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MAY 3, 2018

HOTCHPOT CLAUSES

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Hotchpot clauses have existed for hundreds of years. The concept is simple, and the rationale sound. So why are they so seldom used today? The answer to that question may be found in the case law, which highlights not only difficult evidentiary matters but also the challenge in drafting clear and comprehensive hotchpot clauses to address all of the possible issues that can arise. It should however be noted that most of the case law related to hotchpot clauses are pre-twentieth century English decisions. This paper will examine issues related to hotchpot clauses, and review some of the leading Canadian cases related to such clauses.

Overview

The purpose of including a hotchpot clause in a will is to ensure that the testator's beneficiaries (usually residuary) are treated equally in the distribution of the testator's estate, by taking into account any advances or gifts made to them by the testator during his/her lifetime. In essence, a beneficiary's entitlement to the estate will be reduced by the amount so advanced or gifted. A provision cancelling or releasing any debt owed by a beneficiary to the deceased is usually combined with a hotchpot clause.

Theobold writes:

> In many cases the instrument contains a direction that advances made by the testator are to be brought into hotchpot. This means that, what the instrument directs the division of a fund between the recipient of the advance and another, or others, the advance must be notionally added back into the fund, and the fund as notionally increased then divided, with the recipient giving credit for what he has already received. The recipient must put back into the pot what he has already received, and the pot then shared out. [1]

The following illustrates how a hotchpot clause works. Consider the following scenario:

- X, the testator has 3 children, A, B and C

*The author gratefully acknowledges the research for this paper undertaken by Katherine Stephens, student-at-law.

[1] Theobold on Wills, 17th Edition, (London: Thompson Reuters Ltd., 2010), p. 854, 36-034

- X dies in 2017 leaving an estate of $3 million to be divided equally among A, B and C
- X left a will dated January 12, 2012 which included a hotchpot clause, and a provision cancelling any debts owed to X by A, B or C ("release clause")
- X loaned $1,000,000 to A in 2010
- X gifted $120,000 to B in 1999
- X loaned $200,000 to C in 2005

If there were no hotchpot or release clauses each of A, B and C would receive one-third of the estate, or $1 million. However, in the above example, the hotchpot clause requires that the value of the gift and loans to A, B and C be brought into account to determine the value of the estate as follows:

	$ 3,000,000.00
	+$ 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 hotchpot amount

For the purpose of the hotchpot clause the estate value is $4,320,000.00 and each of A, B and C would notionally be entitled to one third of that amount, or $1,440,000.00. However, the hotchpot and release clauses operate to equalize the benefit to each child by deducting what each beneficiary has already received. Accordingly, each of A, B and C would receive the following:

- A would receive $1,440,000 million less the $1 million loaned, (and now repaid), so $440,000
- B would receive $1,440,000 million less the $120,000 gifted, so $1,320,000

- C would receive $1,440,000 million less the $200,000 loaned, (and now repaid), so $1,240,000

The total of the amounts paid to each of A, B and C is $3 million, consistent with the actual value of the estate available for distribution.

Failing to include both the hotchpot and release clauses in the will could create unintended prejudice for some beneficiaries and a windfall for others. The hotchpot clause in and of itself does not operate to release the beneficiaries from the obligation to repay any debts owed by them to the testator's estate. Even if the debts are greater than the beneficiary's entitlement under the will, the beneficiary must still repay his debt unless the will provides otherwise. [2]

As Theobold states:

> "…a hotchpot clause is primarily a charging and not a discharging clause, so that in cases where an absolute interest in the share is not given to the debtor [thus a gift] some further expression of intention on the part of the testator to release the debt will be required to discharge the debtor from his liability." [Author's addition] [3]

Consider the effect on the distribution of X's estate in the above scenario if only the hotchpot, but not the release clause, was included in the will.

