

## **BRASCHI AND NEW CONCEPTS OF THE FAMILY**

by W. JOSEPH JOINER, II'

The concept of the traditional, nuclear family is one that is beginning to be questioned in American society. It is safe to state that until the late 1960's most American children grew up in an environment where the nuclear family (father, mother, siblings) was the accepted norm. Today that is far from the case.<sup>1</sup> Current family relationships include a host of alternatives. Group living, unmarried cohabitation, and single parent settings are but a few examples of the alternatives available in society today. It is clear that the US legal system has not been able to take the rapid change in society's mores into account in its' definition of what constitutes a "family". Most statutory definitions are linked to the nuclear family of yesteryear. Most alternative family arrangements are denied the rights which traditionally have attached to the concept of family.<sup>2</sup> It is the object of this writer to advance the concept that when a household becomes the functional equivalent of a family, the law should regard it as such. Briefly stated, the argument is that similarly situated persons should be treated equally and when the law fails to do so, it is a clear denial of fundamental fairness.

Changing social patterns make it increasingly difficult for researchers to define what is meant by the word "family". The marriage rate in the US is continually falling and there has been an enormous increase in the number

<sup>1</sup>Associate Professor of Business Administration, Eastern Kentucky University '27.8% of US households consist of a father, mother and children. STATISTICAL ABSTRACT OF THE UNITED STATES, 1988, Table 62 (108th ed. 1988) hereinafter cited as STATISTICAL ABSTRACT.

<sup>2</sup>5a\* generally, Harris, *Non-Nuclear Proliferation: Alternative 'Family' Arrangements Grow Mon Common Across US*, UTNE READER March-April, 1989. Village of Belle Terre v. Boras, 416 U.S. 1 (1974) and Peck, *When Family is not a Household Word: New Arrangements Leave the Law Behind*, THE PROGRESSIVE, September, 1988.

of unmarried couples.<sup>3</sup> In recognition of this change the US Census Bureau coined the term "POSSLQ" meaning "partners of the opposite sex sharing living quarters". Although many of the newer living arrangements appear to be distinct from the traditional family, they do serve to preserve the valuable qualities of support, love, values, ethics and affection found in family relationships of the past.

As used herein the term "alternative family" or "non-traditional family" refers to several types of living arrangements. This may include but is not limited to an unmarried couple, either heterosexual or homosexual, and either with or without minor children from one or both partners. It may be a single parent with minor or adult children living at home. It may be a step-family relationship where the "parents" are married or non-married. Cohabitation seems to have become increasingly more accepted and might soon become the majority living experience if the trends continue.<sup>4</sup>

It has been noted that same-sex and heterosexual couples have many of the same values and functions as the traditional family. Increasing numbers of same-sex couples remain together for a life-time in committed relationships. Many same-sex and heterosexual couples have children. In response to the AIDS crisis the mores in the homosexual community seem to have changed thus supporting monogamy and longterm relationships. Clearly these relationships require extensive sharing of familial responsibilities most often connected with the traditional family unit.<sup>5</sup> However the law has made it very difficult-and in some cases impossible-for same-sex couples and unmarried heterosexual couples to be recognized as having the same relationship as those persons in the traditional family. If our society is to keep pace with the evolving nature of the family, it is necessary to rethink our concepts of what is a family and what rights should attach to that relationship.

The New York Court of Appeals has led the way towards a new definition of the term "family". In the case of *Braschi v. Stahl Associates Company* decided in 1989 the New York court was faced with a case arising under rent stabilization laws.<sup>6</sup> The crux of the case was that the court ruled four to two that a gay couple who had lived together for over ten years could be considered a family under the New York City's rent control regulations. The

\*71.7% of the US adult population was married in 1970. In 1986 that number had fallen to 62.9% In 1970 there were 523,000 unmarried couples while in 1986 that number had grown to 2,220,000. STATISTICAL ABSTRACTS, Table 54.

