



White Paper

Guidance for Professional Deputies Acting in Court of Protection Cases and Statutory Will Applicants.

The importance of validating the last Will,
obtaining previous Wills to understand the content
and evidencing that an unknown or undisclosed Will
does not exist.

May 2019 - Compiled by the National Will Register

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NEW DIGITAL PORTAL PROVIDES A USER-FRIENDLY SEARCH FOR STATUTORY WILL APPLICANTS

Certainty the National Will Register plays a crucial role in the work of those involved in applying for a Statutory Will. The Official Solicitor recommends that a Will Search should be conducted in appropriate cases for Statutory Will applicants. To facilitate this a new digital portal (link below) provides a user-friendly and comprehensive search for Statutory Will applicants.

www.nationalwillregister.org/OfficialSolicitorandPublicTrustee.

As you are no doubt aware, one of the vital roles the Official Solicitor plays is acting as a litigation friend in Statutory Will applications. In such instances, it is of utmost importance that he gains a wide understanding of the past wishes and feelings of the person the Will is to be created for, in order to ensure these are reflected in the creation of any Statutory Will. The Official Solicitor will, therefore, want to exhaust the possibility of the existence of any unknown Will(s) prior to the creation of a Statutory Will and also be satisfied that the Will believed to be the last Will has not been superseded by an unfound or unknown Will. As a Deputy you can assist him with this by undertaking a National Will Register Will Search.

A Certainty Will Search:

1. Checks against Wills that have been registered with Certainty the National Will Register and its millions of records.
2. Performs a geographically targeted search for Wills that have not been registered with both regulated and unregulated Will writing professionals.

Carrying out the above will help establish:

- Whether any Will is in existence
- Where any existing Wills are located
- Which Will (if any are in existence) is the most up to date one
- To gain a wider understanding of the past wishes and feelings of the person who the Will is for

The above points will then determine for the Official Solicitor whether a Statutory Will is necessary or not, and what provisions should be made.

It is therefore essential that Professional Deputies are aware of the service the National Will Register's Certainty Will Search provides, in order to ensure that they are diligently carrying out their role.

As a Deputy, you can conduct a Certainty Will Search via the Certainty the National Will Register and the Official Solicitor website, call 0330 100 3660 or email enquiries@certainty.co.uk.

In at least one in every ten Certainty Will Searches carried out, an unknown Will is found which was not thought to exist or a Will that supersedes the Will thought to be the last.

ASCERTAINING THE POSITION OF THE WILL

We are writing to all solicitors in England and Wales who act as a Professional Deputy appointed by the Court of Protection.

Ethics Guidance drafted in conjunction with and approved by: The Court of Protection, Office of the Public Guardian, Legal Ombudsman, The Law Society and the Society of Trust and Estate Practitioners, states that the Will forms part of the financial affairs belonging to the donor. It highlights scenarios of possible adverse outcomes which can occur without knowing the contents of the Will.

The Official Solicitor recommends that a Will search should be conducted in appropriate cases for statutory wills applicants. A new digital portal has been launched to enable a Deputy to carry out a search quickly and easily www.nationalwillregister.org/OfficialSolicitorandPublicTrustee.

The purpose of carrying out a Certainty Will Search in CoP cases is to help establish the status of a Will in relationship to the P:

- Is there an unknown Will or Wills in existence and where they are located
- If you are in possession of a Will is it the most up to date one
- Obtaining and understanding the content of any previous Wills

For information, a Certainty Will Search:

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The Certainty Will Search required is called a Will Search Combined which is an allowable disbursement of £95 +vat.

To conduct this search please visit the portal or alternatively contact the Will Search Team using the details below who will be able to assist.

Tel: 0330 100 3660

Email: enquiries@certainty.co.uk

Web: www.nationalwillregister.co.uk

A WILL FORMS PART OF THE FINANCIAL AFFAIRS OF A PERSON

Section 51 of the Mental Capacity Act 2005 (the Act) grants the Court of Protection the authority to appoint the Official Solicitor to 'act in the name of, or on behalf of, or to represent the person to whom the proceedings relate'.¹ One of the important roles played by the Official Solicitor is acting as a litigation friend in Statutory Will applications where she has the power to execute a Will, as granted through section 18 of the Act.² When creating a Statutory Will for a person who lacks the capacity to do so, the Official Solicitor must act in the person's 'best interests', the meaning of which is detailed in the Act.³ As part of acting in their best interests, she must ensure, amongst other points, that she considers 'the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)'.⁴

A Will forms part of the financial affairs of a person, according to Ethics Guidance drafted in conjunction with and approved by The Court of Protection, Office of the Public Guardian, Legal Ombudsman, The Law Society and the Society of Trust and Estate Practitioners, termed 'Access to and disclosure of an incapacitated person's Will' (the Guidance).

