

BEFORE THE  
DEPARTMENT OF SOCIAL SERVICES  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

GLENDA NEWTON-JOHN  
dba NEWTON-JOHN FAMILY CHILD CARE  
77073 California Drive  
Palm Desert, CA 92111

Respondents.

OAH No. L2004070411

CDSS No. 6704183001  
(License Revocation)

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**PROPOSED DECISION**

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 30, 2004, in Palm Desert, California.

Leslie Evans, Staff Attorney, represented Complainant Dave Dodds, Deputy Director, Community Care Licensing Division, California Department of Social Services.

Wayne H. Battersby, Attorney at Law, represented Respondent Glenda Newton-John, who was present throughout the administrative proceeding.

The matter was submitted on September 8, 2004.

**FACTUAL FINDINGS**

*Preliminary Matters*

1. The Department of Social Services, State of California, is responsible for licensing and regulating family day care homes under the California Child Day Care Facilities Act (Health & Saf. Code § 1596.70 et seq.) and Title 22, California Code of Regulations, section 102351.1 et seq.

*Jurisdictional Matters*

2. On July 6, 2004, an Accusation was signed by Complainant Dave Dodds, Deputy Director, Community Care Licensing Division, Department of Social Services, State of California. The Accusation and other required jurisdictional documents were served on

Respondent Glenda Newton-John, together with an Order for Temporary Suspension of License Prior to Hearing. The Accusation seeks the revocation of Newton-John's license to operate a family day care home.

Respondent Glenda Newton-John timely filed a Notice of Defense dated July 7, 2004.

3. On August 30, 2004, the administrative record was opened. Jurisdictional documents were presented. Sworn testimony and documentary evidence was received. Closing arguments were given. The record was left open through the close of business on September 7, 2004, to permit the receipt of a letter from a witness. On September 8, 2004, following the receipt of a letter from Molly F. (Exhibit 5), the record was closed and the matter was submitted.

#### *The License and Facility*

4. The Department of Social Services (the Department) issued Facility License Number 334811188 to respondent Glenda Newton-John (Newton-John) to provide family day care services to infants and children at 77073 California Drive, Palm Desert, CA 92211. The following restriction appeared on the license:

“Maximum capacity: 6 children with no more than 3 infants, or 4 infants only, or capacity 8 children when 2 are at least 6 years of age with a maximum of 2 infants. Off limits all bedrooms and garage.”

5. A facility sketch (floor plan) indicated the interior of the facility consisted of a living room, a dining room, a kitchen, a laundry room, a garage, two bedrooms and a den. The den, which was located at the rear of the facility, was 19 feet by 12 feet. Most day care activities occurred in the den, according to Newton-John. The facility sketch (floor plan) accurately depicted the location of the rooms inside the day care facility.

6. A facility sketch (yard) accurately depicted the facility's exterior, consisting of a covered patio area and a swimming pool. The swimming pool was enclosed by five foot high wrought iron fence five equipped with an appropriate gate and latch.

The swimming pool could be seen easily from the den.

7. Newton-John's family day care license has not been disciplined.

#### *Glenda Newton John*

8. Glenda Newton-John resides at 77073 California Drive, Palm Desert, CA 92211, where she operates Newton-John Family Child Care. According to her testimony, Newton-John was a licensed day care provider in the State of Washington from 1978 until she moved to Palm Desert, California in 2000. She became licensed as a family day care provider after arriving in California.

Newton-John loves children. It is without dispute that Newton-John communicates well with children and is highly regarded by their parents.

*The June 18, 2004 Incident*

9. On June 18, 2004, around 10:00 a.m., Jennifer M. and her daughter, Hanna M., who was then three years old, arrived at Newton-John's family day care home. The front door was open, as was customary. Jennifer M. and Hanna M. went inside.

When they reached the den, they saw Newton-John fast asleep. Newton-John was slumped over in a reclining chair, her head was down and it was obvious Newton-John was not paying attention to what was going on outside. No other adult was present at the family day care home at the time except Jennifer M., who had just entered.

