Legal Issues and the Use of Trusts in Reverse Mortgages: A Comparative Legal Approach

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I. Introduction

Japan has already reached the level of a super-aging society; its aging rate reached 27.3% in 2016.[1] The declining birthrate and the aging Japanese population continue to advance. Hence, expectations related to the creation of a sustainable aging society that extends up to the next 20–30 years are increasing in the Japanese society.[2] Prior to focusing on the solutions to address the other challenges of the super-aging society, strengthening of the economic foundation of the elderly is one of the main concerns that must be addressed. The share[3] of the public pensions in the incomes of the elderly has become extremely high, and the combined declining birthrate and aging population are making the financing of pensions under the levy system more challenging. Consequently, it has become difficult to guarantee the income of the elderly through public pensions alone.[4]

Reverse mortgages have attracted a lot of attention because of the recognized need for the elderly to become self-sustaining.[5] A reverse mortgage is a system wherein an elderly person receives a regular (typically monthly) loan from a financial institution, using the house they live in as collateral, which is repaid in a lump sum when the elderly person sells the house or dies. In a normal mortgage, the full amount of the loan is received at the beginning. Thereafter, the debt balance is gradually reduced through monthly or periodic repayments (forward mortgage). In contrast in the above structure, the balance of the loan gradually increases during the contract period; thus, it is called a reverse mortgage.

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[1] Ministry of Internal Affairs and Communications, *Population Estimates*, October 1, 2016 (final figures). Please refer to *Aging Society White Paper, 2017* (Cabinet Office).
[2] Cabinet Office, *The Guideline of Measures for Aging Society* (2018).
[3] According to the Ministry of Health, Labor and Welfare's *National Livelihood Survey* (2015), elderly households in which the ratio of public pensions and benefits to total income is 100% account for 55% of all elderly households receiving public pensions and benefits. Conversely, only 20.5% of all the elderly households derive less than 60% of their total income from the public pensions and benefits.
[4] For this reason, the importance of defined contribution pension plans, in which individuals bear the investment risk, has also increased in recent years. Since the amended Defined Contribution Pension Act was passed in 2016, beginning in January 2017, defined contribution pension plans have been extended to include civil servants and housewives.
[5] Even in the New Growth Strategy decided by the Cabinet in 2009, "active use of reverse mortgages" was proposed as one of the self-help alternatives to public pensions.

The advantage of a reverse mortgage is that it allows the elderly to stay at their houses for as long as possible. The concept of "the elderly living in their homes until the end of their lives" is also known as "aging in place." This concept is also incorporated in the concept of "community-based integrated care system" that Japan is currently promoting.[6] It is common knowledge that many of the elderly genuinely wish to continue to live in their own houses.

The basic requirement for expanding the use of reverse mortgages is the existence of a certain number of elderly people who own their homes. Japan has a high rate of home ownership (61.7%). If we limit the number of households in which the "main breadwinner" is ≥65 years old, about 80% own a house. Hence, reverse mortgages may serve to complement the self-sustaining efforts of the elderly. Considering the economic situation of the elderly people in Japan, it can be assumed that ample motivation prevails for reverse mortgages to be expanded.

However, some challenges hinder the use of reverse mortgages[7]. First, reverse mortgages possess the inherent risk of collateral value falling below the loan value. Then, who should take this risk? In Japan, it is currently passed on to the elderly who receive the reverse mortgage. Additionally, reverse mortgages have a unique requirement of selling the collateral property after the death of the elderly borrower. Therefore, in many cases, as inheritance begins after the owner's death, the loan contract process also requires the consent of all presumed heirs. Further, even if everyone agrees this, the specific presumed heirs may change, given the tendency of reverse mortgage financing to be long-term.

This study thus examined the aforementioned issues of reverse mortgages from a legal perspective; it determined the systems for overcoming the issues through a comparison and by outlining the initiatives conducted in the U.S. and the U.K., thereby combining the Japanese reverse mortgages and trust systems.

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[6] This is specifically stated in acts such as Article 5, Paragraph 3 of the Long-Term Care Insurance Act ("The national and local governments are committed to ensuring that the insured are able to live independent daily lives according to their abilities in their familiar communities as much as possible...") and
the Act for Securing Comprehensive Medical and Long-term Care in the Community of 2014 ("... to enable elderly people to lead independent daily lives in their familiar communities according to their abilities as long as possible...").

[7] In addition, refer to the following: Yuko Nakata, Kota Matsui, *Strengthening the Economic Base of the Elderly through Home Ownership - Focusing on the Legal Issues of Reverse Mortgages* (2017). Bulletin of Kyorin CCRC, Kyorin University (2017), pp. 24-33. Manuscript of the author, *Suggestions for American Home Equity Conversion Mortgages and Japanese Reverse Mortgages*, Faculty of Law, Nanzan University, Vol. 42, No. 2, pp. 65-87.

II. Current status of reverse mortgages in Japan

1) Potential use of reverse mortgages

A major characteristic of the current economic foundation of the elderly in Japan is a high dependence on public pensions. About 55% of the elderly households counted only on public pension as their income as of 2015, and in 68% of the households, the share of public pensions and benefits in total income was >80%.[8] However, living expenses are often difficult to manage with public pension and benefits only. In fact, many households make up for the shortfall by drawing down on their savings.[9] In addition, the macroeconomic indexing system, which adjusts pension benefit levels in accordance with the declining birthrate and aging population, is being promoted. It is expected that the level of public pension and benefits will further decline in the future.

Hence, although the cash income of the elderly is scarce and a concern about a long-term shortage of funds prevails, the home ownership rate among the elderly households is high.[10] In other words, a typical economic situation of the elderly in Japan can be characterized as "owning a house (stock) but lacking in cash (flow) (house-rich but cash-poor)." The advantage of a reverse mortgage is allowing the elderly to continue living in their homes and turning the value of their asset into a regular income; hence, using a reverse mortgage as an option could strengthen the economic foundation of the elderly households.

2) Types of reverse mortgages in Japan

Most reverse mortgages in Japan are entered into through the following contracts. First, the elderly person signs a loan agreement (Article 587 of the Civil Code) with a financial institution or local government to borrow money in a lump sum or on a monthly basis. Simultaneously, a first-rank revolving mortgage is created on the residence (including the land) as the collateral object.[11] Thereafter, during their lifetime, the loans are paid out to the elderly person who signed the contract. There are two types of payment methods: fixed monthly payments (annuity type) and lump-sum payments (lump-sum type). The

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[8] Ministry of Health, Labor and Welfare, *National Livelihood Survey* (2015) (see Note 3).

[9] The monthly shortage of elderly households is said to be 50,000–70,000 yen. If the average extraordinary expenditure (300,000 yen) is incorporated, the annual shortfall would be 900,000–1.14 million yen. Assuming an average life expectancy of 20 years at age 65, it is estimated that there will be a lifetime shortfall of approximately 18–22.8 million yen.

[10] Statistics Bureau, Ministry of Internal Affairs and Communications, *2013 Housing and Land Survey of Japan*.

[11] At this point, a trust agreement may be set up if the provisional registration of the transfer of ownership is to proceed simultaneously. I will describe this in detail later, but in cases wherein the heirs have given their consent, the method of provisional registration of ownership is adopted in advance to facilitate a smoother subsequent sale procedure.

entirety of the loan is repaid in lump sum when the collateralized home (including land and buildings) of the elderly debtor is sold after their death.[12].

