when they heard the appeal in *Joram Developments Ltd. v. Sharratt*.<sup>120</sup> The court felt that the difficult question posed by *Dyson Holdings* — the extent to which changed social attitudes towards cohabitation between unmarried couples and the offspring of such liaisons may have enlarged the meaning of the

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common English word without doing violence to the doctrine of judicial precedent," but concluded that it would be "unduly legalistic" to allow such a consideration to defeat the appellant's claim. *Id.* at 513; [1975] 3 W.L.R. at 751. He stated that:

[I]f language can change its meaning to accord with changing social attitudes, then a decision on the meaning of a word in a statute before such a change should not continue to bind thereafter, at all events in a case where the courts have consistently affirmed that the word is to be understood in its ordinary accepted meaning.

*Id.*; [1975] 3 W.L.R. at 751.

116. [1979] 1 W.L.R. 13; [1978] 3 All E.R. 1016 (C.A.).

117. *Helby*, [1979] 1 W.L.R. at 18; [1978] 3 All E.R. at 1020.

118. *Helby*, [1979] 1 W.L.R. at 18; [1978] 3 All E.R. at 1020.

119. *Helby*, [1979] 1 W.L.R. at 19; [1978] 3 All E.R. at 1020. The moral overtones of this decision are shown in the language by the court regarding the woman's role in the relationship. The court pointed to the fact that the female partner had not adopted the character of a wife. *Id.* at 21; [1978] 3 All E.R. at 1021. The court goes on to list the characteristics of a wife, which included the presence of children and the adoption of the man's name as well as encouraging others to be regarded as members of the same family. *Id.* at 21; [1978] 3 All E.R. at 1022-23. In this case the woman was a well known writer who had made many appearances on television and the radio; she preferred an arrangement that left her independent, but also gave her the security of marriage. *Id.* at 19; [1978] 3 All E.R. at 1020. Not only was the woman's streak of independence noted by the court, but it appears that the presence of some role reversal was disquieting; the man had nursed his partner during her final illness. The court felt that the plaintiff's argument that the relationship was one of a "nursing dependence rather than one based on a family unit" had weight. *Id.* at 20; [1978] 3 All E.R. at 1021.

120. [1979] 1 W.L.R. 1; [1975] 2 All E.R. 12 (C.A.); [1979] 1 W.L.R. 928; [1979] 2 All E.R. 1084 (H.L.(E.)).

expression "family" in the Rent Act — did not arise in this case.<sup>121</sup> The facts in *Joram Developments* were considered unusual, and therefore, did not provide a suitable occasion for the court to undertake a general consideration of which people may be included in the expression "a member of the original tenant's family."<sup>122</sup>

The unique facts of *Joram Developments* involved a young man who shared a flat and a platonic relationship with an elderly widow who was the statutory tenant.<sup>123</sup> This relationship lasted eighteen years: the young man looked after the widow in her declining years. Upon her death, he stated that he had become the statutory tenant by succession because he was a member of the original tenant's family.<sup>124</sup>

The county court judge held that this couple had achieved a familial nexus such as one would only find in a family and dismissed the landlord's claim for possession.<sup>125</sup> The Court of Appeal reversed the decision, finding that the appellant was incapable of being a member of the tenant's family as a matter of law.<sup>126</sup> The House of Lords also found that the young man was not a member of the widow's family.<sup>127</sup> They acknowledged that the definition of family was not limited to cases of a familial nexus in the strict legal sense,<sup>128</sup> but that the definition still required a broadly recognizable de facto familial nexus recognizable as such by an ordinary man.<sup>129</sup> Two adults who had lived together in a platonic relationship could never artificially establish such a relationship for the purposes of the statute.<sup>130</sup> Therefore, while unmarried couples of the opposite sex were beginning to be recognized as families by the courts, more unconventional relationships were denied succession to rights.

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121. [1979] 1 W.L.R. at 930; [1979] 2 All E.R. at 1086.

122. *Id.*; [1979] 2 All E.R. at 1086.

123. *Id.*; [1979] 2 All E.R. at 1086.

124. *Id.* at 928; [1979] 2 All E.R. at 1084.

125. *Id.*; [1979] 2 All E.R. at 1084.

126. *Id.* at 931; [1979] 2 All E.R. at 1087.

127. *Id.*; [1979] 2 All E.R. at 1087.

128. The strict legal sense appears to be a connection by way of consanguinity, of affinity, of adoption (de jure or de facto) during minority, or of regular sexual intercourse (past or present). *Id.* at 931; [1979] 2 All E.R. at 1087 (quoting *Ross v. Collins*, [1964] 1 W.L.R. 425, 432; [1964] 1 All E.R. 861, 866).

129. *Id.* at 931; [1979] 2 All E.R. at 1086 (quoting *Brock v. Wollams*, [1949] 2 K.B. 388, 395).

130. *Id.* at 931; [1979] 2 All E.R. at 1086 (quoting *Ross v. Collins*, [1964] 1 W.L.R. 425, 432; [1964] 1 All E.R. 861, 866).

### 3. Recent Decisions: The Necessary Familial Nexus

In 1986 a woman who had been living with the deceased tenant in a lesbian relationship challenged the definition of family under the Housing Act.<sup>131</sup> *Harrogate Borough Council v. Simpson*<sup>132</sup> involved a woman who said that she was entitled to a secure tenancy because she had lived with her partner as "husband and wife."<sup>133</sup> On appeal the woman argued that the Housing Act had intended to include relationships in which the couple was living together as if married since the views of the public had changed over the last decade concerning homosexual relations.<sup>134</sup> The court rejected this argument, however, stating that although societal attitudes had changed in regard to informal living associations between men and women,<sup>135</sup> if Parliament had meant the statute to be interpreted to recognize a homosexual couple, it would have plainly stated so.<sup>136</sup> The court concluded that to be husband and wife, the partners must be of the opposite sex; it was not sufficient that the relationship had all the characteristics of a spousal relationship except the ability to bear children.<sup>137</sup>

The Housing Act only concerns public housing and defines "member of family." In private housing tenancies, there is no definition of member of family, but there have been no cases involving homosexual cohabiters. Nonetheless, there have been cases involving unmarried heterosexual couples.<sup>138</sup> The court could have chosen to apply the same tests of permanence and

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131. Housing Act, 1980, ch. 51, §§ 30, 50, now Housing Act, 1985, ch. 68, §§ 87, 113. *Harrogate Borough Council v. Simpson*, [1985] 2 F.L.R. 91; [1986] 16 Fam. 359.

132. [1986] 16 Fam. 359.

133. *Id.*

134. *Id.* It was argued that: (1) during the 1960s and 1970s Parliament recognized that there was a form of relationship beside a formal marriage between two persons which the public had come to recognize and accept as being a perfectly proper and normal relationship; (2) the manifestations of marriage could be had between unmarried people: these manifestations were mutual love, monogamy, some degree of public acknowledgment of their condition of living, faithfulness, a permanence of relationship, sexual relations of some kind; and (3) the word "as" in the phrase "live together as husband and wife" indicated that the provisions were intended to apply to people who were not married but who gave the appearance of living together in the married state. See Housing Act, 1980, ch. 51, § 50 (3).

135. *Harrogate*, [1986] 16 Fam. 359.

136. *Id.*

137. *Id.*

138. See *Dyson Holdings, Ltd. v. Fox*, [1976] Q.B. 503; [1975] 3 W.L.R. 744; [1975] 3 All E.R. 1030 (C.A.); *Helby v. Rafferty*, [1979] 1 W.L.R. 13; [1978] 3 All E.R. 1016 (C.A.); *Hawes v. Evendon*, [1953] 1 W.L.R. 1169; [1953] 2 All E.R. 737.

stability that are used for unmarried heterosexual couples to these circumstances.

