When Is It Company? When a Crowd?

By Adam Leitman Bailey and Dov Treiman

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With Governor Paterson's recent announcement that New York would accord administrative recognition to same-sex unions solemnized in jurisdictions that recognize such unions, notably in every jurisdiction with which New York shares a border except for Pennsylvania, the focus is once again placed on nontraditional families. In the groundbreaking decision of *Braschi v. Stahl*, the New York Court of Appeals granted administrative recognition to nontraditional families for purposes of rent regulation.[1] While arising in the context of a gay household, *Braschi* was clear that its protections were not limited to gay persons and equally clear that its protections were not to be defined by sexual conduct.[2] As *Braschi* law developed, it became obvious that the types of relationships that would receive these kinds of protections were by no means limited to quasi-spousal relationships. *Braschi* protections have been granted in relationships that were conducted similarly to those of grandparent / grandchild, parent / child, and sibling / sibling.[3] The largely open question that has until now remained unanswered is how *many* people can be in a *Braschi*-protected family.

Recent court decisions have demonstrated a pattern of growing recognition that while "marriage," as accepted in North America since the admission of Utah as a State, is limited to precisely two persons, many other well-recognized familial relationships are not: siblings, children, cousins, grandparents. Since *Braschi* never purported to recognize an alternative to *marriage*, but rather expanded the meaning of "family," it therefore stands to reason that those seeking *Braschi* recognition need not be limited to those seeking recognition of a relationship consisting of only two persons. What complicates this issue even further is that when one has a multi-person nontraditional family, one is rather likely to have multiple noncontiguous apartments involved.

The highly traditional, and indeed, ancient convent or monastery exemplifies the evolvement in the court's adoption of the "nontraditional" family. The presiding member of such institutions, in Christian society, is nearly universally referred to by a parental title and the denizens of the institution are generally referred to by a sibling title. If one actually examines the way these institutions live out their communal lives, one will discover that they meet nearly the full criteria set forth in *Braschi* in determining whether the unit in question is a "family." While individual brothers and sisters may have taken a vow of poverty, the income derived by members of the convent or monastery accrues to the institution and certainly can be viewed as each member of the institution being financially interdependent with every other. In one of the very few cases to discuss such living arrangements, *Melohn v. The New York Province of the Society of Jesus*,[4] the court declined to rule whether the collection of brethren living together was a monastery. The court simply viewed the lives of all the "brothers" as spreading over the various apartments and recognized each "brother" as having a primary residence in the apartments individually.[5] Notably, the *Braschi* criteria were never mentioned in the decision.[6] But, what of groups that are bound together by nonspiritual ties?

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While New York City is, on the whole, more comfortable with gay couples than the rest of the nation, popular culture in New York City does not yet appear to recognize committed relationships that extend beyond a two-person bond. The word for such bonds, in the sexual context, is "polyamory," which has been defined by the Unitarian Universalists for Polyamory Awareness (UUPA), among others, as "the philosophy and practice of loving or relating intimately to more than one person at a time with honesty and integrity."[7] According to a *New York Times* report of the UUPA's position, "[t]he group is quick to distinguish polyamory from 'swinging' or 'cheating.' Polyamory 'involves intentional open long-term loving relationships,' not recreational or covert sexual activity."[8] How remarkably similar this is to the language of *Braschi* that says "it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control,"[9] and also in the language of the regulations that codified it: "In no event would evidence of a sexual relationship between such persons be required or considered."[10]

In multi-person families, there is no greater need to consider evidence of sexual relationships than there is in two-person families. Rather, the standard is to be found in the UUPA report regarding "long-term loving relationships,"[11] which is further clarified in *Braschi* as "dedication, caring and self-sacrifice of the parties."[12] Just as *Braschi* is flexible about the kinds of relationships that can be mimicked

without *jural imprimatur*—spousal, filial,[13] fraternal, *inter alia*—so, too, can polyfamilies show equal flexibility.