In Japan, there are two kinds of reverse mortgage, namely, those operated by public institutions and those operated by private entities. Both apply the same contractual approach as described above. Further, there are two categories of such programs that are operated by public institutions, namely, those led by the national government (Ministry of Health, Labor and Welfare) and those implemented independently by local governments. Direct and indirect programs are the two main classifications of reverse mortgage programs that are independently implemented by local governments. The direct loan type involves the execution of a direct contract between the local government and the elderly homeowner and is commonly referred to as the "Musashino Method," and the indirect loan type is generally referred to as the "Setagaya Method." Local governments act as a bridging partner between financial institutions and the elderly, as well as shouldering interest costs. However, government-led reverse mortgage programs are virtually nonexistent today because in 2003, they were merged with a system of the national government that provides mortgage-backed loans to cover living expenses (Ministry of Health, Labor and Welfare). Consequently, the term "public reverse mortgage" often refers to the national government's real estate-backed living expense loan system that is operated by the Council of Social Welfare.

As of August 2019, there were 60 reverse mortgage products offered by at least 50 institutions that are available in many variations. There are numerous implementers, from financial institutions to housing corporations. A common feature of both public and private reverse mortgages is that the collateral object is limited to real estate in the form of land (and the buildings on it). Subsequently, there are a limited number of reverse mortgages for apartments (in which the owner only owns one room of the building).[13] This may be due to the fact that land holds the primary value in Japan, and it is difficult to recognize the asset value of a section of a building. Notably, this perception may serve to constrain the expansion of the use of reverse mortgages in Japan.

3) Literature review

[12] However, this is a general framework. Remarkably, the specific contracts and methods will differ for each financial institution and municipality.

[13] Only Tokyo Star Bank accepts condominiums as collateral objects, but the condominiums that qualify are also limited. It is restricted to condominiums with an appraised value of 30 million yen or more in urban areas of the Tokyo metropolitan area. There is a real need for a reverse mortgage program for condominium owners. In many cases, their children already have their own homes, and it is often easy to obtain the heirs' agreement. However, as it is simply a part of a whole condominium building, how to handle the reverse mortgage if the entire condominium needs to be completely revamped due to its age is a matter of concern.

An example of a comprehensive study of reverse mortgages is Tsuyoshi Kurata's book *Mochiie Shisan no Tenkan Shisutemu (A Conversion System for Owner-occupied Assets)*.[14] This book examines reverse mortgages in Japan from business, management, and sociological perspectives, thus revealing some of the attending legal issues. There are also studies[15] that consider reverse mortgages as a financial foundation for the elderly from the perspective of laws pertaining to the elderly. Some studies[16] are also based on the legal perspective of the elderly but emphasize the role of reverse mortgages as a tool similar to trusts for enforcing the will of elderly citizens regarding their own property, as well as other related works[17] that describe reverse mortgages from the viewpoint of those in the business.

Some studies deal extensively with reverse mortgages, and some others deeply investigate the legal issues involved. As an example, Morita[18] considered the legal challenges of reverse mortgages prior to them being a focus of attention in Japan, thus providing a comparative theory on reverse mortgages in the U.S. Moreover, Taniguchi[19] discussed the legal issues and subsequent developments under the Japanese law.

In addition, Yamakita, a law practitioner, mentioned about the possibility of using trusts early on in his research.[20] Although there are studies presented from a law practitioner's

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[14] Kurata, T., *Mochiie Shisan no Tenkan Shisutemu (A Conversion System for Owner-occupied Assets)* (Hosei University Press, 2007). Kurata, T., *Kyoju Fukushi Wo Design Suru - Minkan Seido Reverse Mortgage No Kanousei (Designing Residential Welfare: The Potential of Private System Reverse Mortgages)* (Minerva Shobo, 2012).

[15] Higuchi, N. and Seki, F. (eds.), *Koureishahou - Chouju Shakai No Hou No Kiso (The Law for the Elderly: Fundamentals of Law in a Longevity Society)* University of Tokyo Press, 2019, up to p. 108. Kato, H. (ed.), *Choukoureika Shakai No Kaigoseido - Jizokukanou Na Seido Kouchiku To Chiiki Zukuri (The Long-Term Care System in a Super-aging Society: Building a Sustainable System and Creating Communities)* (Chuokeizai-Sha Holdings, 2016), Chapter 5. Namiki, T., *Choukoureika Shakai Deno Kinyuu No Hatasu Yakuwari - Reverse Mortgage Wo Fukumu Kinyuu Shouhin No Katsuyou (The Role of Finance in a Super-aging Society: The Use of Financial Products Including Reverse Mortgages)*.

[16] Institute of Gerontology, The University of Tokyo (ed.), *Todai Ga Tsukutta Koureishakai No Kyoukasho - Chouju Jidai No Jinsei Sekkei To Shakai Souzou (The University of Tokyo's Textbook for an Aging Society: Life Planning and Social Creation in the Age of Longevity)* University of Tokyo Press, 2017, p. 303.

[17] Nakatani, S., *Koureisha No Seikatsu Shikin Nenshutsu No Kirifuda - Reverse Mortgage - Mochiie Ga Anatano Rougo Wo Shiawase Ni Suru (Reverse Mortgage: The Trump Card for Raising Living Funds for the Elderly and Creating Happiness in the Senior Years)*, Kobe Shimbun General Publishing Center, 2017 is a great example of a representative work.

[18] Morita, R., *America Ni Okeru Reverse Mortgage No Katsuyou To Nihon Deno Tekiyou No Kadai (The Use of Reverse Mortgages in the U.S. and the Challenges of Applying Them in Japan)*, Nihon Keizai Daigaku Ronbunshu, Vol. 43, No. 2, pp. 185-197.

[19] Taniguchi, S., *Wagakuni Ni Okeru Reverse Ortgage No Tenkai (The Development of Reverse Mortgages in Japan)*, Bulletin of the Institute for Research of Regional Economy, Takasaki City University of Economics, Vol. 45, No. 1, pp. 30-40.

[20] Yamakita, H., *Reverse Mortage No Genjou To Kadai (Reverse Mortgages: Current Status and Issues)*, Monthly Report of Japan Federation of Shiho-Shoshi Lawyer's Associations, 2011, No. 472, pp. 25-31.

perspective on the possibility of using reverse mortgages and trusts,[21] only a few have explored this possibility.

4) Challenges that hinder the use of reverse mortgages

This paper examined some of the challenges and issues that may arise in terms of the use of reverse mortgages, thus comparing them to a reverse mortgage approach known as the Home Equity Conversion Mortgage (HECM), which is commonly used in the U.S.

(a) Three major risks for collateral collapse

Reverse mortgages are subjected to multiple risks of collateral collapse; there are three major risks for collateral collapse in reverse mortgage, namely, (1) longevity risk, (2) interest rate fluctuation risk, and (3) risk of decline in real estate collateral value. In particular, the longevity risk refers to the risk that the borrowing amount may exceed the appraised value of the owner's house due to a long life in the context of reverse mortgages.[22] In Japan, to hedge this risk, there are only a few reverse mortgages that provide loans until death, such as pensions. In most cases, they are fixed-term loans. Risks (2) and (3) are not unique to reverse mortgages, as they represent collateral collapse risks that can be problematic in relation to conventional loans.

