



Online CLE

# Removing Occupants from Estate Property

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# Chapter 1

# Removing Occupants from Estate Property<sup>1</sup>

HILARY NEWCOMB  
HAN Legal  
Portland, Oregon

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## *Removing Occupants from Estate Property*

How can a fiduciary legally accomplish the removal of occupants from estate property? To start, the following questions should be analyzed:

- Who is the occupant?
- Is there a lease agreement, written or oral?
- What is the fiduciary's legal authority?
- Which County might you be filing in?

Landlord tenant law is complex, detailed and separate from estate and trust law. For example, most of the landlord tenant laws are found in chapters 90 and 105 of the Oregon Revised Statutes (ORS), and chapter 90 only applies to true landlord tenant relationships. Yet the eviction cases we typically encounter in estates and trusts involve family members, not tenants. Regardless, there are legal options we can pursue in probate court and civil court to remove occupants from estate property. This article will address the laws surrounding removing occupants from estate property in Oregon, and conclude with how to address any personal property issues that remain following an eviction.

### I. Spouse and Dependents in the Family Home

When analyzing a potential eviction, first evaluate who the occupants are in the estate property, because they may have legal rights to the property. It matters if the occupants are the decedent's surviving spouse, dependents, heirs or devisees. See ORS 114.005. The surviving spouse and children (more broadly "dependents") of the decedent can occupy the family residence for one year after the decedent's death, or until the earlier termination of a lease or life estate, as further detailed in ORS 114.005. The term "dependent" means a qualifying child or a qualifying relative of the decedent. See IRC §152 for the complete definition of dependent.

This right to occupy is automatic and does not require any action by the family, any party, or the court to make it effective. This right to occupy is also superior to the personal representative's (PR) duty to take possession of estate assets. But see ORS 114.225, which requires the PR to evaluate whether allowing an heir of the estate to remain in an estate real property is feasible, in contrast to them vacating, if their removal "is reasonably required for purposes of administration." *Id.* In such a case, a PR could allow the decedent's surviving spouse and dependents to remain in the family home until final distribution, but the PR would likely need to coordinate charging the occupants reasonable rent if they remain after the one-year term.

In 2017 an amendment to ORS 114.005 occurred that allows the court to waive or alter this one year right to reside by a dependent, if good cause can be shown. See ORS 114.005(3).

The occupants under ORS 114.005 also have duties to the real estate, such as the duty not to allow waste of the property, to maintain homeowner's insurance, and to pay property taxes. See ORS 114.005 for more details.

## II. Statutory Authority to Support Evictions in Probate Court

### A. Legal Authority.

There is legal authority in support of estate fiduciaries' ability to remove an occupant from estate property. Depending on the type of estate matter, each fiduciary has different statutory authority they may rely on to pursue an eviction. This analysis depends on the client's specific fiduciary role, which are categorized below, as well as the specific facts relevant in the case.

1. *Trustees of trusts:* ORS 130.055 addresses the probate court's jurisdiction over a trustee and beneficiaries having its principal place of business in Oregon; ORS 130.690 says a trustee "shall take reasonable steps to take control of and protect trust property." ORS 130.505(6) allows the court supervising a conservatorship to hear a conservator's action involving the distribution of trust property.
2. *Personal Representatives/Administrators of estates:* Under ORS 114.225, the PR "has a right and *shall take* possession and control of the estate of the decedent," with the exception of property already in the possession of an heir or devisee that is not needed for administration (emphasis added). ORS 114.265 requires a PR to "preserve, settle and distribute" the estate; ORS 114.305(13) charges the PR with insuring assets against damage and loss, and ORS 114.305(19) allows the PR to prosecute actions for the protection of the estate. Under the probate code, the right to possession of the estate remains with the PR and jurisdiction remains in the probate court until final distribution is decreed. So until final distribution, the PR of the estate is the person having an interest in the land. *Veberes v. Phillips, 23 Or App 363, 542 P2d 928 (1975), Sup Ct review denied.*
3. *Conservators of conservatorships:* ORS 125.420 requires a conservator to take possession of all the property of substantial value of the protected person; ORS 125.445(26) authorizes the conservator to prosecute actions for the protection of the estate assets and in performance of the conservator's duties; ORS 125.025(3)(a) authorizes the court to compel the attendance of any person who may have knowledge about the estate of the protected person. See also ORS 130.505(6) allowing the conservator to pursue an action regarding trust assets, as mentioned above.

