

Top 10 Scary Things to Encounter During a Title Examination

Description

By Douglass W. Dewing

Title insurance, and the title examination upon which the policy is based, rely on consistent applications of general principles of law. A title examiner's report walks a thin line between a mere listing of documents found during the period of examination and an opinion of a knowledgeable lay person applying those principles of law to a particular parcel of land or state of facts (the practice of law). There are some common fact patterns that can upset that application, leading examiners (and underwriters) astray.

Here is a listing of a few scenarios that have elevated my anxiety levels over the years. There is a "glass half full/glass half empty" sense to a couple of them, which may lead the reader to think the author is always anxious. The reader may be right.

Common/Uncommon names

If you are told your current owner's name is Smith or Jones, you know there is a high probability you are going to have to separate a lot of chaff to get to the wheat. In 1850, the ten most common names [1] in the United States were:

Surname	Male First Name	Female First Name
Smith	John	Mary
Brown	William	Sarah
Miller	James	Elizabeth
Johnson	George	Martha
Jones	Henry	Margaret
Davis	Thomas	Nancy
Williams	Charles	Ann
Wilson	Joseph	Jane
Clark	Samuel	Eliza
Taylor	David	Catherine

A 2014 study by a retired Spanish professor from Illinois revealed the ten most common name variations, taking the names from census data and the checking the name against the Whitepages.com website for frequency [2]. He reports the following as the most common name combinations:

James Smith:	38,313
Michael Smith:	34,810
Robert Smith:	34,269
Maria Garcia:	32,092
David Smith:	31,294
Maria Rodriguez:	30,507
Mary Smith:	28,692
Maria Hernandez:	27,836
Maria Martinez:	26,956
James Johnson:	26,850

In a couple of decades, the "new" favorite names [3] children (what will we call the generation after the post-Millennial, or Generation Z, cohort?) may be buying real estate, so hold on for

Emma
Liam
Noah
Olivia
Ava
Isabella
Sophia
Elijah
Logan
Mia

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The risk for the examiner or underwriter: deleting one or more entries from the report that are, in fact, applicable, even though there is nothing on the face of the instrument to suggest that. The symptom indicating when you are most at risk: fatigue.

Names from other cultures pose a significant risk to the title examiner, primarily because other people may not know how to treat them either. Sun Wen (Chinese) and Kim Il Sung (Korean) are examples where the surname is given first, but the wary examiner may search the indices for both, not knowing how the deputy clerk indexing them may have treated them. The examiner may also be unfamiliar with the most common typographical error forms, or the phonetically similar variations, and won't recognize them even if they are seen. Kim, for example, may be Romanized as Gim. [4] Sun may also appear as Suen, Sen, Sng, Ton, Son, Soon, Suan and Swen. [5]

European based cultures tend to follow the given name-family name model; from the East Asian cultural sphere the order was family name-given name. But it may be the custom in some of these cultures to reverse the sequence for the convenience of westerners [6], which puts the examiner right back in the soup.

Too many loans/no loans

As was sung in the musical Cabaret, "Money Makes the World Go Round." [7] In the world of real estate, loans are an everyday occurrence. Land can be expensive. Very few people can pay cash

for everything.

Sadly, in the "go-go-go" days of overheated development, people sometimes lost track. Banks would record full releases when partial releases were intended. It might be the wrong form was pulled from a drawer. It might be they drafted it themselves and mixed up the language reciting the loan was fully paid, but only a portion of the collateral released . . . or that the loan was partially paid and all the collateral released. The release might identify the original loan, but not the modification which increased (rarely was the loan decreased, until the economy tanked) the amount of the loan. The lender might release a deed of trust, but not the simultaneously recorded assignment of rents. A commercial property developer/manager might sell a chain of nursing homes in Wisconsin and refinance a shopping center in Texas, and use the excess proceeds to pay off the loan on an office building in Virginia. An oceanfront owner with a retreat in the mountains might use pipeline condemnation proceeds to pay off a beach house.

