



EVICITION OF OVERSTAYING GUEST OR FAMILY MEMBER PACKET FOR HOUSING PROJECT VOLUNTEER ATTORNEYS

This packet is for use in the limited situation where a homeowner desires to evict a guest or adult family member who is not a residential tenant. The distinction is critical in determining how to advise a homeowner. The applicable law is fully explained in the Eviction of Overstaying Guests Practice Tip, which is included in the packet.

The packet is intended for housing project volunteer attorneys. The packet is **not** intended for distribution to homeowners. However, the Demand to Vacate letter and the Eviction Action Complaint, along with the instructions for completion of the forms may be given to homeowners. The attorney advising the homeowner may wish to review the instructions with the homeowner and assist the homeowner in completing the forms. The Eviction Action Complaint can be completed, but not filed, before service of the Demand to Vacate letter based upon the assumption that the occupant will not have vacated by the date ordered. If the occupant vacates the home, an eviction action will not be necessary. At a minimum, the attorney should alert the homeowner to the filing fee, explain the IFP application process, and review the eviction action service and affidavit of service requirements.

The packet includes the following:

- 1. Eviction of Overstaying Guests Practice Tip**
- 2. Demand to Vacate Letter instructions and template**
- 3. Eviction Action Complaint instructions and template**



PRACTICE TIP (11.26.19)

EVICITION OF OVERSTAYING GUESTS

Introduction

Sometimes, a guest invited by a homeowner to live in the homeowner's residence temporarily or an adult family member living in the residence with the permission of the homeowner refuses the homeowner's request to move out. This situation is problematic when the homeowner's relationship with the guest or adult family member becomes strained or antagonistic. The purpose of this practice tip is to review the options available to the homeowner to legally force the guest or family member to move out of the home without resorting to self help and to review the possible defenses available to the guest or family member who desires to remain in the home.

Analysis

To evict an adult family member or a guest who has overstayed his or her welcome, a homeowner should follow the procedures prescribed for the commencement of an eviction action in M.S. §§ 504B.281-371 (2018). The homeowner cannot, without legal risk, resort to self-help,¹ and usually the police will not intercede on the homeowner's behalf unless a crime has been committed.²

In determining how to proceed with an eviction action, the critical question that must be answered is whether the guest or family member is a residential tenant or rather is a person residing in the home without any tenancy status.

The term, "residential tenant," is defined by statute to mean:

a person who is occupying a dwelling in a residential building under a lease or contract, whether oral or written, that requires the payment of money or exchange of services, all other regular occupants of that dwelling unit, or a resident of a manufactured home park.³

Accordingly, a guest or adult family member would be considered a residential tenant if the guest or adult family member were occupying the home under an oral or written lease or agreement requiring the payment of rent or the performance of specified services for the homeowner.

(1) The Occupant as a Residential Tenant

¹ M.S. § 504B.375 (2018) prohibits a landlord from unlawfully excluding or removing a residential tenant, and M.S. § 609.606 (2018) makes the unlawful exclusion or removal of a tenant a misdemeanor offense.

² If the homeowner believes that the adult family member or guest has committed a crime, the homeowner may report the alleged crime to the police. If the family member or guest is harassing the homeowner or another person residing in the home, the person being harassed may apply for a domestic abuse order for protection or an harassment restraining order, depending on the relationship of the parties, and may request a "no contact" provision in the order. M.S. §§ 518B.01 (order for protection), 609.748 (harassment restraining order) (2018).

³ M.S. § 504B.001, subd. 12 (2018).

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If the guest or adult family member is a residential tenant, as defined above, then the homeowner can evict the guest or adult family member (a) if the person does not pay the rent or perform the agreed-upon services or (b) if the person holds over after receiving a valid notice to quit the property.⁴ The guest or adult family member would be considered a tenant at will if, as in most cases, the agreement with the homeowner did not include a fixed ending date for the agreement.⁵ To terminate a tenancy at will by notice to quit, the notice must be received by the tenant on the last day before rent is due, effective on the last day of the next rental period.⁶

If the basis for the guest's or adult family member's status as a residential tenant is the payment of rent and the tenant neglects or refuses to pay rent when it becomes due, the homeowner may terminate the tenancy at will by giving the tenant a 14-day notice to quit.⁷ Or, as an alternative, the homeowner could commence an eviction action based upon nonpayment of rent.⁸ Although more expeditious, the difficulty with the latter approach is that the eviction action constitutes a demand for the rent, and affords the tenant a right to redeem the tenancy at will by paying the rent due plus costs of the action.⁹ Thus, an eviction action for nonpayment of rent does not assure that the guest or adult family member will leave the home.