### B. Show Cause Proceedings to Accomplish Eviction

A legal action may be initiated in probate court to evict unlawful occupants from estate property, using the above-mentioned legal authority. This action is commonly initiated with a motion for an order to show cause to notice the occupants and demand them to appear before the probate court and inform the court why they should not be required to vacate the property. In summary, the legal authority for this show cause proceeding is that any fiduciary has ownership rights in the property, they have the express mandate to take possession and control of the estate assets,

protect and preserve the assets, and make them productive (see above legal citations). One factor to always be cautious and diligent about with a show cause matter is effectuating proper notice to the occupant, especially since it may be a challenge to traditionally serve an occupant who is trying to evade service. This show cause procedure is widely utilized and accepted in the tri-county area (Multnomah, Clackamas and Washington Counties), but may not be available or known in other counties. It may be worthwhile to contact the court in which you intend to file well in advance to explore the procedure that particular county prefers.

Analyze all relevant facts and support your motion with an affidavit of the facts by someone with first-hand knowledge regarding who the occupants are, that there is no lease agreement that keeps you out of a forcible entry and detainer (FED) proceeding, and all other methods previously employed by the fiduciary to request that the occupants peacefully leave the property.

Once the motion for order to show cause has been filed, and the concurrently filed order to show cause has been signed by a judge, both the motion and order are to be properly noticed and a show cause hearing is conducted thereafter. At the show cause hearing, either the occupants appear and an evidentiary hearing is scheduled, or they fail to appear and a default on the order to show cause is granted. If the occupant arrives at the show cause hearing, often a dialogue can occur to resolve them moving out on an agreed upon date. If a further hearing is needed and next scheduled, then it is an evidentiary hearing and the moving party must appropriately prove up their case with witnesses and evidence. If an order after a show cause hearing or evidentiary hearing grants the eviction, and the occupants are notified of this eviction order but remain on the property, secondarily a writ of assistance can be requested and granted. This writ enables the Sheriff to assist the fiduciary with a more forceful (or more peaceful) removal of the occupants from the property.

### III. FED (think landlord-tenant relationship and possession)

Forcible entry and detainer (FED) proceedings are statutory in nature and “designed to be quick and summary, to obtain peaceful resolutions of possessory disputes.” *Class v. Carter*, 293 Or.147, 150 (1982) (emphasis added). The one and only legal issue that may be decided in FED cases is entitlement to possession. ORS 105.105 to ORS 105.168. The appropriate question in FED proceedings is who is entitled to possession of the property in a landlord-tenant situation? A common scenario in FED cases is when a tenant has failed to pay rent, they have been noticed to vacate and they refuse to vacate. FED actions may be pursued in either residential or commercial property evictions.

An FED proceeding is a civil court action that requires a complaint to be filed to remove a tenant from property owned or managed by the person filing the complaint. If an FED action goes to trial, the standard civil rules must be followed, such as the Oregon Evidence Code, the Uniform Trial Court Rules, and the Oregon Rules of Civil Procedure. At trial, the burden of proof is on the plaintiff/landlord to support the eviction, and the tenant must prove any defenses or counterclaims. If the landlord prevails, the tenant has four days to vacate and if the tenant remains after that time, the Sheriff can assist with the tenant’s removal and the removal of their belongings.

Commonly in estate and trust matters, the occupants we seek to evict are family members and do not have any type of written or oral rental agreement, they did not pay rent, and are more so defined as temporary occupants or guests, so they are often not designated “tenants” under the ORS. Because of the common failure of a true “tenant” in estate evictions, FED proceedings are typically inappropriate and therefore not a viable option.

*A. FED Requirements in more detail:*

1. *Unlawful holding by force.* For an FED action to be cognizable, there must be either a forcible entry or an unlawful holding by force by the occupant. The statutory definition of an “unlawful holding by force” requires a landlord-tenant relationship. *See Aldich v. Forbes, 237 Or. 559, 391 P.2d 748 (1964).* When an occupant enters a property as an equitable owner under a purchase agreement, for example, their entry is not by force or unlawful, so an FED action would not be applicable. Additionally, there is no landlord-tenant relationship between parties after an executed land sale contract. *See Schroeder v. Woody, 166 Or. 93 (1941).* An FED action is also not applicable to an action for trespassing or ejection.

