

## **Mind Your Business – Tia’s Tips for Better Rental Management**

Oh, Tenant Where Art Thou?

The legal minefield of re-taking abandoned rental property

***By Tia Politi, ROA President***

In a perfect world, residents give notice to vacate, move out at the exact date and time agreed, and leave the property in great condition. It’s fantastic when that happens. But while many move-outs go something like that, many do not. Perhaps the most difficult scenario for the end of a tenancy is when a tenant just stops communicating, you have no idea what’s going on or where they are, and no idea whether they are still living in or claiming a right of possession to your rental unit.

Landlord-tenant law does provide for the re-taking of a rental unit upon tenant abandonment. According to **ORS 90.147(2)(b)(c)** a landlord may infer abandonment based on a tenant’s actions that imply relinquishment:

After the expiration of an outstanding termination of tenancy notice or the end of a term tenancy, the landlord reasonably believes, under all the circumstances, that the tenant has relinquished or no longer claims the right to occupy the dwelling unit to the exclusion of others; or the landlord reasonably knows of the tenant’s abandonment of the dwelling unit.

But how can you really know whether your rental property has been legally abandoned, and, if necessary, how do you prove it in a court of law? First, what are the circumstances? Has a notice to terminate been issued by one party or the other? Have the residents been gone for more than seven days without notice? Have the utilities been taken out of their name? Do neighbors report seeing activity consistent with moving away? If so, that can be some indication of abandonment.

The other information you need is inside the dwelling unit, but because your tenant still has legal possession, you need to provide a 24-hour notice to enter before you can go check it out. Once inside, what do you see? Are there items present that might indicate residency such as food in the kitchen, a bed or bedding, and toiletries in the bathroom? If so, it’s likely they have not abandoned the property. If those things are absent, it’s likely that the tenant has left; however, just because you don’t find food, bedding or toiletries in the unit doesn’t mean they don’t intend to return, or have willfully surrendered their right to possession. Maybe the tenant was almost done moving, but suffered an accident or injury, or maybe they intend to come back to retrieve some final items or clean up. How can you know?

It’s hard to be certain, and it’s risky to re-take possession by claiming legal abandonment – mainly being sued for unlawful ouster, with the associated financial penalties.

**90.375 Effect of unlawful ouster or exclusion; willful diminution of services.** If a landlord unlawfully removes or excludes the tenant from the premises, seriously attempts or seriously threatens unlawfully to remove or exclude the tenant from the premises or willfully diminishes or seriously attempts or seriously threatens unlawfully to diminish services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electric or other essential service, the tenant may obtain injunctive relief to recover possession or may terminate the rental agreement and recover an amount up to two months’ periodic rent or twice the actual damages sustained by the tenant, whichever is greater. If the rental agreement is

terminated the landlord shall return all security deposits and prepaid rent recoverable under ORS 90.300. The tenant need not terminate the rental agreement, obtain injunctive relief or recover possession to recover damages under this section.

Operate in bad faith and the penalties could rise from there. A forcible entry and unlawful detainer (FED) action provides a tenant with due process, and a chance to present their side of a case. When you just take the property back without notice they are deprived of that right, and that's not something to be taken lightly.

If you serve your notice to enter and find that all the tenant's belongings are there, there's no sign of moving, and no sign of them, before you assume abandonment, there's a few places to check, starting with the local jail. If you do confirm that the tenant is incarcerated, to my mind they have not willfully abandoned the property. You may serve whatever termination notice is appropriate to the situation, and proceed to court on that, or move forward on a previously issued notice of termination by you or them, once it expires.

If you check the jail and your tenant isn't there, another possibility is that your tenant may have suffered a medical emergency. Reach out to their emergency contacts to alert friends or family to the fact that you haven't had contact and are concerned about their welfare. They may know something or not, but it's a place to start. You can call the local hospitals, but likely won't get any information based on the HIPPA privacy laws. You may also call the police to alert them to the potentially missing person and ask about recent accidents.