[<https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Access-to-and-disclosure-of-an-incapacitated-persons-will.page>]. It is therefore imperative that the content of any existing or past Wills is known, to avoid possible adverse outcomes. The Guidance, relevant to SRA regulated solicitors, details that in order for the solicitor to act in the best interests of their client they should have 'knowledge of the contents of the Will and/or codicils(s)'.

Solicitors appointed by the Court of Protection can also act as Deputies or can be involved with clients who have their own Deputies. Therefore, both Deputies and the Official Solicitor will, before creating a Statutory Will, want to:

- (a) exhaust the possibility of the existence of any Will(s) and find their location
- (b) understand which Will (if any exist) is the latest one

The latter point will enable them to determine whether or not any Will they have been presented with is the most up to date Will. All of the above will aid them in determining the past plus current intentions and wishes of the person they are acting for.

Where knowledge is missing about a Will which has been made, or when acting upon a Will which is not the latest Will, the interests and wishes of the person the Will is being created for can easily be misconstrued.

¹ Mental Capacity Act 2005, Section 51, subsection (2) (e)

² Mental Capacity Act 2005, Section 18, subsection (1) (i)

³ Mental Capacity Act 2005, Section 4

⁴ Mental Capacity Act 2005, Section 4, subsection (6) (a)

JACK'S CASE

In Jack's case below, the SRA outline one of the reasons why it is important to take steps to ascertain if a Will exists or not or to prove the last Will has been located.

Jack has made a Will giving his house (currently worth £300,000) to his nephew, Paul, and the residue (about £20,000) to charity. He also made a Property and Financial Affairs Lasting Power of Attorney, without any restrictions, in favour of Paul. This has been registered with the Office of the Public Guardian.

Jack subsequently has a stroke and is no longer able to live in his own home. Paul decides that he must sell the house to pay for Jack's care.

The effect of selling the house is that when Jack dies the gift in the Will to Paul fails and he gets nothing. The charity benefits from the whole of the estate. This was not what Jack intended.

However, if Paul is aware of the contents of the Will, he can apply to the Court of Protection for either a Statutory Will to be made so that Jack's wishes are followed or obtain an order for sale, which under the Mental Capacity Act 2005 ensures that the gift is saved.

Why does at least one in every ten Certainty Will Searches undertaken result in an unknown Will being found:

1. A client is sure they hold the last Will – in reality the only person who can confirm this is true is the deceased or vulnerable person
2. A client favours the Will they present to you – a later Will may include; step children, siblings not being treated equally or contain a charitable donation
3. A client may believe a Will was not written – see point 1
4. A client may feel there is a Will/later Will but does not know who/where it was written – it can be confusing in an expanding and merging Will writing marketplace to identify the location of a Will
5. The Will was not written recently – most are advised to review their Will every 3-5 years or after a life/financial event. Whether the Will is old or new, the risk of a Will or later Will coming forward after an event can be mitigated

JUNE'S CASE

Solicitors may find it hard to uphold a duty to act in their clients' interests if a Will exists that they are unaware of or a later Will exists than the one that has been presented to them.

In June's case below, the SRA outline one of the reasons why it is important to take steps to ascertain if a Will exists or not or to prove the last Will.

June has made a Will in which she gives her friend, Margaret, her premium bonds. At the time of making the Will these are worth £500. June's son, David is the sole residuary beneficiary. David is unaware of the contents of the Will.

June has dementia and lacks mental capacity to manage her finances, David is appointed as June's Deputy. He decides he should invest £49,500 of June's money in premium bonds.

June dies. David discovers that Margaret will now get £50,000 premium bonds (much more than his mother ever intended) and he gets less than intended.

Had David been aware of the Will, he would have invested his mother's money differently, so as not to frustrate June's succession plans.

