Special Report

Probate & Trust Evictions:
Termination of Occupancy in Real Property By An Executor, Administrator, Trustee Or Attorney-In-Fact

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By George Lee Liddle, Jr., Esq.
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I once had the opportunity to work with a probate client who needed to evict a problem tenant who was also a relative. My personal experience with unlawful detainer actions is very limited so I consulted with a trusted advisor who referred me to Liddle and Liddle, a Glendora-based law firm specializing in evictions. The client and I were so impressed at the professionalism and effectiveness of their team and how well they communicated each step that I asked Attorney George Liddle to share his expertise outlining how the legal professional should approach resolving an undesirable occupancy issue.

Rick Harmon

BACKGROUND:
The scenario usually arises from some variation on this theme; the estate, the trust, or the principal is the owner of real property occupied by persons whose presence in the property is undesirable or inconsistent with the planned disposition of that property.

The question is: can the Executor, Administrator, Trustee or Attorney-In-Fact for the owner get these occupants out of possession of the property expeditiously and economically?

The key to a quick and inexpensive recovery of possession of real property is to fit the facts of the case and the occupant in question into the discrete categories of defendants who are subject to the remedy of Unlawful Detainer, California Code of Civil Procedure §1161 and 1161a et seq.

The Unlawful Detainer statute has been part of California's statutory law since 1872. Unlawful Detainer is a remedy for recovery of possession of real property from a person in possession thereof whose possession, which began lawfully, has become unlawful, but who, nevertheless, "detains" the property, and, hence, is guilty of "Unlawful Detainer". But there is a catch; only those occupants whose possession fits into one of the statutorily described categories of C.C.P. §1161 or §1161a are subject to this relatively quick and economical remedy.

TENANTS
Unlawful Detainer is most commonly a remedy utilized by a landlord to dispossess a tenant. When the owner of rental property dies or becomes incapacitated, the Executor, Administrator, Trustee or Attorney-In-Fact under a durable power of attorney may become a "landlord" if real property in the estate or Trust or belonging to the principal is tenant-occupied. A common problem for the Executor, Administrator, Trustee or Attorney-In-Fact is to ascertain the terms of each individual tenancy in the property. We would hope that the deceased or

incapacitated owner has well-organized, logical books and business records including written rental agreements, rent payment ledgers, rental receipt books, maintenance records, copies of change-of-terms notices, and all correspondence between landlord and tenant for each rental unit in an easily discoverable location. This is seldom the case. Lack of this complete documentation can result in a "catch-as-catch-can" scramble for facts and documents in an effort to piece together the status of each tenant in the real property. Often the tenants have only an oral rental agreement with the incapacitated or deceased owner, who kept his "rental records" in his head!

The first order of business is to review all evidence and facts available without input from the tenants themselves. Next, a friendly communication with each tenant is in order if there are any material gaps in the information gleaned from the owner's records. When an Executor, Administrator, Trustee or Attorney-In-Fact takes over rental property, he or she may wish to send each tenant an "estoppel certificate" along with a request that it be dated and signed by each tenant and returned and that missing information, if any, be supplied. An estoppel certificate usually includes, at a minimum, the term of the tenancy (month-to-month, one-year lease, etc.), the current monthly rent, the day of the month the rent is due and payable, the date to which rent has been paid, the amount of any security deposit, any unaddressed maintenance/repair problems, the names of all current occupants and copies of any written rental agreements, current or past.

Unless required to do so by a written rental agreement, a tenant is not obligated to sign and return an estoppel certificate to the landlord but many tenants will. Refusal to do so may give the Executor, Administrator, Trustee or Attorney-In-Fact some idea of where the "problem tenancies" lie.

Generally, a written 30-day Notice to Quit can terminate non-rent controlled month-to-month tenancies for any reason at any time. The notice must be properly prepared and served, however, in order to be effective. Personal service on the tenant is preferred; service by substitution and mailing is permitted, as is service by posting on the premises and mailing if personal service cannot be affected. The 30-day Notice to Quit in a month-to-month tenancy may also be served by certified mail, but the rules regarding service are complex and proper service is critical to the success of the case. Preparation and service of notices is the step in which the Executor, Administrator, Trustee or Attorney-In-Fact is most likely to make a fatal error. When the notice expires, if the tenant has not vacated the premises, the tenant's "detention" of the premises becomes unlawful, and filing of an Unlawful Detainer action is in order. The Executor, Administrator, Trustee or Attorney-In-Fact must refuse to accept any rent that pays for rental periods beyond the expiration date of the 30-day Notice to Quit or the right to enforce the 30-day Notice to Quit may be deemed waived.

Of course, the 30-day Notice to Quit cannot terminate a valid, unexpired term lease. Even though the original landlord is dead or disabled, a term lease, such as for six months, one year, five years, etc., is enforceable by the tenant against the Executor,

Administrator, Trustee or Attorney-In-Fact, even if the terms of that lease are unfavorable to the estate, trust or principal, such as a lease at an under-market rent. If the lease is valid, unexpired and enforceable, it must be honored by the Executor, Administrator, Trustee or Attorney-In-Fact.