It is probably unsurprising that situations dealing with a polyamorous relationship would require the court to address the issue regarding whether the combination of several noncontiguous apartments can be viewed as one primary residence. After all, more people need more space and there is no limit on the amount of space they may need or be entitled to.[14]

The law is well established that two or more apartments[15] can be combined to form a single living space for a family.[16] For such to occur, it is unnecessary that the apartments share a common wall or be at all physically capable of connection without passage through the common areas of the building.[17] However, whether the apartments are contiguous or not, the court is obliged to examine the usage of each unit. For example, if one of the units is simply used for storage, it will not be regarded as dwelling space and therefore is not entitled to be considered part of the one apartment unit spread over noncontiguous spaces.[18]

The more interesting question is whether two or more apartments may represent a single primary residence when those apartments are located in separate buildings. While one would be hard-pressed to imagine a scenario that establishes a house in the Hamptons as being but a single primary residence with an apartment in New York City, it is entirely possible that a family—even a traditional family—could arrange its life so that it performs some family functions at one apartment and some other family functions at another one, a few blocks removed. The family may, for example, dine and entertain company in one apartment and sleep in the other. Or, again for example, one particularly loudly snoring family member may be banished to sleep at a sufficient distance so as to allow the remainder of the family to sleep insulated from the gentle sounds of a sawmill. Given the scarcity of large affordable apartments, many families may find themselves relegated to this multi-block scenario. Intriguingly, there is nothing in the reported decisions to contradict such a possibility.[19]

It is relatively easy to demonstrate that a set of parents—married or otherwise, gender diverse or otherwise—living together with their brood of children—natural, adopted, foster, or step—forms a single cohesive family for purposes of rent regulation. They can retain that ease of analysis whether they are in a single apartment or spread over more than one—provided the children are minors. However, complications begin when a relationship that is non-marital but traditional, or non-traditional, is spread over multiple apartments. The proof may be unclear as to whether the lives are being led as a single family or as a multiplicity of families with close ties—extended families,[20] for whom the law accords no protection.[21]

For multiple persons to claim *Braschi* protections, they will have to show that not only do they fully meet the *Braschi* criteria with respect to each other, but also, where applicable, that their apartments are being used as multiple rooms of the most elusive of concepts, one single home.