Two other recent Court of Appeal cases examined the definition of "member of the tenant's family" and produced two different results.<sup>139</sup> In *Chios Property Investment Company Ltd. v. Lopez*,<sup>140</sup> the respondent was held to be a member of her deceased cohabitee's family, although they had only been together for two years.<sup>141</sup> However, she had moved into his flat with the intention of marrying him when their financial circumstances improved.<sup>142</sup> Here, the county court stated that all the claimant had to show was a sufficient state of permanence and stability with the deceased tenant for it to be said that she was a member of his family.<sup>143</sup> It was argued that this was an error; the correct test was whether an ordinary man would view the claimant as a member of the tenant's family.<sup>144</sup> Sir Waller found that the county court had not been in error and had stated the correct test. The *Lopez* court reasoned that when an ordinary man considers whether someone is a member of another's family, the answer must be based on the very test that the county court posed: whether the relationship had reached a sufficient state of permanence and stability for the claimant to be considered a member of the deceased tenant's family.<sup>145</sup> The court took into consideration the social mores of the 1980s: people often form a relationship without a legal marriage. The *Lopez* court noted, however, that this case was exceptional and should not be regarded as entitling courts to draw a similar inference from a similar short

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139. *Chios Property Inv. Co. Ltd. v. Lopez*, [1987] 05 E.G. 7, 20 H.L.R. 120; [1988] 1 E.G.L.R. 98; *Sefton Holdings Ltd. v. Cairns*, [1988] 18 Fam. 164.

140. [1987] 05 E.G. 7, 20 H.L.R. 120; [1988] 1 E.G.L.R. 98.

141. *Id.*; 20 H.L.R. at 120; [1988] 1 E.G.L.R. at 98.

142. *Id.*; 20 H.L.R. at 120; [1988] 1 E.G.L.R. at 98.

143. *Id.*; 20 H.L.R. at 120; [1988] 1 E.G.L.R. at 98. Sir Waller said that there could be no absolute rule about length of duration although the longer the relationship, the easier it would be to infer permanence. *Id.* But there is no magic in the length of time the couple has been together; it appears that the crucial question is whether the relationship was quasi-marital. *Id.* *Lopez* is distinguished from *Helby* because in *Helby*, the couple had a non-marital relationship, although they had been together for five years. See *Helby v. Rafferty*, [1979] 1 W.L.R. 13; [1978] 3 All E.R. 1016 (C.A.).

144. *Lopez*, [1987] 05 E.G. 7, 20 H.L.R. 120; [1988] 1 E.G.L.R. 98 (quoting *Dyson Holdings, Ltd. v. Fox*, [1976] Q.B. 503; [1975] 3 W.L.R. 744; [1975] 3 All E.R. 1030 (C.A.)). The landlord also tried to resurrect an old consideration by claiming that the absence of children should have led the county court to conclude that this couple could not be a family. *Id.* See also *supra* note 94 and accompanying text.

145. *Lopez*, [1987] 05 E.G. 7, 20 H.L.R. 124; [1988] 1 E.G.L.R. 98.

period of time unless there were special circumstances.<sup>146</sup>

In the second case, *Sefton Holdings Ltd. v. Cairns*,<sup>147</sup> a woman who moved in with a family after her own parents were killed was found not to be a family member even though she had been living with them for twenty-nine years. She claimed that she was treated as if she were a daughter of the family.<sup>148</sup> At the time that she moved in with the family she was not a minor and there was no authority offering protection for a de facto adoption of an adult.<sup>149</sup> In *Sefton*, the court ruled that the term family had to be given its "ordinary, everyday meaning," which meant a relationship of blood, marriage, or adoption.<sup>150</sup> The *Sefton* court held that two "strangers" could not artificially establish a familial nexus<sup>151</sup> and dismissed the appeal even though it described a close, familial relationship.<sup>152</sup> The court referred to *Dyson Holdings*, and noted that a couple living together as husband and wife would be regarded as having the requisite familial nexus, but it did not explain why pretending to be a spouse is less artificial than pretending to be a daughter or a sister.<sup>153</sup> Thus it seems to be possible to establish a familial nexus by living together as man and wife but not as two sisters.

No attempt was made to define family by the *Sefton* court, and the opinion was offered that no case existed in which a court had found it possible to identify the necessary ingredient or quality that distinguished a familial nexus from one that was less than familial.<sup>154</sup> Despite a few court decisions that looked at

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146. *Id.*

147. [1988] 14 E.G. 58, 20 H.L.R. 124; [1988] 1 E.G.L.R. 99; [1988] 18 Fam. 164; [1988] 2 F.L.R. 109.

148. *Id.* at 164.

149. *Id.*

150. *Id.*

151. *Id.* (citing *Ross v. Collins*, [1964] 1 W.L.R. 425, 432; [1964] 1 All E.R. 861, 866). *Ross* involved a woman who had nursed a statutory tenant as well as her own mother who had lived with the tenant for many years. She resided with the tenant for many years after her mother's death and claimed that she had looked upon him as a sort of elder relative: a brother or a father. It was held that she was not a member of the tenant's family, however, because there was no family relationship of any kind. In his decision Lord Russell discussed the impossibility of two strangers artificially establishing a familial nexus. *Ross*, [1964] 1 W.L.R. 425, 432; [1964] 1 All E.R. at 868.

152. *Sefton Holdings*, [1988] 14 E.G. 58, 20 H.L.R. 124; [1988] 1 E.G.L.R. 99; [1988] 18 Fam. 164; [1988] 2 F.L.R. 109.

153. *Bainham, Sefton Holdings Ltd. v. Cairns* (1987), 138 New L.J. 19 (Jan. 22, 1988).

154. *Sefton Holdings*, [1988] 14 E.G. 58, 20 H.L.R. 124; [1988] 1 E.G.L.R. 99; [1988] 18 Fam. 164; [1988] 2 F.L.R. 109.

special circumstances, British courts recognize four types of relationships in determining succession rights to rent-regulated housing. Children, spouses, one person acting in loco parentis to another, and unmarried couples of the opposite sex who meet a test of permanence and stability, are the current relationships that meet the definition of family. The 1988 Act's impact is unclear. However, given its narrow language and strict residency requirement, it appears that diverse-relationship families will not be protected under its provisions.

#### IV. UNITED STATE STATUTORY AND CASE LAW

##### A. *Statutory Law*

##### 1. The Growth of Rent Control

Historically, rent control regulations in the United States have been imposed in times of war, or immediately thereafter, in response to emergency housing shortages.<sup>155</sup> In 1970, however, the federal government passed the Economic Stabilization Act<sup>156</sup> as a temporary measure to stabilize rents and to prevent oppressive rent increases during a time of inflation.<sup>157</sup> The Economic Stabilization Act also altered the prerequisite of an emergency for rent control legislation to include economic need.<sup>158</sup> Thus, inflation became the major force behind the passage of rent con-

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155. The housing shortage after World War I caused the creation of rent controls in the District of Columbia and some other states. See *The Food Control and the District of Columbia Rents Act*, Pub. L. No. 66-63, §§ 101-122, 41 Stat. 297, 298 (1919) (extended and amended 1922 and 1924; expired 1925); Act of April 1, 1920, chs. 136-39, 1920 N.Y. Laws 228-32 (1920) (expired 1922). During World War II, Congress imposed rent controls in various parts of the country in response to the wartime housing shortage. See *Emergency Price Control Act of 1942*, Pub. L. No. 77-42, 56 Stat. 23 (1942) (expired 1947). Federal regulation continued under the *Housing and Rent Act of 1947*. See 61 Stat. 193, 62 Stat. 83, 63 Stat. 18, 64 Stat. 255, 65 Stat. 110 (1951). Congress authorized federal rent controls in some areas until 1951; however, although these federal regulations were totally eliminated in 1951, state and local governments frequently replaced them with their own controls. See also Note, *Rent Control and Landlord's Property Rights: The Reasonable Return Doctrine Revived*, 33 *RUTGERS L. REV.* 165, 168 (1980); see also *infra* notes 171-72 and accompanying text.

156. Pub. L. No. 91-379, §§ 201-06, 84 Stat. 799 (1970) (expired 1974).

157. See Pub. L. No. 91-379, § 202, 84 Stat. 799-800 (1970) (expired 1974). The Economic Stabilization Act was part of the national wage and price controls imposed by President Richard Nixon. Katz, *Rent Lids Have Been Vexing Ever Since 1919*, 68 *A.B.A. J.* 903 (1982).

158. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 *CORNELL L. REV.* 517, 527-28 (Mar. 1984) [hereinafter Rabin].



trol laws.<sup>159</sup>

In anticipation of the expiration of the Economic Stabilization Act, several states passed their own rent control laws during the late 1970s.<sup>160</sup> This was the beginning of two decades of extensive legislation regulating residential tenancies and broadening the rights of tenants.<sup>161</sup> These recent rent control laws sharply limit rent increases.<sup>162</sup> The needs of the elderly, the poor, and the handicapped were also taken into consideration.<sup>163</sup> Rent control regulations usually allow only for rent increases of a specified percentage of the previously existing rent; prevent evictions without good cause; and sometimes allow members of the tenant's family to gain entitlement to the dwelling upon the tenant's death or departure as a statutory tenant.<sup>164</sup> The Supreme Court has traditionally upheld the constitutionality of rent control regulations.<sup>165</sup>

An estimated 200 communities currently have rent control laws.<sup>166</sup> The following states all have some form of rent control: California, Connecticut, Massachusetts, New Jersey, and New

159. Rabin, *supra* note 158, at 520, 527-29 nn. 37, 44.

160. Rabin, *supra* note 158, at 527.

161. C. MOYNIHAN, AN INTRODUCTION TO THE LAW OF REAL PROPERTY 76-78 (2d ed. 1988) [hereinafter C. MOYNIHAN]. Much of this legislation concerns warranties of habitability in residential leases. *See also* Rabin, *supra* note 158, at 521-22.

162. *See generally* Rabin, *supra* note 158, at 521.

163. P. MARTIN, THE ILL-HOUSED: CASES AND MATERIALS ON TENANT'S RIGHTS IN PRIVATE AND PUBLIC HOUSING 1018, 1021 (1971) [hereinafter P. MARTIN]; *see also infra* note 165.

164. A statutory tenancy is terminable at will by the tenant, but it is not terminable at will by the landlord. It is only terminable by the landlord under limited circumstances. A tenant occupying premises subject to rent control gives him a more extensive estate than under common law rules. C. MOYNIHAN, *supra* note 161, at 71.

165. The first challenge to the constitutionality of rent control regulations was in 1921 when the Supreme Court ruled in favor of a Washington tenant who stated that he was entitled to stay in his apartment as long as he paid his rent. *Block v. Hirsch*, 256 U.S. 135 (1921). Rent control laws have consistently withstood attacks against their constitutionality. *See, e.g., Bowles v. Willingham*, 321 U.S. 503 (1944) (upholding power to fix rents pursuant to Emergency Price Controls Act); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948). These decisions, however, were usually based on the need for the local governments to fix rent increases in times of emergency housing shortages. The need for an emergency to sustain rent control regulations is no longer necessary. Rent control laws were recently upheld in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). Chief Justice Rehnquist found that states have a broad power to regulate housing conditions in general and landlord-tenant relationships in particular, and that there were other legitimate purposes of rent control besides the elimination of excessive rents caused by housing shortages. The San Jose rent-control ordinance took into consideration such factors as "hardship to a tenant" when determining rent increases; this was found to be a legitimate purpose. *Id.* at 9-10.

166. Rabin, *supra* note 158, at 520, 527.

York.<sup>167</sup> While many urban areas passed regulations during times of housing crises,<sup>168</sup> and many areas enacted controls in the late 1970s,<sup>169</sup> New York State has stood alone in having a comprehensive program of rent control for over four decades.<sup>170</sup>

## 2. New York State's Rent Control Laws

Before the expiration of the federal rent control legislation after World War II, New York State perceived a continuing housing shortage and passed its own rent control plan, which was fashioned after the federal law.<sup>171</sup> The Emergency Housing Rent Control Law of 1946<sup>172</sup> resulted in the promulgation of succeeding housing rent regulations. These controls ended in 1962, but at that time New York City enacted its own rent control law (Rent Control).<sup>173</sup> The city placed more than one million apartments under city rent control. Concern for the plight of low-in-

167. In California, Los Angeles, San Francisco, Berkeley, Santa Monica, and about 20 other cities have rent control laws. The state allows municipalities great leeway in establishing such controls. The city of Hartford and approximately 10 other cities in Connecticut have a "mild form [of rent control] that comes into play only if tenants complain about rents." Boston, Brookline, and Cambridge, Massachusetts all went to the legislature and asked that regulations be enacted. Frank, *Learn the Rules: Rent Control May Spread*, 71 A.B.A. J. 22 (1985). Rent-control laws are especially popular in New Jersey where almost 200 communities are estimated to have some form of rent control, and the state allows the local governing body to institute such controls themselves. Katz, *Presidential Panel Calls for Ban on Rent Control*, 68 A.B.A. J. 903 (1982). The states of Washington, Colorado, and Arizona ban rent control. *Id.* In New York State, New York City and the counties of Westchester, Rockland, and Nassau all have rent-control regulations. Indeed, New York State has had rent control for over four decades. See *infra* notes 171-72 and accompanying text.

168. P. MARTIN, *supra* note 163, at 1018.

169. See generally Rabin, *supra* note 158, at 527.

170. P. MARTIN, *supra* note 163, at 1018.

171. New York State rent-control laws cover apartments built before 1947 that have been occupied by the same tenant since at least 1971. These rent guidelines affect about 167,000 apartments, most of them in New York City. They limit the rent increases landlords can charge in apartments with long-term tenants. Since state law says that family members can continue to live in a rent-controlled apartment after a tenant dies, the meaning of the word family becomes crucial because it may represent a savings of hundreds of dollars a month. N.Y. Times, Nov. 9, 1989, at B2, cols. 1-2; L.A. Times, July 7, 1989, at 24, col. 6.

172. N.Y. [Emergency Housing Rent Control Law] §§ 8581-97 (McKinney 1974) (L. 1946, ch. 274 as amended by L. 1947, ch. 704; L. 1948, ch. 678; L. 1949, ch. 591). This law has been frequently amended and is still in force outside of New York City.

173. P. MARTIN, *supra* note 163, at 1019-20. N.Y. [New York City Rent and Rehabilitation Law] §§ Y51-1.0-18.0 (McKinney 1974) (1962 Local Law No. 20 as recodified by L. 1985, ch. 907, § 1), (current version at [New York City Rent Control] §§ 26-401-26-415 (McKinney 1987)).

come tenants can be discerned in these laws.<sup>174</sup> New construction and high-rent housing were exempted from the regulations.<sup>175</sup> Under Rent Control laws, neither the surviving spouse of the deceased tenant, nor some other member of the deceased tenant's family who was living with the tenant at the time of death, can be evicted.<sup>176</sup> The precise language regarding family members is "some other member of the deceased tenant's family."<sup>177</sup> Family is defined as a "household including not only the servants but also the head of the household and all persons in it related . . . by blood or marriage."<sup>178</sup>

It was assumed in 1962 that further rent controls would not be needed, and indeed, decontrol of regulations did occur.<sup>179</sup> By 1968, however, New York City faced another housing shortage and responded to this new crisis by enacting the Rent Stabilization Act of 1968 (Rent Stabilization Act).<sup>180</sup> The buildings effected included those not already under rent control, and more and higher rent increases were tolerated under these new regulations than under the previous Rent Control law.<sup>181</sup> It was clearly contemplated by the legislature that rent control would eventually end as rent-controlled tenancies terminated and became subject to rent stabilization.<sup>182</sup> Since the Rent Stabilization Act required landlords to grant a one or two year lease to the tenant but failed to define tenant anywhere in the statute,<sup>183</sup> succession to the tenancy once the original tenant died or vacated the

174. P. MARTIN, *supra* note 163, at 1020.

175. N.Y. [New York City Rent and Rehabilitation Law] § YY51-3.0(e)(2) (McKinney 1974), (current version at [New York City Rent Stabilization] § 26-504 (McKinney 1987)).

176. N.Y. [New York City Rent and Eviction Regulations] § 56(d) (McKinney 1974), (current version at [Rent and Eviction Regulations — New York City] § 2204.6(d) (McKinney 1987)).