The death or disability of the original landlord may open the door to all manner of chicanery by the occupant, including allegations of oral term leases, forged leases, leases signed under undue influence or duress and oral modifications by the former landlord. Often the Executor, Administrator, Trustee or Attorney-In-Fact or their counsel will have to be creative and sometimes even devious in rooting out liars and frauds in these situations.

It goes without saying that the Tenant is also bound by a valid, unexpired and enforceable term lease. If the tenant violates the terms of that lease, a Three-day Notice to Perform Covenant or Quit, a Three-day Notice to Pay Rent or Quit, a Three-day Notice to Quit for Incurable Breach, a Three-day Notice to Quit for assigning the lease or subletting the property in violation of the lease terms or a Three-day Notice to Quit for Commission of Waste or Nuisance is required to be served prior to filing an Unlawful Detainer action. Some written leases require longer notice periods. Again, the contents and service of these notices is critical to the eventual success of the action and they should be prepared and served by someone with a detailed knowledge of the peculiarities of each type of notice.

NON-TENANT OCCUPANTS

It is common for estate or trust property to be occupied by non-tenants at the time the Executor, Administrator, Trustee or Attorney-In-Fact takes over management and control of the non-tenant-occupied property. Occupants may include family members, lovers, caretakers, friends, friends of friends and even strangers. If these occupants paid rent for their occupancy, they are tenants; if not, they are most likely tenants-at-will, who entered into possession with the consent of the owner but without any specific agreement to pay rent and without any specific time period for their occupancy. (See Civil Code §789)

When Grandpa gets sick and Granddaughter Suzy is unemployed and without a roof over her head, she and her boyfriend and his adult daughter from a prior marriage all move in with Grandpa to "take care" of him without any rent charged or any specific date for their occupancy to end. When Grandpa dies or becomes incapacitated, the Executor, Administrator, Trustee or Attorney-In-Fact may want these people to move out. The lure of free rent, however, often influences these people to refuse to leave. As tenants-at-will, these occupants are subject to an Unlawful Detainer action, but only after service and expiration of a 30-day Notice to Quit. It is not a surprise that family members, former lovers, lifelong friends and friends of friends can often give the Executor, Administrator, Trustee or Attorney-In-Fact a bigger headache than a tenant when it comes time to declare their "free ride" over! It may also constitute a breach of duty for the Executor, Administrator, Trustee or Attorney-In-Fact to just let these people continue to occupy the premises rent-

free. It is not at all unusual to find these people stealing personal property of the deceased or incapacitated owner or subletting the real property to persons unknown without authority to do so.

UNLAWFUL DETAINER PROCEDURE

After the appropriate notice expires, the complaint in Unlawful Detainer is filed in the local Superior Court; it must be personally served and the occupant has 5 days after service to file a response in the Court. The horror stories of the occupant who manages to stay 11 months and costs the estate tens of thousands of dollars in attorney's fees and litigation costs are largely fantasy, but not impossible. The most important advantage the Executor, Administrator, Trustee or Attorney-In-Fact can get over the skilled and energetic defendant in Unlawful Detainer litigation is to hire competent and experienced counsel. That means an Unlawful Detainer "specialist" attorney who has years of experience, handles Unlawful Detainer actions daily, and has litigated thousands of Unlawful Detainer actions. The worst and most abusive examples of occupants who stay long and run up the fees are enabled to do so by inexperienced, or incompetent counsel for the Executor, Administrator, Trustee or Attorney-In-Fact.

When a judgment for possession is obtained from the Superior Court in the Unlawful Detainer action, either by default pursuant to C.C.P. §1169 or by trial, a writ of execution is issued to the sheriff, who goes out and posts a final five-day notice on the premises. The sheriff then sets a date and time for the "lock-out" about a week later. The Executor, Administrator, Trustee or Attorney-In-Fact, or his designated representative, needs to meet the sheriff and to be prepared to change the locks on all the doors and to completely secure the premises when the sheriff escorts all remaining occupants off the property. The sheriff delivers a receipt for possession to the representative and any re-entry thereafter by the former occupant is subject to criminal penalties for trespass and/or breaking and entering.

Any personal belongings of the former occupant need to be inventoried and stored in a reasonably safe manner for eighteen (18) days after the mailing of a "Notice of Right to Reclaim Abandoned Property". (C.C. §1965, 1980 et seq.) Storage of the former occupant's personal property somewhere other than on the premises is recommended; we don't want the former occupant to have any reason whatsoever to come back to the premises after the lockout.

Now the property is vacant and subject to disposition as determined by the Administrator, Executor, Trustee or Attorney-In-Fact. Be careful who you allow into possession for any reason however, or the eviction process may have to begin all over again!

Mr. Liddle *is available to discuss your eviction matter. Please contact him at:*

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