(b) Limited number of users

The purpose of a long-term living fund support system is to supplement living funds for low-income individuals (for example, exemption from residential taxation). Hence, the number of eligible elderly people is limited. In addition, as noted previously, private reverse mortgages largely limit their target properties only to land (and buildings) with a substantial appraisal value. One of the reasons for this is considered to be that buildings (especially used buildings) have little value in Japan. Moreover, the government is endeavoring to improve the value of used buildings,[23] but many issues are still to be addressed. In other words, public reverse mortgages are mainly available to low-income people, while private reverse mortgages are mainly available to people with substantial assets. Consequently, there are few reverse mortgages available to the middle class. Another problem is the division of public reverse mortgages into national and local levels. If these were integrated together, as in the U.S., the risk of collateral collapse might be

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[21] Enishi, S., *Reverse Mortgage To Shintaku No Katsuyou Ni Tsuite (On the Use of Reverse Mortgages and Trusts)*, 2016 Summer Edition, The Land Institute of Japan, pp. 43-48.
Shibui, K., *Reverse Mortgage To Kazokukan No Shintaku No Yuugou (The Integration of Reverse Mortgages and Family Trusts)*, 2016 Summer Edition, The Land Institute of Japan, pp. 49-54.

[22] Moreover, the usual longevity risk refers to the risk of living longer than expected and thus exhausting all savings.

[23] Ministry of Land, Infrastructure, Transport and Tourism, *Basic Plans for Living (National Plan)* (approved by the Cabinet on March 15, 2011).

avoided (especially the longevity risk). The current system (long-term living fund support system), which is quite limited in terms of who can receive loans, could undergo some amendments.[24]

(c) Issues related to the lifetime annuity system and contractual capacity

As reverse mortgages are limited to the elderly, verifying the borrower's ability to enter into a contract and make competent decisions may be a challenge; furthermore, a major feature of reverse mortgages is that the contracting party is often an elderly person whose mental capacity is declining. The HECM type of reverse mortgage offers counseling to those who wish to receive it.[25] Unfortunately, this type of counseling is not offered in Japan. Therefore, this practice should be considered, as it is important to prevent conflicts before they occur and not just to deal with them after they have occurred.

(d) Problems with recourse loans

In many cases, reverse mortgages in Japan are recourse loans, which mean that a guarantor must be provided. However, it is often difficult for the elderly to find a guarantor in general and not just for reverse mortgages. HECMs in the U.S. apply nonrecourse loans to avoid the aforementioned risk of collateral collapse. In other words, even if the sale price of the collateral is less than the loan amount, the elderly borrower will not be expected to repay the loan through other means; therefore, the sale of the collateral object represents the fulfillment of the obligation. Hence, a guarantor is not needed in this case. Consequently, it can be assumed that there are few barriers to applying reverse mortgages for both the lenders and borrowers in the U.S.

(e) Lack of provisions for surviving spouses

In many cases, there is no provision for joint and several debtors. If a spouse is not designated as a joint debtor, the surviving spouse may not be able to continue to live in the property when the debtor passes away. A bill to amend the Inheritance Law was passed in July 2018, and spousal residence rights are also scheduled to be modified in the Civil Code in the future. Further discussion is necessary regarding the spousal residence rights that will be newly established through Civil Code amendment and stipulated in reverse mortgage contracts.

In the HECMs in the U.S., a provision regarding the residence rights of the surviving

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[24] Tanimura, N., *Seikatsuhogo To Reverse Mortage Seido - Youhogo Setai Muke Chouki Seikatsu Shien Shikin Wo Chuushin To Shite (Public Assistance and the Reverse Mortgage System: Focusing on Long-Term Living Fund Support System for Households in Need of Public Assistance)*, Research Bulletin of Kagoshima Immaculate Heart College, 2009, No. 39, pp. 47-58; this work has highlighted that long-term living fund support payments, particularly for households requiring assistance, may violate the Constitution.

[25] HECM Counseling Protocol: https://www.nrmlaonline.org/wp-content/uploads/2010/07/072010-HECM-Protocol-Revision.pdf (Last accessed August 23, 2019).

spouse after the death of the debtor is specified within the contract, thereby protecting their residence rights.[26] Furthermore, considerations are carefully made so as not to consider reverse mortgage loans as income, which prevents the disqualification of people from low-income programs with income limits such as Medicaid and Supplemental Security Income.[27]

(f) Consent of the presumed heirs

A problematic situation arises when the heirs of an elderly person who had a reverse mortgage do not provide their consent for the sale when the debtor passes away. In Japan, it is recommended to obtain a written consent of the heirs when entering into contract for a public reverse mortgage. However, in reality, there are many cases wherein this consent is not obtained beforehand.

5) Problems with reverse mortgages in Japan: The case of Musashino City[28]

One of the first cases in Japan in which the reverse mortgage was introduced was a program launched in Musashino City in 1981. In 1973, Musashino City launched programs, such as a senior meal service, a silver helper system, and a bathhouse program, and expanded welfare for the elderly by providing day-care, bathing, and short-stay services. As a continuation of this trend, a welfare fund loan ordinance of Musashino City was enacted in 1981, and a welfare fund loan program, including reverse mortgages, was started.[29]

Musashino City's reverse mortgage was a pioneering effort in Japan. It influenced the subsequent introduction of reverse mortgages by the government and private entities. However, in March 2015, 34 years later, Musashino City decided to discontinue this program.[30]

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[26] Consumer Financial Protection Bureau "Snapshot of reverse mortgage complaints December 2011–2014" p. 9 [https://www.consumerfinance.gov/data-research/research-reports/snapshot-of-reverse-mortgage-complaints-december-2011-2014/ (Last accessed August 23, 2019). In addition, refer to, https://assets.documentcloud.org/documents/2756372/201502-Cfpb-Report-Snapshot-Reverse-Mortgage.pdf].

[27] Lawrence. A. Frolik and R. L. Kaplan, *Elder Law In A Nutshell* (6th ed. 2014), p. 220.

[28] For details, see Nakata and Matsui (Note 7).

[29] Musashino City, *Report of the Musashino City Welfare Fund Loan System Review Study Committee*, p. 1. Musashino City's program was designed to help people receive residential welfare for a fee and continue living at their residence. Hence, it was different in nature from other reverse mortgages, which only provide cash loans to the elderly.

[30] According to the *Fifth Committee Meeting Minutes of Musashino City Welfare Fund Loan System Review Study Committee* of Musashino City, there were two proposals for revamping the welfare fund loan system: (1) abolish the system and (2) continue the program with stricter conditions including raising the target age and revising the limit. As a result of the discussions between the study committee members and the secretariat, it was apparent that they were aware that this was a flagship program, but they were nevertheless leaning toward abolishing the system.

Musashino City's program was based on direct financing, with the welfare corporation acting as the contracting party; taxes were used as the source of funds. When the program commenced, it was acknowledged to be "unfair that only some people would benefit from the program" in the city council discussion.[31] In 2012, the mayor of Musashino City commissioned the establishment of the Musashino City Welfare Fund Loan System Review Committee, and the method by which the welfare corporation was operated was reviewed.[32] The review addressed the following five problems:[33]

First, long-term care insurance system reduced the demand for residential welfare services provided by the welfare corporation. It was determined that the role played by the Musashino City's welfare corporation had been replaced with the introduction of the long-term care insurance system. Second, the significance of the city's lending as a welfare fund had been reduced. The original purpose of this system was to provide loans for the use of home welfare services facilitated by the welfare corporation. However, most of the loans at that time were being taken to support "living expenses." The trend was not in line with its original purpose. Third, after the system was launched, similar reverse mortgages were introduced by the government and private financial institutions, which increased the number of options. Fourth, the risk of collateral collapse became evident. Fifth, all the expenses used for the welfare loan program were paid from Musashino City's general fund.