10. Newton-John had fallen asleep while giving a bottle to Mark F., a five-month-old client, who was dropped off at the family day care home about 15 minutes before Jennifer M. arrived. Bella B., a family day care client who was about a year and a half old, was playing by herself in the den when Jennifer M. arrived. Daniel Q. and David Q., twin brothers who were about five years old, and Patrick V., Jennifer M.'s four-year-old nephew, were playing in the swimming pool when Jennifer M. arrived. They had no supervision.

11. Hannah M. shook Newton-John's knee three times after entering the den, saying "Glenda, wake up." Newton-John finally awakened.

Jennifer M. was initially speechless. At first she thought Newton-John might be dead. When Newton-John gained consciousness, Jennifer M. asked, "What were you thinking?" Jennifer M. went outside, opened the latched gate and entered the enclosed swimming pool area. She told the three boys they had to get out of the pool immediately. Jennifer M. and the boys then returned to the den.

Jennifer M. used her cell phone to call her sister, Shelly V., who was at work, and told her what she had just seen. Jennifer M. then called her employer to advise that she would be late to work.

Jennifer M. took Hanna M. and Patrick V. back to her home. Upon returning home, Jennifer M. telephoned the Riverside County Sheriff's Office.

12. Shelly V. recalled receiving a telephone call from her sister the morning of June 18, 2004. Jennifer M. sounded "upset" and said she had just found Patrick V. in the swimming pool when Newton-John was sleeping.

13. Deputy Sheriff Tapp spoke with Newton-John on June 18, 2004. Newton-John said she began feeding an infant in a chair inside the family room around 9:45 a.m. Newton-John said she was facing the backyard because children were in the pool. Newton-John said she closed her eyes for a moment and Jennifer M. entered the residence about that time and began yelling, "You're sleeping and there are kids in the pool."

14. David M., Hannah M.'s father, spoke with Newton-John a few days after the incident. Newton-John told David M. there had been a mistake and asked Jennifer M. to withdraw the complaint.

15. Dale Sadler (Sadler), a Licensing Program Analyst with Community Care Licensing, investigated the matter. Sadler asked Newton-John if she had fallen asleep. Newton-John denied falling asleep, but said, "It may have looked like it." Newton-John admitted she was feeding a bottle to an infant in the den when three young boys were in the pool outside.

#### *Newton-John's Testimony*

16. Newton-John testified she was not asleep in a chair in the den when Jennifer M. arrived. She admitted David Q., Daniel Q. and Patrick V. were in the swimming pool at the time she was seated in the den, giving a bottle to Mark F.

17. Newton-John testified she was awake when Hanna M. shook her, and Hanna was excited because she wanted to join the others in the pool. Newton-John testified Jennifer M. became very upset and accused her of sleeping.

18. Newton-John testified she did not ever tell anyone she had been sleeping. She testified she did not attempt to have Jennifer M. withdraw the charges. Newton-John told Sadler that Jennifer M. was mistaken.

#### *Other Matters*

19. Patrick V. could not swim at the time of the incident. Daniel Q. and David Q. had some water skills, but neither had gone through formal swimming lessons. Each boy in the swimming pool was wearing a life jacket and "floaties" (an inflated air chamber secured around the upper arm to help the child remain buoyant and upright).

20. On and before the date of the incident, Newton-John required any child entering the pool to wear a life jacket and floaties.

21. On and before the date of the incident, Newton-John was almost always present at poolside, providing direct supervision, when any client was using the swimming pool; however, she admitted there were rare occasions on which she would watch children using the pool from inside her home, for example when she was bottle feeding a client.

22. Newton-John does not have any kind of water safety certification. She has never been a lifeguard.

23. Jennifer M. had seen Newton-John asleep in the family day care home when children were in care on prior occasions, but never when any child was in the pool. Newton-

John always awakened soon after Jennifer M. entered the room where Newton-John was sleeping.

24. David M. had seen Newton-John asleep in the family day care home when children were in care on a prior occasion, but no child was in the pool on that occasion.