177. *Id.*

178. *Bistany v. Williams*, 83 Misc.2d 228, 229, 372 N.Y.S.2d 6, 7 (N.Y. City Ct. 1975) (citing Webster's Third New Int'l Unabridged Dictionary 821 (1961)).

179. P. MARTIN, *supra* note 163, at 1018-19.

180. N.Y. [New York City Rent Stabilization Law] §§ YY51-1.0-8.0 (McKinney 1983) (1969 Local Law No. 16 as amended by Local Law 1974, No. 1 and recodified as L. 1985, ch. 907, § 1), (current version at §§ 26-501-26-520 (McKinney 1987)).

181. N.Y. [New York City Rent Stabilization Law] § YY51-5.0(b)(3) (McKinney 1983), (current version at § 26-510(b)(3) (McKinney 1987)).

182. *See* N.Y. [New York City Rent and Rehabilitation Law] §§ Y51-1.0-18.0 (McKinney 1974), (current version at [New York City Rent Control] §§ 26-401-26-415 (McKinney 1987)).

183. N.Y. [New York City Rent Stabilization Law] § YY51-6.0(c)(4) (McKinney 1983), (current version at § 26-511(c)(4) (McKinney 1987)).

apartment remained questionable.

Six weeks after a potentially devastating Court of Appeals decision, which apparently would allow for the eviction of members of a tenant's family if their names were not on the lease,<sup>184</sup> the Emergency Operational Bulletin (Bulletin) was enacted on December 11, 1985.<sup>185</sup> Its purpose was to authorize new protections against evictions for tenants of rent-stabilized apartments.<sup>186</sup> Certain members of the tenant's family defined as "immediate family members" received preferential protection. Family members who had previously received protection, like siblings, grandparents, grandchildren, and in-laws were not considered immediate family members.<sup>187</sup> Therefore, the Bulletin clearly limited its protection to members of a traditional nuclear family rather than an extended family. The rights of succession were also severely limited by the Bulletin's stringent residency requirement. Special provisions were made, however, for the elderly and the disabled.<sup>188</sup> Nevertheless, in 1987, an appellate court found these emergency provisions to be unauthorized.<sup>189</sup>

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184. *Sullivan v. Brevard Associates*, 66 N.Y.2d 489, 488 N.E.2d 1208, 498 N.Y.S.2d 96 (1985). See *infra* notes 221-24 and accompanying text.

185. Division of Housing and Community Renewal, Emergency Operational Bulletin 85-1 (Emergency Operational Bulletin), December 10, 1985.

186. In rent-stabilized housing situations, the "owner must offer a renewal lease to an immediate family member . . . if that member has continuously resided in the apartment and maintained it as a primary residence since either (1) the tenancy began, or, (2) since the beginning of the relationship as a member of the immediate family." Note, *Succession Rights*, *supra* note 4, at 228-29. Immediate family member is defined as a husband, wife, son, daughter, stepson, stepdaughter, father, or mother. *Id.* at 229.

A landlord must offer a right of first refusal to a new lease to non-immediate family members such as a brother, sister, nephew, niece, uncle, aunt, grandchild, grandparent, stepparent, father-in-law, mother-in-law, son-in-law, and daughter-in-law if that person has lived continuously in the apartment and maintained it as a primary residence since the tenancy began or since the beginning of the relationship as a member of the tenant's non-immediate family. *Id.* (citing the provisions of the Emergency Operational Bulletin). For a complete discussion of the provisions of the Emergency Operational Bulletin and its impact, see Note, *Succession Rights*, *supra* note 4, at 227-30.

187. Note, *Succession Rights*, *supra* note 4, at 223 n.50.

188. The Emergency Operational Bulletin provides for instances when a family member moves into the apartment of an elderly or disabled relative, or when an elderly or disabled relative moves in with a family member. The landlord must offer a renewal lease to the remaining relative, or conversely to the remaining elderly or disabled relative. It should be noted, however, that the special provisions only apply if the two relatives are immediate family members. See Note, *Succession Rights*, *supra* note 4, at 229.

189. *Two Associates v. Brown*, 131 Misc.2d 986, 502 N.Y.S.2d 604 (Sup. Ct. 1986), *rev'd on other grounds*, 127 A.D.2d 173, 513 N.Y.S.2d 966 (1st Dep't 1987) (trial court found that homosexual partner of a deceased tenant was a family member for purposes of a renewal lease; appellate court found that Emergency Operational Bulletin was unauthorized).

Two proposed rent stabilization codes were drafted after the Bulletin which substantially changed the rent-stabilization law.<sup>190</sup> The second revised code was implemented; the differentiation between immediate and nonimmediate family members was eliminated and combined into a category of family members.<sup>191</sup> If the tenant vacates, a family member<sup>192</sup> has the right to a renewal lease if the apartment is the primary residence since the beginning of the tenancy or the beginning of the relationship.<sup>193</sup> If the tenant dies, family members have the right to a renewal lease if the family member has lived there for at least two years prior to the death of the tenant.<sup>194</sup> These regulations use blood relationships as well as marital relationships as the primary criteria for succession to rent-regulated apartments. In the wake of a recent New York Court of Appeals decision, which found a homosexual couple to fall under the definition of family within the Rent Control laws,<sup>195</sup> New York State housing officials expanded the definition of family on November 8, 1989 to include nontraditional family members for the more than one million rent-stabilized apartments statewide. The new proposed regulations specify that people unrelated to a tenant by blood or marriage can remain in a rent-stabilized apartment if they meet two primary requirements: one, living with the tenant for at least two years (one year for the elderly and the disabled); and two, showing emotional and financial commitment and interdependence between themselves and the person on the lease.<sup>196</sup> On

190. See Note, *Succession Rights*, *supra* note 4, at 222 n.47.

191. N.Y. [Rent Stabilization Code] §§ 2523.5(b)(1) & (b)(2) (McKinney 1987).

192. Family member is defined as: husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, and daughter-in-law. N.Y. [Rent Stabilization Code] § 2520.6(o) (McKinney 1987).

193. N.Y. [Rent Stabilization Code] § 2523.5(b)(1) (McKinney 1987).

194. N.Y. [Rent Stabilization Code] § 2523.5(b)(2) (McKinney 1987).

195. *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989). See *infra* notes 227-41 and accompanying text.

196. The Division of Housing and Community Renewal has proposed to amend section 2520.6 by adding the following provisions:

(n) Immediate Family. A husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson or granddaughter of the owner [or the tenant].

(o) Family Member.

(1) A husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-

November 9, 1989, however, New York City landlords brought a suit against the State Agency and were able to obtain a temporary restraining order against the new rules.<sup>197</sup>

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law, or daughter-in-law of the tenant or permanent tenant; or

(2) Any other person residing with the tenant or permanent tenant in the housing accommodation as a primary or principal residence, respectively, who can prove emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed, may include, without limitation, such factors as listed below. In no event would evidence of a sexual relationship between such persons be required or considered.

(i) longevity of the relationship;

(ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;

(iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;

(iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;

(v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;

(vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

(vii) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally-committed relationship.

Division of Housing and Community Renewal, Emergency Proposed Permanent Amendments to the New York State Rent Regulations On Succession Rights of Family Members Residing with Rent Stabilized and Rent Controlled Tenants, November 8, 1989.

See also N.Y. Times, Nov. 9, 1989, at B2, col. 1. These emergency regulations took effect immediately to block landlords from evicting unrelated people. "We must assure that nontraditional 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," stated Richard L. Higgins, the Commissioner of the New York State Division of Housing and Community Renewal. *Id.* at B1, cols. 2-3. This change in regulations, following so soon after the *Braschi* decision means that New York state is looking at the reality of family life in making its decision. *Id.* at B2, col. 1.

197. Rent Stabilization Ass'n v. Higgins, No. \_\_\_\_ (N.Y. Sup. Ct., 1st Dep't, filed Nov. 9, 1989). At this time, the case is still pending. Even if the new regulations are

## B. Case Law

### 1. Members of the Family

The earliest cases in New York State regarding succession rights to tenancies were brought under the Emergency Housing Rent Control Law.<sup>198</sup> These cases typically involved a landlord's desire to regain possession of an apartment and decontrol it after the tenant had died or departed.<sup>199</sup> The cases also began to define exactly who are members of the tenant's family.