2. *Landlord-tenant relationship.* A “tenant” must be occupying the property and that tenant must have a rental agreement. The definition of “tenant” is a driving force in what warrants an FED proceeding versus an alternate “removal” proceeding. ORS 90.100(45) defines tenant to mean:

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...a minor, as defined and provided for in ORS 109.697 (emphasis added).

And a tenant does not mean “a guest or temporary occupant.” ORS 90.100(45)(c).

Without a rental agreement, there is no true “tenant,” and a landlord cannot proceed with an FED proceeding.

3. *Possession dispute only.* FED proceedings are limited to the determination of the right to possession of a premises in the context of a landlord-tenant relationship, and only the right to possession. *See Class v. Carter, 293 Or. 147, 150, 645 P.2d 536 (1982).* For example, no controversy can be raised as to the merits of the property’s title in an FED action. *See Bunch v. Pearson, 186 Or App 138 (2003); Schroeder v. Woody, 166 Or. 93 (1941).*

*B. Examples.* A valid FED cause of action would include:

1. When a tenant or person in possession of the real estate fails or refuses to pay rent within the time period that it is due on the lease or agreement under which they hold, or fails to deliver possession of the premises after being in default on payment of rent for the statutory period of time;

2. When a lease's terms have expired and the lease has not been renewed, or when the tenant or person in possession is holding from month to month, or year to year, and remains in possession after proper notice to quit, is holding contrary to any condition or covenant in the lease, or is holding without any written lease or agreement. *See Schroeder v. Woody, 166 Or. 93 (1941)*; and

3. If a trust beneficiary is granted a tenancy for life in real property owned by the trust, but this interest terminates if the beneficiary no longer resides in the property, an FED action is appropriate to determine occupancy. For instance, a trustee and a beneficiary may sign a lease agreement consistent with the trust terms, but an FED proceeding can determine that the beneficiary is no longer residing there and therefore is no longer a beneficiary of the trust. The court has authority in an FED proceeding to interpret the provisions of the trust for purposes of determining whether the beneficiary had a right to possession, following the court's determination that they no longer resided on the property. *See Schmidt v. Hart, 237 Or. App 412, 241 P.3d 329 (2010)*.

*C. Notice.* Notice is both unique and critical in FED proceedings, and it must comply with both the statutes and the rental agreement, so both must be thoroughly reviewed in advance of giving notice. See ORS 105.105 to 105.168.

#### IV. Ejectment (think ownership and title)

When someone has title to property, they have a right to the property. With the right of title to property comes the right to possession. This is in contrast to an FED action that is only about possession, not title. If an occupant in possession is also an owner or they claim ownership, then an ejectment action is relevant.

The statutory foundation for an ejectment action is “a legal estate in real property and a present right to the possession of the property.” ORS 105.005. Ejectment is a civil action to recover possession and title to land, so property ownership is a necessary component in seeking possession and title pursuant to the ejectment laws.

A trustee, PR, or conservator of an estate that owns property may file a motion for an order of ejectment in the probate court to recover title on behalf of the respective estate property. The filing of an ejectment action can also include an action for possession. Any ownership interest of the decedent typically vests upon the death of the decedent. The probate court has jurisdiction to hear an ejectment issue under ORS 111.085(4) for PRs, guardians, and conservators, and under ORS 130.050 for trustees. Proper notice is critical as due process applies. The notice provisions in ORS 111.215 are likely sufficient to satisfy the due process rules and establish personal jurisdiction over the occupant of the property.

The case of *Bunch v. Pearson, 186 Or App 138 (2003)* illustrates when an ejectment action instead of an FED action applies. In *Bunch*, Plaintiff son initially brought an FED action against his mother (occupant) and succeeded at the trial court level, but the defendant mother won on

appeal. The *Bunch* Court found that because the defendant entered the property as an equitable owner under the land sale contract, her entry was neither unlawful nor by force. There was also no landlord-tenant relationship between the parties; both are requirements for an FED action (see above). Although plaintiff argues that defendant should be considered either a tenant at sufferance under ORS 91.040 or a tenant at will under ORS 91.050, the Court concluded that neither statutory definition was applicable based on the facts. The *Bunch* Court determined this action was more appropriate under ORS 105.005 as an action for ejectment, because title was at issue, as well as possession.

