

Family & Housing Law CLE: Common Issues Facing the LGBTQ Community

A CLE Program Presented by LeGaL as part of the LGBTQ
Brooklyn Legal Assistance Project, a partnership of LeGaL, the
Brooklyn Community Pride Center and Brooklyn Law School
OUTLaws



THE LGBT BAR ASSOCIATION OF GREATER NEW YORK

October 11, 2012
6:00 p.m. – 8:00 p.m.
Brooklyn Law School
250 Joralemon Street, Room 503
Brooklyn, NY

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of The New York Community Trust and the New York Bar Foundation.



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LEGAL Family & Housing Law CLE:
Common Issues Facing the LGBTQ Community

Thursday, October 11, 2012, 6:00 p.m. to 8:00 p.m.
Brooklyn Law School, 250 Joralemon Street, Room 503

AGENDA

- I. Introductions and Overview of Training, 6:00 – 6:10

Family Law

- II. What All Attorneys Need to Know About LGBT Law, 6:10 – 6:15

- III. LGBT Family Law

- a. Marriage and Other Ways to Protect Relationships, 6:15 – 6:25
- b. Legal Protections When Couples Decide Not to Marry, 6:25 – 6:35
- c. Child Custody with LGBT Parents, 6:35 – 6:40
- d. Domestic/Intimate Partner Violence, 6:40 – 6:45

- IV. Q&A, 6:45-7:00

Housing Law

- V. Proceedings in Housing Court, 7:00 – 7:05

- VI. Roommate Disputes, 7:05 – 7:15

- VII. Defenses and Counterclaims in Housing Court, 7:15 – 7:25

- VIII. Representing LGBT Clients and HIV/AIDS-Specific Resources, 7:25 – 7:35

- IX. Succession Rights, 7:35 – 7:45

- X. Non-payment Procedures for Tenants or Roommates, 7:45 – 7:50

- XI. Q&A, 7:50 – 8:00

Faculty Bios

*LeGaL Family & Housing Law CLE:
Common Issues Facing the LGBTQ Community
October 11, 2012*

Virginia Goggin

Virginia Goggin spearheaded NYLAG's LGBT Law Project at NYLAG in 2008 after receiving the Orrick, Herrington & Sutcliffe Community Responsibility Fellowship. Virginia represents and advises LGBT (lesbian, gay, bisexual and transgender) community members in a variety of legal areas including child custody, domestic violence, second parent adoption, succession rights in housing, wills and advanced directives. She received NYC's Anti-Violence Project's Courage Award for her work in forming the Domestic Violence Legal Clinic at AVP. Prior to NYLAG, Virginia worked at The Legal Aid Society in the Disability Advocacy Unit. She was an AmeriCorps Service Member for two years serving in a low-income housing project in Columbus, Ohio. Virginia graduated from New York Law School in 2008. She received the Hank Henry Judicial Fellowship from the LGBT Bar Association of Greater New York (LeGaL) in 2005 and was awarded the Joseph Solomon Public Service Fellowship in 2007.

Richard Landman

Richard Landman, Attorney Emeritus, AICP, has been a Land Use Attorney and Certified Planner for decades, working at NYU for 20 years as an Administrator and Adjunct Professor and is currently an Adjunct Professor at New York Law School. He has 3 Masters Degrees and a J.D. cum laude from New York Law School. He has received the Pro Bono Award numerous times for his voluntary efforts through the Access for Justice Program at Housing Court. He has also been the Lead Attorney at the LGBT Bar Association Foundation's Walk-In Clinic for the past 5 years. He was also the Executive Director of Real Estate Development for the City of New York during the Koch Administration and VP of a Brazilian Construction Company.

Rick started one of the first gay student associations at his college in 1970 and helped organize the First March on Albany for Gay Rights in 1971 and the First March on Washington for Lesbian and Gay Rights in 1979 and has been active in many of the LGBT organizations throughout the decades. Currently he conducts LGBT History Tours and Talks as part of his www.Infotrue.com program and will be giving the Keynote Address at BMCC for LGBT History Month.

Family & Housing Law: Common Issues Facing the LGBTQ Communities



Rick Landman, Esq., Adjunct Professor, New York Law School
Virginia M. Goggin, Esq., LGBT Law Project at NYLAG

Sponsored by: **The LGBT Bar Association of Greater New York - LeGaL**
Thursday October 11, 2012 6:00 -8:00
Brooklyn Law School

lgbt family law

What will we cover tonight?

- LGBT Law – what every attorney needs to know
 - Ch-Ch-Ch-Changes....all the time!
 - Protecting Your Client in Court
 - Ethical Considerations when accepting cases
- LGBT Family Law – the basics
 - Marriage, Domestic Partnerships, Civil Unions – Oh My! Getting into them, and getting out of them
 - Legal Protections When We Decide Not To Marry
 - Second Parent Adoption
 - Custody
 - Support – Child and Spousal
 - Domestic/Intimate Partner Violence

LGBT Law: Changes

- LGBT law is always changing, new developments, new cases, etc. so you must check on case law anytime you are representing or providing a consultation with an LGBT client.
- Some cases may end up being “impact cases” and you do not want to make bad law.
- Consult with the national leaders in our communities:
 - Transgender Legal Defense and Education Fund -- TLDEF
 - Lambda Legal
 - National Center for Lesbian Rights -- NCLR
 - GLAD
 - Transgender Law Center
 - etc.

LGBT law

protecting your clients in court

Code of Judicial Conduct, Canon 3 (22 NYCRR §100.3)

- A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently
 - (B)(4) **A judge shall perform judicial duties without bias or prejudice against or in favor of any person.** A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, **sex, sexual orientation**, religion, national origin, disability, **marital status** or socioeconomic status, **and shall require staff, court officials and others subject to the judge's direction** and control to refrain from such words or conduct.
 - (B)(5) **A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice** based upon age, race, creed, color, **sex, sexual orientation**, religion, national origin, disability, **marital status** or socioeconomic status, against parties, witnesses, counsel or others. *This paragraph does not preclude legitimate advocacy when age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, or other similar factors are issues in the proceeding. (emphasis added)*

LGBT Law: ethical considerations

Rules of Professional Conduct

Rule 8.4: Misconduct

- A lawyer or law firm shall not:
 - (d) engage in conduct that is prejudicial to the administration of justice;
 - (g) unlawfully discriminate in the practice of law....on the basis of age, race, creed, color, national origin, **sex**, disability, **marital status**, or **sexual orientation**.
 - (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
 - (h) engage in any other conduct that adversely reflects on the lawyer's fitness as a lawyer.

LGBT Law: ethical considerations

GLAD's Standards for Protecting LGBT Families

- **Support the Rights of LGBT Parents**
- **Honor Existing Relationships Regardless of Legal Labels**
- **Honor the Children's Existing Parental Relationships After a Break-Up**
- **Maintain Continuity For the Children**
- **Seek a Voluntary Resolution**
- **Remember That Breaking Up Is Hard to Do**
- **Investigate Allegations of Abuse**
- **The Absence of Agreements or Legal Relationships Should Not Determine Outcome**
- **Treat Litigation as a Last Resort**
- **Refuse to Resort to Homophobic/ Transphobic Laws and Sentiments**

(continued)

LGBT Law: ethical considerations

GLAD's Standards for Protecting LGBT Families (cont')

- It is wrong and unethical for parents or lawyers to take advantage of anti-LGBT laws. Do not resort to arguments that a person who is not a “legal” parent has no right to seek custody or visitation. The stress or angst over the end of a relationship can sometimes stir the flames of internalized homophobia or transphobia. A parent’s own anti-LGBT sentiments can have a negative impact on the children and should be confronted. The best interests of the children should control decisions concerning custody and visitation.
- No one should reveal, or threaten to reveal, the sexual orientation or transgender status of an opposing parent in an attempt to harass or intimidate the other parent.
- **GLAD Standards available online at:**
<http://www.glad.org/uploads/docs/publications/protecting-families-standards-for-lgbt-families.pdf>

LGBT FAMILY LAW

THE BASICS

MARRIAGE...

CIVIL UNIONS...

DOMESTIC PARTNERSHIPS....

OH MY!

MARRIAGE

- NYS Marriage Equality-July 2011 (L.2011, Ch.95)
 - **State-based marriage rights and benefits granted**
 - Approximately 9800 marriage licenses issued to date
 - Also available in: MA, CT, IA, VT, NH, Washington DC, WA, MD, CA* , Belgium, the Netherlands, Canada, Spain, South Africa, Norway, Denmark, Portugal, Sweden, Iceland, Argentina, Brazil, parts of Mexico
- **Legal relationships converted to marriages**
 - In NH , CT, and WA, marital equivalents previously entered into were converted to *marriages* by operation of law when marriage equality was adopted. N.H. Rev. Stat. §457.46 ; C.G.S.A. § 46b-38rr; Wash. Rev. Code §. 26.60.0001
- **Same-sex marriages performed outside of NY**
 - **Valid out-of state marriages are accorded similar respect per case law:**
 - Both Martinez v. Monroe Community College [50 A.D.3d 189 (4th Dept. 2008), lv. to appeal denied 10 N.Y.3d 856 (2008)] and In re Estate of Rantle, 81 A.D.3d 566, 917 (1st Dept 2011) reaffirmed longstanding marriage comity principles by declaring that same-sex marriages performed validly in other jurisdictions *must* be recognized in NY

marriage

- Marriage with a transgender spouse or spouses
 - If a transgender spouse validly married someone *before transition*, in NY this marriage should remain legally valid.
 - Before marriage equality, for some couples married in NY *following the person's transition*, case law may consider that marriage void as a violation of previously existing prohibitions against “same-sex” marriage.
 - Anonymous v. Anonymous, 67 Misc.2d 982 (1971); Frances B. v. Mark B., 78 Misc.2d 112 (1974); *see also* K.B. v. J.R., 26 Misc.3d 465 (2010) and Karin T. v. Michael T., 127 Misc.2d 14 (N.Y. Fam. Ct 1985) where void marriages negatively impacted parentage
 - Under 2011's Marriage Equality Act, all couples may now legally marry in NY without regard to the intended spouses' sex or gender.

divorce

- New York State will contemplate divorce for any valid marriage, performed in or out of state, as long as the jurisdictional requirements are met:
 1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or
 2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or
 3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or
 4. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, or
 5. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action. (Consolidated Laws of New York - Domestic Relations Laws - Article 13 - Sections: 230 and 231)

civil unions_{and}

Comprehensive Domestic Partnerships

- **CIVIL UNION**: Confers *substantially similar* rights and benefits to CU partners as in marriage, but widely regarded as an inferior legal status
 - Available in: NJ, HI, RI, DE, IL and other jurisdictions outside the US
- **Comprehensive Domestic Partnerships**: May be marital equivalent or provide an enumerated list of rights and benefits
 - Available in: CA, OR, NV & WA* (broad, comprehensive rights); CO, HI, ME, MD*, WI (more limited rights)

