Six Minute Estates Lawyer

Hotchpot Clauses: What Happens to Debts on Death?

Justin W. de VRIES
de VRIES LITIGATION LLP
Toronto and Oakville Offices

Tel: (416) 640-2754
Fax: (416) 640-2753

Email: jdevries@devrieslitigation.com
Website: devrieslitigation.com

Follow: allaboutestates.ca and devrieslitigation.com/blog

Contents

Part I – All About Hotchpot[1]

A hotchpot is commonly defined as a confused mixture of different things[2] or "a thick soup or stew of vegetables, potatoes and usual meat".[3] Black's Law Dictionary defines "hotchpot" as: "… throwing the amount of an advancement made to a particular child, in real or personal estate, into the common stock, for the purpose of a more equal division, or of equalizing the shares of all the children."

In modern Canadian estates law, hotchpot clauses are seldom used. Alongside their common law and legislative equivalents, they have become a vestige of their ancient English predecessor. Most existing cases are "English and old".[4] Few Canadian cases are decided on the matter, and with each passing year, cases become rarer.

The concept behind hotchpot is simple, and its objective is fair. So why is it heading towards extinction?

Part I of this paper provides a summary on hotchpot clauses, its related concepts, and a summary of ten important principles. Part II attempts to provide an explanation on the waning popularity of hotchpot. Three potential reasons are explored. Finally, Part III of this paper explores the benefit of reviving the use of hotchpot, and how this might be done.

I.I – Overview of Hotchpot Clauses: distinguishing between related concepts

In estates law, "hotchpot" is a legal term of art.[5] The meaning of putting assets into hotchpot may be self-evident to solicitors and litigators alike. However, four distinct concepts are couched within this umbrella term. It may refer to: **(1)** a hotchpot clause, **(2)** the related common law rule against double portions and the presumption of ademption by advancement, **(3)** legislation to the effect of hotchpot, in the context of intestacy, and even **(4)** a release clause.

When analyzing hotchpot, it is important not to equivocate between the term's different uses. They activate in different circumstances and carry variations of different sub-rules and assumptions.

---

[1] This paper was co-authored by Justin de Vries and Tyler Lin (student-at-law) of de VRIES LITIGATION LLP.
[2] Cambridge Dictionary.
[3] Merriam-Webster Dictionary.
[4] To borrow the phrase employed by the Alberta Court of Appeal in *Plamondon v Czaban*, 2004 ABCA 161 at para 46, 8 ETR (3d) 135.
[5] Corina S. Weigl, "Hotchpot Clauses – A Primer", Fourth Annual LSUC Estates and Trusts Forum (20-21 November 2001) at 1.

A hotchpot clause[6] is essentially a clause which could go into an instrument such as a will or trust. The clause itself does not have to follow a specific form. Any combination of words to the same effect of accounting for prior advances, and ensuring fair distribution, will do.[7]

The purpose of concepts **(1) – (3)** are the same: to prevent a beneficiary from receiving more than a testator intends, by taking into account a combination of prior advances and testamentary gifts.[8] In doing so, equal distribution of testamentary and *inter vivos* advances among all beneficiaries can be achieved.[9] At its core, hotchpot gives effect to the presumption that the testator, historically a patriarch, intends to treat his beneficiaries/children equally[10] (see **Appendix A** for a basic example).

Hotchpot clauses are further divisible into those which address advancements that are not loans (e.g., a gift), and those that address advancements which are.[11]

Of equal importance is concept **(4)**: the release clause. It is not strictly speaking a type of hotchpot. Rather, it is a distinct, required component in hotchpot clauses which addresses loans. Its purpose is to ensure that the math behind hotchpot in such cases can operate correctly, by "canceling or releasing any debt owed by a beneficiary to the deceased".[12]

There are three ways to calculate hotchpot clauses. If the clause or will expressly sets out a special formula, it must be used.[13] If no formula is set out, either the *Re Hargreaves*, or *Re Poyser* methods can be used.[14] The former method adds all advances back into a pot alongside estate assets, divides them by the number of beneficiaries, and subtracts the amount of their individual advances. This method is what is colloquially known as bringing assets "into hotchpot". It is by far the most popular method in the modern era but was disfavoured by courts of the early 1900s[15] (for an illustration, see **Appendix B**).

