



## Children Often Cause Controversy

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One thing we all have in common is that we all once were children. As we well know, kids can be nice, and they can be naughty. Especially when they come from someone else's child, what one person sees as a child's "squeals of delight" can sound like fingernails dragged across a blackboard to the ears of another.

It is not surprising that the behavior of children can become a focal point of controversy in the community association setting. This is especially true in Florida, with its well known large population of retirees and empty-nesters. As one lady told me awhile ago: "I love my grandchildren dearly, two weeks at a time."

It is not uncommon to find association rules which attempt to regulate the conduct of children. As a recent decision from a federal court in California shows, such rules can become the ticket to an expensive discrimination lawsuit.

The Keys is a 792 unit condominium complex in Walnut Creek, California. The community's facilities consist of three swimming pools, a clubhouse/fitness complex, and other recreational amenities (such as tennis and basketball courts). The association's board of directors adopted various rules that included the following:

- The main pool could only be used by adults during the summer months (with limited exceptions), and was used mainly for lap swimming.

- Children under age 15 could not enter the clubhouse (including the billiard room) unless accompanied by an adult.
- Children under age 16 could not enter the gym without a parent, and could not use exercise equipment at any time.

Several families sued the association, claiming that the rules violated federal laws which prohibit discrimination against families with children. The judge was asked to issue an injunction to stop the association from enforcing the rules while the suit was pending.

The judge ruled that the association's stated reason for the adults-only pool, peace and tranquility, did not pass muster under the federal anti-discrimination laws. The judge wrote that a blanket prohibition against use of the main pool by children would be no different than a similar rule aimed at "women, persons born in Iraq or China, or members of the Episcopal Church."

The court decided that it would not grant an injunction against enforcement of the other rules until the association was given the opportunity to justify the reasonableness of those rules at trial. Although pre-trial orders from a single federal trial judge are hardly the "law of the land", this case reminds us that rules involving children must be carefully scrutinized to avoid the specter of discrimination litigation.

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The Fair Housing Amendments Act of 1988 prohibits discrimination against families with children. With the exception of properly structured “55 and over” communities, the law applies to all condominium associations and homeowners associations in Florida, and also applies to all common area regulations. ■

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*Mr. Adams concentrates his practice on the law of community association law, primarily representing condominium, co-operative, and homeowners' associations and country clubs. Mr. Adams has represented more than 600 community associations and serves as managing shareholder of the Firm's Naples and Ft. Myers offices.*

*Send questions to Joe Adams by e-mail to [jadams@becker-poliakoff.com](mailto:jadams@becker-poliakoff.com) This column is not a substitute for consultation with legal counsel. Past editions of this column may be viewed at [www.becker-poliakoff.com](http://www.becker-poliakoff.com).*

**Question:** One of your recent articles implies that Florida's Sunshine Law is applied less rigorously to association boards than governmental bodies. The Florida Attorney General's website says that the Sunshine Law applies "to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before the board for action." Does this apply to condominium boards? M.H. (via e-mail)

**Answer:** No. Florida's Government-in-the-Sunshine Law, Chapter 286 of the Florida Statutes does not apply to community associations. Although the law regulating associations do contain advertisement requirements (hence the colloquial "sunshine" reference), these laws do not carry the same weight as the governmental counterpart.

One main distinction is that it is a criminal infraction to violate governmental sunshine laws, while violation of association sunshine laws could, at worst, draw a civil penalty. As applied to your question, the government sunshine laws apply to any communication between two or more members of a public board, whereas the association law only applies to gatherings of a quorum. Therefore, while two members of a city council could not privately discuss council business, two association board members are free to do so, unless the board only consists of three persons, in which case the conversation would constitute the gathering of a quorum of the board.

**Question:** Our association levied an assessment to pay for damage caused by Hurricane Ivan. It now appears that there will be excess funds left over. My question is what can (or must) be done with the excess proceeds, and what happens to refunds when the person who paid the assessment has sold? C.I. (via e-mail)

**Answer:** Section 718.116(10) of the Florida Condominium Act states that special assessment proceeds can only be used for the purpose for which the assessment is levied. After that work is complete, the board of direc-

tors has two choices as to what to do with the money. First, the board can credit each unit owner's account as an offset against future assessments. Alternatively, the board can refund the excess proceeds.

In the event of a refund, the money is known as "common surplus", and passes with the title to the unit. Therefore, the current title holder would get the refund, even if their predecessor paid the assessment. Of course, the parties to the unit's sale are free to make arrangements in their contract for addressing matters of this nature.

**Question:** We are trying to recall (remove from office) the members of our association's board. I have two questions. First, does the petition to call a special meeting for recall require the date of the meeting to be stated? Secondly, does the "majority of the voting interests" mean a majority of all units, or a majority of those who vote? D.G. (via e-mail)

**Answer:** In recent years, there has been a constant focus on dissatisfaction in associations. In my experience, most associations are either well run, or run by the only people who will volunteer to do the job. However, there are associations which are poorly run, where politics overtakes business, and where change needs to be made.

That is why those who lead changes in the law have advocated to make recall procedures for both condominium and homeowners associations easy to understand, and user-friendly. The Division of Florida Land Sales, Condominiums and Mobile Homes has made strides in this regard by publishing a web-based resource called "Recall Procedures from A to Z: Beginner's Guide to Recall Procedures" which can be found at [http://www.state.fl.us/dbpr/lsc/arbitration/whats\\_new/recall\\_procedure\\_from\\_a\\_to\\_z.htm](http://www.state.fl.us/dbpr/lsc/arbitration/whats_new/recall_procedure_from_a_to_z.htm).

According to Section 718.112(2)(j) of the Florida Condominium Act, recall of the board can be accomplished

by a majority of all voting interests (not just those who vote), with or without cause. In most condominiums, each unit is assigned one voting interest.

There are two ways to get a recall going. The first method is called “written agreement”, where no meeting of the members is ever held. Rather, petitions are circulated and, if signed by a majority, served on the board.

The second method of recall (in my opinion much less preferable) is for ten percent of the unit owners to petition to call a special members’ meeting to vote on the

recall. In that case, Chapter 61B of the Florida Administrative Code contains the details for how the meeting is to be called.

In response to your specific inquiry, a petition serving as a meeting call by ten percent of the members would need to specify the date, time and place of the meeting. There are also other formalities that have to be followed if you are seeking to recall a majority of the board, because you need to make provision for electing their replacement. That is why I feel that written agreement is a more straightforward and understandable way to pursue recall. ■

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