ARTIFICIAL MECHANISMS AND UPDATE OF WILLS: DISCARDING THE PHENOMENON OF FAILED LEGACIES AND NONEXISTENT LEGATEES

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Abstract
Legatees and legacies are the objects of testamentary disposition. Legatees are carefully chosen from a larger group of a testator's descendants including his objects of interest. Legacies which are considered by a testator to be well deserving are provided for the chosen legatees based on his understanding of the personalities and needs of his beneficiaries. Thus, testamentary disposition is presumed to be a just distribution based on a number of indices known only to the testator until his death. But, a situation where legacies given to named legatees are not found in the Will of a testator after his death and/ or where legatees named to inherit some legacies are discovered to have predeceased the testator may be termed a misnomer to the essence of the inclusion of update mechanisms in Wills. The above seems to be a major defect in Wills despite the fact that regular update of Wills till the death of the maker is enshrined in the statute on Wills. This paper examines the absence of regular update in Wills and found through doctrinal research method that the traditional means of effecting happenings in testators' lives is the obstacle to that feat. The conclusion of the paper is that the use of artificial mechanisms, electronic communication inclusive; to update Wills, will improve the present situation and reflect the real intentions of a testator conceived before his death. The paper recommends a review on the statute on Wills to accommodate the use of electronic communication for testamentary disposition particularly as it relates to its update.

Keywords: Legacies, Legatees, Failed Objects, Non-existent Legatees, Electronic Communication and Regular Update of Wills

1. Introduction

Succession is both natural and legal phenomenon.[1] Naturally, the toil of man on earth is pushed by the belief that after death, the property acquired while alive will be succeeded to by descendants who will exercise exclusive rights over the property as well as benefit from the same.[2] The above is also canvassed for in the Holy Books where followers are admonished to leave inheritance for their descendants.[3] Cultural practices welcome the succession of descendants to the property owned dead relatives.[4] Nature's support for succession appears neither limited by religion nor by culture.

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[1] M T Otu and M Nabiebu, 'Succession to, & Inheritance of Property under Nigerian Laws: A Comparative Analysis' (2021*) European Journal of Social Sciences* 62:2 p. 72.
[2] Ibid.
[3] The Gideons, *Holy Bible* (The Gifeons International, 1976) p. 696.
[4] Otu and Nabiebu (n. 1).

The principles guiding succession to property seems regulated by law. The privileges attached to succession as well as the duties which flow from it is equally controlled by legal apparatus not by the proprietor of the property though the power to donate the same lies with him.[5] Legal instrument outlines the transformational rules of ownership through succession which includes:

(i) that the right to succession is suspended while the proprietor of the property is alive or while alive has not given up ownership of the same;

(ii) that the nature of the property marked for succession is such that can outlive the proprietor and retain its usefulness for its successor;

(iii) that succession can be through testate or intestate means.[6]

Therefore, succession has legal undertone alongside its natural bias. Succession includes the transfer of property as well as the rights and obligations inherit in the same to the one who succeeds to.[7] The rules which guide the passing of gifts is determined by certain factors one of which is whether the proprietor of the gift created a Will before his death or simply died intestate. Where he left a Will, Testate Succession Rules will be applied but where no Will exist, Intestate Succession Rules will be followed.[8] The former allows the proprietor of property/gifts to deal with the same as he wishes and to outline all persons he would wish to be favoured by his gifts. Testate Succession Rules appears more friendly to proprietors of property than the Intestate Rules because of the priority given to their major concerns namely the gifts they wish to bequeath (that is their legacies) and the beneficiaries they hope to favour with their gifts (that is the legatees).

The special offer made to Will creators as per their legacies and legatees may be jeopardized unless the medium of communicating their well thought out wishes has features which will prevent any set back to the actualization of their dreams. The use of electronic communication to update testamentary desires seems to be the answer to the fulfilment of testamentary desires in contemporary times. This article examines in fair detail the consequences of failed legacies and the incident of non-existent legatees in Wills. The article also queries why electronic communication which comprise the use of technological devices offered by today's advanced world would not be extended to the creation and update of Wills. It is the belief of this paper that the latter would enhance the potency of testamentary disposition. The content of this article is set out in five parts including this introduction. Part II of the article highlights the categories of legatees and the nature of legacies made in Wills. Part III x-rays the consequences of the traditional rules on failed gifts and ineffective remedies put in place to cure defect in statute on Wills. Part IV presents the benefits in the use of electronic communication to update Wills. Part V contains the observations and recommendations of the writer.

2. Categories of Legatees and Types of Legacies

2.1 Legatees

[5] Andersen, 'The Role of Traditional and Cultural Beliefs in Wealth Succession Planning in Nigeria' (2023) <https://ng.andersen.com> accessed 28/6/2025.

[6] Otu and Nabiebu (n. 1).

[7] T O G Animashaun & A B Oyeneyin, *Law of Succession: Principles, Cases, Statutes and Commentaries* (MIJ Professional Publishers Ltd, 2002) p. 28.

[8] W F Frank, *The General Principles of English Law* (10th edn.; George G Harrp & Co. Ltd, 1999) p. 156.

