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Early Lease Termination by Battered Tenants

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For a domestic violence survivor who is a tenant in private or subsidized rental housing, an existing long-term lease may be one of the many housing barriers that she faces when fleeing abuse. In most states, landlord-tenant laws can trap tenants who are trying to flee abuse by providing no flexibility for a battered tenant to terminate her lease early, or by financially penalizing a tenant who terminates her lease early to flee abuse.

In a few jurisdictions, specific statutory remedies for this problem are emerging. In most jurisdictions, however, state-level legislative reform remains an uphill battle, though badly needed. In these states, advocates continue to identify case-by-case advocacy strategies that can assist some survivors under current law. This article reviews some of these state legislative developments and advocacy strategies, based on informal correspondence with attorneys and advocates around the country who have assisted or represented domestic violence survivors as tenants.

Lease termination by tenants in rental housing on the private market is typically out of reach of federal regulation, unless a private landlord's failure to grant a tenant's request for early termination discriminates on the basis of a protected class under the federal Fair Housing Act, 42 U.S.C. §§ 3601 et seq., or unless a private landlord participates in a federal rental subsidy program. For this reason, emerging legislative advocacy on the lease issue has focused on state landlord-tenant and housing laws.

A discussion of the important issue of discrimination against domestic violence survivors on the basis of sex under the federal Fair Housing Act is beyond the scope of this article. The issue has been, and is being, litigated. See **United States ex rel. Alvera v. C.B.M. Group, Inc.**, No. CV 01-857-PA (D. Or. 2001) (favorable

consent decree); **Warren v. Ypsilanti Housing Commission** (E.D. Mich. filed 2002, settled favorably 2003); **Raney v. Crawford/Katica, Inc.** (W.D. Wash. filed 2004); **Winsor v. Regency Property Management, Inc.** (Wis. Cir. Ct. 7, 1995) (Case No. 94 CV 2349). Advocacy on the housing discrimination issue also is being conducted by national legal advocates at the ACLU Women's Rights Project, <http://www.aclu.org>, Legal Momentum (formerly NOW Legal Defense and Education Fund), <http://www.legalmomentum.org>, the National Law Center on Homelessness & Poverty, <http://www.nlchp.org>, and other advocates around the country.

State Statutory Lease Termination Exceptions for Domestic Violence

Oregon and Washington have favorable, new landlord-tenant statutes that permit a domestic violence survivor to terminate her lease early in certain circumstances, upon a showing that domestic violence has occurred. See Or. Rev. Stat. § 90.453 (2003); Wash. Rev. Code § 59.18.575 (2004); Wash. Rev. Code Ann. § 59.18.352 (2004) (threats by another tenant), and also Erica L. Smock & Tammy L. Kuennen, "Protecting Victims of Violence Through Housing Legislation," 8 DVR 17 (2003). In both states, a victim must notify the landlord within 90 days of the violent incident leading to her decision. Upon notification of domestic violence, the landlord must release the tenant from her lease obligation without penalty. Both statutes contain "proof" requirements to establish the occurrence of domestic violence, which resulted in part from compromise with landlord groups and/or housing providers. The Washington proof requirements are quite broad and include both court orders of protection

and a tenant's reporting of the violence to a "qualified third party," which may include a law enforcement officer, court employee, clergy member, attorney, social worker, mental health professional, licensed counselor, or advocate at an agency for domestic violence survivors.

Pending Legislation

Similar legislation, with varying notice and evidence requirements, is pending in Kansas, Massachusetts, and New York City, with legislative advocacy efforts under way in other jurisdictions. See H.B. 2864, 80th Leg. (Kan. 2004); H.B. 707, 163d Gen. Ct. (Mass. 2003); Intro. 305 of 2004 (New York City Council 2004). All of these proposals require some form of documentation or a verbal statement of abuse from the victim. The New York City bill uses "reasonable accommodation" language borrowed from disability law.