The latter accounts for lost income and interest, adding 4% per annum on any amounts advanced to the actual income of the estate, and divides between beneficiaries. This method found favour with the courts in the early 1900s but is rarely used in modern times.[16]

---

[6] For classic examples of hotchpot clauses, see Jordan Atin, "Wills and Estates Practice Basics 2017", Law Society of Upper Canada (27 March 2017) at 177 and Weigl, *supra* note 3.
[7] *Prittie Re,* [1940] OWN 28, 1940 CarswellOnt 94 (Ont H Ct J).
[8] Weigl, *supra* note 3 at 1.
[9] Atin, *supra* note 4 at 177.
[10] Marni M. K. Whitaker, "Hotchpot Clauses" (1992) 12 Est & Tr J 7.
[11] Weigl, *supra* note 3 at 3.
[12] Debra L. Stephens, "Hotchpot Clauses", Law Society of Ontario Six-Minute Estates Lawyer (3 May 2018) at 1.
[13] Weigl, *supra* note 3 at 6.
[14] *Ibid* at 6-7.
[15] *Ibid* at 6.
[16] *Ibid.*

I.II – The Flipside of Hotchpot: the common law presumptions

The common law equivalent of hotchpot clauses is found in two similar principles: the presumption against double portions, and the presumption of ademption by advancement.[17] The former presumption is well-known: unless rebutted, a parent or person in *loco parentis* does not intend to provide double portions to his children and, instead, intends to treat his children equally. Therefore, if the parent gives one child an *inter vivos* gift, it should be deducted from any gift to that child under the will.[18]

The latter presumption arises when a gift in a will is not available at the time of the testator's death (the gift is said to adeem), because of an *inter vivos* gift. The presumption is that the gift is an advance on the inheritance and is deducted from the gift under the will. For an excellent illustration, see the Nova Scotia Supreme Court's recent decision in *Re Pierce Estate.*[19]

There are two situations where the common law principles will apply. First, where there is no hotchpot clause, but a valid will otherwise exists. The presumptions will activate to ensure a hotchpot-like division of assets.[20]

The second situation is one where there is a hotchpot clause within a valid will, however, distributions were made after the will and clause were put into effect, and there were no further amendments or codicils to cover these post-will distributions. In this case, the presumptions can apply in conjunction with the existing hotchpot clause, to cover advances made after the will. Excellent illustrations include *Re Prittie*[21], as well as *Re Barrett Estate.*[22]

I.III – Hotchpot Legislation: the intestacy context

In situations where there is no will, intestacy rules which are functionally equivalent to hotchpot will activate.[23] In Ontario, these rules are codified in section 25 of the *Estates Administration Act* ("***EAA***").[24] All Canadian provinces and territories contain some legislation to similar effect.

---

[17] Stephens, *supra* note 10 at 5.
[18] Canadian Estate Administration Guide, *Wills*, "Hotchpot or the Rule Against Double Portions" (8179) [CEAG, "Rule Against Double Portions"].
[19] *Pierce Estate, Re*, 2003 NSSC 110, 214 NSR (2d) 274.
[20] Stephens, *supra* note 10 at 5.
[21] *Prittie Re, supra* note 5.
[22] *Barrett Estate, Re,* 2003 ABQB 986, 4 ETR (3d) 163, aff'd 2005 ABCA 112, 14 ETR (3d) 161.
[23] Weigl, *supra* note 3 at 8.
[24] *Estates Administration Act,* RSO 1990, c E.22.

However, Weigl notes an insightful criticism of Schnurr[25]: In Ontario, distribution of an estate's asset on intestacy is not governed by the *EAA*, but rather by Part II of the *Succession Law Reform Act* ("***SLRA***")[26]. Without similar hotchpot provisions under the SLRA, section 25 is, for the most part, ineffective in bringing a deceased's assets into hotchpot.

I.IV – Release Clauses and the Math Behind Them

The title of this paper is a bit of a misnomer. Outside of a bankruptcy and contract law context, hotchpot clauses do not actually govern what happens to debts on the death of the testator. A separate release clause, either within the hotchpot clause or within the will or codicil, is necessary to deal with debt.[27] To get the correct math in scenarios with *inter vivos* loans, a release clause is crucial.[28]

As stated in Theobald on Wills, hotchpot clauses in the estate law context are "a charging and not discharging" type of clause.[29] Because loans are not automatically forgiven by the operation of a hotchpot clause, the loaned amount will be included once through operation of hotchpot, and a second time through the loan itself. The same loan is falsely counted twice and doubled at the expense of the loanee.[30]

This double counting will cause unintended prejudice for some beneficiaries, and a windfall to others. For an illustration of this, see **Appendix C**.

I.V - What is Not Meant by "Hotchpot"

In the estate law context, a hotchpot clause can also refer to funds subject to a power of appointment.[31] Outside of estate law, a "hotchpot clause" can refer to a different concept under bankruptcy and contract law. In that context, the clause does not equalize beneficial entitlement, but rather, works to equalize the claims of unsecured creditors to ensure fair division.[32]

---

[25] Weigl, *supra* note 3 at 8.
[26] *Succession Law Reform Act*, RSO 1990, c S.26.
[27] Atin, *supra* note 4 at 177-178.
[28] Canadian Estate Administration Guide, *Wills*, "Administering Hotchpot Clauses" (9910) [CEAG, "Administering Hotchpot"].
[29] John Ross Martyn et al, *Theobald on Wills*, 17th ed (London, UK: Sweet & Maxwell/Thomson Reuters, 2010) at 858.
[30] CEAG, "Administering Hotchpot", *supra* note 26.
[31] *Weigl*, *supra* note 3 at 2.
[32] *Westdale Construction Co v 1189380 Ontario Ltd*, [1998] OJ No 1719, 1998 CarswellOnt 1603 (Ont Ct J (Gen Div Comm Lst)).