Endnotes

1. 74 N.Y.2d 201, 212-13, 543 N.E.2d 49, 54-55, 544 N.Y.S.2d 784, 789–90 (1989).
2. *Braschi*, 74 N.Y.2d at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.
3. *See id.* (citing as examples: "*Athineos v. Thayer*, NYLJ Mar. 25, 1987, at 14, col 4 (Civ. Ct. Kings County), *aff'd* N.Y.L.J., Feb. 9, 1988, at 15, col. 4 (App. Term 2d Dep't) (orphan never formally adopted but lived in family home for 34 years); *2-4 Realty Assocs. v. Pittman*, 137 Misc. 2d 898, 902 (two men living in a "father-son' relationship for 25 years); *Zimmerman v. Burton*, 107 Misc. 2d 401, 404 (unmarried heterosexual life partner); *Rutar Co. v. Yoshito*, No. 53042/79 (Civ. Ct NY County) (unmarried heterosexual life partner); *Gelman v. Castaneda*, NYLJ Oct. 22, 1986, at 13, col .1 (Civ. Ct. N.Y. County) (male life partners).").
4. 17 HCR 93A, N.Y.L.J., Mar. 27, 1989, at 25, col. 4 (Civ. Ct. N.Y. County).
5. *See id.* (concluding that the petitioner "failed to raise a single factual issue that the premises [were] not being used as primary residences for respondents").
6. *Id.*
7. Unitarian Universalists for Polyamory Awareness, http://uupa.org (last visited Sept. 30, 2008).
8. Peter J. Steinfels, *Beliefs; Among struggles with boundaries are those facing Godless Americans and advocates of 'polyamory,'* N.Y. TIMES, Aug. 17, 2002, at B6.
9. *Braschi*, 543 N.E.2d at 55.
10. N.Y. COMP. CODES R. & REGS. TIT. 9, § 2520.6 (2008).
11. Unitarian Universalists for Polyamory Awareness, *supra* note 7.
12. *Braschi*, 543 N.E.2d at 55.
13. For example, legally unrelated persons could structure their household to consist of two parents and two children for a total of four people.
14. *See Pultz v. Economakis*, 40 A.D.3d 24, 26, 830 N.Y.S.2d 101, 102 (1st Dep't 2007) (positing that "the case law in this Department has consistently recognized that 'the Legislature has as yet placed no limitation on the amount of space a given owner may regain for personal use'") (citing *Sobel v. Mauri*, N.Y.L.J., Dec. 12, 1984, at 10, col. 4 (App. Term 1st Dep't)), *aff'd*, 10 N.Y.3d 542, 890 N.E.2d 880, 860 N.Y.S.2d 765 (2008).
15. *224 E. 18th St. Assocs. v. Sijacki*, 138 Misc. 2d 494, 499, 524 N.Y.S.2d 964, 968 (N.Y.C. Civ. Ct. 1987).
16. *See, e.g., C.H. Page Assocs., v. Dolan*, 12 HCR 257B, N.Y.L.J., Nov. 8, 1984, at 4, col. 2 (App. Term 1st Dep't); *Handy v. Renzulli*, 141 A.D.2d 351, 525 N.Y.S.2d 609 (1st Dep't 1988); *R.A.S. Ventures v. McCracken*, 23 HCR 70A, N.Y.L.J., Feb. 3, 1995, at 25, col. 4 (App. Term 1st Dep't); *Nick v. DHCR*, 244 A.D.2d 299, 664 N.Y.S.2d 777 (1st Dep't 1997); *Noto v. Bedford Apts. Co.*, 21 A.D.3d 762, 801 N.Y.S.2d 21 (1st Dep't 2005); *Kassell v. Bakst*, 14 HCR 185A, N.Y.L.J., Jun. 2, 1986, at 7, col. 2 (App. Term 1st Dep't).
17. *See G & G Shops, Inc. v. NYC Loft Board*, 193 A.D.2d 405, 405, 597 N.Y.S.2d 65, 65 (1st Dep't 1993). The treatment of two noncontiguous apartments as a single residence was proper upon finding that the apartments were not used for mere purposes of convenience. 193 A.D.2d at 405, 597 N.Y.S.2d at 65; *see also 10 W. 66th St. Corp. v. DHCR*, 184 A.D.2d 143, 149, 591 N.Y.S.2d 148, 151 (1st Dep't 1992). It is recognized that two noncontiguous rental apartments may constitute as a single residential unit. 184 A.D.2d at 149, 591 N.Y.S.2d at 151.

18. *See Briar Hill Apts. Co. v. Teperman*, 165 A.D.2d 519, 523, 568 N.Y.S.2d 50, 53 (1st Dep't 1991) (noting that the usage of a noncontiguous apartment must be "maintained . . . as an integral part of their residence" in order to be considered a primary residence); *see also Greenwich Vill. W. Realty Co. v. Rosenthal*, 21 HCR 201A, April 2, 1993 (N.Y.C. Civ. Ct.) (stating that a tenant can be evicted from a noncontiguous apartment if evidence shows that it is no longer used as his or her primary residence).

19. *Cf. Kassell v. Bakst*, 14 HCR 185A, N.Y.L.J., June 2, 1986, at 7, col. 2 (App. Term 1st Dep't) (declining to find apartments in noncontiguous buildings as a single primary residence because the individuals in question were not actually *using* them as a single residence for a single family).

20. Uncles, aunts, nieces, nephews, and cousins are unprotected by rent regulation unless they *also* meet the *Braschi* criteria.

21. *See W. 93rd St. Partners v. Zobel & Zobel*, 18 HCR 105A, Aug. 31, 1988 (N.Y.C. Civ. Ct.) (concluding that "however noble be the mission or deeply felt the filial devotion" between the grandmother and the grandchildren, evidence was insufficient to prove that the apartment in question was the primary residence of the grandchildren); *see also Wonko Realty Corp. v. Estate of Dreisch*, 150 Misc. 2d 1046, 1047–48, 572 N.Y.S.2d 276, 277–78 (N.Y.C. Civ. Ct. 1st Dep't 1991) (holding that the claimant was not entitled to succeed deceased sister's apartment for lack of proof that the apartment was her primary residence).

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