In fact, few state laws permit early lease termination for any reason, even related to other hardship such as disability, illness, military service, old age, fire, or death. States with statutory exceptions for one or more of these other reasons—but not specifically for domestic violence—include Delaware, Georgia, Idaho, Iowa, Kansas, Maryland, New Jersey, New York, North Carolina, Tennessee, and Virginia. See Del. Code Ann. tit. 25, § 5314 (2004) (death, illness, disability, long-distance move required under current employment, military service, admission to public or subsidized housing, admission to a residential program for senior citizens); Ga. Code Ann. § 44-7-37 (2004) (military service); Idaho Code § 55-2010 (2004) (military service, move required under current employment); Iowa Code § 562A.25 (2004) (fire); Kan. Stat. Ann. § 58-2504, 2570 (2004) (military service); Md. Code

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Ann., Real Prop. § 8-212.1 (2004) (military service); N.C. Gen. Stat. § 42-45 (2004) (military service); N.J. Stat. Ann. § 46:8-9.1, 9.2 (2004) (death, disability); N.Y. York Real Prop. Law § 227-a (2004) (certain senior citizens moving to certain residences); Tenn. Code Ann. § 66-7-110 (2004) (individual with disability admitted to public housing); Va. Code Ann. § 55-248.21:1 (2004) (military service). Delaware also has unique, positive case law under the federal Fair Housing Act interpreting the state's statutory lease exception for disability. See *Samuelson v. Mid-Atlantic Realty*, 947 F. Supp. 756 (D. Del. 1996).

Case-by-Case Negotiation Strategies

In most states, where there is no statutory lease exception for domestic violence, tenants needing to flee abuse deal with landlords on a case-by-case basis. Depending on the landlord and the state, attorneys and advocates have met with success using varied negotiation techniques and litigation strategies under state landlord-tenant or contract law arguments. Particularly when approaching informal negotiation situations, it is important to prepare in advance by examining state and local law and the details of the tenant's lease and by having the client gather as much physical documentation as possible about both the abuse and the tenancy. An advocate or attorney can assist the tenant in setting up a meeting with the landlord and attending the meeting with the tenant. If the tenant has informed the landlord of abuse and the landlord does not respond, or responds adversely, the tenant should document all communication with the landlord. The tenant also should maintain any documentation she has of the abuse. In addition, independent of the abuse, the terms of the lease and the condition of the property can be critical. For example, if the property is not up to code, the tenant should take pictures of any problems.

Many advocates try appealing to a landlord's common sense to permit a tenant's early termination of a lease to flee abuse. If the landlord believes it is in his or her best interest to negotiate with the tenant, the tenant is more likely to be successful. If the tenant and landlord reach an informal mutual agreement about the tenant's

early termination, written documentation of the agreement may help. Housing advocates without training on domestic violence must understand the immediate safety threat for an individual and any children fleeing abuse and must understand the battered tenant's immediate need to move. Advocates need to be able to convey to the landlord that time is of the essence in working out an arrangement for the tenant to leave. For this reason, it can be helpful for the tenant to document all possible evidence of the abuse, such as any police reports, medical records, documentation from shelters, court orders, and any conversations with case managers, other service providers, or clergy. In this process, it is important to remember the privacy and confidentiality needs of the tenant and therefore to limit documentation to whatever the tenant consents to disclose to the landlord or to whatever may be reasonably necessary to be persuasive to the landlord, and nothing more. It is also important to clarify that the client is releasing the information only for the purposes of the negotiation.

Formal Mutual Lease Termination. Some attorneys succeed in persuading a landlord to agree to a formal mutual termination of the lease by the landlord and tenant to avoid the tenant's breach of the lease. Such an arrangement can formally protect the tenant from any liability. This process involves persuading the landlord of the immediate safety issues involved with the domestic violence situation, using any documentation that can be gathered. If a negotiation for a formal mutual termination fails, attorneys are sometimes successful in arguing the tenant's mitigating circumstances more informally, so that the landlord does not see the situation as a breach of the lease or rental agreement. In this situation, the condition of the property or the landlord's actions in dealing with the tenant as a domestic violence survivor can be important to document.