If the basis for the guest's or adult family member's status as a residential tenant is an exchange of services and the tenant ceases to perform the services, the homeowner may commence an eviction action for breach of the agreement.¹⁰ If the tenant continues to perform the services and the homeowner desires to terminate the at-will tenancy, the homeowner must give the tenant a three-month notice to quit under M.S. § 504B.135(a).

(2) No Tenancy Status

There must be a legal basis to support the eviction of a guest or adult family member who does not enjoy "residential tenant" status. The law is not well settled in this area. Following are two theories for the creation of a legal basis to support an eviction. They are grounded upon the assumption that initially, the guest's or adult family member's occupancy was with the permission and consent of the homeowner, and therefore not unlawful.

One theory holds that the homeowner can unilaterally create a tenancy by giving the guest or family member a notice that effective on a given date, weekly or monthly rent in a stated amount will be due and owing. The theory continues that if the rent is not paid, the homeowner can give a 14-day notice to quit or commence an eviction action for nonpayment of rent (see above discussion). This theory is of questionable validity because a tenancy can only be created by an agreement; a tenancy cannot be created by unilateral action. Black-letter principles of contract law apply. In this example, the notice to pay rent would be considered an offer, and the payment

⁴ M.S. § 504B.285, subd. 1(a)(2), (3) (2018).

⁵ M.S. § 504B.001, subd. 13 (2018) ("tenancy at will" defined to mean "a tenancy in which the tenant holds possession by permission of the landlord but without a fixed ending date").

⁶ M.S. § 504B.135(a) (2018).

⁷ M.S. § 504B.135(b) (2018).

⁸ M.S. § 504B.285, subd. 1(a)(2).

⁹ M.S. § 504B.291, subd. 1(a) (2018).

¹⁰ M.S. § 504B.285, subd. 1(a)(2).

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of the rent an acceptance of the offer by action, thereby creating a tenancy at will. The refusal to pay the rent demanded would be considered a rejection of the offer, thereby defeating the creation of a tenancy.

A second theory is based upon the logical proposition that having granted permission or consent to the guest or adult family member to occupy the home, the homeowner can withdraw that permission or consent, thereby essentially making continued occupancy unlawful. Simply put, the permission or consent to live in the home granted by the homeowner must be formally withdrawn by the homeowner.¹¹ To do that, the homeowner can provide the guest or family member with a written demand that the guest or family member vacate the home on or before a specified date and notice that continued occupancy after that date will be considered an illegal trespass. There are no discernable standards for setting the vacation date, and the homeowner may set the date depending on the circumstances at hand. The written notice should contain the date of the notice, the name of the guest or family member, the express withdrawal of any permission or consent to occupy the home previously granted by the homeowner, the address of the home, the name of the homeowner(s), and the date when the guest or family member must be out of the home. The demand should be signed by the homeowner(s), and a copy handed to the guest or family member. The date of service should be noted on the original, and the original maintained by the homeowner.

If the guest or family member does not vacate the home on or before the date specified in the demand, the homeowner may commence an eviction action pursuant to M.S. § 504B.301 (2018), which states in pertinent part that “[a] person may be evicted if the person has unlawfully or forcibly occupied or taken possession of real property or unlawfully detains or retains possession of real property.” In this example, the guest or family member is unlawfully retaining possession of the home following the withdrawal of permission or consent to be there and the demand to vacate.¹² The commencement of an ejectment action in district court would also be an option, although a more complex and less expeditious one.¹³

(3) Defense Theories

There are several theories for defending against an eviction action commenced pursuant to M.S. § 504B.301.

The first line of defense for a guest or adult family member who has received a notice to vacate from the homeowner, has refused to leave, and is facing an eviction action, is to establish that she or he is a “residential tenant” (see definition above). A residential tenant cannot be evicted

¹¹ See, e.g., *State v. Hoyt*, 304 N.W.2d 884 (Minn. 1981).