Musashino City's system was abolished based on the three following major factors: (i) the establishment and spread of long-term care insurance system, (ii) the emergence of the real risk of collateral collapse, and (iii) expenditures from the city's general financial resources. The advent of long-term care insurance system was not anticipated when Musashino City launched this program, as it possessed a unique significance. The third problem, on the contrary, occurred because Musashino City adopted the direct loan system, which is uncommon in other municipalities.[34] Of the three factors, the most difficult to solve is the second problem, i.e., the collateral collapse risk, a problem inherent within the reverse mortgage mechanism.

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[31] Musashino City, *Report of the Musashino City Welfare Fund Loan System Review Study Committee* (Note 29), p. 2.

[32] The following link will take you to the minutes and report of the 5th meeting of the review committee. http://www.city.musashino.lg.jp/shisei_joho/shingikai/shingikai_kaigiroku/koureishashien/1010573/index.html (Last accessed August 23, 2019).

[33] Musashino City, *Report of the Musashino City Welfare Fund Loan System Review Study Committee* (Note 29), pp. 3-5.

[34] Originally, the main purpose of this project was to provide loans to elderly households that had real estate assets but little cash income. In reality, however, loans were often made to elderly households that not only had real estate assets but also had sufficient cash income. As such, a major criticism has been directed at the use of city resources to finance such program.

Due to the collapse of the mortgage bubble economy and the Lehman shock, the value of real estate in Musashino City fell drastically, and the loan period became longer than expected. In some cases, as a result, the maximum loan amount was reached during the course of the program; furthermore, in cases where the maximum loan amount was reached while the elderly was still alive and the repayment was postponed until the time of death. The repayment amount from the property sale was less than the loan balance in some cases, and therefore, lenders could not collect the loan in full. These developments thus represent the manifestation of the longevity risk and the risk of collateral loss.

The most common form of reverse mortgage in Japan is the annuity type wherein the loan is provided on a monthly basis. However, many of these loans do not cover the debtor until their death, as in the case of public pensions, but establish upper limits, as in the case of Musashino City. Reverse mortgages, such as general insurance, are designed based on life expectancy. If the loan term is assumed to be 20–25 years, it may pose a longevity risk that is greater than expected due to the longer lifespan of the debtor.[35] The same holds true for Musashino City where the average life expectancy in 1980 was 73.35 and 78.76 years for men and women, respectively.[36] Therefore, they likely set the loan to last until 80 years old.

6) Other issues surrounding lower court cases

There have been no lower court cases in Japan that directly challenged the issue of reverse mortgages. In this section, we will discuss two cases involving reverse mortgages.

(a) Tokyo District Court, August 6, 2014[37]

In this case, Plaintiff A sought to eliminate the power of execution, through an action to oppose a claim against Defendant B, of a notarial deed created to facilitate payments for childcare support during their amicable divorce procedure on the grounds that a part of the debt stated in the notarial deed has been extinguished via repayment. This is where the reverse mortgage became a problem. Plaintiff A and Defendant B had twins. Due to A and B's flamboyant lifestyle and the expenses of the twins' education and childcare expenses, the total debt at the time had reached 135.55 million yen. Subsequently, Plaintiff A (in 30s) made an appointment for Tokyo Star Bank's individual financing

[35] It is difficult to set the lending period for reverse mortgages because it is not only a matter of life expectancy, as in life insurance. In some cases, much of the reverse mortgage financing is still currently performed in the form of lines of credit, thus raising the possibility that they may be constrained by contractual capacity issues.

[36] Ministry of Health, Labor and Welfare, *Heikin Jyumyo no Suii (Trends in Average Life Expectancy)*, http://www.mhlw.go.jp/wp/hakusyo/kousei/10-2/kousei-data/PDF/22010102.pdf (Last accessed August 23, 2019).

[37] Tokyo District Court, August 6, 2014 (LEXDB Document No.: 25521230).

concierge consultation program called *Jujitsu Jinsei* for Plaintiff C, who is Defendant B's father (in a different case), and Plaintiff C applied to Tokyo Star Bank to borrow this new type of reverse mortgage (*Jujitsu Jinsei*) with a maximum loan amount of 15.6 million yen. Consequently, a revolving mortgage was created on the land and building where Plaintiff C lived, with the bank as the right holder. Thereafter, a loan of 15.6 million yen was transferred to Plaintiff C's bank account, and on the same day, Plaintiff C withdrew the money and lent it to the household of Plaintiff A and Defendant B. Over the next two years, Plaintiff C paid off the loan from Tokyo Star Bank.

Reverse mortgages offered by private financial institutions can be categorized into three main types based on the purpose of use: free use, limited use, and leasing. In recent years, an increase was observed in the volume of free use loans that do not restrict the purpose of use, as the lenders want to make the process more convenient so that people can use it as something similar to a pension. However, there are times when this free use is taken advantage of, and the loans are taken out in a way that does not align with the original purpose. The aforementioned case can be said to be a perfect example of this. In other words, the reverse mortgage contract in this case was not used by an elderly couple to enrich their lives but to pay off the debts of their children. As evidence, the young couple (in their 30s) made an appointment for a consultation before signing the reverse mortgage contract. Additionally, the repayment period of a reverse mortgage is usually set at the time of death, but ultimately, the entire loan was repaid in just a little over two years.

(b) Tokyo District Court, November 9, 2015[38]

In this case, a land and building were co-owned by the Plaintiff and the Plaintiff's younger brother; each of whom owned one-half of the land and building to which an Agreement on Division of Inheritance was drawn up; the land and building in question became the sole property of the Plaintiff's younger brother (who lived on the land and in the building with his parents and grandmother at the request of his grandmother along with his wife and children and took care of his parents and grandmother). In all, nine years after drawing up the Agreement on Division of Inheritance, the Plaintiff's younger brother signed a reverse mortgage agreement with Sumitomo Mitsui Trust Bank. Hence, a revolving mortgage was created on the land and building in question, and the Plaintiff's younger brother received a loan based on this reverse mortgage contract. After the younger brother died, the Plaintiff claimed that the aforementioned Agreement on Division of Inheritance was forged by the Plaintiff's younger brother and that the Plaintiff had a one-half interest in the property. The Plaintiff sued Sumitomo Mitsui Trust Bank

[38] Tokyo District Court, November 9, 2015 (LEXDB Document No.: 25532135).

and requested the bank to conduct procedures, including registering the transfer of land/building ownership and correcting the registration. Most of the issues were about the authenticity of the aforementioned Agreement on Division of Inheritance. The reverse mortgage contract was not the issue here. However, the financial institution that managed the reverse mortgage took the risk of being sued. Therefore, this case exposes the problems inherent in reverse mortgages.

In this case, Sumitomo Mitsui Trust Bank seems to have obtained the consent of the presumed heirs while concluding the reverse mortgage contract because the real estate in question (especially the land) was valued quite high, at over 130 million yen, and the maximum loan amount was presumably high. If the presumed heirs do not give their consent beforehand in such a situation, it may cause problems at the time of inheritance, and the procedure for selling the property after death may not proceed. On the contrary, in most cases, lenders do not obtain the consent of the persons other than the presumed heirs who have previously had an interest in the property. This aspect highlights the fact that financial institutions are at a risk of being sued by such persons.