Legatees comprise natural and/or artificial persons whom testators have found worthy to be mentioned in their testamentary documents as beneficiaries to their assets in the quantum desired by them at the time of the execution of the documents.[9] They include those who shared a bond with a Will creator through blood, marriage, business affiliation or by providing care to him.[10] The list of a testator's legatees will range from his spouse, children, grandchildren, relatives (brothers, sisters) and others. Charity organizations are included in the others. Parents often do not make the list because of the traditional belief that death is associated with age. The above persons may be categorized into major, contingent and residuary beneficiaries.[11] The major beneficiaries are the first in the list of persons to receive gifts from a testator.[12] They are the closest to the testator and are deemed special to receive higher and better rewards/gifts than others in the list.[13] Gifts of family house or family account or cherished family ornament may be given to that category of beneficiaries which list may include a spouses, children and grandchildren.

Contingent beneficiaries are next in line to major beneficiaries in the testamentary document of a testator. They inherit what major beneficiaries would have received but for the death of the latter or non-adherence to legal formalities.[14] Whilst a beneficiary labelled as major may be unable to get the gift ascribed to him, the contingent beneficiary as the alternative inherits the asset in his stead. Residuary beneficiaries take the remainder of the estate after the two above have received their gifts and all outgoings have been settled.[15] The inclusion of residuary beneficiaries in a Will is considered to be sufficient proof that a testator had no intention of allowing intestate succession rules to govern any part of his estate particularly where the part in question was left undistributed in his Will.

The aforementioned received judicial approval in *Omobude Omonuwa v Benson Edegbe & Ors*.[16] The testator in that case failed to devise some of his immovable properties and monies in selected bank accounts totaling the sum of N12,361,112.47 (Twelve Million, Three Hundred and Sixty-one Thousand, One hundred and twelve Naira and Forty-seven Kobo). The plaintiff sought an order of Court to distribute the property not captured in the Will in accordance with Benin Native Law and Custom. The Court relied on the content of the clause and held that the provision of residuary beneficiaries in the clause meant that the testator did not wish for the distribution of his estate to be subjected to the application of Benin Customary Law.[17] It held further that the property not captured in the Will had already been provided for in the residuary clause which removes any recourse to intestate rules.[18]

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[9] Aatos, 'Categories of Legatees' <https://aatos.app/catrin.u.k.solicitor> accessed 5 June 2025.
[10] Ibid.
[11] A Namavati 'Understanding Common Types of Beneficiaries in a Will' <amphony.ai/insights> accessed 2 June 2025.
[12] Ibid.
[13] *Wood Estate, Re* [2004] BCAC 205 CA; 332WAC 205 MLB.
[14] Namavati (n. 11).
[15] Ibid.
[16] (2017) <edojudiciary.gov.ng> accessed 22 July 2025.
[17] Ibid.
[18] Ibid.

Judicial interpretation has also been resorted to where there is ambiguity on the legatees to benefit from certain gifts mentioned in a Will. *In Lumpkin v de Souza*,[19] the testator tied three legatees to a piece of land at the time he made his Will. First was the church with the instruction that it would be used to build a house for the minister. The second and third legatees were his sister and her heir, where the piece of land devised to the first legatee is considered too small to accomplish its purpose. The testator however built a house on the land during his life time and upon his demise, the question was whether the improvement made on the land by the testator changed his intention as at the time his Will was executed. The next poser to that was who among the three legatees would take the gift as wished by the testator. The Court held the church to be the rightful legatee to the building existing in the land. It explained that by the ambulatory nature of a Will, its content speaks and takes effect as if it had been executed shortly before the death of the testator. The testator may have alluded to a fact not in existence as at the time he created his Will but which later came into being before his death, the latter circumstances will govern his Will. Therefore, since the Will spoke of a house for the minister of the church and as at the time the testator died, he had built a house on the land, the church will inherit the house.

In a similar vein, the gift made by the testator in another clause for the proceeds from a farm to be divided annually to support two circuits of a church or where the first is impracticable, the same proceeds to be shared between the testator's sister and the church; was held by the Court to be void for uncertainty. The Court maintained that the testator had no intention of devising the farm but the proceeds. It ordered the farm to be sold and the proceeds shared between the testator's sister and the church.

Perhaps, the testator's inability to capture all his possessions particularly the assets he continued to acquire before his death led to the use of omnibus clause in *Omobude Omonuwa v Benson Edegbe & Ors*. The analogue system of communicating Wills may be responsible for the short fall in the Will namely, the lack of specificity recorded in the residual clause. The resort to the Court for interpretation may have been avoided with valuable time and resources saved where modern facilities of artificial were employed. Legatees are known to testators and the knowledge of their existence or nonexistence is also made available to him throughout his lifetime so their inclusion or exclusion in Wills would not pose difficulty to testators in the use of modern mechanisms

2.2 Legacies

Legacies are gifts created by testators during their lifetime to take effect after their demise.[20] The above gifts are different from ordinary day to day gifts in the following ways:

(i) they are neither given out for the moment enjoyment nor laced with sole spontaneous activity;
(ii) they can exist without the knowledge or input of the beneficiary;
(iii) they are reversible until the death of the testator;
(iv) they are made based on the Will creator's deep reflection on the totality of his circumstances and situations in life as well as that of his descendants with the view of improving the latter's economic status after his demise.