<sup>4</sup>43.3% of the US population lives in a household consisting of a married couple with minor children. 27.5% of the population lived in a traditional setting without children. There was a drop of 13% per year in the year 1980-1986 in the numbers of traditional households. Thus by the year 2002, alternative families will be in the majority if the trend continues. *Id.*

<sup>5</sup>*See generally*, M. Mendott, THE MENDOTA REPORT (1980) and A Friedman, TV. *Necessity for SUMJUCognition of Same-Sex Marriage: Constitutional Requirement and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L. J. 134, (1987).

<sup>6</sup>4 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S. 2d 784 (1989).

court opined that "in the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence".<sup>7</sup>

The facts of the case are relatively simple. It involved two gay men who had shared a rent-controlled apartment for over ten years. After one partner died, the landlord attempted to evict Braschi under the theory that Braschi was a licensee with no right to occupy the apartment since the deceased partner was the tenant of record. The landlord's claim was based on the fact that only "the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant" was protected from eviction.<sup>8</sup> The Appeals Court disagreed with the landlord's interpretation. It concluded that the protection offered by the statute was intended to be extended to individuals "who reside in households having all the normal familial characteristics".<sup>9</sup> The ruling of the court was that Braschi and his partner had a familial relationship which entitled Braschi to protection from eviction by the landlord. The finding was fact-based and the court considered the many different factors which showed that Braschi and his partner had had a long-term relationship which had been "characterized by an emotional and financial commitment and interdependence".<sup>10</sup>

In showing the emotional attachment testimony was introduced which showed that the two men had lived together as permanent life partners for more than ten years. They had regarded each other, and were regarded by their friends and respective families, as spouses. They regularly had visited with their individual families and attended family functions as a couple. The plaintiff continued to maintain a strong relationship with his partner's niece who considered him to be an uncle. Evidence showed that Braschi had clearly considered the apartment as home. The address was his address of record for all important documents. He received all mail at this address and was known to the doorman and maintenance staff who regarded the two men as a couple.<sup>11</sup>

The proof at trial showed that the two men had shared the debts and obligations of running the household. Each was an authorized signatory on safety deposit boxes, joint savings and checking accounts and joint credit cards. Rental payments had been made numerous times from a joint checking account. The plaintiff had received a power of attorney from the

<sup>7</sup>*Id.* at 211, 543 N.E.2d at 53-54, 544 N.Y.S.2d at 789.

<sup>8</sup>*Id.* at 209, 543 N.R.2d at 52, 544 N.Y.S.2d at 787 wherein the landlord's reading of the city ordinance is noted by the court. New York City Rent and Eviction Regulation 9 Section 2204.6(d).

<sup>9</sup>Braschi, 74 N.Y.2d at 211, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

<sup>11</sup>*Id.*

deceased partner which had allowed Braschi to make all decisions that were necessary for financial, medical and personal reasons during the illness. Braschi had been named as the beneficiary of the deceased partner's life insurance and was the co-executor of the estate. The appellate court reasoned that these facts, reasonably construed, showed that the two men were more than mere roommates.<sup>12</sup>

In a more recent case the New York courts declined to extend the Braschi analogy and definition of "family". In *LASEK v. PARKE*, the Surrogate's Court did not feel that the Braschi concept of family included a life partner who sued the estate of the deceased partner for claims for nursing care and household services.<sup>13</sup> The *Lasek* court stated that "there is no indication that the Court of Appeals intended broad application of this expanded definition of family".<sup>14</sup> In fact the Court read the decision of the Court of Appeals to be limited to the Braschi fact pattern.<sup>13</sup>

The *Lasek* court's opinion noted that there was no definition of the word "family" within the Surrogate Court Procedure Act or Estates, Powers and Trusts Law in New York which would allow such a definition as that proposed by the plaintiff in *Lasek*. Conversely this seems to imply that a plaintiff might be successful if there is a statutory definition of family in a context which might support such a claim. This recognition does not mean that such a definition is advisable, however. It does seem to mean that summary judgements based on a traditional reading of the word "family" without any supporting statutory or case law would be inappropriate following *Braschi*. It would be particularly inappropriate when a life partner can show the manifestations of a familial relationship with the factors as noted in *Braschi*. Clearly when a household becomes the functional equivalent of a family it should be so acknowledged. Similarly situated people should be treated the same.<sup>16</sup>

As political power of same-sex couples and non-married heterosexual couples rises, more local governments are recognizing the impropriety of granting "family" status and the benefits that attach thereto to only those families existing in the traditional framework. A few municipal statutes now grant family benefits to the unmarried spouses of public employees. These

*Id.*

\*144 Misc.2d 813, 545 N.Y.S.2d 668 (1989).