III. Innovations against collateral loss in the U.S.

1) History of reverse mortgages

The concept of reverse mortgages was developed in 1961 in Portland, Oregon, in the U.S.. Nellie Young, a high school football coach, was in financial trouble after the death of her husband, and an employee of a local financial institution that offered saving and loan products wanted to support her and hence developed this special financial product (reverse mortgage).[39] When private lenders began reverse mortgages in 1961,[40] a wide variety of reverse mortgage programs emerged, and the concept began to spread throughout the U.S..[41]

Ken Scholen's work in 1978 promoted research, education, and development of reverse mortgages as a financial product.[42] The risk of collateral loss that is inherent in reverse

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[39] The History of Reverse Mortgage:
https://www.reversereview.com/wp-content/uploads/2012/10/October.Spotlight.HECMTimeline1.pdf
(Last accessed August 23, 2019).

[40] Kojima, T., *Reverse Mortgage Ni Motomerareru Seifu No Yakuwari - Beikoku (Home Equity Conversion Mortgage (HECM)) Tanjou No Ikisatsu To Igi - (The Role of Government in Reverse Mortgages: The Birth and Significance of Home Equity Conversion Mortgages (HECMs) in the United States)*, Nomura Institute of Capital Markets Research Quarterly 2012 Summer (2012), pp. 83-97, 86.

[41] Another example is the Property Tax Deferral Program established in Oregon in 1963, which is regarded as a prototype of the reverse mortgage. (See Kojima (Note 8), p. 86.)

[42] Morita (Note 18). In the same year, the State of Wisconsin's Department of Rural Development offered Deferred Payment Loan Programs for senior citizens who had difficulty maintaining or renovating their homes. It is considered to be the first reverse mortgage by a public institution because it was made in the form of a monetary loan to the elderly (pp. 189-190).

mortgages was highlighted as the main issue in the U.S. Therefore, Scholen urged government involvement in reverse mortgages.[43] The driving force behind the rapid growth in the use of reverse mortgages was the increased involvement of the federal government. Scholen, who contributed to this movement, is still regarded as the "godfather" of reverse mortgages.[44]

In 1982,[45] the Housing and Community Development Act was passed. This act stipulated that the Federal Housing Administration (FHA),[46] which is under the supervision of the Department of Housing and Urban Development (HUD), would be responsible for the provision of reverse mortgage insurance. In 1987, the HECM proposal (government-backed reverse mortgage) was passed by the Congress. In the following year, President Reagan signed it into law,[47] and in 1989, HECM became a law. The Housing and Community Development Act of 1987[48] includes provisions for creating a reverse mortgage market for the future. For two years, starting in 1989 as a pilot program, the FHA was allowed to provide HECM insurance for up to 2,500 cases.

After 1990, the number of HECM users rapidly increased; by 1997, the number of HECM lender institutions reached its height, i.e., 195. Moreover, in the following year, the HUD Appropriations Act formally recognized the HECM program. The Congress also allocated funds for counseling, outreach, and consumer education. Furthermore, to protect consumers (users), safeguards (such as full disclosure of fees) were implemented.

Since the 2000s, HUD and the American Association of Retired Persons (AARP) have worked together to launch counseling policies to help seniors accurately understand and use reverse mortgages, which can be difficult to comprehend. At this time, a counseling procedure protocol was introduced for anyone wishing to apply. Moreover, in 2005, the first HECM refinancing was conducted. In the following year, the AARP conducted a national survey of reverse mortgage borrowers. The main motivations for using reverse mortgages were to prepare for future emergencies and improve the quality of life.

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[43] Specifically, the Federal Housing Administration (FHA) proposed to provide insurance for reverse mortgages.

[44] Under Scolen's leadership, in 1978, the Bureau on Aging of Wisconsin launched a reverse mortgage research project, and a study group for the realization of reverse mortgages was initiated. He was instrumental in the birth and development of reverse mortgages, including the creation of the National Center for Home Equity Conversion, an independent non-profit organization in 1981.

[45] Kojima (Note 42) and Morita (Note 18), who point out that the Garn-St. Germain Depository Institution Act of 1982, clarified the supervisory and regulatory framework for reverse mortgages.

[46] This is a part of the HUD Bureau that guarantees mortgage debt.

[47] Kojima (Note 42). Regarding the significance of President Regan's signature, the author posits, "reducing the cost of health care, which has been on the rise since the establishment of Medicaid in 1965, has been one of the top priorities, and the pilot HECM project is regarded as a way to control the increase in fiscal spending on health care, which is expected to continue to rise, and can be said to have arisen because of its congruency with the policies of the 'small government'" (p. 89).

[48] See the *Housing and Community Development Act of 1987*.

In 2008, there was a surge in loans because the first baby boomers had reached 62 years of age, the age of HECM availability. In the same year, the Secure and Fair Enforcement for Mortgage Licensing Act (2008) was enacted. This licensed the HECM loan originators and necessitated the states to follow consistent procedures when registering them.[49] By 2009, the HECM for Purchase was introduced,[50] establishing three types of HECMs: *HECM refinancing*, *HECM for Purchase*, and regular HECMs.

After entering the new decade, additional options were added to reverse mortgages, thus making the product safer for users. In 2010, HUD developed a new HECM called the HECM Saver that allowed consumers to borrow less than a standard reverse mortgage. In the same year, according to a national survey conducted by the AARP, the motivation for using reverse mortgages shifted from *improving quality of life* to *reducing debt* because of the impact of the Lehman shock. In 2013, HUD announced a new HECM policy to make reverse mortgages safer, stronger, and less risky. By 2017, the HECM loan limit was raised for the first time[51] since 2009 because of the rising housing prices.

2) HECM's terms of use

Currently, reverse mortgages in the U.S. are almost exclusively dominated by HECMs, which are widely used. To use HECMs, requirements for both the borrower and the borrower's residential property were set out, and both must be met.[52]

(1) Terms of use for the borrower

The following are the terms of use for the borrower: (i) users (borrowers) of HECMs must be at least 62 years old. Prior to 2014, there was a strict requirement that the spouse also had to be at least 62 years old. However, now, there are special cases wherein the spouse can be under the age of 62.[53] (ii) Borrowers must have ownership[54] of the real estate that is the subject of the HECM. However, HECM can also be used to acquire a property through the loan for the purpose of relocating to an alternative property. (iii) No delinquent payments on federally related debts can be incurred and the property must not be listed on HUD's exclusion list, and (iv) the borrower and spouse must attend

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[49] The Housing Economic Recovery Act of 2008 provides safeguards for consumers.

[50] This allows borrowers to buy a new house without paying a monthly mortgage. In this method, the loan is repaid from the proceeds of the sale at the time of death or evacuation, mirroring regular reverse mortgages. This method is being used to replace large houses, which are difficult for the elderly to maintain and manage with compact and livable houses that are in line with their family structure.

[51] The then President Barack Obama signed the American Recovery and Reinvestment Act of 2009, which raised the lending limits for HECMs.

[52] "FHA Reverse Mortgages (HECMs) for Seniors" https://www.hud.gov/program_offices/housing/sfh/hecm/hecmabou (Last accessed August 23, 2019).

[53] *See, supra* Note 54.

[54] There must also be no mortgage on the house in which the borrower is living in (i.e., mortgage must be paid off). However, in some cases, including refinancing, this requirement is omitted.

counseling with a HUD-approved counselor prior to implementing the application process.

Only those who are recognized as having the ability to fulfill the obligations of the HECM loan agreement by meeting the abovementioned terms will be eligible to use HECM. However, in principle, HECM does not require the submission of documents showing financial capacity, which is usually required for regular loans.

(2) Property requirements

(i) The property must be habitable and complete, (ii) have a real estate appraisal,[55] (iii) be detached or a building of no more than four units,[56] and (iv) meet HUD's minimum property requirements.