The estate would now total $4,200,000 as each of A and C would have had to pay the estate the amount loaned, being $1,000,000 and $200,000, respectively. The hotchpot amount of $1,320,000.00 would then be added which would increase the estate for the purpose of determining the hotchpot value to $5,520,000.00. Based on this amount, each of A, B and C would be entitled to one third of that amount or $1,840,000.00. However, the amount advanced to each would still have to be deducted from each beneficiary's entitlement as follows:

[2] *Re Horn, Westminster Bank Ltd. v Horn* [1946] Ch. 254.
[3] Theobold on Wills, *supra*, p. 858, 36-045.

-A would get $1,840,000.00 less the $1,000,000.00 loaned to him for a total of $840,000.00. However, given that A is required to repay the $1,000,000.00 loan, he would actually be in a deficit position.

-B would get $1,840,000.00 less the $120,000.00 gifted to him, or $1,720,000.00.

-C would get $1,840,000.00 less the $200,000 loaned to him, or $1,640,000.00. However, given that C is required to repay the $200,000 loan, the net effect of his entitlement would be $1,440,000.00.

As you can see from the net results above, the total paid to A, B and C equals the revised value of the estate ($4,200,000.00) but there is great prejudice to A and much greater children equally and might result in an application to the court for directions, or worse, a claim against the drafting solicitor.

One of the significant advantages of bringing a loan given to a beneficiary into hotchpot is that it has the effect of neutralizing any limitation period with respect to the debt. If the testator had loaned money to a child twenty years before his death, and during the intervening period made no effort to collect it, nor did the child acknowledge the debt, any claim to have the child pay the debt to the estate could be statute barred. The hotchpot clause may solve this problem. [4]

A testator may, by including a hotchpot clause, even be able to neutralize the bankruptcy of the debtor beneficiary. While section 178(2) of the *Bankruptcy and Insolvency Act* [5] 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 the debt in the bankruptcy, the balance of the loan outstanding at the time of the testator's death will be brought into hotchpot when determining the child's entitlement to his father's estate. [6]

[4] *Poole v. Poole,* (1871) Ch. App 17.
[5] *Bankruptcy and Insolvency Act*, RSC 1985, e-B-3.

The Rule Against Double Portions and the Presumption of Ademption by Advancement

Hotchpot has sometimes been referred to as the rule against double portions, or the presumption of ademption by advancement. However, unless the will provides to the contrary, only advances made during the testator's lifetime are brought into hotchpot. Where advances are made after the will is executed, the rule against double portions and the presumption of ademption by advancement are often invoked. It should be noted however, that the rule against double portions and the presumption of ademption by advancement apply only between the testator and his/her child, or a person for whom the testator stands in *loco parentis.*

Ademption by advancement is when the testator, after executing his will, subsequently gifts all or part of the property the beneficiary is to receive pursuant to the testator's will. However, if the will does not contain a hotchpot clause which indicates the testator's intention to distribute the residue of his estate equally among his beneficiaries, the strength and application of these principles have generally been discounted in Canadian case law. The following cases indicate that the above presumptions have little or no place in current Canadian jurisprudence in such circumstances. Only if there is ambiguity in the will, which necessitates the introduction of extrinsic evidence as to the testator's intention to take advances made in the deceased's lifetime into account in distributing the estate, will such principles be considered. Even so, the rule against double portions, like the presumption of ademption by advancement, are only presumptions, which can be rebutted by evidence of a contrary intention on the part of the testator.

In a 2004 decision of the Alberta Court of Appeal, in dealing with gifts made by the testator to his son after he executed his will, the court reviewed the rule and stated:

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[6] *Ainsworth, Re* [1922] Ch 22.

> "…[though] equity presumes that the donee cannot take both the full gift and the full bequest…legal research shows so many exceptions to that "rule" that nothing remains of it in this case…Any "rule" about double portions is a presumption at best,…not strong, and is easily rebutted. [7]

The Court went on to note:

> "The decided cases on the presumption against double portions, are English and old; few Canadian cases can be found. The cases put a narrow construction on what is a portion or an advancement triggering the presumption.
> … [as it is a] branch of the doctrine of ademption…it arises only if there is some similarity between the bequest in the will and the asset transferred before death. In particular, a gift of land cannot adeem a bequest of money (or vice versa). So the presumption does not apply to land..(Indeed the authorities conflict on whether the presumption can even apply to a bequest of the residue…" [8]

In *Re Cross Estate* [9] the will provided that the residue of the testator's estate was to be held in a spousal trust and then distributed on the death of the wife. The will also provided that the trustees were to be given discretion to advance $5,000 to the testator's son to establish him in business and that upon attaining the age of thirty, the son was to receive a legacy of $10,000. The trustees sought the advice and direction of the court as to whether the $5,000 was to be treated as an advance on the legacy, thus reducing the amount the son would receive at thirty years of age, from $10,000 to $5,000.