Dissolving a civil union or comprehensive DP_(not NYC DP)

- **Civil Unions**
 - **3rd Dept. has allowed the Supreme Court to grant an equitable action allowing the dissolution of a civil union, recognizing the civil union as a matter of comity. Dickerson v. Thompson, 73 A.D.3d 52 (3rd Dept. 2010); 88 A.D. 121 (3rd Dept. 2012)**
- **Domestic Partnerships**
 - no written decisions – but it is happening in practice

NYC domestic partnerships

- NYC Domestic Partnership: confers *limited* legal status, rights, and protections
 - Can be housed as ‘family’ in homeless shelters;
 - Grants health care decision making;
 - Allows visitation at medical and nursing home facilities;
 - Allows surviving DP control of partner’s remains after death;
 - Allows Crime Victim’s Board compensation;
 - Allows for visits of incarcerated domestic partner;
 - Does not confer access to spousal benefits;
 - Does not create a legal relationship with a child of the partnership;
 - Does not give the right to be included on an apartment lease subject to rent regulation;
 - Does not grant ability to petition for wrongful death of DP;
 - Domestic partners are not included in the intestacy laws;
 - Employers and others may extend benefits to DPs, but these are waning, especially after the passage of the Marriage Equality Act.
- To Dissolve NYC DP:
 - Getting married, automatically terminated;
 - Both parties signing and filing a Termination Statement (or if both will not sign, sending the Termination Statement to

legal protections when we decide not to marry (and for our chosen families)

- Last Will and Testament
 - You can name who will be in charge of your estate (no matter how small or large) and who will inherit your estate including belongings.
 - Planning for the bulk of your estate not to go through the courts (Totten Trusts, ITF, Life Insurance Beneficiaries, etc.).
- Health Care Proxy
- Living Will
- Durable Power of Attorney
- Agent for Disposition of Remains

Marriage, Civil union and Domestic partnerships

Legal Relationships when you leave NYS

- **1996 Federal Defense of Marriage Act** [28 U.S.C. §1738C; 1 USCA §7 (1996)]
 - Prevents federal legal recognition of same-sex marriages and other legal statuses for federal purposes
 - Allows states to avoid full faith and credit/comity by passing laws not recognizing same-sex relationships
- **“Mini-DOMAs”**
 - Currently, the majority of US states have their own versions of DOMA (called “mini-DOMAs”) via statutes and/or constitutional amendments.
 - Tracked by National Conference of State Legislatures at:
<http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>
- **Portability Issues**
 - Mini-DOMA states may refuse to respect certain NY marriages
 - Other states may respect these relationships in a variety of ways. Tracked by Lambda Legal at: <http://www.lambdalegal.org/publications/nationwide-status-same-sex-relationships>

Second Parent Adoption

- New York has second parent adoption allowing a non-legal parent to adopt their partner's child whether they are married or not married. Matter of Jacob, 636 N.Y.S.2d 716(1995).
 - Not all states allow second parent adoptions, see Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010), (*North Carolina Supreme Court construed the state adoption statutes to ban second parent adoptions, thus voiding years of such adoptions that had been granted. The ACLU has filed a federal case, Fisher-Borne v. Smith, asserting such a ban violates the 14th Amendment.*)
 - Check all states at Lambda Legal: www.lambdalegal.org/states-regions

Failure to Formalize Parent-Child Relationship through second parent adoption

- Claims made under de facto/equitable estoppel theory not viable per Alison D v. Virginia M, 77 NY2d 651 (1991); aff'd under Debra H., *supra*
 - even where non-biological parent was involved during time of conception, raised child from birth, held out as the child's parent, & served as a parental figure to the child in all financial and psychological ways
- Non-biological parent viewed as a "legal stranger" to the child for most purposes and may only obtain child custody/visitation if "extraordinary circumstances" exist
- Lack of access to parentage may be a particular challenge for certain poor and low-income families:
 - Limited access to knowledgeable lawyers; limited access to legal information or legal services
 - Until marriage equality in NY, limited ability to travel to other jurisdictions to avail selves of marriage or marriage equivalent presumptions before child's birth
 - May have used "informal" mechanisms to conceive child
 - Adoption is cost prohibitive & intrusive; if non-bio parent has DV, CPS or criminal history, adoption may not be approved

Parentage

- **Parentage derived from civil union:** “New York will recognize parentage created by a civil union.” Debra H. v. Janice R., 4 N.Y.3d 576 (2010).
 - See also Wesley v. Smith-Lasofsky 105819/10, NYLJ 1202508854947 (Sup Ct, NY County, 7/18/11, Drager, JSC)(in unique case, no parentage rights for non-adopting spouse to child adopted after CU by his former partner)
- **Parentage derived from other state-sanctioned legal relationships:** Examine laws of celebration state to determine if there are any attendant parental rights
 - No NY case law yet determining parentage where there was a comprehensive domestic partnership. See AEH v. MR, SJC11010 (case currently pending before MA high court to determine recognition of parentage of children born to parents domestically partnered in CA)
- **Parentage derived from adoption:** Created through a second-parent adoption (Mtr. Of Jacob and Dana, 86 NY2d 651 [1995]) or joint adoption (In re Adoption of Emilio R., 293 AD2d 27 [1st Dept 2002], Adoption of Carolyn B., 774 NYS2d 227 [4th Dept 2004])

Custody and Visitation

- **Where parties have a child-in-common:**
 - If able to access Family or Supreme Court, will determine based upon “best interests of the child”
- **Best Interest of the Child**
 - Parent’s sexual orientation does not render them unfit on this basis. See Paul C. v. Tracy C., 209 A.D.2d 955 (1994)
 - No NY published case law addressing impact of parent’s gender identity/expression on the best interests of the child
 - If a transgender parent’s gender identity can’t be shown to have hurt the child in some way, contact with the child should not be limited by “best interests”
 - Per DRL §240(1), FCA §§ 651(a),(b) 652(c) DV, where proven, must be a weighty factor in the best interests determination
- **No legal relationship established between non-biological, non-adoptive parent and child:**
 - Parent viewed as a “legal stranger” and may only rely on extraordinary circumstances to obtain standing to seek access to the child

What We Know About LGBT Parenting

American Psychological Ass'n (2005):

<http://www.apa.org/pi/lgbt/resources/parenting-full.pdf>

Pediatrics journal (June 2010):

<http://pediatrics.aappublications.org/content/early/2010/06/07/peds.2009-3153.full.pdf+html>

Applied Developmental Science journal (July 2010):

<http://people.virginia.edu/~cjp/articles/ffp10b.pdf>

Lambda Legal's Transgender Rights Toolkit :

http://www.lambdalegal.org/sites/default/files/publications/downloads/trt_transgender-parents_0.pdf

Intimate Partner Violence & the LGBT Community

- LGBTQ people experience intimate partner violence at the same rates as any other community: 25-35% of relationships.
 - Heintz, Adam J. Melendez, Rita M. Intimate Partner Violence and HIV/STD Risk Among Lesbian, Gay, Bisexual and Transgender Individuals, *Journal of Interpersonal Violence*, Feb. 2006, Vol. 21 Issue 2, p. 193-208.
- There are additional barriers, in addition to lack of cultural competence with LGBT issues, to receiving legal social service assistance. According to a survey by Anti-Violence Project:
 - only 7% reported to the police
 - nearly half of all those seeking DV shelter were turned away;
 - more than half were denied an order of protection
- **Power & Control Wheel for LGBTQ people in handouts and online at:**

<http://www.avp.org/documents/DVWheelcopyrighted2000.pdf>

A Few Resources....

- **Empire Justice Center FAQ:**
<http://www.empirejustice.org/issue-areas/domestic-violence/dv-glb-community/lgbt-legal-options-june12.html>
- **ABA Toolkit for Attorneys Working with LGBT Survivors of DV**
 - http://www.americanbar.org/groups/domestic_violence/resources/resources_for_attorneys/marginalized_communities/lgbtq.html
- **National Coalition of Anti-Violence Programs IPV Training and Technical Assistance Center**
 - TA: info@ncavp.org, 1-855-AVP-LGBT (Mon-Fri, 10 a.m. to 6 p.m. EST)
 - Resource Bank: <http://www.avp.org/ncavp.htm>

Family Offense Proceedings: Who May Commence a Matter under FCA §812?

- Victim of any act which would constitute an enumerated family offense (harassments, assaults, strangulation, sex offenses, etc...); and
- These acts are alleged to have been committed between spouses or former spouses, between parent and child, or between members of the same “family or household.”
- "Family or household members" defined as:
 - (a) persons related by blood or *marriage*;
 - (b) persons *legally married* to one another;
 - (c) persons *formerly married* to one another; and
 - (d) persons who have a *child in common* regardless of whether such persons have been married or have lived together at any time
 - (e) parties in current or former “*intimate relationship*”

OP Provision Challenges for LGBT Families (FCA §§ 828, 842)

- Access to shared residence & early lease termination
 - *While OP does not decide interest/title, impact on who may remain in residence*
- Temporary custody/visitation of children in common
 - *Parentage questions?*
- Temporary order of child support, including medical support
- Insurance coverage of/payment for victim's medical expenses
- Batterer's education programs; incarceration for batterer
 - *Appropriate/safe for LGBT abuser?*

Child Support under FCA §§828 (4), 842

- Under FCA provisions, support may be ordered in an “amount sufficient to meet the needs of the child, without a showing of immediate or emergency need”, regardless of whether the court has information regarding the respondent’s income and assets.
- **LGBT Context**
 - Where legal relationship between parent and child is established, child support may be ordered. Frazier v. Penratt 32 A.D. 3d 722 (2006)
 - Implied promise-equitable estoppel theory case law has allowed non-biological, non-adoptive parents of children conceived via artificial insemination to continue facing child support obligations for their children. H.M. v. E.T., 14 N.Y.3d 521,527 (2010); Karin T. v. Michael T., 127 Misc.2d 14 (1985)(transgender parent was ordered to pay despite void marriage)