In *Matter of Waitzman v. McGoldrick*,<sup>200</sup> the court held that since the original tenant's in-laws were members of the family unit at the time the landlord purchased the apartment, they were entitled to protection from eviction.<sup>201</sup> The court stated that these family members were protected despite the departure of the original tenant.<sup>202</sup> Other cases found that an aunt and a nephew living with the tenant were members of the family,<sup>203</sup> and even that a maid who "slept in sporadically" was part of a family unit.<sup>204</sup>

These early cases established that blood relatives and people related by marriage to the tenant were members of the tenant's family, but required the family member to be able to offer

enacted, there is still a stringent residency requirement, and a test to pass for those who wish to inherit an apartment. A lengthy residency requirement may serve as a barrier to succeeding to rent-regulated housing, especially when the tenant is ill. See *West 22nd Street Ass'n v. Thomas*, 144 Misc.2d 292, 547 N.Y.S.2d 517 (1st Dep't 1989).

New York State Governor Mario Cuomo has announced that he will seek legislation to allow homosexuals to inherit their partners' rent-controlled apartments. U.P. Int'l, Jan. 3, 1990 (NEXIS).

198. N.Y. [Emergency Housing Rent Control Law] §§ 8581-97 (McKinney 1974); N.Y. [State Rent and Evictions Regulations] §§ 1-117 (McKinney 1974), (current version at [Rent and Evictions Regulations] §§ 2100-2109 (McKinney 1987)).

199. After the rent controlled tenancy ends, the landlord is allowed to return the apartment to the open market and charge a free market rate for it. See Note, *Succession Rights*, *supra* note 4, at 217.

200. 20 Misc.2d 1085, 121 N.Y.S.2d 515 (Sup. Ct. 1953).

201. *Id.*; 121 N.Y.S.2d at 515. Here, the members of the family unit were the tenant's mother-in-law and sister-in-law. See also *Bierer v. Abrams*, 20 Misc.2d 1085, 201 N.Y.S.2d 110 (1956) (mother and father of tenant entitled to possession of apartment after tenant had left).

202. *Waitzman*, 20 Misc.2d at 1086, 121 N.Y.S.2d at 516 (citing *Goodman v. Ross*, 274 A.D. 811, 79 N.Y.S.2d 791 (2d Dep't 1948)). In *Goodman*, other occupants (case doesn't specify the relationship to tenant) were found to be entitled to "possession, use and occupancy" of apartment despite the fact that original tenant had moved. *Id.*; 121 N.Y.S.2d at 516.

203. *Osborne v. Weaver*, 7 A.D.2d 653, 180 N.Y.S.2d 149, 150 (2d Dep't 1958).

204. *Lion Brewery of New York City v. Weaver*, 8 A.D.2d 173, 175, 186 N.Y.S.2d 912, 914 (1st Dep't 1959).

proof of the relationship.<sup>205</sup> Surviving spouses were found to have succession rights, but not if they were not living with the tenant at the time of death and had established an independent residence elsewhere.<sup>206</sup>

The court in *Cesbron v. Reardon*<sup>207</sup> believed that the member of the family had to be in "lineal descent," and found that "aunts, along with the whole avuncular class of nieces and nephews" were outside the definition of immediate family.<sup>208</sup> In a later case, *Bistany v. Williams*,<sup>209</sup> however, the court ruled that *Cesbron* was in error, and that the rent regulations spoke only of "'some other members of the deceased tenant's family,' not 'immediate family.'"<sup>210</sup> The *Bistany* court found that a nephew who continuously resided with his uncle since the age of six months was a statutory tenant.<sup>211</sup>

Indeed, the New York courts appeared to be taking a practical approach to cases involving succession rights. In *Herzog v. Joy*<sup>212</sup> a sister who moved into her older sister's apartment and who remained in residence after her sister, the original tenant, moved out could not be evicted. The court found that the test of tenancy under the rent control laws was not whether the apartment was occupied by the tenant of record, but rather, whether it is occupied by the person entitled to possession.<sup>213</sup> In *Herzog* the original tenant had moved out, but because the remaining sister had been residing in the apartment before her departure,

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205. *Jantzen v. Weaver*, 10 A.D.2d 75, 77, 197 N.Y.S.2d 685, 688 (1st Dep't 1960) (a woman who claimed to be the departed tenant's niece was unable to offer any proof of the relationship, and gave conflicting statements regarding paying rent, was found not to be a family member).

206. *Boman Realty Corp. v. Trice*, 205 Misc. 588, 131 N.Y.S.2d 771 (1954) (husband who was not living with his wife and who had established another residence was found not to be a statutory tenant in wife's residence).

207. 73 Misc.2d 715, 343 N.Y.S.2d 163 (1973).

208. *Cesbron*, 73 Misc.2d at 716, 343 N.Y.S.2d at 164-65 (citing *Samuel Rubin & Son, Inc., v. Sackler*, 190 Misc. 1064, 76 N.Y.S.2d 286, 287) (an immediate member of the deceased tenant's family did not become a squatter, but was entitled to possession of apartment). *Cesbron* relied on the language of *Sackler* which protected an immediate family member of the tenant's family, barring the "protective mantle" of the rent control law only to those of lineal descent. *Id.* at 716, 343 N.Y.S.2d at 164-65. In *Cesbron*, a nephew of the tenant was not allowed to become a statutory tenant despite living with his aunt for three years. *Id.*

209. 83 Misc.2d 228, 372 N.Y.S.2d 6 (N.Y. City Ct. 1975).

210. *Id.* at 228-29, 372 N.Y.S.2d at 6-7.

211. *Id.* at 229, 372 N.Y.S.2d at 7.

212. 74 A.D.2d 372, 428 N.Y.S.2d 1 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 821, 422 N.E.2d 582, 439 N.Y.S.2d 922 (1981).

213. *Id.* at 375, 428 N.Y.S.2d at 4.



and because she was a close family member, the court found her to be entitled to occupancy.<sup>214</sup> The court noted that more distant relatives than siblings had been found to be members of the tenant's family.<sup>215</sup>

The lack of definition of members of the family allowed courts to interpret the statute fairly loosely. Within that definition, however, courts appeared to be recognizing blood or marital relationships that had some degree of stability and permanence. Yet, after the passage of the rent stabilization laws, a shift occurred.

## 2. Member of the Immediate Family

One of the first succession cases under the Rent Stabilization Act requested a definition of the term "members of the immediate family of tenant." In *Tagert v. 211 East 70th Street Co.*,<sup>216</sup> a tenant wanted permission for his son and his son's family to move into his apartment for the remainder of his lease. He asked that his son be granted a renewal lease on either the grounds that he was a subtenant or a "member of the immediate family of tenant."<sup>217</sup> The New York Court of Appeals held that while the lease provided for concurrent occupancy by the tenant and his family members, this case did not fall under the provision. Since the tenant had not occupied the apartment at the same time as his son, the court found that the son had no right to the apartment.<sup>218</sup> The court did note, however, that family members who actually lived with a tenant would be able to continue to occupy the apartment for the remainder of the lease upon the tenant's death or departure.<sup>219</sup> The court added that family members could not succeed to a tenancy by moving into an apartment upon the tenant's death or departure, and most significantly, that a landlord is not required to renew a lease when an apartment is successively passed to members of the

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214. *Id.* at 374-76, 428 N.Y.S.2d at 3-4.

215. *Id.* at 376, 428 N.Y.S.2d at 3. See *supra* notes 201-03 and accompanying text.

216. 63 N.Y.2d 818, 472 N.E.2d 22, 482 N.Y.S.2d 246 (1984).

217. *Id.* at 820, 472 N.E.2d at 23, 482 N.Y.S. at 247. Initially, the Rent Stabilization Act did not define its terms, therefore an "informal rule of thumb" for rent stabilized apartments [arose]: if an immediate family member lived with the tenant of record for at least six months . . . the relative was entitled to a renewal lease." Note, *Succession Rights*, *supra* note 4, at 223 n.50.

218. *Id.* at 821-22, 472 N.E.2d at 23-24, 482 N.Y.S.2d at 248.

