

EXECUTIVE NOTE

THE PRIOR RIGHTS OF SURVIVING SPOUSE AND CIVIL PARTNER (SCOTLAND) ORDER 2011

SSI 2011 No. 436

1. The above statutory instrument was made in exercise of powers conferred by sections 8(1) and (3) and 9(1) of the Succession (Scotland) Act 1964 as amended. The instrument is subject to negative resolution procedure.

Policy Objective

2. In order to take account of the impact of inflation and changes in the value of property etc. and following consultation, the objective of the instrument is to increase the financial limits for various forms of provision for a surviving spouse or civil partner from the estate of a deceased person who died intestate (i.e. without leaving a valid will).

Background

3. Under sections 8 and 9 of the Succession (Scotland) Act 1964, when a person dies intestate, a surviving spouse or civil partner is entitled to various forms of provision from the deceased's estate, subject to specified financial limits.

4. The limits are prescribed by statutory instrument; they are updated periodically (typically on a roughly 5-yearly basis) to take account of the impact of inflation and changes in the value of property etc.. The present limits were set by statutory instrument in 2005 - The Prior Rights of Surviving Spouse (Scotland) Order 2005 No. 252 and are as follows:

Section	2005
8(1)(a) & (b) Interest of spouse in dwelling house where surviving spouse / civil partner lived	£300,000
8(3)(a) & (b) Entitlement to furniture in that dwelling house	£24,000
9(1)(a) Entitlement out of the estate if the deceased left children	£42,000
9(1)(b) Entitlement out of the estate if there are no children	£75,000

5. The 2011 Order differs from the 2005 Order in that it includes reference to civil partners to whom prior rights were extended under the Civil Partnership Act 2004 (the 2004 Act) which was not in force at the time of making the 2005 Order. The relevant limits have, however, applied to civil partners by virtue of the amendments made to sections 8 and 9 of the Succession (Scotland) Act 1964 by the Civil Partnership Act 2004.

Consultation

6. A report was commissioned from Scottish Government Justice Analytical Services to inform and provide the basis for the consultation. Taking account of that report, the Scottish Government then consulted on increase in the limits, including a significant increase in the housing prior right limit. A consultation was carried out on the following proposals.

Section	2005	Proposed
8(1)(a) & (b) Interest of spouse in dwelling house where surviving spouse / civil partner lived	£300,000	£470,000
8(3)(a) & (b) Entitlement to furniture in that dwelling house	£24,000	£29,000
9(1)(a) Entitlement out of the estate if the deceased left children	£42,000	£50,000
9(1)(b) Entitlement out of the estate if there are no children	£75,000	£89,000

7. The consultation paper was sent directly to 15 organisations; it was also made available on the Scottish Government website. A News Release was also issued on the day of the consultation launch. The consultation ran for 13 weeks from 22 February 2011.

8. Ten responses (including a late one) were received. Five of the 10 respondents agreed with the suggested levels for prior rights. Reservations were expressed by four of the remaining respondents. These included, on the one hand, whether there should be any limits at all and, on the other, whether the limits ought to be lower because the significantly higher spouse/civil partner housing prior right limit could result in there being less estate left for children to inherit. One respondent raised separate issues. These reservations would not appear to be consistent with the purpose of the primary legislation, as enacted by Parliament, which is to allow a surviving spouse/civil partner to continue to live undisturbed in the family home unless that property has an exceptionally high value.

Consideration

9. The consultation responses raised a number of technical points in relation to setting upper limits for prior rights which were considered further with Scottish Government Justice Analytical Services. In terms of the points made, it was accepted that in setting the upper limit for the housing prior right the most up to date house price figures should be used. Those used in the consultation paper were the latest figures available at the time – specifically, figures from January 2004 to November 2009. Using figures from August 2011, the increase over the period would be 58% rather than the 57% quoted in paper in the consultation exercise. The figure has been adjusted accordingly as set out in the table below. This is the only change to the figures consulted on.

<u>Prior Rights</u>	<u>2005 (current)</u>	<u>Figures consulted on</u>	<u>Final proposal</u>
8(1)(a) & (b) Interest of spouse in dwelling house where surviving spouse / civil partner lived	£300,000	£470,000	£473,000
8(3)(a) & (b) Entitlement to furniture in that dwelling house	£24,000	£29,000	£29,000
9(1)(a) Entitlement out of the estate if the deceased left children	£42,000	£50,000	£50,000
9(1)(b) Entitlement out of the estate if there are no children	£75,000	£89,000	£89,000

Effect of the change on other family members – potential concerns

10. The main impact of the increase in the level of a surviving spouse/civil partner's prior rights in intestacy is to enhance the rights of that survivor to diminish other relatives' (often, though not always, likely to be children's) rights to succeed under section 2 of the 1964 Act. Section 2 sets out the order of succession in intestacy to the estate which remains after a spouse/civil partner's prior rights and after the legal rights of a spouse/civil partner and children to a share of the deceased's moveable estate have been taken from the estate. Children are first in line to inherit under section 2. Raising the value of a spouse/civil partner's prior rights could mean that the estate which falls to be distributed under section 2 of the 1964 Act will potentially be reduced.

11. However, the purpose of provisions under section 8 is to ensure that a surviving spouse/civil partner is able to remain undisturbed in the family home. Given that many properties, particularly in Scottish cities, have values well in excess of £300,000, the surviving spouses in these cases would not be entitled to the house and the executors might have to sell the property and the spouse accept a cash equivalent.

12. Also, in terms of the increase to £473,000, it should be borne in mind that this an upper value level. If the property is valued below this figure, the surviving spouse/civil partner will not be entitled to any further estate under the housing prior right.

Equality Impact Assessment

13. It is acknowledged that, because in some cases this legislation could potentially advantage bereaved parents to the disadvantage of bereaved children, it could be perceived in such cases as being to the benefit of the relatively elderly as against the relatively young. It could also be said that it is likely to be of more benefit to women than men, as on average wives tend to outlive husbands.

14. However, these are established features of the underlying primary legislation. No formal Equality Impact Assessment was carried out on this statutory instrument, as this is a

settled policy area and the uprating exercise simply takes account of the effect of inflation and changes in property values on prior rights.

Financial Effects

15. It is considered that no BRIA is necessary as the instrument has a negligible impact on the Scottish Government, local government or on business. As above, the uprating exercise simply takes account of the effect of inflation and the value of property on prior rights.

16. It is not anticipated that raising the limits for a surviving spouse/civil partner's prior rights will give rise to extra expense for individuals. There may in fact be an increase in the number of intestate estates in which surviving spouses can remain in the dwelling house, thus avoiding the cost and stress associated with moving house.