Other Key Order of Protection-Related Laws

- **Interstate Enforcement of OP/Portability**
 - NY must enforce another state's OP just as if issued here. FCA §154-e, DRL §252(7), CPL § 530.11(5)
 - Other jurisdictions must enforce NY's OPs even if jurisdiction to issue was based on legal status not obtainable there (i.e. marriage equality). 18 U.S.C.A. §2265
 - VAWA crime of interstate violation of OP applicable to same-sex couples (see "AG Opinion of the Office of Legal Counsel, April 27, 2010")
- **Entry into the Statewide Family Protection & Warrant Registry under Executive Law §221-a**
 - All criminal or civil family offense OPs shall be entered in the statewide database
- **Parties are subject to Mandatory Arrest & Primary Physical Aggressor Determinations under CPL §140.10(4)**

DV-Related Housing Protections for LGBT Victims

- **No current *statewide* anti-discrimination protections for DV victim status in NY, but protection available for discrimination based upon sex or sexual orientation (Executive Law §296)**
- **NYC Local Law 43**
 - Added a new section to the Administrative Code which ensures that domestic violence victims who apply for emergency shelter or related services are not denied those services based on the lack of documentation of the incidence of domestic violence
- **Early lease termination if have Order of Protection from Family, Criminal, or Supreme Court (see generally Real Property Law §227-c)**
 - A residential tenant who has been granted an Order of Protection is permitted to terminate the residential lease or sever a co-tenancy and be released from any liability for rent by the court that issued the OP

DV-Related Housing Protections for LGBT Victims

- **2005 VAWA [42 U.S.C. §§ 1437(d), 1437(f)] provides protections in certain federal public and subsidized housing programs:**
 - Victim of DV* is defined as felony or misdemeanor crimes of violence committed by:
 - victim's current or former spouse
 - by a person with whom the victim shares a child in common
 - by a person who is cohabitating with or has cohabitated with the victim as a spouse
 - by a person similarly situated to a spouse of the victim under the state's domestic or family violence laws
 - by any other person against an adult or youth victim who is protected from that person's acts under the state's domestic or family violence laws
- * Also protects victims of dating violence and stalking

thank you!

Please contact me with any questions,
corrections or referrals!

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LeGaL HOUSING CLE TRAINING OVERVIEW¹

I. Overview

This training is designed to provide an overview of housing law, including types of housing, defense of nonpayment proceedings, and defense of Holdover proceedings. Special focus will be given to the succession rights of same-sex partners, resources available for people living with HIV/AIDS, and tips for representing LGBT clients.

II. Types of Housing

This section provides an overview of the types of housing you may encounter when assisting clients with housing related issues. Determining the type of housing that a client has is the first step in understanding that client's rights and responsibilities. The following list is far from exhaustive, but includes the most common types of housing in New York City.

A. Rent Stabilized

Generally, rent-stabilized housing law governs buildings built before June 1, 1974, which have six or more units.² The Rent Stabilization Law and the Rent Stabilization Code govern rent-stabilized housing and set forth the basis for a statutory tenancy. The regulations also describe the rights and responsibilities of the landlord and tenant, including rent amounts, rent increases, and provisions to terminate the tenancy. Generally, apartments with rents that exceed \$2,000 are deregulated when they become vacant.³ However, owners may subject the units to rent regulation voluntarily.⁴ The primary features of rent-stabilized housing are the limits on rent increases and that the landlord is bound to renew the lease at its expiration. Owners may also seek rental increases during each lease-term renewal by offering the tenant a renewal lease with rental increases determined by the rent guidelines board, increases for improvements to the building ("Major Capital Improvement Increases"), and increases each time a tenant vacates the unit. Therefore, some units in an apartment building may be subject to rent stabilizations, while others are exempt.

B. Rent Control

Rent-controlled housing is found in buildings with three or more residential units in use prior to February 1, 1947, where the tenant has been continuously occupying the apartment since July 1, 1971.⁵ The Emergency Tenant Protection Act governs rent-controlled housing. The major

¹ These materials, which have been modified slightly to reflect recent developments, were first used as part of a LeGaL Housing Law CLE presented in November 2010. We gratefully acknowledge the work of Aurore DeCarlo of Housing Conservation Coordinators (HCC) and Rebecca Symes, formerly of HCC.

² Unconsolidated Laws §26-501 et seq., Unconsolidated Law § 8601 et. seq.

³ Rent Stabilization Code 2520.11, 9 NYCRR 2520.11

⁴ Owners can subject themselves to Rent Regulation when receiving some type of government benefit even if the rent exceeds \$2,000 (e.g. 421-a or J-51 Tax Abatement may subject market rate rentals to Rent Stabilization during the period that the Tax Abatement is in effect and sometimes beyond the expiration of the tax benefit).

⁵ 9 NYCRR § 9 NYCRR 2200 et seq.

distinction between rent control and rent stabilization is that the owner must gain approval from the Division of Housing Community Renewal (DHCR) before the owner may seek a rent increase and that there are no lease renewals. Therefore, some residential building may have some units subject to rent control, others subject to rent stabilizations, while still other units are exempt.

C. Section 8

Section 8 is a Federal Housing Program (HUD-authorized) that allows low-income individuals to reside in privately owned housing while providing the owner with a rent subsidy. There are two types of Section 8 – voucher-based Section 8 and project-based Section 8.

In voucher-based Section 8, the tenant is given a voucher (an agreement by the Federal Government to give a rent subsidy to a landlord who agrees to accept the person with the voucher as a tenant) and must find a landlord who will accept the voucher. In New York City, owners cannot discriminate against a tenant based on the tenant's status as a voucher recipient.⁶

In project-based Section 8 subsidies are given to the owner of the building and the owner of the building rents out the subsidized units to eligible tenants, but the subsidy remains with the apartment and is not something the tenant can retain when the tenant leaves the development. In the Section 8 program, tenants generally pay 30% of their income toward rent. The City or State Housing Authority administers this program. However, if there are specific questions, HUD has a handbook that outlines its procedures and policies.⁷

D. New York City Housing Authority (“NYCHA”)

NYCHA Housing is federal public housing that is owned and managed by New York City's Housing Authority. NYCHA provides subsidized housing for families and individuals of modest economic means. NYCHA has specific rules and regulations that govern its housing, which are set forth in the NYCHA manual.⁸ NYCHA is required to commence administrative proceedings prior to the commencement of holdover proceedings in Housing Court.⁹ Tenants of NYCHA buildings generally do not pay more than 30% of their income toward rent.

E. City-Owned Housing

New York City still maintains a small residential housing stock, which is owned and managed through Housing Preservation and Development (“HPD”).¹⁰ This type of housing is called *In Rem* housing. This housing is exempt from rent regulation, but subject to provisions in the rules

⁶ Local Law 10, New York City Administrative Code §§ 8-101 *et seq* and *Tapia v Successful Mgt. Corp.*, 24 Misc 3d 1222[A], 2009 NY Slip Op 51552U] [2009]

⁷ HUD Housing Handbook http://www.hudclips.org/sub_nonhud/cgi/selecthbk.cgi

⁸ Find the NYCHA manual on www.Probono.net

⁹ See *Escalera* Decree arising from Litigation commenced by The Legal Aid Society *Escalera v. NYCHA*, 425 F.2d 853 (2nd Cir. 1970), modified in part *Escalera v. NYCHA*, 924 F. Supp. 1323 (SDNY 1996).

¹⁰ New York City Charter, Chapter 16, § 1802.8

of the City of New York.¹¹ The City does not want to maintain ownership of these buildings, and seeks to transfer the property through one of its many disposition programs. Some of the major disposition programs are the Tenant Interim Lease Program (“TIL”)¹², Neighborhood Entrepreneurs Program (“NEP”)¹³, and the Neighborhood Redevelopment Program (“NRP”)¹⁴. Different rules apply to each program, and the rental housing sold by the City of New York is generally subject to protections set forth in Rent Stabilization.

F. Private Unregulated Housing

Private, unregulated housing is all housing that no type of rent or eviction regulations governs. Therefore, only the lease between the parties, general common law rights, and minimum statutory protections define the tenant’s and landlord’s rights and responsibilities (eg. Warranty of Habitability).

G. Cooperative

In cooperatives, apartment residents buy into the building as shareholders. Each shareholder is allocated a number of shares that is directly connected to the apartment they reside in. Shareholders elect a board of directors from amongst themselves who manage the property. The shareholder is neither a tenant nor an owner of any specific unit, but rather the owner of a share of the corporation that owns the building. Ownership of a share of the corporation entitles the owner to live in one of the units. People in cooperatives usually pay the cooperative board a maintenance fee, which covers the monthly operating expenses. Cooperatives control resale policies as well.

Original tenants from before the co-op’s incorporation who do not buy into the cooperative at the time of conversion are still protected under rent stabilization or rent control so long as the cooperative conversion was formed under a non-eviction plan.¹⁵ The proprietary lease governs terms of eviction for shareholders. Tenants who lease subsequent to cooperative conversion are generally unregulated tenants with limited protections.¹⁶

H. Condominium

Condominiums owners purchase the unit they reside in. There is generally no limitation on resale. There is usually a condominium board, which deals with common-area issues and usually has a carrying charge, which is a monthly expense. Condominium holdovers are rare in New York City.

¹¹ 28 RCNY Chapters 30, 35

¹² The tenants purchase the building to make it into a low income cooperative. Tenants purchase their units for \$250 but have resale restrictions. The City pays for the rehabilitation.

¹³ A local for profit developer purchases the building and generally the city pays for a gut rehabilitation

¹⁴ A community based organization purchases the building to maintain the housing as permanent affordable rental housing

¹⁵ Martin Act, Article 23 of General Business Law, 13 NYCRR Part 18

¹⁶ Paikoff v. Harris, 713 NYS 2d 109 (AT 2nd Dept 1999), GBL § 352-eeee

I. Mitchell-Lama

Mitchell Lama is an affordable housing program created in New York State in the late 1960's to keep middle-income families living in New York City. In exchange for low-interest mortgage loans and real property tax exemptions, developers created rental or cooperative properties with income restrictions meant to provide affordable housing for middle-income families.

Developments are eligible to withdraw from the Mitchell-Lama program ("buy-out") after 20 years in the program and upon prepayment of the mortgage or upon the expiration of the subsidy, which is usually 30 years. In the event that an owner chooses to prepay the mortgage or the subsidy expires, remaining tenants if eligible will receive Enhanced Section 8 Vouchers or "sticky vouchers." With an enhanced voucher, the tenant will pay the greater of either the rent tenant paid at the time of dissolution of the Mitchell-Lama property (minimum rent) or 30% of their income. This often results in enhanced voucher tenants paying more than 30% of their income. The only way to have the rent lowered from the minimum rent is if the tenant's income subsequently decreases by 15% or more.¹⁷

III. Proceedings in Housing Court

A. Civil Court, Small Claims Court, and Housing Court

The Civil Court of the City of New York has jurisdiction over civil cases involving amounts up to \$25,000 and other civil matters referred to it by the Supreme Court. It includes a small claims part for informal dispositions of matters not exceeding \$5,000 and a housing part for landlord-tenant matters of unlimited amounts and housing code violations.¹⁸

Generally, the Small Claims Part is the proper venue for claims arising from an owner's failure to return a security deposit, consequential damages from the owner's breach of the warranty of habitability, or disputes between roommates about outstanding rent.