The Court ruled that the advance of $5,000 was a charge against the capital of the residuary estate and not the legacy. As the son had no claim, either direct or contingent, to the residue of the estate, there was no "advancement" to be taken into

[7] *Plamondon v Czaban,* 2004 ABCA 161, as cited in *Campbell v. Evert,* 2018 ONSC 593, 2018 CarswellOnt 988. (See also *Campbell v Evert*, 2018 ONSC 2258, 2018 CarswellOnt 5960 re costs awarded)
[8] *Ibid*, paragraph 45.
[9] *Cross Estate, Re*, 1965 CarswellBC 29, 51 W.W.R. 377 (BCSC).

account. More importantly, Justice Wootton held "…where there is no hotchpot clause none will be implied." [10]

The recent Ontario decision *Campbell v. Evert* [11] underscores the need to include a hotchpot clause in a will if the intent is to bring advances into account to equalize the beneficiaries' entitlements. A party, who seeks to argue that a testator who advanced monies to some of the beneficiaries of his estate during his lifetime but did not include a hotchpot clause in his will intended to treat all of them equally, will now find it very difficult to rely on the rule against double portions and the presumption of ademption by advancement.

In 1990, Dr. Evert gratuitously transferred the family cottage (then valued at $145,000) to Peter. She also executed a will in 1990 which provided her daughter, Monica, with a $145,000 bequest. She then divided the residue of her estate equally between Monica and Peter.

Issues subsequently arose between Monica and Peter related to the management of their mother's care and assets. Dr. Evert created an *inter vivos* trust in 2000. She was the beneficiary during her lifetime but on her death the document provided that Monica would receive a legacy of $150,000, and the balance remaining in the trust would be divided equally between Monica and Peter. In 2001, Dr. Evert transferred her home to Peter for no consideration.

At the time of Dr. Evert's death, the trust was valued at $550,000 and the estate $190,000. Monica received $150,000 from the trust and the balance was divided equally between Monica and Peter. Monica then sought her legacy of $145,000 from the estate before the balance was divided between Peter and her. There was no dispute regarding the validity of any of the documents or transfers executed by Dr. Evert.

[10] *Ibid*, paragraph 5.
[11] *Campbell v. Evert, supra.*

Peter took the position that Monica was not entitled to the $145,000 legacy under the will and that the intent of his mother was that the $150,000 under the trust was in lieu of the $145,000 bequest in the will, and not in addition to it. He relied on the rule against double portions and the presumption of ademption by advancement.

Lococo, J., citing the analysis by the Alberta Court of Appeal in *Plamondon* with approval, stated that there was absolutely nothing in the language of the trust agreement or the will connecting the two amounts to be paid to Monica under each document. The trial Judge noted that he was bound by the principles enunciated in *Re Robinson,* [12] which clearly state that "…as a general rule, extrinsic evidence as to the testator's intention is not permissible to contradict the clear and unambiguous language of a testamentary document." [13] Even if he allowed extrinsic evidence to be admitted related to Dr. Evert's intention, His Honour determined that the presumption against double portions would not apply as the evidence related to Dr. Evert's transfer of the cottage and family home to Peter, rebutted the presumption.

These decisions can be contrasted with those of *Re Prittie* and *Re Barrett,* discussed later in this paper.

What Constitutes an "Advance"?

