

## Trespass or Eviction?

### Facts

Deputy Carswell is called to the scene of a domestic disturbance at an apartment. There the deputy encounters Elaine, the complainant, and her "sometimes live-in boyfriend" Kramer. The couple has had a fight, and Elaine wants Kramer to leave her apartment and not come back. Kramer refuses to do so, claiming he has a legal right to be present there. Kramer claims he has in the past helped with rent and utilities; last month he helped Elaine paint the kitchen; and his clothes and personal items are in the apartment which "proves he has a legal right to be there."

### Issue

What action may Deputy Carswell take in this situation? May he evaluate Kramer for arrest as a trespasser, or may Kramer be legally removed only through the civil eviction process?

### Discussion

Law enforcement officers frequently have difficulty distinguishing a trespasser who is subject to criminal arrest from a lawful tenant who must be evicted in civil court. The following legal summary is intended to guide officers in making this determination:

- (1) The eviction process — North Carolina's statutory eviction procedure is set forth at Chapter 42 of the General Statutes. The process is known as "summary ejection," and is exclusively for disputes between landlords and their tenants. Thus, a summary ejection eviction lawsuit may not be heard by our courts unless the parties are in a landlord-tenant relationship.
- (2) When are persons in a "landlord-tenant relationship"? — Only when they are parties to a lease where one party is identified as the landlord, and the other the tenant.
- (3) What is a "lease"? — A lease is a contract whereby one person, called the lessor (landlord), grants to another person, called the lessee (tenant), the right to use a definite parcel of land for a term specified in the contract, in consideration of payments called rent. A lease does not have to be in writing to be valid, but even "verbal" leases must contain these essential elements and be agreed upon and understood by both parties.

The following considerations are generally **irrelevant** and standing alone are **not determinative** to whether a lease exists:

- \* That one party has clothes in a closet, a toothbrush in the bathroom, a CD player in the living room, etc.

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[Frequently, officers mistakenly believe that the presence of such items in the premises automatically confers on the owner of those items the status of "lawful tenant." This is incorrect. Again, refer to the definition of "lease" above. Toothbrushes and CD players are not part of the definition.]

**\* That one party has been "staying there."**

[Officers frequently make the following statement upon responding to a domestic fight: "Ma'am, if you've let him stay here there's nothing we can do." This may be incorrect, for the subject may indeed be a criminal trespasser. Again, refer to the definition of "lease" above. That one party has let another "stay there" (without more) does not meet the legal test to create a lease.]

**\* That the parties have been living together as "husband and wife."**

[Again, this does not create a lease unless one "spouse" in a lease contract is identified as "landlord," and the other "spouse" a "tenant." This is rather unusual.]

**\* That one party has been paying or "helping with" the rent (or utilities, phone bill, etc.).**

[Again, the question is whether the parties are in a landlord-tenant relationship and their circumstances otherwise meet the definition of a lease contract. Making payments or "helping out" do not create a lease in the absence of the other contract terms.]

**\* That one party receives mail at the address, or possesses a driver's license or other identification that shows that address.**

[Receiving mail at an address does not create a lease there. By the same token, having a driver's license showing a particular address doesn't create legal rights in the premises by that fact alone. If this were the law a person could simply have the Governor's address printed on his license, then show up at the Executive Mansion prepared to take residence!]

**Consider a few common situations:**

1. Girlfriend "Jane" lives in an apartment she rents from "Willow Bend Realty." Her boyfriend "John" has been staying there with her for several weeks. Jane is of course a tenant in her relationship with Willow Bend, but is she a *landlord* to her boyfriend John? Once again, only if she has a contractual agreement with John which satisfies the definition of a lease. In many such instances the facts will not bear this out (and as a matter of law, residential realty companies rarely allow a "sublease" in any event). John is merely Jane's **guest**, who, like any party guest, must leave when his hostess directs him to. If John refuses to leave when asked to do so, an officer may properly evaluate him for a trespass arrest. [NOTE: If Jane is allowing John to live in her apartment without Willow Bend's permission or knowledge, *she* may be in violation of her lease and she may be evicted.]
2. Jane lives in public housing and has a lease with the Greensboro Housing Authority. Jane goes to the manager's office and has her uncle, John, added to the lease as a "member of the household." If Jane later decides that she wants Uncle John removed from the premises, may she evict him under the statutory procedure? No, because Jane is not John's landlord. Jane should go to the manager's office and simply have John's name stricken from her lease as a member of her household. This can be accomplished as a purely ministerial (i.e., clerical rather than legal) matter. If John refuses to leave the premises, he may be evaluated for arrest as a trespasser.

3. Jane and John wish to lease an apartment together, and both execute a lease with Willow Bend Realty. One month later Jane and John are not getting along, and Jane wants John out of the apartment. May Jane have John arrested for trespassing? Obviously not, because John is a lawful tenant under the lease, as is Jane. May Jane evict John? No, because Jane is not John's landlord. Jane and John are "bound together" by the terms of the lease contract, and there is no legal remedy whereby one tenant can dispossess the other. Jane's best hope is to work out an informal, non-legal "settlement" with John whereby he can be convinced to move out voluntarily. [NOTE: Please remember that if John has committed "domestic violence" against Jane, then Jane may be able to have John evicted from the premises under G.S. § 50B-3 (domestic violence protective order) without regard to landlord-tenant status under Chapter 42 or other normal "possessory estate" considerations.]