The Housing Part handles only residential landlord tenant disputes. The cases heard in the Housing Part are summary proceedings. The types of case that can be heard in the Housing Part include Non-Payment Proceedings, Holdover Proceedings, RPAPL Section 7A Actions, Post-Eviction Proceedings, and Tenant Initiated Housing Part Actions (HP).

B. Nonpayment Proceedings

Nonpayment proceedings are summary proceedings commenced by the owner in the Housing Part and seek outstanding rent arrears from the tenant. Article 7 of the Real Property Actions and Proceedings Law (RPAPL) primarily governs summary eviction proceedings. Procedural aspects of summary proceedings that are not specifically addressed by the RPAPL are governed by the Civil Practice Law and Rules (CPLR) and the Civil Court Act.

¹⁷ <http://www.hud.gov/offices/pih/publications/notices/01/pih2001-41.pdf>

¹⁸ <http://www.courts.state.ny.us/courts/nyc/civil/index.shtml>

Prior to the commencement of a nonpayment proceeding, an owner is required to serve the tenant with a proper rent demand.¹⁹ This rent demand can be made orally or in writing pursuant to statute, however, the lease between the parties may require such a demand be made in writing. If a tenant is served with a Petition and Notice of Petition of Nonpayment, they must go to court and answer the proceeding in person.

If the tenant fails to answer the proceeding within five business days of being served the petition, the court may enter a default judgment against the tenant.²⁰ Once a default is entered, the court will allow the owner to hire a city marshal to evict the tenant. A tenant can have the default judgment vacated by filing an Order to Show Cause, but the tenant will have to convince the court that he or she has both a meritorious defense and a reasonable excuse for the default.

A tenant may also be evicted if he or she fails to pay rent pursuant to a court ordered agreement or decision after trial. However, if the tenant pays the outstanding rent as required by a settlement agreement or a judge's order after trial, the proceeding is discontinued.

C. Holdover Proceedings

Holdover Proceedings are summary proceedings commenced in the Housing Part and, like nonpayment proceedings, are governed by Article 7 of the RPAL, the CPLR, and the Civil Court Act.

Holdover Proceedings, unlike nonpayment proceedings, are actions in which the owner seeks possession of the apartment. If the proper grounds exist, an owner can commence a Holdover proceeding against anyone who is in possession of the apartment, which may be the tenant, a squatter, or a licensee. Tenants can also commence Holdover proceedings against roommates or licensees as long as the roommate is not a signatory to the lease.

Holdover Proceedings are generally more complex than nonpayment proceedings and can be based on many different grounds. Prior to the commencement of a Holdover proceedings, a predicate notice is served. The type of predicate notice that is served depends upon the underlying grounds for the Holdover, but some examples include a Notice to Cure, a Notice to Terminate, and a Notice to Quit. The Holdover proceeding is commenced upon the service of the Notice of Petition and Petition on the respondent. The respondent may answer either orally or in writing on or before the return date pursuant to RPAL §743 (or three days before the return date if served with the petition at least 8 days before the court date), and may seek to amend his or her answer.²¹

¹⁹ RPAL 711(2)

²⁰ 22 NYCRR 208.42(d)

²¹ 22 NYCRR 208.17(d) or by notice of motion CPLR 2004 if beyond as of right period.

1. Types of Holdover Proceedings, Non-Curable vs. Curable

Holdovers can be divided into two categories, allegations of curable breaches and non-curable breaches of the lease agreement or law. A curable holdover can be resolved by a change in behavior prior to, during, or after litigation. Examples of curable holdovers include illegal sublet, illegal alterations, and other breach of lease holdovers, like overcrowding or having an unauthorized pet.

A non-curable holdover cannot be resolved by a change in behavior, and is therefore more difficult to defend against. Examples of non-curable holdovers include any illegal activity, non-primary residency, or a squatter or licensee cause of action.

Some types of holdovers apply only to rent-regulated housing. In private, unregulated housing, the landlord would either proceed on the following actions if they violate the lease or the landlord may simply wait until the lease term expired and refuse to renew.

Squatter

A squatter is an occupant who intruded into the premises without permission of the owner, former owner, or anyone else entitled to possession, such as the tenant or former tenant. The owner must prove it is a person entitled to possession of the property and that the occupant never had permission to stay from anyone with a possessory right to the property.²² However, some courts have allowed owners to use self-help to remove a squatter so long as done without violence.²³ Owner must serve the alleged squatter with a 10 Day Notice to Quit before commencing a court proceeding.²⁴

Licensee

A licensee is an occupant who entered the premises with permission of a person entitled to possession, such as a tenant or former tenant. The landlord must prove it is a person entitled to possession and that the occupant's permission to stay in the premises has either expired or been revoked.²⁵ Owner must serve the alleged licensee with a 10 Day Notice to Quit. The exception to this rule is that a cohabiting spouse or spouse-equivalent cannot be evicted as licensee, but other remaining family members can.²⁶

²² RPAPL Section 713(3). *Robbins v. De Lee*, 310 N.Y.S.2d 804 (N.Y.A.D. 3rd Dep't 1970); *Murowski v. Melkun*, 336 N.Y.S.2d 845 (N.Y.CityCiv.Ct. 1972); *Einhorn v. Einhorn*, 124 N.Y.S.2d 498 (N.Y.Sup. 1950).

²³ *Fish v. Simpson*, 477 N.Y.S.2d 946 (Civ. Ct 1984), *P & A Brothers Inc v. City of New York Dept of Parks and Recreation*, 585 N.Y.S.2d 335 (1st Dept 1992)

²⁴ RPAPL § 713(10)

²⁵ RPAPL Section 713(7). *Rosenstiel v. Rosenstiel*, 245 N.Y.S.2d 395 (N.Y.A.D. 1st Dep't 1963); *Murowski v. Melkun*, 336 N.Y.S.2d 845 (N.Y.CityCiv.Ct. 1972); *Wright v. Wright*, 67 N.Y.S.2d 63 (N.Y.Mun.Ct. 1946).

²⁶). *Rosenstiel v. Rosenstiel*, 245 N.Y.S.2d 395 (N.Y.A.D. 1st Dep't 1963)

Super

A super or employee holdover is for employees whose housing is dependent on continued employment. The landlord must prove the landlord employed the tenant, that the tenancy rights were dependent upon employment, and that the employment has ended, and that the employment was properly terminated.²⁷ No Notices required prior to filing the holdover petition. There is only one substantive defense to this type of proceeding – if the employee's tenancy preceded his or her employment, the employee may remain in apartment as regulated tenant.²⁸

Nuisance

A tenant may be evicted on the ground of nuisance if the tenant engages in recurring, frequent, or continuous objectionable behavior that threatens the life, health, or safety of the owner or other tenants, creating imminent danger for others.²⁹ Annoying or eccentric behavior is not sufficient to constitute a nuisance.³⁰ Owners are required to serve some notice prior to commencement of the proceeding. Generally, owners serve the tenant with a Notice to Cure and a 10 Day Notice to Terminate. However, the allegations will affect the type of notice that is required to be served and if the allegations involve conduct that is dangerous to building employees or other tenants, the owner may serve the 10 Day Notice to Terminate without first serving a Notice to Cure. Owners must make reasonable accommodations for tenants with disabilities where the conduct is related to a disability.³¹

Breach of Lease

A tenant may be evicted for failure to comply with substantial terms of the lease.³² Often this ground will be combined with an allegation of nuisance. Some specific examples of breach of lease

- harboring an unauthorized pet (exception: waiver by having pet openly and notoriously for more than 3 months)³³
- commercial use of apartment (standard: must materially affect character of building)³⁴
- waste or altering premises without permission³⁵
- overcrowding, having too many people in apartment³⁶

²⁷ RPAPL 713(11), Mohr v. Gomez, 662 NYS2d 979 (1997); Haros v. Piskorz, 470 NYS2d 973 (1983).

²⁸ Gottlieb v. Adames, NYLJ September 23, 1994 p.21 c.2 (AT 1st Dept.), Kwong v. Guido, 492 NYS2d 678 (1985);

²⁹ RPAPL 711(1); 9 NYCRR 2524.3(b); 9 NYCRR 2204.2(a)(2)

Domen Holding Co. v. Aranovich, 753 NYS2d 57 (1st Dep't. 2003); James v. NYCHA, 589 NYS2d 331 (1st Dep't. 1992); 177 East 90th St. Co. v. Niemela, 453 NYS2d 567 (NY City Civ Ct 1982).

³⁰ Cheren v. Jackson, NYLJ October 18, 1983 p. 6 c.1 (AT 1st Dept.).

³¹ See Americans with Disabilities Act 42 USCA 12000 et seq., Fair Housing Act 42 USCA 3600 et. seq.

³² 9 NYCRR 2204.2(a); 9 NYCRR 2524.3(a).

³³ East River Housing Corp. v. Matonis, 312 NYS2d 461 (N.Y.A.D. 1st Dep't 1970), Starrett City, Inc. v. Jace 524 N.Y.S.2d 130, (N.Y.Sup.App.Term, May 18, 1987)

³⁴ Cohen v. Walker, 86 NYS2d 519 (N.Y.Sup. 1949).

³⁵ Sigsbee Holding Corp. v. Canavan, 240 NYS2d 900 (N.Y.CityCiv.Ct. 1963).

³⁶ Sandflow Realty Corp. v. Diaz, 315 NYS2d 487 (N.Y.CityCiv.Ct. 1970).

- chronic rent delinquency, repeated failure to pay rent on time³⁷
- prohibited appliances, such as air conditioner or washing machine³⁸

Prior to commencing a Holdover proceeding on the ground of breach of lease, the tenant is served with a Notice to Cure, which provides a specified cure period, followed by a 10-Day Notice to Terminate. After trial, even if a tenant is found to violate any of the above substantial obligations of his or her tenancy, the tenant will be allowed a time to cure said violation and remain in the apartment.³⁹

Illegal Activity or “Bawdy House”

A tenant may be evicted and the tenant’s lease voided by the landlord, police, or even the owners of neighboring buildings for using or selling drugs in the premises, prostitution, or other crimes.⁴⁰ No Notice Required *unless* Notice specifically required by statute or lease, usually a 7-Day Notice of Termination.