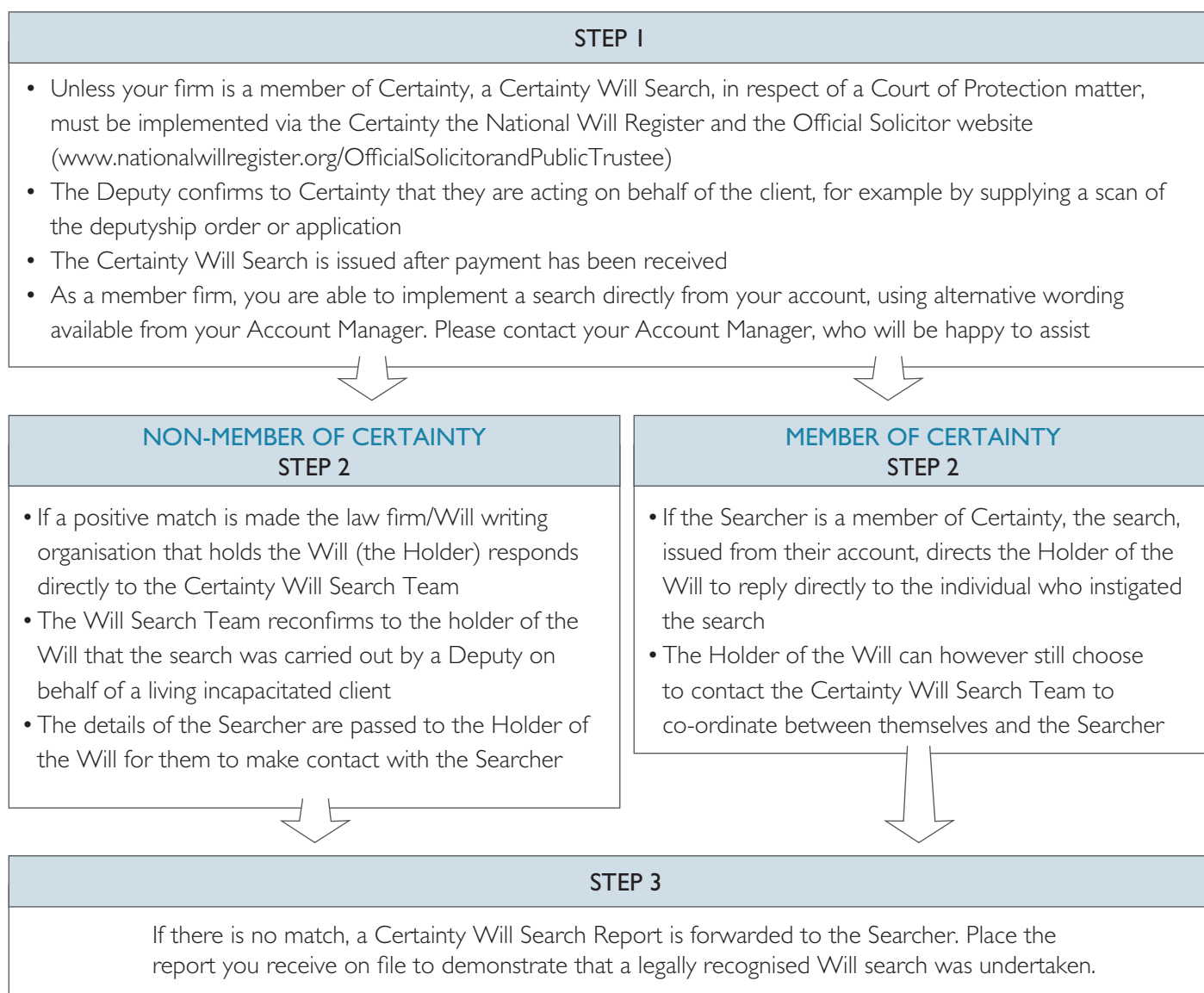
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HOW TO IMPLEMENT A CERTAINTY WILL SEARCH IN A COURT OF PROTECTION MATTER

As a Deputy making a Statutory Will application you will want to satisfy yourself that the client has never written a Will that is unknown, or that a later Will than the one you have been presented with does not exist and if this is the case, what provisions are contained within the Will. To facilitate this, a new digital portal (link below) provides a user-friendly and comprehensive search for Statutory Will applicants. This search will help you to identify if an unknown Will exists and demonstrates that adequate measures have been taken by the Deputy to consider wishes and intentions contained in an unknown Will.

Our helpful guide provides a step-by-step guide on how to conduct a Certainty Will Search in a Court of Protection matter.



This Guidance has been produced for the purposes of informing those acting as Deputies and in respect of The Official Solicitor's recommendation that a Will search should be conducted in appropriate cases for Statutory Will applicants.

To facilitate this a new digital portal provides a user-friendly and comprehensive search for statutory Wills applicants. www.nationalwillregister.org/OfficialSolicitorandPublicTrustee.

It has been created as a guide and is considered correct as of May 2019. It has not been created as a piece of legal advice and should not be substituted for gaining legal advice.



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