As *Bouchard v Alberta*[33] demonstrates, courts do not allow the mixing of these two distinct principles of the same name (although it is possible for two related matters to be heard in the same action[34]). In *Bouchard v Alberta,* the defendant recipients of mineral rich land also happened to be beneficiaries of an estate. Counsel for the defendant attempted to equivocate between two possible meanings of hotchpot, leading the Court to write: "the defendant cannot take advantage of the principles of hotchpot and advancement to reduce his liability. Such principles apply only as between beneficiaries of the estate on distribution and cannot affect liability as between plaintiff and defendant".[35]

I.VI – 10 Principles of Hotchpot

These ten principles are not meant to be a complete survey of all relevant rules of hotchpot. Rather, it is a survey of some of the main rules, which could be problematic and could be improved upon (as discussed in **Part II.II** below).

1. **Principle 1:** Any loan, gift, transfer, and conveyance can be subject to hotchpot clauses, therefore they can all constitute an "advance" for the purpose of hotchpot calculations.[36] It is the wording of the hotchpot clause that determines what comes into hotchpot, and when.[37] Even amounts which pass outside of the estate, such as through right of survivorship or beneficial designation, can be brought into hotchpot. It can even include advances made by other family members outside of the testator.[38]

2. **Principle 2:** Contrary to the above rule, in the context of intestacy, only an "advance" and not a loan, gift or other type of transfer, can be brought into hotchpot. The only reported case on this matter seems to be over one-hundred years old.[39] In it, the Court ruled that a loan did not fall under the statutory definition of "advance" pursuant to the *Devolution of Estates Act*[40] (**"DEA"**), the predecessor to both the *SLRA* and *EAA*.

3. **Principle 3:** Unless specified otherwise within the will, the valuation date of an advanced asset or legacy, is its value at the time it was transferred from the testator to the beneficiary, not, for example, at the death date of the testator.[41]

---

[33] *Bouchard v Alberta (Registrar, North Alberta Land Registration District)* (1959), 27 WWR 433, 1959 CarswellAlta 14 (Alta SC) [*Bouchard v Alberta*].
[34] See *Northmark Mechnical Systems Inc. v. Watson Estate,* 2010 BCSC 176, 54 ETR (3d) 245.
[35] *Bouchard v Alberta, supra* note 31 at para 38.
[36] Stephens, *supra* note 10 at 8-9.
[37] *Ibid* at 17-18.
[38] *Ibid* at 18.
[39] *Hall, Re* (1887), 14 OR 557, 1887WL10120 (H Ct J (Ch Div)).
[40] *Devolution of Estates Act,* RSO 1960, c 106.
[41] Stephens, *supra* note 10 at 11.

4. **Principle 4**: if the advance is a loan, the amount to be calculated for hotchpot must be the amount specified within the will or related document.[42] This is the case even if the loan has been partially or fully repaid[43], and even if the amount was never lent or advanced. The actual outstanding quantity of loan can be used only where the will does not specify an amount.[44]

5. **Principle 5:** If the will does not specify the method of calculating interest rates on advances, then neither income nor a growth in value can be added to the original advance when calculating hotchpot.

   The only exception appears to be interest on advances from the date of the testator's death, until the date of distribution. Following *Re Poyser,* the interest rate charged for this interim period is locked at 4% minimum.

6. **Principle 6:** If a beneficiary predeceases a testator, but advances were already made to that beneficiary, any such advances to that beneficiary will not be deducted from the entitlement of his issue, unless the will states otherwise.[45]

7. **Principle 7:** Contrary to the above, in the intestacy context, advances *will* be considered against issue of the deceased.

8. **Principle 8 - Hotchpot Clause and Presumption Against Double Portions Rule:** If a will refers to an attached list or ledger regarding the amount advanced, an issue arises as to whether such a list must pre-exist the will to be accounted for during the hotchpot calculation. There is conflicting authority on this issue. Weigl believes that for the list/ledger to have effect, it must pre-exist the will.[46] However, the issue was decided differently in *Re Barret Estate*.[47]

9. **Principle 9 - Presumption Against Double Portions Rule:** The presumptions against double portions and of ademption by advancement may apply only between a testator and his or her child, or a person for whom the testator stands in *loco parentis.*[48]

---

[42] *Ibid* at 11.
[43] CEAG, "Administering Hotchpot", *supra* note 26; Weigl, *supra* note 3 at 5.
[44] Stephens, *supra* note 10 at 11.
[45] *Ibid* at 19.
[46] Weigl, *supra* note 3 at 4.
[47] In *Barrett Estate, Re, supra* note 20, a testator left directions for equal distribution of the residue of his estate between three sons. He included reference to three lists/ledgers which recorded amounts of advances. Two of these were created after he created his will. The Court took into account the ledger which pre-existed the will, however, it also took into account the two post-will ledgers through use of the presumption against double portions.
[48] Stephens, *supra* note 10 at 5.