Roommate Overcharge

A tenant may be evicted for charging a roommate more than the proportionate share of the rent. Proportionate share is determined by dividing the rent by the number of occupants.⁴¹ The purpose of this provision is to prevent tenants from profiteering from their rent regulated apartments. Courts have found this behavior can be curable depending on whether the overcharge rises to the level of profiteering.⁴² A tenant will be served a 7-Day Notice of Termination.

Non-Primary Residence

A tenant may be evicted for failure to live in the residence full time.⁴³ Also, a prime tenant who has sublet an apartment must intend to return to the apartment at the end of the sub-lease. Non-primary residence can only be brought at the end of a lease period, as it is a reason to refuse a lease renewal. During the lease period, the landlord is more likely to bring an illegal sublet holdover. To prove non-primary residence, the landlord must show: a different permanent address through taxes, vehicle registration, and/or state-issued identification, voter registration, residing in the regulated apartment less than 183 days per year, and/or subletting the apartment.⁴⁴ Non-primary residence is not curable. Rent Stabilized tenants will be served

³⁷ Adam’s Tower Ltd. Partnership v. Richter, 717 NYS2d 825 (2000).

³⁸ 77-34 Austin St. Corp. v. Haas, 154 NYS2d 702 (Mun.Ct. 1956).

³⁹ RPAPL § 753.4

⁴⁰ RPL 31; RPAPL 753(4); RPAPL 715(1), Lituchy v. Lathers, 232 NYS2d 627 (N.Y.Sup. 1962).

⁴¹ 9 NYCRR 2525.7 Ram 1, LLC v. Mazzola, NYLJ 6/8/01, 21:1 (Civ Ct City NY County 2001), *aff’d* 2001 WL 1682829, (NY Sup App Tm. 2001); Bryant v. Carey, 765 N.Y.S.2d 146 (NY City Civ Ct 2003).

⁴² Roxborough Apartments Corp. v. Becker, (App Term 1st Dept 2006).

⁴³ 9 NYCRR 2504.4(d);

⁴⁴ 9 NYCRR 2520.6(u), Nussbaum Resources I, LLC v. Gilmartin, 781 NYS2d 552 (N.Y.CityCiv.Ct. 2003); Emay Props Corp. v. Norton, 519 NYS2d 90 (App.Tm.1st Dep’t. 1987).

with Notice of Non-Renewal of Lease (*Golub* Notice). Rent Control tenants need not be served with a *Golub* Notice.⁴⁵

Illegal Sublet

A tenant may be evicted for subletting the apartment without the landlord's permission, for overcharging a subtenant, or for subletting the apartment for longer than the two years allowed.⁴⁶ An owner may not unreasonably refuse a subtenant, so tenant has the right, after the landlord has rejected the sub-tenant without good cause, to sublet the apartment without permission.⁴⁷ Owner must serve a Notice to Cure and a 10-Day Notice of Termination.

Illusory Prime Tenancy

A tenant may be evicted for failing to ever move into the apartment and then subletting it for profit, or by abandoning the property and subletting it for profit with the implicit or explicit knowledge of the landlord.⁴⁸ This cause of action frequently arises when the landlord would like to charge higher than allowable rents through an illusory tenant, or when the tenant and landlord, knowing the building will soon convert to a cooperative, charge an illegal rent to subtenants who will pay the higher rent for the option to buy into the building. However, if landlord is not aware of the illegal subtenant, then case is probably non-primary residence. Subtenant may be awarded tenancy rights.⁴⁹ Tenant must be served with a Notice of Termination prior to commencement of the proceeding.

Owner's Personal Use

An owner may evict a tenant to regain use of the apartment for himself or herself or for a family member (spouse, child, parent, in-law, sibling, grandparent, or grandchild) at the end of the lease period. In order to recover possession based on personal use, the landlord must be an actual person, not a business organization. The rules vary significantly depending on whether rent-stabilization or rent control governs.⁵⁰ Generally, rent control tenants have more protections. For example, under rent control, landlord may not evict seniors (62 years old) or people with disabilities under this cause of action without finding providing them with a comparable replacement apartment. There are additional restrictions for long-term tenants (20+) under rent control. The owner must serve a Notice of Non-Renewal (under Rent-Stabilization), or Notice of Termination (under Rent Control).

⁴⁵ 9 NYCRR 2204.3(b)

⁴⁶ RPL 226-b; 9 NYCRR 2525.6 ; 9 NYCRR 2524.3(h). ; *Diamond v. Menasche*, 535 NYS2d 335 (1988).

⁴⁷ RPL 226-b(2)(a) *KUR Development Corp. v. Aleandri*, 557 NYS2d 828 (1990)

⁴⁸ NYC Admin. Code 26-520, *Avon Furniture Leasing, Inc. v. Popolizio*, 500 N.Y.S.2d 1019 (1st Dep't 1986); *Bozzi v. Goldblatt*, 587 NYS2d 658 (N.Y.A.D. 1st Dep't. 1992); *Bruenn v. Cole*, 568 N.Y.S. 2d 351 (N.Y.A.D. 1st Dep't. 1991).

⁴⁹ *Avon Furniture Leasing, Inc. v. Popolizio*, *Supra*

⁵⁰ NYC Admin. Code 26-511(c)(9)(b); 9 NYCRR 2524.4(a) – rent stabilized; NYC Admin Code 26-408(b)(1); 9 NYCRR 2204.5 – rent controlled.

IV. Defenses & Counterclaims in Housing Court

The tenant must raise defenses and counterclaims in the written answer. That answer will set forth the claims the respondent-tenant will prove at trial. This is not an exhaustive list of defenses, but a good overview of the defenses that occur regularly in holdover proceedings

a. Objections in Point of Law/Affirmative Defenses/Counterclaims

When answering a proceeding, a tenant can raise claims and defenses. Tenants can raise an

1. Objection in Point of Law is a technical objection to claims raised in the petition and which on its face warrant dismissal of the petition,
2. Affirmative Defense requires additional facts, which dispute the facts raised by the petitioner and could result in dismissal of the proceeding or a counterclaim which seeks affirmative relief that is monetary, injunctive, or otherwise.

b. Service of Process

Prior to the commencement of a summary proceeding in Housing Court, the owner must serve tenant with the correct predicate notices in the proper manner.⁵¹ For example, prior to the commencement of a nonpayment proceeding, an owner is required to serve the tenant with a proper rent demand.⁵² This rent demand can be made orally or in writing pursuant to statute, however, the lease between the parties may require such a demand be made in writing. The failure to properly plead and prove the rent demand at trial will result in dismissal of the proceeding. In Holdover proceedings, the predicate notice is generally a Notice to Cure and/or a Notice to Terminate.

After service of the predicate notice, the owner must serve the Notice of Petition and Petition. RPAPL § 735 governs service of the Notice of Petition and Petition. The owner must make reasonable attempts to personally serve the tenant, by attempting to hand the petition to the tenant personally. When attempting personal service, serving another person in apartment of suitable age and discretion is permissible. Thereafter, serving the respondent by regular *and* certified mail at the subject premises and any other known addresses. A person will be considered to be of suitable age and discretion where the nature of his or her relationship with the person to be served will make it more likely than not that they will deliver process to the named party.⁵³

⁵¹ RPAPL §735

⁵² RPAPL 711(2)

⁵³ See 50 Court Street Assoc. v. Mendelson & Mendelson, 572 N.Y.S. 2d 997 (NYC Civ Ct 1991)

After the owner has made reasonable attempts to personally serve the tenant (generally two attempts at different times of day will be considered reasonable), the owner may use “nail and mail” service. The owner must leave a copy posted on door or put under door, thereafter serving by regular mail *and* by certified mail, and filing proof with court.

c. Personal Jurisdiction

Respondents must raise personal jurisdiction defenses at the time they answer or the defense is considered waived.⁵⁴ It is extremely important to determine whether a personal jurisdiction defense exists. It is good practice to get a copy of the entire file before answering to be able to determine how the petitioner claims service was effectuated. Once a service defense is raised, it the burden of the petitioner to prove service was proper. The hearing to determine proper service is a traverse hearing.⁵⁵ In order to properly raise this defense, the tenant must include specific facts supporting the claim that personal jurisdiction is lacking.

d. Subject Matter Jurisdiction

When subject matter jurisdiction is at issue, the court must determine whether a proceeding can be maintained on the face of the petition.⁵⁶ Courts determine whether the petition is adequate by looking at:

1. Whether they allege a sufficient factual basis to state a cause of action and maintain a proceeding, whether the court is the proper venue and forum for the case
2. Whether the petitioner is authorized to commence the proceeding and has properly registered the subject premises,
3. Whether the petition alleges the correct apartment,
4. Whether the petition has been properly verified.⁵⁷

If a respondent contests any of the above, these responses are considered “Objections in Point of Law.”

Subject matter jurisdiction can be raised at any time. Therefore, if you are filing amended answers for respondent/tenants, you can raise all substantive defenses in your proposed amended answer at the time you make a motion to amend or amend as of right.⁵⁸

⁵⁴ CPLR §3211(e)

⁵⁵ Traverse hearing is an evidentiary hearing with witnesses. Petitioner will usually have the process server testify to the service effectuated. The process server will bring his/her logbook that will outline service completed during the same timeframe. Use the cross-exam to attack the process-server’s credibility. Research the process server’s schedule on the days of alleged service to look for inconsistencies by pulling the court files of index numbers before and after the tenant’s index number.

⁵⁶ PRAPL §741

⁵⁷ RPAPL § 741.

