MEMORANDUM RE
RETURN OF SECURITY DEPOSIT WHEN
ONE ROOMMATE MOVES OUT AND ANOTHER PERSON MOVES IN

FACTS

A lease is made between at least two unmarried roommates and a landlord. One of the roommates moves out. The lease says nothing in particular about this issue. The roomate who moves out either

> [a] terminates his interest by giving proper notice to terminate to the landlord or by moving out at the end of a term lease that does not require notice but simply ends on its last day; or
>
> [b] doesn't terminate his interest as in #a but instead just finds a replacement tenant as allowed by the lease (sublets or assigns his interest to the replacement)

ISSUE

Under these facts, is the landlord required to return the deposit to the person moving out minus the usual deductions[1] or is it proper for the landlord to retain the deposit on the grounds that it now is on account for the remaining roommate/s plus the replacement roommate?

SHORT ANSWER

In scenario #b, the landlord should retain the deposit, but in scenario #a the landlord must return the deposit minus the usual deductions.

ANALYSIS

[1] Minn. Stat. § 504B.178[2], subdivision 3(a) (emphasis added) reads in pertinent part as follows:

> Subd. 3. **Return of security deposit**. (a) Every landlord shall:
>
> (1) within three weeks after termination of the tenancy; ....
>
> and after receipt of the tenant's mailing address or delivery instructions, return the deposit to the tenant, with interest thereon as provided in subdivision 2, or furnish to the tenant a written statement showing the specific reason for the withholding of the deposit or any portion thereof.

---

[1]See Minn. Stat. § 504B.178 for the allowable deductions. By far the most common are deductions for unpaid back rent or damage beyond ordinary wear and tear. See the next footnote for the URL for a copy of this statute.

[2]Available at https://www.revisor.mn.gov/statutes/?id=504B.178

Thus, the question becomes when does the "termination of the tenancy" occur?

[2] To answer that question, the first issue is what kind of tenancy does the tenant have? The relevant statute is Minn. Stat. § 500.19[3], subdivisions 1-2, which read as follows:

> Subdivision 1. **According to number**. Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter.
>
> Subd. 2. **Construction of grants and devises**. All grants and devises of lands, made to two or more persons, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy. This subdivision shall not apply to mortgages, nor to devises or grants made in trust, or to executors.

So, unless the lease expressly declared the tenancy to be a joint tenancy, the tenancy is a tenancy in common.[4]

[3] Pursuant to subdivision 1 of the just quoted statute, "the nature and properties of [the tenancy in common] ... shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter." Therefore, since no part of Chapter 500 includes any rule related to the subject of this memo, the applicable rules are common-law rules. These rules are discussed in #4 below.

[4] [a] Unlike a joint tenancy, where each joint tenant can completely control the entire estate/lease, tenants in common only control what each owns, called an "undivided interest in the whole". As one recent case stated, quoting 20 *Am. Jur. 2d Cotenancy and Joint Ownership* §_109, "the lease is regarded as being leases of the owners' separate shares of the property". Abraham v. Bellefy, File No. A03-585 (Minn. Ct. App. 2/3/04).[5] An older case stated the same principle in the language of the time as follows: "If tenants in common join in a lease it is in judgment of law the distinct lease of each of them, for they are separately seized, and there is no privity of estate between them." Eastman v. Lamprey, 12 Minn. 153 (Gil. 89) (1866)[6].

---

[3]Available at https://www.revisor.mn.gov/statutes/?id=500.19

[4]If the tenants are a married couple, then certain aspects of family law may apply. Minn. Stat. § 500.19, subd. 4. This memo concerns roommates who are not married.

[5]Available at http://mn.gov/lawlib/archive/ctapun/0402/opa030585-0203.htm

[6]Available on page 89 at http://books.google.com/books?id=SX80AQAAMAAJ&pg=PA116&dq=eastman+lamprey+minnesota+reports+volume+12&hl=en&sa=X&ei=rEkmUvi1HMGt2QW96IDACw&ved=0CC0Q6AEwAA#v=onepage&q=eastman%20lamprey%20minnesota%20reports%20volume%2012&f=false

In other words, each of a pair of co-tenants controls his share of the tenancy. His share is the right to use the entire place but not to interfere with the other person's use; he can only sell or terminate what he has, the shared use of the whole unit..

[b] In a tenancy in common, there must be unity of possession. Gould v. Sub-District of Eagle Creek School District, 8 Minn. 427 (Gil. 382) (1863)[7]; Chapman Place Ass'n v. Prokasky, 507 N.W.2d 858 (Minn. Ct. App. 1993)[8]. This means that in a tenancy in common, the co-tenants must share the right to possess the unit.

[c] As discussed above, a cotenant may sell or transfer ("alienate") his share (his undivided interest) in the property without destroying the unity of possession. 20 *Am. Jur. 2d Cotenancy and Joint Ownership* § 40 (2005 and 2013 Supp.)[9].

[d] However, since "unity of possession is the very essence of a tenancy in common, anything that severs or destroys that unity must necessarily terminate the tenancy." *Id*[10].

[5] Based on #4.c, if a co-tenant transfers his interest to another occupant by way of a sub-lease or an assignment of the lease, then the tenancy in common continues rather than terminates. Therefore, the landlord would not be required to account for the deposit since there has been no termination of the tenancy.