10. **Principle 10:** This is contrasted against the previous rule above. Because the wording determines which amounts can be brought into hotchpot and by whom, advances between other people, not only between a testator and child, can be brought into hotchpot (e.g., other family members such as grandparents, uncles, and aunts[49]).

Part II – Modern Treatment: 3 reasons for the unpopularity of hotchpot

II.I – Reason 1: intention over presumption

The presumptions against double portions and of advancement by ademption are still in existence. Sadly, in the modern era, these presumptions have largely disappeared. Courts have moved away from the use of these presumptions, and towards the testator's intention regarding equal distribution.

In 2004, the Alberta Court of Appeal noted in paragraphs 37 to 42 of *Plamondon v. Czaban* ("***Plamondon***"): "legal research shows so many exceptions to [these] rule[s] that nothing remains of [them] […] Any "rule" about double portions is a presumption at best […] The question is the intent of the testator. [These presumptions are] not strong, and easily rebutted […] all manner of evidence may be led to rebut it". [50]

In 2018, Ontario Superior Court of Justice cited *Plamondon* approvingly in paragraph 45 of *Campbell v. Evert.*[51] At paragraph 60, Lococo J. preferred the approach in *Plamondon*, where the presumptions did not activate, over that of *Re Barrett Estate* where they did. He distinguishes *Re Barrett Estate* as in that case, there was the presence of a hotchpot clause in the will. The trend against the use of these presumptions continues.

II.II – Reason 2: historical and societal change

To understand hotchpot's waning popularity, it is helpful to understand the historical context which had popularized it in the first place. Historically, the concept of hotchpot dates to the 12th

[49] *Ibid* at 18.
[50] *Plamondon v Czaban, supra* note 2.
[51] *Campbell v Evert*, 2018 ONSC 593, 36 ETR (4th) 138.

century, and possibly earlier[52]. One of Ontario's oldest cases on hotchpot, *Re Nordheimer*[53], illustrates a popular use for these clauses: the marriage settlement.[54]

Up until 1882, married women suffered severe legal disabilities. When married, their legal identity merged with that of their husband.[55] Therefore, they had no independent right to own property, to sue or be sued, no rights over their children, nor an entitlement to their own earnings (unless they were widowed).[56]

Because of the legal fiction of disentitlement, landed patriarchs who wished to provide for their married daughters had to employ a marriage settlement.[57] This is a type of trust engineered to give an allowance to a married daughter while she is unable to own assets.[58] This way, she has pocket money until she dies, at which point the trust conventionally dissolves and its assets pass to her husband and/or children.

In the second half of the 17th century, it had become common place for any well-to-do father to make marriage settlements for their married daughters and younger sons. The eldest son naturally inherits a father's fortune due to the doctrine of primogeniture.[59] However, fathers still sought to divide assets evenly between married daughters and younger sons (everyone was equal except the eldest male heir). To achieve this, hotchpot clauses were used as part of marriage settlements.[60]

In present day Canada, women have the same legal rights as men. Legal disabilities attached to wives were dispelled because of 19th century suffrage and other reform movements.[61] This made marriage settlements obsolete. A substantial use for hotchpot clauses was lost as a result.

II.III – Reason 3: 10 practical and legal difficulties of hotchpot

[52] Weigl, *supra* note 3 at 1.
[53] *Nordheimer, Re* (1913) 14 DLR 658, 1913 CarswellOnt 848 (Ont SC).
[54] By turning to Black's Law Dictionary's entry on hotchpot, one would find two separate entries on hotchpot, one ancient and one modern. The ancient concept was used primarily to allow a patriarch to provide for his married daughters via marriage settlement. See Henry Campbell Black, *Black's Law Dictionary,* 5th ed (St. Paul, MN: West Publishing Company, 1979) at 665.
[55] The vestiges of this outdated belief are still found in many of our modern cultural practices. For example, upon marriage, it is not uncommon for the new couple to be introduced at a wedding as Mr. and Mrs. X, with X being the full name of the man. The idea was that women themselves were property, as denoted by the change of their last name, to be passed from fathers to husbands. As property could not own property, these legal disabilities were seen as logical.
[56] M. Conway, "Equity's Darling?" in Bruce Ziff et al, eds, *A Property Law Reader: Cases, Questions, and Commentary*, 4th ed (Toronto: Thomson Reuters, 2016) 470.
[57] *Ibid* at 471.
[58] *Ibid* at 471.
[59] Though primogeniture has lost steam in modern society, the succession rules of the British Royal Family are a prime example of its survival to present day.
[60] Conway, *supra* note 54 at 473.
[61] *Ibid* at 475.