As there are not many requirements imposed on the eligibility of the borrower and property, it can be said that HECMs are relatively easy to obtain.

3) Handling the risk of collateral loss

By nature, reverse mortgages must be long-term loans with no fixed term; therefore, the risk of collateral loss, such as longevity risk, interest rate fluctuation risk, and risk of decline in real estate value, exists naturally These are common issues of reverse mortgages not only in Japan but also in other countries, including the U.S.

(1) Regarding the longevity risk, lenders are generally unwilling to assume this risk. Therefore, there are many cases in the U.S. wherein private reverse mortgages other than HECM are loaned for a fixed period. As the time of death of each individual is independent of others, the *law of large numbers* applies to this risk (as the number of users increases, the risk can be standardized and spread).[57] As HECMs possess a government guarantee, the lender does not need to be concerned about a failure to collect the debt. Moreover, the barriers to use are less, as the application requirements are not very strict and are standardized. The AARP, which has a considerable of members, has promoted the use of reverse mortgages, thereby greatly contributing to the expansion of users. Furthermore, in formulating the loan amount, life expectancy is assumed to be 100 years[58] (which is longer than the assumed life expectancy in Japan). Of course, if the users live longer than 100 years, there might be a risk of collateral loss. Even in such a case, if there are many users, the risk can be standardized by the law of large numbers.

[55] Real estate appraisals must be based honoring FHA guidelines.
[56] Regarding the building with up to four housing units, one unit must always be occupied by the borrower. Furthermore, HUD-approved condominiums and some mobile homes can sometimes also meet the HECM eligibility requirements.
[57] In other words, it mirrors regular insurance in that it uses the law of large numbers.
[58] Lawrence. A. Frolik and R. L. Kaplan, *supra* Note 27, p. 216

(2) Interest rate fluctuation risk is diversified through securitization.

(3) The risk of real estate value fluctuation (decline) is difficult to avoid. In the U.S., government insurance underwrites this risk. This aspect provides peace of mind to the lenders who fear loss.[59]

Changes in the real estate value and markets occur in the same directional vector nationwide. Unlike the longevity risk, it is challenging to diversify this risk using the law of large numbers.[60] A method of creating a fund in case of a sudden drop in real estate values (known as the risk pooling method) is a viable option. However, if prices fall in a circumstance when such a fund has not been sufficiently created, it will be difficult for the fund to survive, thus burdening and limiting the capacity of the private sector to provide such insurance.[61] Hence, the U.S. government chose to provide this insurance.

The HUD-supervised FHA guarantees protection for lenders against the risk of overlending from declining home appraisal values and guarantees borrowers protection against the risk of the inability to continue receiving the loan if the lender goes bankrupt. When reverse mortgages first began, Fannie Mae (Federal National Mortgage Association) assumed the responsibility for supporting this program. Following the collapse of Lehman Brothers, this role was transferred to Ginnie Mae (Governmental National Mortgage Association). Fannie Mae and Ginnie Mae are among the government-sponsored financial institutions that are supervised by the HUD.

Fannie Mae was founded in 1938, privatized in 1968, and is now a semi-private, governmental sponsored enterprise under HUD supervision. It bought mortgage bonds listed on the balance sheet of private financial institutions (for example, banks) and issued collateralized guarantee notes in the securitization market. Lenders were also selling HECM loan receivables to Fannie Mae to avoid the risk of holding the receivables on the balance sheet for an extended period and facilitate easier issuance of new loans. Fannie Mae is experienced in handling defaulted mortgage loans and therefore presented as the perfect investor for purchasing HECM debt.[62] However, due to the subprime mortgage crisis in 2008, Fannie Mae was forced to post losses, thus making it necessary to shift the handling of HECMs from Fannie Mae to Ginnie Mae.

Ginnie Mae, like Fannie Mae, is a HUD-supervised government-sponsored enterprise, but it is quite different from Fannie Mae in that it is a pure government agency, as opposed

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[59] However, after the subprime crisis, when real estate values fell and collateral lost value, subsidies were effectively paid by the government. To combat this, reverse mortgage insurance premiums were raised thereafter. In that sense, it can be said that the borrower (elderly person) bears the risk cost.

[60] Kojima (Note 42).

[61] American Homestead, which adopted the risk pooling method, was unable to secure the expected rate of appreciation when real estate prices slumped. Consequently, the company ceased operations in 1990.

[62] Kojima (Note 42).

to being a semi-private entity.[63] Ginnie Mae securitizes publicly insured or guaranteed FHA mortgages [mortgage-backed securities (MBS)] and is responsible for guaranteeing principal and interest payments. The MBS guarantee by Ginnie Mae can be considered an explicit guarantee of the federal government. Ginnie Mae is not like Fannie Mae or other government-sponsored enterprises, as it does not bear the credit risk of mortgage bonds, which is borne by the FHA; in other words, Ginnie Mae only guarantees the principal and interest payments on the MBS. As the credit risk of the underlying mortgage loans is borne by the FHA, Ginnie Mae is largely immune to the challenges of default and foreclosure that could result from a housing bubble collapse.[64] Moreover, the fact that Ginnie Mae also guarantees HECMs (MBS) is reassuring to borrowers.

4) Configuring a trust while utilizing HECM

It is common to establish a living trust on a collateral property while using an HECM, or conversely, to use an HECM on a property that was originally held in trust. This aspect is obviously allowed as long as the respective conditions and requirements are met.[65] However, the aforementioned trust is not configured as an alternative means of obtaining consent from the presumed heirs, which is the case in Japan. It acts more as a means of enforcing their will with respect to the property.

The circumstances in the U.S. have traditionally differed from those of the U.K., which will be discussed later. In the U.S., trusts have been used to pass on assets, more so than to avoid inheritance taxes.[66] In the U.S., formal inheritance procedures require court proceedings (probate procedures). Therefore, trusts have been used in the U.S. to avoid this probate process. Furthermore, rather than using a trust as a *point in time* for distributing inheritance, as is the case in Japan, it has been used to plan asset management as a *line* that runs through one's life until their death. Therefore, it functions as an estate planning vehicle for one's family, including the surviving spouse and children.[67] Hence, the aforementioned trust is not created to obtain the consent of the presumed heirs but to function as a vehicle for asset management during one's life and after their death.

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[63] Other HUD-supervised, government-sponsored enterprises include Freddie Mac. Fannie Mae and Freddie Mac are semi-governmental organizations, but Ginnie Mae is a pure federal agency.
[64] See Kobayashi, M., *Beikoku Seifu Teitou Kinko (Ginnie Mae) No Saikin No Doukou (Recent Developments of Ginnie Mae in the U.S.)*, Quarterly Journal of Residential Finance (2013), No. 28, pp. 66-73.
[65] HUD, Chapter 4 mortgage credit analysis 4 (available at https://www.hud.gov/sites/documents/42351C4HSGH.PDF) (Last accessed August 23, 2019).
[66] Higuchi, N., *America Ni Okeru Souzoku (Shibou Niyoru Zaisan Shoukei) To Seizen Shintaku No Katsuyo [Inheritance (Succession to Property by Death) and the Use of Living Trusts in the United States]*, Journal of Law and Political Science, Musashino University, No. 9 (2018), pp. 201-236, 233.
[67] See Higuchi (Note 68), p. 222.

IV. Reverse mortgages in the U.K.

1) History of equity release[68]

What is called a reverse mortgage in the U.S. is referred to as an equity release mortgage in the U.K. (hereinafter referred to as equity release in this study). In recent years, a product called a lifetime mortgage has been frequently used, which is why this type of mortgage is now sometimes generally referred to as lifetime mortgage.