¹² Continued occupancy would also constitute a trespass, a misdemeanor crime, under M.S. § 609.605, subd. 1(b)(3) (2018).

¹³ The essential difference between an eviction action and an ejectment action is that in the former, the sole issue for determination is the right to possession of real property, while in the latter, the district court has jurisdiction to consider all issues presented and apply all available legal and equitable remedies. See, e.g., *Berg v. Wiley*, 226 N.W.2d 904, 907 (Minn. 1975).

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pursuant to § 504B.301 because the occupancy cannot be considered “unlawful.”¹⁴ Rather, the owner would have to proceed under M.S. § 504B.285, subdivision 1(a)(2) (breach of lease or nonpayment of rent) or subdivision 1(a)(3) (hold over after termination of the tenancy by notice to quit). And, if there was no fixed ending date to the tenancy and no rent being paid, the residential tenant would be considered a “tenant at will” and the notice to quit requirement would be three months. M.S. § 504B.135(a).

Under the definition of “residential tenant,” there are two bases for establishing residential tenant status. The first basis is that if the guest’s or adult family member’s occupancy is based upon a lease or contract with the owner to pay rent or perform specified services, then she or he is a “residential tenant.” A synonym for the word, “contract,” as used in the above definition, is “agreement,” and the agreement may be “oral.” Therefore, a long-staying family member or guest may be able to argue, for example, that her or his occupancy was subject to a condition set by the homeowner regarding the performance of certain household chores or the contribution toward certain household expenses. In theory, the condition would constitute an offer and the performance of the condition would represent an acceptance, creating an agreement, and thereby establishing the status of “residential tenant.”

The second basis is that the reference in the definition of “residential tenant,” to “all other regular occupants of that dwelling unit” can be read broadly to confer the status of “residential tenant” on a “regular occupant,” notwithstanding the absence of facts sufficient to establish a “lease or contract.” The term, “regular occupant,” can logically be interpreted to mean an occupant of some significant duration, as opposed to a guest or person occupying the property on a short-term or transient basis. As such, a regular occupant would be entitled to the benefits afforded a tenant, as contrasted with a person with no tenancy status. This interpretation supports the public policy embodied in Chapter 504B to resolve disputes regarding the occupancy of residential property in an orderly and peaceful way, and without resort to self-help remedies.¹⁵

A second and independent line of defense may be available, grounded upon the concept that the guest’s or adult family member’s occupancy is based upon a bona fide claim of right that cannot be unilaterally abrogated by the homeowner by simply demanding that the guest or family member vacate the home. As discussed above, the theory underlying the concept that a homeowner can commence an eviction action pursuant to M.S. § 504B.301 is that after receipt of a notice to vacate, the guest’s or adult family member’s continued occupancy becomes an unlawful trespass. Occupancy pursuant to a bona fide claim of right defeats the trespass and renders the occupancy lawful.

Presence pursuant to a bona fide claim of right precludes a conviction for criminal trespass to property under M.S. § 609.605, subdivision 1(b)(4) (2018).¹⁶ A claim of right is not limited to a

¹⁴ M.S. § 504B.301 does permit the eviction of a residential tenant in cases where controlled substances have been seized by the police from the tenant’s apartment pursuant to M.S. § 609.5317 (2018). The seizure essentially renders continued occupancy “unlawful.”

¹⁵ *Supra*, n. 1.

¹⁶ *E.g.*, *State v. Hoyt*, 304 N.W.2d 884, 890.

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claim of ownership.¹⁷ For example, a claim of right arguably could be created by a long-term romantic or familial relationship with a homeowner involving a sharing of household responsibilities and/or expenses. In such circumstances, an argument can be made that the owner cannot simply unilaterally withdraw consent to occupy the home, demand that the person leave, and then pursue an eviction action. The person with the claim of right may have grounds to seek equitable relief and/or to interpose a counterclaim. Arguably, therefore, the only proper action for the homeowner to pursue would be an ejectment action.¹⁸

¹⁷ *Id.* at 889.

¹⁸ *Supra*, n. 12.