Hotchpot has been called "a drafter's nightmare and a litigator's dream".[62] Beyond simple drafting errors, such as the failure to include a release clause, below is a list of 10 potential difficulties that make hotchpot troublesome to employ.

Difficulty 1 – wrong statute: In Ontario, intestacy legislation to the effect of hotchpot distribution is found within section 25 of the *EAA*. However, Ontario's intestacy laws on distribution of assets are governed by Part II of the *SLRA*, and not the *EAA*. Therefore, section 25 cannot have its intended effect.

Difficulty 2 – practical redundancy: Speaking again of intestacy legislation, the requirement that an advance must be expressly acknowledged in writing by the testator or beneficiary is redundant. As Whitaker notes, if a testator is going to take the time to understand succession laws, and take the time to put things into writing, then surely, they could have just prepared a will.

Difficulty 3 – narrow range: For practical and arithmetic purposes, hotchpot calculations can only be meaningfully applied in a narrow range. Practically, it would be impossible to account for every penny or toothpick received by each sibling over the years.[63]

To be brought into hotchpot, an advance must be big enough. In other words, it must be "substantial relative to the size of the estate".[64] Estate litigators will recognize this definition is highly problematic. What is meant by "substantial" relative to the size of an estate can be highly variable. Section 8179 of the Canadian Estate Administration Guide, which contains commentary on hotchpot, gives an example of "funds given to buy a house or to establish a business".[65] What about funds for a small cottage, for half a house, or a quarter of a business? With years of pent-up emotion, it is not uncommon for siblings to litigate over items of even nominal value.

While an advance too small is not worth accounting for, one which is too large will skew the math altogether. For an illustration, see **Appendix D**.

Difficulty 4 – record keeping: Depending on the size of the gift, there may not be a record tracing it from parent to child.[66] While there is likely to be a paper trail for large gifts, e.g., a cottage or substantial loan, there may not be a record or even appraisal for a used car, jewelry gifts for special occasions, or sentimental chattels with some monetary value such as a gun collection.

Hotchpot calculations will only work with the right numbers. Without the right records, there can be no right numbers.

Difficulty 5 – what even constitutes an advance?

---

[62] Stephens, *supra* note 10 at 20.
[63] CEAG, "Rule Against Double Portions", *supra* note 16.
[64] *Ibid.*
[65] *Ibid.*
[66] Stephens, *supra* note 10 at 8.

For the purposes of a hotchpot clause, and depending on its wording, any loans, gifts, transfers, or conveyances may qualify as an advance. However, for the intestacy equivalent of hotchpot, the Court in *Re Hall* interpreted the phrase "advance" within the *DEA*[67] narrowly, to the exclusion of loans.

Without cases to interpret section 25 of the *EAA*, it will be difficult to know what is and is not an advance for its purposes.[68]

Difficulty 6 – the loan amount: As stated above[69], according to *Re Wood*, if the will specifies a specific amount to be taken into hotchpot, then that number must be used. This number must be used during hotchpot calculations even if it was never lent in the first place, or if it had already been repaid fully or partially.[70]

This rule is far too rigid. One drafting error by the solicitor in valuating the loan, can cause a windfall to the estate at the expense of a beneficiary.

Difficulty 7 – valuation: an advance of legacy causes little problem to hotchpot calculations. As stated above, the valuation date for an asset is the date that it was transferred.[71] However, there are several ways to valuate other types of advances such as property or chattels. Examples include the insurable value or fair market value at the time of testator's death.

This rule on valuation date as being the date of the transfer is far too rigid. *Re Nordheimer* was a case from 1913. This rule was created with only depreciating assets in mind (think used furniture).

Middleton J. writes in paragraph 22 of *Re Nordheimer*: "property, especially personalty, might be of little value at the death of the [testator] or the time of the final distribution […] it would be manifestly unfair to the other distributes that the advanced distribute might have use of property for many years and then account only for its value less the decrease in value from wear and tear and usage".

However, in the modern age, many assets are volatile and capable of both great appreciation and depreciation. In 1985, the average price of a Toronto home was around $100,000.[72] In 2021, that same average home is worth over $1,000,000.[73]

---

[67] *Devolution of Estates Act*, *supra* note 38 is the progenitor statute for both Ontario's *SLRA* and *EAA*.
[68] As of April 2021, CanLII, WestLaw and QuickLaw indicate no cases which have been decided on section 25 of the *EAA*.
[69] Stephens, *supra* note 10 at 11.
[70] CEAG, "Administering Hotchpot", *supra* note 26.
[71] *Nordheimer, Re*, *supra* note 51.
[72] Jason Heath, "Now and then: Do Canadian homes really cost that much more than 30 years ago?", *Financial Post* (24 March 2015), online: <https://financialpost.com/personal-finance/mortgages-real-estate/now-and-then-do-canadian-homes-really-cost-that-much-more-than-30-years-ago>.
[73] Toronto Housing Market Report", *WOWA* (6 April 2021), online: <https://wowa.ca/toronto-housing-market>.