4. Jane and John are married and live together in a house. Both names appear on the deed to the property. Following a domestic fight, Jane calls the police and requests that officers "throw John out." May John be arrested for trespass? Clearly not. He is a co-owner of the real estate and has equal rights to be present (although obviously he can be charged with any offenses he has committed there, such as assault.) May Jane evict John? Again, no. This is not a landlord-tenant situation at all. Rather, both parties are *owners* of the premises. [As in example #3, if John has committed domestic violence against Jane, he may be evicted under G.S. § 50B-3 (domestic violence protective order) without regard to landlord-tenant status under Chapter 42 or other normal "possessory estate" considerations.]

### **Conclusion:**

Let's return to our original domestic call between Elaine and Kramer. How does Deputy Carswell decide between a trespass charge versus simply referring Elaine to the Clerk of Court for eviction? **By asking a few simple questions:**

1. The deputy may begin by determining Elaine's legal relationship to the premises at issue. He may ask her who owns or rents the premises?
2. If Elaine answers that she rents the premises from Willow Bend, an obvious followup question is whether she signed the lease alone, or whether Kramer signed the lease with her. If Kramer did not sign the lease, he is not a tenant with respect to Willow Bend—Elaine alone is the tenant. [If Kramer's name appears on Elaine's lease as a mere "member of her household," in most cases she may simply have his name stricken from the lease as a ministerial matter.]
3. Deputy Carswell may next inquire into the only other "theory" that could create lawful tenant status for Kramer. In other words, have Elaine and Kramer executed (or agreed to) a lease *between themselves* identifying Kramer as Elaine's tenant (and Elaine as Kramer's landlord)? Considering the definition of lease set forth above, this is somewhat unlikely. Deputy Carswell may want to simply inquire of Kramer, "Is Elaine your landlord?" That question will very likely produce a negative answer.
4. If Kramer is not a tenant of Willow Bend, and is not a tenant of Elaine, his legal status is that of mere guest, and as every party-goer knows, **guests** must leave when the hostess orders them to—not wait to be evicted. Guests who refuse to leave are subject to evaluation as trespassers under Chapter 14.

Does it make a difference that Kramer has helped with rent and utilities? For purposes of acquiring *tenant* status, no. Tenancies are created only by *leases*. For simplicity, officers may analogize these situations to that of a ticket-holder at a movie theater. Just because the ticket-holder has paid value for the privilege of watching a movie,

he does not acquire the status of tenant, but merely that of guest (or more accurately, a “licensee”—a person with a mere grant of permission, paid-for or otherwise). The movie manager reserves the right to “toss out” any patrons who misbehave, and few persons would question the manager’s right to do this, or expect the manager to resort to the eviction process. Stated differently, a mere grant of permission in the form of a movie ticket—even though purchased for value—is not tantamount to legal rights under a lease. [NOTE: If Kramer painted Elaine’s kitchen, or advanced her \$50 for rent, Kramer may file a small claims action against Elaine for services rendered or for money to be refunded—but he is nevertheless a trespasser in her apartment after being told to leave.]

### **Some Final Points:**

- (1) The foregoing issues can be legally tricky, and a correct determination of “what the officer can do” depends on having correct facts. Having correct facts depends in part on knowing what questions to ask. Knowing what questions to ask depends on having a basic knowledge of trespass *and* eviction law.
- (2) When responding to a domestic fight situation, officers should be prepared to make valid trespass arrests, and to avoid making incorrect or unnecessary eviction referrals to the clerk’s office (such as when the parties are not in a landlord-tenant relationship). Officers should also avoid giving out incorrect procedural information, and should seek to know “the basics” of filing an eviction lawsuit in order to provide helpful information to the public, generally speaking. Citizens may want to know, for example, if they need a lawyer to do an eviction? (No). If they don’t have a lawyer, how will they prepare the legal paperwork? (The clerk’s office will have fill-in-the-blank form documents that are easily prepared). And so on. Officers may want to speak with a clerk of court for clarification of other details.
- (3) In situations that raise uniquely difficult legal questions, officers should use caution:
  - \*When in doubt, avoid making a warrantless trespass arrest. The safest legal approach is to first seek a warrant.
  - \*Avoid giving out “legal advice” on specific matters. Refer the parties to private legal counsel for a determination of their specific legal rights and responsibilities in an apartment or other premises.
  - \*Be certain to check with agency legal counsel whenever there is uncertainty on legal issues.
  - \*If your agency is a client of our firm, we recommend that you contact us whenever there is uncertainty about how to proceed.**

NOTE: This article was originally authored by Kevin Smith in March 1999 and appears on the North Carolina Justice Academy Website.



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