**EVICTON OF OVERSTAYING GUEST OR FAMILY MEMBER
DEMAND TO VACATE LETTER – INSTRUCTIONS**

- List the names of the adult occupants to be evicted
- Determine the time to be given between the date of the demand letter and the move-out date; the time could, for example, be one week, two weeks, three weeks, a month, or three months, depending on the urgency to have the occupant(s) move out
- Address a separate letter for each occupant
- All owners sign the letter(s)
- Make two copies of the signed letter(s)
- Hand the original letter(s) to the occupant(s)
- On one of the copies of each letter write down the date, time, and place the letter was handed to each occupant
- Hold onto both copies of all the letters

DEMAND TO VACATE

Date: _____

To: _____

Address: _____

This letter serves as written notice that I am withdrawing any permission or consent previously given to you to live in my home at the above address. You must vacate the home with all your possessions on or before the following date: _____ by the following time: _____.

I will consider continued occupancy after this date as an unlawful possession and an illegal trespass.

If you fail to vacate the home on or before the above date, I will commence an eviction action against you pursuant to M.S. § 504B.301 (2018), which states in pertinent part that “[a] person may be evicted if the person has unlawfully or forcibly occupied or taken possession of real property or unlawfully detains or retains possession of real property.”

Owner(s): _____ **Date:** _____
(signature)

_____ **Date:** _____
(signature)

Name(s) _____

Address: _____



**EVICITION OF OVERSTAYING GUEST OR FAMILY MEMBER
EVICITION ACTION COMPLAINT – INSTRUCTIONS**

- Complete the top box with the judicial district and the county: the judicial district will be the Fourth for Hennepin County, the Second for Ramsey County, and the Tenth for Anoka, Chisago, Isanti, Kanabec, Pine, Sherburne, Washington and Wright Counties.
- Complete the caption with the names and addresses of all owners (plaintiffs) and all occupants (defendants)
- Complete the body of the Complaint by filling in the blanks
- Sign the Complaint in front of the court administrator
- Prepare an IFP application or pay the court filing fee
- File the Complaint and obtain the Summons from the court administrator
- Have a person who is not an owner serve the Summons and Complaint on all occupants and prepare affidavits of service
- File the affidavits of service at least three business days before the hearing date on the Summons

State of Minnesota

District Court

County of:	Judicial District: _____
	Court File Number: _____
	Case Type: Housing

EVICTION ACTION COMPLAINT

(Minn. Stat. §504B.301)

Plaintiff #1 (Owner)

Name:
Address:
City/State/Zip

Plaintiff #2 (Owner)

Name:
Address:
City/State/Zip:

Defendant #1 (Occupant)

Name:
Address:
City/State/Zip

vs.

Defendant #2 (Occupant)

Name:
Address:
City/State/Zip

1. Plaintiff(s) are the Owner(s) of the home located at _____.

2. On or about _____, Owner(s) gave permission and consent to Occupant(s) to live in the home with Owner(s) as guests, and Occupant(s) moved into the home.

3. Owner(s) and Occupant(s) did not enter into any agreement regarding residence in the home, and Owner(s) did not ask Occupant(s) to pay any money or perform any services in exchange for the permission and consent to live in the home.

4. Occupant(s) did not pay and have not paid any money to Owner(s), and have not performed any services while Occupant(s) have lived in the home.

5. By letter to Occupant(s) dated _____, Owner(s) withdrew the permission and consent formerly given to Occupant(s) to live in the home, and demanded that Occupant(s) vacate the home on or before _____.

6. Owner(s) handed a copy of the letter to each Occupant on _____. A true and correct copy of the letter is attached to this Complaint.

7. Occupant(s) did not vacate the home as demanded in the letter and continue to live in the home.

8. The present occupancy of the home by Occupants(s) is unlawful.

9. Pursuant to the provisions of Minnesota Statutes, Section 504B.301, Owner(s) seek judgment against Occupants(s) for restitution of the premises plus costs and disbursements.

10. On information and belief, Occupants(s) are not in the military service.

I (We) declare under penalty of perjury that everything I (We) have stated in this document is true and correct. Minn. Stat. § 358.116.

Dated: _____

County and State where signed

Signature

Name: _____

Address: _____

City/State/Zip: _____

Telephone: _____

E-mail address: _____

Dated: _____

County and State where signed

Signature

Name: _____

Address: _____

City/State/Zip: _____

Telephone: _____

E-mail address: _____