Similarly, digital assets are immune from physical wear and tear. These assets are becoming an increasingly common part of one's estate in the 21st century.[74] Cryptocurrencies such as Bitcoin were once traded at a value of $0.0008 USD in 2008[75], and are now worth $57,693.50.[76]

A rule created in an era where the value of used furniture was the main concern, is antiquated in 21st century life. The rigidity of this rule can lead to unfairness. A few dollars worth of cryptocurrency at the time of transfer, might grow to an amount that overshadows the entire estate at the time of the testator's passing.

Difficulty 8 – issue of the deceased: Again, there is a discrepancy between rules. For the purposes of a hotchpot clause, in the event that a beneficiary predeceases a testator, the advances made to that beneficiary will not be brought into hotchpot against his issue.[77] However, in the event of intestacy, hotchpot legislation *will* take advances into account against the issue of the deceased.[78]

Difficulty 9 – who is the lender: There is another discrepancy here. For the purposes of a hotchpot clause, it is the wording which determines what amount can be brought into hotchpot and by whom. Advances between other people, not only between a testator and child, can all be brought into hotchpot (e.g., other family members such as grand-parents, uncles, aunts).[79]

For the common law presumptions of hotchpot, only advances between a testator or a person for whom the testator stands *loco parentis*, and his/her child, can count.

Difficulty 10 – same type of advance: In cases where the presumptions related to hotchpot are activated, the assets to be accounted for must be the same type as the assets originally transferred. Therefore, "a gift of land cannot adeem a bequest of money (or vice versa)".[80]

This rigid rule was followed in *Re Cross Estate*.[81] The governing will established that the son was to receive a legacy of $10,000. The estate trustee also had discretionary power to advance $5,000 dollars to the son. The estate trustee sought advice from the court as to whether the $5,000 should come out of the $10,000 legacy. The court held that the advance of $5,000 was a charge against the capital of the residue of the estate, and therefore not an outright legacy. Therefore, equalization by hotchpot did not activate.

---

[74] Tyler Lin, "Cautionary Tales on Digital Estate Asset Planning" (15 March 2021), *de VRIES LITIGATION LLP* (blog), online: <https://devrieslitigation.com/cautionary-tales-digital-estate-asset-planning/>.
[75] Georgia Williams, "Bitcoin: A Brief Price History of the First Cryptocurrency", *Investing News Network* (11 February 2021), online: <https://investingnews.com/daily/tech-investing/blockchain-investing/bitcoin-price-history/#:~:text=Bitcoin%20price%20history%3A%20A%20response,price%20performance%2C%202010%20to%202021>.
[76] "Bitcoin", *CoinDesk*, online: <https://www.coindesk.com/price/bitcoin>.
[77] Stephens, *supra* note 10 at 19.
[78] Weigl, *supra* note 3 at 3.
[79] Stephens, *supra* note 10 at 18.
[80] *Plamondon v Czaban*, *supra* note 2 at para 45.
[81] *Cross Estate (Re)* (1965), 51 WWR 377, 1965 CanLII 833 (BC SC).

The narrow application of this rule is embodied by Wootton J.'s statement, "where there is no hotchpot clause as here, none is to be implied".[82] The rigidity of this rule may cause certain types of assets to be unaccounted for and skew the final hotchpot calculation.

Part III – The Future of Hotchpot

III.I – Why We Should Bring Back Hotchpot

For all the strikes against hotchpot identified above, there are at least two sound reasons to bring hotchpot back into fashion.

First, one of the "significant advantages" of bringing a loan which was given to a beneficiary, into hotchpot, is that it has the effect of neutralizing any limitation with respect to debt.[83] For example, if the testator had loaned money to a child/future beneficiary twenty years prior to his own death, and during that period made no efforts to collect it, and neither did the child acknowledge this debt, the testator's estate may be statute barred from rightly collecting due to limitation periods. However, a hotchpot clause can claw this loan back into the estate, for the purposes of calculating and equalizing testamentary asset distribution.

This clever use of hotchpot utilizes its own rigidity to an advantage. Because only a release clause, and not a hotchpot clause can release a debtor from his debt to the estate, by purposefully failing to include such a release clause, any debt which exceeds that beneficiary's share of the estate will be considered during the final distribution.

In these situations, "a hotchpot clause may provide the only means to address debts" that have become statute barred.[84] An excellent illustration is found in *Hare v. Hare.*[85]

Secondly, a testator may, by including a hotchpot clause in his will, even be able to neutralize the bankruptcy of the debtor beneficiary.[86] While section 178(2) of the *Bankruptcy and Insolvency Act*[87] would normally provide a full release of the debt owed to the testator when the child is discharged from bankruptcy, if the testator files proof of debt in the bankruptcy, the balance of the loan at the time of the testator's death will be brought into hotchpot when determining the child's entitlement to his parent's estate.[88]

---

[82] *Ibid* at para 5.
[83] Stephens, *supra* note 10 at 4.
[84] Atin, *supra* note 4.
[85] *Hare v Hare* (2006), 277 DLR (4th) 236, 2006 CanLII 41650 (Ont CA).
[86] Stephens, *supra* note 10 at 4.
[87] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 178(2).
[88] Weigl, *supra* note 3 at 6.