Finding New Tenants. Advocates also sometimes succeed in finding alternative tenants to take the place of the battered tenant and to cover the battered tenant's remaining rent on the lease. In some cases, domestic violence shelters or advocates may be aware of other battered clients who may be good alternative ten-

ants. In such a case, the domestic violence program or advocate may be able to serve as an informal intermediary with the landlord or landlords. This option can be especially helpful if state law provides that landlords are required to mitigate damages, as in Connecticut, for example, and the local housing market is tight—thus, a landlord could be legally precluded from recovering damages for the tenant's breach of the lease if the landlord can simply replace one tenant with another. This option also can be helpful in securing a confidential new location for the fleeing tenant and discouraging a batterer who has left from returning to the prior residence. Depending on the landlord, such negotiation can be protracted and difficult, so it is important to remember the emergency nature of the domestic violence situation and convey the urgency to the landlord.

Case-by-Case Litigation Strategies

Illegal Lease Terms. If preparing for litigation, it is important to review the tenant's lease again for any clauses that may be illegal under state law or that may support some kind of breach of the lease by the landlord, either express or implied. These issues may or may not be related to the domestic violence, but they may nonetheless be helpful to a tenant who is being battered. For example, some jurisdictions, such as Massachusetts, statutorily require a landlord to take steps to remedy lease violations within fourteen days if the department of health notifies the landlord of these lease violations. See Mass. Gen. Laws Ann. ch. 111, §127L (2004). If the landlord fails to take steps to remedy the landlord's lease violation within the fourteen days, the tenant is then permitted to terminate the lease with "reasonable notice."

Constructive Eviction. Another doctrine that permits a tenant to terminate a lease early in many states is constructive eviction. Constructive eviction may occur in tenancy cases involving domestic violence because of a substantial interference with the tenancy or a breach of the tenant's quiet enjoyment of the property. Under an interference theory, a tenant may terminate the lease for a very substantial interference with the tenancy, such as no heat or hot water, without having to obtain a formal citation from

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the department of health, as is otherwise sometimes needed. In some states, such as Massachusetts or Minnesota, inadequate locks could arguably constitute such an interference. In addition, but depending on the state, so might the landlord's failure to take immediate action to prevent violence by another tenant. See Minn. Stat. § 504B.161 (2004); *Ricke v. Villebrun*, No. UD-1961112566 (Minn. Dist. Ct. 4th Dist. Dec. 5, 1996); *Olson v. Brooks*, No. UD-1950209512 (Minn. Dist. Ct. 4th Dist. Mar. 7, 1995); *Colonial Court Apartments, Inc. v. Kern*, 163 N.W.2d 770 (1968). Either of these interferences can be difficult to show as a legal matter, so examining state law is critical. In some states, such as Texas, landlords have used such theories against battered tenants, instead of in their favor, resulting in eviction of the tenant, for example by evicting the battered tenant or the entire household because of the violence under a breach of quiet enjoyment argument.

In an interesting recent case involving domestic violence under a constructive eviction theory in Minnesota, a tenant had obtained an order of protection against her batterer. She then called the police to report later incidents of violence, threats, and destruction of property. Because she still did not feel safe, she gave notice to her landlord under a state statute, claiming the property was not "fit for its intended use," i.e., quiet enjoyment. After the tenant met with the landlord, the landlord refused to end her tenancy. In an action under the statute, the local court found that the landlord constructively evicted the tenant. The court ordered the landlord to release the tenant from the lease immediately. See *Plaintiff v. Country Village Apartments*, C8-02-14178 (Minn. Dist. Ct. 1st Dist. July 8, 2002). Such an argument may not be persuasive in other jurisdictions, but it nonetheless serves as an example of advocates' creativity and the limitations of existing law.