On the other hand, based on #4.d, if a co-tenant terminates his interest by giving the landlord the required notice to quit/vacate/terminate tenancy, then the tenancy in common is also terminated because the unity of possession has been terminated, and the landlord has the usual time (three weeks absent a condemnation) to return the deposit minus any correct deductions.

SUMMARY

If a co-tenant wants to vest his right to return of the deposit, he should terminate his tenancy by giving the needed notice to vacate to the landlord (and at some point provide the landlord an address for return of the deposit.)

Alternatively, the co-tenant could make a deal with a replacement tenant, assigning his interest to that person and getting a payment from the replacement (probably equal to the co-tenant's

---

[7]Available on page 382 at http://books.google.com/books?id=poA0AQAAMAAJ&printsec=frontcover&dq=%22minnesota+reports+volume+8%22&hl=en&sa=X&ei=OrAsUpa1MIqXqgGz04DIBQ&ved=0CC8Q6AEwAA#v=onepage&q=%22minnesota%20reports%20volume%208%22&f=false

[8]Available at http://scholar.google.com/scholar_case?case=5200548732097591138&hl=en&as_sdt=2,24

[9]This part of Am.Jur.2d is reprinted as an Appendix to this memo.

[10]See footnote 9.

original contribution toward the deposit, but legally any payment the two agree on). If the co-tenant does this, he has no right of return of the deposit from the landlord as the replacement has stepped into his shoes; instead, he gets whatever he gets from the replacement, with the replacement taking over the risk of return or non-return of the deposit down the road.

APPENDIX
20 *Am. Jur. 2d Cotenancy and Joint Ownership* § 40 (2005 & Supp. 2013)

§ 40 Severance and termination

An ownership interest of a tenant in common is severable. n1 Since unity of possession is the very essence of a tenancy in common, n2 anything that severs or destroys that unity must necessarily terminate the tenancy. n3 However, alienation that does not destroy the unity of possession does not destroy the tenancy, but only transfers ownership to another party. n4

A tenancy in common ends upon the definite ouster by one cotenant of the others. n5 However, where property held in cotenancy is a single family home, there is no ouster of one cotenant by the cotenant in possession where the home could be jointly occupied and it is not shown that the cotenant not in possession requested, or wanted to request, access to the property. n6

> Definition: An ouster is the wrongful dispossession or exclusion by one tenant of his or her cotenant or cotenants from the common property of which they are entitled to possession. n7

A tenant in common who conveys his or her interest to a third person ceases to be a cotenant, n8 but the purchaser of the undivided share of a tenant in common becomes a cotenant with the remaining owners. n9

The general rule of the common law was that property held in common could be divided only by the consent of the owners or by a proceeding in a court of equity; n10 it appears that this rule still prevails where the common property embraces several things of different qualities or values, or consists of but a single object that cannot be divided without destroying its character or identity. However, where personal property is severable in its nature, in common bulk, and of the same quality, n11 each tenant may sever and appropriate his or her share, if it can be determined by measurement or weight, without the consent of the others. n12

A tenant in common who takes more than his or her share of commingled goods is liable for conversion. n13

FOOTNOTES:
n1 Robinson v. Samuel C. Boyd & Son, Inc., 822 A.2d 1093 (D.C. 2003).

n2 § 33.

n3 Tresher v. McElroy, 90 Fla. 372, 106 So. 79 (1925); McLawhorn v. Harris, 156 N.C. 107, 72 S.E. 211 (1911).

n4 In re Abernathy, 259 B.R. 330 (B.A.P. 8th Cir. 2001), aff'd, 19 Fed. Appx. 460 (8th Cir. 2001) (Missouri law); Wachter Development L.L.C. v. Gomke, 544 N.W.2d 127 (N.D. 1996).

n5 Howell v. Bradford, 570 So. 2d 643 (Ala. 1990).

n6 Reitmeier v. Kalinoski, 631 F. Supp. 565 (D.N.J. 1986)

n7 Estate of Hughes, 5 Cal. App. 4th 1607, 7 Cal. Rptr. 2d 742 (4th Dist. 1992).

n8 Matter of Estate of Rogers, 473 N.W.2d 36 (Iowa 1991).

n9 Matter of Estate of Rogers, 473 N.W.2d 36 (Iowa 1991); Anderson v. Boyd, 229 Miss. 596, 91 So. 2d 537 (1956).

n10 Warren v. Boggs, 83 W. Va. 89, 97 S.E. 589 (1918).

n11 Kelly v. Lang, 62 N.W.2d 770 (N.D. 1953) (lambs are not so alike that they can be easily divided by count); Deutscher v. Broadhurst, 69 S.D. 554, 12 N.W.2d 807 (1944).

n12 Preston v. U.S., 696 F.2d 528, 35 U.C.C. Rep. Serv. 579 (7th Cir. 1982) (Wisconsin law); Dickey v. Spears, 237 Ky. 684, 36 S.W.2d 341 (1931). As to fungible goods, generally, see Am. Jur. 2d, Sales § 218.

n13 Preston v. U.S., 696 F.2d 528, 35 U.C.C. Rep. Serv. 579 (7th Cir. 1982) (Wisconsin law).