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A Trap for the Unwary Landlord: Prohibitions Against Child Care

Craig D. McMahon, Esq., Edward O'Connor and Jamie Sternberg, Esq.

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A property manager is approached by a resident. The resident advises that she's planning to operate a child care business in her rental unit.

Management's initial thought may be to deny permission to the resident.

- The unit may be small, and/or not well-suited for a child care business.
- Management may have concerns about potential liability.
- The lease may prohibit use of the unit for business use.
- Restrictive covenants (such as CC&Rs) may prohibit use of the property for nonresidential use.
- The property's zoning may prohibit commercial businesses.

Even if all of the facts above are true, none will prevent operation of a family child care business. Under California law, a family child care business can be operated in all residential properties, (whether apartments, condominiums or single family residences), even if all of the facts above are true, provided certain conditions are met¹.

Maximum Number of Children. There are two types of family child care homes: "small family child care homes" and "large family child care homes". A small family child care home provides care for up to 8 children. A large family child care home provides care for up to 14 children.

To operate legally in residential rental property without the permission or consent of the property owner, a small family child care home must be limited to six children or less, including the operator's children. The number can be increased up to a total of eight children, but only if the property owner provides written consent².

To operate legally in residential rental property without the permission or consent of the property owner, a large family child care home must be limited to twelve children or less, including the operator's children. The number can be increased up to a total of fourteen children, but only if the property owner provides written consent.

¹ Health & Safety Code §1597.40 states that it is "the intent of the Legislature that family child care homes for children should be situated in normal residential surroundings so as to give children the home environment which is conducive to healthy and safe development. It is the public policy of this state to provide children in a family child care home the same home environment as provided in a traditional home setting."

The legislature declared that: (a) it has a responsibility to insure the health and safety of children and family homes that provide child care; (b) there are insufficient numbers of regulated family child care homes in California; (c) there will be a growing need for child care facilities due to the increase in working parents; and (d) there should be a variety of child care settings, including regulated family child care homes, as suitable alternatives for parents.

The Legislature went on to declare this policy to be of statewide concern with the purpose of occupying this field of law to the exclusion of municipal zoning, building and fire codes and regulations governing the use or occupancy of family child care homes for children....and to prohibit any restrictions relating to the use of residences for family child care homes for children.

² The required consent form is available at <http://www.cdss.ca.gov/cdssweb/entres/forms/English/LIC9149.pdf>.

Licensing. Family child care homes must generally be licensed by the California Department of Social Services.³ There are requirements for the home (which requires a home inspection⁴) and for the care providers (e.g. at least fifteen hours of health practices training).

Notice to the Property Owner. The child care provider must provide the property owner with thirty days advance written notice of their intent to operate the child care business on the property. However, because the operator is generally not required to obtain the landlord's "consent," the failure of an existing resident to provide prior notice will not give the property owner a basis to shut down the child care business.

Security Deposit Increase. The property owner can require the child care provider to increase the security deposit to the maximum allowed by law, which currently is twice the monthly rent for an unfurnished unit and, three times the monthly rent for a furnished unit.

Insurance or a Bond. Health & Safety Code §1597.531 requires licensed operators to:

- carry liability insurance of \$100,000 per individual/\$300,000 aggregate; or
- hold a \$300,000 bond; or
- inform each parent they do not carry liability insurance or a bond. The operator must obtain affidavits signed by each parent acknowledging that the parents are aware of the lack of insurance or bond. Operators must also inform parents that it is possible that the property owner may not carry insurance coverage for losses "arising out of, or in connection with, the operation of the family child care home," except if the losses are "caused by, or result from, an action or omission by owner for which they would normally be liable under the law⁵."

To minimize risk of premises liability claims, once notified of the intent to operate a family child care home, a property owner may wish to take extra precautions to inspect the property and minimize any dangerous conditions on the property.

If the operator carries insurance or a bond, the property owner can request to be named as an additional insured, as long as it does not result in cancellation or non-renewal. If adding the property owner increases the insurance or bond premium, the cost increase must be paid by the property owner.

Compliance with Property Rules and Regulations. The same reasonable rules that apply to other residents may be enforced against a family child care operator. For example, the child care business may not cause excessive noise that disrupts the peaceful and quiet enjoyment of other tenants, nor can the property be damaged beyond normal wear and tear. If there is excessive noise, damage, etc., the property owner can provide warnings or notices in a manner consistent with any other property rule violation⁶.

³ Health & Safety Code § 1596.792 recognizes certain limited exceptions where a license is not required. Licenses are required if the provider cares for children from more than one family who are not related to the provider. A license is not required if the provider cares for children of the provider (or a relative) and/or children from only one other family.

⁴ The residence will be inspected. See the Pre-Licensing Readiness Guide – Family Child Care Home checklist available at <http://www.cdss.ca.gov/cdssweb/entres/forms/English/LIC9217.pdf> for information about the inspection.

⁵ The required form for this disclosure is available at <http://www.cdss.ca.gov/cdssweb/entres/forms/English/LIC282.pdf>.

⁶ To minimize potential fair housing claims, the property owner should carefully evaluate the circumstances and any contemplated action and may wish to seek legal advice.

Additional Resources.

- The California Department of Social Services and Child Care Advocate Program has a “Family Child Care Self-Assessment Guide Tenant Rights” available at <http://cclcd.ca.gov/res/pdf/FamilyChildCareSelfAssessGuideTenantRights.pdf>.
- A “Manual of Policies and Procedures” summarizing family child care laws and regulations is available at <http://www.cdss.ca.gov/ord/entres/getinfo/pdf/fccman.pdf>.
- California laws regarding family day care homes are available at http://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=HSC&division=2.&title=&part=&chapter=3.6.&article=. Regulations are available at <http://www.cdss.ca.gov/ord/entres/getinfo/pdf/fccman.pdf>.
- Landlords may wish to use a Child Care Addendum with their lease or rental agreement for residents operating family child care businesses. Kimball, Tirey & St. John LLP has a Child Care Addendum available. Contact (800) 574-5587 or breginfo@kts-law.com if you are interested in purchasing it.

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