*Id.* at 814, 545 N.Y.S.2d at 670.

*Id.*

"S\*# Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) and US Department of Agriculture v. Murray, 413 U.S. 508 (1973) wherein it is noted that "one aspect of fundamental fairness guaranteed by the Due Process Clause of the Fifth Amendment is that individuals similarly situated must receive the same treatment by the Government".

unmarried spouses are frequently referred to as "domestic partners".<sup>17</sup> Under the provisions of the New York Executive Order, if a city employee registers their partnership relationship with the city, thus affirming that they have lived in a close and committed personal relationship for a least one year, the partners then become entitled to modest family-type benefits such as bereavement leave. Other cities such as Seattle, Lansing, Philadelphia and Washington, D.C. have or are currently considering similar legislation.<sup>18</sup> After a lengthy negotiating process with the union which represents the city employees, the City of Santa Cruz, CA adopted a policy which extends health benefits to the domestic partners of its municipal employees.<sup>19</sup> The city statement regarding the adoption of this program stated that it was an attempt to equalize the benefits offered to married and non-married employees.<sup>20</sup> In order to be eligible for benefits, a city worker must sign an affidavit which certifies that they are in a domestic partnership. The language must include wording to the effect that " we are each other's sole domestic partner and intend to remain so indefinitely and are responsible for our common welfare".<sup>21</sup>

The City of West Hollywood, CA has, in what may be the most encompassing ordinance, extended health benefits to the domestic partners of city employees. For purposes of health benefits, the definition of domestic partners is "any two people, regardless of their gender, who live together, share a mutual obligation of support for the common necessities of life, and who have registered as domestic partners with the City Clerk's office". The ordinance also requires city hospitals and jails to allow visitation by domestic partners. Currently more than fifteen per cent of the city work force has registered for benefits.<sup>22</sup>

Another California municipality, the City of Berkeley, has extended benefits to the domestic partners of its employees. The benefits include medical coverage, dental coverage and bereavement leave. The city stated in its policy that it was attempting to equalize employment benefits between married couples and those who were not married. Further the city noted that for many couples there was not issue of choice since the law in California does not recognize lesbian or gay marriage.<sup>23</sup>

<sup>17</sup>S- generally New York, New York Executive Order No. 123; West Hollywood, Ca., WHMC Section 4220-28 (1985); Madison, WI General Ordinance Section 3.36 (15) (1988); and Tacoma Park, Md. Code Section 6-81(a), 8b- 108(b)(1986).

<sup>18</sup>Louisville Courier-Journal, September 3,1989 at HI, Col. 2.

<sup>19</sup>Santa Cruz, Ca. Domestic Partner Information Sheet, (1987).

<sup>20</sup>*Id.*

<sup>21</sup>City of West Hollywood, Ca. Employee/Domestic Partner Health Insurance Information Sheet.

<sup>22</sup>Berkeley, Ca. Domestic Partner Information Sheet.

The Takoma Park, Md. ordinance provides rights for domestic partners in two ways: by contract or by ordinance. Domestic partners are explicitly provided for in the city's contract with the American Federation of State, County and Municipal Employees. The contract provides for bereavement leave in the event of a death in an employee's family. The family, for purposes of the leave, is defined as including a domestic partner. The city code of Takoma Park also defines immediate family as including a domestic partner. The ordinance states that a domestic partner is "persons who have lived together for at least one year (1) and who consider themselves to be in a committed relationship or if they have lived together less than one year can show other types of indicia of relationship."<sup>24</sup>

Thus a cursory review of municipal statements, whether in the form of contract provisions with employee unions or in the form of an ordinance, shows that there is an increasing number of municipalities which are recognizing the inequity of granting city benefits to one class of citizens while denying those same benefits to others. It remains to be seen whether these legislative enactments are a trend which will continue or are an aberration. It is probable to assume that as more and more same-sex and heterosexual non-married couples exist, their political power will require the city governments to rethink city positions regarding domestic partners and city benefits.