Leases in Public and Subsidized Housing

Section 8 Vouchers. Cases involving a federal subsidy, such as a Section 8 rental voucher, can be more complicated because the program involves both the

private landlord and the local public housing authority (PHA) that administers the federal subsidy program. For instance, the Section 8 voucher program is administered by the U.S. Department of Housing and Urban Development (HUD) and governed by federal statute and regulations. See 42 U.S.C. § 1437f (2004); 24 C.F.R. Part 982 (2004). The local PHA is required to follow the statute and regulations. The local PHA has the discretion to implement rules and policies beyond these federal requirements, but nothing in federal law requires that it do so. A household's participation and financial assistance under the program are subject to these requirements. However, because the household then takes the voucher to use on the private rental market, the household's actual tenancy is governed by a lease with the private landlord.

Portability of Vouchers. Tenants in the federal voucher program who are fleeing domestic violence need to be aware that in general, Section 8 vouchers are portable. Thus, a household receiving voucher assistance can take the voucher, keep receiving the subsidy, and move—both within the jurisdiction that issued the voucher and outside the jurisdiction. See 24 C.F.R. § 982.314. In some circumstances, however, the local PHA can limit portability. For example, under the regulations, the PHA can prohibit the household from moving during the initial term of the lease, and the PHA can prohibit more than one move by the household each year. The PHA also may deny a household's request to move with the voucher if the PHA has any independent ground to terminate the subsidy, such as an independent and serious lease violation by the household. See 24 C.F.R. § 982.314; 982.551; 982.552. So, if the household violates its lease obligation with the private landlord by prematurely moving, the PHA may, in turn, terminate the household's federal subsidy. In addition, if a household applies for voucher assistance to a PHA outside the jurisdiction where the household currently resides, and the PHA approves the household's application, the PHA may prohibit the household from taking the voucher outside its jurisdiction for one year after the household

receives the voucher. See 42 U.S.C. § 1437f(r)(1). A household also may not move with its voucher to another jurisdiction if the household has moved from its previous voucher-subsidized housing in violation of a lease. See 42 U.S.C. § 1437f(r)(5). On these issues, the current federal statute and regulations contain no special provisions related to domestic violence.

Helpful Policies of Some PHAs. However, PHAs have the authority to adopt helpful policies to ensure that households continue to receive voucher assistance when moving in an emergency situation. For example, PHAs can clarify that tenants who notify the PHA of a domestic violence situation within a reasonable period of time can move to protect their safety during the initial lease term, or more than once a year, without losing voucher assistance. PHAs can also adopt policies to approve emergency moves because of domestic violence in an expedited manner and to treat such requests as a priority. A local PHA's Section 8 administrative plan, on file with the PHA, must state any policies the PHA follows in addition to the federal statute and regulations.

In dealing with the Section 8 voucher program, or any other federal subsidy programs that supplement the private housing market, it is important to note the interaction of state and federal law. In the voucher program, the contract between the PHA and the landlord must clearly state that all leases that the landlord offers to voucher-subsidized tenants must be consistent with state and local law. See 42 U.S.C. § 1437f(o)(7)(B)(ii)(I). PHAs may disapprove any lease that is inconsistent with state and local law. See 24 C.F.R. § 982.308(c). Because some jurisdictions, such as Oregon and Washington, have helpful new laws for battered tenants, PHAs should deny approval to any lease that conflicts with these statutes. In some other jurisdictions, state and local landlord-tenant laws, in general, may be more favorable to tenants than federal law. It is also important, however, to compare state and local law with federal law on a case-by-case basis to determine which is more favorable to the tenant, and, where possible, to argue under the more favorable law.

