Clearinghouse REVIEW
Journal of Poverty Law and Policy
July–August 2009
Volume 43, Numbers 3–4

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Case Notes

California Litigation Vindicates Rights of Tenants Who Operate Family Day Care Homes

Every day millions of children spend time in day care. In California alone hundreds of thousands of families rely on child care to help shoulder the load of work, school, and family. While many children receive care in center-based programs, nearly 35 percent of children in licensed day care statewide are cared for in the homes of family day care providers (California Child Care Resource and Referral Network, 2007 California Child Care Portfolio 7 (2007), www.rrnetwork.org/publications/2007/revised-portfolio-2007.pdf). Stable child care can help low-income and other vulnerable families improve their chances for financial independence and self-reliance. Unfortunately the stability of child care can be threatened when the family day care provider is also a residential tenant rather than a homeowner.

Child Care Law Center receives numerous calls every year from prospective family day care providers who reside in rental property and hit roadblocks with their landlords. In some situations the landlord merely voices concern about the possibility of the tenant providing child care in the rental home, but not infrequently providers are faced with serious threats to their tenancy. Family day care providers serve families across the economic spectrum, including many low-income families, and frequently these providers are themselves of low income. The average annual income for small family day care providers in California is $23,000 (Bureau of Labor Statistics, Occupational Employment and Wages, May 2008 (last modified May 4, 2009), www.bls.gov/oes/2008/may/oes399011.htm (Occupation Code 39-9011, Child Care Workers)).

Not surprisingly the vast majority of these providers are women with children. Home-based child care is a field of employment that is relatively easy to enter with minimal educational and resource requirements. Family day care providers often serve as knowledgeable resources for the families and communities they serve, particularly in minority communities where in-home providers offer a link to health and social services in addition to their culturally and linguistically familiar care. These low-income women with children who provide care in their homes are particularly vulnerable to discrimination by landlords.

California is one of the few states that offer specific housing protections to family day care providers who live in rental property. Although these laws are on the books, they do not always prevent landlords and property management companies from taking adverse actions against their tenants. Family day care providers are rarely in a position to challenge these unlawful actions. Because frequently their income is dependent on actually operating a family day care home, they cannot afford attorneys or the prospect of vacating their home if the landlord evicts them. Because day care providers are usually women with families of their own, they cannot risk the upheaval created by losing their housing as well as their livelihood.

In 2007 Child Care Law Center—in conjunction with Western Center on Law and Poverty, a pro bono law firm, and a private housing attorney—determined that litigation was necessary to vindicate the rights of tenants who operate family day care by fighting back against the threats of a large property management company.

California Health and Safety Law

The California Health and Safety Code regulates licensed family day care homes in California (Cal. Health & Safety Code §§ 1597.30 *et seq.* (West 2008)). Family day care homes are defined as day care operations where children are cared for in the provider's home (*id.* § 1596.78). Residential tenants operating family day care homes face particular challenges because they are not in control of their own property.

In 1981, in an effort to remedy the problems faced by tenants operating day care homes, California passed its first legal protections for licensed day care providers residing in rental property (*id.* § 1597.501 (1981) (amended and renumbered 1983)). In 1983 the legislature amended and expanded the protections and made other structural changes in the laws governing licensed family day care homes in California (*id.* §§ 1597.30 *et seq.* (West 2008)).

The tenant protections extend to both small and large family day care providers in California (*id.* §§ 1597.40). Property owners are prohibited from directly or indirectly restricting a tenant's right to operate a family day care home either through formal instruments such as the lease or through informal means such as verbal or written restrictions imposed after the lease is signed (*id.*). These protections extend to family day care providers who own property governed by homeowner's associations (*id.*)

These protections have proven extremely helpful to vulnerable tenants in a number of situations. However, a question on the applicability of these protections to tenants living in multiunit dwellings lingered because of inconsistencies in the drafting of the California statute. This legal question was one of the issues raised in our case, *Morrison v. Vineyard Creek Limited Partnership* (No. SCV-240627 (Cal. Superior Ct. filed May 1, 2007)). The case also presented broader questions of tenant housing law protections for family day care providers.

Morrison v. Vineyard Creek Limited Partnership

Our case began when we received a call through Child Care Law Center's information and referral line from Sarah Morrison, a woman who was renting an apartment in a large multifamily apartment complex in Santa Rosa, California. Morrison wanted to open a licensed small family day care home and had properly notified the property management company in writing of her intent to operate. In California family day care providers do not need permission from the property owners to operate in their homes (CAL. HEALTH & SAFETY CODE § 1597.40(d) (West 2008)).