⁵⁸ You can amend as of right within 20 days of filing the original answer pursuant to CPLR §3025(a).

e. Laches

Generally, landlords may not pursue a claim after a certain period of time, if the landlord has delayed asserting claim to tenant, gave no notice of problem, and the delay prejudices the tenant.⁵⁹ Laches is the equitable aspect of statute of limitations and for holdover would require the court to dismiss the allegation. In the context of nonpayment cases, the landlord would be stopped from using a summary proceeding to collect the rent. Once Laches is proven, the owner must seek the rent in Civil Court and the outstanding rent cannot be the basis for a possessory judgment.

f. Warranty of Habitability

Landlord will seek use and occupancy from the tenant while a holdover proceeding is pending and ongoing rent during the nonpayment proceeding. If conditions exist in the subject premises that are dangerous to life, health and safety, rent or use and occupancy should be set at an amount below the last agreed upon rent (or legally regulated rent) since the tenant has been forced to live with such conditions.⁶⁰ Any offset of rent is called rent abatement. A tenant must provide the landlord of notice of the problem and the owner must have failed to repair the condition. The worse the condition, the higher the abatement (no heat during the winter, substantial abatement, roaches in apartment, smaller abatement).

g. Tender and Refusal

In cases in which the tenant has paid the rent, but the owner has refused to accept the rent, the tenant can claim that the owner must bring a non-possessory action in Civil Court.

h. Acceptance of Rent (Holdover proceedings only)

Landlord may not accept rent during the period after expiration of Notice of Termination and prior to serving the Petition, as it confuses the issue of whether tenancy has been terminated. Acceptance of rent has been determined to include cashing public assistance payments, retaining checks, and not returning a check immediately.⁶¹ Courts examine the intent of the owner by accepting the payment and so this defense generally will not be successful in a pre-trial motion.

i. Waiver (Holdover proceedings only)

The defense of waiver is based on an action by the landlord that suggests the landlord would like to continue the landlord/tenant relationship despite having initiated a holdover proceeding, while landlord has knowledge of the tenant's breach.

⁵⁹ 269 Associates v. Yerkes, 449 N.Y.S.2d 593 (N.Y. City Civ. Ct. 1982 ;

⁶⁰ Evens v. Charap, N.Y.L.J., December 18, 1991, p. 13, col. 1 (Civ. Ct. N.Y. Co.); Gammerman v. Kulko, N.Y.L.J. June 22, 1994, p.30, col.3, 22 H.C.R. 339A, aff.d. as modified, N.Y.L.J., July 26, 1995, p. 23, col. 1 (A.T. 9 & 10 Jud. Dists.); King Enterprises Ltd. v. Mastro, 2001 WL 1328712, 2001 N.Y. Slip Op. 40162(U), N.Y.City Civ.Ct., June 01, 2001.

⁶¹ See Greenwich Gardens Assocs. V. Pitt, 484 N.Y.S. 2d 439 (Dist Ct Nassau County 1984).

Waiver can arise in a variety of circumstances including 1) acceptance of rent after the expiration of the notice of termination and before the commencement of the holdover proceeding (commencement by service of the Petition and Notice of Petition),⁶² 2) commencing a nonpayment Petition during a holdover proceeding,⁶³ 3) acceptance of rent and other action such as offer of a renewal lease which shows an expression of intent on behalf of the landlord⁶⁴, or in pet cases, notice and knowledge of the existence of the pet for more than three months without the commencement of a holdover proceeding constitutes waiver in rent regulated and cooperative housing.⁶⁵

All of the above show some type of equivocation by the landlord about whether a landlord-tenant relationship exists despite the alleged breach, which should result in dismissal of the holdover proceeding.

j. Cure of the Violation (Holdover proceedings only)

Depending on the type of proceeding pending, respondent may be able to cure the violation as set forth in the petition (i.e. illegal sublet, breach of lease). You may seek to argue that the breach has been cured even if the cause of action is not curable based on the interests of justice or the particular facts in your case.

k. Retaliatory Eviction (Holdover proceedings only)

Landlord may not punish tenant for exercising his or her right to complain to government agencies, enforce the lease or law, or participate in a tenant association. Landlord's action presumed retaliation if taken within six months of the tenant commencing a lawsuit to correct housing violations, complaining to a government agency, or following a prior retaliatory eviction.⁶⁶ Once the respondent proves that he or she took such an action, the burden reverts to the landlord to rebut the presumption of retaliation.⁶⁷ Tenant can raise the defense if the presumed retaliation is taken after six months of the protected behavior, but will not have the benefit of the presumption of retaliation.

l. Anti-Discrimination (ADA, FHA, etc)

Landlord may not discriminate against disabled tenants by refusing to rent to them or refusing to make reasonable accommodations, unless the tenant poses a danger to other tenants.⁶⁸

⁶² Jeppaul Garage Corp. v. Presbyterian Hospital in City of New York, 61 N.Y.2d 441 (N.Y. 1984); Witkoff v. Shopwell, Inc., 491 N.Y.S.2d 740 (2nd Dep't 1985); Greene Ave Associates v. Cardwell, 743 N.Y.S.2d 842 (N.Y. City Civ. Ct. 2002)

⁶³ McCormack v. Geidel, NYLJ 11/22/78, p. 15, col. 1 (App. Term 2d Dept.); Ansonia Associates v. Pearlstein, 471 N.Y.S.2d, 527 (N.Y. City Civ. Ct., 1984).

⁶⁴ Lee v Wright 485 NYS2d 543 (1st Dept 1985)

⁶⁵ NYC Admin Code 27-2009.1(b)

⁶⁶ Real Property Law 223-b

⁶⁷ Id.

⁶⁸ Americans with Disability Act 42 USC 12000 et seq., and Fair Housing Act 42 USC 3600 et seq.

m. Rent Overcharge

The owner must prove the rent charged is the legal rent. Tenant may dispute that claim by producing a lease with a different rental amount. If the apartment is subject to rent regulation, the tenant can rely on DHCR records to prove the rent is higher than the legally regulated rent.⁶⁹

n. Order to Correct

A tenant who has outstanding repairs in his or her apartment may raise as an affirmative defense and counterclaim that the court should order the owner to correct all outstanding repairs as part of any order or settlement agreement. The tenant must prove the existence of conditions that violate the Multiple Dwelling Law and other applicable laws. The tenant can request a court-ordered inspection of the public areas of the building and the tenant's apartment to determine the existence of housing code violations.

o. Trial by Jury

Generally, leases prevent respondents from having a trial by jury.⁷⁰ However, when there is no lease that prevents a trial by jury, tenants should demand a trial by jury if the facts of their case warrant it. The jury trial will be conducted by a Civil Court Judge and may be more beneficial. To preserve the right, the tenant must request a jury trial in the answer and pay the fee for the jury trial.

V. Representing LGBT Clients and HIV/AIDS-Specific Resources

A. Representing LGBT Clients⁷¹

- Avoid assumptions! When first meeting a client do not make assumptions about that client's gender or sexual orientation. Make it a habit to use inclusive language with all clients.
- Signify to clients that your office is a safe space for LGBT people by displaying pamphlets about resources for LGBT people, flyers about LGBT events, or artwork with positive messages about LGBT people.
- Recognize biases you may have about certain segments of the LGBT community. Remember that even advocates who are members of the LGBT community can have biases.

⁶⁹ A determination of what the legally regulated rent can be very complicated.

⁷⁰ *Avenue Associates v. Buxbaum*, 373 N.Y.S.2d 814 (N.Y. Sup. 1975)

⁷¹ www.abanet.org/.../Screening_for_LGBT_Victims_of_Domestic_Violence.ppt, and http://www.nclrights.org/site/DocServer/Proyecto_Poderoso_Flyer_cd.pdf?docID=2321

- Be sensitive to your client's gender identity and, when relevant and necessary, collaborate with your client on how to inform the court about a change in your client's gender presentation.
- Recognize that LGBT people may have a heightened fear of the police, court system, and government personnel because of systemic discrimination against LGBT citizens.
- Build relationships with your clients based on mutual respect. Encourage your clients to speak freely with you by explaining your role as their attorney, include straightforward explanations about confidentiality and attorney-client privilege.
- When clients are hesitant to reveal their sexual orientation to you or the court, but that information is necessary to raise certain defenses or counterclaims, explain the importance of those defenses or counterclaims. Explaining their importance will allow your client to make an informed decision about whether to reveal his or her sexual orientation. Respect your client's decision.

B. Resources for Tenants living with HIV/AIDS and/or their Advocates

1. HIV/AIDS Services Administration (HASA) is a division of the New York City Human Resources Administration. HASA expedites access to public benefits and social services needed by people living with HIV/AIDS. Benefits include emergency rent grants, ongoing assistance with rental payments, and emergency and transitional housing.

You can learn more at the HASA website:

http://home2.nyc.gov/html/hra/html/directory/hasa_services.shtml

2. The HIV Legal Advocacy Manual was developed by the HIV Project of South Brooklyn Legal Services for case managers at community-based organizations, social workers, and others who work with low-income HIV-infected individuals and their families.

A copy of the manual is available on South Brooklyn Legal Services' website:

<http://www.sbls.org/index.php?id=167>

3. *How to Get a Place Called Home: A Handbook to Help People Living with HIV/AIDS Find Housing in New York City* is a publication by New York State Department of Health that provides a comprehensive list of affordable housing available to people living with HIV/AIDS and instruction on how to apply.

You can access the publication by following the link below:

<http://www.nyhealth.gov/diseases/aids/docs/doh-9547.pdf>

4. NY State Division of Human Rights, Office of AIDS Discrimination enforces laws prohibiting discrimination on the basis of HIV/AIDS status. Clients can file a complain

by calling 1 (800) 523-2437. Clients can also file complaints with the NYC Commission on Human Rights by calling (212) 306-5070 or HUD Fair Housing Complaint Hotline, if the housing is subsidized by HUD, by calling 1 (800) 669-977.

More information on filing a complaint with the Office of AIDS Discrimination is available at: http://www.dhr.state.ny.us/pdf/trifold-hiv_aids.pdf

5. Civil Legal Services for Low-Income People Living with HIV/AIDS there are several organizations that specialize in providing civil legal services for people living with HIV/AIDS including Gay Men's Health Crisis (serves NYC residents), HIV Law Project (serves Manhattan and Bronx residents), and the Bronx AIDS Services Legal Advocacy Program (serves Bronx residents), South Brooklyn Legal Services HIV Project.

VI. Succession Rights

A family member who resides in a rent regulated apartment with the tenant of record can claim succession rights as a defense to a squatter or licensee Holdover proceeding or a nonprimary residence proceeding where the tenant of record has permanently vacated the subject premises. The ability to assert succession rights with the passage of marriage equality in New York State and beyond may impact the rights of succession.

A. Relevant Statutory Framework

Succession rights for Rent Stabilized Tenants are governed by RSC § 2520.6 and §2523.5. Succession rights for Rent Control Tenants are governed by 9 N.Y.C.R.R. § 2204.6. The language of the respective statutes is identical and so we will only address the RSC statutes, but recognize that the discussion below applies to both Rent Stabilization and Rent Control.

RSC §2523.5(b)(1):

“if a tenant has permanently vacated the housing accommodation, any member of such tenant's family ... who has resided with the tenant in the housing accommodation as a primary residence for a period of no less than two years, or where such person is a “senior citizen,” or a “disabled person” as defined in paragraph (4) of this subdivision, for a period of no less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, shall be entitled to be named as a tenant on the renewal lease.”