In this modern "on the internet, nobody knows you're a dog" world, liens may be released simply because a fraudster has a laser printer. Insurers have flagged releases without an accompanying transaction (sale or refinance) as a potential red flag for fraud. Is it innocent? Is it fraud? Is it an indexing error hiding that transaction? All an examiner can do is worry, and share the information found with the underwriter.

Silent Serial Monogamists

This one is silly and sexist, and probably belongs at the bottom of the list. It is slightly related to the naming customs discussed previously. Back before women earned graduate degrees, professional licenses, and earned significant income, it was customary that upon marriage a wife would adopt the husband's family name. It was also customary that a married couple would stay married. As marriage stability tumbled^[8] it became increasingly possible for a woman to hold title to a property longer than she held a name.

Most lenders know those names, as they were revealed during the credit history stage of loan approval, but don't share with the title examiner. The loan documents may say XY, formerly known as XX, formerly known as XW; but again, the original examiner wasn't told. There were a few years where all the "cool" people refinanced every six months, whether they needed to or not, so the examiner might find a running tally of the owner's name over time, but not everyone played that game.

The local marriage register would not be a fool-proof solution, since the Elvis Whole Lotta Love Chapel in Las Vegas is as happy to marry a Virginian as it is to deal them a hand of 21 in the back room. Missing names means missing parts of the examination means potentially missing liens and encumbrances.

Sadly, this is a gender specific concern. Not only do males rarely change their names (although the examiner needs to be alert to the possibility as it is not prohibited by law, only by custom) but the male serial monogamist may advertise his condition by moving title from solely owned to tenants by the entirety and then back to solely owned upon divorce.

Multiple Generations of Intestacy

One of the underlying principles to a good title is that all the documents necessary to evidence the ownership interests are already in the land records. The acquisition of "heired" property absolutely requires information sharing between the purchaser, the seller and the examiner. Especially when the property has gone through multiple generations of intestate succession, it is highly unlikely the examiner will be able to find all the threads leading to 100% complete ownership. As Americans became more mobile, it is increasingly likely that not all the records upon which the examiner would rely are located in the Commonwealth of Virginia, much less in the city or county where the real estate is located.

If the examiner doesn't know the record owner had six children or when the record owner died, that's six names that were not run from the proper date. Even if there is some horse trading between family members, their deed recitals may be summarized (AB, BB, and CC being the sole surviving heirs) omitting information the examiner might find helpful (CB married DC, and is signing the deed; DB died as an infant, unmarried, without children; EB married FF, who died first, leaving EB a widower, who then died intestate without children; FB married HG, and they had six children IB, JB, KB, LB, MB and NB . . . stuff like that). As Americans grew mobile, we also tended to lose track of family members, so AB and BB in the prior example may not even know about FB's marriage or all of FB's children. (Not everyone brings the future spouse home to get married, much to Momma's dismay.) Their recital may be flat wrong (we get more if we only have to split the sales price three ways) or they may not actually know the identity of the holders of the outstanding percentages of ownership. They know for their immediate circle of the family, but that's all they know.

An examiner is not a genealogist, although some of the data they work with is the same. If there is information in the county records to suggest a missing motherlode of family data can be found up in New Jersey, the examiner should report that to the customer, and let a New Jersey professional find and interpret the New Jersey data. (with care, because the New Jersey result may not be the Virginia result)

Just because Ancestry.com can get you access to New Jersey data does not necessarily mean it will be the right data. If you are looking for Smith heirs, refer back to the first segment. James, Michael and Robert Smith are the three most popular guys in America. How, without context, will you know, or be able to convince your underwriter, that the James, Michael and Robert sitting at the table are the right ones among the 100,000 candidates out there?

Things that are off-kilter "vague" wrong . . . defect in execution, in description

Earlier I noted the consistent application of general rules is necessary for a title examiner's continued good mental health. If the deed is from AB, and the prior deed vested title in BB, we have a problem. Corporate deeds need to be signed by corporate officers at the vice presidential level or higher. Partnership deeds need to be signed by general partners. Unincorporated Association deeds need to be blessed with a court order. Fiduciary deeds need to be signed by the fiduciary. If the signer is not the person or entity in the prior recorded instrument, or doesn't fit nicely within a statutory presumption of authority, a little warning bell should be going off. Sometimes it can be fixed, sometimes it doesn't need to be fixed, and sometimes it has to be fixed. All the examiner knows is what is in the land records. If the governing documents are not recorded, be they corporate bylaws, a partnership agreement, an operating agreement, a trust agreement, or whatever, then all the examiner

can do is point out the deviation from statutory presumption, and presume it is a problem. Advise the underwriter.