As can be seen, loans, gifts, transfers, and conveyances may all be subject to hotchpot. However, there can be some very difficult practical and evidentiary issues. Is a small or nominal gift (subjective of course to the testator and/or beneficiary) to be taken into account? [14] Who has a record of such a gift? Is a gift of jewellery from a mother to a

[12] *Rondel v. Robinson Estate*, 2010 ONSC 3484.
[13] *Campbell v. Evert, supra,* paragraph 58.
[14] It has been held that the advances "….*must be sufficiently large to give rise to a presumption that they are a permanent provision for the beneficiary, and perhaps form a large part of the estate of the person making the advance."* Williams on Wills, 9th ed. (London: LexisNexis Butterworths, 2008) page 926, [100.6]; also see *Re George's Wills Trusts*, [1949] Ch 154.

daughter to be taken into account? How do you value the jewellery – is it insurance, replacement or fair market value? If fair market value, is it the value when it is gifted or the value on the mother's death? Should interest be calculated and paid on advances? Can real property be considered when calculating the advance? If real property is conveyed do you take into account the value as at the date of the conveyance or at the date of death? What if the beneficiary has improved the property or sold it before the testator's death? Theobold states that advances for the purpose of determining what comes into hotchpot do not ordinarily include real property unless the testator evidences a contrary intention to include it. [15] (However see *Re Nordheimer* discussed later in this paper).

These and many similar questions have created difficulties for estate trustees and the court in determining precisely what goes into hotchpot, and how to value such advances.

It is beyond the scope of this paper to address all of these questions and other issues that arise when dealing with, and interpreting, hotchpot clauses. What follows highlights the most significant principles which have evolved from English and Canadian decisions pertaining to hotchpot clauses.

Valuing the Advance

Clearly the starting point with respect to any hotchpot clause, is the document itself, whether it be a will or other trust document. One of the oldest reported Ontario decisions dealing with hotchpot clauses answers the question of "when" the advance to the beneficiary applies for the purpose of bringing it into hotchpot.

Re Nordheimer [16] deals with hotchpot clauses in both a testator's a will and in marriage settlement trusts for his daughters (such marriage settlements being similar to a trust

[15] *Theobold on Wills, supra,* page 855, 36-036.
[16] *Nordheimer, Re,* 1913, CarswellOnt 848, 14 D.L.R. 658.

deed), which were executed by the testator. Generally under each of the marriage settlements, the testator settled specific assets in a trust for the daughter so that she could enjoy the income from the settlement during her lifetime, with the capital available to her spouse and issue on her death.

The marriage settlement for each daughter was completed at different times. One was settled at the first daughter's (A's) marriage, and the other well after the second daughter's (B's) marriage. The testator transferred both land, stocks and bonds to A's settlement trust, while the testator transferred only stocks and bonds to B's marriage settlement trust. Further, while B was entitled to all of the income generated from her settlement trust, A was limited to receive only $1,500.00 per year of the income generated by her trust. There were additional differences in the terms of each of the settlements, but both contained hotchpot clauses stating that the daughter would not take any share in the deceased's residuary estate without first bringing the value of the assets transferred to the trusts into hotchpot, and accounting for them.

The estate trustees sought the assistance of the Court to ask whether the advances made by the testator to each daughter under the marriage settlements were to be brought into hotchpot in determining their respective entitlement to the deceased's estate, and if so, what amount was to be accounted for.

Middleton, J., quoting Thornton on Gifts and Advancements (Ed. of 1893, pages 605-606) stated:

> It is astonishing how little authority is to be found upon the question. In Thornton…., the matter is thus dealt with: "Shall the advanced distributee be charged with the property advance at its value in advanced, or when the intestate dies, or when the final distribution of the estate is made?....The advanced distributee shall be charged with the value of the property as of the date of its advancement. This is eminently proper; for the property, especially if personality, might be of little value at the death of the intestate or the time of the final distribution; and it would be manifestly unfair to the other distributees that the advanced distributee might have the use of the property for many years, and then be required to

> account only for its value less the decrease in value from wear and tear and usage. " [17]

His Honour, having noted that the trustees were given full power to change the investments of each marriage settlement, determined that the value of the assets at the time they were transferred by the deceased to the daughter's respective marriage settlement, was the amount that was to be taken into hotchpot and deducted from each daughter's entitlement to the testator's estate. Middleton J. concluded:

> "In other words, the testator, by making the advancement, desires the capital sum advance to be treated as a payment *pro tanto* on account of the ultimate portion of the child. He foregoes the enjoyment of the income of this fund during the rest of his life, but neither income nor any increment of the settled fund is, in the absence of special direction, to be credited upon the ultimate portion." [18]

Clearly, this is authority for the principle that only the amount actually advanced should be brought into hotchpot. This is easily done with respect to assets which have a specific ascertainable value as at the date of the advance. This includes cash, stocks, bonds, etc. However, where real property or other assets which would normally be appraised, are transferred or gifted, without attaching a specific value to them, this creates more difficulty. However, retrospective analyses or appraisals can usually provide a fairly definitive value for the purpose of the hotchpot amount.

If the testator, in his will, or in another document, specifies the amount that is to be taken into hotchpot, then that amount must be included, even if the advance was a loan that had been partially repaid by the time the testator dies. [19] However, if there is no amount stated in the document, the actual amount of the loan outstanding at the time of the testator's death is the only amount that should be included in hotchpot. [20]

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[17] *Ibid,* paragraph 22.
[18] *Ibid,* paragraph 26.
[19] *Re Wood, Ward, v Wood,* (1886) 32 Ch D 512.
[20] *Re, Kelsey, Woolley v. Kelsey* [1905] 2 Ch 465.

What if the advance/gift is made after the date of the testator's will? What if it is made after the testator's death? The 1940 Ontario decision, *Re Prittie,* [21] and the 2013 Alberta decision in *Re Barrett Estate*, [22] address these issues. In each case, the court carefully examined that wording of the hotchpot clause before making its decision.

In *Re Prittie* the testator died January 30, 1928, leaving a will dated March 18, 1924. His widow died July 8, 1939, leaving a will which was a mirror image of the testator's will. The testator's will provided that his widow was to receive the income from a spousal trust comprising the residue of his estate, and that on her death (after payment of some legacies) the residue was to be divided equally among their surviving children, provided that:

> "….in arriving at the shares of the residue of my estate, my Executor and Trustee, shall take into account all conveyances, transfers of any property, real and personal, made to any Trustees or Trustee by me or by my said wife or at our or either of our directions for the benefit of any of my children, and also any gift made by me or by my said wife to any of my children unless in the making of such gift a contrary intention is expressed". [23]

While the will does not expressly state it is a hotchpot clause, the effect of the provision is that anything advanced to the children by the deceased or his wife was to be taken into hotchpot.

The estate trustee sought the direction of the court with respect to whether the hotchpot clause operated as at the date of the testator's death, or as at the date of the widow's death. Further, he questioned whether gifts made by the widow in her will were also to be taken into hotchpot. The deceased had made gifts in varying amounts to their children during his lifetime. His widow had done so as well, and had also made gifts in varying amounts to the children in her will.

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[21] *Prittie, Re*, 1940 CarswellOnt, [1940] O.W.N. 28.
[22] *Barrett Estate, Re*, 2003 CarswellAlta 1787, 2003 ABQB 986, 4 E.T.R. (3rd) 163.
[23] *Prittie, Re*, *supra*, paragraph 10.

Kelly, J. held that his first duty was to examine the language of the will itself to ascertain the testator's intent. If "…that intention plainly appears and is capable in law of being carried out…," [24] then case law and principles of construction would not come into play. After reviewing the testator's will he concluded that it was evident that the testator, by using very broad and sweeping language, including not only "all conveyances, transfers and gifts", but also anything that benefitted his children, clearly intended to achieve equality among his children with respect to the disposition of his estate.

The Judge then went on to find that by including all transfers/gifts made by his wife, and knowing that one of the two would predecease the other, the testator could only have intended that all advances made by both of them during their lifetimes were to be brought into hotchpot. Further, as the testator did not restrict the meaning of "gifts" in any way, and made no reference to his or his wife's "lifetime", Kelly, J. found that gifts made by the wife to the children under her will also fell within the clause and were to be brought into hotchpot. The testator's intent (as gleaned from the wording of the clause) was to equalize all benefits provided to their children at any time, so that each child would receive the same amount from his/her parents' global estate. The Court held if the testator had intended otherwise he would have expressed an intention to the contrary in his will.