B. Braschi

Braschi v. Stahl, 74 NY2d 201 (Ct App 1989), affirmed a lower court's finding that gay life partners who lived together for 10 years before the death of the tenant of record, had joint bank accounts and safe deposit boxes, held themselves out as spouses, Braschi was the beneficiary of the deceased tenant of record's life insurance policy, Braschi had power of attorney in case of

the deceased tenant of record's illness or incapacitation qualified as "family" under the 1989 version of the New York City Rent and Eviction Regulations.

C. Family Members Today

Family Member is defined as

RSC § 2523.5 (0):

“(o) *Family member* (1) A husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-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.”

Until quite recently, all members of same-sex partnerships seeking to claim succession rights had to rely on RSC § 2523.5 (0)(2) and prove both “emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant.”

The passage of marriage equality in a variety of jurisdictions, including New York, has impacted the application of the above definition.

First, prior to the passage of marriage equality in New York, it became possible for same-sex couples legally married in other jurisdictions to take advantage of the protections granted by RSC § 2523.5 (0)(1) and claim family member status as a “husband” or “wife.” This development greatly reduced the burden on legally married same-sex couples.

This development came out of a case in the Supreme Court, Appellate Division, Fourth Department and a directive issued by Governor Paterson. On May 14, 2008, Governor Paterson issued a directive in response to Martinez v. County of Monroe, 850 NYS2d 740 (App Div 4th Dept 2008), which stated that same-sex marriages performed legally in other states are “entitled to recognition in New York in the absence of express legalization to the contrary,” and that disregarding these marriage might be a violation of the New York State Human Rights Law (Martinez, 850 NYS2d at 743).

After the May 14, 2008 directive, the New York State Division of Housing and Community Renewal (DHCR), the administrative agency that oversee rent regulation, took the position that legal out-of-state same-sex marriages are entitled to the same protections as opposite-sex marriages.

From the DHCR's Frequently Asked Questions webpage:

“Are same-sex marriages, lawfully performed outside of New York, entitled to the same rent protections applicable to lawfully recognized marriages between opposite-sex couples?

Yes. DHCR shall construe the terms "spouse," "husband" and "wife" to encompass legal same-sex marriages performed outside of New York State. This will broaden the scope of both how succession rights can apply and the right to include the name of a spouse on the lease.” <http://www.dhcr.state.ny.us/rent/faqs.htm#ol17>

Second, the passage of New York’s marriage equality statute has reduced the burden further for those couples choosing to marry. (See attached succession rights supplement).

D. Succession Rights of Members of Non-Legally Married Same-Sex Couples

Many same-sex couples may not seek to be legally married, but still will engage in relationships that result in both “emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant” as contemplated by RSC § 2523.5 (0)(2) and applicable case law (See attached succession rights supplement).

In order to prove that a same-sex couple has both an “emotional and financial commitment, and interdependence between such person and the tenant or permanent tenant,” RSC § 2523.5 (0)(2) enumerates a non-exhaustive list of factors for the court to consider.

RSC § 2523.5 (0)(2):

“...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.”

E. The Issue of Permanent Vacatur: “Hiding Out” or Delay

In the last few years, the Appellate Term has issued a number of decisions uniformly holding that a tenant of record's moving out of an apartment or otherwise not maintaining the same as a primary residence is not the equivalent of permanently vacating the premises as required by the succession statutes. The Term has held that even if a tenant no longer resides in the premises, a permanent vacatur cannot be shown if the tenant maintains contacts with the apartment. Rather the date of permanent vacatur can only be determined at the time the tenant or remaining occupant notifies the landlord of tenant's death or surrender of the premises.

- Metropolitan Life Ins. Co. v. Butler, 2002 WL 83691, N.Y.L.J., Jan. 18, 2002, 18:1 (App. Term 1st Dep't. 2002): tenants deemed not to have permanently vacated prior to surrender and period during which they renewed leases, even though they “were concededly not residing in there primarily”
- East 96th St. Co. v. Santos, 13 Misc.3d 133(A), 2006 WL 2975965 (App Term 1st Dep't. 2006): Permanent vacatur set at death of tenant in spite of fact that tenant had relocated to Florida years before since tenant retained “substantial ties” to the apartment after Florida relocation in 1995 by continuing to return to the apartment during vacations and spending several months in the apartment each year through 2000 and submitting renewal leases in tenant's name through November 2004.
- 360 West 55th St. v. Anvar, 13 Misc.3d 7, 822 N.Y.S.2d 353 (App. Term 1st Dep't. 2006): Court found that respondent and tenant, albeit having lived in spousal-like relationship for a number of years, gradually dissolved their relationship over a long period with tenant spending more and more time in California. Court held that tenant did not permanently vacate until written surrender to the landlord in March 2004 after the expiration of the last lease renewal. Court held that because the relationship changed in preceding years, respondent could not demonstrate that he had resided together with the tenant as a “family” during the two years prior to tenant's permanent vacatur

- 72A Realty Assocs. v. Kutno, 15 Misc.3d 100, 838 N.Y.S.2d 334 (App Term 1st Dep't. 2007), rev'g 12 Misc.3d 1161(A), 819 N.Y.S.2d 213 Civ. Ct. N.Y. Co. 2006) long-term spousal like relationship between respondent and tenant changed in 1999 and tenant moved out at that time though break up appeared to have extended through 2001. Throughout that time Tenant maintained some contacts with apartment by occupying sporadically when respondent was not present, making rent payments, and signing a renewal lease that extended through 2003. Court determined that the permanent vacatur date was October 31, 2003, the expiration date of the last renewal lease and found that respondent had not resided with tenant nor maintained a family-type relationship with tenant during two-year period immediately preceding the tenant's permanent vacatur.
- ST Owner LP v. Nee-Chan, 16 Misc. 3d 1122(A), 847 N.Y.S.2d 905 (NY City Civ Ct, 2007): In defending non-primary residence holdover, tenant of record failed to establish primary residence in the subject premises. Tenant's son, who had lived in the premises since the beginning of the leasehold in 1987, could not establish succession because the court found that tenant had not permanently vacate the premises. Although the tenant no longer maintained the premises as her primary residence she continued to sign renewal leases, make rent payments, receive bills at the premises, and kept photographs and mementos in the apartment.
- 85 Fourth Partners v. Herbert, 18 Misc.3d 1112(A), 2008 WL 73009 (Civ. Ct. N.Y. Co. 2008) (finding that tenant did not permanently vacate the apartment until surrendering the apartment 16 years after moving out, after which he maintained substantial ties with apartment, and that the relationship ended long before the date of surrender).
- Third Lenox Terrace Assocs. v. Edwards, 881 N.Y.S.2d 367 (App Term 1st Dept 2009): Trial court's decision is reversed. Claimant failed to establish succession rights to sister's tenancy where sister resided elsewhere as of March 1998, landlord was not notified of tenant's move, money orders were paid in sister's name, and renewal leases were signed by the sister through October 2005. The Court held that the tenant of record could not be found to have permanently vacated until the expiration of the last renewal lease in October 2005. Since the claimant and her sister did not co-reside in the premises during the two year period immediately preceding October 2005, the succession claim had to fail. Moreover, the Court held that since the would be successor and tenant had purposefully concealed tenant's vacatur from the premises, claimant was deemed to have waived any succession claim.
- Extell 609 West 137th St LLC v. Santana, 873 N.Y.S.2d 511 (NY City Civ Ct 2009) *affirmed* 24 Misc 3d 141(A), 2009 WL 2407944 (App Term 1st Dept 2009) : Landlord's summary judgment motion granted where respondent and tenant conceded that tenant had moved out in May 2004, tenant signed renewal lease in 2005, and tenant mailed letter to landlord in May 2007 requesting that respondent daughter be named tenant. (*motion for leave to appeal to AD currently pending*)
 - *Compare, Warren LLC v. Carbello*, 5/6/2009 NYLJ 25, (col. 1) for the proposition that signing of renewal leases, alone, does not automatically

defeat a succession rights claim. Respondent claimed succession rights where he had been living with parents (TORs) until their vacatur in 1998. Petitioner moved for summary judgment arguing that the tenant of record had not permanently vacated until 2008 on termination of the last renewal lease she executed. Court denied Petitioner's motion ruling that a triable issue of contemporaneous occupancy had been presented.

But see, Fourth Lenox Terr. v. Wilson, 2007 N.Y. Slip Op. 27150, 2007 WL 1121728 (App Term 1st Dep't. 2007): Appellant's status as a successor tenant relates back to the time of the tenant's permanent vacatur [when she moved to New Jersey], and cannot be retroactively vitiated by the landlord's belated, posthumous allegations of nonprimary residence against the tenant.”.

F. How and When to Assert Succession Claim?

The Appellate Term has outlined the proper way to assert a succession claim.

In *South Pierre Assocs v. Markowitz*, 17 Misc 3d 53, 844 N.Y.S.2d 552 (App Term 1st Dept 2007) the court denied a succession claim denied where the would be successor was found to have concealed his occupancy for almost thirteen years following the tenant's death by forging the tenant's name on renewal leases and several rent payments. The court instructed the following:

“in the ordinary course of events, a family member, who remains in the apartment following the departure of the named tenant, will receive a renewal notice towards the end of the lease term, directed to the named tenant; the recipient will *thereupon* inform the landlord of the tenant's departure as well as his status as a family member; and, assuming there is no dispute regarding his status, the surviving family member will receive a renewal lease designating him tenant of record” *citing 245 Realty Assoc v. Sussis*, 243 A.D.2d at 32-33 (App Div 1998).

But compare,, Riverton Assocs v. Knibb court found that the respondent-undertenant did not forfeit her succession rights otherwise firmly established by concealing her occupancy from the petitioner for a two-year period following her grandmother's death through the submission of renewal leases bearing her grandmother's forged signature. According to the Appellate Term, given the respondent's long term co-occupancy and the *short-lived duration of the respondent's misrepresentations* (emphasis added), any fraud or irregularities committed in the aftermath of the grandmother's death cannot reasonably be said to have caused the petitioner any discernable prejudice.

VII. Settlements/Trials

The majority of proceedings in Housing Court are settled pursuant to a written settlement agreement. A settlement agreement can be entered into at anytime, including before, during, or after trial. In a settlement agreement, the parties are not bound to the limits the judge must follow in awarding a judgment at a trial, but rather may construct a contract that resolves the

matter. Accordingly, the settlement agreement can include any terms to which the parties agree. Settlement agreements in Housing Court often follow these general formats:

A. Nonpayment Settlements

Payment Plan: The tenant agrees to pay a certain amount of money each month over a period of time, eventually paying off the arrears. In addition, the owner agrees to make certain repairs in the apartment by a certain date.