[19] (1929) 9 NLR 81.
[20] B A Oni, *The Law of Succession in Nigeria: Principles, Cases and Practice* (University of Lagos Press & Bookshop Ltd, 2019) p 35

Legacies are the results of calculated reflections on past and present events aimed at creating both pleasant or unpleasant future surprises. The futuristic nature of legacies invariably connotes that first; the gifts should not be encumbered for beneficiaries to take absolutely the good title of the gift. Secondly, the usefulness of the gifts is guaranteed beyond the demise of the Will creator. The above is made possible because legacies contained in a Will belong only to a named individual that is, the person the Will is ascribed to. Group or inherited property is excluded from gifts that are termed as legacies and that in effect means that the property given out is free from disputes. Again, only the property which continues to exist at the time of the demise of the Will creator is passed on. Thus, permanence appears to be an important feature of legacies so that the time interval between the creation/review of a Will and the death of the Will creator will have no effect on the beneficial value of the legacy so created.

Legacies which encompass devises (realty) and bequests (chattels) are categorized into the following:[21]

(i) specific legacies;
(ii) general legacies;

2.2.1 Specific Legacies

A gift would be classified as specific in a Will where it points at a discrete or concrete asset left behind by the maker of that Will.[22] It includes a well described particular jewelry, an identified car with special features indicated, a distinct building different from the other buildings of the testator or a definite piece of land distinguishable from other such assets of the testator so that it can easily be separated from the other property owned by him and from the remainder of his estate.[23] In *Bothamley v Sheron*[24] the features of specific legacies which must coexist were highlighted by the Court thusly;

(i) it is part of the testator's property so; it's source is known;
(ii) it must be a part that is separable from the whole of the testator's property, so; it is neither the entirety of the testator's property nor the whole of the remainder after all legatees have been satisfied in accordance with the testator's wishes.[25]

Again, in *Robertson v Broaden*[26] the Court reasoned that the detailed description given to specific legacies is proof of a testator's intention that the identified property should pass to the named legatees in the state and condition indicated by that description. First, the use of 'my' which precedes such gifts illustrates that the testator has adequate knowledge of the property in question and who it should go to.[27] The further description points to the fettles of the property conceived mentally by a testator and represented physically in the instrumentality of a Will for a legatee to get after the demise of the testator.[28] The mental conception which signifies the

[21] N Clayton, 'What is a Legacy in a Will and the Types of Legacy Gifts' (2023) https://atkinsdellow.com accessed 1/7/2025.
[22] S Gilford, 'A Guide to the Types of Legacies that may appear in a Will" <footanstey.com> accessed 1/7/2025
[23] Oni (n. 20).
[24] (1875) 1 R 20 Eq 304.
[25] Ibid.
[26] (1893) 1 App. Cas 812.
[27] *Re Campton* (1914) 2 Ch. 19.
[28] *Robertson v Broaden* (n. 26).

intention of the testator is what gives effect to the legacy. A vivid picture of the above is captured in the case of *Re Rose*.[29] In that case, the testator bequeathed in his Will, the shares he held of a specific company to a beneficiary. The legal formalities for the registration of the shares had not been completed by the directors of the company when the testator died. The issue was whether the legacy of shares transmitted to the beneficiary was effective in the absence of complete registration. The Court held that though the legal title to the shares may not pass because registration had not been completed, the legacy was effective because the intention to transmit the shares had been completed by the testator and that is sufficient to guarantee the equitable interest.[30] The legacy as captured in the Will showed not only that the testator had sufficient knowledge of the gift but also that he intended the said shares to pass to the beneficiary in the manner described in the document. The Court held further that the incomplete registration which cannot be attributed to the testator shall not operate to defeat his desire.[31]

The Court has also shown in *Pension-Smith v Smith*[32] that a testator's intention as at the time the Will was created must align with the reality after his demise for specific legacy to pass.[33] The testator in that case devised his dwelling house to some named devisees during the making of his Will. The same house which was sufficiently described as a dwelling house was latter used for commercial purposes by the testator and it remained so at the time of his death. The Court held that the specific legacy failed because the intention of the testator at the time the gift was created did not match the physical description of the gift as it stood after the demise of the testator. The Court explained further that whilst the testator mentally conceived a place of residence to pass to the devisees, the shops which the house was converted to did not pass that description so, cannot pass as specific legacy.[34]

A similar position was adopted by the Court in *Smith Estate (Re)* [35] and in the case of *In Warren (Re),*[36] the Court found the need to strengthen the fact that the intention of a testator is the paramount consideration where there is an issue over the type of legacy bequeathed by a testator in his Will. In the latter case, the testator's Will contains a clause which reads thusly; 'to make over and assign to our adopted son George Warren $10,000 worth of capital stock of the Thomas Warren Knitting Company Ltd.' At the time, the testator passed on, the value of the stock in the named company was less than what was stated in the testator's Will. The controversy was whether the clause bequeathed specific or demonstrative legacy to the beneficiary. The Court held the bequest to be a demonstrative legacy for two reasons namely;

(i) the testator did not use the word 'my' in any way to describe the legacy. Thus, no particular asset which the testator possessed was meant;

(ii) the worth of the stock was less than that which the testator indicated in the Will at the time it was created. The Court reasoned that the reduction in the value of the stock is an indication that the testator did not intend the legacy to pass to a main beneficiary who is ranked next to his widow.

[29] (1949) Ch 78.
[30] Ibid.
[31] Ibid.
[32] (1974) 11 CCHGJ 1649.
[33] Ibid.
[34] Ibid.
[35] (2003) 240 Sask. R. 258 (QB).
[36] 54 O. L. R 433.