Practically, a testator can bring a loan into hotchpot even if it has been discharged by a bankrupt, simply by including wording in the will which expresses this intention. Examples include *Rose v. Gould* and *Re Jolly*.[89]

III.II – How to Bring Hotchpot Back

Three general reforms might help to fix the 10 problems listed in **Part II.II** above. First, rules regarding hotchpot must be made more flexible, and inconsistencies should be eliminated. For example, different valuation dates should be used for different types of assets. It may make sense to keep the valuation date at the date of transfer for furniture (even furniture in modern times will depreciate over time), but to use the date of death or date of distribution to value highly volatile crypto securities.

Secondly, courts may have to streamline existing rules and exceptions to the presumptions against double portions and of ademption by advancement. In other words, the swiss cheese problem must be fixed.

Lastly, where necessary, legislative updates are required. For example, section 25 of the *EAA* might be reproduced within Part II of the *SLRA*. This way, the intended legislative effect may actually take place.

To conclude, hotchpot is an ancient doctrine which we have neglected to develop. To quote Middleton J. on one aspect of hotchpot, it is "astonishing how little authority is to be found".[90] With each passing year, the gap between modern life and this doctrine's relevance widens.

However, this neglect can both be viewed as a con and a pro. Where old uses cease to exist (such as the marriage settlement), new uses might always be found for old doctrines. At the end of the day, the rationale behind hotchpot is still sound. Where prior guidance is out of date, it is easier for modern courts to distinguish between old cases and create new ones.

Will hotchpot make a come-back? Only time will tell.

[89] CEAG, "Administering Hotchpot", *supra* note 26.
[90] *Nordheimer, Re*, *supra* note 51 at para 22.

Appendix A – An Illustration of Hotchpot

This illustration is taken from section 8179 of the Canadian Estate Administration Guide, titled "Hotchpot or the Rule Against Double Portions".

Example: A testator directs that the residue of his estate be divided equally among his three children. The residue is valued at $1,000,000.00. Notionally added to this is an amount of $200,000.00 that has been advanced to one of the children. The resulting $1,200,000.00 is then divided equally in three - $400,000.00 to each child. From the amount going to the child who received the advance, $200,000.00 is then deducted. The result is that the child who received the advance gets $200,000.00; the other two get $400,000.00 each.

If the hotchpot rule does not apply, then each child would receive 1/3 of $1,000,000.00, not $1,200,000.00.

Appendix B – An Illustration of Hotchpot in the *Re Hargreaves* Method

This illustration is taken from pages one to three of Debra L. Stephens article titled "Hotchpot Clauses".

C gets $1,000,000.00. However, in accounting for *inter vivos* gifts and loans by X, A received $2,000,000.00 from X. B has received $1,200,000.00, and C has received $800,000.00, assuming he has repaid his loan to X. The testator's intention to leave his assets equally has been foiled by his failure to account for prior gifts and loans.

With a hotchpot clause: All loans and gifts are added to the estate assets, and this amount is then divided equally into three shares. The individual shares then have the specific amounts of gifts or loans subtracted.

$3,000,000.00 – X's estate assets at time of death

\+ $1,000,000.00 – loaned to A

\+ $ 120,000.00 – gifted to B

\+ $ 200,000.00 – loaned to C

TOTAL $4,320,000.00 – this is the total amount to be brought into hotchpot

$4,320,000.00 ÷ 3 = $1,440,000.00 – this is the amount each child would receive, prior to deductions

$1,440,000.00 - $1,000,000.00 = $440,000.00 – this is A's share, after hotchpot adjustments

$1,440,000.00 - $120,000.00 = $1,320,000.00 – this is B's share, after hotchpot adjustments

$1,440,000.00 - $200,000.00 = $1,240,000.00 – this is C's share, after hotchpot adjustments

Appendix C – An Illustration of Release Clause

This illustration is taken from page four of Debra L. Stephens article titled "Hotchpot Clauses", with a minor error corrected.

With a release clause (the correct numbers): Continuing with the example from Appendix B, if a release clause is included within X's will, then A's $1,000,000.00 and C's $200,000.00 loans are forgiven, because these amounts have already been subtracted from the hotchpot. This results in the same final entitlements per child, as represented in Appendix B.