Other indices of change in the law regarding the concept of family should be noted. Within the concepts of property law and tax consequences change has been non-existent practically. It appears that in these areas statutes clearly favor the traditional definition of family. Members of non-traditional families considering estate planning face particular problems. As noted by Lovas, an estate plan generally consists of three basic areas: property ownership, beneficiary designation and the state probate code.<sup>25</sup>

Of the three estate planning areas noted by Lovas it is safe to assume that at the current time property ownership and beneficiary designation are the most valuable estate planning tools for unmarried same-sex and heterosexual couples. A surviving joint owner or beneficiary of a life insurance plan will receive the designated property regardless of the existence or non-existence of the traditional nuclear family relationship. Same-sex couples may easily effect a legal relationship by executing reciprocal wills, naming each other to life insurance policies, executing powers of attorney for one another and by jointly owning property.<sup>26</sup> Generally there will be no protection offered by state probate codes for survivors of same sex relationships. Due to statutory definitions of surviving spouse, same-sex relationships would not fit within the

<sup>24</sup>Takoma Park, Md. Code *supra* note 17.

<sup>25</sup>Lovas, "When is a Family Not a Family? Inheritance and the Taxation of Inheritance Within The Non-Traditional Family", 24 Idaho L. Rev. 353 (1987).

<sup>26</sup>Re Adoption of Adult Anonymous, 106 Misc.2d 792, 435 N.Y.S.2d 527 (1981).

survivors benefits offered by state probate codes. However an argument could be made for survivors of heterosexual non-married couples that the survivor is in fact a surviving spouse. The doctrine of the common law marriage would clearly be applicable in this situation. Establishing such a relationship would of course depend upon the recognition of common law marriages by the particular state.<sup>27</sup> But it is beyond the scope of this article to examine property rights arising in cases such as *Marvin v. Marvin* and its' progeny.<sup>28</sup>

Given the dearth of case law and statutory support for same-sex couples seeking to preserve or establish familial relationships, many have resorted to adoption procedures to find legal support for their relationships. Rightly or wrongly it is clear that this is an avenue for many persons who exist in these types of relationships. Adoption, like marriage, brings the relationship itself into the purview of the law and automatically creates certain rights and duties in both parties. However, the effectiveness of this option varies considerably from jurisdiction to jurisdiction.

Some states clearly will not permit an adult to adopt another adult.<sup>29</sup> Other states expressly permit adult adoptions.<sup>30</sup> In other jurisdictions there is no mention either way. A very few states will permit adult adoption if the purpose is to make the adoptee the adoptor's heir at law.<sup>31</sup> If the statute is unclear courts are divided as to whether adoption is invalidated if the purpose of the adoption was merely to establish inheritance rights.<sup>32</sup> Again it seems clear that the basic tool for estate planning within the alternative family should be that of the will and of jointly owned with survivorship clause property. Operating outside of these mechanisms at the present time would be a risky venture indeed.

In another area some couples have thought that perhaps a relationship might be able to be established via recognition by some form of tax code or regulation. This has proven to be a dry well of hope. Tax codes are very strictly written, interpreted and generally offer little hope to the non- traditional family. Unmarried couples are not recognized by the Internal

<sup>^</sup>Lovas, *supra*.

"*Marvin v. Marvin*, 18 Cal.3d 660,134 Cal.Rptr. 815,557 P.2d. 106 (1976). Also see generally Annot., "Property Rights Arising From Relationship of Couple Cohabiting Without Marriage", 3 A.L.R. 4th 13 (1981).

"*Dolby v. Carroll*, 274 Ala. 273, 147 So.2d 803 (1962).

<sup>K</sup>See generally Rev. Unif. Adoption Act Section 2 (1971).

"*Colo. Rev. Stat. 14-1-101* (1987) and *Wise. Stat. Ann 851.51* (1987).

<sup>2</sup>See *Harper v. Martin*, 552 S.W.2d 690 (KyApp.1977) and *Estate of Fortney*, 5 Kan. App.2d 14,61 P.2d 599 (1980) where adult adoptions for these purposes were ruled to be not invalid; *In Re Estate of Griswold*, 140 NJ. Super.35, 354 A2d 717 (1976) where such adoptions were held invalid.