In *Re Barrett*, the Alberta Court of Appeal dealt with a will which also did not explicitly refer to a hotchpot clause. In Mr. Barrett's will he directed that the residue of his estate was to be divided equally among his three sons, "…taking into account amounts lent or given to each of my sons as per the attached list by myself or my wife adjusted to present value at the date of my death using the Consumer Price Index as an inflation factor." [25] The wife predeceased the testator, but as in *Re Prittie,* her will was a mirror image of the testator's will.

[24] *Ibid,* paragraph 12.
[25] *Barrett Estate, Re, supra, paragraph 2.*

At the time of the testator's death three lists were discovered – one list in the testator's handwriting which was executed before the will was signed (the "Pre-Will List"); and two lists which post-dated the execution of the will; one in each of the testator's and the wife's handwriting (the "Post-Will Lists").

The estate trustee sought the advice and direction of the Court as to whether the advances referred to in each of the Pre-Will List and the Post-Will Lists were to be taken into hotchpot. As the Pre-Will List existed prior to the will, was referred to in the will, was confirmed to be in the testator's handwriting, and was found with the original of the will, the advances set out in the list were deemed to be included through the doctrine of incorporation by reference. In fact the Pre-Will List was submitted to probate as part of the will proved in solemn form. [26] Further, despite a claim by one of the sons that he had repaid a portion of the amount advanced to him as set out in the Pre-Will List, the full amount advanced to the son as stated in the Pre-Will List, was brought into hotchpot, consistent with the principle set out in *Wood, Ward v. Wood,* referred to earlier, where it was held that if the amount to be included in hotchpot is specifically set out in the will (and it was when the Pre-Will List became part of the probated document), there is no reduction for any amount alleged to be repaid to the testator.

The issue which created the most difficulty for the estate trustee was with respect to the Post-Will Lists. The hotchpot clause referred to an "attached list" which of course was the Pre-Will List. On what basis could it be said that the testator intended that the Post-Will Lists advances also be taken into hotchpot? The Court held that as there was some ambiguity as to whether the advances set out in the Post-Will Lists were to be taken into hotchpot, it allowed extrinsic evidence to be admitted to assist the Court in making its determination. This evidence included the drafting lawyer's affidavit which included:

a) His discussions with the testator regarding loans he had made to his sons, and in particular one son, who he felt was irresponsible with money;

[26] *Ibid*, paragraphs 28-29, see also *Tucker v Tucker,* 168 A.P.R. 102 (Nfld. T.D.).

b) The instructions he had received from the testator to include not only the hotchpot clause but also the CPI clause to ensure fairness, due to the timing and extent of the loans;
c) That the testator kept a notebook (which the lawyer saw on a number of occasions) detailing each loan, and that the testator, at times, provided the lawyer with copies of pages of the notebook;
d) That the testator gave him a copy of the same Pre-Will List that was found with the original will, and;
e) That the testator would from time to time give him sheets which reflected the original Pre-Will List, but which had been updated to reflect the additional advances. The lawyer confirmed that the wife also provided him with her Post-Will List and that both Post-Will Lists were in his files at the time of the testator's death.

The other evidence before the Court was that two of the sons admitted that they had received all of the advances listed on the Post-Will Lists. The son who had received the greatest amount of advances under the Post-Will Lists tendered no evidence at all (including denying he received the advances listed) but simply took the position that the testator had not intended to include these amounts in hotchpot, and also that he had repaid a portion of any amounts so advanced.