If an instrument purports to affect property described on the attached Exhibit A, and there is no exhibit attached, we have a problem. If the property is described on a plat to be attached, and there is no plat, we have a problem. If the description in words on Exhibit A doesn't match the picture on the plat, we have a problem. If the words don't match the words of the prior description, we have a problem. If the tax bill description doesn't match any of the recorded descriptions, we have a problem. We may be pretty sure we know what was intended . . . but how can we be sure?

The Unexpected

Nobody likes surprises. The best surprise is no surprise.^[9] How can you expect the unexpected? As Monty Python declaimed^[10] "Nobody expects the Spanish Inquisition! Our chief weapon is surprise! surprise and fear! fear and surprise! our two weapons are fear and surprise! and ruthless efficiency! Our three weapons are fear, surprise and ruthless efficiency! and an almost fanatical devotion to the Pope! Our four! no! amongst our weapons! amongst our weaponry!"

Whether it is a deed from a total stranger to the examination results obtained thus far, an encumbrance shown on a plat for which no conveyance can be found, a less and except that seems to be located right in the middle of the parcel, a notation that the tax bill is sent to someone whose name you don't recognize, running into the unexpected can result in a frantic review of your work, a partial or complete do-over and/or a strong desire for either a strong drink or a different career . . . or both.

Nothing

This can be the most nerve-wracking finding of all. After running the chain back and pulling the adverse conveyances, you find . . . nothing. Or you can't find a source deed in the name of the purported seller to create a chain of title. Or you can't find a source deed into the person to whom the tax bills are sent. Or you can't find an off conveyance from the adjoining owner's (in any direction, meaning you may have done four examinations already) chain of title for your land or your seller. At this point, you feel like an underwriter who hears there is no loan against the property, but this is worse, there is no anything against the property.

Sigh. Pour me a Pappy Van Winkle if you have it, Maker's Mark or Woodford Reserve if you don't.



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member of the Virginia land title community. Douglass W. Dewing earned a BA from Washington and Lee University, a JD from Washington University School of Law and a MA from Saint Leo University. He is the author of *A Virginia Title Examiner's Manual*, most recently updated in 2017, a co-author of *Virginia CLE's Real Estate Transactions in Virginia*, most recently updated in 2015, an occasional presenter at CLE and CE (Title Insurance) programs, and an occasional contributor to various professional journals and trade publications.

[1] <https://blogs.ancestry.com/cm/calling-james-smith-10-most-common-first-and-surname-combinations/>

[2] <https://blogs.ancestry.com/cm/calling-james-smith-10-most-common-first-and-surname-combinations/>

[3] <https://www.mom365.com/baby-names/top-100-baby-names>

[4] [https://en.wikipedia.org/wiki/Kim_\(Korean_surname\)](https://en.wikipedia.org/wiki/Kim_(Korean_surname))

[5] [https://en.wikipedia.org/wiki/Sun_\(surname\)](https://en.wikipedia.org/wiki/Sun_(surname))

[6] <https://en.wikipedia.org/wiki/Surname>

[7] Can you believe Dame Judi Dench played Sally Bowles in the 1968 London production? (the Liza Minelli role in the 1972 movie) [https://en.wikipedia.org/wiki/Cabaret_\(musical\)](https://en.wikipedia.org/wiki/Cabaret_(musical))

[8] http://www.hopesandfears.com/hopes/city/city_index/214133-city-index-marriage-lengths;
<https://www.refinery29.com/2017/01/137440/divorce-rate-in-america-statistics>

[9] <http://www.sjsu.edu/faculty/wooda/motel/holiday/index.html>

[10] <https://www.telegraph.co.uk/comedy/comedians/monty-python-s-25-funniest-quotes/the-spanish-inquisition/>

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