Use of Reasonable Accommodation Argument. In one Sec. 8 voucher case in Washington, argued before the current favorable state statute on domestic violence was enacted, an attorney successfully relied on a reasonable accommodation argument under federal disability law to assist a battered tenant in a mutual termination negotiation. In that case, a young child suffered extreme trauma after witnessing his mother being raped in their apartment. The landlord and PHA agreed to a mutual termination of the lease outside of court based on the tenant's reasonable accommodation claim. In some cases, domestic violence may result in trauma to the battered tenant, any children, or any household members that, independently, may be considered a legal disability under the federal Fair Housing Act. If pursuing such a reasonable accommodation strategy, it is necessary to present and argue the facts as a disability matter under the Fair Housing Act, which can be limited in scope because injuries and temporary disabilities are not generally covered.

Federal Public Housing With No Private Landlord. In the federal Public Housing program, where there is no private landlord, the tenant's lease is governed entirely by the federal statute, regulations, guidance from HUD, and any policies of the local PHA. See 42 U.S.C. § 1437 et seq. (2004); 24 C.F.R. Part 960 (2004). As in Section 8, the current federal statute and regulations contain no special provisions related to domestic violence on the issue of leases. However, new program guidance issued by HUD in 2003 for the Public Housing program clarifies that PHAs have the discretion to adopt emergency transfer policies for residents fleeing domestic violence. See HUD, *Public Housing Occupancy Guidebook* 215-221 (June 2003), § 19.4. HUD urges PHAs to establish such a policy in Public Housing by, for example, issuing a voucher to the resident to make sure that she can move. In recognition of the emergency health and safety considerations underlying a battered tenant's

request for an emergency transfer, PHAs that adopt such emergency transfer policies should further adopt procedures to avoid long delays in approving and expediting emergency transfers, which can further endanger battered residents. When a resident seeks an emergency transfer based on domestic violence, a PHA or PHA staff should accept a wide range of "proof" of domestic violence, and a PHA's policies should acknowledge that the credible statement of the victim can be sufficient proof. The HUD Guidebook itself recommends that PHAs exercise their discretion in accepting a wide range of evidence to establish the occurrence of domestic violence. See *Guidebook* § 19.2. In addition to establishing or maintaining a meaningful transfer policy, PHAs should make certain that residents are actually aware of any transfer options available to them in situations of domestic or sexual violence.

Conclusion

The recent HUD Guidebook is an important step towards addressing barriers to moving for domestic violence survivors in the federal Public Housing program. National and local advocates are working to ensure that PHAs adopt, and comply with, HUD's recommendations on domestic violence, or adopt even more favorable policies and practices. Advocates are also working to extend these protections to the other federal housing programs, such as Section 8. Local domestic violence advocates and allies in the housing community can play an important role in advocating for better policies with the local PHA about leases, moving, housing discrimination, and other issues faced by battered tenants in these programs. Best practices adopted by a local PHA can be adopted by other PHAs elsewhere around the country and can serve as national models.

Because specific state law protections for battered tenants do not currently exist in most states, state legislative advocacy is badly needed to craft new laws,

like those in Oregon or Washington, that enable battered tenants to terminate their leases early. Better state laws can also assist battered tenants who participate in federal housing subsidy programs, such as the Section 8 voucher program, where in some cases, state law may be more favorable for the tenant than federal law. In doing this advocacy, it is important for local domestic violence advocates and attorneys to develop coalition relationships with local housing advocates and attorneys who support these reforms and who may have extensive knowledge of local housing laws and practices, as well as relationships with the local PHA.

When negotiating or litigating these cases one at a time, it is important to develop similar collaborative relationships and referral contacts with local housing advocates and attorneys who can assist or represent battered tenants whom they encounter in their work. Reputable cross-training on the nature and dynamics of domestic violence, screening, and available legal protections may be needed for housing advocates and attorneys, depending on the community. Domestic violence advocates and attorneys may be able to serve as an important collaborative resource to ensure that allies handle cases involving battered tenants consistent with best practices in the domestic violence community. In addition, depending on available resources, domestic violence advocates and attorneys can begin to serve as such a training resource to the PHA or any local landlord groups.

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