Coutu, J. found on a balance of probabilities that all of the Post-Will transactions did occur, and that this raised the rule against double portions. The Court held that the testator was presumed to have wanted all of these transactions to be taken into account by creating the lists, to equalize the benefits to be received by each of his sons. The son who opposed their inclusion, failed to rebut the presumption inherent in the rule. Further, the Court, invoking the equitable doctrine of presumption of ademption by advancement, determined that regardless of the presumption, the joint intention of the testator and his wife, in not knowing who of them would predecease the other,

evidenced their joint intent that the estate "…on the last of them to die would be adjusted for all advances made by either of them to each of their three sons." [27]

Accordingly, if there is a hotchpot clause (which normally applies only to pre-will advances unless it specifically refers to gifts in a will), it can extend to post will advances through the rule against double portions and the presumption of ademption by advancement. If there is evidence of the intent to equalize all advances, and provided there is nothing in the will or otherwise to support a contrary intention on the part of the testator, all advances will be brought into hotchpot.

Interest on Advances

In *Re Barrett*, the testator specifically required the estate trustee to adjust to "…present value at the date of my death using the Consumers Price Index as an inflation factor". [28] Again, the executor was required to look to the particular wording of the will in adding this amount to each advance before bringing it into hotchpot. But what if there is nothing in the will about interest on the advances? As seen in *Re Nordheimer*, it has long been established, that absent a requirement in the will, neither income nor a growth in the value of capital advanced can be added to the original advance when determining the hotchpot amount.

While it is thus clear that no income or capital growth can be added to the advance for the purpose of hotchpot unless the will states otherwise, the Courts have held that interest is to be added to advances from the date of the testator's death to the date of distribution to the beneficiaries. [29] The English decision of *Re Willoughby, Willoughby v. Decies* [30] sets out the principles regarding interest:

> "(1) that no interest is charged against an advanced child prior to the testator's death; (2) that where the period of distribution of the testator's

[27] *Ibid*, paragraph 43.
[28] *Ibid*, paragraph 2.
[29] *Stewart v Stewart*, (1880) 15 Ch D 539.
[30] *Re Willoughy, Willoughy v Decies*, [1911] 2 Ch 581 CA.

> property is at the testator's death [i.e. the estate is immediately distributable], interest is charged against an advanced child from the death and not from the subsequent date at which in fact the distribution takes place; (3) that if the period of distribution is at the expiration of a period of accumulation or of a prior life interest, interest is charged not from the date of death but from the period of distribution; and (4) that the effect of a charge upon the residue, such as a life annuity secured by a fund set apart to meet it, does not alter the period of distribution." [31]

The decision of *Re Poyser*, [32] as cited in *Re Willoughby*, provides authority for the rate of interest that is to be charged. As noted above, this can be from the date of the testator's death if there is no life interest in the estate, or from the death of the life tenant. The rate in these cases is stated to be four (4) percent per annum, unless the will specifically provides for a different rate.

While the principles set out in *Re Willoughby* were followed by Kelly, J. in *Re Prittie*, as he calculated interest from the date of the wife's death (she had a life interest in the testator's estate), His Honour applied a rate of five (5) rather than four (4) percent on the advances. It is not clear from the reasons whether this rate was set out in the will or whether he felt it was a more applicable rate in 1940.

What can be Brought into Hotchpot and by Whom?

As noted earlier, the wording of the hotchpot clause is paramount in determining what comes into hotchpot, and when. The advances can be limited to those made during the testator's lifetime, but can also include gifts under the testator's will. Theobold states that:

> "A direction that, if a parent should during his life advance or pay any sum for the benefit of his children, the sums are to be brought into account, does not include a share taken under the father's intestacy nor benefits

[31] *Ibid*, at page 597.
[32] *Poyser, Re* [1908] 1 Ch 828.

> given by his will. But the direction may be so framed as to include gifts by will…." [33]

Advances can also include property that passes to the beneficiary on the testator's death by right of survivorship, or as a designated beneficiary. [34] The amount to be brought into hotchpot may also include advances made by others (such as the testator's spouse) as seen in *Re Prittie* and in *Re Barrett*. However, it could also include advances made by other family members (such as grandparents, aunts, uncles, etc.), or from trusts or other entities.