Therefore, the Court will only give effect to specific legacy where the intention of the testator is manifest in the Will. The particularities given to specific legacy play vital role in safeguarding the legacy where the same is subsumed in a bigger asset left by a testator. In *Wood Estate, Re,* [37] the testator's Will contains a clause which specifies that the stocks and bonds in an account with RBC Dominion Securities should be shared among his four children. The said stock with the designated company was transferred to Midland Waliogn few weeks after the Will was made. After the demise of the testator, the executor sought the Court's interpretation to the clause containing the gift made to the testator's children.

The trial Court held that the specific gift made to the children no longer existed with the transfer made by the testator shortly after his Will was created. But the appellate Court took a different position. The latter Court held that the sum accruing from the dealings with the stock at RBC Dominion Securities cannot be located because the same was no longer in existence. The Court directed for further evidence to ascertain whether there are distinct stocks from RBC account existing in Midland account in which case the children would take the stocks as specific legacy. Specific legacies are traceable, distinguishable and free from any reduction in value which other legacies may be subjected to for the purpose of redeeming the Will from debts.

2.2.2 General Legacy

All other legacies other than specific legacy (which is distinctively marked out) and residuary legacy (which remains after all other legatees have been satisfied and debts over the estate paid) may be grouped as general legacy.[38] They are described as general gifts because they may either benefit a number of legatees or refer to sum of money payable from general asset belonging to a testator to named beneficiary/beneficiaries. For example, a testator may leave a general legacy to all of his grandchildren in this manner: 'I give to all my grandchildren in equal share the proceeds from the sale of the lock up shops situated at No. 5 Billboard, Kano and to share also from the same proceeds is my niece- Mary Obi,' The gifts so mentioned may severally or together not exhaust proceeds from the sale referred to or may be unable to satisfy all the legatees mentioned yet, provisions must be made for all beneficiaries as intended by the testator.[39] General legacies are by nature, legacies of quantity catering for substantial number of testators' descendants in different ways.

Demonstrative legacies appear to be one of the ways through which general gifts are captured in testators' Wills. In *Ashburner v MacCuire*,[40] the Court held that Demonstrative legacy is by its nature general legacy. It is however, satisfied from a particular fund pointed out in the Will.[41] The latter feature tends to bring it under the same umbrella with specific legacy. However, where the specific property from which the gift is to be made is not available at the time of the death of the testator, the gift will be treated as general legacy. Judicial authority to the dual function of demonstrative legacies is demonstrated in *Re O' Connor* [42] and *Re Webster*. [43] In the former, the

[37] *Wood Estate, Re* Supra (n. 13).
[38] Gilford (n. 22).
[39] Ibid.
[40] (1786) 2 Bro. Ch. 108.
[41] Ibid.
[42] (1970) N. 1159.
[43] (1973) 1 All ER 602.

testator in his Will gave specific direction that the gift to a legatee be satisfied from a named fund. The fund was insufficient to satisfy the gift at the time of the reading of the Will. The issue before the Court was whether the gift has adeemed with the insufficiency of fund or could still be satisfied as a general legacy with recourse to another fund from the testator's estate.[44] The Court held the legacy to be a general legacy and added that an essential characteristic of demonstrative legacy is that it functions as general legacy where the circumstances witnessed in that case occurs.[45] Therefore, the legatee was entitled to his gift payable from the general personal estate.

In the latter case, the testator mandated that a gift be satisfied from his shares in the family business. The Court held the gift to be demonstrative legacy since the pointer on how the gift will be satisfied was available.[46] In *Tieko v Afriyie,* [47] the Court warned against the danger of treating demonstrative legacy as specific where the testator had no intention of doing so. In that case, the Court held that where the intention of a testator is to create a specific legacy, he does that through the choice of words expressed in his Will.[48] But where his intention is couched to show that a gift will be satisfied from an explicitly stated fund, then demonstrative legacy is intended. The aforementioned makes it difficult for demonstrative legacy to be defeated and that is good assurance to the testator that his gift will end up as desired.[49] It is also a guarantee to the legatee meant to inherit the named gifts.

A testator may give general legacy in form of sum of money to named individuals or a charity.[50] There may be a further directive in his Will that such pecuniary gift should be taken free of tax and/or made available to the legatees on installments.[51] The latter creates an annuity as observed by the Court in *Re Earl of Berkeley*. [52] The Court held further in that case that each installment payable at intervals constitutes a separate legacy which may be classified as specific, general or demonstrative legacy depending on the wish of the testator.[53] Interval payment which is expressed by a testator with the first person possessive element 'my' would be classified as specific legacy so that the named legatee or legatees will take absolutely the amount stated. General legacies empower general legatees which on its own accommodates a large number of a testator's descendants so, should be safeguarded so that the operation of the law will not take over the good intention of a Will creator.

3 Consequences of the Application of Traditional Rules and Equitable Remedies on Legacies

The legacies created by a testator in his Will may fail and never get to intended legatees. One of the reasons could be due to the emergence of circumstances not envisaged at the time the document was executed but became visibly manifest before the demise of the testator.[54] The

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[44] Re O' Connor (n. 39).
[45] Ibid.
[46] Re Webster (n. 40).
[47] (1975) GLR 461 @464.
[48] Ibid.
[49] Gilford (n. 22).
[50] Oni (n. 20).
[51] Ibid.
[52] (1968) 3 All ER 364.
[53] Ibid.
[54] R Kerridge & Parry, *The Law of Succession* (2nd Edn; Sweet & Maxwell, 2009) p. 46.

value of a legacy may also be reduced at the time it is made available to the legatee named to benefit from it where there is insufficient fund to satisfy some of the gifts itemized by a testator in his Will.[55] The above is able to have effect on legacies because by the ambulatory nature of a Will, its content takes effect after the demise of the maker who is presumed to have executed the document immediately before his death.[56] Thus, depending on the type of legacy a legatee is honoured with, the doctrines of lapse, ademption or abatement may be his unforeseen enemy.