219. *Id.* at 821, 472 N.E.2d at 23-24, 482 N.Y.S.2d at 248.

tenant's family.<sup>220</sup>

In 1985 *Sullivan v. Brevard Associates*<sup>221</sup> directly challenged the issue of whether a landlord had to offer a renewal lease to a relative who had lived with the tenant and who had remained in the apartment after the departure of the original tenant. In *Sullivan* a sister asked for validation of her tenancy after the original tenant had established tenancy elsewhere.<sup>222</sup> Since the lease had expired by the time the case reached the Court of Appeals, however, the remaining issue was whether the landlord must offer a renewal lease. The court held that under the Rent Stabilization Act, a landlord must offer a renewal lease only to a tenant of record and does not have to offer a renewal lease to a relative of a tenant who occupies the apartment with the tenant.<sup>223</sup> The court determined that the rent stabilization legislation deliberately omitted a definition of tenant because the law only meant the person named on the lease to be considered the tenant. The court did not discuss whether a sister could be defined as an immediate family member and entitled to succession.<sup>224</sup>

This decision was shocking because of its potentially devastating results. Widows and children of deceased tenants, as well as unmarried couples or homosexual couples who had lived together over a long period of time, discovered that they had no succession rights to their apartment. It was shortly after this decision that the Bulletin and other legislation was passed in order to overcome this decision and to provide for succession by various family members of the tenant.<sup>225</sup> The current regulations use blood or marital relationships as criteria for succession, but give little protection to unmarried homosexual or heterosexual couples as well as to more unusual family configurations.<sup>226</sup>

### 3. Recent Trends: The Reality of Family Life

The most recent decision by the New York Court of Appeals concerning succession rights to rent-controlled apartments

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220. *Id.*, 472 N.E.2d at 23-24, 482 N.Y.S.2d at 248.

221. 66 N.Y.2d 489, 488 N.E.2d 1208, 498 N.Y.S.2d 96 (N.Y. 1985).

222. *Id.* at 491, 488 N.E.2d at 1208-09, 498 N.Y.S.2d at 97.

223. *Id.* at 490-91, 488 N.E.2d at 1208, 498 N.Y.S.2d at 96.

224. *Id.* at 492, 488 N.E.2d at 1209, 498 N.Y.S.2d at 97.

225. See *supra* notes 184-86, 191 and accompanying text.

226. See *supra* notes 191-93 and accompanying text.

is *Braschi v. Stahl Associates Company*.<sup>227</sup> This decision called for a more realistic view of the family, one that does not "rest on fictitious legal distinctions or genetic history, but instead [finds] its foundations in the reality of family life."<sup>228</sup> *Braschi* held that a homosexual couple who had lived together for a decade could be considered a family under New York City's rent control regulations.<sup>229</sup> The court never mentioned sexual orientation or marital status in its language, choosing to focus instead on the quality of the relationship between the couple in reaching its decision.<sup>230</sup> It held that unmarried lifetime partners of tenants should be included in the term family as used in the rent control laws.<sup>231</sup>

In *Braschi* one of the partners of a homosexual couple whose mate had died sought protection from eviction from their rent-controlled apartment. He claimed succession rights as a member of the deceased tenant's family who had been living with the tenant.<sup>232</sup> The Court of Appeals stated that the resolution of this problem required a determination of the meaning of the word family.<sup>233</sup> Previously, the New York Supreme Court had examined the nature of *Braschi*'s relationship with his deceased partner and found that a ten-year interdependent rela-

227. 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

228. *Id.* at 211, 543 N.E.2d at 53, 544 N.Y.S.2d at 788.

229. *Id.* at 201, 543 N.E.2d at 49, 544 N.Y.S.2d at 784.

230. See generally *Braschi*, 74 N.Y.2d at 201, 543 N.E.2d at 49, 544 N.Y.S.2d at 784. Nonetheless, this decision is "the first time any top state court in the nation has recognized a gay couple to be the legal equivalent of a family." *L.A. Times*, July 7, 1989, at 24, col. 6.

It is predicted that the next decade will bring a change in the legal rights of homosexual couples. Paula L. Ettelbrick, Legal Director of Lambda Legal Defense and Education Fund, Remarks at Brooklyn Law School Forum on Domestic Partnership Legislation and the Changing Definition of Family (Nov. 30, 1989). Denmark has already allowed homosexual couples to be legally joined together in "registered partnerships." These partnerships give these couples most of the same rights that married, heterosexual couples enjoy, with the major exception of not having the right to adopt a child. *N.Y. Times*, Oct. 2, 1989, at A8, col. 4. It seems that allowing homosexuals to marry will eventually happen. However, Paula Ettelbrick argues that this goal is flawed. By legalizing homosexual marriages, she believes that the law is forcing homosexuals to accept traditional heterosexual institutions. Ettelbrick thinks the correct aim should be a tolerance for divergent life-styles. Isaacson, *supra* note 8, at 102, col. 3.

231. *Braschi*, 74 N.Y.2d at 201, 543 N.E.2d at 49, 544 N.Y.S.2d at 784. Before *Braschi*, lower courts implied that the rent control provisions protected unmarried homosexual and heterosexual couples. See *Gelman v. Castaneda*, N.Y.L.J., Oct. 22, 1986, at 13, col. 1 (N.Y. Civ. Ct.); *Zimmerman v. Burton*, 107 Misc.2d 401, 434 N.Y.S.2d 127 (N.Y. Civ. Ct. 1980).

232. *Braschi*, 74 N.Y.2d at 206-07, 543 N.E.2d at 50-51, 544 N.Y.S.2d at 785-86.

233. *Id.* at 206, 543 N.E.2d at 50, 544 N.Y.S.2d at 785.

tionship met "any definitional criteria of the term 'family'."<sup>234</sup> The New York Supreme Court's assessment of the relationship included: the exclusivity and longevity of the relationship; the level of emotional and financial commitment; the manner in which the couple handled their everyday life; the way they held themselves out to society; and the reliance that they had on each other.<sup>235</sup> The appellate division reversed this decision, stating that the rent control law only protects family members within traditional, legally recognized familial relationships.<sup>236</sup> A homosexual couple is not given protection by the law, so the court held that *Braschi* could not be protected by the rent control law's noneviction provision.<sup>237</sup>

Although *Braschi* lists the characteristics a relationship must possess to qualify for legal consideration as a family, it cautions that the "totality of the relationship" would control.<sup>238</sup> It is a narrow ruling,<sup>239</sup> singularly concerned with New York City's rent control regulations, but *Braschi* is likely to be precedent setting because the language of the decision extends beyond the rights of a homosexual couple to encompass other diverse-relationship families.<sup>240</sup> Indeed, one case that followed on

234. *Id.*, 543 N.E.2d at 51, 544 N.Y.S.2d at 786.

235. *Id.* at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

236. *Braschi v. Stahl Associates Co.*, 143 A.D.2d 44, 45, 531 N.Y.S.2d 532 (1st Dep't 1988).

237. *Id.*

238. *Braschi*, 74 N.Y.2d at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

239. Indeed, just how narrow the *Braschi* decision is was shown in *Matter of Alison D. v. Virginia M.*, 155 A.D.2d 11, 552 N.Y.S.2d 331 (2d Dep't 1990). Here, a woman who had shared responsibility for child-rearing with her former lesbian partner had no legal visitation rights. In the dissent Justice Kooper argued that just as *Braschi* necessitated a re-examination of the definition of family, these circumstances compelled a re-examination of parent. *Id.*

240. N.Y. Times, July 7, 1989, at A1, col. 1. "As the definition of family is litigated across the country . . . courts are going to be looking for precedents and this case is going to be the landmark." *Id.* *Braschi* is being claimed by the gay community as a "ground-breaking victory for lesbians and gay men." N.Y. Times, July 7, 1989, at A1, col. 1. See also Newsday, July 7, 1989, at 26, col. 2.

Since the *Braschi* decision, New York courts have extended protection to diverse-relationship families living in rent-stabilized apartments. See *East 10th St. v. Estate of Goldstein*, 154 A.D.2d 142, 552 N.Y.S.2d 257 (1st Dep't 1990); *Park Holding Co. v. Power*, 554 N.Y.S.2d 861 (1st Dep't 1990). Protections were considered even more essential in rent-stabilized housing because the less restrictive provisions of the rent stabilization laws make it easier to evict tenants.