After Thatcher's Conservative Party came to power in 1979, the public pension system in the U.K. was subjected to a process of downsizing. This aspect resulted in the emergence of the needy low-benefit pensioners, particularly among the middle- and low-income groups and self-employed households. Today, in the U.K., the general public considers it normal to invest in real estate for the future, rather than relying solely on pensions.

The equity release in the U.K. dates back to 1930, which is much earlier than reverse mortgages in the U.S. In 1965, Home Reversion (later renamed as Hodge Equity Release) introduced a product similar to the current equity release in the market in the U.K. In 1972, the Home Income Plan was launched wherein when a life annuity is purchased as a loan, the borrower repays only the interest while receiving the monthly annuity income, and the principal is repaid through the sale of the mortgaged house upon death.

By 1988, roll-up plans that did not require interest payments during the term and even products with high borrower risk, on a floating instead of a fixed rate basis, were developed. These plans were widely used at the time in accordance with the adoption of Life Assurance Premium Relief until 1984 and Mortgage Interest Relief at Source was provided during home purchases based on the Finance Act of 1983. As the lending banks were directly compensated by Her Majesty's Revenue and Customs for the interest amount based on this interest-relief system, it was regarded as safe and easy to use. In contrast, this was not the kind of support that would compensate for the three major collateral loss risks of reverse mortgages like HECM in the U.S.; however, the

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[68] Shinohara, F., *Eikoku No Equity Release Oyobi France No Viager Nadono Genjou (The Current Status of Equity Release in the U.K. and Viager in France)*, The Land Institute of Japan (2016 Summer Edition), pp. 79-98.
Nishizawa, T., *Kakkoku No Reverse Mortgage To Seidoteki Hatten (History and Institutional Development of Reverse Mortgages in Various Countries)*, Annual Report of The Institute of Economic Research, Chuo University, No. 45 (2014), pp. 365-384.
Kojima, T., *Eikoku/Kankoku No Reverse Mortgage Ni Tsuite (On Reverse Mortgages in the U.K. and South Korea)*, Nomura Institute of Capital Markets Research Quarterly Spring (2013), pp. 1-9. Radu S. Tunaru *'UK Equity Release Mortgages: a review of the No Negative Equity Guarantee'* (2019) (available at https://www.actuaries.org.uk/system/files/field/document/ARC%20Final%20Research%20Report_ERM%20NNEG_19022019.pdf) (Last accessed August 23, 2019).

government's interest subsidy lowered the cost of purchasing a Home Income Plan, which is considered to have led to a rapid increase in consumer demand.[69]

Inflation and falling home values since the end of the 1980s have resulted in accumulated losses for borrowers of the Home Income Plan, many of whom were elderly pensioners to begin with. This aspect became a social problem in the U.K., as elderly borrowers who were unable to pay their excess debt had their homes repossessed. As a result, in 1990, the plan was overseen under financial regulations and was subsequently suspended for new borrowers.

In 1991, a new product called the Safe Home Income Plan (SHIP) was introduced in the market. At that same time, an industry group of the same name, *SHIP*, was established to enforce the accountability and compliance of borrowers, which had been lacking in the past. The industry group was renamed the Equity Release Council in 2012, thereby broadly expanding the consumer protection measures.

In contrast to the U.S., public reverse mortgages are not offered on a national level in the U.K. where as many private equity releases in disarray exist as there are in Japan. Therefore, the purpose of government involvement is limited to the regulation of conduct in financial products and transactions by the Financial Conduct Authority.

2) Terms and conditions (primarily of lifetime mortgages)

This section provides an overview of the terms and conditions of lifetime mortgages, which is the most commonly used form.[70] A lifetime mortgage is a system in which a mortgage is placed on a home and the loan is taken over a period. Upon completion of the contract (for example, upon the death of the borrower), the borrower or his or her heirs repay the loan (principal and interest) in a lump sum by selling the property. As noted, it is now mandatory for each provider to establish his/her own No Negative Equity Guarantee (NNEG) in such cases. This factor allows borrowers to achieve security similar to HECMs in the U.S.

The borrower must be at least 65 years old (in the case of a couple, both must be at least 65 years old). Diagnosed health conditions that affect life expectancy are considered. The borrower must be a British citizen.

The property must be a detached house or a flat including a basement. Furthermore,

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[69] Fudosan Ryutsu Sokushin Center Public Interest Incorporated Foundation (Real Estate Information and Promotion Center), *Shoyuu Fudousan Wo Riyou Shita Koureisha No Seikatsu Anteisaku Ni Kansuru Kaigai Chousa Kenkyuu Houkokusho (Report on Overseas Survey Research on Measures to Stabilize the Lives of the Elderly Using Real Estate Owned)* (Real Estate Information and Promotion Center, 2016), pp. 77-78.

[70] The Money Advice Service, Lifetime Mortgage (available at https://www.moneyadviceservice.org.uk/en/articles/lifetime-mortgage) (Last accessed August 23, 2019).

properties above the fifth floor without an elevator are not eligible. Other requirements include constraints of the property being located in England, Wales, or Scotland and the property being owned as well as being occupied as the primary residence. Additionally, if the property is in freehold or leasehold, the number calculated by subtracting the borrower's age from 145 years must be at least 65 years.

3) Initiatives to avoid the collateral loss risk

Some initiatives have heightened the trust and security of consumers by applying a NNEG policy on equity release products that presents a guarantee that if the amount of debt exceeds the appraised value of the collateralized home due to a decline in home prices, the borrower has no obligation to pay the excess amount.[71] In terms of the imposition of the NNEG requirement on private equity release, it can be argued that the U.K. government is indirectly involved in the application of consumer protection measures. Moreover, the assessed value of houses is reviewed once every six months; hence, it can be considered that the government, as much as possible, is endeavoring to avoid the risk of falling housing prices.

As noted, the limitations in U.K. with respect to the government's involvement in equity release are parallel to that of Japan. It does not actively provide support systems like the HECM in the U.S. for which the government provides a guarantee and assumes the risk, thus leaving the private sector to make an effort to avoid the risk of collateral loss that is inherent in an equity release.[72]

4) Configuring a trust

The main reason for the use of trusts in the U.K. is to reduce the burden of inheritance tax. In recent years, the divorce rate has considerably increased, and trusts are being used for financial protection, such as leaving assets for the benefit of descendants. Such arrangements are rarely used as a means of securing long-term income as they are in Japan.

There are no existing provisions in the terms and conditions of an equity release product indicating that a trust must not be established for land and buildings that are the subject of an equity release. Therefore, if a trustee uses the value of the trust property and

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[71] Radu S. Tunaru, *supra* Note 69.

[72] Shinohara (see Note 70), "Providers seem to be limiting the uncertain risks, which are difficult for a provider to predict to just housing price decline by procuring fixed-rate conditions via methods including securing long-term funds from insurance and annuity companies and swapping out variable interest rates, without paying the annuity to the borrowers, and handling the longevity risk by consulting a life table themselves or having the funders (i.e., life insurance companies and annuity companies) shoulder this risk, which are the reasons why the private sector has been able to provide NNEG-backed lifetime mortgage loans by themselves" (p. 84). Hence, initiatives are being taken to hedge two of the three major collateral loss risks, thus leaving the risk of housing price decline as the potential issue.

complies with the terms of the trust agreement, then the trustee is eligible to borrow. However, banks in the U.K. have a practice of not advancing loans if a trust is an individual's residence. Therefore, setting up such a trust can be considered practically meaningless.[73] However, in some cases, financing is available if assets other than a residence are included as part of the trust asset.