It's also possible that your tenant is deceased (what attorney Brian Cox describes as, ***The Ultimate Act of Abandonment!***), and you may enter only to find their body. You may see their obituary in the paper, or be notified of the passing by a friend or relative. One of my residents died in her unit just after rent had been paid for the month, so I had no idea there was a problem, but after a couple of weeks of not seeing her the other tenants in the complex gathered together to talk about it, and took it upon themselves to call the police to do a welfare check, where she was found deceased inside. They then advised me of the situation. Calling the police to perform a welfare check is the correct way to handle this type of entry in these types of circumstances.

Even after confirming the passing of your tenant, there could still be obstacles to re-taking possession by asserting legal abandonment. For example, a lawful caregiver, a temporary occupant, or a guest and their dependents may still be occupying the unit. Or there could be family members who are in the unit going through and disposing of personal property. In the case of a caregiver or temporary occupant, once the lawful tenant has passed away, their right of possession terminates, and this person becomes a squatter in the eyes of the law. Any other unauthorized occupants, even family members or guests, are also considered squatters under the law.

**ORS 90.100**

(44) "Squatter" means a person occupying a dwelling unit who is not so entitled under a rental agreement or who is not authorized by the tenant to occupy that dwelling unit. "Squatter" does not include a tenant who holds over as described in ORS 90.427 (11).

(48) "Tenant":

(a) Except as provided in paragraph (b) of this subsection:

(A) Means a person, including a roomer, entitled under a rental agreement to occupy a dwelling unit to the exclusion of others, including a dwelling unit owned, operated or controlled by a public housing authority.

(B) Means a minor, as defined and provided for in ORS 109.697.

(b) For purposes of ORS 90.505 to 90.850, means only a person who owns and occupies as a residence a manufactured dwelling or a floating home in a facility and persons residing with that tenant under the terms of the rental agreement.

(c) Does not mean a guest or temporary occupant.

I once had two tenants pass away. The first was a very long-term Section 8 tenant, who had raised her two now-adult daughters in the unit and they were still residing there. We worked with them and HACSA (now Homes for Good) to continue the tenancy. In the other case, we had a single-person tenancy for a man who had given his notice to vacate effective January 31<sup>st</sup>, but he passed away in early January. After he gave his notice, but before he died, he had tried to get other family members to take over the tenancy, but they didn't qualify and their applications were denied, so once I read of his passing in the paper, I was concerned that we would have unauthorized occupants to deal with.

I contacted his son and emergency contact, who said they were staying there temporarily to pack and move his father's things and would turn in keys as scheduled. Because rent had been paid for the period, I agreed, and they did turn in keys as promised. If they hadn't, we would have served a **24-hour Notice for an Unlawful Occupant – ORHA form #39** and proceeded to eviction court because they had no right of possession. (If you find yourself in this situation, don't accept rent and take timely legal action or you could create a tenancy by waiver – read **ORS 90.412**.)

Another sticky wicket is when you show up to inspect, and find the locks have been changed, all the window blinds are drawn, you can't see anything, and you can't get in. A reasonable person might assert that you could take a chance and drill out a lock to gain entry, or would they? I don't know, but see how quickly things get problematic from a legal standpoint? If you are risk-averse as I am, you might instead serve a **Notice of Termination with Cause – ORHA form #38**, for changing the locks without permission and evict if there's no response. You could wait and see if rent gets paid, and evict for non-payment of rent. Sometimes, there's just no risk-free option, but if you want to take your chances and take the property back without an eviction, be sure to consider the Reasonable Person Standard in your decision-making process and document every step you take along the way.

The reasonable person standard denotes a hypothetical person in society who exercises average care, skill, and judgment in conduct and who serves as a comparative standard for determining liability. So it's essential to consider how a theoretically objective, rational, uninvolved person would view your reasoning and the objective evidence that led you to make that decision. More importantly, it's essential to consider how a judge in court would view it. If you are trying to decide whether or not to take a property by legal abandonment, you should carefully review your actions in that light, and make sure you can back up your decisions with evidence or witness testimony in the event you are challenged. If you can't be sure the property has been legally abandoned, and want to play it safe, then the FED

process is the only way to be certain that you have the legal right to regain possession of your rental unit. It will be somewhat costly in time and money, but potentially far less costly than the alternative.

***This column offers general suggestions only and is no substitute for professional legal counsel. Please consult an attorney for advice related to your specific situation.***

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