Revenue Code or by the IRS. Unmarried domestic partners are not able to take advantage of the greatest tax benefit available-that of filing a joint return. Married couples have more exemptions and are able to combine deductions in order to be above the threshold amounts. The Internal Revenue Code provides that in order to file a joint return the taxpayers must be husband and wife. Persons who are not married in the traditional sense can not be a husband and wife under the Code provisions.<sup>33</sup>

If all citizens are to enjoy the fruits of the democratic way of life which has been established in the United States then the legal definition of "family" must be changed. To do otherwise is to guarantee continual "separate and unequal" treatment of a large percentage of the population who have chosen for one reason or another to live in a non-traditional relationship. Outside of strictly legal protections, unmarried heterosexual and homosexual couples have encountered different reactions to their relationships. In some cases there has been open acceptance and nurture. In numerous other cases, particularly with same-sex couples, there have been vastly different reactions. It is axiomatic that many same-sex couples live in fear of hate crimes perpetrated by bigots. A cursory review of most popular literature will illustrate that fact.

Some glimmer of hope for a more open and accepting society is noted by the small advances occurring in various areas of the US. One recent break is that made possible by the National Organization for Women in the medical insurance field. The savings for unmarried couples are substantial. Major airlines now offer free-flight benefits to domestic partners of frequent fliers. Other benefits are on the way. Clearly these changes are in recognition of the changes under way in our society. In many areas the non-traditional family is being recognized as a legitimate alternative to the traditional, nuclear family. Same-sex and heterosexual couples still struggle for adequate health insurance, dental insurance, eye care, life insurance, bereavement leave, pensions, sick leave, and membership in civic clubs. All these are things which "traditional" families take for granted. Still, for all of society's progress, many segments seem largely reluctant to socially endorse alternative families.<sup>34</sup>

Throughout the remainder of this decade there clearly will be a growing debate over how to define "family". State legislatures and conservative courts are lagging behind the rest of the United States-and the world-in the reality of living arrangements. This lag may stem from the opposition of many of those persons with political power to the existence of alternative living arrangements and their belief that the nuclear family is the bedrock of society without which all order will evaporate. Newly recognized forms of loving may

<sup>33</sup>IRC Section 6013(a) and 7701(a)(38).

<sup>34</sup>The Louisville Courier-Journal, September 3, 1989At H6, col.4.

be seen as a threat to the very order of the universe. The problem with this objection is that it ignores the positive characteristics of alternative families. Alternative families are just as capable as traditional families of providing stability, values, love, welfare, care and support. Something must be wrong in the traditional family if fifty percent of all marriages end in divorce.

Some argue that the nuclear family is the only situation which can transmit society's value system. This argument fails to convince those who have studied alternative family arrangements. Some may say that the *Braschi* formula for family is an unworkable test and one which will be subject to abuse. According to the *Braschi* court, "a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence."<sup>w</sup> This test need not be subject to abuse. Courts daily examine much more complicated relationships in routine litigation. The relationship of two lifetime partners can be examined to determine if it is long-term and characterized by commitment. The test is objective, workable and free from abuse.

In conclusion family, municipal and constitutional law practitioners need to be aware of the rights of those persons who live in non-traditional familial relationships. This area of law will increase in importance as more and more heterosexual and same-sex couples live together without the traditional trappings of a marriage. When courts confront this issue they need to put aside the old notions of what constitutes a "family". As noted herein there have been numerous situations where state and municipal governments have moved toward recognition of the actual. *Braschi* is indicative of such movement. As noted by the New York Court of Appeals the definition of "family" is that of a relationship characterized by emotional and financial interdependence. The law and the American legal system should focus on the societal interests of protecting long-term, supportive relationships. It is no longer tenable to espouse one element of society's social agenda to the detriment of countless other members of society. The focus of our legal system should be to fashion flexible remedies to support the reasonable expectations of the parties involved. *Braschi* attempts to do so.

<sup>w</sup>Braschi, *supra* at note 9.