#### V. Squatters

A squatter is defined as “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 (Termination of periodic tenancies) (7).” ORS 90.100 (43). To clarify, a holdover tenant pursuant to ORS 90.427(7) is a tenant who “remains in possession without the landlord’s consent after expiration of the term of the rental agreement or its termination...”

A squatter can be removed via a show cause proceeding, although this procedure does depend on the county of venue.

Before squatters have any chance to gain legal ownership rights, they must first meet strict conditions, including a 10 year consecutive stay. The adverse possession rules are in ORS 105.620.

#### VI. Elderly Persons and Persons with Disabilities Abuse Prevention Act (TRO)

As long as the core elements are met to pursue a temporary restraining order (TRO) under the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EPPDAPA), an occupant/abuser residing in an elder’s property will be evicted once this TRO is granted. When used properly, this legal procedure can prove to be an expedited means of accomplishing an eviction, which can be very effective in dire situations.

The legal requirements to pursue a TRO under the EPPDAPA are that the petitioner is an elderly (65 years of age or older) or disabled person, or the guardian of such a person, wrongful conduct that constitutes statutory abuse has occurred against that petitioner in the last 180 days, and there is immediate and present danger of further abuse by the respondent. See ORS 124.005 and 124.010. If ordered by the Court, the TRO prevents the respondent from entering the residence of the petitioner, they must stay a certain number of feet away from petitioner, so they are truly evicted, or else they risk immediate arrest for violating the TRO (and possibly a fine). Once a TRO is obtained, a peace officer can assist with a peaceful removal of the respondent/occupant, and the removal of the respondent’s personal property as well.

The legal purpose of a TRO under the EPPDAPA is to immediately prevent abuse of an elder, first and foremost. However, if the occupant is the abuser and the elder owns the property, the

property is jointly owned by them both, or if the two parties are married, obtaining such a TRO will also accomplish an immediate eviction of the abuser.

#### VII. Rent Increase Limitations and Evictions: SB 608

If an estate fiduciary owns a residential dwelling and there is a landlord-tenant relationship, newly enacted Senate Bill 608 may apply to control rents, which could also impact a subsequent eviction. SB 608 only applies if there is a tenant, so a written or oral lease agreement is a prerequisite for this new legislation to apply.

In summary regarding SB 608, a landlord who terminates a tenancy with a 30-day notice without cause during the first year of a tenancy, may not increase rent for the next tenancy by more than 7%, plus the consumer price index (CPI) above the previous rent. If a landlord does increase rent in violation of SB 608 (+7% + CPI), then the landlord is liable to the tenant for three months' rent, plus actual damages suffered by the tenant. There are also exceptions to these rules.

SB 608 applies to any fixed term tenancy entered into on or after February 28, 2019, to the termination of any month-to-month tenancy that occurs after March 30, 2019, and immediately to any notice of rent increase. SB 608 includes significant detail regarding rent increases, which is beyond the scope of this article, since the aim in mentioning SB 608 is to address that it is new legislation and has a potential impact on evictions.

For further detail regarding SB 608 and how it affects rent increases and no cause evictions, please review the written materials located at: <https://www.oregonlandlord.net/>

#### VIII. Personal Property Issues

After an occupant vacates property, they often leave behind personal belongings. ORS 90.425 provides that the residential landlord/owner cannot consider the tenant's property abandoned and dispose of it until the tenancy is terminated (generally termination or expiration of a rental agreement) and detailed notice is given. In the estate and trust arena, where we are commonly without a lease, this begs the question of whether Chapter 90 is relevant to the treatment of personal property, considering a tenancy is required for Chapter 90 to apply. Given the sensitivity and disputes surrounding personal property, even absent a true tenancy, an option is to simply opt into Chapter 90's treatment of personal property in order to minimize future problems by following the existing statutory structure for landlord/tenants.