25. Shelly V. had seen Newton-John asleep in the family day care home when clients were in on occasion in April 2004. According to Shelly V., she “was sleeping really good.” No child was in the pool. Shelly V. began to think the day care home might not be a safe environment, but nevertheless took her son back within the month.

26. Tammy Q., Daniel Q. and David Q.’s mother, believed Newton-John was the best day care provider her children ever had. Her children were under Newton-John’s care for approximately one and one-half years, five days a week, nearly all day while Tammy Q. was working. Tammy Q testified, “She always took the very best care of them.” Tammy Q. had never seen Newton-John asleep.

27. Nicole B., Bella B.’s mother, first engaged Newton-John’s services on St. Patrick’s Day, 2003. Bella was less than a year old at the time. Since then, Newton-John provided Bella B. with day care services at least five days a week from approximately 8:00 a.m. until 6:00 p.m. Bella B. loved Newton-John, whom Bella B. considered to be a second grandmother. Nicole B. never saw Newton-John sleeping and she never observed any inappropriate conduct or dangerous situations within the day care facility. Newton-John was trustworthy and provided Bella B. with a safe environment, according to Nicole B.

28. Molly F.’s letter was highly complimentary of the day care services provided by Newton-John to her infant son. She described Newton-John as a trusted, loving provider.

29. Molly F. recalled dropping her son off at Newton-John’s the morning of July 25, 2004, at approximately 9:55 a.m. Newton-John seemed alert and active at the time.

#### *Children and the Risks of Drowning*

30. Notice is taken that the Center for Disease Control determined that in 2001, 859 children ages zero to 14 years died from drowning. While drowning rates have slowly declined, drowning remains the second-leading cause of injury-related death for children ages 1 to 14 years.

Children under age one most often drown in bathtubs, buckets, or toilets. Among children ages one to four years, most drownings occurred in residential swimming pools. Most young children who drowned in pools were last seen in the home, had been out of sight less than five minutes, and were in the care of one or both parents at the time.

According to the Center for Disease Control, for every child who drowns, three receive emergency department care for non-fatal submersion injuries. More than 40 percent of these children require hospitalization. Nonfatal incidents can cause brain damage that

result in long-term disabilities ranging from memory problems and learning disabilities to the permanent loss of basic functioning (i.e., permanent vegetative state).

#### *Adequate Supervision*

31. Because of the foreseeable, serious risks associated with drowning and non-fatal submersion injuries, parents and caregivers should never — even for a moment — leave a young child alone or in the care of another young child while the young child is in a bathtub, swimming pool, spa, wading pool or other body of open standing water. When a young child uses a bathtub, pool, spa, wading pool or other body of standing water, the supervising adult should be nearby and should provide actual supervision. The adult's attention should be focused on the child, and the adult should not be engaged in distracting activities such as talking on the telephone, socializing or taking care of other chores. The use of flotation devices and air-filled swimming aids is no substitute for actual supervision.

#### *Evaluation of the Evidence*

32. Newton-John was inside the facility when three young boys were outside in the swimming pool. The undisputed situation involved an unreasonable risk of danger to children in care.

33. A preponderance of the evidence established Newton-John was fast asleep when Jennifer M. entered the family day care home. Jennifer M.'s credible testimony on the issue, together her immediate removal of her child and Patrick V. from the day care facility, immediately telephoning her sister, immediately telephoning her employer, and promptly reporting the matter to law enforcement, was sufficient to establish the allegation that Newton-John was asleep.

Newton-John's denial, coupled with her admission that she may have appeared to have been sleeping and her admissions that she had just closed her eyes when Jennifer M. arrived at the day care facility, was insufficient to overcome Jennifer M.'s believable testimony that Newton-John was asleep. The evidence offered to impeach Jennifer M.'s testimony, for example, Newton-John was observed to be awake and alert shortly before Jennifer M. arrived, was insufficient to overcome the inherent believability of Jennifer M.'s observations and testimony.