One court has even broadened the *Braschi* test; a homosexual couple that had maintained an exclusive relationship, but had not held themselves out to their respective families as a couple, were found to be a family. The court ruled that it would be "unfair and inappropriate" for a homosexual couple to "hold themselves out openly and notoriously

*Braschi's* heels cited *Braschi* in its determination that a mother and son who had lived as a family with the tenant of a rent controlled apartment, were found to be members of his family even though there had been neither marriage nor adoption.<sup>241</sup> It appears crucial, however, that the pending regulations<sup>242</sup> be enacted if diverse relationship families are to be protected.

## V. COMPARISON OF THE CURRENT LEGAL DEFINITIONS

The United States and Great Britain have always had disparate approaches to rent control. At this time, however, the United States and Great Britain appear to be in the process of reversing their respective stances towards rent-regulated housing. Indeed, they are actually adopting each other's position. Great Britain, which has a long legislative tradition of giving abundant rights to tenants, has recently enacted legislation that will eventually result in the elimination of rent control.<sup>243</sup> The succession rights to rent-regulated housing have been narrowed and restricted in line with this legislative change. Under this legislation, Great Britain will only allow a spouse, or the equivalent of a spouse, to inherit a statutory tenancy.<sup>244</sup>

The United States has had a history of leaving tenants' rights under the control of the states. With the notable exception of the jurisdiction of the state of New York, the remaining states have neglected landlord-tenant law.<sup>245</sup> In the last two decades, however, there has been a dramatic change in landlord-tenant legislation throughout the United States, which has given enormous rights to tenants.<sup>246</sup> Riding on this crest of change, the New York State courts have broadened the definition of family in succession rights to include a relationship that does not have the previously needed criteria of blood ties or marital ties.<sup>247</sup> New York State is also trying to enact legislation that would clearly give a person who is unrelated to a tenant by blood or

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to their own families [because] some segments of our society . . . look askance at gay and lesbian relationships." *Lerad Realty Co. v. Reynolds*, N.Y.L.J. (Aug. 29, 1990) at 22, cols. 5-6 (N.Y. Civ. Ct.).

241. *2-4 Realty Associates v. Pittman*, 137 Misc.2d 898, 523 N.Y.S.2d 7, *aff'd*, 547 N.Y.S.2d 515 (1st Dep't 1989) (the Civil Court's decision was cited in *Braschi*).

242. *See supra* notes 195-97 and accompanying text.

243. *See* Housing Act, 1988, ch. 50.

244. *See* Housing Act, 1988, ch. 50, sched. 4.

245. P. MARTIN, *supra* note 163, at 1018.

246. Rabin, *supra* note 158, at 527.

247. *See Braschi*, 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989).

marriage succession rights to rent-regulated housing.<sup>248</sup>

These changes in both countries are so recent that it is unclear what direction the law will eventually take. Great Britain has just enacted legislation that takes a dramatic step towards decontrol, but it should be remembered that the Rent Acts fluctuated in the past, bringing decontrolled housing back under rent control in times of economic hardship.<sup>249</sup> This new legislation clearly favors landlords, and it can be predicted that it will have a negative impact on tenants. The legislation does not seem to be aware of the fact that a majority of families are no longer nuclear;<sup>250</sup> there is no room for the recognition of diverse-relationship families within its provisions for succession to rent-regulated apartments.<sup>251</sup> Therefore, it appears that tenants who choose to live in unusual family configurations will be barred from inheriting their homes.

Before the 1988 Act was passed in Great Britain, the courts recognized four types of relationships as constituting a family. Historically, the categories of children, marital relationships, and someone acting in loco parentis to another were recognized as family members. A fourth category of unmarried cohabitantes of the opposite sex was added when the British courts realized that this form of relationship was socially acceptable. This last category was subjected to tests of stability and permanence, as well as an appearance of marriage,<sup>252</sup> in order to qualify as a family under succession rights.

It seems likely that unmarried couples will be subjected to a similar standard of permanence and appearance of marriage by the language of the 1988 Act, which states that succession will only be to a spouse or a person living as the tenant's spouse.<sup>253</sup> This language leaves possibilities for differing treatment for unmarried couples under the 1988 Act as it was applied in cases like *Helby*<sup>254</sup> and *Lopez*.<sup>255</sup> In *Helby*, although there had been a long-term mutually interdependent relationship, the court found this couple to fall outside of the definition of family because

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248. See *supra* note 196.

249. See *supra* notes 51-53.

250. See *supra* note 8.

251. See Housing Act, 1988, ch. 50, sched. 4.

252. See *Helby v. Rafferty*, [1979] 1 W.L.R. 13; [1978] 3 All E.R. 1016 (C.A.).

253. See Housing Act, 1988, ch. 50, sched. 4, para. 2.

254. See *Helby*, [1979] 1 W.L.R. 13; [1978] 3 All E.R. 1016.

255. See *Lopez*, [1987] 05 E.G. 57, 20 H.L.R. 120; [1988] 1 E.G.L.R. 98.

they had no plans to marry and did not hold themselves out to society as married. In *Lopez* the relationship was of a much shorter duration, but the court found that this couple was a family because they had had plans to marry. This preference can also be discerned in the language of the 1988 Act.

Homosexual couples are not recognized as families by the British courts.<sup>256</sup> It appears that homosexual couples will continue to be denied succession rights under the 1988 Act. Since spouses and cohabitants of the opposite sex are given statutory tenancies under the act, eliminating homosexual partners from this category seems to be against its intent. More unique relationships like those of *Joram Developments*<sup>257</sup> and *Sefton Holdings*<sup>258</sup> were also denied recognition as families by the courts, despite being permanent, stable, and mutually interdependent. Again, people involved in these types of relationships will be excluded from succeeding to a statutory tenancy, and it seems unlikely that these diverse-relationship families will even be able to obtain the lesser protection of an assured tenancy.<sup>259</sup>

One of the most dramatic changes<sup>260</sup> is the elimination of children from the category of those who can inherit a statutory tenancy. Children have traditionally been included by British courts as having primary rights to succession.<sup>261</sup> Under the new regulation, however, children can only inherit an assured tenancy as a member of the tenant's family. This change in the law will obviously cut off long-term tenancies and return housing to the open market quickly. Indeed, all the legislative changes regarding succession rights have this purpose. Nevertheless, it is notable that the lower courts in Great Britain have recognized people unrelated by blood or marriage as having rights to inherit a tenancy.<sup>262</sup> This is an encouraging sign; in New York State the lower courts were also the first to recognize diverse-family relationships.<sup>263</sup>

In contrast to Great Britain's legislation, New York State appears to be heading towards a very liberal interpretation of

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256. See *Harrogate*, [1986] 16 Fam. 359.

257. See *Joram Developments Ltd. v. Sharrott*, [1979] 1 W.L.R. 1; [1975] 2 All E.R. 12; [1979] 1 W.L.R. 928; [1979] 2 All E.R. 1084 (H.L.(E.)).

258. See *Sefton Holdings Ltd. v. Cairns*, [1988] 18 Fam. 164.

259. See Housing Act, 1988, ch. 50, § 39 & sched. 4; see also *supra* notes 77-79.

260. See *supra* note 76 and accompanying text.

261. See *supra* note 92.

262. See *Sefton Holdings*, [1988] 18 Fam. 164.

263. See *supra* notes 234-35.

the definition of family. The recent *Braschi* decision as well as the pending legislation regarding succession rights are clear indicators that New York State is recognizing that most families are not nuclear ones. In order to insure that people who are entitled to rent-regulated housing are able to inherit, the courts and legislature have expanded the definition of family to include those who are not related by blood or marriage.<sup>264</sup> Since New York is only one jurisdiction in the United States, it remains unclear how the other states with rent regulations will define family, and whether they will expand the traditional definition.<sup>265</sup> The general trend in landlord-tenant law, however, is towards more rights for tenants.<sup>266</sup> Therefore, it seems likely that the succeeding legislation in other jurisdictions may follow New York's lead.