Without a release clause (the incorrect numbers): Without a release clause, the loans of A and B are counted twice. Once within the calculation of hotchpot, and once as a standalone loan/debt to the estate. This results in the following:

$3,000,000.00 – X's estate assets at time of death

\+ $1,000,000.00 – hotchpot accounting for amount loaned to A

\+ $1,000,000.00 – actual loan amount repaid by A

\+ $ 120,000.00 – hotchpot accounting for amount gifted to B

\+ $ 200,000.00 – hotchpot accounting for loaned to C

\+ $ 200,000.00 – actual loan amount repaid by C

TOTAL $5,520,000.00 – this is the total amount to be brought into hotchpot

$5,520,000.00 ÷ 3 = $1,840,000.00 – this is the amount each child would receive, prior to deductions

$1,840,000.00 – ($1,000,000.00 hotchpot's account of loan + $1,000,000.00 actual loan) = -$160,000.00 – this is A's share. After falsely accounting for the loan twice due to absence of a release clause, A now owes a significant amount to the estate, where he should have received $440,000.00.

$1,840,000.00 – $120,000.00 gift to B = $1,720,000.00 – this is B's share. For failure to include a release clause, B's entitlement increased significantly from $1,320,000.00. B receives a windfall of $400,000.00.

$1,840,000.00 – ($200,000.00 hotchpot's account of loan + $200,000.00 actual loan) = $1,440,000 – this is C's share. Here, the lack of release clause caused C's loans to be counted twice. However, because C's loan is much smaller than A's, he still receives a windfall after double counting.

Appendix D – An Illustration of an Asset Too Large for Hotchpot

This illustration is taken from section 9910 of the Canadian Estate Administration Guide, titled "Administering Hotchpot Clauses".

Facts: There are three children, A, B and C. Testator X gives a gift of $100,000 to child A. At the time of his death, his will stipulates equal division with a hotchpot clause. His estate is valued at $100,000.

$100,000.00 – X's estate assets at time of death

+ $100,000.00 – hotchpot accounting for amount gifted to A

TOTAL: $200,000.00 – hotchpot amount to be divided by three children

$200,000.00 ÷ 3 = $66,666.67 – the shares of Children B and C

$66,666.67 - $100,000.00 = -$33,333.33 – the share of Child A. He now owes the estate because of the hotchpot clause.

If it was the intention for the testator for each child to inherit $33,333.33, then that intention would be defeated. No child would have received that amount. Two children would receive too much, and one child would now owe the estate funds. Since the gift is not a loan, a release clause wouldn't be able to solve this problem.

TABLE OF AUTHORITIES

LEGISLATION

JURISPRUDENCE

SECONDARY MATERIALS

Atin, Jordan, "Wills and Estates Practice Basics 2017", Law Society of Upper Canada (27 March 2017).

"Bitcoin", *CoinDesk*, online: <https://www.coindesk.com/price/bitcoin>.

Black, Henry Campbell, *Black's Law Dictionary,* 5th ed (St. Paul, MN: West Publishing Company, 1979).

Cambridge Dictionary, online: <https://dictionary.cambridge.org/>.

Canadian Estate Administration Guide, *Wills*, "Administering Hotchpot Clauses" (9910).

Canadian Estate Administration Guide, *Wills*, "Hotchpot or the Rule Against Double Portions" (8179).

Conway, M., "Equity's Darling?" in Bruce Ziff et al, eds, *A Property Law Reader: Cases, Questions, and Commentary*, 4th ed (Toronto: Thomson Reuters, 2016) 470.

Heath, Jason, "Now and then: Do Canadian homes really cost that much more than 30 years ago?", *Financial Post* (24 March 2015), online: <https://financialpost.com/personal-finance/mortgages-real-estate/now-and-then-do-canadian-homes-really-cost-that-much-more-than-30-years-ago>.

Lin, Tyler, "Cautionary Tales on Digital Estate Asset Planning" (15 March 2021), *de VRIES LITIGATION LLP* (blog), online: <https://devrieslitigation.com/cautionary-tales-digital-estate-asset-planning/>.

Martyn, John Ross et al, *Theobald on Wills*, 17th ed (London, UK: Sweet & Maxwell/Thomson Reuters, 2010).

Merriam-Webster Dictionary, online: <https://www.merriam-webster.com/>.

Stephens, Debra L., "Hotchpot Clauses", Law Society of Ontario Six-Minute Estates Lawyer (3 May 2018).

"Toronto Housing Market Report", *WOWA* (6 April 2021), online: <https://wowa.ca/toronto-housing-market>.

Weigl, Corina S., "Hotchpot Clauses – A Primer", Fourth Annual LSUC Estates and Trusts Forum (20-21 November 2001).

Whitaker, Marni M. K., "Hotchpot Clauses" (1992) 12 Est & Tr J 7.

Williams, Georgia, “Bitcoin: A Brief Price History of the First Cryptocurrency”, *Investing News Network* (11 February 2021), online: <https://investingnews.com/daily/tech-investing/blockchain-investing/bitcoin-price-history/#:~:text=Bitcoin%20price%20history%3A%20A%20response,price%20performance%2C%202010%20to%202021>.