A legacy will be deemed to have lapsed where the named legatee predeceases the testator.[57] The traditional rule is that the gift given to a legatee (human or artificial person) will fail where the latter is outlived by the testator.[58] The gift will become part of the residue of the estate of the testator. In the same vein, the Will made by a testator will be of no effect where all the legatees named in that Will die before the testator.[59] The principle guiding the traditional rule appears to be premised on good reasoning namely, that the demise of the legatee leaves the gift without an owner because until the death of a testator no benefit is conferred on the beneficiaries he has chosen. So, those who die before him would have no inheritance through his Will. The gifts formerly attached to their names will exist without owners which negates the object of succession namely that properties do not exist in vacuum.[60] Although a testator cannot prevent the application of the doctrine of lapse to his Will through deliberate inclusion of words to that effect, he can provide alternative beneficiaries in his Will. The other beneficiary is meant to take that which was originally devised to another but for his death before the demise of the testator.[61] The facts and decision in *Re Ladd*,[62] strengthens the fact that the maker of a Will cannot exclude the application of lapse to a Will by the inclusion of words to that effect.[63] A better way of achieving that purpose is illustrated in *Sibley v Cook*,[64] and *Re Greenwood*, [65] In both cases, the Court held that a testator may provide in his Will that where he outlives the initial legatee, the gift should be given to another descendant of the testator or to any child of the initial legatee who has attained specific age.[66]

In *Morley v Bird,*[67] the Court explained when lapse would be deemed to have occurred to a gift made to two or three persons jointly. It held that where one of the legatees predeceases the testator, the gift held jointly will pass to the surviving legatees.[68] The Court explained that the remaining surviving legatees will inherit their share as well as that of the dead beneficiary.[69] Lapse would however become inevitable where each of the joint legatees dies before the testator. It would seem that a different rule would apply where the gift to more than one legatee is severed

[55] Ibid.
[56] *Okebola v Boyle* (1998) 2 NWLR (Pt. 585) SC.
[57] Kerridge & Parry (n. 54).
[58] Ibid.
[59] Gilford (n. 22); *Re Servers of the Blind League* (1960) 1 WLR 564.
[60] Frank (n. 8).
[61] Kerridge & Parry (n. 54).
[62] (1932) 2 Ch. 219.
[63] Ibid.
[64] (1747) 3 Atk 572.
[65] (1912) 1 Ch. 393, 396.
[66] Ibid.
[67] (1798) 3 Ves. 629.
[68] Ibid.
[69] Ibid.

such that even where they take equally they are tenants in common. In the latter situation, the gift to the beneficiary who predeceases the testator suffers lapse despite the fact that the other tenant(s) in common outlives the testator.[70] Therefore, certain drafting techniques could be used to circumvent the effect of lapse in Wills.

Another technique which is employed to beat the doctrine of lapse in Wills is to devise legacies to a class of persons whose identity is clearly defined at the death of the testator.[71] For example, where a testator devises a gift to his children who survives him, only the testator's children who outlive him will benefit from the gift. Any of the testator's child who dies before him would not make up the class at his demise. The latter drafting technique will ensure that no portion of a testator's legacy will be void.[72] The unanswered question in all of these is, what happens where all the children of the testator dies after the execution of his Will but before his demise? Resource to the traditional rule tend to suggest that the legacy to the children who cannot be ascertained at the testator's demise will fail since there would be no one to inherit the same. Again, the Will will become an ineffective document containing legacies with no legatees. Drafting techniques and their shortfalls appears to be a clog in the wheel of progress of testamentary disposition.

The confirmation of Wills/codicil for the purpose of safeguarding legacies may not be the needed answer in all circumstances. Although in *Re Hardyman*[73] where a testatrix left pecuniary legacy for life to two of her relatives namely, her cousin and his wife and the codicil she made after the cousin's wife passed on saved the legacy contained therein; confirmation would have been ineffective if the cousin never remarried or remarried after the codicil but before the death of the testatrix and the latter outlived the new wife. [74] Thus, the use of codicil to strengthen the intention of a testator about a legacy in order to prevent the application of the doctrine of lapse to his Will is not free from setbacks.

The reliance on statutory provisions in statutes designed for the protection of legacies became another option due to the ineffectiveness of the aforementioned. One of the States where such statute exist is Arkansas.[75] The Anti-Lapse Statute in that State provides for the legacy meant for a deceased legatee to be inherited by his child and where he has no issue, it will go to the other descendants of the testator. A similar provision exists in New York Anti-Lapse Statute with the same intent as that captured above.[76] The statute neither specified the position of the child (where more than one child of the predeceasing beneficiary is alive) that will inherit the legacy nor the descendant of the testator that will be so favoured.[77] The limitation to the provision is that a legacy to a predeceased legatee who is not related to the testator will lapse where the former is not survived by a child.[78]

[70] *Page v Page* (1728) 2 P. Wms, 236.
[71] Kerridge & Parry (n. 54).
[72] *Re Jackson* (1883) 25 Ch. D 162.
[73] (1925) Ch. 287.
[74] Ibid.
[75] Ark. Anti-lapse Code 1979 (amended) S. 28-26-104.
[76] Ibid.
[77] Ibid.
[78] Ibid.