V. Use of trusts

1) Advantages of using trusts

Reverse mortgages are unique in that the realization of collateralized real estate, which is usually an exceptional method of debt collection, always occurs at the exit stage. Another unique attribute is that the ownership of the collateral property is shared by heirs, as the borrower has already died, and inheritance has already begun at the time the realization occurs. In addition, the remaining debt owed to the financial institution is also passed on to the borrower's heirs as inherited debt in proportion to their legal share.[74]

However, if the smooth realization of the property cannot be achieved, as in the case of Musashino City, the risk of collateral loss will be encountered. Thus, the consent of all presumed heirs is required in advance. However, as shown in the lower court case presented above, challenges have risen in some cases when a stakeholder subsequently appears. As such, this measure cannot be considered sufficient. In many reverse mortgage cases, a borrower does not have a spouse or a child who wish to inherit the land (real estate). In such cases, the presumed heirs could extend to brothers and sisters, and the number of presumed heirs could grow very large to the point of making it difficult to obtain prior consent.[75]

This issue can also be dealt with by simultaneously creating a will. In other words, a lender only needs to designate the heirs or beneficiaries of the property in advance and obtain their consent. Should the heir or beneficiary designated in the will die or lose the capacity to draft a will (ability to make decisions) due to dementia or other reasons, consent would not be obtainable when executing a voluntary sale. In the end, it will still remain a potential risk to the lending financial institution.

Hence, a trust as a system to compensate for the above shortcomings could be integrated with a reverse mortgage contract. A trust[76] is essentially defined as the

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[73] Fudosan Ryutsu Sokushin Center Public Interest Incorporated Foundation (Real Estate Information and Promotion Center) (Note 71), pp. 89-91.

[74] Enishi (Note 21), p. 44.

[75] A reverse mortgage is a contract with a long time horizon. As a result, the presumed heirs may die, and cases could potentially arise wherein the presumed heirs at the time of the borrower's contract and at the time of the borrower's death differ. Enishi (Note 21), p. 44.

[76] On trusts in general, see Higuchi, S., *Introduction to Trust and Trust Law [2nd Edition]*

management and disposition of property by a specific person in accordance with a specific purpose, and any other act necessary to achieve the purpose (Article 2, Paragraph 1 of the Trust Act). The trust system makes it possible to manage assets during the lifetime of the property owner who wishes to use a reverse mortgage and consistently and continuously manage and dispose of the assets after the property owner's death.

The property can be separated from the borrower (the former property owner), and the ownership of the property can be transferred to the trustee.[77] Therefore, in the event of the borrower's death and the start of inheritance, the property will not be included in the inheritance; the ownership of the property is not temporarily transferred to the heirs. Furthermore, if a particular event specified in the trust agreement occurs (i.e., when the principal of a loan in a reverse mortgage contract becomes due and payable), the collateral real estate can be realized in the name of the trustee.

For financial institutions that lend under reverse mortgage contracts, setting up a trust has the advantage of placing the responsibility for the administrative costs of realizing the collateral property, repaying the loan, and distributing the remaining balance to the heirs with the trustee. Moreover, setting up a trust is a secure approach for lending institutions, as it ensures that the process of the voluntary sale of the collateral property is secured.

2) Framework for reverse mortgage contract and trust usage

This section will now present a proposed framework as a tentative draft of what the aforementioned contract would look like. A reverse mortgage agreement is signed between a borrower and a financial institution; thereafter, a mortgage or revolving mortgage is established on the land and/or building where the borrower lives. The collateralized property is then placed in a trust under the oversight of the trustee. At this time, the right to use the property must always be configured for the borrower, as many reverse mortgage contracts require the borrower to live in the property. When the trust is established, the ownership of the property is transferred to the trustee, requiring an agreement on the use of the collateral property between the trustor (borrower) and the trustee.

(KOUBUNDOU Publishers, 2014). Dogauchi, H., *Shintakuhou Nyumon (Introduction to Trust Law)* (Nikkei Bunko, 2007). Kanda, H. and Orihara, M., *Shintaku Hou Kogi (Lectures on Trust Law)* (KOUBUNDOU Publishers, 2014).

[77] The trustee becomes the owner after the trust is established, and as the trust is separated from the trustee's individual assets, the trustee's creditors cannot go after the property in the trust (Article 23, Paragraph 1 of the Trust Act). The trust will also not belong to a bankruptcy estate, even in the event of the trustee's bankruptcy (Article 25, Paragraph 1 of the Trust Act). Owing to this bankruptcy segregation feature, the trust is not affected even if the trustee's bank goes bankrupt.

The trustee must then redeem the entrusted property following the death of the borrower, repay the reverse mortgage loan in full, and dispose of any remaining assets. Reverse mortgage lenders and trustees do not have a direct legal (or contractual) relationship; however, a separate system to relate and cooperate with one another may be required.

VI. Conclusion

Reverse mortgages are considered to have potential use in Japan. The elderly are highly dependent on the public pension system and are currently forced to pay the monthly shortfall by draining their savings. A high percentage of such elderly people own real estate. Many of their children now live in urban areas, and they may not necessarily always wish to inherit the property that their parents are living in. There is also an apparent high demand for reverse mortgages as a means of converting such real estate into cash and ensuring that the real estate is managed after death, which is also in line with the government's intention to promote self-sustainability among the elderly.

Notably, the risk of collateral loss and the need to obtain the consent of presumed heirs have been cited as obstacles in previous studies. Even in the case of Musashino City and lower court precedents, we can say that this legal issue is an inherent aspect of reverse mortgages that cannot be overlooked. The U.S. and the U.K. have adopted approaches for avoiding these challenges within the frameworks of their respective legal systems. For example, in the U.S., a large part of the risk of collateral loss has been hedged by creating a national reverse mortgage (HECM) under the auspices of the AARP. Only the risk of falling real estate collateral prices, which cannot be hedged, was determined to require government guarantee. In the U.K., as in Japan, no government guarantee against such collateral loss risk is available. However, guarantee (NNEG) is given so that if the amount of debt exceeds the appraised value of the collateralized house due to a decline in the house's value, there is no obligation to pay the excess amount. This aspect makes it possible for the elderly to benefit from the system with peace of mind.

Furthermore, both the U.K. and the U.S. have strict consumer protection measures in place, thus focusing on the fact that the elderly are the users of such loans. This aspect is also quite different from the circumstances in Japan. In the U.S., reverse mortgages are designed to offer users peace of mind by providing information and counseling via professional counselors prior to finalizing a loan. Such initiatives in the U.K. and U.S. can be referenced for revising reverse mortgages in Japan.

The use of a trust system seems to offer an effective approach to addressing the challenges of the requirement of presumed heirs' consent and initiating the inheritance process, which is unique to Japan. By employing a trust to isolate the property from the elderly borrower, the property will no longer be considered as included in the inheritance when the inheritance process commences. Subsequent voluntary sales will also be smoother. As a trust has the advantage of removing administrative burdens from financial institutions, there is a high chance that setting up a trust for reverse mortgages will become the preferred approach in the future.

In Japan, reverse mortgages are still not widely used. However, by referring to the innovations observed in the U.K. and the U.S. and combining them with the novel approach of trusts, it assumed that it will be possible to rebuild the system into one that is more secure for the elderly. In addition, such self-sustaining efforts should be increasingly encouraged in addressing the growing needs of our super-aging society.