In response to her notification, Morrison immediately received from an attorney for the property management company a letter stating that she was not allowed to operate. The letter made clear that the property management company did not believe that California's Health and Safety Code § 1597.40 protected Morrison. Specifically the company did not interpret the statute as protecting tenants residing in multifamily apartment complexes. Our counterarguments about the applicability of the statute did not persuade Vineyard Creek. When we realized that the property management company was prepared to take action against Morrison if she provided day care in her home, we decided to pursue affirmative litigation to vindicate her rights.

As a small legal services support center that always works in collaboration with legal aid organizations and other advocates, Child Care Law Center cocounseled with attorneys who had litigation and housing backgrounds. This cocounseling arrangement allowed us to develop strategies that relied on multiple theories of law to advance our client's rights.

Legal Claims

California has specific tenant protections written into its family day care statute. This statute, however, was not the only basis for our claims against Vineyard Creek. The strength of the legal argument came from the intersection of child care and housing laws. What were the claims, and how did they work together?

The child care claim brought under California's Health and Safety Code served as the underpinning of our arguments. The thrust of the opposing party's argument in *Morrison* was that Morrison did not have a statutory right to operate a family day care home in her apartment. Vineyard Creek read a reference in Health and Safety Code § 1597.40(a) to "single family residences" as limiting the term "real property" in the two separate subsections that contain the tenant protections. This interpretation would allow landlords to prevent tenants who live in multiunit dwellings from choosing to operate a family day care home or even to evict such tenants. We argued that the statutory language, legislative history, and public policy considerations favored a reading that extended the protections to all tenants operating licensed family day care homes, whether in single-family homes or multifamily units. Because this was a case of first impression in California, no relevant case law existed on this point.

Establishing Morrison's legal right to operate was critical because it enabled us to put forth two strong housing arguments that require an existing legal right to be applicable. California has a fair housing law that prohibits discrimination on the basis of source of income (CAL. GOV'T CODE § 12955 (West 2007)). The statute defines source of income as "lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant" (*id.* § 12955(p)(1)). If Morrison was protected by the Health and Safety Code, then her income was lawfully obtained from parents in exchange for her care of their children. Vineyard Creek was threatening Morrison with litigation specifically because she planned to operate a family day care home and her income would be derived from this lawful use of her residence. Because California's fair housing law was designed to protect tenants whose landlords discriminated against them on the basis of their source of income, we contended that Morrison's situation came within the ambit of protection contemplated by this law.

California tenants are also protected by a retaliatory eviction statute (CAL. CIVIL CODE § 1942.5 (West 2007)). The statute prohibits a lessor from retaliating against the lessee because the lessee has "lawfully and peaceably exercised any rights under the law" (*id.* § 1942.5(c)). In *Morrison* Vineyard Creek threatened litigation against Morrison if she opened her licensed family day care home. Again, based on the Health and Safety Code rights, we contended that Morrison's operation of a family day care home was a lawful exercise of her rights. We alleged that Vineyard Creek's threats were made in response to Morrison's notification of her intent to open a family day care home and that their actions constituted retaliation against their lessee due to her notice that she intended to exercise lawfully and peaceably her rights to provide child care in her apartment.

Settlement Agreement

We filed the complaint in May 2007, and just over a year later in June 2008 we reached a nonconfidential settlement with the opposing party. The final agreement contained both monetary and injunctive relief. Morrison was allowed to operate her licensed family day care home without fear of discrimination, retaliation, or eviction. The settlement explicitly required Vineyard Creek to obey all fair housing laws. The judge retained jurisdiction for three years to enforce the terms of the settlement and determine attorney fees.

The terms of the settlement were greatly enhanced by bringing both the state child care and housing law claims. Having the additional valid causes of actions allowed us to push beyond the initial offer of simply allowing Morrison to operate her family day care home (a solution that we proposed and Vineyard Creek rejected before we filed the complaint). The housing laws include specific remedies—provisions, which the Health and Safety Code lacked, both for injunctive and monetary relief and for attorney fees.

Obtaining a nonconfidential settlement was extremely valuable. One of the difficulties of challenging illegal landlord or property management practices is the diffuse nature of the actions and potential defendants. Not taking a piecemeal approach to obtaining landlord compliance is hard, unlike suing a state agency or a city. From the beginning, we hoped that this case would have a broad, positive impact on day care providers throughout California and beyond. This goal could be accomplished only by first selecting a client who was in-

terested in helping a broader class of similarly situated people and, second, ensuring a nonconfidential settlement. We were fortunate that Morrison was just that client and refused to settle if the agreement was confidential.