The application of Florida Anti-Lapse Statute in the case of *Lorenzo v Medina* [79] shows its inept nature in safeguarding a testator's desire towards the objects of his testamentary disposition. In that case, the testator shared his estate into two equal parts. He gave fifty percent to his brother and the other fifty percent to his brother in-law with a rider that where the initial legatees predecease him, each legacy will go to the spouse of the predeceasing legatee.[80] The testator may have presumed that it will be impossible for both husband and wife to pass on before him, hence; he ended the line of inheritance on the wife of each. He may have also intended each family to keep what he had for them thus, he provided for the legacy to move from the head of each family to the next in line and not from one family to another. But his desires were his proposal not that of God. His calculations failed when both his brother and his wife predeceased the testator in that succession. Upon the demise of the testator, the legacy to the predeceasing legatees was contested by the children of the latter and the testator's brother in-law. The children relied on the Florida Anti-Lapse statute which allows the legacy given to a predeceasing legatee to be inherited by his surviving family member provided the survivor is a descendant of the testator's grandparent. The brother in-law maintained that the statute cannot be relied upon in the distribution of the testator's estate.

The Court decided in favour of the brother in-law and he was given the entire estate of the testator. [81] The Court held that by the provision of the Will, the legacy was to the testator's brother and upon his death, the gift went to his wife. The demise of the latter ended the journey on the gift and made it available to the brother in-law.[82] Recourse was not made to the anti-lapse statute because the deceased woman is not a descendant of the testator's grandparent.[83] So, both traditional rules and equitable remedies are deficient in providing succor in this aspect.

The position is not totally different from what befalls legacies which adeem upon the death of testators. Ademption results from a testator's act during his lifetime after the execution of his Will.[84] The above seems strengthened by the fact that the testator who distinguished a legacy from his entire estate and made it available to be inherited by specific legatee(s) is under the guide of his intention. His subsequent act (whether expressed orally or in writing) which contradicts his earlier intention either in part or whole is an indication of a change of intention with the last act taking precedence over the first. So, the last act revoked the dictates of the Will with respect to the specific but the same legacy will not be altered where the estate is insolvent after the demise of the testator rather, it accrues from the death of the testator.[85]

The principle behind the equitable remedy of ademption is that injustice would be occasioned where certain persons who share special relationship with the testator are gifted twice at the expense of other persons in the same category with the testator.[86] The principle was articulated by the Court in *Ojule v Okoyo* .[87] In that case, the testator's Will contain specific legacy with the

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[79] 47 So. 3d 927 (2010).
[80] Ibid.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] Kerridge & Parry (n. 54).
[85] Ibid.
[86] Ibid.
[87] (1972)NSCC 280.

instruction that the same should be shared equally amongst his children. Before, his demise, he gave a portion of the same legacy to the defendant - a grandchild of his whose mother was deceased. Upon his death, the other beneficiaries to the Will sought an order of Court to the effect that the gift to the defendant had adeemed by the subsequent gift made by the testator after the execution of his Will. The Court held that ademption would not apply because the plaintiff led no evidence to establish special relationship between the defendant and the testator which makes the maintenance of the first compulsory for the second.[88] The decision of the Court shows that even where ademption is perceived, its proof places a heavy burden on the propandanders which may be difficult to discharge.

Ademption leaves the first legatee empty handed while the subsequent beneficiary takes the specific legacy free from the option of an election.[89] In *Re Edwards*,[90] the highlighted principle was emphasized by the Court.[91] In that case, the Court may have reasoned that there was no beneficial interest on which the gift in the Will could operate because the gift having adeemed is for all intent no longer in the Will, so; the earlier named legatees cannot lay claims to it.[92]

Legacies in Wills may suffer proportional reduction or elimination at the time of inheritance as against the intentions nursed by testators in their testamentary disposition.[93] The legal concept known as abatement occurs where the estate of a testator is insufficient to cover its debts and meet all the legacies contain therein.[94] The category of legacies which may abate due to the insolvency of a testator's estate include demonstrative, pecuniary and residuary legacies. Legacies under that group are not completely disadvantaged. Their merits include

(i) they do not adeem whether some part or the whole of the legacy cease to exist at the death of the testator
(ii) the legacies remain payable whether or not the fund from which such is to be satisfied is located at the death of the testator.

The aforementioned position of the law may however be rendered inapplicable where a testator indicates a contrary intention.
It is pertinent to note that the estate of a testator is far from being described as insolvent at the time his testamentary disposition is being executed. If it were so, legacies would not be made in the magnitude they exist in the Wills. The insufficiency of an estate is a development that creeps up towards the testator's latter days on earth and becomes manifest after his death. Factors responsible for such situation includes:

(i) that the testator during his lifetime used up the funds originally earmarked for that purpose leaving his estate short of fund;
(ii) that the fund existed at the time of the death of the testator but was used to pay off what the estate owed.

[88] Ibid.
[89] Cjokoyelawview.com 'Election' <https://cjokoyelawview.com> accessed 15 September 2025.
[90] (1958) Ch. 168 @ 177.
[91] Ibid.
[92] Ibid.
[93] Clayton (n. 22).
[94] Ibid.

