

SUCCESSION (SCOTLAND) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Testamentary documents and special destinations

Section 8 – Destinations in wills and certain trusts: conditional institution

35. Where property is the subject of a destination (that is, a provision in a will or trust for its transfer to “person A, whom failing person B”), there are currently different presumptions about how the property will pass depending on the type of property in question. So where property may be transferred to person A, whom failing person B, by way of a destination in a will or a trust taking effect during a trustor’s lifetime and the property is heritable it will be presumed that B is a substitute. This means that if A dies still owning the property it will then still pass to B by virtue of the destination. On the other hand, where the property is moveable, if A inherits the property then any right that B had falls at that point. This presumption is known as a “conditional institution”. This section creates a new rule that provides that where any kind of property goes to A, B loses all rights to take the property under the destination in the will or trust. The effect is that B is a “conditional institute” and not a “substitute” even where the property is heritable.
36. Subsection (2) provides that this presumption does not apply where it is clear from the will or trust that a different result is intended.