ORS 90.425 is a very long and very detailed statute, so please take a careful look when applying the statute. While the owner is dealing with the various statutory timelines elapsing, they are responsible for the abandoned personal property and it must be safely stored. Below are some of the fundamental written notice and time periods applicable to an owner dealing with a tenant's remaining personal property.

Prior to storing, selling or disposing of the tenant's personal property, ORS 90.425(3) requires the landlord/owner give written notice to the tenant that must be:

1. Personally delivered to the tenant; or
2. Sent by first class mail addressed and mailed to the tenant at:
  - (a) The premises;
  - (b) Any post-office box held by the tenant and actually known to the landlord;and
  - (c) The most recent forwarding address if provided by the tenant or actually known to the landlord.

Please note the extra 3 days added to a notice due to mailing is applicable here. ORS 90.155(2).

The written notice to the prior tenant must state several statutory factors, pursuant to ORS 90.425(5), and summarized below. Please note that the treatment of personal property remaining in a recreational vehicle, manufactured home, or floating home are treated differently than a single family residence, as detailed in ORS 90.425.

Required details to include in the written notice to the prior tenant regarding abandoned personal property are:

1. The remaining property is considered abandoned;
2. The tenant must contact the landlord by a specified date, as further detailed in subsection (6), to arrange for the removal of the personal property;
3. The property is stored in safekeeping;
4. The tenant can arrange for removal of the property by contacting the landlord at a described telephone number or address on or before a specified date;
5. Storage payments may need to be made by the landlord or the tenant (prior to release), depending on the circumstances (see ORS 90.425); and
6. If the tenant fails to contact the landlord by the specified date, or fails to remove the property within the statutory period of time after contacting the landlord, then the landlord must state in this letter that they intend to dispose of the property if it is not timely claimed. ORS 90.425(5).

If the landlord fails to permit the prior tenant to recover possession of their personal property under ORS 105.165(1), then the tenant may recover from the landlord, in addition to any other amount provided by law, twice the actual damages or twice the monthly rent, whichever is greater. ORS 105.165(4).

The time requirements following the notice to arrange for the disposition of abandoned personal property (excluding recreational vehicles, manufactured dwelling, or floating home) are:

1. Following personal delivery or mailing of the notice, the tenant must contact a landlord *not less than five (5) days after personal delivery or eight (8) days after mailing of the notice*; and

2. If contact is not made in that time frame, or, if after that contact, the personal property is not *removed within 15 days*, the landlord may sell or dispose of the personal property.

After the requisite notice and time periods have elapsed, the owner may “dispose” of the personal property, which by statute means:

...if reasonably appropriate, the landlord may throw away the property or may give it without consideration to a nonprofit organization or to a person unrelated to the landlord. The landlord may not retain the property for personal use or benefit. ORS 90.425(1)(b).

What if the decedent of the estate rented property and their personal property remains in their old rental unit? ORS 90.425(21) provides that heirs, devisees, and the PR have the same rights as the deceased tenant with respect to that deceased tenant’s remaining personal property. So the estate representative can deal with the landlord/owner, pursuant to ORS 90.425.

If a TRO under the EPPDAPA is obtained and includes an immediate eviction of the abuser occupant, the Order can also address personal property issues. For example, the Order may allow for the abuser to vacate and take their primary possessions while the peace officer is present to facilitate the eviction, and additional personal property may be retrieved at a later time with the assistance of a peace officer. See ORS 124.020 and ORS 124.025.

## IX. Conclusion

After a fiduciary has made reasonable efforts to encourage an unlawful occupant voluntarily vacating estate property, they can pursue legal options in court for an eviction. Whether the fiduciary files a show cause action in probate court, an FED proceeding, or an ejectment action, there are different legal options for the varying factual scenarios. Once circumstances are clear that the fiduciary must pursue an eviction, the legalities must be analyzed and the appropriate legal path determined. If you are unclear about a particular county’s practices, a call to the court clerk is often a helpful early step to maneuver most efficiently through their court system. A streamlined procedure in estate evictions, and the one that is generally acceptable in the Portland tri-county area, is a show cause proceeding filed in probate court. Regardless of which legal option you may need to pursue, one constant is our fiduciary clients have a duty to the estate’s heirs/beneficiaries (who may also be the occupant), and must operate in a reasonable and efficient manner in their pursuit of an eviction.