Therefore, the estate of a testator contains both benefits and burdens which must be discharged alongside with testamentary wishes.
Judicial backing has been given to the doctrine of abatement even though the same may not have been intended by a testator at the time he created his Will. In *Eko v Diyan*,[95] the testator devised his house which was under mortgage to his children for the purpose of their education. In the same Will, he gave his gratuity to some other persons whose names he clearly specified in the Will. Some of the beneficiaries sought for an order of Court for the executrices and trustees to give effect to the Will. The order was made and the mortgage on the specific legacy was discharged from the gratuity which is the general legacy. The traditional rule for the discharge of such liabilities was followed irrespective of what may have been the intention of the testator.

The case of *Pension-Smith v Smith* [96] shows that a testator's well stated intentions may be ignored in the determination of debt repayment in the estate of a testator. In that case, the testator left an instruction in his Will that debt on the estate should be settled out of only one of his houses. He had devised his houses severally to members of his family. The executrix made an application to the Court for guidance on whether the instruction in the Will would be followed for the settlement of the debt. The Court took a position different from the instruction contained in the Will. It held that the different beneficiaries of the distinct properties subjected to a common charge should make proportional contributions to the discharge of the debt.[97] It held further that where several distinct properties subject to a common charge are disposed of among several persons, the rule is that the debt will be apportioned between the properties the testator left behind.[98]

The traditional rule which governs abatement of legacies is as put forward by the Court in *Smith Estate, Re*.[99] In that case, the Court was asked for the order of priority of devises and bequests to follow in the settlement of claims against the estate under a Will. The Court held inter alia that the first legacy to abate in such circumstances is residuary personality followed by residuary real property then general legacies comprising demonstrative and pecuniary legacies.[100] The type of legacy will determine how much it will abate in the face of insolvency which a testator may not have considered at the time his Will was created but happened during his life time for its consequences on his Will to be addressed by him.

4 Transformative Use of Digital Wills in Safeguarding Objects of Testamentary Wishes

Traditional means of updating testamentary wishes appear belaboured with processes. The law will only approve of an update or review that is procedurally in line with the processes of creating a Will.[101] So, the law expects the same effort put in my a testator at the time he created his Will namely, the gathering of persons to affirm his Will to be carried out at the time the same Will is to be updated irrespective of the difficulties that may be encountered in achieving the feat. Persons the testator may wish to attest to his updated Will may be in locations different

[95] (1973) 2 CCHC J 141.
[96] (1974) 11 CCHCJ 1649.
[97] Ibid.
[98] Ibid.
[99] (2003) 240 Sask. R-258 (QB).
[100] Ibid.
[101] Wills Act 1837 S. 20.

from his or the said persons may not be easily disposed to leaving their abode due to health challenge. Again, what a testator may have expended at the time his Will was made may be spent twice or more when the same procedure is to be engaged by him at the time of update because the update may come decades after the Will was created. Thus, both effort and money expended will not be the same at different times yet, the law will only deem an update effective where the provisions of statute are followed.

It is important to establish that the vigour with which a Will is created may not be the same at the time of its update or review. For example, the tenacity with which a testator in his fifties creates his Will may be difficult to replicate as he advances in age when more acquisitions are made or losses incurred and new or better opinions are formed about some persons. He may wish to change the legacies made to certain legatees who though may be alive but must have demonstrated to him through their acts that they do not deserve to be so compensated as done already in his Will or that they should be more favoured than in the way already expressed in the Will. Also, he may have found reasons perhaps due to his innermost convictions drawn from his later life experiences, to leave his assets to others or include the latter not previous accommodated in his Will. The testator like others in his shoes may refrain from updating their Wills. Thus, with less strength and perhaps diminishing resources, most testators leave their Wills in the same form they were created with many contentious issues arising from the changes in their latter lives which their testamentary wishes did not capture.

Wills which are not updated in line with the progression or regression in testators' lives before their death may miss out the true intentions testators may have nursed over their objects because it may be difficult to ascertain the testamentary wishes:

(i) for legatees whose legacies where not found at the death of the testator;
(ii) for legacies made to legatees who predeceased the testator;
(iii) for the settlement of debts incurred during the life time of a testator but held against his estate as well as the unsettled charges against some legacies in his Will.

All of the above circumstances are preventable with the use of electronic communication for the purpose of updating Wills because that medium of communication reduces to the barest minimum the challenges which the traditional means presents to testators.

Electronic communication employs digital devices useful for speedy and accurate information on personal lives of testators at any time up until their demise. With simple cell phone, Ipad or note pad. a testator can make changes to his earlier created Will where his intentions for certain legacies may have been eroded with latter events that happened during his lifetime. In *Jenmi v Balogun*,[102] a testator lived with his son alone in the house he bought before he made his Will. He devised the same house to him at the time he was still a bachelor and gave his other houses to his other children. The testator's son got married while his father was still alive and had his own children. The whole family lived in the house. The son was declared a judgment debtor and after the demise of the testator, the property was attached. One of his children challenged the attachment made to the property on the ground that the devise cannot operate as the sole property of his father. The argument put forward before the Court is that the property stood as a family

[102] (1936) 13 NLR 53.

property so cannot be attached for the debt of one member of the family. The plaintiff urged the Court to so hold or at best hold that they are all joint tenants to the property.

The Court held that the intention of the testator could be read in his words of devise. The testator in his words of devise gave the property to his son and to him alone.[103] The attachment was right because the property is his and not a family property nor is he in joint tenancy with others over the same property.[104]

The testator may not have wished for the property to be attached due to the act of his son. It is possible while the devisee got married and had children, the testator had hoped that the property which accommodated all of them will be their family property. Perhaps, what he failed to do was to alter and update his Will in line with the changes in his son's live which he witnessed. He may have used electronic means to have the updated Will confirmed without moving persons away from their abode for that purpose.