In *Northmark Mechanical Systems Inc. v. Watson Estate* [35] the Court had to deal with the following clause:

> "Before any of my children, including without limitation my son, Richard Watson, takes a share in my residuary estate, he or she is to take into account and hotchpot all amounts due and owing to me by him or her at the date of my death." [36]

While the facts are too complex to go into in detail in this paper, the testator loaned her son Richard, significant amounts of money to invest in the stock market, both on his and on her behalf. These investments were undertaken only through her brokerage account. Richard took the funds loaned to him by his mother and put them into his company, Northmark, who then acquired the investments. The corporate records and financial statements of Northmark were quite convoluted and their accuracy was questioned by the estate trustees (the deceased's daughters), The estate trustees asserted that Richard had improperly organized his and Northmark's affairs to defeat the hotchpot clause by manipulating the Northmark shareholder loan account related to the purchase of the stock investments. Richard disputed that he owed the estate any

[33] Theobold on Wills, *supra,* page 855, 36-035.
[34] *Falconer Estate, Re*, 1949 CarswellBC 102, [1949] 2. W.W. R. 1171 (BCSC).
[35] *Northmark Mechanical Systems v Watson Estate,* 2010 BCSC 176, 2010 CarswellBC 293 (BCSC).
[36] *Ibid,* paragraph 3.

monies and commenced a claim on behalf of Northmark, asserting that his mother's estate owed Northmark over $400,000.

The issue before the Court was whether the claim by Northmark against the estate could proceed independently of the action commenced by the estate against Richard. The Court concluded that the two matters had to be heard together.

> "…the determination as to what is owing under the hotchpot, how it will be satisfied, and what portion of the proceeds are available to be used in that regard will be decided in the probate action. The relationship of the allocation of those proceeds to the shareholder's loans has been raised in …this action." [37]

What if a Beneficiary Predeceases the Testator?

The wording of the will is also key in determining whether the advance will be brought into hotchpot if the person to whom the advance was made predeceases the testator. If the will divides the residue among the testator's children, with a gift over to the issue of any child who predeceases the testator, any advance made to the deceased child will not be taken into hotchpot against the deceased child's issue unless the will specifically states that it is to be so taken into account. [38]

Hotchpot and Intestacy

Hotchpot is a concept so entrenched in the common law, that it has been extended (in some circumstances) to intestate succession. Section 25 of the *Estates Administration Act* [39] provides that where there is evidence that the deceased advanced property to a child during his lifetime, and the advance is equal to or greater than the share the child (or his or her issue) is entitled to on intestacy, then such advance will be taken into account in the distribution of the intestate's estate. For an excellent discussion on this

[37] *Ibid*, paragraph 73.
[38] Theobold on Wills, *supra,* page 857, 36-041.
[39] *Estate Administration Act,* R.S.O. 1990, c. E22.

topic and others related to hotchpot clauses, see Corina S. Weigel's paper, "Hotchpot Clauses – A Primer" [40]

Summary

Hotchpot clauses can be very useful in estate planning. They can also however, be a drafter's nightmare and a litigator's dream. It is difficult to craft a hotchpot clause which covers all issues and future contingencies. With the advent of multiple wills, multi-jurisdictional wills, and alter ego and joint partner trusts, it is increasingly difficult to draft such clauses. Further, even a well drafted clause can be affected by claims made against the estate such as equalization under the *Family Law Act*, and dependent's relief claims under the *Succession Law Reform Act*.

Without doubt, extreme care must be taken by the solicitor who is asked to include a hotchpot clause in a will. Thankfully there are a number of valuable resources available which analyze the components of hotchpot clauses and provide excellent precedents. These include:

1. Corina S. Weigel, "Hotchpot Clauses – A Primer" (referred to earlier in this paper)
2. Jordan Atin, "Wills and Estates Practice Basics", Law Society of Upper Canada CPD (March 27, 2017)
3. Williams on Wills, 9th edition, (London: LexisNexis Butterworths, 2008) (including clauses which are intended to exclude hotchpot, and the rule against double portions)

[40] *Corina S. Weigel, "Hotchpot Clauses – A Primer"* Fourth Annual LSUC Estates and Trust Forum (Nov. 20-21, 2001).