## VI. RECOMMENDATIONS

Great Britain has taken a dramatic step in diminishing tenants' rights with the 1988 Act. This move towards eliminating rent control and the severe restrictions on succession rights to statutory tenancies will make decontrol possible.<sup>267</sup> For some time, however, there will be people who are entitled to statutory tenancies. Since the underlying social purpose of rent regulations was to prevent evictions of those who deserved to inherit the dwelling, it seems only fair that this category of inheritors should not be limited only to spouses and cohabitees of the opposite sex. Those who have established a family, even if it is not one that is widely recognized, should be able to pass on a tenancy to those with whom they have established a long-term devoted relationship. This should include homosexual couples, as well as platonic friendships and roommates if they are mutually

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264. See *supra* notes 39-42 and accompanying text.

265. Cases that discuss definition of family and may indicate trends in United States law are zoning cases which have expanded the definition of family. In *Moore*, the Supreme Court invalidated a city ordinance which barred extended families from living in a single unit and found that the scope of the privacy right in family matters extended to families comprised of close relatives who lived together out of choice or necessity. 431 U.S. 505. See also *supra* note 9.

266. See *Nash v. City of Santa Monica*, 37 Cal.3d 97, 688 P.2d 894, 207 Cal. Rptr. 285 (1984) (landlord not allowed to destroy his rental housing).

267. The Housing Act 1988 has been described as another triumph for "Thatcherism" in that it brought about a change in landlord-tenant law that would have been unthinkable 10 years ago. See Lewis, *Looking Back Over Half a Decade*, 140 NEW L.J. 63, 64 (Jan. 19, 1990).



interdependent. The elderly population of Great Britain is rising; elderly friends who have decided to live together for companionship or economics should not be deterred by the threat of losing their homes.<sup>268</sup>

Since the majority of families in Great Britain do not fall within the definition of the nuclear family,<sup>269</sup> basic principles of fairness dictate that Parliament should acknowledge families that lack the distinguishing characteristics of the traditional nuclear one and grant these couples succession rights to tenancies. Homosexual couples should also be recognized by the legislature as families. One possible solution is to allow homosexual couples the right to a domestic partnership.<sup>270</sup> With this type of legal recognition, a homosexual couple would meet the language of the statute. Domestic partnership laws could also be extended to include other diverse family relationships. This would also eliminate litigation over various and inconsistent definitions of family in the court system.

Although the New York State courts have struck a powerful blow for the rights of diverse-relationship families,<sup>271</sup> this is only a tiny step forward. The response to the *Braschi* decision by the legislature has been positive. Legislation is currently pending that would clearly allow unrelated people to succeed to tenancies. Also in the wake of *Braschi*, former New York City Mayor Edward Koch signed an order officially recognizing the domestic partnerships of city employees.<sup>272</sup> New York Governor Mario

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268. See *South Northamptonshire*, [1987] 1 W.L.R. 1433; [1987] 3 All E.R. 831 (C.A.), *petition allowed*, [1988] 1 W.L.R. 319 (H.L.(E.)). Here the court warned the elderly not to move into the homes of others because of the risk of giving up secure accommodation and finding themselves homeless if the tenant dies within a year of the move. *Id.* at 833. Elderly people might move for companionship or economic reasons and not be able to prove that they are a member of the family in order to preserve their homes. See *Bainham, South Northamptonshire District Council v. Power* (1987), 138 New L.J. 19 (Jan. 22, 1988).

269. See *supra* note 8 and accompanying text.

270. In this Note, domestic partnership means a relationship between two people who live together but are not legally married. This includes heterosexual couples as well as homosexual couples. Domestic partnerships enable unmarried couples to gain marital rights extended only to married couples. See *infra* note 272.

271. See *Braschi*, 74 N.Y.2d at 201, 543 N.E.2d at 49, 544 N.Y.S.2d at 784; see also *supra* notes 227-42 and accompanying text.

272. N.Y. Times, July 7, 1989, at A1, col. 1. This executive order gives city employees official recognition to domestic partnerships that have been established between two people (they must both be 18 years old and have lived together for at least one year). They will be entitled for bereavement leave in the event of the death of a domestic partner or the death of a child or a parent of a domestic partner. United Press Int'l, Aug.

Cuomo has announced his intention to sign a bill that would give homosexuals the right to succession to rent-regulated housing.<sup>273</sup> Although these changes reflect a sensitivity to the needs of diverse-relationship families, more changes could be enacted by state as well as federal legislatures. For example, couples who are in a domestic partnership could have benefits equal to those of married couples. Finally, homosexuals could be given the option of having a legal marriage.

## VII. CONCLUSION

In July 1989 New York State's Court of Appeals announced, in a controversial opinion, that the surviving partner of a homosexual couple had succession rights to their rent-regulated apartment.<sup>274</sup> The court also defined the partner's prior relationship as a family under the state's rent control laws.<sup>275</sup> This decision follows two decades of increased landlord-tenant legislation in the United States that dramatically favors tenants. Six months before the *Braschi* decision, Great Britain enacted wide-ranging new legislation that changed seventy years of rent regulations that favored tenants to regulations which enabled landlords to easily regain possession of dwellings as well as to charge increased rents. This legislation is the result of the British Government's stated desire to decontrol housing and to charge mar-

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7, 1989. Five other cities provide bereavement leave for domestic partners of municipal employees: Los Angeles; Madison, Wisconsin; San Francisco; Seattle; and Takoma Park, Maryland. Isaacson, *supra* note 8, at 102, col. 1.

Los Angeles, West Hollywood, Berkeley, and Santa Cruz all have passed domestic partnership ordinances which provide certificates authenticating relationships between heterosexual and homosexual couples who are living together. L.A. Times, July 26, 1989, at 7, col. 5. A similar ordinance in San Francisco was rejected in November 1989, after opposition from religious groups. Isaacson, *supra* note 8, at 101, col. 1. In November 1990 San Francisco voters approved an ordinance that would allow couples to register as domestic partners, opening up the possibility that nonmarried partners may be able to obtain marital and family benefits. The Bureau of Nat'l Affairs, Daily Labor Report, DLR No. 217, p. A-11 (Nov. 7, 1990).

The spread of AIDS has been only one impetus in the push among gay couples for medical coverage, bereavement-leave policies, pension rules, and hospitalization visitation rights. Since 30-40% of an employee's compensation comes from fringe benefits, gay couples are discriminated against because they do not have the option to marry and therefore get coverage. Isaacson, *supra* note 8, at 101, cols. 1-3. Only three Californian cities offer health benefits to the domestic partners of municipal employees: Berkeley, Santa Cruz, and West Hollywood. *Id.* at 102, col. 1.

273. See *supra* note 197.

274. See *Braschi*, 74 N.Y.2d at 201, 543 N.E.2d at 49, 544 N.Y.S.2d at 784.

275. *Id.*

ket rates for housing.<sup>276</sup> At this time, it appears that American tenants are the winners in the battle over succession rights to rent-regulated housing and British tenants are the losers. It remains unclear, however, where these diverging paths in landlord-tenant law will lead.

One of the main elements of rent regulation is security of tenure and the ability to pass on a tenancy to those who share the home. Succession rights to rent-regulated housing have traditionally been awarded to spouses and members of the tenant's family. The State of New York is expanding that definition to include diverse-relationship families; this is a direct result of a reality of family life in the United States. Although the statistics reporting the shift from nuclear families to more unique, diverse-relationship families are not as dramatic for Great Britain as they are for the United States,<sup>277</sup> they are significant and will probably increase. It seems likely that there will be political pressure as well as economic pressure to return to rent controls. Five years ago, the New York State courts and legislature tried to narrow the definition of those who could succeed to rent-stabilized housing.<sup>278</sup> This more restrictive legislation was the beginning of court challenges and political pressure to expand the definition of family. Whether a similar result will occur in Great Britain poses an interesting question.

For most people in the United States and Great Britain, diversity is the hallmark of contemporary family life, and the legal definition of family should change to reflect this diversity.

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276. *See supra* note 267.

277. *See supra* note 8.

278. *See supra* notes 191-94.