The testator may have entertained and envisaged what later became of his property from the actions of his son before his death but saw the process of effecting changes to his initially nursed desires as being onerous if not impossible. The provisions of the statute would have been accomplished effortlessly and timeously before his death with electronic communication which would have also enabled him to effect statue demands on attestation to the amended Will without moving witnesses from their base to his. Electronic communication has facilities for connecting persons in remote places together to perform a task which hitherto looked impossible.

With electronic medium, last wishes can be communicated seamlessly in the face of imminent death. In Javier Castro,[105] the testator was hospitalized and knew he would not leave there alive. While there, he had no opportunity of making elaborate preparations for traditional process of documenting his desires over his legacies and the legatees who include the loved ones and descendants. He was visited by his distant relatives who had electronic devices with them for the purpose of communicating information. The devices namely Ipad and stylus pen were put into use and the testator made his last wishes which were securely stored electronically before passing on. His expressed intentions were held valid and unaltered by the Court. Perhaps, if he had waited to carry out the ancient traditional procedure associated with making and updating last wishes, he may not have conveyed his desires while alive. His legacies would have been left in the hands of others to manage just as the fate of his legatees would lie in the hands of those who never wished him and his descendants well. The testator in *Jenmi v Balogun*[106] may have acted differently today if he had lived in jurisdiction where electronic communication and update of Wills has been given legal status. Most jurisdictions took the steps in effecting the use of that medium in their statute on Wills during COVID 19 pandemic.[107]

[103] Ibid.
[104] Ibid.
[105] (2013) ES00140 Ohio Ct Com Pl.
[106] Ibid.
[107] Natalie M Banta, 'Electronic Wills & Digital Assets: Reassessing Formality in the Digital Age' (2019) *Baylor Law Review* Vol 71:3 pp 548-602.

The use of electronic communication in updating Wills will enable a testator make changes in his Will where his initial legatee predeceases him. No drafting technique or statute can beat the occurrence of death and the time of such occurrence. The death which took the initial legatee contained in a Will can also take the substitutes made to replace the former through drafting technique or subsequent codicils to effect desired intentions. In *Re Hardyman*,[108] the drafting technique employed in the Will failed to save the legacy made to some legatees because both the initial legatee and the alternative predeceased the testatrix. The frustration and expenses involved in the process may negative any intention by testators to carry out update where necessary. In the latter case, there was recourse to the use of a codicil to correct what needed to be changed during the lifetime of the testatrix. The gift in the Will would have still failed if the provision made in the codicil did not occur at the death of the testatrix. All of the above can be avoided few minutes to the death of a testator which is a better opportunity to effect a testator's real wishes in the document ascribed to him., Update of Wills through electronic communication enables testators to re-execute and re-affirm the new version of their Wills in accordance with statutory requirement.[109]

The use of enacted statute such as anti-lapse statute to remedy the incidence of failed gifts has equally proved abortive as shown in the case of *Lorenzo v Medina*.[110] It would appear that the major limitation to the application of such statutory provision is that it lacks the input of testators' true and last intentions. The statute in its discretionary provision makes attempt at approximating what the testator may have wished but attempts cannot represent the exact wishes not expressed in a Will. The testator can save his Will from various interpretations not conceived by him and make his descendants enjoy his estate where electronic communication is included in the statue as a means of updating testamentary disposition. This will enable testators to make the needed changes in their Wills to reflect what they may have perceived about their respective family members before their death. The same medium will enable him to remove instantaneously assets which he no longer possesses and those encumbered by his acts or those of others but to his knowledge before his demise. This stand will ensure that legatees inherit their legacies in the nature intended by the testator because the medium has strong features through which last wishes can be secured from unsolicited interferences.

5. Observations and Recommendations

It is the observation of this paper that legacies fail in Wills primarily when the needful is not done by a testator after the initial communication of his testamentary desires but before his death. Again, it is discovered that the reduction or elimination of certain legacies in Wills can be attributed to testators' inability to effect changes as they occur even though the same where witnessed by them. The paper also found that the traditional means of updating Wills is the major obstacle to failed legacies in Wills. The same ancient system makes it difficult for testators to carry out changes when their named legatees finally pass on during their lifetime. All indications show that both the legatees and the legacies provided for by testators in the Will created by them can be badly affected where a testator fails to interact with the document called his Will before

[108] Re Hardyman Supra (n. 73).
[109] Banta (n. 107).
[110] Lorenzo Medina Supra (n. 79).

his death. A Will that is not updated can mar testamentary desires contained therein because some dispositions may be made in the manner not designed or ever imagined by him.

Electronic communication appears to be the solution to failed objects in testamentary disposition. The use of the said medium to convey changes which occur after testamentary wishes have been made will pose no problem because the devices used to achieve the feat are readily available and easily accessible to all –both the young and the old. Wills updated through electronic communication will remain safeguarded from externalities until the time of probate.

The recommendation of this paper is that electronic communication for update of Wills should be incorporated into the statute on Wills through amendments to the existing statute. The enactment of Electronic Wills Statute in jurisdictions where the same does not exist should be considered by relevant authorities. The absence of the aforementioned may not negate the use of the same provided the judicial system is proactive enough to give broad interpretations to update mechanism so as to accommodate communication in electronic form. The above will give testamentary disposition a good leap in contemporary world where electronic medium of is gradually replacing the old medium.