34. Newton-John has enormous affection for children. Many children and parents are completely satisfied with the day care services she provided. Newton-John established many parents have trusted her with their children's well being.

These matters do not negate the fact Newton-John was inside the day care facility, sleeping on the job on June 18, 2004, when children in her care were using the backyard swimming pool without close supervision. The risk of harm to these children was totally unacceptable and requires the revocation of Newton-John's license.

## LEGAL CONCLUSIONS

### *The Standard of Proof*

1. The standard of proof in this action is a preponderance of the evidence. Health and Safety Code sections 1596.887, subdivision (b), 1596.889 and 1596.8897, subdivision (e).

### *Applicable Statutory Authority*

2. Health and Safety Code section 1596.885 provides in part:

“The department may . . . revoke any license . . . issued under this act upon any of the following grounds and in the manner provided in this act:

. . .

(c) Conduct which is inimical to the health, morals, welfare, or safety of either an individual in or receiving services from the facility . . . ”

### *The Purpose of Health and Safety Code Section 1596.885*

3. The purpose of Health and Safety Code section 1596.885 is apparent from its language - to protect the health, morals, welfare, or safety of children who are at child care centers. Consistent with this purpose, the statute permits the Department of Social Services to revoke a license if any conduct that threatens children occurs, whether it occurs on-site or off-site, as long as that conduct jeopardizes children at the facility. To interpret the statute otherwise would defeat the purpose of the legislation, a violation of the cardinal rule of statutory construction. *Adamson v. Department of Social Services*, 207 Cal.App.3d 14, 22.

### *Applicable Regulatory Authority*

4. Title 22, California Code of Regulations, section 102423 provides in part:

“(a) Each child receiving services from a family child care home shall have certain rights that shall not be waived or abridged by the licensee regardless of consent or authorization from the child's authorized representative. These rights include, but are not limited to, the following:

. . .

(2) To receive safe, healthful, and comfortable accommodations, furnishings, and equipment . . . ”

5. Title 22, California Code of Regulations, section 102417 provides in part:

“(a) The licensee shall be present in the home and shall ensure that children in care are supervised at all times. When circumstances require the licensee to be temporarily absent from the home, the licensee shall arrange for a substitute adult to care for and supervise the children during his/her absence. Temporary absences shall not exceed 20 percent of the hours that the facility is providing care per day.

. . .

(5) All licensees shall ensure the inaccessibility of pools . . . through a pool cover or by surrounding the pool with a fence.

(A) Fences shall be at least five feet high and shall be constructed so that the fence does not obscure the pool from view. The bottom and sides of the fence shall comply with Division 1, Appendix Chapter 4 of the 1994 Uniform Building Code. In addition to meeting all of the aforementioned requirements for fences, gates shall swing away from the pool, self-close and have a self-latching device located no more than six inches from the top of the gate . . .

(6) Outdoor play areas shall either be fenced, or outdoor play areas shall be supervised by the licensee or caregiver.

(A) Outdoor play areas shall not include any area made inaccessible by fencing pursuant to Section 102417(g)(5). . .”

*Cause Exists to Revoke the License*

6. Cause exists under Health and Safety Code section 1596.885, subdivision (c), under Title 22, California Code of Regulations, section 102423, subdivision (a)(2), and under Title 22, California Code of Regulations, section 102417, subdivision (a) to revoke Glenda Newton-John’s license to provide family day care services. On June 18, 2004, Glenda Newton-John failed to provide adequate supervision to three children using the backyard swimming pool at her licensed day care facility. Glenda Newton-John was inside the facility at the time. The situation was unsafe and presented an unacceptable risk of harm. Glenda Newton-John’s conduct was inimical to the health, welfare and safety of children receiving services at the day care facility.

This conclusion is based on Factual Findings 4-6, 9-15, 19-22 and 30-34 and on Legal Conclusions 1-5.

## ORDER

Facility License Number 334811188 issued to Glenda Newton-John to provide family day care services to infants and children at 77073 California Drive, Palm Desert, CA 92211, by the Department of Social Services, State of California, is revoked.