Lump sum payment: Tenant agrees to pay all the arrears by a certain date. This type of settlement is only an option if tenant anticipates assistance from a charity or government organization or receiving money from tax refund or family member.

Payment conditioned upon repairs: Tenant will pay a portion of the rent and balance once the repairs are complete.

Payment and Rent Abatement: Tenant pays part of the rent and the landlord agrees to waive a portion of the rent arrears because of conditions that exist in the subject premises. Tenant generally pays the balance of the rent right away.

B. Holdover Settlements

1. Discontinue: Petitioner agrees to drop the action, with prejudice or without prejudice. Generally, the petitioner will discontinue without prejudice following a Motion to Dismiss, which the respondent would clearly win. The petitioner is then free to re-file the action after having corrected the errors. Sometimes, the petitioner will agree to discontinue with prejudice if it is clear that the petitioner has no case or circumstances have changed.
2. Probationary Stipulation: Tenant agrees to refrain from the lease-violating or nuisance behavior, without admission, for a certain period of time. Once the probation period has expired, the landlord agrees to automatically discontinue with prejudice. If the tenant violates the agreement, the landlord may restore the case to the calendar for a hearing or trial. Probationary stipulations are common in overcrowding, *Collier* or cluttering cases, and in other minor nuisance or lease violation cases.
3. Rent Increase: A squatter or licensee agrees to pay a higher rent in consideration for the landlord discontinuing the action and accepting the respondent as a tenant.
4. Buy-out: A tenant accepts money or free rent for a period of time to vacate by a date certain. This method is frequently discussed, especially in buildings where a long-term tenant pays a low rent-regulated rent. Buy-outs are offered in every

type of holdover when the landlord's motive is to save money and time by striking a deal with a tenant who pays below-market rent.

5. Time to leave: A landlord gives the tenant time additional time to vacate while paying full, reduced, or no rent. This type of settlement may resolve a dispute where the tenant has a weak case, but needs time to find a new place to live.
6. Other: Any other creative solution to the problem, including the landlord finding the tenants a new apartment, exclusion of the problem tenant or occupant, cooperation in a proceeding against another tenant, etc.

C. Trial

A full evidentiary hearing with direct and cross-examination before a judge and/or jury. These are extremely difficult for pro se litigants so they should be aware of their right to trial, but the perils of going forward as well.



THE LGBT BAR ASSOCIATION OF GREATER NEW YORK

HOUSING LAW: SUCCESSION RIGHTS

Supplement to CLE Materials October 2012

INTRODUCTION — Despite the recent enactment of marriage equality in New York, many LGBT couples who are living together have not yet married or do not wish to do so. Additionally, many members of the LGBT community facing economic challenges or who have left home after familial difficulties may find themselves living with roommates or boyfriends/girlfriends. Frequently, only one of the people living in the apartment is listed on the lease. **This tip sheet explains the rights you may have to remain in some kinds of housing units in New York City even if after the person on the lease leaves the apartment or dies.**

MY PARTNER WAS THE ONLY PERSON LISTED ON OUR LEASE AND HAS LEFT OR PASSED AWAY. DO I HAVE THE RIGHT TO STAY IN MY APARTMENT?

In some instances, a landlord may agree to execute a new lease listing you as a tenant. However, frequently landlords will refuse to add your name to the lease and move to evict you. It is important that you understand what legal rights you may have to stay in your apartment. Depending on the circumstances, you may be able to assert **Succession Rights** in order to remain in your home.

Succession Rights may apply in certain government regulated apartments. Initially, Succession Rights were limited to “traditional immediate family members” (e.g., a husband or wife, children etc.). Due to court challenges, however, such rights have been extended to **Non-Traditional Immediate Family Members**, which may apply to many LGBT couples and loved ones depending on the circumstances.

MARRIED SAME-SEX COUPLES

If you were legally married in New York, or another marriage equality jurisdiction, you should be entitled to Succession Rights as a “traditional immediate family member”. Your name should be placed on the lease as a matter of right, upon the next lease renewal. You still must determine whether your apartment is of a type for which such rights apply.

DETERMINING THE STATUS OF YOUR APARTMENT

It is important to determine (a) whether the type of apartment you are living in is one for which succession rights may even apply and then, if such rights may be available, (b) whether you can qualify as a “non-traditional immediate family member” (as compared to, for example, a “roommate” or “occupant”) in the event that you were not married.

In general, rent-controlled and rent-stabilized apartments provide Non-Traditional Immediate Family Members with Succession Rights. In contrast, most market apartments (in houses, condos, coops, or market apartment houses, and certain New York City Department of Housing Preservation and Development (HPD) projects such as the Tenant Interim Lease (TIL) Apartment Purchase Program tend not to have such rights unless specified in the lease. Always review your lease carefully.

Other regulated apartments must be analyzed individually. Some regulations prohibit any Succession Rights at all, while others have limitations or set procedures that must be followed to exercise such rights, such as New York City Housing Authority (NYCHA) apartments where the Non-Prime Tenant must have been listed on the Family Household records (e.g., as a Domestic Partner).

It is advisable to visit the local office of the New York State Division of Housing and Community Renewal (DHCR) to help determine the status of your apartment.

If you determine that your apartment is of a type for which Succession Rights may apply, you must still establish that you qualify as a Non-Traditional Family Member (unless you were legally married).

DO I QUALIFY AS A NON-TRADITIONAL IMMEDIATE FAMILY MEMBER?

If you registered as Domestic Partners or entered into a Civil Union, you should qualify as a Non-Traditional Immediate Family Member. It is important to understand that, depending on the circumstances, you may qualify as having been domestic partners even if you never registered as Domestic Partners. You should also be aware that evidence of your relationship being sexual in nature need not and will not be considered.

You should gather evidence to help show that you shared an “emotional and financial commitment, and interdependence” with the person named on the lease. A variety of factors (not all of which can be listed here) can help you meet this requirement including: the longevity of the relationship, the intermingling of your finances, showing that you were named in key documents such as a Will, Durable Power of Attorney, Living Wills, or on an insurance policy; or by showing you engaged in family-type activities (e.g., photos showing you jointly attended family functions, holidays and celebrations).

Again, this is not required if you can produce a Domestic Partnership Certificate or a Marriage License or evidence of a Civil Union. You should also be aware that evidence of your relationship being sexual in nature need not and will not be considered.

Even if you establish that you qualify as a Non-Traditional Family Member in an apartment for which Succession Rights may apply, you must still demonstrate that you lived with your loved one for the last two years in the apartment and that it was your prime residence.

PROVING THAT YOU LIVED WITH YOUR LOVED ONE FOR THE LAST TWO YEARS

Evidence must be gathered to prove that you (the Non-Prime Tenant) lived with your loved one (the Prime Tenant) for the last two years of the Prime Tenant's residence in the apartment unit (and that it was your prime residence). Typical items can include: a driver's license, voter registration records, tax returns, utility bills, and the testimony of friends and other witnesses that you lived in the apartment for the last two years prior to your loved one's death or departure for a nursing home.

INFORMING YOUR LANDLORD/COURT ACTIONS

If you believe you can meet all the requirements above, you should notify the Landlord and include supporting information as soon as possible after the death (or departure to a nursing home) of the Prime Tenant. It may be advisable to first seek legal assistance and ask an attorney to notify the Landlord on your behalf and, ideally this notice should be provided before your Landlord commences any legal action. There are non-profit entities available to help you do this in the LGBT legal community and beyond.

If your Landlord begins a court action to seek to evict you from the apartment (this is called a Holdover Proceeding), there are several pro bono legal entities that will represent you and help you assert your Succession Rights or other defenses. It may also be helpful to speak with the Attorneys at the Pro Se Litigant Help Center at each borough's Housing Court's Help Center (part of the Access to Justice Program) once a procedure is started. They can assist in preparing the evidence required.

You should always respond to any court papers and attend court appearances even if you have to request extra time to speak with/retain a lawyer. If you fail to do so, your Landlord can get a "default judgment" against you. Even if your landlord agrees to add you to the lease for a rent controlled or rent stabilized apartment, it is advisable for you to visit DHCR and verify that the changes were made to the records to show that you are now listed as a Prime Tenant on the lease.

NOTE: If the 2 tenants were registered Domestic Partners, with the Prime

Tenant being on the lease, the Landlord does NOT have to put the Domestic Partner on the lease while the Prime Tenant is alive and living there. If they are legally married, then the new spouse's name should go on the next lease renewal.

Key Terms to Understand

- ***Succession Rights:*** Rights enjoyed by certain “family members” of a tenant to remain in certain types of apartments after that tenant dies or permanently leaves the apartment.
- ***Non-traditional Immediate Family Members:*** Apartment occupants not listed on a lease who can demonstrate an “emotional and financial commitment, and interdependence” with the tenant listed on the lease.
- ***Prime Tenant:*** The tenant named on an apartment's lease.
- ***Non-prime Tenant:*** A person living in an apartment who is not named on the apartment's lease.

About LeGaL - The LGBT Bar Association of Greater New York

LeGaL was one of the nation's first bar associations of the lesbian, gay, bisexual, and transgender (LGBT) legal community and remains one of the largest and most active organizations of its kind in the country. Serving the New York metropolitan area, LeGaL is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT community and promoting the expertise and advancement of LGBT legal professionals.

Through the LeGaL Foundation, the organization publishes *Lesbian/Gay Law Notes*, the most comprehensive monthly publication summarizing legal developments affecting the LGBT community here and abroad, conducts a weekly walk-in pro bono clinic at Manhattan's LGBT Community Center serving hundreds of individuals each year, a monthly clinic on Long Island, a twice monthly clinic in Brooklyn, a collaborative Life Planning Clinic with NYLAG's LGBT Law Project, sponsors the Dr. M.L. Hank Henry, Jr. Fund for Judicial Fellowships and, among its many other activities, runs the area's only career fair dedicated to first-year LGBT law students.

For more information on LeGaL, visit <http://www.le-gal.org>.

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Online Legal Resource Center: www.le-gal.org/site/Resources.html

The LGBTQ Brooklyn Legal Assistance Project

The LGBTQ Brooklyn Legal Assistance Project is a partnership of LeGaL, the Brooklyn Community Pride Center and Brooklyn Law School OUTLaws and is made possible with the generous support of The New York Community Trust and the New York Bar Foundation. The clinic operates on alternate Wednesday evenings from 6:00-8:00 pm at One Boerum Place, 3rd Floor.

For more information on LeGaL, visit <http://www.le-gal.org/site/BrooklynClinic.html>.