Implications and Commentary

Morrison presented an opportunity to take up the needs of a vulnerable subgroup of tenants—licensed family day care providers. Practicing in California, we were fortunate to have laws in place. New York has a state zoning law that offers tenants some protections, but California's statute is currently the most protective of tenants' rights (N.Y. Soc. Serv. Law § 390(12)(b) (Consol. 2007)). Pennsylvania's General Assembly introduced in 2007 a bill extending zoning protection to family day care providers, but the bill did not pass (H.B. 1474, 2007–08 Reg. Sess. (Pa. 2007)).

This lack of legal protection for family day care providers in most states is an opportunity for legislative advocacy. Child care and housing advocates can work together to understand what protections already are in their state and strategize effective ways to expand or create rights for licensed family day care providers. Each state has its own set of licensing laws and standards, and the definition of what constitutes licensed in-home day care varies considerably among states. In fact, even the terminology is variable. The term "family day care home" is California-specific, but all states have an equivalent form of licensed in-home day care.

Advocates seeking to expand protections for licensed family day care providers who reside in residential property should be aware of some potential roadblocks. First, associations and other groups representing landlords likely will expend time, money, and energy fighting increased tenant protections. Cities and localities may have concerns about infringements on their local zoning and land use powers. In California the statute reflects concessions with both types of interests. For example, the statute allows landlords to charge a higher (but still regulated) security deposit to tenants who operate licensed family day care homes (Cal. Health & Safety Code § 1597.40(d) (West 2008)). It also allows localities to maintain some zoning control over large family day care homes (*id.* § 1597.46). Such concessions can be necessary to help move the legislation, but they should be thoughtfully considered and accepted with caution.

California's protections have suffered from drafting inconsistencies. The legal question at the heart of the *Morrison* case is a clear example of how lack of statutory clarity can make litigation necessary. When the family day care law was amended in 1983, the term "single-family residence" was inserted in several places for zoning purposes, but, because the whole statute was not revised for consistency, the insertion of this term gave landlords a hook for arguing that multi-family apartment dwellings were not protected by the state law. California advocates have considered legislation to correct these ambiguities but are concerned that opening up the statute will give landlord associations an opportunity to lobby for fewer rights for tenants. This possibility makes *Morrison* and other cases protecting the rights of licensed family day care providers so crucial.

Family day care providers are a vulnerable tenant population, and advocates can use the California law as both an example and a cautionary tale for drafting protections for their own state. Child Care Law Center continues to work on these issues and believes that *Morrison* is a victory for day care providers statewide.

Author's Acknowledgments

I wish to acknowledge our cocounsel who worked on this case: S. Lynn Martinez, staff attorney, and Richard Rothschild, director of litigation, Western Center on Law and Poverty, and private attorneys Nancy Palandati, Monica Patel, and Monika Lee.

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New York District Court Rules that Fair Housing Amendments Act May Require "Economic Accommodations"

In what is believed to be only the second ruling of its kind nationwide, the U.S. District Court for the Eastern District of New York held that the Fair Housing Amendments Act (FHAA) could require a landlord to accept a disabled tenant's Section 8 housing choice voucher subsidy where the subsidy is necessary for the tenant to use and enjoy her apartment.[1] Accepting the plaintiff's argument that the U.S. Supreme Court's decision in *U.S. Airways v. Barnett* had changed the law with respect to what is an "accommodation" within the meaning of the FHAA, the court declined to follow the Second Circuit's precedential holding in *Salute v. Stratford Greens Garden Apartments*.[2] In *Salute* the Second Circuit held that acceptance of a disabled tenant's Section 8 subsidy was an "economic" accommodation and thus one that could not be compelled by the FHAA.[3]

[1]Fair Housing Amendments Act, 42 U.S.C. §§ 3601 *et seq.*; *Freeland v. Sisao Limited Liability Company*, No. CV-07-3741 (CPS) (SMG), 2008 WL 906746 (E.D.N.Y. April 21, 2008).

[2]*Freeland,* 2008 WL 906746, at *5; *U.S. Airways v. Barnett*, 535 U.S. 391 (2002) (Clearinghouse No. 53,202); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293 (2d Cir. 1998) (Clearinghouse No. 51,899).

[3]*Salute*, 136 F.3d at 302.

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